# BEFORE THE PUBLIC SERVICE COMMISSION
# STATE OF MISSOURI

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| In the Matter of the Application of Aquila, Inc., for Authority to Acquire, Sell and Lease Back Three Natural Gas-Fired Combustion Turbine Power Generation Units and Related Improvements to be Installed and Operated near the City of Peculiar, Missouri | ) ) ) ) ) ) | Case No. EO-2005-0156 |

## STAFF'S RESPONSE TO COMMISSION ORDER DIRECTING FILING

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff) in response to the Commission's January 10, 2006 Order Directing Filing which directed the Staff and Aquila, Inc. to respond to the Office of the Public Counsel's (Public Counsel) December 29, 2005 Motion For Rehearing. In response to the Commission's Order, the Staff respectfully states that it believes Public Counsel's argument regarding Section 393.190 has merit. Thus, the Staff states as follows regarding Public Counsel's Motion For Rehearing:

### DISMISSAL OF APPLICATION

1. Public Counsel first asserts that the Commission failed to comply with the requirement of 4 CSR 240-2.116(4) that states that "[a] case may be dismissed for good cause found by the Commission after a minimum of ten (10) days notice to all parties involved." The Staff notes that the Commission's December 19, 2005 Report And Order had an eleven (11) day effective date.

### SECTION 393.190

2. Next, Public Counsel argues that the Commission incorrectly held that Section 393.190 RSMo 2000 does not apply to the transaction for which Aquila sought Commission

authorization for it to acquire, sell and lease back three natural gas-fired combustion turbine power generation units and related improvements to be installed and operated near the City of Peculiar, Missouri (Peculiar). The Staff concurs with the argument of the Public Counsel. The Public Counsel, in part in its Motion For Rehearing, relies on the Dissenting Opinion of two Commissioners filed on December 21, 2005 in Case No. EO-2005-0156. Based on the positions that the Staff has taken in prior filings in this case and takes in the instant pleading, the Staff finds that it agrees with the Dissenting Opinion in large part.

The Staff believes that there is no need to repeat those arguments in the Dissenting Opinion with which it agrees.[1] Nonetheless, the Staff may be able to provide assistance by citing history which clearly shows that Aquila is in error when it asserts that plant in any stage of construction prior to being "fully operational and used for service" is not "necessary or useful in the performance of [a utility's] duties to the public."

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[1] As the Commission will recall, the Staff asserted at page 3, paragraph 7 of Staff's Suggestions In Support Of Stipulation And Agreement, filed on September 14, 2005, and at page 3, paragraph 8 of Staff's Response To Order Directing Filing, filed on October 14, 2005, that Section 393.190.1 is applicable to the transaction that is the subject of Aquila's request for authority:

> 8. It is the opinion of the Staff that the transaction that Aquila entered into with the City of Peculiar on or about December 30, 2004 to accomplish a Chapter 100 financing involved the sale, assignment, lease, transfer, mortgage or other disposal of or encumbrance of a part of Aquila's "franchise, works or system, necessary or useful in the performance of its duties to the public." Therefore, Staff believes that pursuant to Section 393.190.1 RSMo 2000 those transactions were void; in particular, but not limited to, Aquila's delivery of a special warranty deed of realty to the City of Peculiar. Further, in Staff's view Section 393.100 provides that the Commission is without authority to ratify those transactions retroactively.
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> . . . .
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> 7. Unlike the situation in Case No. EF-2003-0465 where Aquila was seeking authority to encumber assets, here Aquila is seeking authority to transfer ownership of the South Harper Station as part of a Chapter 100 financing arrangement with the City of Peculiar where Aquila will lease-back the newly built station from the city with an option to purchase it for the sum of $1,000 plus payment in full of all outstanding bonds related to the Chapter 100 financing. Here Aquila will reap a financial advantage in that it will avoid taxes on the property transferred to the city and, instead, will make payments to the City of Peculiar less than the avoided taxes while retaining most of the benefits of ownership of the property.

