BEFORE THE PUBLIC SERVICE COMMISSION
FOR 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

APPLICATION FOR REHEARING OF
KCP&L GREATER MISSOURI OPERATIONS COMPANY

KCP&L Greater Missouri Operations Company ("GMO" or "Company"), applies for rehearing of the Report and Order on Remand issued by the Commission on August 30, 2011 ("Remand Report and Order"), pursuant to Section 386.500.1[1] and 4 CSR 240-2.106. In support of its application, the Company states as follows:

I. Legal Principles that Govern Applications for Rehearing.

1. All decisions of the Commission must be lawful, with statutory authority to support its actions, as well as reasonable. State ex rel. Ag Processing, Inc. v. PSC, 120 S.W.3d 732, 734-35 (Mo. en banc 2003). An order's reasonableness depends on whether it is supported by substantial and competent evidence on the record as a whole. State ex rel. Alma Tel. Co. v. PSC, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001). An order must not be arbitrary, capricious, or unreasonable, and the Commission must not abuse its discretion. Id.

2. In a contested case, the Commission is required to make findings of fact and conclusions of law pursuant to Section 536.090. Deaconess Manor v. PSC, 994 S.W.2d 602, 612 (Mo. App. W.D. 1999). For judicial review to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the Commission, make sense to the reviewing court. State ex rel. Capital Cities Water Co. v. PSC, 850 S.W.2d 903, 914 (Mo. App.

[1] All citations are to the Missouri Revised Statutes (2000), as amended.

W.D. 1993). In order for a Commission decision to be lawful, the Commission must include appropriate findings of fact and conclusions of law that are sufficient to permit a reviewing court to determine if it is based upon competent and substantial evidence. State ex rel. Monsanto Co. v. PSC, 716 S.W.2d 791, 795 (Mo. en banc 1986); State ex rel. Noranda Aluminum, Inc. v. PSC, 24 S.W.3d 243, 246 (Mo. App. W.D. 2000); State ex rel. A.P. Green Refractories v. PSC, 752 S.W.2d 835, 838 (Mo. App. W.D. 1988); State ex rel. Fischer v. PSC, 645 S.W.2d 39, 42-43 (Mo. App. W.D. 1982), cert. denied, 464 U.S. 819 (1983).

3. In State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, 691-92 (Mo. App. W.D. 2003), the Court of Appeals described the requirements for adequate findings of fact when it stated:

> While the Commission does not need to address all of the evidence presented, the reviewing court must not be "left 'to speculate as to what part of the evidence the court found true or was rejected.'" … In particular, the findings of fact must be sufficiently specific to perform the following functions:
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> > [F]indings of fact must constitute a factual resolution of the matters in contest before the commission; must advise the parties and the circuit court of the factual basis upon which the commission reached its conclusion and order; must provide a basis for the circuit court to perform its limited function in reviewing administrative agency decisions; [and] must show how the controlling issues have been decided[.]
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> St. Louis County v. State Tax Comm'n, 515 S.W.2d 446, 448 (Mo. 1974) (citing Iron County v. State Tax Comm'n, 480 S.W.2d 65 (Mo. 1972)).

4. The Commission cannot simply recite facts on which it bases a "conclusory finding," and must "fulfill its duty of crafting findings of fact which set out the basic facts from which it reached its ultimate conclusion" in a contested case. Noranda, 24 S.W.3d at 246. "Findings of fact that are completely conclusory, providing no insights into how controlling issues were resolved are inadequate." Monsanto, 716 S.W.2d at 795.

5. A review of the evidentiary record in this case demonstrates that the Report and Order failed to comply with these principles in certain respects and that rehearing and clarification should be granted as to the issues discussed below.

II. Issues on Which Rehearing is Sought.

A. Cycle Order 1 Did Not Engage in Retroactive Ratemaking.

6. The Commission erroneously found that its February 14, 2008 Order (Cycle 1 Order) constituted retroactive ratemaking. Pursuant to the Court of Appeals' decision in State ex. rel. Ag Processing, Inc. v. PSC, 311 S.W.3d 361 (Mo. App. W.D. 2010), the Commission was given an opportunity to review the actions that it took in its May 17, 2007 Report and Order ("May 2007 Order") in the Aquila Rate Case No. ER-2007-0004.[2] Although the Court of Appeals found that the Cycle 1 Order violated the prohibition on retroactive ratemaking, it remanded the case to the Commission for proceedings consistent with its ruling that retroactive ratemaking occurred prior to the tariffs becoming effective on July 5, 2007. Id. at 367. In its Remand Report and Order, the Commission has failed to explain how the Fuel Adjustment Clause (FAC) enacted under Section 386.266 worked in this particular case and why the Cycle 1 Order did not engage in retroactive ratemaking.

