

If the legislature wishes to approve automatic adjustment clauses, it can of course do so by amendment of the statutes, and set up appropriate checks, safeguards, and mechanisms for public participation. *Id.* at 57.

3. Following the suggestion of the Court, the General Assembly in 2005 amended the statutes and enacted Section 386.266. This statute clearly provides the Commission with the statutory authority to approve a FAC mechanism with appropriate consumer protections. The Commission exercised its statutory authority and adopted a rule governing fuel and purchased power cost recovery mechanisms for electric utilities. *See* 4 CSR 240-20.090. The Commission also specifically approved KCP&L-GMO's fuel adjustment mechanism in its Report & Order in Case No. ER-2007-0004 (May 17, 2007).

4. Secondly, the Industrial Intervenors incorrectly suggest that a FAC mechanism constitutes "retroactive ratemaking." (Motion, pp. 1-2) Once again, the Industrial Intervenors' arguments are without merit. In *UCCM*, the Court found a specific surcharge that collected past expenses that were not collectible under a previous FAC mechanism to constitute improper retroactive ratemaking. *UCCM* at 480-81. This surcharge issue was separate and apart from the Court's consideration of the statutory authority for the FAC mechanism.

5. Unlike the surcharge that was disapproved by the Court in *UCCM*, the FAC adjustments at issue in this proceeding are applied only to future customers on future bills under the provisions of the FAC tariff. KCP&L-GMO is not allowed to adjust the amount charged to past customers to reflect increased or decreased expenses. As a result, the FAC mechanism does not constitute improper retroactive ratemaking.

6. In *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470, 481 (Mo.App. 1998), the Missouri Court of Appeals considered and rejected the identical arguments of counsel for the Industrial Intervenors in relation to their legal

challenge to the Purchased Gas Adjustment Clause. Judge Laura Stith (now Chief Justice) writing for the Missouri Court of Appeals stated:

We do not believe that the PGA constitutes the kind of improper retroactive ratemaking disapproved in *Utility Consumers Council*. The adjustments permitted under both the PGA and the ACA are applied only to future customers on future bills. The companies are not allowed to adjust the amount charged to past customers either up or down. Moreover, the PSC conducts a prudence review of the ACA before the adjusted amount becomes part of the rate.

7. In any event, the Industrial Intervenors are raising their constitutional arguments in the wrong forum. The Commission is not a court, and has no judicial authority to declare a statute to be unconstitutional. *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 168 S.W. 1156, 1164 (Mo. 1914); *See also Duncan v. Missouri Bd. For Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo.App. E.D. 1988); Order Deferring Ruling On Respondent Gordon Burnham's Motion to Dismiss, *Staff v. Suburban Water and Sewer Co.*, Case No. WC-2008-0030 (July 1, 2008).

8. In this proceeding, KCP&L-GMO has made the required filings under 4 CSR 240-20.090(4) to allow the Commission to review the actual fuel and purchased power costs that the Company has incurred and to allow rates to be adjusted *on a prospective basis* to reflect those actual costs. (Direct Testimony of Tim Rush, p. 3).

9. On January 29, 2009, the Commission Staff filed its Recommendation that the Commission issue its interim rate adjustment Order approving KCP&L-GMO's tariff to become effective on March 1, 2009, subject to true-up and prudence reviews. (Staff Recommendation, p. 3). The Commission should adopt this Staff Recommendation and approve KCP&L-GMO's tariff to become effective on March 1, 2009.

WHEREFORE, for the foregoing reasons, KCP&L-GMO respectfully requests that the Commission deny the Industrial Intervenors' Motion To Reject Tariff, and instead approve the Company's tariff, as recommended by the Commission Staff.

Respectfully submitted,

/s/ James M. Fischer

James M. Fischer, MBN 27543
email: jfischerpc@aol.com
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383

Attorney for
KCP&L Greater Missouri Operations Company

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 18th day of February, 2009, to all counsel of record.

/s/ James M. Fischer

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