In fact, the Commission does not have to look any further than the December 20, 2005 Western District Court of Appeals' Opinion in *StopAquila.org, et al. v. v. Aquila, Inc.*, Case No. WD 64985. The Western District Court of Appeals appears to have held that an investor-owned public utility must obtain a certificate of convenience and necessity to construct a generating facility, after a public hearing, both of which events must occur generally contemporaneous with the actual construction of the generating facility. How is it, as argued by Aquila and found by the Commission, that under Section 393.190.1, the Commission only obtains jurisdiction after the affected generating plant is constructed and is "fully operational and used for service," but under the December 20, 2005 Western District Court of Appeals decision, an investor-owned public utility must first obtain the Commission's determination, after a contemporaneous public hearing, that a generating plant proposed to be constructed by the utility is "necessary or convenient for the public service" (Section 393.170.3), in order for the utility to be authorized to construct the generating plant?

3. First, the Staff will address the Commission's Order of January 23, 1981 in Case No. EO-81-216[2] of Arkansas Power & Light Company (APL) cited by Aquila in its September 28, 2005 Response Of Aquila, Inc. To Motion To Stay and again in its October 24, 2005 Reply To Responses Of Public Counsel And Staff. This case is distinguishable on its facts. A 1987 Eighth Circuit United States Court of Appeals decision respecting APL and the Commission noted that APL served customers in Arkansas, Louisiana, Tennessee and Missouri and that APL's Missouri business constituted about 4% of APL's sales. *Arkansas Power & Light Co. v. Missouri Public Serv. Comm'n*, 829 F.2d 1444, 1446 (8th Cir. 1987). Although Aquila, Inc. is a

[2] *In the Matter of the Application of Arkansas Power & Light Company Regarding the Selling of Certain Pollution Control Facilities and Other Facilities and the Repurchasing of these Facilities.*

Delaware corporation,[3] its principal operating divisions are Aquila Networks – MPS and Aquila Networks – L&P, both of which operate solely in Missouri. Case No. EO-81-216 involved the sale and repurchase of certain pollution control facilities and other facilities at APL's Independence Steam Electric Station located in Independence County, Arkansas. Among other things, the Commission stated in its January 23, 1981 Order in Case No. EO-81-216 that:

> . . . there is no evidence that the facilities are necessary or useful parts of the generating system supplying electricity to Missouri residents. 43.5 percent of the Independence Steam Electric Station, of which the facilities are to be a part, is not owned by Arkansas Power & Light Company, and the station is not thereby completely available to Arkansas Power & Light Company for use to Missouri residents, if to be used for Missouri residents at all. Consequently, these facilities are not considered necessary and useful in the performance of the utility's duties to Missouri customers, even if the transaction were technically construed to be a sale.

As stand-alone statements of the law, the Staff does not concur with the Commission's statements in its January 23, 1981 Order in Case No. EO-81-216 that "the facilities to be encumbered do not yet exist as necessary and useful parts of the utility system, since the facilities are still to be constructed" and "a financing transaction does not logically come under the purview of this section [i.e., Section 393.190]."

4. The Staff notes two rate case Reports And Orders that predate the adoption of Initiative Proposition No. 1 on November 2, 1976: *Re Union Electric Company, Case Nos. 18,314, et al*., Report And Order, 20 Mo.P.S.C.(N.S.) 395, 403-06 (December 22, 1975) and *Re Kansas City Power & Light Company, Case Nos. 18,433, et al*., Report And Order, 20 Mo.P.S.C.(N.S.) 592, 600-04 (April 23, 1976). The Commission's December 19, 2005 holding in Case No. EO-2005-0156, that plant in any stage of construction prior to being "fully

[3] The December 21, 2005 Dissenting Opinion, at page 9, refers to Aquila as "a company headquartered in Missouri" and "a Missouri utility."

operational and used for service" is not "necessary or useful in the performance of [a utility's] duties to the public," is in direct conflict with these two Commission Reports And Orders.

In Case Nos. 18,433, et al., Union Electric Company (UE) proposed including in rate base $27.5 million construction work in progress (CWIP) that represented expenditures on the Callaway nuclear plant through December 31, 1975. The Commission decided to place Callaway CWIP in rate base. After quoting Section 393.270(4) in its Report And Order, emphasizing the words "return upon capital actually expended," the Commission stated that the CWIP being included in rate base is "capital actually expended" and the generating facilities being constructed, but which were not yet completed, were "*necessary* to serve the needs and demands of the customers of the company:"

> The Commission finds that the monies in this adjustment to rate base are "capital actually expended". Therefore, the issue becomes whether or not the Commission *should* allow nuclear CWIP in rate base given the facts in these cases in the exercise of the Commission's administrative discretion. It has been the long-standing policy of this Commission, and in the majority of jurisdictions, to disallow a return on property that is not "used and useful" in the public service. However, as other commissions have found, the term "used and useful" can reasonably be construed to include monies expended for constructing facilities *necessary* to serve the needs and demands of the customers of the company. [20 Mo.P.S.C.(N.S.) at 405; emphasis in the Commission's Report And Order.]

