

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

In the Matter of Aquila, Inc., d/b/a Aquila)	
Networks-MPS and Aquila Networks-L&P)	
for Authority to Implement Rate Adjustments)	<u>Case No. EO-2008-0216</u>
Required By 4 CSR 240-20.090(4) and the)	
Company's Approved Fuel and Purchased)	
Power Cost Recovery Mechanism)	

**MOTION TO REJECT TARIFFS AND
RESPONSE TO STAFF RECOMMENDATION**

COME NOW, the Office of the Public Counsel ("OPC"), AG Processing, Inc. and Sedalia Industrial Energy Users' Association ("Industrial Intervenors") and for their Motion to Reject Tariffs and Response to Staff Recommendation respectfully state as follows:

1. BACKGROUND

1. On May 17, 2007, the Commission issued its Report and Order in Case No. ER-2007-0004. In that Order, the Commission rejected rate and FAC tariffs previously filed by Aquila, Inc. on July 3, 2006. The Commission, however, authorized Aquila to file tariffs in compliance with that Report and Order, including fuel adjustment clause tariffs. On May 25, 2007, the presiding officer, under a purported delegation of authority, approved rate tariffs filed by Aquila for service on and after June 1, 2007. In that same Order, the presiding officer, based primarily upon a recommendation from Staff, rejected Aquila's fuel adjustment tariffs on the basis that those FAC tariffs did not comply with the Report and Order. After several iterations of FAC tariffs filed by Aquila, the presiding officer, again under a purported delegation of authority, finally

found a set of FAC tariffs which she claimed complied with the Report and Order. Those FAC tariffs were approved, over the timely objections of OPC and the Industrial Intervenors, on June 29, 2007 “to become effective on and after July 5, 2007.”

2. THE AQUILA FAC TARIFFS

2. Aquila’s FAC tariffs, as approved by the presiding officer, are designed to work in the following manner. Rates are established in a general rate case with all fuel and purchased power expense recovered through base rates. Semi-annual adjustments are then made to recover differences between the fuel and purchased power expenses experienced in the previous six months (the “accumulation period”) and those reflected in base rates. Changes between the actual fuel and purchased power costs and those reflected in Aquila’s base rates are then recovered over the following 12 months (the “recovery period”). At the end of the recovery period, a true-up is conducted to determine whether the amounts recovered from the adjustment during the recovery period resulted in an under or over collection of fuel and purchased power costs.

3. THE IMMEDIATE CASE

3. As provided by its tariffs, Aquila was required to file, by January 1, 2008, its fuel and purchased power cost under / over recovery for the first accumulation period. Given that the FAC tariff was not effective until July 5, 2007, this under / over recovery should not be for a complete 6 month accumulation period. Rather, at most, this current adjustment should recognize cost differences realized from July 5, 2007, the date that the FAC tariffs became effective, through November 30, 2007.

5. The Commission’s rules, however, explicitly prohibit partial month recoveries.

4 CSR 240-20.090(1)(I): 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* unless the effective date is on the first day of the calendar month. (emphasis added).

The rationale underlying the Commission's prohibition against partial month recoveries is necessarily based on the fact that utilities maintain financial books based upon full calendar months. As such, it would be virtually impossible to distinguish between: (1) those fuel costs and revenues that occur in that portion of the month preceding the effective date of the commission order approving a fuel adjustment clause and (2) those costs and revenues which occurred in the remainder of the month following the effective date of the commission order.

6. With this in mind, the Commission's rules provide that the effective true-up period commences on "the first day of the first calendar month following the effective date of the commission order approving" the fuel adjustment clause. Putting aside any concerns with the presiding officer issuing, by purported delegation, a final order of the Commission, the first day of the first month following the effective date of the Commission's order is August 1, 2007. Therefore, Aquila's current filing should only reflect over / under collection for the months of August 1, 2007 through November 30, 2007. Despite the explicit requirements of the Commission's rule, Aquila's current filing claims under-recovery of costs beginning June 1, 2007.

7. In its previous pleadings, Aquila has acknowledged that it could only seek recovery for fuel and purchased power under-collection variances beginning on the first day of the calendar month following approval of the FAC tariffs.

Aquila is both concerned and frustrated by Staff's response. The Company is concerned because raising the issues discussed in Staff's recommendation shortly before the operation of law date in this case

jeopardizes Aquila's ability to put in place a FAC that will accomplish the purposes for which it is designed and approved. *Under the Commission's rules, the Company cannot start the deferral of either the under-collection of over-collection of fuel and purchased power costs until the Commission has specifically approved the tariffs designed to implement the FAC.* . . . Aquila fears that these issues are being raised at this time not because there is a legitimate question as to whether the Company's proposed compliance tariff sheets are consistent with the *Report and Order* but, instead, because Staff, which opposed the FAC, is attempting to frustrate the intent of the Commission as expressed in the *Report and Order* and financially penalize the Company by delaying the implementation beyond the start of the summer cooling months.¹

In the prayer to the same pleading, Aquila requested expedited relief, asserting:

If the Commission fails to approve tariff sheets that authorize Aquila to implement its FAC on or before June 1, 2007, *the Company will be prohibited from accumulating and eventually collecting from customers fuel and purchased power costs incurred to provide service to customers for the entire month of June and continuing thereafter until such times as tariff sheets implementing the FAC are approved.*²

8. Still again, in yet another Motion for Expedited Consideration, Aquila noted that, absent immediate Commission action, Aquila would be "denied" collection of under-recovered fuel and purchased power expenses for the month of July.

