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)

PROPOSED FINDINGS OF FACT

OF THE INDUSTRIAL INTERVENORS'

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

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1. ON WHAT DATE WITHIN THE INITIAL ACCUMULATION PERIOD (JUNE – NOVEMBER 2008) SHOULD THE CALCULATION OF FUEL COSTS BEGIN?

In its February 14, 2008, Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause, the Commission held that it had actually implemented a fuel adjustment clause for Aquila through the issuance of its May 17, 2007 Report and Order in Case No. ER-2007-0004. Given the Commission's regulations found at 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I), the Commission could begin accumulating changes in fuel and purchased power expense effective on June 1, 2007.[1]

In its March 23, 2010 opinion, the Court of Appeals held that the Commission's February 14, 2008 Order was unlawful. Specifically, the Court held that "any adjustment to the cost of electricity based on electricity that had already been consumed by Aquila customers prior to the effective date [of the tariffs] clearly constitutes retroactive ratemaking."[2] Therefore, given the clarity of the Court of Appeals decision, GMO's fuel adjustment clause could not commence on June 1, 2007.

Given the inapplicability of the June 1, 2007 commencement date, the parties now take differing views of when GMO should be allowed to begin accumulating changes in fuel and purchased power costs. Based upon the effective date of the underlying fuel adjustment tariffs, GMO and Staff contend that GMO be allowed to track changes in fuel and purchased power expenses starting on July 5, 2007. In contrast, the Industrial Intervenors and Public Counsel assert that provisions contained in the Commission's fuel adjustment regulations mandate that any accumulation begin on the first day of a calendar

[1] See, *Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause*, issued February 14, 2008, at page 4 ("The Commission interprets its regulation as establishing a recovery period beginning on the first day of the first month following the Report and Order, and not following the approval of the implementing tariff.).

[2] *State ex rel. Ag Processing v. Public Service Commission*, 311 S.W.3d 361, 367 (Mo.App. 2010).

month. Therefore, the Industrial Intervenors and Public Counsel maintain that changes in fuel and purchased power expense be accumulated beginning on August 1, 2007. As this decision indicates, the Commission agrees with the Industrial Intervenors and Public Counsel and orders that the Initial Accumulation Period begin on August 1, 2007. The August 1, 2007 commencement date is mandated for several reasons.

First, Commission regulations mandate that fuel adjustment clauses start on the first day of a calendar month. Following the enactment of Section 386.266 in 2005, the Commission undertook a rulemaking proceeding in order to implement the provisions of that statute.[3] In 2006, the Commission opened Case No. EX-2006-0472 to consider proposed fuel adjustment clause rules. Recognizing that Section 386.266 requires all amounts collected under a fuel adjustment clause to be subject to an annual true-up audit,[4] and recognizing that utilities keep records on a monthly basis, Commission regulations mandate that any true-up period commence on the first day of a calendar month. Commission rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) provide as follows:

> 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 logic of the Commission's rule requiring a fuel adjustment clause to begin on the "first day of a calendar month" is obvious. The rationale for this rule is founded in the fact that utilities keep financial books on a monthly, not daily, basis. Given the lack

[3] See, Section 386.266.12.
[4] Section 386.266.4(2).

of daily financial information, it would be impossible for the Commission to meet the statutory requirement to conduct an accurate true-up of any adjustment clause that commences on a day other than the first day of a month. Instead, any true-up would be, at best, an approximation. Therefore, the practical effect of the Commission's true-up year definition and the statutory requirement that the Commission conduct a true-up is that any fuel adjustment clause must commence on the first day of a calendar month.

Second, Staff's expert witness conceded the applicability of the Commission's regulations. Specifically, Staff witness admitted that the calculation of changes in fuel and purchased power costs must commence on the beginning of a calendar month. Contrary to the statutory requirement that the Commission "accurately" conduct a true-up,[5] any true-up beginning in the middle of the month would admittedly be an "approximation."[6] In fact, when asked how he would now interpret and apply the Commission's regulations, Mr. Roos admitted that the Commission's true-up, and therefore the accumulation period, should begin on "August 1, 2007."[7]

Third, recent Commission decisions have also recognized the applicability of this Commission regulation. Recently, the Commission has issued an order which supports the notion that GMO's fuel adjustment clause could **not** begin in the middle of the month. Rather, the Commission's order, recognizing the fact that utilities' do not keep daily financial records, held that GMO's most recent fuel adjustment changes must begin on the first day of a 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

[5] Section 386.266.4(2).
[6] Tr. 156.
[7] Tr. 158.