In Case Nos. 18,433, et al., filed by Kansas City Power & Light Company (KCPL), the Commission decided to place LaCygne 2 CWIP and Iatan 1 CWIP in rate base, but not Wolf Creek CWIP, stating as follows:

> The Commission finds that the Company should be allowed to include CWIP in rate base relating to LaCygne Unit No 2 and to Iatan Unit No. 1 but that it should not be allowed to include CWIP related to Wolf Creek Nuclear Unit No. 1.
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> [Quotation of Section 393.270(4) in Report And Order omitted here]
>
> The Commission finds that the monies in this adjustment to rate base represent "capital actually expended". Therefore, the issue becomes whether or not the

> Commission should allow CWIP in rate base given the facts in this case as an exercise of the Commission's regulatory discretion. [20 Mo.P.S.C.(N.S.) at 601.]
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> . . . . . the Commission adopts the following three criteria for inclusion of major CWIP in rate base:
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> (a) The total cost of the project, whether jointly or separately owned, shall exceed $50,000,000;
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> (b) No major CWIP will be allowed in rate base if the plant is expected to go on line within twelve (12) months following the effective date of a Report and Order granting a general rate increase; and
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> (c) The Company carries the burden of proving that the additional plant under construction is required as scheduled. [Id. at 604.]

5. Second, on June 26, 1981, in Case No. EF-81-366, KCPL filed an Application for authority to enter into, and approval of, various documents and agreements comprising a nuclear fuel lease transaction, and requesting specific accounting and ratemaking treatment. It should be immediately noted that KCPL's nuclear generating unit, Wolf Creek, did not become "fully operational and used for service" prior to September 3, 1985: "[t]he Commission finds the Wolf Creek Generating Station has met the Commission's in-service criteria and was fully operational, in accordance with Section 393.135, R.S.Mo. 1978, at 1:16 a.m. on September 3, 1985." *Re Kansas City Power & Light Co.*, Case Nos. EO-85-185 and EO-85-224, Report And Order, 28 Mo.P.S.C.(N.S.) 228, 235 (1986). The Commission in 1981 found that it had jurisdiction over the nuclear fuel lease transaction pursuant to Sections 393.190.1, 393.140.1, 393.140.8, 393.180, 393.200.1 and 393.220.1. *Re Kansas City Power & Light Co*., Case No. EF-81-366, Report And Order, 24 Mo.P.S.C.(N.S.) 686, 695 (1981).

Under the transaction that KCPL proposed, KCPL would transfer title to its nuclear fuel to Continental Illinois National Bank and Trust Company of Chicago as Trustee (Trustee) of the KCPL Fuel Trust (Trust). Upon transfer of title, the Trust would pay to KCPL a

sum equal to the book value of the nuclear fuel. KCPL and the Trust would enter into a nuclear fuel lease (Lease) whereby the Trust would lease the fuel to KCPL. The Trust would pay for the nuclear fuel required during the term of the Lease. Under the Lease, the Trust would lease to KCPL all of the nuclear fuel required by KCPL during the testing, start-up and commercial operation of Wolf Creek. The Trust would capitalize, as a cost of nuclear fuel, all of its expenditures until KCPL began to make payments under the Lease. At that time, KCPL would start to make payments pursuant to the terms of the Lease in amounts required to cover the amortization of the capitalized cost of the nuclear fuel and the ongoing financing and other charges payable by the Trust. KCPL would pay no sums under the Lease until the fuel began to generate heat at Wolf Creek. The Trust would use commercial paper notes, term notes, term loans and revolving credit loans to pay for the nuclear fuel. These financings would be secured by the Trust by assigning KCPL's payments under the Lease and the Trust's other rights under the Lease, and by granting a security interest in the nuclear fuel and assigned contract rights.

