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)

INDUSTRIAL INTERVENORS' REPLY BRIEF

ON THE EFFECT

OF WESTERN DISTRICT REMAND

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ATTORNEYS FOR AG PROCESSING, INC. AND THE SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION

September 10, 2010

I. INTRODUCTION

When reading the briefs of KCPL – GMO and Staff, one must take the opinions expressed therein and put them into context. When this case was initially before the Commission, both GMO and Staff took the opinion, over the objections of Public Counsel and the Industrial Intervenors, that the Commission could allow recovery of cost changes that predated the implementation of the GMO fuel adjustment clause tariff. Ultimately, as the Western District Court of Appeals' decision makes clear, both GMO and Staff were wrong.

Now, with the case back on remand, neither GMO nor the Staff wants to concede defeat and accept the obvious implications that result from their past erroneous opinions. Instead, both seek to either take another bite at the apple or, worse still, claim that the Commission is powerless to remedy its past decision. What is most telling, however, is how inconsistent Staff and GMO are in their opinions. While Staff agrees that GMO cannot recover fuel cost changes prior to July 5, 2007, GMO argues that the Court of Appeals just didn't understand and that the Commission should do a better job of explaining its position. On the other hand, while GMO does not argue the Commission's authority to refund money, Staff takes the position that the Commission is powerless to remedy the past mistake that the Staff helped effectuate.

Ultimately, given the clarity of both the Court of Appeals' decision and the Commission's regulations, this is a simple decision for the Commission – GMO's fuel adjustment clause did not go into effect until August 1, 2007 and any amounts collected by GMO prior to this date was unlawful. Given that GMO has already collected overcharges for June and July of 2007, the Commission should order GMO to refund any

moneys collected for June and July of 2007. As this brief will show, Staff's assertion that the Commission is powerless to order refunds is based upon Staff's failure to even consider the Commission's empowering statute or its regulations. That statute clearly indicates that the Commission is not only authorized, but expected, to order a utility to refund moneys that were improperly collected under the fuel adjustment clause.

II. RESPONSE TO GMO'S BRIEF

After reading its brief, one immediately recognizes that GMO believes that it is arguing its case to the Missouri Supreme Court. That is, GMO spends the vast majority of its brief explaining why the Court of Appeals was wrong in its decision. Unfortunately for GMO, that ship has sailed. Given an opportunity to make these same arguments, the Court of Appeals rules against GMO; refused to allow rehearing and refused to grant transfer. Still again, in light of similar arguments, the Supreme Court refused to accept transfer. GMO has had ample opportunity to make its multitude of arguments as to why the filed-rate doctrine and the rule against retroactive ratemaking are not applicable. To date, GMO's arguments have been roundly rejected by the courts of this state. The true motivation underlying GMO's desperate arguments is simple; GMO does not want to refund the millions of dollars that it unlawfully collected from its customers. With all of this in mind, the Commission should reject GMO's self-serving invitation to simply better explain its decision. Instead, the Commission should order refunds of all improperly collected amounts.

A. Missouri's Statutory Mechanism Requires Rates and Terms of Service to be Contained in an Approved Tariff.

At pages 1 through 11 of its brief, GMO invites the Commission to preserve its initial decision and simply rewrite its February 14, 2008 decision. GMO bases its position on the erroneous belief that the Court of Appeals' decision did nothing more than find that the prior Commission order failed to adequately explain its decision. As even the Staff recognizes, GMO is mistaken.

In its opinion, the Court of Appeals provided a clear recitation of Missouri law regarding the filed-rate doctrine and the rule against retroactive ratemaking. Specifically, relying on Section 393.140(11), the Court finds that a utility may only charge the rates "as specified in its schedules filed and in effect at the time."[1] This requirement to only charge the rates contained in the utility's tariff is known as the filed-rate doctrine. The filed-rate doctrine is **absolute** and the Commission is powerless, under the related doctrine against retroactive ratemaking, to address profits or losses which result from the rates specified in those tariffs.[2] Ultimately, these statutory requirements all dictate one simple conclusion applicable to all Commission cases, "[o]nly costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause."[3]

GMO ignores this simple conclusion. Instead, GMO argues that the approval of tariffs would have been meaningless because the tariffs failed to provide any useful information. Furthermore, GMO seeks to undermine Missouri's statutory notice mechanism [tariffs] by arguing that customers had adequate notice through newspaper articles. Again, GMO's arguments are a day late and a dollar short. Absent statutory

[1] *State ex rel. Ag Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361, 365 (Mo.App. 2010) ("AGP").
[2] *Id.*
[3] *Id.*

changes, the notice in newspaper articles is meaningless. Notice of changes in a utility's rates and terms of service **must** be effectuated through the approval of tariffs. Given that GMO's fuel adjustment tariff was not effective until July 5, the Commission is powerless to allow any recovery under that tariff for prior periods.

B. Commission Regulations Mandate that a Fuel Adjustment Clause become Effective on the First Day of a Calendar Month

GMO continues its goal of reducing any refunds by arguing that, under any circumstances, refunds should be limited only to the period before July 5.[4] Commission regulations, the Commission's effectuation of other fuel adjustment clauses and GMO's own prior statements reveal that, once again, GMO is attempting to rewrite the law in an effort to minimize its refund of unlawfully collected rates.

Commission Rules 4 CSR 240-3.161 and 4 CSR 240-20.090 provide certain requirements applicable to all fuel adjustment clauses. Relevant to the immediate inquiry, those rules provide that a fuel adjustment clause may only become effective on the first day of a calendar month.