> evidence demonstrated that the utility maintains financial records on a monthly and not a daily basis.[8]

The same logic that compelled that Commission finding also compels the Commission to find that GMO's first fuel adjustment clause could not have started until the "first of the month." Then, as now, GMO did not keep financial records on a daily basis. Therefore, if a commencement date in the middle of the month were adopted, the Commission would be unable to comply with "the statute requiring an accurate true-up."

Fourth, GMO has admitted the applicability of the Commission's regulation in several previous pleadings. In its May 24, 2007 pleading in Case No. ER-2007-0004, GMO urged the Commission to summarily reject concerns raised by other parties and hastily approve its fuel adjustment clause tariffs by June 1. If Commission approval was delayed until after June 1, GMO recognized that the fuel adjustment clause would not become effective until the first day of the next calendar month (July 1).

> In the definition of "True-up year," which appears in 4 CSR 240-3.161(1)(G), the true-up period for a fuel adjustment clause begins 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 the calendar month, then the true-up year beings on the effective date of the commission order." ***The import of this definition is this: if the Commission delays the effective date of the tariff sheets that relate to GMO's fuel adjustment clause beyond June 1, 2007, GMO will not be able to accumulate costs during the month of June 2007 and recover those costs through its fuel adjustment clause***.[9]

In a subsequent pleading, GMO again noted that any delay in Commission approval past the first day of a month would result in a delay in the implementation of the fuel adjustment clause until the first day of the next calendar month.

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[8] *Order of Clarification and Modification*, Case No. ER-2010-0356, issued May 27, 2011, at page 9.

[9] *Supplemental Suggestions in Support of GMO's Request for Expedited Treatment*, Case No. ER-2007-0004, filed May 24, 2007, at page 3 (emphasis added).

> If the Commission fails to approve tariff sheets that authorize GMO to implement its FAC on or before June 1, 2007, the Company will be prohibited from accumulating and eventually collecting from customers fuel and purchased power costs incurred to provide service to customers for the entire month of June and continuing thereafter until such times as tariff sheets implementing the FAC are approved.[10]

Despite GMO's repeated pleas, the Commission refused to approve GMO's fuel adjustment clause tariffs by June 1. Recognizing that recovery for June was lost, GMO then began to urge the Commission to approve its FAC tariffs by July 1. Absent approval by that date, GMO expressly noted that the fuel adjustment clause could not become effective until August 1, 2007.

> If the revised tariff sheets are not made effective on or before June 30, 2007, GMO may be denied recovery of more than $11 million in fuel and purchased power costs in the month of July 2007, alone.[11]

Fifth, contrary to their current positions, when GMO and Staff initially processed this case, they each demonstrated a belief that a fuel adjustment clause begin on the first day of a calendar month. The Commission issued its Report and Order in Case No. ER-2007-0004 on May 17, 2007. Despite the fact that permanent rate schedules went into effect on May 31, Staff and GMO implicitly recognized that a fuel adjustment clause must go into effect on the first day of a calendar month. As such, instead of claiming that the fuel adjustment clause went into effect: (1) May 17 with the Report and Order or (2) May 31 with the other rate schedules, GMO and Staff delayed its initial implementation of the fuel adjustment clause tariffs until June 1, 2007. Clearly, GMO and Staff's initial

[10] *Response to Staff's Recommendation to Reject Tariff Sheets, Motion for Clarification of Report and Order, and Motion for Expedited Treatment*, Case No. ER-2007-0004, filed May 30, 2007, at page 7 (citing to Commission Rule 4 CSR 240-3.161(1)(G).

[11] *Motion for Expedited Treatment and for Approval of Tariff Sheets filed in Compliance with Commission Order*, Case No. ER-2007-0004, filed June 18, 2007, at page 4.

implementation of this case reflects the implicit understanding that the fuel adjustment clause **must** go into effect on the first day of a calendar month.

Finally, while the Commission's February 14, 2008 decision was ultimately overturned because it attempted to allow recovery of changes in fuel and purchased power costs beginning on June 1, 2007, that Order did expressly recognize, in several places, that the fuel adjustment clause must commence on the first day of a calendar month. As the Commission noted there:

> Essentially, the Commission's decision whether to approve or reject that tariff must turn on an interpretation of the meaning of the Commission's regulation. As previously indicated, the key regulatory provision is the definition of True-Up Year which states that the true-up year, meaning the period for which the company can accumulate costs, begins on the first day of the first month following the effective date of the commission order that approves the FAC. If Aquila and Staff are correct, Aquila will be able to recover costs accumulated in June and July 2007. ***If the parties that oppose the tariffs are correct, the accumulation and recovery of costs cannot begin until August 1.*** (emphasis added).

