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 Required by 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism.	**)**	**Case No. EO-2008-0216**

SECOND INITIAL BRIEF AFTER REMAND
OF STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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STAFF'S SECOND INITIAL BRIEF AFTER REMAND

COMES NOW the Staff of the Public Service Commission ("Staff") and, for its *Second Initial Brief* to the Public Service Commission ("Commission") after evidentiary hearing post remand, states:

In the Joint List of Issues filed May 6, 2011, the parties characterized the issues before the Commission for resolution by a series of five questions. Each question (bold text) is restated below, followed by Staff's position in response to the question:

1. **On what date within the Initial Accumulation Period (June-November 2008 (sic)) should the calculation of fuel costs begin?**

   July 5, 2007.

2. **Does the Commission have the authority to order a refund or adjustment for the recovery of fuel costs in a future fuel adjustment clause case regarding any overcollection that occurred in the Initial Accumulation Period?**

   No.

3. **What is the amount of a refund or adjustment, if any?**

   Based on a start date of July 5, 2007, the aggregate amount that should be returned to KCP&L Greater Missouri Operations Company customers in its MPS rate district is $1,975,363 and in its L&P rate district is $484,626, plus interest accrued on each amount after December 31, 2010, at KCP&L Greater Missouri Operations Company's short-term borrowing rate.

4. **What is the appropriate mechanism for a refund or adjustment, if any?**

   A bill credit.

5. **Is it appropriate under the facts of this case for the Commission to issue an Accounting Authority Order to GMO regarding any amounts that are contained in a refund or adjustment?**

   No.

DATE TO BEGIN FUEL COSTS COMPARISON AND COMMISSION AUTHORITY TO ORDER REFUND OR ADJUSTMENT

1. **On what date within the Initial Accumulation Period (June-November 2008 (sic)) should the calculation of fuel costs begin?**

   July 5, 2007.

2. **Does the Commission have the authority to order a refund or adjustment for the recovery of fuel costs in a future fuel adjustment clause case regarding any overcollection that occurred in the Initial Accumulation Period?**

   No.

Staff's positions on the first two issues are presented in the testimony of Staff witness John A. Rogers (Rogers Direct, Ex. 3; Rogers Rebuttal Ex. 4; and Tr. 131-41) and were extensively briefed in the brief Staff filed in this case on August 31, 2010. Rather than restating its arguments already presented in that brief, a copy of it is attached. In supplementation of its argument regarding the purpose and meaning of "true-up year" in the Commission's fuel adjustment clause rules (4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I)) in that brief, Staff points out the Commission neither described nor responded to any comments on "true-up year" when it adopted its final fuel adjustment clause rules on pages 2005-2016 of Vl.31, No. 23, December 1, 2006, of the *Missouri Register*.

This Commission has issued orders to make fuel adjustment clauses effective on dates other than the first of the month which resulted in base energy cost rates in the fuel adjustment clause changing with an accumulation period in at least two general electric rate increase cases,

one for Union Electric Company (File No. ER-2001-0036, June 16, 2007, *Order Approving Compliance Tariff Sheets and Depreciation Rates* and June 17, 2007, *Order Approving Additional Tariff Sheet*) and one for The Empire District Electric Company (File No. ER-2010-0130, September 1, 2010, *Order Granting Motion for Expedited Treatment and Approving Tariff in Compliance with Commission Order*), and presently has pending before it in File No. ER-2011-0004, an agreement that would do so in another The Empire District Electric Company case.

OVERPAYMENT AMOUNT

3. What is the amount of a refund or adjustment, if any?

Based on a start date of July 5, 2007, the aggregate amount that should be returned to KCP&L Greater Missouri Operations Company customers in its MPS rate district is $1,975,363 and in its L&P rate district is $484,626, plus interest accrued on each amount after December 31, 2010, at KCP&L Greater Missouri Operations Company's short-term borrowing rate.

