

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

In the Matter of KCP&L Greater Missouri	)	
Operations Company for Authority to	)	
Implement Rate Adjustments Required By	)	<b><u>Case No. EO-2008-0216</u></b>
4 CSR 240-20.090(4) and the Company's	)	(On Remand)
Approved Fuel and Purchased Power Cost	)	
Recovery Mechanism.	)	

**INDUSTRIAL INTERVENORS' INITIAL BRIEF  
  
ON THE EFFECT  
  
OF WESTERN DISTRICT REMAND**

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ATTORNEYS FOR AG  
PROCESSING, INC. AND THE  
SEDALIA INDUSTRIAL ENERGY  
USERS' ASSOCIATION

August 31, 2010

## **I. PROCEDURAL HISTORY AND COMMISSION'S UNLAWFUL FEBRUARY 14, 2008 ORDER**

CASE NO. ER-2007-0004: On July 3, 2006, Aquila filed proposed rate schedules designed to implement a general rate increase of \$94.5 million in its MPS service area and \$24.4M in its L&P service area. In addition, Aquila filed rate schedules, pursuant to Section 386.266, to implement a fuel adjustment clause. Those rate schedules were denominated as Case No. ER-2007-0004.

Following an evidentiary hearing, the Commission issued its Report and Order on May 17, 2007. In that Report and Order, the Commission **rejected** Aquila's proposed rate and fuel adjustment schedules and ordered Aquila to file proposed rate and fuel adjustment tariff sheets in compliance with the Report and Order.<sup>1</sup> From May 18 – 21, 2007, Aquila filed various tariff sheets designed to comply with the Report and Order. On May 25, 2007, the Presiding Officer issued her Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets. In that May 25 Order, the Presiding Judge expressly **rejected** the Aquila fuel adjustment tariff again.<sup>2</sup>

On May 25, 2007, Aquila again filed tariff sheets which it alleged complied with the Report and Order. On June 14, the Commission issued its Order Rejecting Tariff, Granting Clarification, Directing Filing and Correcting Order Nunc Pro Tunc. Again, as that Order expressly notes, the Commission **rejected** Aquila's fuel adjustment tariff sheets.<sup>3</sup>

On June 18, Aquila filed another set of tariff sheets which it claims complied with the provisions of the Report and Order. On June 29, 2007, the Presiding Officer, under a

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<sup>1</sup> *Report and Order*, Case No. ER-2007-0004, at pages 70-71.

<sup>2</sup> *May 25 Order*, Case No. ER-2007-0004, at page 7.

<sup>3</sup> *June 14 Order*, Case No. ER-2007-0004, at page 7.

purported delegation of authority, issued her Order Granting Expedited Treatment and Approving Tariff Sheets (“June 29, 2007 Order”). That Order, effective July 5, purports to approve Aquila’s fuel adjustment clause.<sup>4</sup>

CASE NO. EO-2008-0216: On December 28, 2007, Aquila filed rate schedules to “adjust charges related to the Company’s approved Fuel Adjustment Clause.”<sup>5</sup> As reflected in the accompanying testimony, those rate schedules are designed to collect increases in fuel and purchased power costs incurred for the six months starting June 2007.

On February 8, 2008, the Industrial Intervenors filed their Motion to Reject Tariffs and Response to Staff Recommendation. In that Motion, the Industrial Intervenors asked the Commission to reject Aquila’s tariffs as unlawful, arguing that the collection of fuel cost increases under a fuel adjustment clause is directly tied to the effective date of the Commission’s *approval* of the FAC rate schedules<sup>6</sup> [July 5, 2007] and not to the date of the Commission’s Report and Order authorizing Aquila to file subsequent compliance tariffs [May 27, 2007]. Any attempt to collect fuel and purchased power increases incurred prior to the approval of the FAC rate schedules is unlawful retroactive ratemaking.

Nevertheless, on February 14, 2008, the Commission issued its Order approving the FAC rate schedules. In that February 14, 2008 Order, the Commission denied the Intervenors’ Motion, ruling that, although the FAC rate schedules did not become effective until July 5, 2007, Aquila had been authorized to implement a fuel adjustment clause in the May 17 Report and Order.

