BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Application of Aquila, Inc. for an Accounting Authority Order Concerning Fuel Purchases	))))	**EU-2005-0041**

MOTION OF
SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION
TO DISMISS OR CONSOLIDATE

COMES NOW SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION (hereinafter SIEUA) and moves that the Application for Accounting Authority Order filed herein by Aquila on August 4, 2004 be dismissed or, in the alternative, transferred to and consolidated with Case No. ER-2004-0034, that case reopened, and notice be directed to be given to all parties to that proceeding of this filing to unilaterally retrade the Unanimous Stipulation and Agreement that concluded that rate case.

In support of this Motion, SIEUA states that there are several reasons why Aquila's Application for an Accounting Authority Order ("AAO") should be dismissed.

1. Aquila's application is nothing more than an attempt to retrade the terms of the contract by which Aquila settled its last rate case, ER-2004-0034. Aquila asserts that the stipulation is "silent" on the handling of expenditures that it might incur above the "cap" level of the settlement. This is like arguing that a contract to sell a cow also includes the farm because it does not mention the farm.

2. Contrary to Aquila's contention, the settlement is not silent on the point. It is amply clear that Aquila may not recover amounts that average in excess of the cap. The settlement makes two points. First, by referencing the average costs, the settlement is not silent on the point that -- at a given point in time -- costs may be above or below the cap. Second, that -- at a given point in time -- Aquila's fuel expenses are below the cap does not entitle the ratepayers to an immediate refund or a reduction in the cap. Similarly, an excursion above the cap does not entitle Aquila to an AAO to accrue these amounts for later recovery. Aquila's argument that the agreement is "silent" is logically and factually flawed. Arguments that the fuel costs are currently above the cap emphasizes the attempt to retrade the earlier deal.

3. The stipulation was a compromise between positions on a difficult issue. Aquila argued for high gas costs, other parties argued that lower levels were more representative. Had a high cost been locked into base rates, ratepayers would have been overcharged if the costs dropped. Had a low cost level been locked in, Aquila would have had to absorb the costs above the level (or file a new rate case). The settlement allocated the risk of wrong guesses between the parties.

4. We believe that settlement negotiations are privileged and should not be disclosed. Unfortunately that rule precludes detailed discussions of the exchanges and trades that

were made to achieve the ER-2004-0034 settlement. That rule also precludes discussion in this context of proposals that were made by various parties in the negotiations and later abandoned. But the Commission will realize that this particular settlement occurred virtually at the end of the hearing of the case. There is no way to know what would have been the litigated outcome, nor the level of base rates that the customers would found satisfactory outside the context of an exchange that included a refundable IEC band at the boundary conditions that all parties found to be an acceptable allocation of risk.

5. The settlement was a package. By its own terms it encompassed all issues. All issues means all issues. It does not exclude issues that one party later on may seek to retrade because they now have had second thoughts about the deal it made. Paragraph 32 of the Stipulation and Agreement provides:

> 32. This Stipulation and Agreement incorporates the agreements of the Parties on ***all issues that the Parties presented to the Commission as issues to be decided in Case Nos. ER-2004-0034 and HR-2004-0024*** and that were not resolved in the stipulation and agreement pertaining to Rate Design and Class Cost of Service filed in Case No. ER-2004-0034 on December 16, 2003.

"All issues" means what it says. Certainly Aquila cannot argue with a straight face that it did not raise fuel cost issues in ER-2004-0034 or HR-2004-0024 to be decided by the Commission.

6. Aquila's filing is also a collateral attack on a Commission Order. The ER-2004-0034 settlement concluded in a

Commission Order that reviewed the settlement, all its terms and found them to be not inconsistent with the public interest. That Order was issued April 13, 2004. In accordance with its terms, no signatory party sought rehearing, and no other persons sought rehearing or to appeal or otherwise challenge the Commission's order approving the stipulation. That order is final, both as to the Commission and as to Aquila who agreed to waive its right to seek judicial review if the settlement was approved without condition. Attempting to retroactively dissect the stipulation to add provisions that were not agreed upon or eliminate provisions that were agreed, is not lawful permitted. The Commission's decision was final.

