BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In The Matter Of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P 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**

SECOND REPLY BRIEF AFTER REMAND
OF STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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STAFF'S SECOND REPLY BRIEF AFTER REMAND

COMES NOW the Staff of the Public Service Commission ("Staff") and, for its *Second Reply Brief* to the Public Service Commission ("Commission") after evidentiary hearing post remand, states:

June 1, 2007 Start Date

As the briefing in this case indicates, the primary issue is the start date for calculating the fuel-related costs during the first accumulation period of KCP&L Greater Missouri Operations Company's fuel adjustment clause. The first accumulation period of GMO's FAC was June to November, 2007. The Commission originally determined the start date coincided with the beginning of that accumulation period—June 1, 2007. Even in its June 7, 2011, brief, GMO still advocates for a June 1, 2007, start date. However, in *State ex. Rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.2d 361 (Mo. App. 2010), the Court of Appeals held that costs incurred before the July 5, 2007, effective date of the tariff sheets implementing GMO's FAC could not be considered in determining FAC customer bill charges or credits—"Only costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause." *Id*. at 366. Therefore, this Commission should decline GMO's half-hearted argument the Commission again determine June 1, 2007, is the start date.

Accounting Authority Order

Likewise, because the Court of Appeals held that "[o]nly costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause," the Commission should reject GMO's request the Commission issue an accounting authority order that would allow it to book for potential future recovery any amounts the Commission orders should be returned to GMO's customers for being improperly collected through its FAC. If return of unlawfully collected amounts is in fact an "extraordinary event," it is not the type of extraordinary event for which this Commission should grant GMO accounting authority to permit it the opportunity to seek to recoup from its customers the very amounts the Commission orders should be returned to those customers. Ex. 8, Staff witness Oligschlaeger rebuttal testimony, pp.3-4.

Rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I)

In their June 7, 2011 briefs, both Public Counsel and the group calling themselves the Industrial Intervenors point to the Commission's *Order of Clarification and Modification*, issued May 27, 2011, in File No. ER-2010-0356 that became effective June 3, 2011, in which the Commission, at pages eight to nine, stated the following:

> Public Counsel, Ag Processing, and SIEUA argue that the FAC portion of the tariffs cannot become effective on June 4, 2011 as requested, but rather, must become effective on the first of the month following the effective date of the Commission order approving the FAC. Public Counsel, Ag Processing, and SIEUA argue that Section 386.266.4(2), RSMo Cum. Supp. 2010, states that an FAC must provide for "an annual true-up which shall **accurately** and appropriately remedy any over- or under- collections, including interest . . ."[7] Public Counsel further argues that the Commission promulgated 4 CSR 240-3.161(1)(G) in order to implement this requirement. That definition provides:

[7] Emphasis added.

> 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 [rate adjustment mechanism] unless the effective date is on the first day of the calendar month.
>
> GMO filed a response to Public Counsel, Ag Processing, and SIEUA on May 25, 2011. In its response, GMO argues "the request that the tariffs become effective on June 4 does not relate to the definition of 'true-up year' in the regulations." The Commission disagrees.
>
> As Public Counsel, Ag Processing, and SIEUA argue, this rule is designed around the fact that utilities keep financial records on a monthly, not a daily, basis. Thus, the FAC could not have an **accurate** true-up as required by Section 386.220.4 if the true-up begins on a day other than the first day of the month.
>
> The Commission does agree, however, with GMO's next argument that the Commission is not prohibited from determining a different effective date of a tariff if good cause exists to do so.[8] In this case, however, there is no good cause to do so for the FAC portion of the tariffs. Because the current FAC will remain in effect until replaced by these tariff sheets, GMO will not be harmed by the delay. 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 basis and not a daily basis.

(Footnotes in original.) In that same order, in ordered paragraph 10, the Commission authorized GMO to file FAC tariff sheets bearing an effective date of July 1, 2011.