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<sup>4</sup> *June 29 Order*, Case No. ER-2007-0004, at page 3.

<sup>5</sup> Rate Schedules, Case No. ER-2008-0216, filed December 28, 2007.

<sup>6</sup> Section 386.266.1

On March 23, 2010, the Western District Court of Appeals issued its Opinion finding that the Commission's Order was not consistent with "the applicable statutory language" or "the prohibition on retroactive ratemaking."<sup>7</sup> On July 19, 2010, the Cole County Circuit Court remanded this matter to the Commission.

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<sup>7</sup> *State ex rel. Ag Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361, 367 (Mo.App. 2010) ("AGP").

## RELEVANT TIMELINE

July 3, 2006: Aquila files Case No. ER-2007-0004 and seeks implementation of a fuel adjustment clause.

May 17, 2007: The Commission issues its Report and Order in Case No. ER-2007-0004, rejecting the tariff sheets submitted by Aquila on July 3, 2006, but authorizing Aquila to file tariffs in conformance with the Report and Order.

May 25, 2007: Presiding Officer issues her Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets and rejects Aquila's first FAC compliance tariffs.

June 1, 2007: Without approved tariffs, Aquila begins deferring under-collection of fuel and purchased power pursuant to its fuel adjustment clause.

June 14, 2007: Commission issues its Order Rejecting Tariff, Granting Clarification, Directing Filing and Correcting Order Nunc Pro Tunc and rejects Aquila's second FAC compliance tariffs.

June 29, 2007: Presiding Officer issues her Order Granting Expedited Treatment and Approving Tariff Sheets in which she approves Aquila's third FAC compliance tariffs.

July 5, 2007: Presiding Officer's June 29, 2007 Order becomes effective.

December 28, 2007: Aquila filed to recover under-recovered fuel and purchased power expense incurred between June 1 and November 30, 2007.

February 14, 2008: Commission issued its Order approving Aquila's December 28, 2007 adjustment tariffs.

## II. WESTERN DISTRICT COURT OF APPEALS' OPINION

### A. THE APPELLATE OPINION PRECLUDES THE RECOVERY OF ANY FUEL COSTS PRIOR TO THE EFFECTIVE DATE OF THE FUEL ADJUSTMENT CLAUSE TARIFFS (JULY 5, 2007).

In its Opinion, the Western District addressed the Commission's unlawful attempt to allow Aquila to collect fuel and purchased power costs that had been incurred prior to the effective date of the fuel adjustment clause tariff. In its Opinion, the Court of Appeals found that the Commission's unlawful action violated both: (1) the filed rate doctrine and the associated rule against retroactive ratemaking<sup>8</sup> and (2) the fuel adjustment clause enabling statute (Section 386.266.1).<sup>9</sup>

#### 1. **Filed Rate Doctrine / Retroactive Ratemaking**

The Court found that the filed rate doctrine is based on the requirements of Section 393.140(11). That statute provides that

No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services **as specified in its schedule filed and in effect at the time.**<sup>10</sup>

Recognizing that the public utility is legally bound to collect only the rates contained in rate schedule "at the time," the filed rate doctrine "precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency."<sup>11</sup> Closely related to the filed rate doctrine, the rule against retroactive

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<sup>8</sup> *Id.* at page 365.

<sup>9</sup> *Id.* at page 366.

<sup>10</sup> *Id.* at page 365 (citing to Section 393.140(11)).

<sup>11</sup> *Id.* (citing to *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 954 S.W.2d 520, 531 (Mo.App. 1997)).

ratemaking precludes the utility from attempting to recover past losses simply because the rates in the tariff did not “perfectly match expenses plus rate-of-return.”<sup>12</sup>

Recognizing that Aquila’s fuel adjustment clause tariff did not become effective until July 5, 2007, the Court of Appeals held that the Commission was precluded, by the filed rate doctrine and the rule against retroactive ratemaking, from allowing Aquila to recover fuel and purchased power expenses that were incurred prior to the effective date of that tariff. As the Court held, the logic of the filed rate doctrine is obvious. By giving clear indication of the rates to be charged, “customers will know *prior to purchase* what rates are being charged and can therefore make economic or business plans or adjustments in response.”<sup>13</sup> Through its February 14, 2008 Order, the Commission sought to allow Aquila to recover fuel expenses incurred prior to the effective date of the underlying FAC tariff. By such action, the Commission prevented customers from knowing “prior to purchase what rates are being charged” and thereby violated the filed rate doctrine.

