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

INITIAL BRIEF OF KCP&L GREATER MISSOURI OPERATIONS CO. REGARDING LEGAL AND FACTUAL ISSUES

KCP&L Greater Missouri Operations Company, formerly known as Aquila, Inc. (also referred to as "Company")[1] states the following as its Initial 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. The Court of Appeals Decision.

The order that was reversed by the Court of Appeals was the Commission's February 14, 2008 Order in this case, which was Aquila's first Fuel Adjustment Clause (FAC) proceeding. An FAC was authorized in Aquila's last general rate case under the Commission's May 17, 2007 Report & Order, Case No. ER-2007-0004 ("Aquila Rate Case"), which analyzed in depth the Company's request for a Rate Adjustment Mechanism in the form of an FAC.

In March of this year, the Court of Appeals held that the February 14, 2008 Order violated the prohibition against retroactive ratemaking. It found a violation because the order permitting the recovery 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–

[1] Aquila, Inc. changed its name to KCP&L Greater Missouri Operations Co. after it was acquired in 2008 by Great Plains Energy Inc. The Commission's approval of the acquisition was recently affirmed by the Court of Appeals. State ex rel. Praxair, Inc. v. Missouri Public Serv. Comm'n, No. WD71340 (Mo. App. W.D., Aug. 17, 2010).

67. However, there are statements in the opinion that require careful analysis by the Commission to determine what the Court of Appeals actually found objectionable and whether the Commission's order constituted retroactive ratemaking under the specific facts of this case.

It is clear that the Court found the Commission's analysis was inadequate, as well as lacking in detail. It also criticized the Commission for disregarding "the applicable statutory language of Section 386.266, the filed rate doctrine, and the prohibition on retroactive ratemaking," and for focusing "on the language of its own regulations." Id. at 367.

In that regard, the Court was not persuaded by the Commission's short explanation that the 2007 Report & Order "made difficult factual, legal, and policy decisions about the nature of an appropriate FAC." See Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause, Case No. EO-2008-0216 (Feb. 14, 2008) at 3. It similarly did not accept the Commission's position that the "subsequent submission and approval of tariffs consistent with that Report and Order is more or less a ministerial act of less significance" and 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. Id. at 3–4 (emphasis added). The Court of Appeals 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.

Yet, it is significant that the Court did not simply order a refund. Rather, it stated that "the cause is remanded to the Circuit Court with directions to remand to the Commission for further proceedings consistent with this opinion." Id. Instead of ordering a refund, the Court ordered the appropriate remedy for the Commission's insufficient justification of its order permitting the recovery of fuel costs beginning on June 1, 2007 — it remanded the case to the Commission for additional findings of fact and conclusions of law.

Consequently, the Commission — which certainly did not intend to engage in unlawful retroactive ratemaking — must review the actions that it took in the Aquila Rate Case, including information that was communicated to customers in June 2007, regarding any future changes in rates.

B. The Court's Analysis of Retroactive Ratemaking.

Before analyzing Section 386.266, which authorized the Commission to approve FACs when it was enacted in 2005, the Court of Appeals first reviewed one of the original provisions of the Public Service Commission Act. Section 393.140(11) provides that a utility may only impose rates and charges for its services "as specified in its schedules filed and in effect at the time." The Court cited State ex rel. Associated Natural Gas Co. v. PSC, 954 S.W.2d 520 (Mo. App. W.D. 1997), which declared: "This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration." Id. at 531.

The Court of Appeals stated that this rule against retroactive ratemaking, again quoting the Associated Natural Gas case, has an "underlying policy of predictability, meaning that if a utility is bound by the rates which it properly filed with the appropriate regulatory agency, then its customers will know ***prior to purchase*** what rates are being charged, and can therefore make economic or business plans or adjustments in response." Id. (emphasis in the Court of Appeals' holding).

The Court of Appeals used these precedents to reverse the Commission's February 14, 2008 Order 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. The problem that the Court found was that the June 29, 2007 Aquila Rate Case order that approved the FAC did not become effective until July 5, 2007. Thus, there were 34 days (June 1 – July 4, 2007) where costs were tracked prior to the effective date of the Commission's Order.

C. The Underlying Policy of Predictability Relied Upon by the Court.

The policy of predictability underlying retroactive ratemaking, as stated in the Associated Natural Gas case and relied upon by the Court of Appeals, is not frustrated here because there was no retroactive ratemaking and because customers knew in advance of their rates effective March 1, 2008 what those rates would be. Utilizing the Court of Appeals' analysis in this remanded proceeding, the critical question in this proceeding is what information would customers have had 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?

