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'

INITIAL BRIEF

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

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I. INTRODUCTION

This case concerns the appropriate Commission response to the Western District Court of Appeals ruling in *State ex rel. AG Processing, Inc. v. Public Service Commission*.[1] In that case, the Court reviewed the Commission's decision, based upon the recommendation of Staff and GMO, finding that the Initial Accumulation Period began on June 1, 2007. The Court held that the Commission's February 14, 2008 Order was unlawful because it purports to implement the fuel adjustment clause prior to the effective date of the underlying FAC tariffs.[2] Specifically, the Court held that "the Commission wholly disregards the applicable statutory language, the filed rate doctrine and the prohibition on retroactive ratemaking" by allowing GMO to collect past under-collection of fuel and purchase power costs dated back to June 1, 2007.

Today, Staff and GMO no longer assert that the FAC accumulation period should have commenced on June 1, 2007. Now, Staff and GMO claim that the Initial Accumulation Period commenced with the effective date of the Commission's order approving those tariffs - July 5, 2007. This brief will show that, contrary to Staff and GMO's new position, the accumulation period must commence on the first day of the following calendar month – August 1, 2007.

As will be pointed out in greater detail, the August 1 start date for the Initial Accumulation Period is dictated by several facts. ***First***, Commission regulations mandate that the accumulation period begin on the first day of a calendar month. ***Second***, the Staff has admitted under cross-examination that the true-up and therefore the start of the first accumulation period must be August 1, 2007. ***Third***, the Commission, in

[1] 311 S.W.3d 361 (Mo.App. 2010) ("*AG Processing*").
[2] *Id.* at page 367.

a recent order, adopted the interpretation that a fuel adjustment clause must start on the first day of a calendar month. ***Fourth***, several GMO pleadings reveal GMO's own understanding that the accumulation period must commence on the first day of a calendar month. ***Fifth***, GMO and Staff's initial treatment of this case indicate that both Staff and GMO believed that the accumulation period must begin on the first day of a calendar month. For these reasons, the Commission should find that the Initial Accumulation Period began on August 1, 2007.

Recognizing that GMO unlawfully collected rates based upon an Initial Accumulation Period beginning June 1, 2007, it is incumbent that the Commission utilize the authority provided by Section 386.266.4(2) and remedy this over-collection. That statute expressly provides the Commission with the authority to order "subsequent rate adjustments or refunds" to "remedy any over- or under-collections." Given that GMO has unlawfully held these funds for over three years, and given the desire to return that money to the ratepayers that were unlawfully charged, it would be appropriate for the Commission to require immediate refunds. That said, however, administrative concerns may dictate that the over-collection be returned through "subsequent rate adjustments."

In the final analysis, the evidence indicates that GMO unlawfully collected $8,794,838 for the period of June 1 through August 1, 2007. This amount, plus whatever additional interest is due, should be returned to the customers as soon as practicably possible.

II. PROCEDURAL HISTORY AND COMMISSION'S UNLAWFUL FEBRUARY 14, 2008 ORDER

CASE NO. ER-2007-0004: On July 3, 2006, GMO filed proposed rate schedules designed to implement a general rate increase of $94.5 million in its MPS service area

and $24.4M in its L&P service area. In addition, GMO filed rate schedules, pursuant to Section 386.266, to implement a fuel adjustment clause. Those rate schedules were denominated as Case No. ER-2007-0004.

Following an evidentiary hearing, the Commission issued its Report and Order on May 17, 2007. In that Report and Order, the Commission **rejected** GMO's proposed rate and fuel adjustment schedules and ordered GMO to file proposed rate and fuel adjustment tariff sheets in compliance with the Report and Order.[3] From May 18 – 21, 2007, GMO filed various tariff sheets designed to comply with the Report and Order. On May 25, 2007, the Presiding Officer issued her Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets. In that May 25 Order, the Presiding Judge expressly **rejected** the GMO fuel adjustment tariff again.[4]

On May 25, 2007, GMO again filed tariff sheets which it alleged complied with the Report and Order. On June 14, the Commission issued its Order Rejecting Tariff, Granting Clarification, Directing Filing and Correcting Order Nunc Pro Tunc. Again, as that Order expressly notes, the Commission **rejected** GMO's fuel adjustment tariff sheets.[5]

On June 18, GMO filed another set of tariff sheets which it claims complied with the provisions of the Report and Order. On June 29, 2007, the Presiding Officer, under a purported delegation of authority, issued her Order Granting Expedited Treatment and Approving Tariff Sheets ("June 29, 2007 Order"). That Order, effective July 5, finally approved GMO's fuel adjustment clause.[6]

[3] *Report and Order*, Case No. ER-2007-0004, at pages 70-71.
[4] *May 25 Order*, Case No. ER-2007-0004, at page 7.
[5] *June 14 Order*, Case No. ER-2007-0004, at page 7.
[6] *June 29 Order*, Case No. ER-2007-0004, at page 3.

