BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of KCP&L Greater Missouri Operations Company for Authority to Implement Rate Adjustments Required By 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism.	))))))	**Case No. EO-2008-0216** (On Remand)

PUBLIC COUNSEL'S POST-HEARING REPLY BRIEF

Introduction

Much of the initial post-hearing brief of KCP&L Greater Missouri Operations Company (GMO) is another rehash of GMO's argument about how the Court of Appeals was wrong and how the Commission can ignore or overrule the Court of Appeals. The first three pages of GMO's post-hearing brief just follows its pre-hearing brief; in fact GMO in that section of its post-hearing brief cites more to its own pre-hearing brief than it does to the evidentiary record. As pointed out in Public Counsel's pre-hearing reply brief, the Commission (even if it agreed) cannot ignore or overrule the Court of Appeals. This matter is before the Commission so that it can take **action** consistent with the Court's opinion. The Court's holding deals with the Commission's actions, not its analysis. The Court could – and did – conduct its own analysis, and that analysis led the Court to conclude that the Commission's actions were unlawful. The Court of Appeals "remanded to the circuit court with directions to remand to the Commission for further

proceedings consistent with this opinion."[1] The Circuit Court judgment "vacates the PSC's order and remands for further proceedings consistent with the Ct. Appeals' opinion."[2] Since the Commission's order has been vacated, the Commission cannot simply make additional findings of fact and conclusions of law to bolster its original order as GMO suggests; it must take some action, and that action must avoid the retroactive ratemaking that the Court of Appeals found unlawful. The Commission simply cannot simply affirm its retroactive approval of the FAC as GMO urges.

The remainder of this brief will address three issues, which are identified in the Joint List of Issues[3] as:

> 1. On what date within the Initial Accumulation Period should the calculation of fuel costs begin?
> 2. Does the Commission have the authority to order a refund or adjustment for the recovery of fuel costs in a future fuel adjustment clause case regarding any overcollection that occurred in the Initial Accumulation Period?
> 5. Is it appropriate under the facts of this case for the Commission to issue an Accounting Authority Order to GMO regarding any amounts that are contained in a refund or adjustment?

1. On what date within the Initial Accumulation Period should the calculation of fuel costs begin?

[1] State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n, 311 S.W.3d 361, 367 (Mo. Ct. App. 2010)

[2] July 19, 2010 Judgment in 08AC-CC00248; emphasis in original.

[3] In its initial post-hearing brief, GMO identifies these issues as "I. The Calculation of Fuel Costs Within the Initial Accumulation Period (June-November 2007) Should Begin on June 1, 2007" and "II. The Commission Does Not Have the Authority to Order a Refund or an Adjustment Regarding Any Over-Collection That Occurred in the Initial Accumulation Period." Staff's initial post-hearing brief uses the same descriptions as the Joint List of Issues.

As Public Counsel pointed out in its initial post-hearing brief, given the dates of the relevant tariff filings and Commission decisions, as well as the Court of Appeals opinion, there really are just two options: July 5 or August 1, 2007. GMO insists that the Commission can ignore the Court of Appeals and again make the initial accumulation period begin before the FAC tariffs became effective. For example, on page 6, GMO states: "Even if the Commission determines that its February 2008 Order constituted retroactive ratemaking…." The Commission does not get to make that determination, because the Court of Appeals already made it – which is why this case is where it is! GMO made its arguments to the contrary to the Court of Appeals, which rejected them. GMO asked the Court of Appeals to rehear the question, and the Court of Appeals refused. GMO asked the Court of Appeals to transfer to the Supreme Court, and the Court of Appeals refused. GMO asked the Supreme Court to take transfer on its own motion, and the Supreme Court refused. The question has been decided, and the decision became final and unappealable over a year ago.[4]

[4] With respect to this outlandish and oft-repeated argument, the Commission should consider whether GMO's briefs and other pleadings comply with 4 CSR 240-2.080(7), which requires that:

> (7) By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, brief, or other document filed with or submitted to the commission, an attorney or party is certifying to the best of the signer's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that—
> (A) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
> (B) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law….

Although GMO dedicates the first three pages to the "June 1 argument," beginning on page 4, GMO argues inconsistently that the first accumulation period must begin on July 5. It bases its "July 5 argument" in part on the fact that the tariff sheets define a June-to-November accumulation period. Because the Court of Appeals has clearly ruled that a June-to-November accumulation period is unlawful, the fact that it is set forth on the tariff lends no more support to a July 5 start date than it does to an August 1 start date. GMO reprises this argument at page 6, stating that "the refund of any sums accumulated on July 5 or later would violate the tariff's plain language," but GMO never acknowledges that the same plain language – if it were controlling – would also prohibit the refund of sums accumulated after June 1. But this language is not controlling because the Court of Appeals has held that the accumulation period cannot begin on June 1, and indeed cannot begin until July 5 at the earliest. In fact, the language of the tariff lends more support to the August 1 start date than it does to the July 5 start date because the June-to-November accumulation period on the tariff recognizes the necessity of beginning an accumulation period on the first day of a calendar month.

After again reverting to its "June 1 argument" at the bottom of page 5, GMO notes (at page 6) that it would be harmed by an August 1 start date, and then concludes – apparently based directly on its statement about harm – that "therefore, regardless of the arguments of the parties, there can be no refund with regard to costs that were incurred by the Company on or after July 5." Harm to GMO notwithstanding, the Commission must keep in mind that the arguments of the parties that GMO wants the Commission to ignore are exactly the same arguments that GMO repeatedly raised in pleadings to the Commission before the tariffs were approved. Until its pocketbook was going to take a

hit, GMO believed that an accumulation period should start on the first of the month, and that the accumulation period could not begin until after the Commission approved its tariffs. The Court of Appeals saw through this self-serving change of position and the Commission should, too.

