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

REPLY BRIEF OF KCP&L GREATER MISSOURI OPERATIONS CO.

KCP&L Greater Missouri Operations Company, formerly known as Aquila, Inc. (also referred to as "Company"), states the following as its Reply Brief to address the legal and factual issues that are before the Commission as a result of the decision of the Court of Appeals to remand these proceedings to the Commission. See State ex rel. Ag Processing, Inc. v. PSC, 311 S.W.3d 361 (Mo. App. W.D. 2010).

A. Commission Rules Regarding a True-Up Year are Irrelevant to This Case.

In their initial briefs, Public Counsel and the Industrial Intervenors cite Commission rules in 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) that define a true-up year. See Public Counsel Initial Brief at 2, Industrial Intervenors' Initial Brief at 8–9. They erroneously assert that the Commission's definition of a true-up year governs when an accumulation period can begin.

The Company agrees with Staff that a tariff provision defining the accumulation period trumps the Commission's rules defining a true-up year. See Staff Initial Brief at 2. See also Staff Recommendation to Approve Tariff Sheet and Motion for Leave to File Out of Time, Case No. EO-2008-0216 (Jan. 29, 2008) at 5. Tariff Sheet No. 124, effective July 5, 2007, provides for a six-month accumulation period of June through November. See GMO Initial Brief Exhibit 6.

Commission rules defining a true-up year do not define when an accumulation period must begin and do not require that an accumulation period start at any particular time. It is absurd to suppose that a rule defining a true-up year, that does not define an accumulation period, would override an unambiguous tariff with the full effect of the law that explicitly defines when an accumulation period begins.

In the language of the rules, "the commission order approving a rate mechanism" was issued in the May 17, 2007 Rate Case Report & Order that became effective May 27, 2007. Thus, even if Commission rules defining a true-up year govern when an accumulation period could start, the June 1, 2007 commencement of the accumulation period does not violate the Commission rules defining a true-up year, as the order approving the rate adjustment mechanism became effective in May 2007.

It appears that Public Counsel and the Industrial Intervenors are confusing the effective date of the Commission approval of the rate adjustment mechanism, which was May 27, 2007, and the effective date of the tariff sheets, which was July 5, 2007. Were 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) applicable to the instant case, "the first day of the first calendar month following the effective date of the commission order approving a RAM" (rate adjustment mechanism) is June 1, 2007.

The Industrial Intervenors make much of prior statements by Aquila, which imply that Aquila accepted the argument that 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) control and that the Commission order referenced in the rule is the June 29, 2007 Order that approved the actual FAC tariff sheets. Viewed through the lens of history, it is understandable why Aquila urged the Commission to approve the tariffs as quickly as possible in order to avoid any future controversy. The tariff filings in late May and June of 2007 followed the litigation of a hotly contested rate case which focused, in particular, on the meaning and effect of the controversial

new statute, Section 386.266. While Aquila was naturally concerned that any suggestion of retroactive ratemaking be avoided in the approval of tariffs, the proper analysis of these filings and their contents shows that no retroactive ratemaking occurred even though the tariffs didn't become effective until July 5.

With the FAC having been approved in the May 17 Rate Case Report & Order, and the accumulation period commencing on June 1 pursuant to tariffs containing nothing but zeros and increasing no customer's rate, Aquila's preliminary conclusions were not well grounded in either fact or law.

B. The Court of Appeals Ordered the Commission to Review its Actions.

It is of utmost importance to note what the Court of Appeals did not order. In reversing the Commission's Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause, Case No. EO-2008-0216 (Feb. 14, 2008) ("February 14, 2008 Order"), the Court of Appeals did not reverse the authorization of a Fuel Adjustment Clause (FAC) in Aquila's last general rate case under the Commission's May 17, 2007 Report & Order, Case No. ER-2007-0004 ("Aquila Rate Case"). The Court also did not order a refund of any amounts accumulated under the FAC.

Rather, the Court of Appeals reversed only the Commission's February 14, 2008 Order, holding that this Order violated the prohibition against retroactive ratemaking because the order permitting the calculation of fuel costs beginning on June 1, 2007 was not issued in the Aquila Rate Case until June 29, 2007 and did not become effective until July 5, 2007. See 311 S.W.3d 365–67. Nowhere did the Court hold that accumulation of costs after the July 5, 2007 tariff effective date was retroactive ratemaking, and nowhere did the Court order a refund of any costs accumulated prior to July 5.