7. Aquila's filing is also inappropriately before the Commission as a unilateral request to modify the ER-2004-0034 settlement. A settlement is a contract and in this case that contract involves more parties than Aquila. If Aquila seeks to modify the terms of the contract, it should first seek out the other parties, convene a negotiation, and then seek to renegotiate the agreement. If an accommodation could be reached, then that agreement could be resubmitted to the Commission. That would, however, seemingly involve reopening the settlement of the ER-2004-0034 case. Nor could the elements of reformation be asserted. The Unanimous Stipulation and Agreement and the drafting of the terms of the negotiated interim energy charge, are not scrivener's errors.

8. The Commission should recall that the settlement of the ER-2004-0034 rate case also involved the settlement of several other items of litigation including those arising out of the merger of then UtiliCorp United with St. Joseph Light & Power. That merger had been invalidated by the Missouri Supreme Court and, as a part of the consideration for the overall settlement of the rate case, certain parties agreed that they would discontinue their challenges to that merger. Indeed, Aquila gained a good deal more than it may think in the ER-204-0034 settlement, but regardless, Aquila felt that the exchange was adequate. There is no room in such an arrangement for one of the parties to seek to retrade its agreement.

9. It now appears that Aquila has developed a severe case of "buyer's remorse." Aquila cannot dispute that the matter was settled, or that it's attorney signed the agreement. Aquila cannot dispute that it knew the significance of the IEC "cap" as well as the "floor." But the Aquila spinmeisters appear to have conveniently forgotten both its own role in the negotiations as well as the positions of other parties in that proceeding. Rather than be satisfied with the deal it made, Aquila now seeks to reopen that settlement and the record in ER-2004-0034.

10. Reopening that record would also allow other parties to review their respective positions in light of Aquila's changes and perhaps would lead to a different result from that rate case. This would also, of necessity, need to recognize that

the rates that are currently being collected were implemented pursuant to a settlement stipulation that the Commission approved. If that settlement stipulation is to be reopened as Aquila seemingly requests, then it would not be unreasonable for other parties to request that all parties be restored to a "status quo ante" including restoration of their positions on the challenged merger and would involve refunding of all the additional revenue that has been collected by Aquila pursuant to the rates that were implemented pursuant to the settlement that it now wants to retrade. This is not a one-way deal. We are not sure that Aquila wants that result, but there is no basis for a unilateral modification of a contract provision; either all parties are bound to their contract or none are bound.

11. Aquila may argue that it only wants the AAO and does not actually want to vary from the terms of the stipulation and recover expenses above the cap. If so, the application should be dismissed as meaningless. Regardless, such an argument is belied by Aquila's August 16, 2004 SEC prospectus filing made in connection with its senior note debt and stock issuances effective that date. This filing evidences Aquila's true intentions in seeking this AAO:

> **Request for Accounting Authority Order.** On August 4, 2004, we filed a request with the Missouri Public Service Commission for an Accounting Authority Order (AAO) requesting clarification of the Interim Energy Charge accounting treatment for the two-year period ending April 2006, for which a settlement

agreement is in place permitting us to recover fuel and purchased power costs up to a specific amount. ***The request asks for confirmation that any significant amounts undercollected during the period may be deferred and considered for recovery in our next rate case.*** We cannot predict what action the Commission may take with respect to our request.[1/]

. . . .

We currently do not recover a significant portion of the fuel and purchased power costs we incur to provide utility services in our largest jurisdiction, Missouri. ***Although we have sought an accounting order that would permit us to seek recovery of these costs in the future, the Missouri Public Service Commission may not approve our request.***[2/]

. . . .

Absent a favorable ruling by the Missouri Public Service Commission on the Accounting Authority Order and subsequent allowance for recovery in our next rate case, if these costs remain above the IEC base cost for the two-year period, we will not recover the excess.[3/]

. . . .

On August 4, 2004, we filed a request with the Missouri Public Service Commission for an Accounting Authority Order (AAO) requesting clarification of the Interim Energy Charge accounting treatment for the two-year period ending April 2006. The request asks for confirmation that any significant amounts undercollected during this period may be deferred

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[1/] August 16, 2004 Prospectus, p. S-7 (emphasis added).

[2/] August 16, 2004 Prospectus, p. S-22 (emphasis added).

[3/] *Id.*, p. S-37 (emphasis added).

and considered for recovery in our next rate case.[4/]

. . . .

