

**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)	<u>Case No. EO-2008-0216</u>
4 CSR 240-20.090(4) and the Company's)	(On Remand)
Approved Fuel and Purchased Power Cost)	
Recovery Mechanism.)	

PUBLIC COUNSEL'S INITIAL POST-HEARING BRIEF

Introduction

In its Initial Brief filed in this matter on August 31, 2010, Public Counsel identified three substantive issues that the Commission must address in order to comply with the opinion and mandate of the Court of Appeals, Western District:

- First, at what date should the initial accumulation period begin?
- Second, what is the difference between the amounts accumulated from June 1 and the amounts accumulated from the appropriate beginning date?
- Third, how should a refund of that difference be accomplished?

In the Joint List of Issues filed on May 6, 2011, the parties phrased them a little differently, but those remain the core issues that the Commission must decide. The parties also suggested two additional issues. The Joint List of Issues states the issues as follows:

1. On what date within the Initial Accumulation Period should the calculation of fuel costs begin?
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 case regarding any overcollection that occurred in the Initial Accumulation Period?
3. What is the amount of a refund or adjustment, if any?
4. What is the appropriate mechanism for a refund or adjustment, if any?

5. Is it appropriate under the facts of this case for the Commission to issue an Accounting Authority Order (AAO) to KCP&L Greater Missouri Operations Company (GMO) regarding any amounts that are contained in a refund or adjustment?

This brief will address only the first four of these issues. 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.

As Public Counsel noted in its August 2010 brief, these are not terribly complex or difficult questions. The first question is one that encompasses both facts and law, the second is an entirely legal question, the third and the fourth are largely agreed-upon by the parties, and the fifth may be the easiest question the Commission has had in years. Since the parties have already filed several rounds of briefs after the remand, this brief will focus on the evidentiary record rather than the procedural background and history.

1. On what date within the Initial Accumulation Period should the calculation of fuel costs begin?

Given the dates of the relevant tariff filings and Commission decisions, as well as the Court of Appeals opinion, there really are just two options: July 5 or August 1, 2007. Public Counsel and the Industrial Intervenors assert that August 1 is the lawful and appropriate start date, and GMO and the Staff argue that the start date should be July 5.

The Court of Appeals found that the accumulation period cannot begin at a point prior to the effective date of the Commission's approval of the FAC tariffs, which was July 5, 2007. The Court's opinion is very clear on this point, and that opinion is now the law of the case. No amount of argument and no additional evidence can change that

result. But simply concluding that the accumulation period cannot have begun **before** July 5 does not resolve the question. Both the Staff and GMO argue that the accumulation period should begin as early as possible, which they believe is July 5. This argument is based solely on the notion that the accumulation period should begin as early as possible, and no other considerations. As this brief will demonstrate, when other considerations are taken into account, it is clear that the accumulation period should begin August 1.

Commission regulations 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) provide that: “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” In order to have the beginning of the initial accumulation period coincide with the beginning of the initial true-up year, the initial accumulation period must begin on the “first day of the first calendar month following” July 5, 2007, or August 1, 2007.

Although both the Staff and GMO have insisted throughout the remand portion of this case that there is no connection whatsoever between when an accumulation period begins and when a true-up year begins,¹ the evidence shows that this insistence is misplaced. Simply put, because the necessary data about fuel costs is kept on a monthly rather than a daily basis, if the accumulation period begins on any day other than the first day of a month, an accurate true-up of fuel costs cannot be performed. As GMO witness Rush testified, the best that can be done “is only an approximation of the fuel costs.” (Transcript, page 127) Mr. Rush also testified that when he tried to calculate fuel costs

¹ See, *e.g.*, GMO Reply Brief, filed September 10, 2010, pages 1-2; Staff’s Brief, filed August 31, 2010, pages 1-2.

for the first four days of July 2007, he did so incorrectly. (Transcript, pages 126-127) Having recognized his error, Mr. Rush now believes that the way that Staff witness Roos approximated the fuel costs for the first few days of July is the only correct way to do so “with the information that we have.” (Transcript, page 127)