Aquila requests expedited approval of the revised tariff sheets because the Company believes good cause exists to allow revised tariff sheets 124-127 to go into effect on less than thirty-days' notice. Sufficient good cause exists because: . . . (f) *without these tariff sheets in effect, Aquila will be denied a portion of the rate recovery already approved by the Commission.*³

¹ *Response to Staff's Recommendation To Reject Tariff Sheets, Motion for Clarification of Report and Order, and Motion for Expedited Treatment*, Case No. ER-2007-0004, filed May 30, 2007, at pages 1-2 (emphasis added).

² *Id.* at page 7 (emphasis added). In a footnote, Aquila further recognizes that, because of 4 CSR 240-3.161(1)(G), the FAC can only become effective on the beginning of a calendar month.

³ *Motion for Expedited Treatment and for Approval of Tariff Sheets Filed in Compliance with Commission Order*, Case No. ER-2007-0004, filed June 18, 2007, at page 3.

Aquila's urgency is again repeated in this same pleading, "[i]f the revised tariff sheets are not made effective on or before June 30, 2007, Aquila may be denied recovery of more than \$11 million in fuel and purchased power costs in the month of July 2007 alone."⁴

9. Aquila again repeated its frustration that Commission action, or possibly inaction, had caused it to lose deferral of fuel and purchased power under-collection for the month of June and possibly for the month of July in another pleading. After the Commission had issued its June 29, 2007 Order approving the FAC tariffs effective for service on and after July 5, 2007, Aquila asked the Commission to engage in legal shortcuts designed to enable fuel cost deferral for the month of July. Having not learned from the predicament caused by similar shortcuts in a recent Empire proceeding, Aquila suggested that the Commission issue a new order upon reconsideration to be effective on only two business days' notice - effectively denying the parties' statutory right to a reasonable opportunity to seek rehearing. Aquila justified such desperate actions because "[u]nless the order approving the FAC tariff sheets bears an effective date of Sunday, July 1, 2007 (or an earlier date), Aquila risks losing the ability to recover its fuel costs for the month of July."⁵ Ultimately, the Commission did *not* heed Aquila's request. Instead, the FAC tariffs became effective on July 5, 2007.

10. The question necessarily arises, if Aquila believed that its tariff filing would provide recovery retroactive to June 1, why was it so insistent in seeking expedited consideration and in attempting to cut off parties', including the Staff's, opposition to its FAC tariffs. The answer is obvious: the FAC does not and cannot provide for retroactive collection of under-recoveries for periods prior to the effective date of the FAC tariff.

⁴ *Id.*

⁵ *Aquila's Request for Reconsideration and Post-Circuit Court Judgment Scenario*, Case No. ER-2007-0004, filed

11. Aquila fails to provide any rationale for its contention that the FAC tariff became effective for deferral of under / over collections from June 1, 2007. Until such time as Aquila presents its position, parties may only speculate and must, therefore, reserve the right to present further response at such time as Aquila comes forward.

4. RESPONSE TO STAFF RECOMMENDATION

12. On January 29, 2008, Staff filed its recommendation to approve Aquila's FAC adjustment tariff. In its pleading, Staff openly acknowledges the problem underlying the start date of the accumulation period in Aquila's tariff.

Aquila's requested adjustment is based on an accumulation period (of eligible costs subject to subsequent recovery from or refund to customers) that commences on June 1, 2007. However, although the Staff herein recommends approval of Aquila's request, a question arises as to whether June 1 is the proper accumulation period state date in this instance, or whether August 1, 2007 is proper. The Commission's rules may be susceptible of at least two interpretations.⁶

The Staff analysis properly focused on 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) which provides that the true-up period shall start on the first day of the first calendar month "following the effective date of the commission order approving a RAM." Ultimately, Staff suggests that Aquila's FAC was "approved" in the Commission's May 25, 2007 Report and Order. Therefore, the first day of the first calendar month following approval was June 1, 2007.

13. Staff's recommendation strains both facts and logic. The Commission's May 25, 2007 Report and Order **rejected** Aquila's proposed FAC. While the Commission also **authorized** Aquila to file additional FAC tariffs, the Report and Order never **"approved"** Aquila's FAC. In fact, in subsequent orders, the presiding judge

⁶ *Staff Recommendation to Approve Tariff Sheet and Motion for Leave to File Out of Time*, filed January 29, 2007, at page 2.

rejected additional Aquila attempts to submit an FAC that complied with the Report and Order. Ultimately, Aquila's FAC was not "approved" until the Commission's June 29, 2007 Order Approving Tariffs which became effective July 5, 2007. While the Staff may suggest that earlier orders authorizing a FAC are sufficient for purposes of calculating the start date of the accumulation period, it is apparent that only an order approving an FAC satisfies the requirements of the Commission's rules.