7. Because there was no data available to customers in June or July of 2007 regarding whether their electric rates would go up or go down and by how much, there was no retroactive ratemaking. Indeed, the tariff sheets that became effective July 5, 2007 contain multiple zeros in all the critical categories relating to fuel costs. See GMO Initial Brief, Exhibits 5-6; T. Rush Direct Sch. TMR-1 (Hearing Ex. 1). These tariff sheets simply stated when the

[2] This is the "general rate case" described by the Commission in the Remand Report and Order at page 6, however, it erroneously referred to it as File No. ER-2006-0044 which does not exist in the EFIS data base.

accumulation and calculation of costs would begin, but did not impose rates. After February 14, 2008 when the Cycle 1 Order was issued, customers then had the specific information regarding rates to be charged beginning March 1, 2008. Only at that time would they have the "means of calculating how much, if anything, their electrical use would cost them," as discussed by the Court of Appeals. 311 S.W.3d at 367. This statement is consistent with the Court's observation approving the purchased gas adjustment mechanism, noting "those tariffs will provide advance notice to customers of prospective charges, allowing the customers to plan accordingly, and the filed rate doctrine's goal of predictability is satisfied." State ex rel. Assoc. Natural Gas Co. v. PSC, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997).

8. The Commission correctly found that retroactive rate making was not an issue in the Cycle 1 Order "as to the recovery of GMO's FAC." See Remand Report and Order at 12. Because the effective date of the Cycle 1 Order tariff sheets preceded any recovery, there was no retroactive ratemaking. Id. However, under Section 386.266, which authorized electric utilities to file FACs, there was no retroactive ratemaking regarding the Accumulation Period's start date of June 1 either. Indeed, the Commission's reference to the Court of Appeal's statement that "[o]nly costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause"[3] is irrelevant to the facts of this case. Similarly, the citation to State ex rel. Assoc. Natural Gas Co. v. PSC, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997), and the U.S. Supreme Court cases it refers to are not pertinent in light of the General Assembly's passage of Section 386.266. The facts in those cases did not deal with Accumulation Periods or methods of collecting cost data that preceded a utility's request to recover costs, as occurred in this case.

[3] Remand Report and Order at 12, quoting Court of Appeals language at 311 S.W.3d at 366 [not p. 367].

Section 386.266 clearly permits FACs and other rate adjustment mechanisms to recover in the future costs that were incurred in the past.[4]

9. The Commission erroneously concluded that the law of the case doctrine barred reconsideration of the issues of retroactive ratemaking considered by the Court of Appeals in its Opinion. However, the Court of Appeals did not enter judgment that concluded the litigation, and it did not order a refund or adjustment for the period June 1 - July 4, 2007. Instead, the Court remanded the case to the Commission "for further proceedings consistent with this Opinion," this Commission should have addressed the arguments that GMO raised in its post-hearing briefs, as well as its Initial Brief Regarding Legal and Factual Issues filed on August 31, 2010.

10. Considering that the Court did not explicitly state that a tariff with zeros would violate the retroactive ratemaking doctrine or that a tariff with zeros would somehow "allow a customer to calculate how much they would be paying as a result of the fuel adjustment clause" (311 S.W.3d at 366), this Commission was obligated to explain in the Remand Report and Order why Cycle Order 1 was lawful.

B. Commission Does Not Have Authority to Order an Adjustment Regarding Any Over-Collection That Occurred in the Initial Accumulation Period.

11. The Commission erroneously concluded that it had the authority to order a refund or adjustment for any over-collection that occurred under the Cycle 1 Order. Because the adjustment ordered by the Commission will occur well after the True-Up Adjustment and the

[4] The Commission properly cited the Court of Appeals' most recent decision in this regard, State ex rel. Ag Processing v. PSC, 340 S.W.3d 146, 148 (Mo. App. W.D. 2011), which held that "forward-looking rate adjustments approved by the PSC pursuant to a previously adopted Fuel Adjustment Charge do not constitute unlawful retroactive ratemaking …." Footnote 34 in the Remand Report and Order erroneously stated that the case was decided "Mar. 1, 2001." The lead docket in that case was No. WD 71986, not 71987.

Prudence Review processes have been completed, and after the increase in rates under the FAC have become permanent, the Commission has no authority to order an adjustment here. The adjustment ordered by the Commission is confiscatory, particularly in light of the fact that no party to these proceedings requested a stay of the February 2008 Cycle 1 Order.

12. The adjustment ordered by the Commission must necessarily occur outside of the Section 386.266 review periods, and therefore such adjustment is unlawful. The Recovery Period during which the Cost Adjustment Factor ("CAF") reflecting the appropriate FAC costs for the June-November 2007 initial Accumulation Period was March 1, 2008 through February 28, 2009. See SEC Rogers Direct at 4 (Hearing Ex. 3); Rush Direct at 8 (Hearing Ex. 1). The True-up Adjustment (File No. EO-2009-0431) relating to this Recovery Period was in effect from September 1, 2009 through August 31, 2010. Id.

13. Staff conducted a Prudence Review (File No. EO-2009-0115) for the period June 1, 2007 through May 31, 2008, and submitted its report on December 1, 2008. Id.; Tr. at 149. There was no finding of imprudence regarding any of the fuel and fuel-related costs accumulated and calculated during the initial Accumulation Period which included the 34 days at issue here. See Tr. at 149. No party objected to the Prudence Review, and it was approved by the Commission. See Rush Direct, Sch. TMR-5 (hearing Ex. 1).