As described more fully above, the Missouri Public Service Commission recently approved a settlement agreement for our electric operations that establishes our right to recover costs up to $13.98/Mwh and $19.71/Mwh for a two-year period in our St. Joseph Light & Power and Missouri Public Service operations, respectively. Absent a favorable ruling on our AAO request (discussed above) and subsequent allowance for recovery of rates, if our actual costs are higher than those allowed costs, then we cannot recover the excess costs through rates. If our actual costs are less than those allowed costs, then we must refund the difference to our customers, except to the extent actual gas costs are below $12.64/Mwh and $16.65/Mwh for our St. Joseph Light & Power and Missouri Public Service operations, respectively. Since the rate increase went into effect pursuant to the settlement agreement on April 15, 2004, our actual costs have exceeded the allowed costs by approximately $6.7 million through June 30, 2004.[5/]

12. These segments of Aquila's SEC filing make clear

- Aquila knew full well the commitment it was making in setting the ER-2004-0034 case as it did;
- Aquila knew full well that it would not be able to recover expenses that when trued up would be above the "cap" of the IEC;
- Despite Aquila's sophistic attempts to fuzz its objectives in this proceeding, its intentions are clear -- to do an end run around its earlier agreement;

[4/] *Id.*, p. S-51 (emphasis added).

[5/] *Id.*

- Given the requirements of Sarbanes-Oxley, Aquila cannot claim in this docket that it is only seeking some esoteric type of accounting protection so as to make its cash flow "appear" better. Aquila is, in fact, seeking to recover the very amounts that it agreed it would not recover under the settlement. Brushing aside all the smoke and mirrors, Aquila is seeking to retrade the ER-2004-0034 settlement.

- From the same SEC filing, it seems clear that Aquila fully knew and understood the substance of its agreement that it now seeks to retrade. Aquila recognizes that the explicit terms of the settlement exclude recovery of the amounts that it is seeking to retrade.

13. Were that not enough, we have Aquila representatives' sworn testimony on the record in ER-2004-0034. Gary L. Clemens, Aquila's Regulatory Manager for Electric for Missouri, under questioning from Commission Chairman Gaw, testified as follows:

> [CHAIRMAN GAW:]
>
> Q. All right. What is your understanding of the true-up process that will occur afterwards and how that will be handled?
> A. We will measure the actual costs for fuel over the two-year period and divide that by the sales to get a cents per kilowatt hour basis. For example, for MPS, if the costs per kilowatt hour basis is above the 19 -- or one dollars and -- excuse me, 1.9712 cents per kilowatt hour basis, ***if it's above that, then we would just eat that amount.***[6/]

14. The stipulation also included a moratorium on rate increases until the agreement expired. It would violate this moratorium on rate increases if Aquila were permitted to reach back into the moratorium period and extract an expense that was

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[6/] Case No. ER-204-0034, Stipulation Presentation, April 5, 2004, Tr. pp. 1915-16 (emphasis added).

included within the period of repose and bring it forward into a new rate period and test year to attempt recovery.

15. Finally, Aquila's request also fails to meet the standards that this Commission has established for permitting an AAO.

16. An Accounting Authority Order or "AAO" is an order from the appropriate regulatory authority permitting a utility to depart from normal accounting practice and treatment and defer recognition of the expenses that are claimed to be associated with some extraordinary event. Normal accounting treatment requires recognition in the period the expenses are incurred resulting in a reduction in the current year's net income. Deferring recognition of an expense results in the creation of a "regulatory asset" on the utility's balance sheet for both regulatory and financial reporting purposes.[7/]

17. AAOs have been grated to address "acts of God," such as the repair of significant and disruptive system damage from an natural occurrence such as an ice or wind storm. These are unanticipated events that are ***not planned for*** in the usual ratemaking process because they are ***nonrecurring*** and are outside the scope of the usual business and operations of the utility.

[7/] Conditions under which such deferrals are allowed are discussed by the Financial Accounting Standards Board (FASB) in Statement of Financial Accounting Standards No. 71, entitled *Accounting for the Effects of Certain Types of Regulation (FAS 71).*

18. AAOs vary from the usual ratemaking procedure of a test year and adjustments to make the selected test year representative.

19. Because the usual ratemaking process involves the consideration of all relevant factors, this Commission has given variances from that process only a carefully limited basis.

> [D]eferral of costs from one period to another . . . violates the traditional method of setting rates [and] should be allowed only on a limited basis[8/]

> The items deferred are booked as an asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period. Id. AAO's should be used sparingly because they permit ratemaking consideration of items from outside the test year.[9/]

20. The obvious and salutary reluctance of the Commission to depart from normal accounting and regulatory treatment is particularly appropriate many privately-held companies have been forced to recast or "restate" operating results because of overly-aggressive accounting techniques that result in possible

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[8/] *In the Matter of the Application of Missouri Public Service*, 1 M.P.S.C. (N.S.) 200, Case Nos. EO-91-358 and EO-91-360 (December 20, 1991) ("Sibley").