## **2. FAC Enabling Statute (Section 386.266.1).**

In addition to violating the filed rate doctrine, the Court of Appeals also held that the Commission’s December 28, 2007 Order also ran afoul of the express dictates of the fuel adjustment clause enabling legislation. Through its approval of “rate schedules,” Section 386.266.1 authorizes the Commission to approve rate adjustments outside of general rate proceedings.

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*

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<sup>12</sup> *Id.* at page 365 (citing to *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 59 (Mo. banc 1979).

<sup>13</sup> *Id.* at page 365 (citing to *Associated Natural Gas Co.*, at page 531) (emphasis in original).

*outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs.*<sup>14</sup>

Similarly, Section 386.266.4 anticipates that a fuel adjustment clause will only be implemented through the approval of rate schedules.

The Commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint. ***The Commission may approve such rate schedules after considering all relevant factors*** which may affect the costs or overall rates and charges of the corporation.<sup>15</sup>

The implication of the requirement that a fuel adjustment clause be implemented through the approval of rate schedules is indisputable. As the Court of Appeals held, [o]nly costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause.”<sup>16</sup>

**B. COMMISSION RULES PRECLUDE THE RECOVERY OF ANY FUEL COSTS PRIOR TO AUGUST 1, 2007.**

Following the enactment of Section 386.266 in 2005, the Commission undertook a rulemaking proceeding in order to implement the provisions of that statute.<sup>17</sup> Those rules, codified at 4 CSR 240-3.161 and 4 CSR 240-20.090 provide certain requirements applicable to all fuel adjustment clauses. Relevant to the immediate inquiry, those rules provide that a fuel adjustment clause may only become effective on the first day of a calendar month.

In 2006, the Commission opened Case No. EX-2006-0472 to consider its proposed fuel adjustment clause rules. Recognizing that Section 386.266 requires all

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<sup>14</sup> *Id.* at page 366 (citing to Section 386.266.1) (emphasis in original).

<sup>15</sup> *Id.* at page 366 (citing to Section 386.266.4) (emphasis in original).

<sup>16</sup> *Id.* at page 366.

<sup>17</sup> See, Section 386.266.12.



amounts collected under a fuel adjustment clause to be subjected to an annual true-up audit,<sup>18</sup> and recognizing that utilities keep records on a monthly basis, the Commission's proposed rules mandated that any true-up period commence on the first day of a calendar month. Despite its obvious presence, Aquila never asked the Commission to modify its rule which required that a fuel adjustment clause commence on the first day of the month. Today, this requirement is codified at 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) of the Commission's rules:

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. If the effective date of the commission order approving a rate mechanism is on the first day of a calendar month, then the true-up year begins on the effective date of the commission order. (emphasis added).

The fact that this rule mandates that a fuel adjustment clause commence on the first day of a calendar month has been previously recognized by Aquila. In its May 24, 2007 pleading in Case No. ER-2007-0004, Aquila urged the Commission to summarily reject concerns raised by other parties and hastily approve its fuel adjustment clause tariffs by June 1. If Commission approval was delayed by June 1, Aquila recognized that the fuel adjustment clause would not become effective until the next calendar month (July 1). In support of its pleading, Aquila specifically referenced the fact, if the Commission delayed approved, that the Commission's rule would cause the fuel adjustment clause to become effective on the first day of the next calendar month.

In the definition of "True-up year," which appears in 4 CSR 240-3.161(1)(G), the true-up period for a fuel adjustment clause begins 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. If the effective date of the commission

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<sup>18</sup> Section 386.266.4(2).

order approving a rate mechanism is on the first day of the calendar month, then the true-up year begins on the effective date of the commission order.” *The import of this definition is this: if the Commission delays the effective date of the tariff sheets that relate to Aquila’s fuel adjustment clause beyond June 1, 2007, Aquila will not be able to accumulate costs during the month of June 2007 and recover those costs through its fuel adjustment clause.*<sup>19</sup>

In a subsequent pleading, Aquila reiterated the fact that any delay in Commission approval past June 1 would result in a delay in the implementation of the fuel adjustment clause until July 1.