In so holding, the Court found inadequate the Commission's brief explanation that the 2007 Report & Order "made difficult factual, legal, and policy decisions about the nature of an appropriate FAC." See February 14, 2008 Order at 3. The Court stated: "Nothing in the Commission's Order even attempts to justify its disregard of the applicable statutory language and the prohibition on retroactive ratemaking ...." 311 S.W.2d at 367.

Because the Court found the Commission's analysis to be inadequate, as well as lacking in detail, it remanded the cause "to the circuit court with directions to remand to the Commission for further proceedings consistent with this opinion." Id. at 367. It is significant that court did not simply order a refund. Accordingly, the Commission has been charged with the duty to better explain its determination that it made "more sense to interpret the regulation to tie the beginning date of the cost accumulation period to the issuance of the Report and Order than to" the June 29 Order approving the tariff. See February 14, 2008 Order at 3–4. The Commission — which certainly did not intend to engage in unlawful retroactive ratemaking — must now review the actions that it took.

C. The February 14, 2008 Order is Not Retroactive Ratemaking.

The Court of Appeals found that the Commission's February 14, 2008 Order violated the prohibition on retroactive ratemaking because it permitted FAC charges to go into effect on March 1, 2008 that were based upon the cost of fuel purchased from June 1 through November 30, 2007, when the June 29, 2007 Aquila Rate Case order that approved the FAC did not become effective until July 5, 2007.

The Court reasoned that, because there were 34 days (June 1 – July 4, 2007) where costs were tracked prior to the effective date of the Commission's Order, customers were unable to know ***prior to purchase*** what rates are being charged, and therefore were unable to make economic or business plans or adjustments in response. 311 S.W.2d at 365, quoting State ex rel.

Associated Natural Gas Co. v. PSC, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997). Indeed, this policy of predictability underlies the filed rate doctrine and the prohibition against retroactive ratemaking.

Here Aquila's customers did know what their rates would be prior to the tariff becoming effective March 1, 2008. By contrast, the tariffs that became effective July 5, 2007 contained no information that customers did not already have on June 1, 2007. Any costs accumulated under the FAC were charged to customers on a prospective basis in 2008. Thus, the accumulation of costs starting on June 1, 2007 did not frustrate the policy of predictability underlying the filed rate doctrine and was not retroactive ratemaking.

1. Customers Knew Prior to Purchase What Rates Are Being Charged.

On December 28, 2007, Aquila filed tariff sheets in this case seeking to recover costs accumulated between June 1 and November 30, 2007 pursuant to its FAC. In testimony filed with the tariff, Aquila filled in the zeros and advised the Commission that the rate schedules proposed to recover cost increases of approximately $12.5 million from its Missouri Public Service (MPS) Division customers and $3.3 million from its St. Joseph Light and Power (L&P) Division customers. See Direct Testimony of Dennis R. Williams at 3. He noted that for MPS customers using 1,000 KWh per month the approximate increase would be $2.00/month, and for L&P customers with the same usage, about $1.50/month. Id. at 5. This was the first time that customers had any opportunity to learn the financial impact of a potential rate increase under the FAC.

On January 4, 2008, customers had a second opportunity to learn the financial impact of a potential rate increase under the FAC. In its January 4, 2008 press release, the Commission advised customers of Aquila's December 28, 2007 filing, noting that for MPS customers using

1,000 KWh per month the approximate increase would be $2.00/month, and for L&P customers with the same usage, the approximate increase would be $1.50/month. See Exhibit A.

Specific cost criteria became available to customers in the Commission's February 14, 2008 Order. In its February 15 public announcement of the Order, the Commission advised customers that the monthly increase would be about $2.00/month in the MPS Division and about $1.50/month in the L&P Division. See Exhibit B. If customers were dissatisfied with the increases in fuel costs allowed by the Commission, they had until March 1 to decide what action to take. As explained earlier, customers were on notice since May 2007 that a FAC had been approved by the Commission and that rates might rise in the future. See GMO Initial Brief Exhibits 1–3.

2. Customers Had No Information on July 5, 2007 That They Would Not Have Had on June 1, 2007.

Customers had no meaningful information available to them to make an economic decision regarding their electricity rates if the order that became effective July 5, 2007 had, instead, become effective on or before June 1, 2007. There was no data available to customers in June or July of 2007 regarding whether their electric rates would go up or down and by how much — such specific cost criteria did not become available until the Commission's February 14, 2008 Order (effective March 1) in this case.