Staff's arguments on this issue are largely the same ones that Public Counsel responded to in Public Counsel's pre-hearing reply brief, and Public Counsel will not repeat those responses here. As a new point, Staff observes that "the Commission neither described nor responded to any comments on 'true-up year'" in the FAC rulemaking proceeding. Staff doesn't follow up on that observation, and it is unclear what significance Staff believes that it holds. A likely reason that no one commented was simply that all parties understood that, at least for a new FAC, the beginning of the first true-up period would coincide with the beginning of the first accumulation period. The rules as proposed accommodated this common-sense idea, and so no party felt the need to comment.

As Public Counsel pointed out in its initial post-hearing brief, both Staff and GMO latch on to the July 5 start date because it is the earliest date possible according to the Court of Appeals decision – and for no other reason. Neither Staff nor GMO offered any additional reasons in their initial briefs.

GMO concludes this section of its argument by claiming that the refund of sums accumulated after July 5 would violate the ban on retroactive ratemaking. (GMO initial post hearing brief, page 6). It is ironic that GMO, which entirely refuses to recognize the Court of Appeal's decision that it was retroactive ratemaking to make the FAC begin

before the tariff approval date, insists that it would be retroactive ratemaking to make the FAC begin after the tariff effective date.

2. Does the Commission have the authority to order a refund or adjustment for the recovery of fuel costs in a future fuel adjustment clause case regarding any overcollection that occurred in the Initial Accumulation Period?

Both GMO and the Staff argue that the Commission cannot take any action to return money to customers that was collected from them pursuant to unlawfully-approved tariffs. GMO cites to the Lightfoot[5] case for the proposition that: "Due process prevents any court or legislative body from taking money from a utility collected from ratepayers pursuant to lawful rates…." (GMO initial post-hearing brief, page 9; emphasis added) First, the Lightfoot case is not particularly applicable, because it did not address the question of payments made pursuant to an FAC, which necessarily contemplates refunds to customers without a stay fund. Lightfoot noted that the "ultimate consumers of gas at Springfield, were not making conditional payments…."[6] GMO customers, pursuant to an FAC, are making conditional payments.

Second, the Lightfoot case, to the extent it is applicable, only addresses money collected from ratepayers pursuant to lawful rates. The due process implications referred to by GMO arise "because, as we understand it, property rights devolve upon effective **lawful rate-fixing** orders."[7] An order approving an FAC does not create property rights because it does not finally fix rates; an FAC by definition provides for subsequent

[5] Lightfoot v. Springfield, 361 Mo. 659, 236 SW 2d 348, (Mo. 1951).
[6] *Ibid.*, at 353.
[7] *Ibid.*; emphasis added.

changes. Moreover, the FAC order was not a lawful order; despite GMO's refusal to recognize it, there is a clear, unequivocal, final and unappealable decision of a Missouri appellate court saying so.

Similarly, GMO's reliance on Monsanto[8] and Joplin[9] is misplaced, because those cases did not deal with an FAC nor did they deal with rates collected pursuant to an unlawfully-approved tariff.

Moreover, it appears that the Commission itself has recognized that the limitation in cases like Lightfoot is not applicable to FAC issues. In its discussion at the June 15 Agenda with respect to Case No. ER-2010-0274, the Commission appeared to have unanimously rejected the unduly rigid interpretation that Staff advanced in that case, and that both Staff and GMO advance here. In its discussion of Case No. ER-2010-0274, the Commission clearly indicated that it is lawful and appropriate to go back to the very beginning of a FAC to correct errors – even though five or six accumulation periods have passed. If it is appropriate to reach back to correct errors made by the parties, then surely it is appropriate to reach back to correct an unlawful action taken by the Commission.

5. Is it appropriate under the facts of this case for the Commission to issue an Accounting Authority Order to GMO regarding any amounts that are contained in a refund or adjustment?

Public Counsel continues to believe that GMO's request for an Accounting Authority Order is so outrageous and ridiculous that it merits no consideration whatsoever. If the Commission wants customers to have to bear the unlawfully-

[8] Monsanto Co. v. PSC, 716 S.W.2d 791, (Mo. en banc 1986)
[9] City of Joplin v. PSC, 186 S.W.3d 290, (Mo. App. W.D. 2005)

accumulated costs at issue here, then it should just decline to order a refund. It makes no sense to order a refund, and at the same time allow deferral for possible re-recovery of the just-refunded amounts.

This reply brief will simply point out that the list of five criteria that GMO lists at page 15 of its initial post-hearing brief is not exhaustive. Until the AAO request here, a sixth criterion was understood and did not need to be explicitly stated. That sixth criterion is that the costs of the item must be appropriate and lawful to recover from customers. It is worth noting that GMO's spurious application of the five criteria to the unlawfully-accumulated costs at issue here (pages 15-18) would fit just as well with a criminal penalty assessed against GMO. Deferring the costs of such a penalty for possible future recovery from ratepayers would never even be considered, and neither should deferring the costs accumulated unlawfully under the FAC.

Conclusion

The Commission should order GMO to include a credit for all amounts accumulated for changes in fuel and purchased power expense between the dates of June 1, 2007 and July 31, 2007 in Recovery Period 8 or 9. In addition, consistent with Section 386.266.4(2) and 4 CSR 240-20.090(5)(A), such refunded amounts should include interest at GMO's short-term borrowing rate through a date as close as practicable to the time when the refunds actually take place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 17th day of June 2011.

/s/ Lewis R. Mills, Jr.