BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the tariff filing of	)	
*A*lgonquin Water Resources of Missouri,	)	
LLC to implement a general rate increase	)	Cases Nos. WR-2006-0425
for water and sewer service provided	)	SR-2006-0426
to customers in its Missouri service areas.	)	

ALGONQUIN WATER RESOURCES OF MISSOURI, LLC'S RESPONSE TO PUBLIC COUNSEL'S APPLICATION FOR REHEARING AND OBJECTION TO MOTION FOR EXPEDITED TREATMENT

COMES NOW Algonquin Water Resources of Missouri, LLC ("Algonquin") and, in response to the Office of the Public Counsel's (Public Counsel) Application for Rehearing and the Public Counsel's Objection to Algonquin's Motion for Expedited Treatment, states as follows in response to the Missouri Public Service Commission (Commission):

I. Rate Case Expense

The Public Counsel's Application for Rehearing is limited solely to the issue of rate case expense. Rate case expenses are routinely accepted as a cost of doing business that utility companies are allowed to recover in rates. The Commission has consistently recognized the regulated utility's right to incur rate case expenses where the facts appear to justify a rate case:

> The Commission does not want to put itself in the position of discouraging necessary rate cases by discouraging rate case expense. This is a particularly treacherous area for the Commission to be addressing in that the Commission cannot be viewed as having a dampening effect upon a regulated company's statutory procedural rights to seek out a rate increase when it believes that facts so justify it. **Disallowing prudently incurred rate case expense can be viewed as violating the**

company's procedural rights.[1]

The Commission has followed a similar approach in numerous other cases.[2] Thus, Public Counsel bears a heavy burden in its challenge to the *Report and Order's* findings and conclusions on rate case expense. Moreover, Section 386.500.1 of Missouri's Revised Statutes provides that the Commission shall only grant an application for rehearing "if in its judgment sufficient reason therefor be made to appear." Public Counsel's application fails to offer anything that was not already presented to (and rejected by) the Commission in the course of this case, so Public Counsel has failed to establish sufficient reason to grant its application.

A. The Commission's Finding and Conclusion that Algonquin Prudently Incurred $174,954 of Rate Case Expense Is Supported by Competent and Substantial Evidence.

Public Counsel argues that the Commission's findings on rate case expense are not supported by competent and substantial evidence.[3] On the contrary, the Commission's *Report and Order* cites record evidence clearly detailing Algonquin's actual rate case expenses for consulting fees and legal fees. Specifically, the *Report and Order* cites Staff witness Boateng's testimony identifying $174,954 in actual rate

[1] *In re St. Joseph Light & Power Company*, 2 Mo.P.S.C.3d 248, 260 (1993)(emphasis added); *see also In re St. Joseph Light & Power Company*, 3 Mo.P.S.C.3d 207, 214 (1994).

[2] *In re Missouri Gas Energy*, 12 Mo. PSC 3d 581, 623 (September 21, 2004) ("MGE is entitled to recover its reasonable and prudently incurred cost of presenting this rate case to the Commission. Such costs are routinely accepted as a cost of doing business for which the company will be allowed to recover its costs in rates . . . .")(emphasis added); *In re Missouri-American Water Company*, 4 Mo.PSC 3d 205, 221-222 (November 21, 1995) ("The Commission finds that it is in the public interest to allow such expenses for the accurate and adequate presentation of Company's rate case."); *In re Missouri-American Water Company*, 2 Mo.PSC 3d 446, 449 (November 18, 1993) ("The general rule governing rate case expense provides that those expenses which are known and measurable, reasonable, necessary and prudently incurred in the preparation and presentation of the Company's case may be included in the expenses of the Company."); and, *In re Missouri Cities Water Company*, 2 Mo.PSC 3d 60, 68-70 (January 8, 1993) ("Public Counsel and Platte County Intervenors want to categorize this case as 'a case that should not have been filed.' The Commission does not want to put itself in the position of discouraging necessary rate cases by denying rate case expense.") (emphasis added).