Through the testimony of Staff witness David C. Roos (Roos Direct, Ex. 5; Roos Rebuttal, Ex. 6, Correction to Roos Rebuttal, Ex. 7 and Tr. 142-160), Staff presents two different calculations of the amount, including interest through December 31, 2010, KCP&L Greater Missouri Operations Company's (formerly known as Aquila, Inc.) customers overpaid. The difference between the two calculations is the use of a start date of July 5, 2007, for one and the use of a start date of August 1, 2007, for the other. Based on a July 5, 2007, start date, the amount is $1,975,363 for the MPS rate district and $484,626 for the L&P rate district. Based on an August 1, 2007, start date, the amount is $7,084,354 for MPS and $1,710,484 for L&P. (Correction to Roos Rebuttal, Ex. No. 7) As the testimony in this case reflects, there is more than one rational methodology for calculating these amounts; however, based on the information available, the accuracy of each is not the same. For example, GMO initially calculated fuel costs

for the first four days of July, 2007, by taking the total fuel costs for the month of July, dividing them by thirty-one and multiplying the result by four. In contrast, Staff allocated the July 2007 fuel costs to the July 5th to 31st part of that month by multiplying the July 2007 fuel costs by the energy usage on Aquila's system during July 5th to 31st and dividing the result by the total energy usage on Aquila's system during the month of July 2007. GMO agrees, and no one disputes, that Staff's methodology for allocating these July 2007 fuel costs is more accurate. (Rush Rebuttal, Ex. 2, p. 2; Roos Rebuttal, Ex. 6, pp. 2-3; Tr. 154-160)

RETURN TO CUSTOMERS OF OVERPAYMENT

4. What is the appropriate mechanism for a refund or adjustment, if any?

A bill credit.

KCP&L Greater Missouri Operations Company's fuel adjustment clause provisions start on P.S.C. MO. No. 1 Sheet No. 124 in its tariff. (See Rush Direct, Ex. 1, Sch. TMR-1). They include Cost Adjustment Factors ("CAF") designed to collect during recovery periods ninety-five percent (95%) of the over- or under-collection of fuel and purchased power-related costs subject to GMO's fuel adjustment clause during each accumulation period. *Id.* If the Commission determines it has jurisdiction to order the overpayments be returned to GMO's customers, Staff recommends it do so by adding the overpayment amounts for each rate district to the ninety-five percent (95%) of the over- or under-collection amount for each rate district during the most recent accumulation period that is used to calculate the current period CAFs for an upcoming recovery period. (Rogers Direct, Ex. 3, p. 5). In other words, Staff proposes they be returned to GMO's customers through the mechanism in its fuel adjustment clause for changing the separately stated fuel adjustment clause charges on customer bills. The separate charge is required by Section 386.266.6, RSMo. Supp. 2010.

ACCOUNTING AUTHORITY ORDER

5. Is it appropriate under the facts of this case for the Commission to issue an Accounting Authority Order to GMO regarding any amounts that are contained in a refund or adjustment?

No.

As Staff witness Mark L. Oligschlaeger testified, an accounting authority order is Commission authorization to vary from Commission rule requirements of how certain costs are booked. (Oligschlaeger Rebuttal, Ex. 8, p. 3). Absent such an order a utility would violate one or more Commission rules if it booked the costs in that manner, and potentially would be subject to penalties. *Id.*; Section 386.570, RSMo. 2000. Here GMO is seeking authority to book any overpayments the Commission orders be returned to its customers in a way that would give GMO the opportunity to seek to recover from its customers in a future rate case those very amounts the Commission determines now GMO must return to them. (Rush Direct, Ex. 1, pp. 11-13; Ex. Oligschlaeger Rebuttal, Ex. 8, p. 3). Mr. Oligschlaeger, a certified public accountant who has been employed by the Commission since September 1981, has never seen this Commission grant such a bold request, and opines that, in his opinion, it would be inappropriate for the Commission to allow a utility the opportunity to seek later recovery of costs the Commission had found before should be refunded. (Oligschlaeger Rebuttal, Ex. 8, pp. 3-4, Tr. 167-179). It is nonsensical that if the Commission determines customers have overpaid under GMO's fuel adjustment clause and, therefore, are entitled to return of their overpayment, the same Commission should give GMO the opportunity to later seek to get back from its customers the same overpayment the Commission earlier determined GMO had collected from them, yet that is the very proposal GMO is making in this case. This Commission should be outraged and offended that GMO would even countenance making such a request of it.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 7th day of June, 2011.