After a subsequent series of pleadings and orders, the Commission, on June 15, 2011, issued in File No. ER-2010-0356 an order titled, *Order Approving Tariff Sheets and Setting Procedural Conference*, in which it ordered new GMO general rate increase tariff sheets to become effective on June 25, 2001, and the referenced new GMO FAC tariff sheets to become effective July 1, 2011. As best as Staff can determine the Commission's statement, "As Public Counsel, Ag Processing, and SIEUA argue, this rule is designed around the fact that utilities keep financial records on a monthly, not a daily, basis," is based on statements

[8] Section 393.140(11), RSMo.

Public Counsel and the Industrial Intervenors made in their pleadings filed in that case on May 20 and 25, 2011, that utilities keep their financial records on a monthly basis. Those pleadings include no citation to the record in that case to support the statements.

Regardless, if Commission rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) require the start date for calculating the fuel-related costs must be the first day of a month—for GMO's first FAC accumulation period August 1, 2007—the issue is still not resolved. This is because the Commission may, for good cause shown, permit noncompliance with these provisions after opportunity for a hearing. 4 CSR 240-3.161(16) and 4 CSR 240-20.090(13).

Both rules 4 CSR 240-3.161 and 4 CSR 240-20.090 first became effective on January 15, 2006, during the pendency of the general rate case (Case No. ER-2007-0004) where the Commission established GMO's FAC by approving its FAC tariff sheets on July 5, 2007.

As the parties have observed, this case is the first time a FAC charge was made under section 386.266, RSMo Supp. 2010.

Section 386.266.4(2), RSMo Supp. 2010, provides, that to approve a FAC, the Commission must find the FAC "includes provisions for an annual true-up which shall accurately and appropriately remedy and over- or under- collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds." GMO's FAC applicable in this case (original tariff sheet no. 126) provides:

> True-Ups and Prudence Reviews
>
> There shall be prudence reviews of costs and the true-up of revenues collected with costs intended for collection. FAC costs collected in rates will be refundable based on true-up results and findings in regard to prudence. Adjustments, if any, necessary by Commission order pursuant to any prudence review shall also be placed in the FAC for collection unless a separate refund is ordered by the Commission. True-ups occur at the end of each recovery period. Prudence reviews shall occur no less frequently than at 18 month intervals.

As Staff stated in its June 1, 2011, reply to the Industrial Intervenors' response to Staff's suggestions in File No. ER-2010-0356, it has been Staff's view, at least since the Commission promulgated rules 4 CSR 240-3.161 and 4 CSR 240-20.090, that the purpose of the true-up is to remedy any over- or under-collection during a recovery period, not to "cure" any mismatch between base fuel costs in the general rates and in the fuel adjustment clause. As it explained there, Staff viewed that, at the end of an accumulation period, the utility's actual fuel and purchased power-related expenses during the accumulation period are compared to the fuel and purchased power-related expenses predicted for that period. The fuel adjustment rate then is adjusted to collect from, or credit, customers for the resulting difference during the associated recovery period. Thus, the sole purpose of the true-up is to remedy the under- or over-collection during the recovery period, since it a virtual certainty the amount actually collected or credited will not match the amount intended to be collected or credited.

Based on Commissioner statements during the June 15, 2011, Agenda, Staff understands the Commission may view the purpose of the true-up more expansively than what Staff has employed. Under the foregoing Staff interpretation, the start date during the accumulation period for calculating the fuel-related costs has no bearing on the subsequent true-up.

As Staff stated in its June 7th brief, this Commission has issued orders to make FACs effective on dates other than the first of the month, which resulted in base energy cost rates in the FAC changing within an accumulation period in at least two general electric rate increase cases, one for Union Electric Company (File No. ER-2001-0036, June 16, 2007, *Order Approving Compliance Tariff Sheets and Depreciation Rates* and June 17, 2007, *Order Approving Additional Tariff Sheet*) and one for The Empire District Electric Company (File No. ER-2010-0130, September 1, 2010, *Order Granting Motion for Expedited Treatment and Approving Tariff*

in Compliance with Commission Order), and had pending before it in File No. ER-2011-0004, an agreement that would do so in another The Empire District Electric Company case. On June 7, 2011, the Commission issued an order in File No. ER-2011-0004 making FAC tariff sheets effective on June 15, 2011, and changing base energy costs (Base Cost) in the FAC within an accumulation period.