Staff witness Roos, while he naturally believes that the approximation method he used was the most reasonable, nonetheless did not dispute that there are other reasonable ways to approximate the fuel usage for the first four days in July. (Transcript, pages 154-155) Mr. Roos was unable to say what amount of error his approximation introduced. (Transcript, page 159) Mr. Roos’ approximation method did not directly factor in weather variations that would have affected fuel use, although it did take into account energy usage. (Transcript, page 154). Mr. Roos’ approximation method did not take into account whether any of the GMO generating facilities were available or unavailable in either the first four days of July or the latter part of July. (Transcript, page 156) Mr. Roos also conceded that under the Commission’s rules, specifically 4 CSR 240-3.161(G), if a fuel adjustment clause tariff was to become effective on July 5, the true-up year would not start until August 1. (Transcript, page 158)

The import of this evidence is that there is indeed a connection between the dates of Accumulation Periods and the dates of True-up Years. This connection means, that as a principle of policy, an Accumulation Period should always begin on the first of a month just like True-up Years do. It also means that, under the particular circumstances of this case, the only way the Commission can order an accurate refund is by basing the refund calculation on an Accumulation Period that begins on the first day of August 2007. If the Accumulation Period begins on July 5, the refund will be only an approximation of

the appropriate amount. If the Accumulation Period begins on August 1, 2007, then the refund can be exactly calculated.

Perhaps even more important than the policy reasons to favor accurate calculations, there is a legal requirement that FACs be accurately trued-up. Section 386.220.4(2) provides that an FAC must include “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....” The evidence in this case demonstrates that an accurate true-up can only be performed if the Accumulation Period begins on the first day of a month.

In the current GMO rate case (ER-2010-0356), the Commission recognized the validity of this argument:

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 . . .” Public Counsel further argues that the Commission promulgated 4 CSR 240-3.161(1)(G) in order to implement this requirement. That definition provides:

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 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.²

The facts of this case, just like the facts of Case No. ER-2010-0356, demonstrate that GMO maintains its records on a monthly and not a daily basis. And the facts of this case also demonstrate that without daily data, calculating fuels usage for a partial month is only an “approximation.” And just as in that case, 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 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 case regarding any overcollection that occurred in the Initial Accumulation Period?

The answer to this question would have been different prior to the passage of Senate Bill 179, which created an exception to the prohibition on retroactive ratemaking for fuel costs. The whole point of an FAC is to allow after-the-fact adjustments to fuel costs. Nothing in Section 386.266 prohibits adjustments for illegally-collected amounts and that statute requires an FAC to “accurately and appropriately remedy any over- or under-collections....”³ It also requires that an FAC “require refund of any imprudently

² Case No ER-2010-0356, Order of Clarification and Modification, issued May 27, 2011, pages 8, 9; emphasis in original, footnote omitted.

³ Section 386.266.4(2).

incurred costs.”⁴ Clearly the Commission has the authority, and just as clearly the responsibility, to remedy the unlawful collections it authorized when it allowed the FAC to begin June 1, 2007.

3. What is the amount of a refund or adjustment, if any?

The amount to be refunded is shown on Exhibit 7: \$7,084,354 for MPS and \$1,710,484 for L&P. Interest should also be included through a date as close as practicable to the time when the refunds actually take place. (Transcript, pages 129-130) Public Counsel suggests that the Commission order the parties to make a joint filing in response to the Report and Order that updates the amounts in Exhibit 7 to include interest up to the beginning of Recovery Period 8 or, if necessary, Recovery Period 9.

4. What is the appropriate mechanism for a refund or adjustment, if any?

Because rates set pursuant to an FAC are explicitly made interim, subject to refund, the FAC itself provides a mechanism for refunding the amounts collected through unlawful retroactive ratemaking. Staff witness Roos, in his direct testimony (Exhibit 5, page 4) states that the refund should be made in Recovery Period 8 (September 2011 through August 2012). Public Counsel believes that this is the appropriate period of time in which to make the refunds.⁵ GMO agrees that the refund should be made over this

⁴ Section 386.266.4(4).