As the Court of Appeals decision makes clear, the Industrial Intervenors and Public Counsel were correct. As such, as indicated in that order, and consistent with Commission regulations, "the accumulation and recovery of costs cannot begin until August 1, 2007."

DECISION: The Commission finds that the GMO should begin to calculate changes in fuel and purchased power costs beginning on August 1, 2007.

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 REGARDING ANY OVER-COLLECTION THAT OCCURRED IN THE INITIAL ACCUMULATION PERIOD?

Despite the Court of Appeals opinion that GMO could not begin accumulating changes in fuel and purchased power costs beginning on June 1, 2007, GMO contends

that the Commission is powerless to remedy its over-collection of these costs. Specifically, GMO contends that the Commission's authority to remedy this situation ended with the subsequent true-up and prudence review. The Commission disagrees.

Section 386.266 requires the Commission to conduct an "accurate" true-up. Once completed, the statute gives the Commission to "remedy" any over- or under-collections through either "adjustments or refunds."

> The commission may approve such rate schedules after considering all relevant factors which may affect the costs or overall rates and charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules [i]ncludes provisions for an annual true-up which shall accurately and appropriately ***remedy any over- or under- collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds***.[12]

Noticeably, the statute contains no limitations on the Commission's authority to remedy any over-collections. As such, the Commission has express statutory authority to remedy the GMO's over-collection of rates under the fuel adjustment clause for the period of June 1, 2007 through August 1, 2007.

Furthermore, the Commission finds that GMO's attempt to limit 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

[12] Section 386.266.4(2) (emphasis added).

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 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.[13] 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."[14] 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. The Commission finds it interesting that GMO seeks to collect revenues under the same

[13] Section 386.266.4(3).
[14] GMO Brief at pages 9-11.

legislation which it now condemns as "confiscatory." Certainly, such legislation was not disconcerting when GMO was unlawfully collecting these moneys.

DECISION: The Commission finds that it has express authority, pursuant to Section 386.266.4 to remedy any over- or under-collection through the use of rate adjustments or refunds.

3. WHAT IS THE AMOUNT OF A REFUND OR ADJUSTMENT, IF ANY?

The evidence indicates that, given the August 1, 2007 start date for accumulating changes in fuel and purchased power costs, the parties are in agreement regarding the quantification of GMO's over-collection of rates. Specifically, as reflected in Staff's testimony, GMO over-collected $7,084,354 from the MPS district and $1,710,484 from the L&P district.[15] The Commission agrees with Staff's uncontested quantification of this over-collection.

4. WHAT IS THE APPROPRIATE MECHANISM FOR A REFUND OR ADJUSTMENT, IF ANY?

As indicated in Section 2, the Commission finds that it has authority, pursuant to Section 386.266.4 to remedy any over-collection through the use of either rate adjustments or refunds. As reflected in Section 3, the quantification of GMO's over-collection is $7,084,354 from the MPS division and $1,710,484 from the L&P district.

GMO and Staff both contend that the Commission should remedy the over-collection through the use of subsequent FAC adjustments. GMO suggests that the most efficient and reasonable option is to use the methodology already in place in the FAC

[15] Exhibit 7.

tariffs. Specifically, GMO notes that the calculation of C in Tariff Sheet No. 125 reflects "under / over recovery determined in the true-up of prior recovery period cost, including accumulated interest, and modifications due to prudence reviews."[16]

While the Industrial Intervenors suggest, given concerns of interegenerational equity, that refunds are more appropriate, the Industrial Intervenors also accept that administrative costs may dictate the use of rate adjustments through the FAC mechanism. The Commission finds that GMO should utilize the FAC mechanism to return the over-collected amounts quantified and found by the Commission in Section 3.

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?

GMO suggests, despite the Court of Appeals decision, that the Commission should issue an Accounting Authority Order so that it may subsequently recover from ratepayers any refunds or adjustments ordered by the Commission. The Commission declines GMO's request.

The Commission finds that the authority to grant Accounting Authority Orders was never designed to allow a utility to avoid the holding of an appellate decision. The Commission finds it illogical and inequitable for a utility be required to make refunds and then be allowed to again recover that very same money from ratepayers.

Finally, the Commission notes that GMO's request appears to be contrary to statute. 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

[16] Exhibit 1, Rush Direct, Schedule TMR-1.

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."[17] 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.[18] 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.

[17] *State ex rel. Monsanto v. Public Service Commission*, 716 S.W.2d 791, 796 (Mo. 1986).
[18] Section 386.266.1.