

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

In the Matter of the Tariff Schedules Filed to)
Adjust the Fuel Adjustment Clause of KCP&L) **Case No. EO-2009-0254**
Greater Missouri Operations Company)

MOTION TO REJECT TARIFFS

COME NOW, Ag Processing Inc., a cooperative, and Sedalia Industrial Energy Users' Association ("Industrial Intervenors") and for their Motion to Reject Tariffs state as follows:

1. On December 30, 2008, KCP&L Greater Missouri Operations Company f/k/a Aquila, Inc. ("KCPL – GMO") filed rate schedules designed to implement a change in rates to reflect an increase in historical fuel and purchased power expense.

2. In *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, the Missouri Supreme Court addressed the legality and constitutionality of fuel adjustment clauses.¹ There, the Supreme Court discussed retroactive ratemaking.

The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established. 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.²

¹ 585 S.W.2d 41 (Mo. banc 1979).

² *Id.* at page 59 (emphasis added, footnotes omitted).

The Supreme Court concluded that retroactive ratemaking was not only a bad regulatory methodology, it was also unconstitutional.

The commission has the authority to determine the rate *to be charged*, §393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery. **It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.**³

3. In 2005, under the mistaken belief that the problems associated with fuel adjustment clauses could be corrected by simple legislation, the General Assembly enacted Section 386.266. That section portends to authorize periodic adjustment mechanisms such as the fuel adjustment clause. As implemented by this Commission, however; because the fuel adjustment seeks to “redetermine rates already established and paid,” the fuel adjustment clause is unlawful in that it deprives the consumer “of his property without due process.”

4. In the testimony of Tim Rush, KCPL – GMO describes the nature of the changes to be made to rates and the rationale for those changes. As Mr. Rush notes, the fuel adjustment rate schedules “adjust rates for fuel and purchased power costs experienced during the six-month period June 2008 through November 2008.”⁴ The testimony continues on to note that “[f]or the accumulation period June 2008 through November 2008, KCP&L – GMO’s actual fuel and purchased power costs have exceeded the base costs included in base rates in Case No. ER-2007-0004 by approximately \$25 million.”⁵

³ *Id.* at page 58 (emphasis added, footnotes omitted).

⁴ Direct Testimony of Tim M. Rush at page 2.

⁵ *Id.* at page 3.

5. Recognizing that KCPL – GMO seeks to adjust rates to allow for past under-collection of fuel and purchased power expense, the fuel adjustment mechanism epitomizes the notion of retroactive ratemaking. As the Missouri Supreme Court, relying on decisions of the United States Supreme Court, has found however, such a mechanism is unconstitutional in that it deprives consumers of their property without due process. Despite the existence of Section 386.266, nothing can save the unconstitutional nature of the KCPL – GMO fuel adjustment mechanism. For this reason, the proposed tariffs must be rejected.

WHEREFORE, AGP / SIEUA respectfully request that the Commission reject KCPL - GMO's tariffs.

Respectfully submitted,

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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 9, 2009