The answer is: Nothing.

The May 17 Report & Order in the Aquila Rate Case may not have provided criteria "specific enough to 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, but the tariff sheets that became effective July 5, 2007 also did not provide that criteria. No meaningful information was 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. Only at that time would a customer have had any information upon which to make an economic decision regarding rates in effect from March 1, 2008 through February 28, 2009, as contemplated by the filed rate doctrine. All that was available in June or July of 2007 was general information that an FAC had been approved by the Commission. And this customers knew in May 2007.

The Commission issued its Report & Order in the Aquila Rate Case approving a Fuel Adjustment Clause on May 17, 2007. The Commission's public announcement dated May 18, 2007 spent six paragraphs advising customers that an FAC had been approved. See Exhibit 1,

"PSC Approves Electric Rate Increase for Aquila," PSC News (May 18, 2007). The Commission specifically advised consumers:

> If implemented by Aquila, the fuel adjustment clause would appear as a separate item on the customer's bill. It can be adjusted up or down twice a year. The earliest this would appear on customer bills would be late this year [2007]. Prudence reviews of those costs will be conducted every 18 months.
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> Id. (emphasis added).

The Commission's decision received wide publicity throughout Aquila's service territory. The Kansas City Star reported on May 19, 2007:

> But in the most controversial part of the ruling, regulators also allowed the utility to have a separate charge on customers' bills to cover changes in the cost of fuel used to generate power, as well as any changes in the cost of wholesale power the utility buys.
>
> The decision makes Aquila the first electric utility in Missouri to be allowed such a charge since the Missouri Supreme Court ruled them illegal in 1979. Circumventing the Court ruling was the focus of aggressive lobbying this decade by the state's electric utilities, and the Missouri General Assembly eventually passed legislation so regulators could once against consider a fuel adjustment clause.

See Exhibit 2, "Rate Boost is Just Days Away; Customers and Electricity Face Higher Costs as of May 31," The Kansas City Star (May 19, 2007).

Other similar stories appear in other newspapers in western Missouri published at this time. The St. Joseph News-Press stated: "PSC officials also allowed Kansas City-based Aquila to include a fuel adjustment clause to cover the sometimes severe swings in fuel and purchased power costs. The clause could be adjusted twice per year and undergo state review." See Exhibit 3, "PSC approves Aquila rate hike," St. Joseph News-Press (May 19, 2007).

Submitting tariffs to the Commission consistent with the Commission's Report & Order, Aquila received the Commission's approval on certain tariff sheets on May 25, 2007, in an Order that became effective May 31. See Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets, Aquila Rate Case (May 25, 2007). Within the

multitude of tariff sheets that were approved by the Commission, there were 28 pages in these general tariffs which reflect that a Fuel Adjustment Clause was approved by the Commission, in addition to Tariff Sheets 124 through 126, that were rejected. See Exhibit 4.

However, in that May 25 Order, three tariff sheets which specifically contained proposed provisions for the FAC were rejected. It is those tariff sheets which Aquila revised and which only became effective July 5, 2007 under the Commission's June 29, 2007 Order. Had those tariff's been approved and gone into effect as of June 1, 2007, what would they have advised consumers with regard to electricity rates? Very little.

1. The FAC Tariffs Approved in 2007 Contained Nothing But Zeros.

In all of the critical categories relating to fuel cost, the tariff sheets that became effective July 5, 2007 contained zeros — multiple zeros. In the tariffs offered by Aquila in its Motion for Expedited Consideration and Approval of Tariff Sheets Filed in Compliance with Commission Report & Order (May 18, 2007), tariff sheets 124 through 126 dealt specifically with the FAC. Tariff sheet 126, which was the actual fuel adjustment clause cost adjustment factor spreadsheet, contained nothing but zeros, with the exception of loss factor data that is not directly related to fuel purchases. See Exhibit 5, Tariff Sheets 124–26, Aquila Motion for Expedited Consideration, Case No. ER-2007-0004 (May 18, 2007).

In comparing these three rejected tariff sheets with the four tariff sheets approved by the Commission's June 29, 2007 Order, there remained nothing but zeros with regard to fuel cost. See Exhibit 6, Tariff Sheets 124–27, Aquila Rate Case Order (June 29, 2007, eff. July 5, 2007). 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.

It is clear from the Court of Appeals' opinion that it wanted consumers 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. While the May 17 Report & Order in the Aquila Rate Case may not have provided such criteria, the tariff sheets that became effective July 5, 2007 did not provide that criteria either.