In all of the critical categories relating to fuel cost, the tariff sheets that became effective July 5, 2007 contained multiple zeros. So, too, did the tariff sheets offered by Aquila in its Motion for Expedited Consideration and Approval of Tariff Sheets Filed in Compliance with Commission Report & Order (May 18, 2007). See GMO Initial Brief Exhibits 5–6. Thus, Aquila's customers would have had no means to calculate how much their electrical use would

have cost them under the FAC, regardless of whether these four tariff sheets had become effective June 1 or July 5, 2007.

The Court of Appeals wanted customers to possess "criteria" that were "specific enough to allow a customer to calculate how much they would be paying as a result of the fuel adjustment clause." See 311 S.W.3d at 366. Because these "criteria" were unavailable until the February 14, 2008 Order was issued, whether the pro forma tariff containing zeros became effective on or before June 1, 2007 or on July 5, 2007 is immaterial. Future customers who could be charged for an increase in fuel costs learned nothing on June 29, 2007 that they did not already know in late May 2007. Furthermore, because customers had their first opportunity to make decisions about their purchases in February 2008, which is prior to their March 2008 purchase, the fact that the FAC tariff sheets effective July 5, 2007 simply authorized the accumulation of cost data as of June 1, 2007 did not constitute retroactive ratemaking.

3. The Accumulation of Costs Beginning on June 1, 2007 is Not Retroactive Ratemaking.

After February 14, 2008, customers had the specific information regarding rates to be charged beginning March 1 and were able to make economic or business plans or adjustments. As long as the rates are prospectively charged, there is no retroactive ratemaking.

The Missouri General Assembly explicitly authorized periodic rate adjustments outside of general rate proceedings in Section 386.266, providing the statutory authority for a FAC that was missing in State ex rel. Utility Consumers' Council of Missouri, Inc. v. PSC, 585 S.W.2d 41 (Mo. banc 1979). There the Court stated: "If the legislature wishes to approve automatic adjustment clauses, it can of course do so by amendment of the statutes, and set up appropriate statutory checks, safeguards, and mechanisms for public participation." 585 S.W.2d at 57. As permitted by Section 386.266, the Commission in this case allowed fuel costs to be tracked for

six months after the new rates authorized by the Aquila Rate Case became effective. During this 6-month period (June–November 2007) the tariffs under which fuel expenses were tracked did not contain any cost or rate information. The rates of customers did not increase. In its February 14, 2008 Order, the Commission approved the collection of additional charges from customers pursuant to the FAC. This was not retroactive ratemaking as the Order became effective March 1, 2008.

Although the new FAC charges related to past costs, that is expressly permitted by Section 386.266. The accumulation of past costs to be charged prospectively to future customers is not unique to the FAC and has been sustained in previous decisions of the Court of Appeals. As discussed in the Company's initial brief, similar devices relating to accounting authority orders and changes in the cost of natural gas through the purchased gas adjustment have been long recognized by this Commission and approved by the courts. See State ex rel. Missouri Gas Energy v. PSC, 210 S.W.3d 330, 336 (Mo. App. W.D. 2006); Midwest Gas Users' Ass'n v. PSC, 976 S.W.2d 470, 481 (Mo. App. W.D. 1998).

D. There Can be No Adjustment Relating to Costs Incurred on or After July 5, 2007.

While the Company firmly stands by its foregoing position that under the specific facts of this case there was no retroactive ratemaking, it is clear that the Court of Appeals held that the only period of time for which any adjustment or refund issue exists is the 34 days between June 1 and July 4, 2007. See 311 S.W.3d at 367. The tariff is clear that it became effective July 5, 2007 and the refund of any sums accumulated on July 5 or later would violate the tariff's plain language, as well as the filed rate doctrine and its various components, including the ban on retroactive ratemaking.

E. Questions of Law and Fact.

The Company believes that it would be helpful to introduce testimony that summarizes the complicated history of the tariffs in this case, the history of information imparted to customers and what customers could have done as a result of decisions by the Commission, and why the Commission's February 14, 2008 Order does not constitute retroactive ratemaking.

Because Aquila was the first company to file for a FAC under the newly enacted Section 386.266, a law that changed the regulatory landscape in Missouri regarding rate adjustment mechanisms, it would be helpful for Commissioners to have a full and complete record with regard to these changes, and why neither these new procedures nor what the Commission did in implementing these changes in 2007 and 2008 constituted retroactive ratemaking. Issues surrounding the possibility of an adjustment or refund and the effect that any adjustment would have upon the FACs that have been approved in subsequent cases also require testimony to determine what, if any, effect such changes will have on the current rates of the Company.