In Case No. EF-81-366, KCPL requested, for accounting purposes, that the Lease be treated as an operating lease and the Staff requested that the Lease be treated as a capital lease. The Commission denied KCPL's request to treat the Lease as an operating lease, for accounting purposes, and directed KCPL to treat the Lease as a capital lease. The Commission specifically made no ratemaking determination regarding the Lease. The Commission noted that KCPL's application was preceded by proceedings respecting UE:

> The Commission notes that the question of the appropriate accounting and ratemaking treatment for a proposed nuclear fuel lease was previously raised in Case Nos. EF-79-237 and EF-81-196 respecting Union Electric Company (hereinafter referred to as "UE"). Although UE and the Staff entered into a Stipulation And Agreement (which was approved by the Commission) that the lease be capitalized in order to correctly recognize the existence of the debt obligation created by the leasing agreement, UE and the Staff stipulated and agreed in that case that the lease may be treated by the Commission otherwise

> than as a capital lease, in a rate-setting proceeding. Based on the evidence presented in the instant contested proceeding, the Commission is not moved to act differently in this case. [24 Mo.P.S.C.(N.S.) at 694.]

There is considerably more detail to the transaction, but it will not be related herein.

6. The Application filed by Aquila on December 6, 2004 asked for Commission authorization for the acquisition, sale and lease back of three combustion turbine generators and related improvements under Section 393.190 and 4CSR 2402.060, 3.110 and 20.015. The Application did not ask in the alternative for the Commission to decline jurisdiction. At page 7, paragraph 16 of its Application, Aquila states that Aquila will treat the lease between Peculiar and Aquila as a capital lease.

7. The Application filed by Aquila on December 6, 2004 states at page 9, paragraph 20 that "Aquila's request is similar to that of Union Electric Company in Commission Case No. EO-2003-0035." (Footnote omitted.). In Case No. EO-2003-0035, UE's Application, filed on August 2, 2002, UE requested on page 1 of its Application that, "pursuant to Sections 393.180, *393.190* and 393.200, RSMo. and 4 CSR 240-2.060," the Commission enter its order authorizing UE to convey to and lease back from the City of Bowling Green, Missouri (City) certain land and improvements, and to issue, execute and perform the necessary agreements and instruments "for the purpose of the Applicant's *construction* of an electric generating facility [Peno Creek combustion turbine generators] in the City." (Emphasis supplied). On page 6 in the "WHEREFORE" clause of UE's August 2, 2002 Application, UE requested that the Commission issue its order authorizing UE to issue, execute and perform the necessary agreements and instruments "for the purpose of constructing the Applicant's electric generating facility in the City." The language in the Application appears to indicate that the construction of the generating facility was prospective, but that was not the case. (The South Harper generating station, which

is the subject of the transaction at issue in Case No. EO-2005-0156, started generating test power in early Summer 2005. The commercial operation dates for Unit 1, Unit 2 and Unit 3 were July 12, 2005, July 1, 2005 and June 30, 2005, respectively.)

A review of the pleadings in Case No. EO-2003-0035 reveals that the Staff filed "Staff's Report To The Commission" on November 5, 2002 in response to the Commission's Order Directing Filing in which the Commission directed the Staff to investigate and determine the effect of the proposed sale and lease back on the school districts. The "Staff's Report To The Commission," dated November 5, 2002, states in part, at page 2, paragraph 3 that AmerenUE had told the Staff that the Peno Creek "power plant began operating in June 2002 and was essentially constructed after January 1, 2002."

8. Fallout from the Commission's December 19, 2005 Report And Order in Case No. EO-2005-0156 is reflected in the Application filed by AmerenUE on December 27, 2005 for an Order authorizing AmerenUE to execute, deliver and perform the agreements and instruments necessary to assume a lease and related documents pertaining to the NRG Audrain combustion turbine generator facility (eight combustion turbine generator units with a combined nameplate capacity of 640 MWs) owned by Audrain County, Missouri which was constructed as part of a revenue bond project under Chapter 100, RSMo. AmerenUE is seeking Commission authorization, if and to the extent the transaction constitutes the issuance of an evidence of indebtedness by AmerenUE under Sections 393.180 and 393.200. The NRG Facility was constructed commencing in 2000 by Duke Energy.