Indeed, the specific cost criteria that the Court of Appeals believes should have been imparted to customers did not become available until the Commission's February 14, 2008 Order (effective March 1) in this case when the zeroes were removed and actual cost data were inserted. It is only at this time that customers would have had sufficient information available to them to know what they would be charged and upon which to make an economic decision. If a customer was dissatisfied with the increases in fuel costs allowed by the Commission's February 14 Order, the customer had until March 1, 2008 to decide what action to take.

Thus, the policy of predictability underlying retroactive ratemaking, as stated in the Associated Natural Gas case and relied upon by the Court of Appeals, is not frustrated here as customers knew what their rates in effect from March 1, 2008 through February 28, 2009 were as of February 14, 2008. Because customers had no specific numbers with which to figure rates until the February 14, 2008 Order was issued, neither an order that becomes effective on or before June 1, 2007 nor an order that becomes effective on July 5, 2007 is retroactive ratemaking or a violation of the filed rate doctrine. After February 14, 2008, customers had the information, regarding rates that are prospectively charged, upon which to make economic or business plans or adjustments.

D. Retroactive Ratemaking Under Missouri Case Law.

In conducting its analysis, the Commission must carefully analyze Missouri's judicial precedents in order to avoid labeling the prospective cost recovery of historical costs as

retroactive ratemaking. As long as the rates are prospectively charged, there is no retroactive ratemaking.

The leading case in Missouri is State ex rel. Utility Consumers' Council of Missouri, Inc. v. PSC, 585 S.W.2d 41 (Mo. banc 1979), where the Supreme Court reviewed a 1974 Report & Order of the Commission that established an FAC. The Commission also authorized a roll-in to basic rates of amounts collected under a prior fuel adjustment clause, as well as a surcharge of certain past fuel costs incurred by the utilities.

The appellants' challenges there were characterized by the Court as making four general arguments: (1) There is no statutory authority for use of an FAC; (2) The Commission can only authorize an FAC in a contested case; (3) The Commission did not make adequate findings of fact to support the FAC; and (4) The surcharge was unlawful retroactive ratemaking as it sought to recover for past losses of a utility. Id. at 47. As the Court's summary of the arguments makes clear, the only retroactive ratemaking challenge was to the surcharge, not to the FAC. Id. at 58–60.

The Court's primary decision addressed Issue 1, holding that the FAC was beyond the statutory authority of the PSC and that the FAC, as well as the roll-in charge and the surcharge, were unauthorized. Id. at 57–58. The Court did not address Issues 2 and 3. When it addressed Issue 4 and the retroactive ratemaking argument, it did not consider its applicability to the FAC because it had previously stated that "... our determination is limited to whether or not a fuel adjustment clause has been authorized by the legislature." Id. at 51. Thus, the Supreme Court did not determine that FACs constituted retroactive ratemaking.

Having concluded that the FAC, roll-in, and surcharge were beyond the Commission's authority, the Court turned to the question of how to provide relief to consumers in Section VII of its decision entitled "Remedies." Id. at 58. Public Counsel in the UCCM case had requested

that the Supreme Court remand to the Commission to determine the excess amount collected by the utilities under the FAC above a "just and reasonable rate," and to order a refund of the excess. Id. It was in response to Public Counsel's request to "redetermine rates" that the Supreme Court concluded that the PSC may not redetermine rates already established and paid without depriving the utility or consumers of their property without due process. Id. Thus, the Court found that Public Counsel's request that the Commission redetermine rates would constitute retroactive ratemaking and not the FAC itself.

The UCCM Court next addressed remedies for the surcharge. The surcharge was authorized by the PSC to allow the utilities to collect for fuel costs incurred when an old FAC was in effect but which had not been collected under the old clause before it expired. Id. at 58. However, the Court found that this was unlawful retroactive ratemaking because the surcharge collected for past expenses that were not permitted under current tariffs. Since the expired FAC was the only basis for the surcharge, this constituted improper retroactive ratemaking. Id. at 58–59. Notably, this surcharge issue was separate and apart from the Court's consideration of the statutory authority for the FAC mechanism. Thus, the UCCM case held that the surcharge and Public Counsel's request for a redetermination of rates were retroactive ratemaking.

In contrast to that situation, the Commission did not find here that the Aquila rates that became effective June 1, 2007 were inadequate. As permitted by Section 386.266, it 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. It was only when the fuel cost information was submitted by Aquila in December 2007 that the process of formulating a Fuel Adjustment Charge began.

The Commission's February 14, 2008 Order 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, they were imposed prospectively.