WHEREFORE, the Company requests that the Commission find that it did not engage in retroactive ratemaking and explain to the Court of Appeals why its Orders in this proceeding are consistent with the Court's opinion. The Company also requests that the Commission adopt a procedural schedule allowing the parties to submit prefiled testimony on all of the issues in this case and to set the matter for an evidentiary hearing.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 10th day of September, 2010 copies of the foregoing have been mailed, transmitted by facsimile, or emailed to all counsel of record.

/s/ Karl Zobrist
Attorney for KCP&L Greater Missouri Operations Company

EXHIBIT A

PR-08-101 -- PSC Sets Intervention Deadline In Aquila Fuel Adjustment Clause Case

Contact: Kevin Kelly (573) 751-9300

FOR IMMEDIATE RELEASE -- JANUARY 4, 2008

JEFFERSON CITY---Aquila, Inc. has filed a request with the Missouri Public Service Commission to adjust the fuel adjustment charge on the bills of its electric customers. Aquila states the charge, known as the fuel adjustment clause or FAC, currently appears on the monthly electric bills of its customers.

In a rate case decision last May, the Public Service Commission granted Aquila's request to implement a fuel adjustment clause in order to address fuel and purchase power cost volatility. Base electric rates established in that rate case reflected a certain level of fuel and purchased power costs. The fuel adjustment clause will reflect increases or decreases in those costs above or below those set in base rates.

According to Aquila's filing, costs have exceeded base fuel costs by approximately $12.5 million in its MPS division and by approximately $3.3 million in its L&P division. Aquila states that for a customer using 1,000 kilowatts of power a month, the request would increase the monthly electric bills for MPS division customers by approximately $2 and by $1.50 a month for electric customers in Aquila's L&P division.

Applications to intervene and participate in this case must be filed no later than **January 22, 2008**, with the Secretary of the Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102. Copies of the application should be sent to: James C. Swearengen and L. Russell Mitten, Brydon, Swearengen & England, P.C., 312 E. Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102; and the Office of the Public Counsel, P.O. Box 2230, Jefferson City, Missouri 65102.

The Office of the Public Counsel is a separate state agency that represents the general public in matters before the commission. Individual citizens wishing to comment should contact either the Office of the Public Counsel (Governor Office Building, 200 Madison Street, Suite 650, P.O. Box 2230, Jefferson City, Missouri 65102-2230, telephone 573-751-4857, e-mail opcservice@ded.mo.gov) or the Public Service Commission staff (P.O. Box 360, Jefferson City, Missouri 65102, telephone 1-800-392-4211, e-mail pscinfo@psc.mo.gov).

Aquila, Inc. provides electric service to approximately 238,500 customers in its MPS division and approximately 65,700 electric customers in its L&P division.

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EXHIBIT B

PR-08-116 -- PSC Approves Aquila Fuel Adjustment Clause Tariff

Contact: Kevin Kelly (573) 751-9300

FOR IMMEDIATE RELEASE -- FEBRUARY 15, 2008

PSC Approves Aquila Fuel Adjustment Clause Tariff

JEFFERSON CITY---The Missouri Public Service Commission has approved a tariff filed by Aquila, Inc. to adjust the fuel adjustment charge on the bills of its electric customers. The commission's vote was 4-1. The charge, known as the fuel adjustment clause or FAC, currently appears as a separate item on the monthly electric bills of Aquila customers.

In a rate case decision in May 2007, the Public Service Commission granted Aquila's request to implement a fuel adjustment clause in order to address fuel and purchase power cost volatility. Electric rates established in that rate case reflected a base level of fuel and purchased power costs. The fuel adjustment clause would reflect increases or decreases in those costs above or below the base level.

According to Aquila's December 28, 2007 filing, costs exceeded base fuel costs by approximately $12.5 million in its MPS division and by approximately $3.3 million in its L&P division.

Under the tariff approved by the PSC, a customer using 1,000 kilowatts of power a month will see an FAC of approximately $2.00 a month in Aquila's MPS division. For a customer using 1,000 kilowatts of power a month in Aquila's L&P division, the FAC will be approximately $1.50 a month.

The tariff carries an effective date of March 1, 2008. As part of the FAC process, the PSC staff will conduct a prudence review of those costs included in the FAC.

Aquila, Inc. provides electric service to approximately 238,500 customers in its MPS division and approximately 65,700 electric customers in its L&P division.

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