

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

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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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 31st day of August, 2010.

/s/ Nathan Williams