> True-up year means the twelve (12)-month period beginning on ***the first day of the first calendar month following the effective date of the commission order approving a RAM*** unless the effective date is on the first day of the calendar month. If the effective date of the commission order approving a rate mechanism is on the first day of a calendar month, then the true-up year begins on the effective date of the commission order. (emphasis added).

The direction of this rule has been previously recognized by the Commission. In Case No. ER-2008-0093, the Commission authorized Empire District Electric to

[4] Staff appears to support GMO's position when it argues that "the most logical date within the first accumulation period for accruing the difference between actual and predicted fuel, purchased power and emissions costs is the earliest date the Court has said is lawful – the effective date of the FAC tariff sheets: July 5, 2007." (Staff Brief at pages 2-3). Like GMO, Staff's position should be read in context as the position of a party that has already been found to be wrong by the Court of Appeals. Nevertheless, the same arguments in rebuttal to GMO's position is equally responsive to Staff's erroneous interpretation.

implement a fuel adjustment clause. While approving Empire's rate tariffs to be effective on August 23, 2008, the Commission delayed the approval of Empire's fuel adjustment clause tariffs until the first day of the following calendar month (September 1, 2008).[5] Still again, when implementing the AmerenUE fuel adjustment clause, the Commission was guided by its rules and made AmerenUE's fuel adjustment tariff effective on the first day of a calendar month.

Even GMO has previously acknowledged the clarity of the Commission's rules. Interestingly, in its opinion, the Court of Appeals ridiculed GMO for its readiness to abandon its previous legal positions when financial considerations mandated a different result.[6] Despite the Court's recognition of its previous hypocrisy, GMO again abandons its previous legal position in favor of an opinion that provides a better financial result. At pages 9-11 of its Initial Brief, the Industrial Intervenors document at least four separate instances in which GMO recognized that Commission rules dictate that a fuel adjustment clause become effective on the first day of the following calendar month. Today, when faced with that reality, GMO again abandons its previous position because financial goals dictate a different interpretation. Like the Court of Appeals, the Commission should recognize GMO's repeated hypocrisy and willingness to say anything that will further its bottom line goal. Instead, the Commission should enforce its regulations and require GMO to refund any amounts collected prior to August 1.

III. RESPONSE TO STAFF'S BRIEF

In a unique argument, Staff asserts that the Court of Appeals decision was pointless. Staff argues that because neither Public Counsel nor the Industrial Intervenors

[5] See, *Order Granting Expedited Treatment and Approving Compliance Tariffs*, Case No. ER-2008-0093, issued August 12, 2008, at pages 3 and 4.
[6] *AGP* at page 367, footnote 5.

obtained a stay of the Commission's order, the Commission is powerless to order refunds. Interestingly, not even GMO, advances Staff's current argument!

Staff's interpretation is based upon the erroneous belief that moneys collected under a fuel adjustment clause are identical to amounts collected under a base rate tariff. As such, analogizing to *State ex rel. City of Joplin*, Staff postulates that the Commission has "no authority to order any refund here."[7]

Staff's position is misplaced. Contrary to their current position, rates collected under a fuel adjustment clause are different than rates collected under a base rate tariff. While the Commission has no authority to order refunds under a base rate tariffs, the fuel adjustment clause tariff expressly provides for such refunds. Section 386.266.4(2) expressly provides for a true-up "to remedy any over- or under-collections." Furthermore, that Section continues on to provide that over-collections shall be remedied through "subsequent rate adjustments or refunds."

Staff appears to argue that any obligation to refund ends with the completion of any true-up or prudence reviews. Again, Staff's opinion is based upon a failure to read the entirety of the statute or the Commission's rule. Section 386.266.4(3) recognizes that refunds may result not only from a true-up or prudence audit, but also from a subsequent court order finding that the FAC was unlawful.

> In the case of an adjustment mechanism submitted under subsections 1 and 2 of this section, includes provisions requiring that the utility file a general rate case with the effective date of new rates to be no later than four years after the effective date of the commission order implementing the adjustment mechanism. ***However, with respect to each mechanism, the four-year period shall not include any periods*** in which the utility is prohibited from collecting any charges under the adjustment mechanism, or any period ***for which charges collected under the adjustment mechanism must be fully refunded***. In the event a court determines that

[7] Staff Brief at pages 3-4.

> the adjustment mechanism is unlawful and all moneys collected thereunder are fully refunded, the utility shall be relieved of any obligation under that adjustment mechanism to file a rate case. (emphasis added).

Similar language recognizing the Commission's ability to order refunds and the impact of such refunds on the utility's obligation to file another rate case in four years has been codified at 4 CSR 240-20.090(6)(A).

Therefore, the Commission has abundant authority, under statute and its implementing regulations, to order a refund of the amounts unlawfully collected prior to August 1, 2007. Once such refunds are ordered, those same statutes and regulations will result in a two month delay in GMO's obligation to file its follow-up rate case in four years.

IV. CONCLUSION

Given the opinion of the Western District Court of Appeals and the clarify of the Commission's regulations, the Commission should find that GMO unlawfully collected for changes in fuel and purchased power expenses that occurred prior to August 1, 2007. As such, the Commission should order that such monies be immediately refunded to customers or passed back to customers through subsequent FAC rate adjustments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

David L. Woodsmall

Dated: September 10, 2010