/s/ Nathan Williams

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STAFF'S BRIEF

COMES NOW the Staff of the Public Service Commission ("Staff") and for its *Brief* to the Public Service Commission ("Commission") states:

Court of Appeals Holding

The Missouri Western District Court of Appeals held in *State ex. Rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.2d 361 (Mo. App. 2010), that it was unlawful for the Commission to include fuel, purchased power and emissions costs Aquila incurred before the July 5, 2009 effective date of Aquila Inc.'s (n/k/a KCP&L Greater Missouri Operations Company) Fuel Adjustment Clause ("FAC") tariff sheets when calculating the Cost Adjustment Factors ("CAFs") for MPS (Kansas City area customers) and L&P (St. Joseph area customers) associated with the first accumulation period of Aquila's FAC—June to November 2007.

The Court's stated rationales for its holding—statutory construction, filed rate doctrine and prohibition on retroactive ratemaking—provide no guidance on the question of whether the part of the accumulation period for which actual costs should be compared to predicted costs for determining the CAFs should start on July 5, 2007, or some later date.

True-up Year

When the tariff sheets in this case were originally before this Commission in January 2008, the Office of the Public Counsel, AG Processing, Inc. and the Sedalia Industrial Energy Users' Association argued the Commission's definition of a "true-up" year in its FAC rules

govern when an accumulation period could start. True-up year is defined in the Commission's FAC Rules (4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I)) as follows:

> 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. The first annual true-up period shall end on the last day of the twelfth calendar month following the effective date of the commission order establishing the RAM. Subsequent true-up years shall be the succeeding twelve (12)-month periods. If a general rate proceeding is concluded prior to the conclusion of a true-up year, the true-up year may be less than twelve (12) months.

In response to the Office of the Public Counsel's, AG Processing, Inc.'s and the Sedalia Industrial Energy Users' Association's argument that the foregoing rule provisions defining a true-up year control, Staff opined the tariff provision defining the accumulation period of June to November trumped the rule definition, and recommended the Commission adopt June 1, 2007 as the start date.

The purpose of defining a true-up year is found in Commission Rules 4 CSR 240-3.161(2)(O), (P) which, based on true-up years, define the time periods for which information is to be filed with the Commission and in 4 CSR 240-20.090(4)(A) which requires the utility to adjust its FAC as follows:

> (A) An electric utility with a FAC shall file one (1) mandatory adjustment to its FAC in each true-up year coinciding with the true-up of its FAC. It may also file up to three (3) additional adjustments to its FAC within a true-up year with the timing and number of such additional filings to be determined in the general rate proceeding establishing the FAC and in general rate proceedings thereafter.

This Commission-Rule-defined true-up year does not require that an accumulation period start at any particular time or define when an accumulation period must begin. It appears to Staff the most logical date within the first accumulation period for accruing the difference

between actual and predicted fuel, purchased power and emissions costs is the earliest date the Court has said is lawful—the effective date of the FAC tariff sheets: July 5, 2007.

No Authority to Grant Rate Relief

Unless the Office of the Public Counsel, AG Processing, Inc. or the Sedalia Industrial Energy Users' Association posted a bond with the Cole County Circuit Court to stay the rates in this case the Commission approved to become effective March 1, 2008, it is Staff's opinion the Commission has no more authority to order any refund here than it did after the Western District Court of Appeals held in 2005 the Commission had approved unlawful water rates for customers of Missouri American Water Company in Joplin, Missouri. *State ex rel. City of Joplin v. Public Service Commission*, 186 S.W.3d 290 (Mo. App. 2005). Based on a review of the online docket entries for Cole County Case No. 08AC-CC00248 in Case.net, they have not done so.