Indeed, Section 386.266 references the Commission's authority to approve FAC tariffs and repeatedly ties that authority to the approval of the FAC rate schedule, not to an order authorizing the subsequently filing of FAC tariffs.

Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in prudently incurred fuel and purchased-power costs, including transportation.⁷

The commission may approve such rate schedules after considering all relevant factors which may affect the costs of overall rates and charges of the corporation. . .⁸

14. Staff further suggests that, despite any other legal difficulties, the Aquila's FAC tariffs provide for an accumulation period commencing on June 1. Therefore, the August 1, 2007 commencement date is "inconsistent" with Aquila's tariff. Staff then mistakenly concludes that, despite these other legal difficulties, the tariff is controlling.

The Staff's decision to recommend approval of Aquila's now-proposed June 1 start date for cost accumulation is based on Staff's view that the tariff provision controls in this instance.⁹

⁷ Section 386.266.1 (emphasis added).

⁸ Section 386.266.4 (emphasis added).

⁹ *Staff Recommendation to Approve Tariff Sheet and Motion for Leave to File Out of Time*, filed January 29, 2007, at page 5.

Staff provides no legal authority for its conclusion that the tariff provisions take precedence over Commission rules or Missouri statutes.

15. On the contrary, recent Missouri case law demonstrates that, where conflict exists between a tariff and either Missouri statute or properly promulgated rules, the tariff must give way.¹⁰ Thus, any conflict between the tariff and a properly promulgated rule is ruled in favor of the rule.

16. Staff's position that the Aquila tariff is controlling would essentially amount to *carte blanche* for the Commission to engage in retroactive ratemaking, so long as that authority was embodied in a utility tariff. In this case, while the Commission approved a tariff with stated accumulation periods, there is nothing to indicate that the Commission intended to retroactively establish cost recovery. Indeed, such action would be unlawful.

17. Prior to the enactment of SB179, fuel clauses had been declared unlawful by the Missouri Supreme Court as contrary to the forward-looking focus of Sections 393.270(3) and 393.140(5).

Past expenses are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses, but under the prospective language of the statutes, §§ 393.270(3) and 393.140(5) they cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses.¹¹

Therefore, rate schedules approved by the Commission must be forward-looking in nature.

¹⁰ *State ex rel. Missouri Gas Energy v. Public Service Commission*, 210 S.W.3d 330, 337 (Mo.App.W.D. 2006).

¹¹ *State ex rel. Utility Consumer Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 59 (Mo banc 1979) (citations omitted).

18. While SB179 (codified as Section 386.266) permitted the Commission to make single issue rate adjustments to address changes in fuel and purchased power expenses, that legislation did **not** revoke the doctrine against retroactive ratemaking. In fact, as pertains to fuel adjustment clauses, that legislation maintained the same forward-looking focus contained in other sections of the Public Service Commission Act. Specifically, Sections 386.266.1 and 386.266.4 now permit the Commission to approve rate schedules designed to allow utilities to remedy over or under collections. Nothing in that legislation, however, authorizes retroactive rate schedules. That is to say, in order to seek the under-recovery associated with fuel and purchased power, the utility must first have in place the relevant rate schedule. Once in place, the rate schedule permits the utility to accumulate under and over collections and seek recovery at a later date. Recovery is predicated on the effective date of the approved rate schedules. Nothing in this legislation permits the Commission to provide recovery for the under-recovery of fuel and purchased power realized prior to the approval of the rate schedule.

5. MOTION FOR EXPEDITED TREATMENT

19. This motion necessitates immediate action by the Commission. By its tariffs, Aquila has sought recovery of past under-recoveries for the months of June – November 2007. Aquila has placed an effective date of March 1 on these tariffs. With the shortened month of February, the Commission has only a few weeks in which to act on the Aquila tariffs. Consistent with this Motion, the Commission should reject Aquila's FAC tariffs and order it to file tariffs which provide for recovery of amounts deferred from August 1, 2007. By acting in an expedited fashion, the Commission can still have these new tariffs approved and implemented by March 1, 2008, thereby

protecting the ratepaying public from unlawful overcollections. Therefore, OPC / AGP / SIEUA request that the Commission order expedited responses to this motion and take this matter up, in a regularly scheduled agenda, as soon thereafter as possible.

20. OPC / AGP / SIEUA filed this Motion as soon as practical. This matter has only been pending about a month. Furthermore, Staff's recommendation was filed just over a week ago. Given the nature of the testimony and tariffs accompanying this filing, as well as the need to consult with clients and retain a subject matter expert, this Motion was filed as soon as practical.

WHEREFORE, OPC / AGP / SIEUA respectfully request that the Commission grant their Motion for Expedited Treatment and, based upon the substance of this pleading, reject Aquila's tariffs and order new tariffs reflecting the recovery of amounts deferred since August 1, 2007.

Respectfully submitted,



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THE OFFICE OF THE PUBLIC
COUNSEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

David L. Woodsmall

Dated: February 8, 2007