

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

In the Matter of the Application of Aquila, Inc.)
for an Accounting Authority Order Concerning) Case No. EU-2005-0041
Fuel Purchases.)

**AQUILA’S SUGGESTIONS IN OPPOSITION TO
MOTIONS TO DISMISS**

COMES NOW Aquila, Inc. (“Aquila” or the “Company”), by counsel, and provides to the Missouri Public Service Commission (“Commission”) the following suggestions in opposition to the motions to dismiss that have been filed by the Office of the Public Counsel (“Public Counsel”) and the Sedalia Industrial Energy Users’ Association (“SIEUA”):

1. On September 8, 2004, the Public Counsel filed its Motion to Dismiss, Or in the Alternative, Motion to Consolidate (“Public Counsel Motion”). Therein, the Public Counsel argues that Aquila’s Application for an Accounting Authority Order (the “Application”) is an unlawful collateral attack upon the Commission’s Order Approving Stipulation and Agreement issued in Case No. ER-2004-0034, and a violation of the terms of that Stipulation. On September 13, 2004, the SIEUA filed a very similar motion entitled Motion of Sedalia Industrial Energy Users’ Association to Dismiss or Consolidate (“SIEUA’s Motion”). These motions are referred to collectively herein as the “Motions to Dismiss.”

SUMMARY

2. The arguments contained in the Motions to Dismiss are inappropriately timed. That is, the potential result about which the motions complain - recovery of fuel costs exceeding the “ceiling” contained in Aquila’s Interim Energy Charge (“IEC”) - is not a result sought by Aquila in this case and, in fact, as a legal and practical matter, is a result which the Commission cannot bring about in this case.

THE MOTIONS TO DISMISS

3. The background for the Motions to Dismiss, as well as Aquila's Application, is found in Aquila's last electric rate case - Case No. ER-2004-0034. On April 13, 2004, the Commission issued its Order Approving Stipulation and Agreement in Case No. ER-2004-0034 wherein, among other things, the Commission approved an IEC for Aquila Networks - MPS electric and for Aquila Networks - L&P electric. Aquila's base rates were designed to include a specific, permanent annual amount for the Company's Missouri jurisdictional cost of fuel and purchased power for its electric operations. Additionally, the IEC included a variable amount for fuel and purchased power costs on an interim basis, subject to true-up and refund. The specifics of the IEC are spelled out in the Unanimous Stipulation and Agreement among the parties to that case. The IEC is to be in effect for a two year period, or until April 21, 2006.

4. Aquila's Application in this docket seeks an AAO to allow it to defer any over/under collections experienced by the Company on a monthly basis during this two year period, so that Aquila does not have to expense any under-recovery on a monthly basis, before the ultimate over/under recovery is known in April, 2006.

5. In view of the foregoing, it is clear that the Motions to Dismiss should be denied because they do not challenge the accounting treatment relief sought by Aquila's Application for an AAO in this case, but rather challenge how future rate recovery of any deferred amounts (something not to be decided in this case) relates to the Unanimous Stipulation and Agreement approved by the Commission in Case No. ER-2004-0034. In this regard, the Public Counsel suggests that the ultimate recovery of any deferred fuel costs related to the IEC will "evade the settlement agreement" and "violate the terms of the Unanimous Stipulation and Agreement."

(Motion to Dismiss, p. 1). SIEUA expresses a similar concern.

6. This concern is irrelevant in this case for reasons that are both legal and practical in nature.

First, Aquila's Application does not request that the Commission address rate recovery of any ultimate under-recovery of fuel costs that may be determined in April of 2006. Instead, the Application requests that the Commission not make any rate decision by imposing a condition establishing that the Commission "reserves the right to consider the ratemaking treatment of the costs deferred and any assertions by parties related to these issues to a future rate case." (App., p. 9, para. 29). The Direct Testimony of Aquila witness Dennis R. Williams, filed with the Commission in this case on September 3, 2004, reiterates this position. In his testimony, Mr. Williams confirms that Aquila is not asking that the Commission address, in this case, what will happen to any under-recovery. (Williams Dir., p. 7).

Second, the Missouri courts have clearly stated that a Commission order as to deferred accounting treatment (what is being sought by the instant application) is something separate and apart from a rate order. In reaching its decision in *State ex rel. Office of Public Counsel v. Public Service Commission*, 858 S.W.2d 806 (Mo.App. W.D. 1993), the Missouri Court of Appeals followed the reasoning in a prior Illinois case (*Business & Profession People for the Pub. Interest v. Illinois Commerce Commission*, 585 N.E.2d 1032 (Ill. 1991)). The Missouri Court of Appeals quoted the Illinois court as recognizing that there is a "fundamental difference between a rate case and a case involving only accounting procedures" (*Id.* at 813), and further cited the Illinois court for authority that "the utility is not automatically entitled to recovery of the full amount of the deferred charges." *Id.*

7. The Missouri Court of Appeals has clearly found that the question of “recovery” is one for a rate case. The grant of an AAO, while providing the utility the opportunity to “present evidence and to argue that the deferred costs recorded in Account No. 186 should be considered by the Commission in approving a rate,” “does not preclude consideration of other relevant factors when the Commission considers the appropriate rate to be charged the utility’s customers.” *Id.* This principle was again followed by the Missouri Court of Appeals in *Missouri Gas Energy v. Public Service Commission*, 978 S.W.2d 434, 438 (Mo.App. W.D. 1998), wherein the Court stated that “in the Public Counsel case, the court made it clear that AAOs are not the same as ratemaking decisions” The Court further stated that “the PSC is not engaged in ratemaking when it approves an AAO.” *Id.*

8. The fact that accounting treatment is a separate question from rate recovery is acknowledged in the August 16, 2004 SEC prospectus quoted extensively by SIEUA. Aquila states that “[t]he request asks for confirmation that any significant amounts under-collected during the period may be deferred *and considered for recovery* in our next rate case” (SIEUA Mot., p. 7) (emphasis added).