[9/] *In re Missouri-American Water Company, Order Concerning Non-Unanimous Stipulation and Agreement, and Denying Motion to Modify*, WO-2000-281, p. 8. *See, also, Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434, 438 (Mo.App. W.D. 1998); *State ex rel. Office of Public Counsel v. Public Serv. Comm'n*, 858 S.W.2d 806, 812-13 (Mo.App. W.D. 1993).

overstatement of income. Here Aquila is motivated by attempts to recover from past poor financial judgments.

21. Aquila has not fulfilled the Commission's traditional AAO test, as the expenses MAWC seeks to defer through the AAO are standard, ongoing business expenses that are included in every rate case, and the mere fact that the expenses may be higher than normal does not entitle MAWC to special AAO treatment.

22. In *Sibley*, the Commission described the limited basis on which AAOs should be allowed by specifying three basic standards to govern review of such applications.

> 1. The primary focus of the inquiry should be on whether or not the event was extraordinary, which the Commission further defined as being unusual and unique, and not recurring.
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> 2. FERC's 5% income materiality test, while not case dispositive, is relevant to whether the event is extraordinary.
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> 3. Determination of extraordinary matters will be made on a case-by-case basis.[10/]

23. Moreover, the Accounting Principles Board made a relevant issuance in 1966 through APB 9 and ABP 30 in 1973. In APB 30, extraordinary items were distinguished by their unusual

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[10/] *Sibley, supra.*

nature and by the infrequency of their occurrence in the following terminology:

> *Unusual Nature* - the underlying event or transaction should possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity, taking into account the environment in which the entity operates. Unusual nature is not established by the fact that an event or transaction is beyond the control of management.
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> *Infrequency of occurrence* - the underlying event or transaction should be of a type that would not reasonably be expected to recur in the foreseeable future, taking into account the environment in which the entity operates. By definition, extraordinary items occur infrequently. However, more infrequency of occurrence of a particular event or transaction does not alone imply that its effects should be classified as extraordinary. An event or transaction in which the entity operates cannot, by definition, be considered as extraordinary, regardless of its financial effect.

24. Further clarifications of these standards may be found in the relevant financial literature. While not binding on this or any other regulatory commission, these standards provide explanatory power for the regulator regarding the application of a consistent and reviewable standard and the need to avoid decisions that otherwise might smack of arbitrariness.

25. An additional factor noted in the literature is that the event is not likely to recur in the foreseeable future. Intuitively, an "extraordinary" item cannot be something that frequently occurs. The "annual winter ice storm" faced by

utilities in other parts of this country would not be considered "extraordinary" either by the utility management or by the utility's customers. FERC uses the concept of an event that is of "unusual nature and infrequent occurrence" and of "significant effect" to describe an "extraordinary" occurrence such that might merit the unusual accounting treatment of an AAO.

26. Even if other reasons did not pertain, these standards preclude Aquila from relief. Its management certainly knew the deal they were making to settle the ER-2004-0034 rate case and ***found that deal to be acceptable***. The rate the Unanimous Stipulation and Agreement settling ER-2004-0034 was not an "act of God" that could not be planned for or managed. Aquila participated actively in the negotiations and should not be surprised by the results it found acceptable. Efforts to retrade using the guise of an AAO are disingenuous.

WHEREFORE, Aquila's Application for Accounting Authority Order should be dismissed. Alternatively it should be transferred to and consolidated with Case No. ER-2004-0034, that case reopened and notice to all parties directed.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

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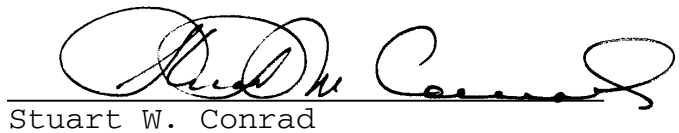
ATTORNEYS FOR SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION

September 13, 2004

CERTIFICATE OF SERVICE

I have served the foregoing pleading by electronic or by U.S. mail, postage prepaid addressed to all parties by their attorneys of record and applicants for intervention as shown in the records of the Commission.



Stuart W. Conrad

Dated: September 13, 2004