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.<sup>20</sup>

Despite Aquila’s repeated pleas, the Commission refused to approve Aquila’s fuel adjustment clause tariffs by June 1. Recognizing that recovery for June was lost, Aquila then began to urge the Commission to approve its FAC tariffs by July 1. Absent approval by that date, Aquila recognized that the fuel adjustment clause could not become effective until August 1, 2007. In its June 18, 2007 pleading, Aquila again recognized the effect of the Commission’s rule:

If 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.<sup>21</sup>

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<sup>19</sup> *Supplemental Suggestions in Support of Aquila’s Request for Expedited Treatment*, Case No. ER-2007-0004, filed May 24, 2007, at page 3 (emphasis added).

<sup>20</sup> *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 page 7 (citing to Commission Rule 4 CSR 240-3.161(1)(G)).

<sup>21</sup> *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 4.

Ultimately, the Commission's order approving Aquila's fuel adjustment clause tariff did not become effective until July 5, 2007. Given the clear mandate of the Commission's rules as well as Aquila's acknowledged interpretation of those rules, Aquila's fuel adjustment clause could not become effective until August 1, 2007. Any attempt to allow Aquila to recover costs for a period preceding this date will again run afoul of the filed rate doctrine as well as the acknowledged meaning of the Commission's rules.

The meaning of the Commission's FAC rules has also been acknowledged in recent cases. For instance, in Case No. ER-2008-0093, the Commission authorized Empire District Electric to implement a fuel adjustment clause. While approving Empire's rate tariffs to be effective on August 23, 2008, the Commission delayed the approval of Empire's fuel adjustment clause tariffs until the first day of the following calendar month (September 1, 2008).<sup>22</sup>

### **III. NECESSARY COMMISSION RESPONSE**

The import of the Western District opinion and the Commission's rules is that Aquila was precluded from recovering changes in its fuel and purchased power costs for the period preceding August 1, 2007. As the appellate decision makes clear, as a result of the filed rate doctrine, "only costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause."<sup>23</sup> While the effective date of the Commission's order approving tariffs was July 5, 2007, Commission's rules expressly prohibit a fuel adjustment clause from taking effect in the middle of a month. Instead, as Aquila has previously recognized and admitted, in such an event the fuel adjustment

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<sup>22</sup> See, *Order Granting Expedited Treatment and Approving Compliance Tariffs*, Case No. ER-2008-0093, issued August 12, 2008, at pages 3 and 4.

<sup>23</sup> *AGP* at page 366.

tariffs become effective on the first day of the next calendar month. As such, Aquila's fuel adjustment clause could not have become effective until August 1, 2007.

Recognizing that Aquila has already collected for the period from June 1 through July 31, 2007, it is apparent that Aquila customers are due a refund. The Commission, in its orders and rules, has previously recognized that amounts collected under the fuel adjustment clause are collected on an interim, subject to refund, basis.<sup>24</sup> In this light, the Industrial Intervenors ask that the Commission order Aquila to refund, in its next biennial fuel adjustment to be filed on or about December 31, 2010, all amounts collected for changes in fuel and purchased power expense between the dates of June 1, 2007 and July 31, 2007. In addition, consistent with Section 386.266.4 (2) and 4 CSR 240-20.090(5)(A), such refunded amounts should include interest at Aquila's short-term borrowing rate.

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<sup>24</sup> See, *Order Clarifying Order Approving Tariff*, Case No. EO-2008-0216, issued February 26, 2008. See also, 4 CSR 240-3.161(8)(A)(2); 4 CSR 240-3.161(8)(B)(2); 4 CSR 240-20.090(5)

Respectfully submitted,

INDUSTRIAL INTERVENORS



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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.



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David L. Woodsmall

Dated: August 31, 2010