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

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| 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


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


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## I. SCOPE OF ISSUES

GMO's Initial Brief is noticeable in its refusal to accept the Court of Appeals' holding that it is unlawful for GMO to attempt to collect changes in fuel and purchased power costs prior to the actual effective date of its fuel adjustment clause. Unwilling to accept this decision, GMO was denied transfer by the Supreme Court.[1] Later, GMO asked the Commission to ignore the appellate holding and instead clarify its initial decision.[2] Like the Supreme Court, the Commission rejected GMO's request and recognized the logic of the Court of Appeals decision.

> The Court of Appeals was clear, however, when it said, "any adjustment to the cost of electricity based on electricity that had already been consumed by Aquila customers prior to the effective date clearly constitutes retroactive ratemaking." The Court of Appeals was also very clear that the accumulation period could not begin before the tariff effective date. To do so, according to the Court of Appeals is retroactive ratemaking. Thus, the Commission will not take additional evidence on this point. GMO's request for hearing on this issue is denied.[3]

It appeared, for a brief moment, that GMO had finally accepted the Court of Appeals decision. In the list of issues prepared by GMO, there is no reflection of this issue.[4] Suddenly, in its Initial Brief, GMO **again** wants to litigate whether the accumulation of costs prior to the July 5 tariff effective date is actually retroactive ratemaking. Specifically, GMO claims:

> The Commission may now explain to the remanding Court that its February 14, 2008 Order in this case approving the collection of additional charges from customers pursuant to the FAC approved in the May 2007

[1] GMO Application for Transfer denied June 29, 2010, Missouri Supreme Court Case No. SC90883.
[2] See, *Order Denying Request to Take Additional Evidence Regarding Retroactive Ratemaking and Directing the Filing of Proposed Procedural Schedule*, issued December 22, 2010, page 2. ("Thus GMO believes that the Commission can take additional evidence and explain to the Court of Appeals that this was not retroactive ratemaking.").
[3] *Id.* at page 3.
[4] See, *Joint List of Issues*, filed May 6, 2011.

> Order is not retroactive ratemaking and that the calculation of fuel costs within the initial Accumulation Period should begin on June 1, 2007.[5]

With this goal in mind, GMO spends the first three pages of its brief attempting to explain why the Court of Appeals, Supreme Court, Cole County Circuit Court and Commission are all wrong on this point.

GMO has had plenty of previous opportunities to explain this issue and has repeatedly failed. At this point, it is incumbent on the Commission to invoke the doctrine of collateral attack and tell GMO "enough"! Section 386.550 provides that "in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." The Commission's December 22, 2010 Order refusing to further consider this issue is final. As such, GMO's current attempt to continue litigating this issue represents a collateral attack on that Commission order as well as the previous Court decisions.[6] Given that this issue is final and not subject to further consideration, the Commission should ignore the first three pages of GMO's Initial Brief.[7]

[5] GMO Initial Brief at pages 1-2.

[6] One must necessarily wonder whether GMO would continue to litigate this same issue, especially through costly outside counsel, if such costs were assumed by corporate shareholders and not passed through to ratepayers.

[7] To the extent that the Commission desires to familiarize itself with this issue, however, the Industrial Intervenors refer the Commission to its Initial Brief on Remand, filed August 31, 2010, at pages 6-8 and Reply Brief on Remand, filed September 10, 2010, at pages 3-5.

## II. INITIAL ACCUMULATION PERIOD MUST BEGIN ON AUGUST 1, 2008

►Industrial Initial Brief – pages 8-16

►OPC Initial Brief – pages 2-6

►GMO Initial Brief – pages 3-5

►Staff Initial Brief – pages 2-3

While the largest issue in this case, GMO spends a scant two pages of its Initial Brief discussing the appropriate start date for the Initial Accumulation Period. And even that that short discussion is primarily focused on convincing the Commission that, despite the retroactive ratemaking holding contained in the Court of Appeals decision as well as the Commission's December 22, 2010 Order, that the Initial Accumulation Period should still begin on June 1, 2007. As reflected in the previous section, GMO's continued argument in this regard constitutes a collateral attack on the previous Commission order as well as the Court of Appeals decision.

Finally, in one short sentence, GMO claims that, if its collateral attack is not allowed, then the Commission should begin the Initial Accumulation Period on July 5, 2007.