CASE NO. EO-2008-0216: On December 28, 2007, GMO filed rate schedules to "adjust charges related to the Company's approved Fuel Adjustment Clause."[7] As reflected in the accompanying testimony, those rate schedules are designed to collect increases in fuel and purchased power costs incurred for the six months starting June 1, 2007.

On February 8, 2008, the Industrial Intervenors filed their Motion to Reject Tariffs and Response to Staff Recommendation. In that Motion, the Industrial Intervenors asked the Commission to reject GMO's tariffs as unlawful.

Nevertheless, on February 14, 2008, the Commission issued its Order approving the FAC rate schedules. In that February 14, 2008 Order, the Commission denied the Intervenors' Motion, ruling that, although the FAC rate schedules did not become effective until July 5, 2007, GMO had been authorized to implement a fuel adjustment clause in the May 17 Report and Order. As such, the Commission found that GMO's fuel adjustment clause allowed for the collection of costs beginning June 1, 2007.

On March 23, 2010, the Western District Court of Appeals issued its Opinion finding that the Commission's Order was not consistent with "the applicable statutory language" or "the prohibition on retroactive ratemaking."[8] On July 19, 2010, the Cole County Circuit Court remanded this matter to the Commission.

[7] Rate Schedules, Case No. ER-2008-0216, filed December 28, 2007.
[8] *State ex rel. Ag Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361, 367 (Mo.App. 2010) ("AGP").

III. RELEVANT TIMELINE

July 3, 2006: GMO files Case No. ER-2007-0004 and seeks implementation of a fuel adjustment clause.

May 17, 2007: The Commission issues its Report and Order in Case No. ER-2007-0004, rejecting the tariff sheets submitted by GMO on July 3, 2006, but authorizing GMO to file tariffs in conformance with the Report and Order.

May 25, 2007: Presiding Officer issues her Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets and rejects GMO's ***first*** FAC compliance tariffs.

June 1, 2007: Without approved tariffs, GMO begins deferring under-collection of fuel and purchased power pursuant to its fuel adjustment clause.

June 14, 2007: Commission issues its Order Rejecting Tariff, Granting Clarification, Directing Filing and Correcting Order Nunc Pro Tunc and rejects GMO's ***second*** FAC compliance tariffs.

June 29, 2007: Presiding Officer issues her Order Granting Expedited Treatment and Approving Tariff Sheets in which she approves GMO's ***third*** FAC compliance tariffs.

July 5, 2007: Presiding Officer's June 29, 2007 Order becomes effective.

December 28, 2007: GMO filed to recover under-recovered fuel and purchased power expense incurred between June 1 and November 30, 2007.

February 14, 2008: Commission issued its Order approving GMO's December 28, 2007 adjustment tariffs.

IV. THE COMMISSION SHOULD BEGIN CALCULATING CHANGES IN FUEL AND PURCHASED POWER COSTS EFFECTIVE AUGUST 1, 2007.

As previously mentioned, GMO's fuel adjustment clause tariff was not approved until June 29, 2007. That order became effective on July 5, 2007. Despite the effective date of the FAC tariff, Staff and GMO initially asserted that GMO could begin calculating changes in its fuel and purchased power costs back to June 1, 2007. Based largely on Staff and GMO's erroneous legal interpretation, the Commission initially agreed and allowed collection of under-charges back to June 1, 2007. Ultimately, Staff and GMO's position was roundly rejected by the Court of Appeals. In that opinion, the Court held that Staff and GMO's position "wholly disregards the applicable statutory language, the filed rate doctrine, and the prohibition on retroactive ratemaking."

Having been proved wrong once, Staff and GMO now take a second bite at the apple and claim that GMO should begin capturing changes in fuel and purchased power expense effective July 5, 2007. Once again, however, Staff and GMO's position "wholly disregards" applicable legal rules, regulations as well as their own prior interpretations.

As this section of the brief will demonstrate, there are five reasons that GMO's fuel adjustment clause could not start until August 1, 2007. ***First***, Commission rules require that a fuel adjustment clause commence on the first day of a calendar month. ***Second***, Staff's admissions under cross-examination reflect the requirement that the true-up and therefore the start of the Initial Accumulation Period must be August 1, 2007. ***Third***, the Commission's recent decision in Case No. ER-2010-0356 reflects the clear direction that a fuel adjustment clause commence on the first day of a calendar month. ***Fourth***, GMO's previous pleadings reflect the fact that GMO "held this same view of the

law" that the fuel adjustment clause must begin on the first day of the calendar month. ***Fifth***, the procedure used by Staff and GMO to initially process this case reveals that both GMO *and* Staff understand that the fuel adjustment clause could not lawfully begin in the middle of the month.