case expenses as well as documents requested during the hearing.[4] The actual invoices supporting the $174,954 were admitted into evidence without objection. *See* Exh. 32 and 33. The testimony in this case demonstrates that Algonquin's total rate case expenses will exceed $225,000.[5] The amount utilized in the Commission's order is much less than actual expenses as it only includes amounts incurred prior to the hearing and does not include preparation for the hearing and post-hearing work, such as preparing this response to Public Counsel's Application for Rehearing. In short, the $174,954 in rate case expense allowed by the Commission is clearly supported by the record evidence.[6] *See* Ex. 16(HC) at 11, Exh. 32 and 33, and Tr. 512.

The Public Counsel further alleges that the amount of rate case expense incurred by Algonquin was not prudently incurred and that "the amount was not verified as entirely prudent by the Staff, only that it was a number provided by Algonquin." Public Counsel App. Reh., p. 3. In examining this allegation, the Commission should keep in mind that the rate case process starts with a presumption that utility costs are "prudently incurred." *In the Matter of Missouri-American Water Company*, Report and Order, 9 Mo. P.S.C. 3d 254 (2000), *citing In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) *(quoting Anaheim, Riverside, et al. v. Federal Energy Regulatory Commission*, 669 F.2d 779 (D.C. Cir. 1981). The Commission went on, in that case, to describe the process as follows:

> In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of

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[3] OPC *Application*, pp. 1, 2.
[4] *See* Ex. 16(HC) at 11; Tr. 512; *see also* Exh. 32 and 33.
[5] Tr. 480.
[6] Ex. 16(HC) at 11; Tr. 480 and 512; Exs. 32 and 33.

> prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." *State ex rel. City of St. Joseph v. Public Service Commission*, 325 Mo. 209, 223, 30 S.W.2d 8, 14 (banc 1930).
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> *Id*.

While the Staff alleged that the Company should not have pursued a general rate case, no party challenged the underlying prudence of the expenditures themselves. In other words, the Staff and Public Counsel approaches to this issue left an "all or nothing" question for the Commission and Algonquin had no burden to show that the individual items were prudent.

B. The Commission's Finding and Conclusion that Algonquin Prudently Incurred $174,954 of Rate Case Expense Is Just and Reasonable.

1. Small Company Rate Case

Public Counsel claims that "not all of Algonquin's rate case expense was prudently incurred," and Public Counsel suggests that Algonquin should have pursued an informal "small company rate case" allowed by the Commission's rules to resolve some issues.[7] First, this case was not frivolously filed. On the contrary, it is the only formal case that has ever been filed for these properties. Indeed, the Commission's Staff acknowledges that there will be a significant increase in the Company's revenue requirement,[8] and Staff did not identify any specific Company cost included in rate case

[7] OPC *Application*, p. 3.
[8] Ex. 15, Boateng Reb., p. 4.

expense that it suggests was imprudently incurred.[9] Accordingly, the Commission's *Report and Order* recognized that the company required a rate increase and Public Counsel does not challenge this decision. Nevertheless, Public Counsel argues that rate case expenses should be denied because Public Counsel believes that a small company rate case proceeding should have been attempted before the formal case was filed. Public Counsel's position is unlawful and unreasonable for the following reasons:

a) **Statutory Rate Making Procedure was Followed**. Section 393.150, RSMo provides the sole statutory basis for rate case filings. Algonquin followed the process outlined by that statute. Section 393.150, RSMo does not contain any requirement that a public utility first pursue a small company rate case;

b) **No Regulation Requires Filing of Small Case**. Commission regulations contain no requirement that a public utility pursue a small company rate case before filing a formal rate case; and,

c) **Agreement Not a Likely Outcome**. The small company rate case procedure, as it appears in the Commission regulations, depends upon agreement between the Staff and the company in the first instance, and, ultimately, with the OPC. If the Company cannot reach agreement with these parties, its sole remedy is to file a formal rate case.[10] Many of the issues tried in this case were disputed in the acquisition case and no agreement was reached. Nothing about the formal filing process prohibits agreement among the parties, yet no agreement was reached in this case.[11] There is no reason to believe that pursuit of the small company rate case process would have done