AG Processing, Inc. and the Sedalia Industrial Energy Users' Association have asserted the Commission's FAC rules and its clarification order conforming to those rules require that the FAC rates it approved to become effective March 1, 2008, were interim subject to refund. What the Commission said in response to the Staff's motion for clarification on this issue is:

> Aquila's FAC process and the Commission's regulations require that the FAC rate adjustments be interim, subject to true-up and prudence reviews.

In its motion, Staff stated:

> 4 CSR 240-20.090(4) provides, in part, as follows:
>
> > . . . If the FAC rate adjustment is in accordance with the provisions of this rule, section 386.266, RSMo, and the FAC mechanism established in the most recent general rate proceeding, the commission shall either issue an **interim rate adjustment order** approving the tariff schedules and the FAC rate adjustments within sixty (60) days of the electric utility's filing or, if no such order is issued, the tariff schedules and the FAC rate adjustments shall take

> effect sixty (60) days after the tariff schedules were filed. . . . [Emphasis added.]
>
> As a point of reference, the Staff would note that in interim rate increase cases, the Commission puts rates into effect as interim, subject to refund.

The Commission has accurately spoken. The rates it approved in this case are interim, subject to true-up and prudence reviews, but not interim subject to refund on court review, absent compliance with the requirements of section 386.520 RSMo. 2000—including the posting of a suspending bond.

Further, in response to a comment by AmerenUE that the utility should recover costs covered by insurance through the rate adjustment mechanism and any insurance proceeds be accounted for in true-up and prudence reviews, the Commission disagreed. The summary of the comment and the Commission's response follow:

> COMMENT: AmerenUE asserts that (7)(A)1.F. appears calculated to prevent inclusion of costs in the rate adjustment mechanism even if the utility has not received any insurance proceeds, and even if there has been no prudence disallowance. The true-up and prudence review provisions of SB 179 are designed to make after-the-fact adjustments, with interest, for items such as this. Before-the-fact preclusion of recovery of these costs is inappropriate and contrary to the statute, and is unnecessary to protect ratepayers, who will be fully protected by mandated true-ups and prudence reviews. Also, if additional requirements are to be imposed with regard to a particular FAC, those requirements should be spelled out in the order approving the RAM. The PSC staff asserts that the language in the rule is appropriate in that it requires the utility to identify any costs subject to insured loss or litigation and clarifies to the utility that such costs may not be recoverable as long as they are so subject. The PSC staff believes this serves as an appropriate incentive to the utility to vigorously pursue the funds tied up in litigation.
>
> RESPONSE: The commission finds that the methodology put forth by the PSC staff creates a greater incentive to expeditiously resolve such matters than the required interest payments noted by AmerenUE. Therefore, no change will be made.

The CAF rates set in this case were in effect from March 1, 2008 through February 28, 2009. Afterward, in File No. EO-2009-0431, the Commission approved a true-up adjustment

that was in effect from September 1, 2009 through August 31, 2010. Staff has also conducted a prudence review for the period June 1, 2007 through May 31, 2008, and its December 1, 2008 report is filed in File No. EO-2009-0115. Therefore, the opportunity for the Commission to provide relief in the true-up or prudence review for including costs in the period June 1 through July 4, 2007 for determining the CAF for the first recovery period does not exist.

Conclusion

The Commission should comply with the Court's mandate and use the fuel, purchased power and emissions costs for the period July 5 to November 30, 2007 to determine the correct CAFs for MPS and L&P for the first recovery period of March 1, 2008 through February 28, 2009. However, the Commission does not have the authority to order the refund of amounts by which the old CAFs exceed the corrected CAFs.

Staff notes that 4 CSR 240-3.161(17) and 4 CSR 240-20.090(14) both state:

> The commission shall review the effectiveness of this rule by no later than December 31, 2010, and may, if it deems necessary, initiate rulemaking proceedings to revise this rule.

Treatment of amounts collected, or refunded, later found to be unlawful is an issue that bears on the effectiveness of the Commission's rate adjustment mechanism rules, and could, if the Commission so desires, be addressed in a revision to the rules.

Respectfully submitted,

/s/ Nathan Williams
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I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 31st day of August, 2010.

/s/ Nathan Williams