

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of KCP&L)	
Greater Missouri Operations Company)	
Containing its Annual Fuel Adjustment)	Case No. EO-2009-0431
Clause True-Up)	

**KCP&L GREATER MISSOURI OPERATIONS COMPANY’S
RESPONSE TO INDUSTRIAL INTERVENORS’ OBJECTION TO TRUE-UP**

Pursuant to 4 CSR 240-2.080, KCP&L Greater Missouri Operations Company (“KCP&L-GMO” or “Company”) hereby respectfully submits to the Missouri Public Service Commission (“Commission”) its response to the Objection To True-Up (“Objection”) filed by Ag Processing, Inc, and Sedalia Industrial Energy Users’ Association (collectively “Industrial Intervenors”) filed on July 22, 2009. In support of its response, KCP&L-GMO states as follows:

1. On July 22, 2009, the Industrial Intervenors submitted their Objection To True-Up requesting that the Commission reject KCP&L-GMO’s request for a true-up and collection of the under-recovery of fuel and purchased power costs on the ground that “GMO’s request amounts to retroactive ratemaking. Such action is constitutionally prohibited and should be rejected.” (Objection, p. 2). For the reasons stated herein, the Commission should deny the Industrial Intervenors’ request.

2. Contrary to the position espoused by the Industrial Intervenors, the Missouri Supreme Court has not declared the use of a FAC mechanism to be “unconstitutional.” In 1979, the Supreme Court in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 57 (Mo. Banc 1979) found that the Commission lacked the statutory authority *at that time* to adopt a FAC mechanism. However, the Court specifically

found that the legislature could adopt the statutory provisions that would allow the Commission to approve a FAC mechanism when the Court stated:

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 KCP&L-GMO's request for a true-up constitutes "retroactive ratemaking." (Objection, 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 (currently, Justice of the Missouri Supreme Court) 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 addition, the Industrial Intervenors raised similar legal challenges to the Company's FAC tariff in Case No. EO-2009-0254. See Industrial Intervenors' *Application For Rehearing*, Case No. EO-2009-0254 (Filed February 26, 2009). In that proceeding, the Commission summarily rejected these legal arguments of the Industrial Intervenors in its *Order Denying Application For Rehearing*, Re: KCP&L Greater Missouri Operations Company, Case No. EO-2009-0254. (Issued March 11, 2009).

9. 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. 3-5).

10. On July 16, 2009, the Commission Staff (“Staff”) filed the Staff Revised Recommendation And Reply To KCP&L Greater Missouri Operations Company’s Response To Staff Recommendation in which it “now recommend(s) GMO under-recovered \$1,132,431 from customers in the MPS and \$187,925 from customers in L&P during March 2008 to February 2009 recovery period for the June to November 2007 accumulation period, based on adjustments to GMO’s under-recovery true-up proposal for (adjustments of (\$3,729) for MPS and (\$968) for L&P) to properly apply interest at GMO’s short-term borrowing rate for July 31, 2008, August 31, 2008, September 30, 2008, and October 31, 2008 as required by 4 CSR 240-20.090(5)A), and (3)(b).” (Revised Staff Recommendation, p. 4). Staff also stated that it believes that there is no longer a dispute between GMO and the Staff in this case. (Id.).

WHEREFORE, for the foregoing reasons, KCP&L-GMO respectfully requests that the Commission deny the Industrial Intervenors’ Objection To True-Up, and instead approve the Company’s tariff, as recommended by the Commission Staff.

Respectfully submitted,

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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 22nd day of July, 2009, to all counsel of record.

/s/ James M. Fischer

James M. Fischer