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)

PUBLIC COUNSEL'S REPLY BRIEF

I. Introduction.

In its initial brief, KCP&L Greater Missouri Operations Company (GMO) devotes most of its efforts to arguing why the Court of Appeals was wrong.[1] Unfortunately, the Commission (even if it agreed) cannot overrule the Court of Appeals. This matter is before the Commission so that it can take **action** consistent with the Court's opinion. Thus, when GMO argues (at page 3) that the Commission "must review the actions that it took," it completely misses the mark. The Court of Appeals reviewed those actions; the Commission must now fix them, not "review" them. Similarly, GMO misses the mark when it states (at page 2) that the Court of Appeals "found the Commission's analysis was inadequate, as well as lacking in detail." The Court's holding deals with the Commission's actions, not its analysis. The Court could – and did – conduct its own analysis, and that analysis led the Court to conclude that the Commission's actions were unlawful. Finally, in its most egregious misstatement of the Court's opinion, GMO states

[1] The entirety of Sections B-D and most of F (pages 3-11, 12) concerns this misguided effort and will not be addressed in this Reply Brief beyond the brief discussion in the Introduction section.

(at page 2) that "the Court … remanded the case to the Commission for additional findings of fact and conclusions of law." This is absolutely untrue. The Court of Appeals "remanded to the circuit court with directions to remand to the Commission for further proceedings consistent with this opinion."[2] The Circuit Court judgment "vacates the PSC's order and remands for further proceedings consistent with the Ct. Appeals' opinion."[3] Neither court even hinted that additional findings of fact and conclusions of law would be appropriate. Indeed, since the Commission's order has been vacated, the Commission cannot simply make additional findings of fact and conclusions of law to bolster its original order as GMO suggests; it must take some action, and that action must avoid the retroactive ratemaking that the Court of Appeals found unlawful.

GMO also argues, in its only actionable point, that the "period of time for which any refund of fuel charges assessed to customers is appropriate is the 34 days between June 1 and July 4, 2007." (GMO, at page 11). Staff makes a similar point about the July 5 date (at pages 2-3), although Staff differs from GMO in that Staff concludes that no refund is appropriate. This brief will first address the question of when the first accumulation period should begin, and then Staff's assertion that no refund can be made.

II. At what date should the initial accumulation period begin?

As they did when the issue was first before the Commission, Public Counsel and the Industrial Intervenors argue that the initial accumulation period must begin on the first day of the month following Commission approval. GMO initially and strenuously

[2] Slip Opinion at page 10.
[3] July 19, 2010 Judgment in 08AC-CC00248; emphasis in original. No party has as of yet discussed the import of the Circuit Court's vacating the Commission's approval of GMO's rate adjustment tariff.

(and now infamously) raised the same argument. The Commission recognized the impact of the argument in its *Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause*:

> 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 cost accumulation period cannot begin until August 1**.[4]

The Court of Appeals has now conclusively ruled that Public Counsel and the Industrial Intervenors were in fact correct, and that should be the end of the matter.

Nonetheless, Staff argues (at page 2) that, under Commission regulations 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I), a "true-up year does not require that an accumulation period start at any particular time or define when an accumulation period must begin." Staff argued that the tariff provisions defining the accumulation period "trumped" the rules. Because the tariff sheets establish – unlawfully – June 1 as the start of the accumulation period, Staff can no longer rely on that argument. Even though the tariff sheets cannot have any bearing on the appropriate start date for the accumulation period, the Staff still refuses to concede that the Commission's rules control and now appears to be of the opinion that an accumulation period can begin at any time before, after, or during a true-up year. This is, of course, nonsense, and moreover directly contrary to the Commission's prior decision that "the cost accumulation period cannot begin until August 1."

[4] *Order Approving Tariff To Establish Rate Schedules For Fuel Adjustment Clause*, issued February 14, 2008, as modified by *Order Clarifying Order Approving Tariff*, issued February 26, 2008.

III. Should a refund be required?

Only Staff argues that no refund should be required; GMO's only issue is whether the refund period should extend until July 5 or August 1. As demonstrated in Point II, the Commission has already recognized that, because the argument of Public Counsel and the Industrial Intervenors has now been conclusively ruled correct, the cost accumulation period cannot begin until August 1. Thus the only question remaining is whether refunds are required for the previously (and unlawfully) accumulated amounts for the period of June 1–August 1, 2007.

The Staff makes much of the Commission's statement in its *Order Clarifying Order Approving Tariff* that "Aquila's FAC process and the Commission's regulations require that the FAC rate adjustments be interim, subject to true-up and prudence reviews." The reason that the Commission issued the clarification order was because the Commission neglected to state in its initial that the rate adjustments were interim, subject to refund. Rather than limiting the situations in which refunds could be made, the Commission's clarification was to ensure that refunds could be made at all. Without the clarification, the Commission could have been faced with an argument that its approval was final and unconditional, and that refunds could not be made under any circumstances. Staff's argument that the Commission's clarification, which was intended to **create** the possibility of refunds, was instead meant to **limit** refunds, is not plausible.

Staff also argues that language in the Commission's Order of Rulemaking issued in Case No. EX-2006-0472 supports its argument that only items specifically identified in

a true-up or prudence review may result in refunds. Once again, the Staff's reading is tortured and narrow. The Commission recognized in its Order of Rulemaking that the review provisions of a FAC are designed to make after-the-fact adjustments for items other than simple imprudent purchases of fuel, or other typical imprudence adjustments. The Commission stated that "costs subject to … litigation … may not be recoverable so long as they are so subject."[5] Nothing in Section 386.266 or in the Commission's rules supports Staff's argument that refunds can only be made for certain specific types of over-collections established in certain specific types of review. Indeed Section 386.266 clearly states that "an adjustment mechanism … shall **require** refund of **any** imprudently incurred costs plus interest at the utility's short-term borrowing rate."[6]

IV. Conclusion.

The Commission should order GMO to include a credit for all amounts collected for changes in fuel and purchased power expense between the dates of June 1, 2007 and July 31, 2007 in its calculation of its next fuel adjustment filing. In addition, consistent with Section 386.266.4(2) and 4 CSR 240-20.090(5)(A), such refunded amounts should include interest at GMO's short-term borrowing rate.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

[5] *Order of Rulemaking*, issued on September 21, 2006 in Case No. EX-2006-0472, page 6.

[6] Section 386.266.4(4) RSMo Cum. Supp 2006; emphasis added.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 10th day of September 2010.

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