⁵ Mr. Roos also testified that if a Commission decision is not issued relatively quickly, or if there are issues about how the refund amounts should be treated, then the refund should be made in the following Recovery Period. (Transcript, pages 150-153) Public Counsel suggests that the Commission, in its Report and Order, order the refunds to be made in Recovery Period 8, but allow the Staff to make a filing explaining why that cannot be accomplished, if the Staff so believes.

period if possible. (Transcript, page 128)

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

By: _____

Lewis R. Mills, Jr. (#35275)
Public Counsel
PO Box 2230
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 7th day of June 2011.

General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Nathan Williams
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Nathan.Williams@psc.mo.gov

David Woodsmall
Sedalia Industrial Energy Users
Association
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65101
dwoodsmall@fcplaw.com

Stuart Conrad
Sedalia Industrial Energy Users
Association
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Koriambanya Carew
The Commercial Group
2400 Pershing Road, Suite 500
Crown Center
Kansas City, MO 64108
carew@bscr-law.com

Rick Chamberlain
The Commercial Group
6 NE 63rd Street, Ste. 400
Oklahoma City, OK 73105
rdc_law@swbell.net

James Lowery
Union Electric Company
111 South Ninth St., Suite 200
P.O. Box 918
Columbia, MO 65205-0918
lowery@smithlewis.com

Thomas Byrne
Union Electric Company
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
AmerenMOService@ameren.com

Wendy Tatro
Union Electric Company
1901 Chouteau Avenue
St. Louis, MO 63166-6149
AmerenMOService@ameren.com

John Coffman
AARP
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net

David Woodsmall
AG Processing, Inc
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65101
dwoodsmall@fcplaw.com

Stuart Conrad
AG Processing, Inc
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Mark Comley
City of Kansas City, Missouri
601 Monroe Street., Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
comley@ncrpc.com

William Steinmeier D
City of St. Joseph, Missouri
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
wds@wdspe.com

Jeremiah Finnegan
County of Jackson, Missouri
3100 Broadway, Suite 1209
Kansas City, MO 64111
jfinnegan@fcplaw.com

Major Frank Hollifield
Federal Executive Agencies
AFCEA/ULT
139 Barnes Drive, Suite 1
Tyndall Air Force Base, FL 32403-5319
frank.hollifield@tyndall.af.mil

Dean Cooper
KCP&L Greater Missouri Operations
Company
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
dcooper@brydonlaw.com

Diana Carter
KCP&L Greater Missouri Operations
Company
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
DCarter@brydonlaw.com

James Swearengen
KCP&L Greater Missouri Operations
Company
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
LRackers@brydonlaw.com

Paul Boudreau
KCP&L Greater Missouri Operations
Company
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
PaulB@brydonlaw.com

Russ Mitten
KCP&L Greater Missouri Operations
Company
312 E. Capitol Ave
P.O. Box 456
Jefferson City, MO 65102
rmitten@brydonlaw.com

Lisa Gilbreath
KCP&L Greater Missouri Operations
Company
4520 Main, Suite 1100
Kansas City, MO 64111
lisa.gilbreath@snrdenton.com

Curtis Blanc
KCP&L Greater Missouri Operations
Company
P.O. Box 418679
Kansas City, MO 64141-9679
Curtis.Blanc@kcpl.com

Karl Zobrist
KCP&L Greater Missouri Operations
Company
4520 Main Street, Suite 1100
Kansas City, MO 64111
karl.zobrist@snrdenton.com

Roger Steiner
KCP&L Greater Missouri Operations
Company
1200 Main Street, 16th Floor
P.O. Box 418679
Kansas City, MO 64105-9679
roger.steiner@kcpl.com

Legal Department
Missouri Department of Natural Resources
1101 Riverside Drive
P.O. Box 176
Jefferson City, MO 65102-0176

/s/ Lewis R. Mills, Jr.