A. COMMISSION REGULATIONS AND SUBSEQUENT INTERPRETATION

Following the enactment of Section 386.266 in 2005, the Commission undertook a rulemaking proceeding in order to implement the provisions of that statute.[9] 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,[10] and recognizing that utilities keep records on a monthly basis, the proposed rules mandate that any true-up period commence on the first day of a calendar month. Despite its participation in that docket, GMO never asked the Commission to modify its rule which required that a fuel adjustment clause commence on the first day of the month. Today, this requirement is codified at 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) of the Commission's rules:

> 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

[9] See, Section 386.266.12.
[10] Section 386.266.4(2).

the fact that utilities keep financial books on a monthly, not daily, basis. Given the lack 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.

B. STAFF INTERPRETATION UNDER CROSS-EXAMINATION

Under cross-examination, Staff's expert witness conceded the applicability of the Commission's rule and the logic underlying that rule. Specifically, Staff Witness Roos 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,[11] any true-up beginning in the middle of the month would admittedly be an "approximation."[12] Finally, 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."[13]

C. RECENT COMMISSION INTERPRETATION

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

[11] Section 386.266.4(2).
[12] Tr. 156.
[13] Tr. 158.

records, held that GMO's most recent fuel adjustment changes must begin on the first day of a calendar month.

There, GMO asked that its fuel adjustment tariff become effective on June 4, 2011. In contrast, Public Counsel and the Industrial Intervenors asserted that Commission regulations require such tariffs to become effective on the first day of a calendar month. Ultimately, the Commission agreed with this interpretation.

> 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.[14]

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."

Finally, the meaning of the Commission's FAC rules has also been acknowledged by the Commission in other recent cases. For instance, in Case No. ER-2008-0093, the Commission authorized Empire District Electric to 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).[15]

[14] *Order of Clarification and Modification*, Case No. ER-2010-0356, issued May 27, 2011, at page 9.
[15] See, *Order Granting Expedited Treatment and Approving Compliance Tariffs*, Case No. ER-2008-0093, issued August 12, 2008, at pages 3 and 4.

D. PREVIOUS GMO STATEMENTS

Several times during the briefing of this case at the Court of Appeals, GMO was asked to explain previous inconsistent statements. In those statements, GMO recognized that a fuel adjustment clause could not become effective until the first day of a calendar. Despite several invitations, GMO never even attempted to explain its previous inconsistent statements. Ultimately, the Court of Appeals recognized the obvious hypocrisy between GMO's positions in previous pleadings and its position in court.[16]

A recitation of GMO's previous statements is highly relevant to the immediate inquiry and demonstrate that GMO itself once "held this same view of the law"[17] – that its fuel adjustment clause could not commence until August 1, 2007.

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***.[18]

[16] *AG Processing* at page 357, footnote 5.
[17] *Id.*
[18] *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).

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.

> 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.[19]

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.[20]

Ultimately, the Commission's order approving GMO's fuel adjustment clause tariff did not become effective until July 5, 2007. Given the clear mandate of the Commission's rules as well as GMO's acknowledged interpretation of those rules, GMO's fuel adjustment clause could not become effective until August 1, 2007. Any attempt to allow GMO to recover costs for a period preceding this date will again run afoul of the acknowledged meaning of the Commission's rules.

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[19] *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).

[20] *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.

E. STAFF AND GMO'S INITIAL PROCESSING OF THIS CASE

As demonstrated in the introduction and timeline, 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 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.

If Staff and GMO truly believed that the fuel adjustment clause became effective with the issuance of the Report and Order, why did Staff and GMO begin tracking changes in fuel and purchased power effective June 1, 2007? The answer is apparent. Both Staff and GMO recognized that 4 CSR 240-3.161(1)(G) requires that any fuel adjustment clause tariff become effective on the first day of a calendar month.[21]

F. CONCLUSION

Clearly, as this brief has demonstrated, there are numerous reasons that GMO's Initial Accumulation Period begin on August 1, 2007. Initially, it should be recognized that GMO and Staff's argument that the tariffs became effective on July 5 is merely a fallback position. Both Staff and GMO initially argued that the tariff became effective on June 1. That position was roundly rejected by the Court of Appeals. As such, one must

[21] Similarly, Staff and GMO did not argue that the fuel adjustment clause became effective with the remainder of the rate schedules on May 31, 2007. Instead, consistent with the direction of the Commission's rule, both Staff and GMO delayed implementation until June 1, 2007.

necessarily question whether their current position is simply another attempt to grasp as much money as possible.