AmerenUE is not seeking Commission authorization pursuant to Section 393.190.1. AmerenUE states at pages 7-8, in paragraph 10 of its Case No. EF-2006-0278 Application, that

the matter of the Commission's Section 393.190.1 jurisdiction is "[t]he key difference between this Application and the application approved in Case No. EO-2003-0035:"

> Even though it is not clear that Applicant is issuing an evidence of indebtedness within the meaning of Sections 393.180 and 393.200, RSMo, because of the unique nature of this Asset Purchase Transaction, Applicant seeks the Commission's authorization, if and to the extent the same may be required, under Sections 393.180 and 393.200, RSMo. In this regard, Applicant would note that this Application, with respect to Chapter 100 issues and issues relating to Sections 393.180 and 393.200, RSMo, is substantially identical to the application approved by the Commission in Case No. EO-2003-0035 relating to Applicant's Peno Creek CTG facility located in Bowling Green, Missouri. The key difference between this Application and the application approved in Case No. EO-2003-0035 is that the Commission elected to exercise its jurisdiction over the Peno Creek CTG transaction under Section 393.190.1, RSMo, on the basis that the transfer of a part of Applicant's franchise, works or system necessary or useful in the performance of its duties to the public….

AmerenUE is not seeking the Commission's authorization under Section 393.190.1 even though it states at the bottom of page 10, paragraph 12, and the top of page 11, paragraph 13, of its Application that it needs the NRG Audrain Facility resource for the summer of 2006:

> Applicant also states that even if the NRG Audrain Facility were not structured with the Chapter 100 arrangement with the resulting cost savings related to the property tax exemption, Applicant would nevertheless purchase the NRG Audrain Facility outright with appropriately modified terms and conditions, so that it could become a generating resource to meet Applicant's resource needs, including capacity needs for the Summer of 2006.

Motion For Expedited Treatment

> 13. Applicant needs additional generating capacity to meet a prudent level of reserves for the summer of 2006. Applicant has determined to obtain this needed capacity via the Asset Purchase Transaction. Therefore, Applicant, respectfully requests that the Commission give this application expedited treatment . . . Expediting this proceeding as requested herein will avoid the harm that could occur if Applicant is unable to obtain the NRG Audrain Facility to meet its Summer 2006 capacity reserve margin requirements, including the possibility that such capacity would have to be acquired at a higher cost or from resources that are otherwise less desirable. Conversely, expediting this Application allows Applicant to obtain a necessary resource needed to provide capacity. . . .

## SANCTIONS

9. Public Counsel asserts in its Motion For Rehearing in the instant case that the majority of the Commission erred in finding that the Public Counsel's request for civil and criminal penalties against Aquila are not properly before it. Said request that "the Commission should immediately pursue all civil and criminal remedies available to it, including those set forth in Sections 386.560 through 386.600 RSMo 2000, to punish Aquila and all of its employees and agents who participated" is found at page 8, paragraph 20 of Public Counsel's Response To Order Directing Filing filed by Public Counsel on October 14, 2005. Should the Commission decide to pursue the question whether there is basis for it seeking civil and/or criminal penalties respecting Aquila's acts, there is much work required that Public Counsel does not address in its request. The Staff will attempt to provide some historical perspective and relates the matter below only for the procedural lesson that may be learned from it.

10. Missouri Public Service Company (MPS), a predecessor to Aquila, Inc., was a partial owner of Jeffrey Energy Center Unit No.1 (Jeffrey 1), which was nearing completion of construction when MPS filed its rate case, Case No. ER-78-29, which had an operation-of-law date of July 5, 1978. On June 16, 1978, MPS filed a late-filed exhibit which included a letter and telegram from a representative of KCPL, the operator of the facility. The letter indicated that Jeffrey 1 was in service on June 11, 1978, delivering power to the owners in the approximate amount of the ownership percentages, and the telegram indicated that Jeffery 1 was on line delivering power to the owners, in their respective ownership percentages, on June 16, 1978. Based on the representations in these documents, the Commission included MPS' proportionate share of Jeffrey 1 as plant in service in rate base for the purpose of setting rates in Case No. ER-78-29.