> Should the Commission agree with Public Counsel and the Industrial Intervenors that the Commission's definition of true-up year governs when an accumulation period can begin, good cause exists in this case to nevertheless begin the accumulation and calculation of costs, approved by the Commission and deemed prudent by Staff, no later than July 5, 2007 when the Commission's Order of June 29, 2007 that approved the FAC tariff sheets became effective.[8]

From this one sentence, it becomes apparent that beginning the Initial Accumulation Period on July 5, 2007 is based solely on the fact that this is the date that the "FAC tariff sheets became effective." What is also apparent from this sentence is GMO's admission

[8] GMO Initial Brief at page 6.

that such a start date would be inconsistent with the "Commission's definition of true-up year." Nevertheless, GMO contends that the Commission should deviate from its definition for some ***unstated*** good cause.

In our Initial Brief, the Industrial Intervenors detailed five separate reasons for the Commission to begin the Initial Accumulation Period on August 1, 2007.[9] Ultimately each of these reasons tie back to the Commission's fuel adjustment clause regulations contained at 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I). Consistent with the statutory requirement in Section 386.266.4(2) that the Commission conduct an "accurate" true-up, the Commission rule defines when the true-up and, by necessary implication, the accumulation period must begin. Recognizing that the utility maintains records on a monthly basis, the Commission's rule mandates that any true-up period and accumulation period begin 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).

Given the lack of financial information on a daily basis, a true-up period that begins on any day other than the first calendar day of a month would necessarily be an approximation and therefore violate the "accurate" true-up requirement in the statute. In fact, Staff acknowledges that starting the Initial Accumulation Period on July 5 would necessarily make the subsequent true-up an "approximation."[10] While Staff believes that

[9] See, Industrial Intervenor Initial Brief at pages 8-16.
[10] Tr. 156.

"there is more than one rational methodology" to address this approximation, it necessarily falls short of the "accurate" true-up required by statute.

The Commission's recent decision in Case No. ER-2010-0356 is dispositive of this issue. Addressing the commencement of GMO's next fuel adjustment clause, the Commission held that the fuel adjustment clause ***must*** commence on the first day of the calendar month.

> The only way to reconcile the language of the statute requiring an accurate true-up with the language of the regulation under the facts of this case is for the FAC to become effective on the first of the month, because the evidence demonstrated that the utility maintains financial records on a monthly and not a daily basis.[11]

Finally, GMO attempts to persuade the Commission to ignore its regulations and start the Initial Accumulation Period on July 5, 2007 because of the alleged "harm" that would be caused.[12] As the Court of Appeals has already held, GMO unlawfully collected rates under its fuel adjustment clause. As such, this Commission's responsibility is to remedy this over-collection and return it to customers either through "rate adjustments of refunds"[13] Given that GMO never lawfully collected this money, it is somewhat disingenuous for it to claim harm when required to return this money. GMO's argument rings hollow.

[11] *Order of Clarification and Modification*, Case No. ER-2010-0356, issued May 27, 2011, at page 9.
[12] GMO Brief at page 6 ("Thus, GMO would be harmed by any delay in the start of the initial Accumulation Period.").
[13] Section 386.266.4(2).

## III. THE COMMISSION HAS STATUTORY AUTHORITY TO ORDER RATE ADJUSTMENTS OR REFUNDS

In 2005, statutory authorization was enacted for the implementation of a fuel adjustment clause. As part of the consumer protections implemented in that statute, the Commission was provided the express authority to remedy the outcome of any true-up. Specifically, the Commission is charged with the responsibility of "remedy[ing] any over- or under-collections . . . through subsequent rate adjustments or refunds."[14] Despite this express authority, GMO now claims that the Commission is powerless to remedy its past unlawful collection of fuel adjustment revenues from ratepayers.

Without any legal citation, GMO claims that the Commission's authority to remedy through "rate adjustments or refunds" ended when the Commission conducted its initial true-up.[15] GMO's attempt to deny the Commission's authority and thereby retain the rates that the Court of Appeals has found to be unlawful is wrong for two reasons.