[9] This is significant given that Staff spent over 1,800 hours of time on this case (excluding Staff counsel time) prior to January of this year. Exh. 34; Tr. 513-514.
[10] 4 CSR 240-3.330(1)(G) and 4 CSR 240-3.635(1)(G).

anything but prolong the rate making process. Even Staff witness Boateng did not believe that all the issues could have been resolved in a small company rate case.[12]

Thus, the Commission correctly held that Algonquin was "not obligated to use the Commission's small company rate increase procedure, and should not be punished for using the formal rate case option."[13]

2. Unrecorded Plant

Public Counsel complains that Algonquin's decision to seek recovery of unrecorded plant in this case was imprudent, and Public Counsel argues that Algonquin's rate case expense should therefore be reduced.[14] Public Counsel's claim is contrary to Algonquin's right to make decisions of management and litigation strategy. The Commission has historically been hesitant to disallow rate case expenses. "The company is entitled to present its case as it sees fit and the Commission will not lightly intrude into the company's decisions about how best to present its case."[15] The fact that the Commission may not ultimately agree with a utility's argument, does not make the costs associated with the pursuit of that issue imprudent.

Public Counsel's argument contradicts the company's fundamental right to present its case and, if adopted, would exceed the Commission's statutory authority in that it is a transparent attempt to manage the company's litigation strategy. The Missouri Supreme Court has explained that Commission's authority to regulate certain aspects of a public utility's operations and practices <u>does not</u> include the right to dictate

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[11] Tr. 498.
[12] Tr. 505.
[13] *Report and Order*, p. 33.
[14] OPC *Application*, p. 3.
[15] *In re Missouri Gas Energy*, 12 Mo. PSC 3d 581, 623 (Sept. 21, 2004).

the manner in which the company conducts its business.[16] Likewise, the Missouri Court of Appeals has stated:

> The utility's ownership of its business and property includes the right to control and management, subject, necessarily to state regulation through the Public Service Commission. The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to the public welfare.[17]

Thus, the *Report and Order* lawfully and properly recognized that Algonquin should not be punished for exercising its statutory right to file a rate case and develop its own litigation strategy.

Public Counsel alleges that Algonquin "was well aware that what it called 'unrecorded plant' was not an allowable item in rate base." Public Counsel App. Reh., p. 4. Public Counsel makes this statement based on the fact that Staff had previously taken a position as to rate base in the acquisition case. However, the Commission had never made a finding as to rate base (in the acquisition case, or any other case). One need look no farther than this case to see that it is possible for the Commission to make a decision that is not consistent with its Staff's position.

Similarly, Algonquin's position does not represent an "end run" around Algonquin's promise to not seek recovery of any acquisition premium. Until the Commission established rate base, it was unclear what the acquisition premium would be. The Commission's order in the acquisition case acknowledges that this fact would

[16] *State ex rel. City of St. Joseph v. PSC*, 30 S.W.2d 8 (Mo. banc 1930).

be addressed in the rate case stating that Algonquin "would not seek to recover, through customer rates, any acquisition premium associated with this transaction that may be determined by the Commission in a rate case." *In the Matter of the Joint Application of Silverleaf Resorts, Inc., and Algonquin Water Resources of Missouri, LLC*, Order Approving Sate of Assets, Case No. WO-2005-0206 (2005). Thus, it was always contemplated that a rate case would be necessary to determine what p[ortion of the purchase price the Commission would find to constitute acquisition premium.

3. Rate Case Timing

Public Counsel argues that the case was prematurely filed because there was only one and a half months of Algonquin data included in the original test year filed by the Company.[18] Public Counsel's argument is not supported by the law or the facts.