This concept is entirely consistent with previous decisions of the Court of Appeals. In affirming the Commission's promulgation of the Emergency Cold Weather Rule, the Court rejected claims that the accounting authority order (AAO) provided in the Rule conditioned the recovery of past deferred charges relating to the Rule with the filing of a subsequent rate case. Noting that the costs of the Cold Weather Rule were "merely a deferment of extraordinary costs," the Court stated: "Although recovery under the AAO is conditioned on filing a subsequent rate case, this is not a case of retroactive ratemaking." State ex rel. Missouri Gas Energy v. PSC, 210 S.W.3d 330, 335 (Mo. App. W.D. 2006).

The Court noted that the collection of costs to be analyzed in a future proceeding was appropriate. "This is not retroactive ratemaking because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future." Id. at 336, citing Midwest Gas Users' Ass'n v. PSC, 976 S.W.2d 470, 481 (Mo. App. W.D. 1998) (holding that cost adjustments for gas previously purchased under the Purchased Gas Adjustment/Actual Cost Adjustment process do not constitute retroactive ratemaking because "[t]he adjustments permitted under both the PGA and the ACA are applied only to future customers on future bills. The companies are not allowed to adjust the amount charged to past customers either up or down.").

Consideration of past costs to set rates to be charged in the future is an historical and widely-accepted ratemaking component with which FAC charges, which relate to past costs but

are imposed prospectively, are entirely consistent. For example, test years are established in rate cases with a view to permitting a utility to recover costs prospectively once the rate case is over. The goal of a test year is to use a utility's past experience as a guide to its future revenue requirement. Thus, ratemakers may calculate their future revenue requirements, and in so doing calculate new rates, based on past expenses. This prospective calculation of rates based on past expenses is consistent with the FAC mechanism.

Given that customers had their first opportunity to make decisions about their purchases in February 2008, the fact that the FAC tariff sheets that became effective July 5, 2007 authorized only the accumulation of cost data as of June 1, 2007 did not constitute retroactive ratemaking.

E. Refund Issues.

While the Company firmly stands by its foregoing position that under the specific facts of this case there was no retroactive ratemaking, it will proceed to outline its position on issues related to the possibility of a refund.

According to the ruling of the Court of Appeals, the only 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. 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.

When the Court of Appeals reversed the Commission's order, it noted that the claim brought by the Office of the Public Counsel was that "a fuel adjustment clause does not become effective until after the rate schedules have been approved and because allowing recovery for fuel costs prior to the effective date of the tariff sheets violates the prohibition against retroactive ratemaking." See 311 S.W.3d at 365. The Court of Appeals agreed. Id. at 367.

It is uncontroverted that the effective date of the Commission's June 29, 2007 Order was July 5, 2007. Therefore, regardless of the arguments of the parties or any details on the gathering of costs and calculation of adjustments in the Commission's regulations, there can be no refund with regard to costs that were incurred by the Company on or after July 5, 2007.

F. Questions of Law and Fact.

The Company believes it would be helpful to introduce testimony that summarizes the complicated history of the tariffs in this case and why the Commission's June 29, 2007 Order and February 14, 2008 Order do not constitute retroactive ratemaking. Although there is a great amount of material that may be gleaned directly from the Commission's records, the Company's tariffs and other materials, it is critical that a complete record including testimony be permitted in this remanded proceeding.

Aquila was the first company to file for a FAC under the newly enacted Section 386.266. This law changed the regulatory landscape in Missouri as far as rate adjustment mechanisms, including fuel costs. It sprung from the Missouri Supreme Court's decision in the 1979 UCCM case and established an entirely new statutory mechanism to deal with fuel and other costs. As a result, the Company believes it would be helpful 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 constituted retroactive ratemaking.

Moreover, the Court of Appeals' emphasis on information imparted to customers and what customers could have done as a result of decisions by the Commission should be set out carefully in the record. As noted above, customers only had the ability to make meaningful decisions based upon fuel costs and rates when the Commission issued its order on February 14, 2008.

The issues regarding the possibility of a refund also require testimony in order to determine whether a refund is appropriate and, if so, what the amount of such refund should be. The Company would be required to ascertain and calculate the fuel costs incurred for the 34-day period of June 1 through July 4, 2007, and share that information with the other parties for their review and analysis. The form of any refund will also require testimony from Company witnesses so that the Commission can determine the most efficient and least burdensome refund mechanism.

Finally, there are issues concerning the effect of any refund upon the FACs that have been approved in subsequent cases and 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 pre-filed 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 31st day of August, 2010 copies of the foregoing have been mailed, transmitted by facsimile, or emailed to all counsel of record.

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