In contrast, the Industrial Intervenors have steadfastly asserted that the tariffs could not become effective until August 1, 2007. The Industrial Intervenors' position has been expressly adopted by the Court of Appeals when it rejected the initial position advanced by GMO and Staff. Therefore, when it comes to credibility, one must necessarily side with the Industrial Intervenors.

That aside, as this section sets forth, there are several reasons that the Commission should find that the Initial Accumulation Period began on August 1, 2007. ***First***, Commission regulations require a fuel adjustment clause to begin on the first day of a calendar month. ***Second***, despite Staff's current legal claims, Staff's expert witness expressly admitted that Commission rules require a fuel adjustment clause to become effective on the first day of a calendar month. Any other date would, contrary to the statutory requirement of an "accurate" true-up, necessarily mean that the true-up would be an "approximation." Moreover, Staff's witness admitted that, given the direction of the Commission's rule, the true-up and therefore the effective date of the fuel adjustment clause tariff must necessarily begin on "August 1, 2007." ***Third***, the Commission has clearly recognized and applied its rule in its recent decision requiring GMO's latest fuel adjustment clause to become effective on the first day of a calendar month. ***Fourth***, GMO's previous pleadings reflect its understanding that the fuel adjustment clause tariffs could not begin until the first day of a calendar month. ***Fifth***, both Staff and GMO initially processed this case with the understanding that the fuel adjustment clause must

begin on the first day of a calendar month. For all these reasons, the Commission should find that the Initial Accumulation Period begins on August 1, 2008.

V. THE COMMISSION HAS THE AUTHORITY TO REQUIRE EITHER A REFUND OR ADJUSMENT IN ORDER TO REMEDY THIS PAST OVERCOLLECTION.

As indicated, 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***.[22]

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.

VI. EVIDENCE CLEARLY DEMONSTRATES AGREEMENT ON THE NECESSARY AMOUNT OF ANY REFUND OR ADJUSTMENT.

There does not appear to be any argument regarding the amount of money over-collected by GMO's for the period of June 1 through August 1, 2007. As set forth by Staff's expert Roos, GMO over-collected approximately $8.9 million from ratepayers for this time period. Specifically, Staff found that GMO over-collected $7,084,354 from the MPS district and $1,710,484 from the L&P district.[23]

[22] Section 386.266.4(2) (emphasis added).
[23] Exhibit 7.

VII. THE COMMISSION SHOULD ORDER IMMEDIATE REFUNDS

As set forth in the prior section, the Commission has statutory authority to order refunds or FAC adjustments in order to remedy GMO's past over-collection of FAC rates. Given that GMO unlawfully collected these rates from customers in 2007, the Industrial Intervenors assert that the Commission should order immediate refunds rather than flow these refunds through the fuel adjustment clause.

As defined by the Commission, "the concept of intergenerational equity is that one "generation" of utility customers should pay the current costs of providing service to them. It is inequitable for customers to pay for the cost of providing service in the past or in the future."[24] The doctrine of intergenerational equity, therefore, dictates that the Commission attempt to return the overcollected funds to the customers that were required to unlawfully pay those funds. Any delay in returning these funds will result in certain customers that did not receive electric service at the time receiving the benefit of refunds.

Therefore, the Commission should be mindful of its obligation to return the overcollection in a timely fashion. Of course, the Commission should also be aware that refunds may cause certain administrative costs that dictate another methodology. Therefore, to the extent that the cost of making immediate refunds is excessive, the Commission could flow any refunds through the next fuel adjustment clause.

VIII. THE COMMISSION SHOULD DENY GMO'S REQUEST FOR AN ACCOUNTING AUTHORITY ORDER

Referring to GMO's request for an AAO, Public Counsel noted in his opening statement that "in over 20 years of practice I don't believe I've ever seen a more egregious

[24] *St. Louis County Water*, Case No. WO-2000-844, 10 Mo.P.S.C.3d 255, issued May 3, 2001. See also, *Missouri Public Service*, Case No. ER-97-394, 7 Mo.P.S.C.3d 178, issued March 6, 1998 ("The principle of intergenerational equity states that the costs of providing the service should be borne by the generation of ratepayers that caused the costs to be incurred, not by an earlier or later generation.").

money grab by any company."[25] The Industrial Intervenors echo Public Counsel's characterization. Further, the Industrial Intervenors agree with Public Counsel that if "GMO is able to come up with any argument that passes the straight face test about why the Commission should grant an AAO to allow it to recover money that was illegally collected in the first place and then ordered refunded, Public Counsel will address that argument in its reply brief."

Respectfully submitted,

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[25] Tr. 113.

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 7, 2011