In MPS' next electric rate case, ER-79-60, the Staff and Public Counsel, based on an investigation, contended that Jeffrey 1 did not actually become "fully operational and used for service" until July 30, 1978. MPS asserted that it determined Jeffrey 1 to be "fully operational and used for service" on June 30, 1978, based upon its judgment. Based on the proceedings in Case No. ER-79-60, the Commission held that Jeffrey 1 did not become fully operational and used for service until July 30, 1978. Thus, the Commission was confronted with "the fact that the Company received revenue based upon the inclusion of Jeffrey 1 in its rate base for the period July 5, 1978 (when the rates approved in the last case went into effect) through July 30, 1978, contrary to the prohibition of Section 393.135." The Staff suggested, and the Commission found, that the next time after Case No. ER-78-29 that Jeffrey 1 could have been placed in rate base was December 14, 1978 when interim rates went into effect for MPS. Since MPS collected $2.1 million from July 5 to December 14, 1978 based on Jeffrey 1 being in service, the Commission held that MPS had collected these funds in violation of Section 393.135. The Commission directed as follows: "We therefore instruct the General Counsel of the Commission to pursue such remedies at law as appear feasible to recover the foregoing amount on behalf of the ratepayers of Company and for any statutory penalties available." *Re Missouri Public Service Company*, Case No. ER-79-60, et al., Report And Order, 23 Mo.P.S.C.(N.S.) 150, 171-75, 175 (1979). The Commission clearly recognized the legal difficulty of literally obtaining a refund of the $2.1 million collected by MPS from July 5 to December 14, 1978 based on Jeffrey 1 being in service in June 1978.

There were no further proceedings on this matter before the Commission. The General Counsel did file suit in the Circuit Court of Jackson County, *State ex rel. Missouri Public Serv. Comm'n vs. Missouri Public Serv. Comm'n*, Case No. CV80-25307, Civil F, and

ultimately the Court denied the Commission's Motion For Partial Summary Judgment and sustained MPS' Motion For Summary Judgment. (Order And Judgment of the Jackson County Circuit Court, dated February 14, 1985, is attached hereto). The Court found that the Commission had proceeded improperly and dismissed the Commission's action without prejudice to the Commission's reassertion of its claims if it were to follow the appropriate procedure and then subject MPS to prosecution of an action for recovery of statutory penalties and refunds if consistent with the findings of the Commission as a result.

The Court held that the Commission's decision approving the inclusion of Jeffrey 1 in MPS' rate base in Case No. ER-78-29 had never been set aside and therefore the Commission's inclusion of Jeffrey 1 in rate base in Case No. ER-78-29 was conclusive in Case No. CV80-25307 and all other collateral actions or proceedings. The Court also held that the questions of whether Jeffrey 1 was fully operational and used for service on or prior to the operation-of-law date in Case No. ER-78-29, and whether MPS thereby unlawfully collected certain revenues from its ratepayers were not material issues in MPS' 1979 rate case, Case No. ER-79-60, and were not essential to the Commission's Report And Order in that case.

The Court held that the Commission had not exhausted its primary jurisdiction in a complaint proceeding in which MPS was afforded a full and proper hearing on the question of whether MPS unlawfully collected certain revenues from its customers attributable to inclusion of Jeffrey 1 in rate base before Jeffrey 1 had become fully operational and used for service. If the Commission were to find in a complaint proceeding that MPS unlawfully collected certain revenues from its customers attributable to the inclusion of Jeffrey 1 in rate base before Jeffrey 1 had become fully operational and used for service, the Commission could then direct its General

Counsel to prosecute an action against MPS for recovery of statutory penalties and refunds. The Staff also cites the Commission to *State v. E.H. Carroll*, 620 S.W.2d 22 (Mo.App. S.D. 1981).

WHEREFORE the Staff files this pleading as Staff's Response To Commission Order Directing Filing.

Respectfully submitted,

**/s/ Steven Dottheim**
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## Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all counsel of record this 17th day of January 2006.

**/s/ Steven Dottheim**

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

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| STATE OF MISSOURI EX REL. MISSOURI PUBLIC SERVICE COMMISSION, | ) | |
| Plaintiff, | ) | Case No. CV80-25307 |
| vs. | ) | Civil F |
| MISSOURI PUBLIC SERVICE COMPANY, | ) | |
| Defendant. | ) | |

ORDER AND JUDGMENT

This case comes before the Court upon pending motions for summary judgment, Plaintiff's Motion for Partial Summary Judgment, and Defendant's Motion for Summary Judgment. The motions have been exhaustively briefed and have been fully argued by the parties. Both parties have indicated that the pending motions are ripe for disposition, there being (and the Court so finds) no genuine issue as to any fact material to the Court's disposition of said motions and defendant being entitled to judgment dismissing this action as a matter of law.