First, GMO's argument ignores the express spirit of the FAC legislation. In 2005, the General Assembly enacted the fuel adjustment mechanism as a tool to protect the utilities against the financial harm that could result from volatility in fuel and purchase power costs. That mechanism, however, was never designed to allow the utility to reap additional profits or to retain unlawfully collected funds. In fact, Section 386.266.4(1) expresses a desire that the utility only make a "fair" return on equity. In order to prevent such windfall profits, Section 386.266.4 requires a "true-up" and return of "over-collections." Now, GMO seeks to retain funds that the Court of Appeals has declared to be unlawful. Such windfall profits certainly increases GMO's profit from a "fair" return

[14] Section 386.266.4(2).
[15] GMO Initial Brief at pages 6-7.

on equity to an excessive return on equity. GMO's argument, and attempt to retain unlawful funds, is certainly contrary to the express spirit of the FAC legislation.

Second, GMO's argument fails to recognize other provisions in the FAC legislation contemplating that "full refunds" shall be made if a court determines that an adjustment is "unlawful." In addition to the true-up provision, another consumer protection aspect of the fuel adjustment legislation is a requirement that the utility file a general rate case within 4 years.[16] That consumer protection is expressly tolled "in the event a court determines that the adjustment mechanism is unlawful and all moneys collected thereunder are fully refunded." Under GMO's argument, however, despite a court determining that the "adjustment mechanism is unlawful," there would never be a situation in which "all moneys collected thereunder are fully refunded." GMO's argument is nonsensical and fails to consider the express intention that, when an adjustment mechanism is declared "unlawful," that all moneys collected be "fully refunded."

Finally, GMO raises a new argument that the refund would be "confiscatory."[17] Noticeably, GMO provides no evidentiary citation to support its claim that the refund would have a "confiscatory" impact. Specifically, there is no evidence to support a finding that GMO would have its credit downgraded or have trouble raising capital. That aside, it is interesting that GMO seeks to collect revenues under the same legislation which it now condemns as "confiscatory." Again, GMO's argument is nonsensical and without evidentiary support.

[16] Section 386.266.4(3).
[17] GMO Brief at pages 9-11.

## IV. AMOUNT OF REFUND

There does not appear to be any disagreement between the parties regarding the amount of refund necessary to "remedy" GMO's over-collection under the "unlawful" adjustment mechanism. Specifically, the parties agree that, using an August 1, 2007 start date for the Initial Accumulation Period requires a refund $7,084,354 for MPS district and $1,710,484 for L&P district.[18]

## V. APPROPRIATE REMEDY

In its Initial Brief, GMO requests that, instead of ordering immediate refunds, that the Commission require an adjustment be made "in its next semi-annual filing and refunded over the next twelve-month Recovery Period."[19] While the Industrial Intervenors assert that an "immediate refund" would better address intergenerational equity concerns,[20] an adjustment to the next semi-annual filing is appropriate so long as interest is properly reflected as required by Section 386.266.4(2).

## VI. AN ACCOUNTING AUTHORITY ORDER IS NOT APPROPRIATE

At pages 13-19, GMO argues that it should be granted an accounting authority order, **four** years after the fact, to allow it to collect from customers the very refunds the Commission and the Western District Court of Appeals has ordered be returned to customers. The Industrial Intervenors agree with Public Counsel's characterization that this is the most "egregious money grab by any company" in over 20 years of practice before the Commission.

[18] GMO Initial Brief at page 6.
[19] *Id.* at page 12.
[20] See, Industrial Intervenor Initial Brief at page 17.

Certainly, when designed to allow utilities to defer depreciation expense from large capital projects or to collect the costs or huge storm damage, no one contemplated that Accounting Authority Order would be used to avoid the express holding of an appellate court decision. By its request, however, GMO asks that the Commission thumb its nose at the Court of Appeals and allow GMO to collect the very funds that the Court has determined to be unlawful and retroactive ratemaking.

Retroactive ratemaking is a constitutional doctrine.[21] It defies all notions of logic and equity that a utility be allowed to use an AAO for the purpose of violating constitutional doctrines. That aside, the General Assembly has provided a very strict procedure by which a utility could seek to collect changes in fuel and purchased power costs. It is well established that "[t]he Public Service Commission is a creature of statute and can function only in accordance with the statutes. Where a procedure before the Commission is prescribed by statute, that procedure must be followed." In this case, the procedure prescribed by statute for the collection of changes in fuel and purchased power costs is through the filing of rate schedules.[22] Certainly, then any other methodology, including the use of an accounting authority order, would be contrary to the prescribed statute and would be deemed an abuse of discretion.

[21] See, *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 59 (Mo. banc 1979) ("UCCM").
[22] Section 386.266.1.

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: June 17, 2011