First, there is no statute or rule that limits when a rate case can be filed. Second, by the time the case was updated, there was thirteen and half months (or more than a year) of Algonquin data that was reviewed by the parties.[19] Public Counsel appears to imply that the update would not have been necessary had Algonquin waited. However, updates and true-ups are common parts of the Missouri rate case process even where an entity has not changed ownership.[20]

Third, it should have come as no surprise that a formal case was filed in that surrebuttal testimony in the acquisition case stated as much.[21] Lastly, with the need for rate relief identified by the Staff case, the Company could not afford to suffer its losses

[17] *State ex rel. Harline v. PSC*, 343 S.W.2d 177, 181 (Mo. App. 1960).
[18] OPC *Application*, p. 5.
[19] Ex. 3, Loos Reb., p. 3.
[20] Tr. 484-485.
[21] Ex. 31, p. 4.

while it waited to file a rate case. Algonquin was under earning as of the time it purchased the properties in August of 2005.[22] It is unclear how long Public Counsel believes the utility should wait before addressing this deficiency.

For these reasons, Public Counsel's arguments related to the timing of this rate case should be rejected.

C. The Commission's *Report and Order* Provides Necessary Guidance To Allocate Rate Case Expense.

OPC claims that the *Report and Order* fails to give any guidance on how rate case expense should be allocated among ratepayers.[23] On the contrary, the Commission's *Report and Order* clearly adopts Algonquin's proposed on rate design. (*Report and Order* pp. 34-35).

In fact, there is evidence in the record as to only one method of allocating rate case expense. Algonquin witness Loos proposed to allocate rate case expense by system. Exh. 1, Loos Dir., Sch. LWL-5; Exh. 3, Loos Reb., p. 2-3. In other words, he proposed to allocate one fifth of the rate case expense to each of the three water systems and two sewer systems. Neither the Staff nor the Public Counsel proposed a different allocation. Certainly there is no proposal in the record to allocate rate case expense on a "customer-specific" basis as suggested by the Public Counsel.

The Public Counsel's arguments about allocation of rate case expense are without merit and must be denied.

D. Expedited Treatment

On March 22, 2007, Public Counsel filed its objection to Algonquin's request for

[22] Tr. 484.
[23] OPC *Application*, p. 6.

expedited treatment. Public Counsel argues that there is no good cause for allowing Algonquin's request for expedited treatment. However, both the Commission's decision and its Staff's position recognize that Algonquin is entitled to extensive rate relief. Further, Algonquin is a small water company and therefore has less cushion for the effects of regulatory lag.

As of April 2, 2007, Algonquin will have already waited the full approximate eleven month period of time Section 393.150.1, RSMo allows the Commission to suspend rate tariff sheets. Algonquin will continue to suffer operating losses until such time as its compliance tariff sheets become effective. The Commission cannot suspend a utility's tariff sheets for an infinite number of eleven month periods, as suggested by the Public Counsel.

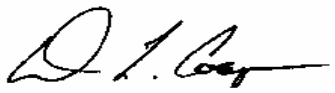
There are no unresolved issues regarding the proper amount of rate case expense or the allocation of this expense. The Report and Order was clear in this regard. Therefore, the Commission should deny Public Counsel's motion objecting to expedited treatment and approve Algonquin's compliance tariff sheets for service on and after April 2, 2007.

II. SUMMARY AND CONCLUSION

The Commission's *Report and Order* did not err in finding and concluding that Algonquin has prudently incurred $174,954 of rate case expense in prosecuting this case through December 31, 2006.[24] Accordingly, Public Counsel's application for rehearing and objection to Algonquin's request for expedited treatment should be denied.

[24] Ex. 16, Boateng Sur., p. 11; Ex. 32; Ex. 33.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 26th day of March, 2007, to:

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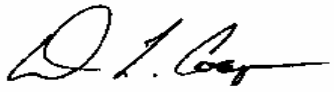

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