Using a start date of August 1, 2007, rather than July 5, 2007, including interest through December 31, 2010, results in a difference of $6,334,849 (($7,084,354 - $1,975,363) + ($1,710,484 - $484,626)). Exs. 6 and 7, Staff witness Roos rebuttal testimony as corrected.

As stated above, section 386.266.4(2), RSMo Supp. 2010, provides, that to approve a FAC, the Commission must find the FAC "includes 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." (Emphasis added.) If rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) require a start date of August 1, 2007, but the Commission grants a variance from them (waives the rules) for GMO's first accumulation period, the question then becomes, "Can there be a true-up that will accurately and appropriately remedy any over- or under-collections if the start date is July 5, 2007?" Staff believes the answer to that question is "Yes."

As Staff witness Roos testified, having better more complete and accurate data would lead to a better result. Tr. Vol. 3, p. 160. That is the thrust of the argument of Public Counsel and the Industrial Intervenors—that one cannot accurately disaggregate fuel cost data for the month of July 2007 between the first four days and the remainder of that month sufficiently to satisfy the rules and perform a true-up of over- and under-collections that satisfy the statute. The Commission should not conclude that not having better data means the data available is

insufficient. Under the statute, the question is, "Can there be a true-up that accurately and appropriately be used to remedy any over- or under-collections if the start date is July 5, 2007?"

The allocation methodology of weighting the monthly July fuel costs by daily energy usage for July upon which Staff and GMO agree is sufficient to satisfy the statutory requirement. Ex. 6, Staff witness Roos rebuttal testimony, pp. 2-3, Tr. Vol. 3, pp. 153-54. Staff witness Roos testified he believes the difference between using Staff's energy allocation methodology and GMO's days' count methodology for fuel costs did not have a significant impact on the over-collection results for the June 1 to July 5 period. Tr. Vol. 3, pp. 159. Stated another way, Staff's allocation methodology of weighting the monthly July fuel costs by daily energy usage for July to determine those costs for the first four days of July 2007 is accurate enough that the Commission should not require GMO to forego over six million dollars in fuel and purchased power-related costs by requiring an August 1st start date instead of a July 5th start date.

Based on the foregoing considerations, Staff believes there is sufficient evidence in the record to constitute the good cause required for relief from these rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I), if the Commission finds they require an August 1, 2007 start date.

Staff witness Roos' testimony that under rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I), a July 5th FAC tariff effective date means the true-up year starts August 1st does not have the significance Public Counsel and Industrial Intervenors attempt to attach to it. It is simply the result of a reading of the plain meaning of the rules. Likewise, that Staff did not propose a July 5, 2011, start date before the remand of this case does not indicate Staff believed the start date for calculating the fuel-related costs during the first accumulation period had to fall on the first day of a month. At that time GMO's tariff had a June 1st start date and Public Counsel and the Industrial Intervenors were proposing an August 1st start date. Staff, who

supported that it was the *Report and Order* that established the FAC, simply supported the June 1st date of the tariff. Regardless, as to the Commission's rules, what matters is what the Commission intended by them, not others.

Authority to Order Refund

The Commission's authority is limited to that conferred on it by statute. Despite their assertions to the contrary, neither Public Counsel nor the Industrial Intervenors have demonstrated statutory authority for the Commission to order refunds in the circumstances presented here. This case arises from an interim rate adjustment and neither the Industrial Intervenors nor Public Counsel have shown that square peg fits into the round holes of true-up or imprudence.

Conclusion

The Staff's conclusion remains the same as it was in its brief filed August 31, 2010. The Commission should comply with the Court's mandate and use the fuel, purchased power and emissions costs for the period July 5 to November 30, 2007 to determine the correct CAFs for MPS and L&P for the first recovery period of March 1, 2008 through February 28, 2009. However, the Commission does not have the authority to order the refund of amounts by which the old CAFs exceed the corrected CAFs.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record this 17th day of June, 2011.

/s/ Nathan Williams