

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of The Empire District Electric)	
Company of Joplin, Missouri for Authority to)	
File Tariffs Increasing Rates for Electric)	Case No. ER-2006-0315
Service Provided to Customers in the Missouri)	
Service Area of the Company.)	

AQUILA’S POST-HEARING BRIEF

COMES NOW Aquila, Inc. (“Aquila”), by counsel, and, pursuant to the Commission’s directive that post-hearing briefs be filed by the parties hereto on or before October 16, 2006, respectfully states as follows to the Missouri Public Service Commission (the “Commission”):

On February 1, 2006, The Empire District Electric Company (“Empire”) filed revised tariff sheets designed to increase rates for retail electric service provided to customers in Empire’s Missouri service area. As part of its initial filing, Empire sought to terminate its current Interim Energy Charge (“IEC”) and replace that IEC with an energy cost recovery mechanism pursuant to Senate Bill 179 (RSMo. §386.266). Aquila moved to intervene in this matter because of Empire’s proposed adjustment mechanism, which, if approved by the Commission and instituted by Empire, would be the first of its kind since the passage of Senate Bill 179. Accordingly, this brief addresses only the issue of Fuel and Purchased Power Expense Recovery Method (issue six in the List of Issues filed herein by the Staff of the Commission on August 28, 2006).

Empire is currently authorized to recover its fuel and purchased power costs through a combination of base rates and the IEC, although the competent and substantial evidence presented to the Commission demonstrates that the current IEC does not allow Empire to recover all of its reasonable and prudently incurred fuel and purchased power costs. It is clear that the Commission must authorize a change, but it is unclear to Aquila whether the Commission will authorize the termination of Empire’s current IEC, modify the terms of the IEC, authorize a new

fuel adjustment mechanism for the recovery of Empire's fuel and purchased power costs, and/or authorize Empire to recover all of its fuel and purchased power costs through its base rates.

The parties to the Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense which was entered into in Case No. ER-2004-0570 (the "Agreement") could not contract away the Commission's inherent powers. Accordingly, the Agreement contains a provision which evidences the parties' understanding of the fact that the Commission could, at any time, terminate Empire's IEC rider, and the Agreement is silent on the issue of the modification of base rates. The fixing of reasonable rates is an exercise of the sovereign police power of the state, and this sovereign power cannot be contracted away. *Ex rel. City of Sedalia v. Public Service Commission*, 204 S.W. 497, 499 (1918).¹

Further, the Commission "cannot commit itself to a position that, because of varying conditions and occurrences over time, may require adjustment to protect the ratepayers." *Ex rel. Capital City Water Company v. Mo PSC*, 850 S.W.2d 903, 911 (Mo.App. W.D. 1993) (internal citations omitted). The Commission must be able to exercise flexibility in its ratemaking function to deal with changing and unforeseen circumstances. *Id.* Consequently, contracts between public utilities and their customers cannot limit the ratemaking authority of this Commission, and utilities "have no authority to enter into a contract which cannot be modified or revoked by the state." *Id.*

Additionally, the Commission's power to modify or terminate Empire's existing IEC rider was not abrogated by the enactment of RSMo. §386.266. Senate Bill 179 did not take effect and become law until after the Agreement was executed and approved by the Commission. Pursuant to Missouri case law, statutes are generally presumed to operate prospectively, and, absent an express intention to the contrary by the legislature, a substantive provision of a statute

cannot be applied retroactively. *Dalba v. YMCA of Greater St. Louis*, 69 S.W.3d 137, 140 (Mo.App. E.D. 2002). In this regard, subsection 10 of the statute reads that nothing in the statute “shall be construed as affecting any existing adjustment mechanism, rate schedule, tariff, incentive plan, or other ratemaking mechanism currently approved and in effect.”

Aquila believes that Missouri’s regulated utilities should be able to fully avail themselves of the provisions of RSMo. §386.266 and recover, in a timely manner, all reasonable and prudently incurred fuel and purchased power costs. Ultimately, pursuant to Missouri law, the Commission must ensure that just and reasonable rates are authorized. Full and timely recovery of prudently incurred fuel and purchased power costs is vital to the economic stability of Missouri’s utilities, and the authorization of a fuel adjustment mechanism by the Commission, in some circumstances, is necessary for truly just and reasonable rates.

BRYDON, SWEARENGEN & ENGLAND P.C.

By: /s/ Diana C. Carter
Diana C. Carter MBE #50527
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
Phone: (573) 635-7166
Fax: (573) 634-7431
DCarter@brydonlaw.com

ATTORNEYS FOR AQUILA, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, mailed by U.S. mail, or electronically transmitted on this 16th day of October, 2006, to all parties of record.

/s/ Diana C. Carter

¹ See also *City Water Company of Sedalia v. City of Sedalia*, 231 S.W. 942, 944-945 (1921); *Ex rel. Missouri Gas & Electric Service Company v. Trimble*, 271 S.W. 43 (Mo. banc 1925); *Ex rel. Kansas City Public Service Company v. Latshaw*, 30 S.W.2d 105, 108 (Mo. banc 1930); *Gaines v. Van Gibbs*, 709 S.W.2d 541, 544 (Mo. App. S.D. 1986).