14. Consequently, there is no opportunity for the Commission to provide relief for the period June 1 through July 4, 2007.

15. Any party aggrieved by a Commission Order has the right to protect its interest by applying to the Circuit Court for a stay of enforcement of any Commission order under Section 386.520. Without a stay order that establishes a fund segregating contested funds from uncontested funds, there is no monetary fund from which relief can be ordered and thus no monetary relief can be granted in this case. City of Joplin v. PSC, 186 S.W.3d 290, 295 (Mo.

App. W.D. 2005). Because the Commission did not stay either its May 2007 Order in the general rate case or the Cycle 1 Order under Section 386.500.3, and because no other party requested a stay, no stay was issued and no bond was established at the Circuit Court, pursuant to Section 386.520. Thus, there is no money to refund to the appealing parties or other customers that represents sums collected in excess of the amounts determined proper on appeal.

16. The Commission's decision on this case is confiscatory in that it orders a refund of FAC costs found to the prudent, in violation of the principles established in State ex. rel. Utility Consumers Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 58-59 (Mo. en banc 1979). Here an FAC was established according to law under Section 386.266 and was implemented pursuant to the Commission's May 2007 Order, as well as the Cycle 1 Order in this case. As a technical matter, it did not become effective until 34 days after it was intended to take affect on June 1, 2007 because of last-minute changes to the tariff. However, no stay was ever ordered, and no party has posted a suspending bond. Moreover, costs accumulated under these tariffs have been found by Staff and the Commission to be prudent. Like the FAC and Roll-In charges in the UCCM case, GMO has a due process right to the sums that were paid under the FAC. The adjustment ordered by the Commission in the Remand Report and Order to GMO's FAC is not lawful.

C. The Commission Improperly Denied GMO's Request for an Accounting Authority Order.

17. The Commission erroneously denied GMO's request for an accounting authority order (AAO) regarding the approximately $2.5 million in accumulations related GMO fuel and fuel-related costs that the Commission has ordered be refunded. The adjustment that the Commission has ordered to occur in Recovery Period 9 beginning in March 2012 will affect

GMO's MPS division in the amount of $1,975,363 and its L&P division in the amount of $484,626.

18. There is no question that these amounts represent prudently incurred fuel and fuel-related costs under the FAC. No party to this case contends otherwise.

19. The Commission found that "[a]n adverse ruling" as a result of appellate litigation is not an "unusual, infrequent, abnormal or extraordinary event." See Remand Report and Order at 21. However, in the context of this case, it is an extraordinary event for two significant reasons. First, the tariff which the Commission finds to have constituted retroactive ratemaking contained absolutely no cost information when it went into effect on July 5, 2007. It simply implemented the FAC, as authorized by the Commission in the May 2007 Order in Aquila's last general rate case. Secondly, the Commission's established procedures to review the first accumulation period (including the 34 days at issue here) found that the fuel and fuel-related costs were prudent in all respects.

20. This situation presents an "unusual" and "infrequent" set of circumstances because this was the first FAC implemented by a utility in the State of Missouri. These particular facts will never be revisited because of the prospective operations of the FAC and Section 386.266. However, the 34 days under consideration in this case are unique and fall within the definition of "extraordinary items" in the Uniform System of Accounts (USOA). The Court of Appeals decision is an "event" under the USOA that will have a "significant effect." Because the record demonstrates that the FAC costs for this initial accumulation period were prudent but are now being denied recovery shows the "abnormal and significantly different"

effect "from the ordinary and typical activities of the company," where cost recovery of prudent expenses would be granted. See UOSA, 18 CFR part 101 (1992), General Instruction 7.[5]

21. During the hearing, several witnesses acknowledged that the passage of Section 386.266 was a significant event that changed the ordinary and typical way that utilities recovered their fuel costs. See Tr. at 146. The changes brought on by the new legislation in how utilities recover their costs were "significant" and "substantially different" from the previous system. Id. at 139-40, 146, 162. As a result, the expenses that are the subject of the Remand Report and Order's adjustment qualify for an AAO and the Commission erred in denying GMO's request.

D. Conclusion.

22. The Commission's actions noted above were unreasonable, arbitrary and capricious, and contrary to the letter and spirit of Section 386.266.

23. As a result, the Report and Order is unjust, unreasonable, unlawful, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law.

[5] As the Commission noted, it has directed Missouri electric utilities to keep all of their accounts in conformity with FERC's Uniform System of Accounts, pursuant to 4 CSR 240-20.030(1).

WHEREFORE, KCP&L Greater Missouri Operations Company respectfully requests that the Commission grant rehearing of its Report and Order, consistent with the arguments set forth above.

Respectfully submitted,

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ATTORNEYS FOR KCP&L GREATER MISSOURI OPERATIONS COMPANY

Certificate of Service

I hereby certify that on this 8th day of September, 2011 copies of the foregoing have been mailed, transmitted by facsimile, or emailed to all counsel of record.

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