The Court finds and concludes that:

1. The Public Service Commission's claims in the action pending before the Court are dependent upon the Commission establishing, inter alia: that Jeffrey Energy Center Unit No. 1 was not fully operational and used for service (within the meaning of §393.135, R.S.Mo. 1978) on or prior to the operation of law date (July 5, 1978) in Missouri Public Service Company's 1978 rate case (Case No. ER-78-29); that, therefore, costs attributable to Jeffrey Energy Center Unit No. 1 were not lawfully includable in the Company's rate base in the Company's 1978 rate case; that the Company collected certain revenues from its ratepayers attributable to inclusion of Jeffrey Energy Center Unit No. 1 in the Company's rate base before Jeffrey Energy Center Unit No. 1 had become fully operational and used for service; and that the Company's collection of such revenues was unlawful, even though

such revenues were collected pursuant to tariffs which had been approved by the Commission in the Company's 1978 rate case.

2. The Commission approved the inclusion of Jeffrey Energy Center Unit No. 1 in the Company's rate base in the Company's 1978 rate case, and authorized the Company to collect revenues attributable thereto from its customers; that decision of the Commission has never been set aside.

3. The Commission's approval of the inclusion of Jeffrey Energy Center Unit No. 1 in the Company's rate base in the Company's 1978 rate case is a decision which is and remains conclusive in this and all other collateral actions or proceedings. Section 386.550, R.S.Mo. 1978.

4. The Commission's decision in the Company's 1978 rate case precludes the Commission from maintaining this action.

The Court further finds and concludes, in the alternative, that:

5. The subject matter of the Company's 1979 rate case (Case No. ER-79-60) solely involved the approval of the appropriate level and design of the Company's prospective rates. The question of the correct in-service date of Jeffrey Energy Center Unit No. 1 (as defined in the Hearing Memorandum) related solely to what, if any, cost of service adjustment therefor should be made in the course of determining the appropriate level of the Company's prospective rates.

6. Both adjustment of the Company's future rates based on the alleged premature inclusion of Jeffrey Energy Center Unit No. 1 in the Company's rate base in the Company's 1978 rate case and authorization of refunds for ratepayers based thereon would have involved retroactive rate making in the context of the Company's 1979 rate case. Consequently, the questions (a) whether Jeffrey Energy Center Unit No. 1 was fully operational and used for service on or prior to the operation of law date in the Company's 1978 rate case (July 5, 1978) and (b) whether the Company thereby unlawfully collected certain revenues from its ratepayers were not material issues in the Company's 1979 rate case.

7. The Commission's discussion of the Jeffrey Energy Center Unit No. 1 in-service date in the Commission's Report in the Company's 1979 rate case was not essential to the order and decision of the Commission in the Company's 1979 rate case.

8. The Commission has not exhausted its primary jurisdiction by affording the Company a proper hearing on the question of whether the Company unlawfully collected certain revenues from its customers attributable to inclusion of Jeffrey Energy Center Unit No. 1 in the Company's rate base before Jeffrey Energy Center Unit No. 1 had become fully operational and used for service, so as to subject the Company to prosecution of an action for recovery of statutory penalties and refunds.

9. This action was instituted prematurely, because the Commission did not exhaust its primary jurisdiction before bringing this action.

10. For each of these reasons, defendant's Motion for Summary Judgment should be and hereby is sustained, and plaintiff's Motion for Partial Summary Judgment should be and hereby is denied.

11. The foregoing findings of fact and conclusions of law, and the order and judgment below, are not to be construed as adjudicating any of the other defenses raised by the defendant in its Motion for Summary Judgment, or contested by the plaintiff in its Motion for Partial Summary Judgment.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED THAT:

Plaintiff's Motion for Partial Summary Judgment is denied;

Defendant's Motion for Summary Judgment is sustained;

This action be and hereby is dismissed, without prejudice to reassertion of plaintiff's claims if the Commission's decision approving the inclusion of Jeffrey Energy Center Unit No. 1 in the Company's rate base in the Company's 1978 rate case (Case No. ER-78-29) later is set aside and if the Commission subsequently exhausts its primary jurisdiction in a complaint proceeding in which the defendant is afforded a full and proper hearing; and

Defendant recover of the plaintiff defendant's costs of action.

2-14-85

Judge of the Circuit Court

A TRUE COPY - ATTEST
CIRCUIT COURT OF JACKSON COUNTY, MO.
COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF JUDICIAL RECORDS
BY _____ DCA