9. In addition, it is impossible to determine at this point what under-recovery, if any, may exist when the two year IEC expires in April of 2006. The AAO requested by Aquila contemplates that the deferred amounts will increase or decrease from month to month based upon under or over-recovery in relation to the IEC. Many variables, including most notably extremely unpredictable fuel markets and weather, will have an impact over the next nineteen (19) months on the ultimate under or over-recovery.

10. If there is no under-recovery, there is no issue as to the what impact the relief

requested in this case may have in relation to Case No. ER-2004-0034. Moreover, if an under-recovery does exist in April of 2006, the question would then arise as to whether or not Aquila would request rate recovery of any such amount. Until Aquila “presents evidence” and argues that the costs of any under-recovery should be included in rates, there is nothing to complain about. Aquila is not “seeking to recover” any amounts in this case, as alleged by the SIEUA (SIEUA Mot., p. 9). There is no rate case at this point in time in which such a request could be made.

11. Furthermore, even in a future rate case, there can be no rate recovery of any deferrals unless approved by the Commission. Thus, even *if there is an under-recovery and if Aquila then requests rate recovery of this amount*, the Commission still has the power to deny the Company’s request.

12. The Public Counsel and SIEUA’s Motions to Dismiss are premised on an assumption as to all three of the described steps. That is, the Motions to Dismiss assume that: 1) there will an under-recovery in April of 2006; 2) that Aquila will seek rate recovery of this amount; and, 3) that the Commission will include these costs in rates. All of this, of course, is pure speculation and cannot form the basis for a proper motion to dismiss. Accordingly, when the Public Counsel asserts that “Aquila’s Application asks the Commission to change the terms of the IEC through an AAO that would allow for *rate recovery* related to fuel prices above the agreed upon IEC ceiling and incurred during the IEC period,” the Public Counsel incorrectly represents the relief requested by Aquila. (Public Counsel Mot., p. 6, para. 9) (emphasis added). Legally and practically “rate recovery” is a question for a future rate case, and cannot be the subject of this case.

13. The legal questions presented by the Motions to Dismiss are not ripe for consideration at this time. The Commission can rule on the Application without reaching the questions raised by the Public Counsel and the SIEUA and without prejudicing the Commission's ability to consider the issues raised by the Public Counsel when the issues do become ripe.

14. The AAO requested by Aquila is based upon the relationship between the IEC, the extremely high gas prices being experienced and the accounting procedures that would otherwise apply. Evidence of the extraordinary nature, or circumstances, can be seen from gas prices that far exceed those found in the positions taken by the parties to Aquila's last rate case. Those parties suggested that an appropriate natural gas price for use in setting Aquila's rates on a going forward basis was from \$3.99/mcf to \$4.35/mcf (App., p. 4-5). The Energy Information Administration now expects natural gas prices to average over \$6.00 this year and next. An approximate 50% increase over the prices suggested as appropriate by other parties is an extraordinary event given the large role natural gas plays in the generation of the electricity utilized by Aquila.

15. A motion to dismiss for failure to state a claim is solely a test of the adequacy of a plaintiffs' petition; the Court must assume that all the plaintiff's averments are true, and must liberally grant all reasonable inferences therefrom. *Eastwood v. North Cent. Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo.App. W.D. 2000); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. Banc 1993). In ruling upon a motion to dismiss, the Court must determine if the facts alleged in the plaintiff's petition meet the elements of a recognized cause of action or of a cause of action that might be adopted in that case. *Eastwood v. North Cent. Missouri Drug Task*

Force, 15 S.W.3d 65, 67 (Mo.App. W.D. 2000); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. Banc 1993).

16. In this matter, Aquila is similarly situated to the plaintiff in the above-referenced cases. In ruling upon the Motions to Dismiss, the Commission should assume that all of Aquila's averments are true, and must liberally grant all reasonable inferences therefrom. Doing so reveals that those facts meet the elements of a recognized cause of action or of a cause of action that might be adopted in this case. Accordingly, the Motions to Dismiss should be overruled.

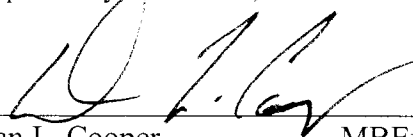
CONSOLIDATION

17. The Public Counsel and the SIEUA also suggest, in the alternative, that case, Case No. EU-2005-0041, be consolidated with Aquila's last rate case, Case No. ER-2004-0034. Such consolidation is neither appropriate nor necessary. Case No. ER-2004-0034 is a closed case. There is no action to be taken in that docket. Aquila does not seek to change the amount of the IEC, does not seek to change the terms of IEC and does not seek to change the IEC ceiling with this Application. As explained above, Aquila's Application does not ask to "unilaterally change the terms of the IEC" (Public Counsel Mot., p. 3) and does not seek a "unilateral modification of the settlement agreement" (Public Counsel Mot., p. 4). What Aquila seeks is accounting treatment that will permit an accurate reflection of the fact that the IEC is a two year program and that the ultimate impact of the IEC on Aquila's finances will not be known until the two years have run.

WHEREFORE, Aquila respectfully requests that the Commission issue its order denying the Motions to Dismiss and adopting the procedural schedule proposed in Aquila's Motion to

Establish Procedural Schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, or sent by electronic mail, on September 17, 2004, to the following:

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