

BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

August 10, 2010

Jefferson City, Missouri

Volume 1

In the Matter of

KCP&L Greater Missouri Operations)
Company for Authority to Implement)
Rate Adjustments Required by)
4 CSR 240-20.090(4) and the) File No. E0-2008-0216
Company's Approved Fuel and)
Purchased Power Cost Recovery)
Mechanism.)

NANCY DIPPELL, presiding
DEPUTY CHIEF REGULATORY LAW JUDGE.

REPORTED BY:
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JUDGE DIPPELL: This is Case No. E0-2008-0216 in the matter of Aquila Inc., doing business as 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.

My name is Nancy Dippell and I am the regulatory law judge assigned to this case. And we come here today for a prehearing conference after the return of this case from the court system to the Commission. I'm going to begin by letting the attorneys make their entries of appearance. And I'll start with Staff.

MR. WILLIAMS: Nathan Williams, Deputy Counsel, P.O. Box 360, Jefferson City, Missouri, 65102.

JUDGE DIPPELL: And the interveners?

MR. WOODSMALL: David Woodsmall with the firm Finnegan, Conrad and Peterson, 428 East Capitol, Suite 300, Jefferson City, Missouri, 65101.

JUDGE DIPPELL: And additional interveners?

MR. COMLEY: Yes, Judge Dippell. Good morning. Let the record reflect the entry of Mark W. Comley of Newman, Comley and Ruth, 601 Monroe, Suite

301, Jefferson City, Missouri on behalf of the City of Kansas City.

JUDGE DIPPELL: And the Company?

MR. ZOBRI ST: Carl Zobrist,
Sonnenschein, Nath and Rosenthal, 4520 Main Street,
Suite 1100, Kansas City, Missouri, 64111 on behalf of
KCP&L Greater Missouri Operations Company.

JUDGE DIPPELL: And the Office of
Public Counsel?

MR. LEWIS: On behalf of the Office of
Public Counsel, my name is Lewis Mills and my address
is Post Office Box 2230, Jefferson City, Missouri,
65102.

JUDGE DIPPELL: Okay. And you're
breaking up just a little bit, Lewis. We may ask you
to repeat yourself or if others can't hear you. Were
you able to hear everyone else?

MR. LEWIS: Yes, fairly well.

JUDGE DIPPELL: Okay. I also had
received calls prior to this conference from AmerenUE
and from the City of St. Joseph and they both asked to
be excused from this proceeding, which I granted with
my usual caveat that any rulings that come out of such
a conference or any agreements, they're kind of stuck
to.

So we come here today because this case came back to us and there was a motion for setting this conference quickly in trying to decide where to go from here on some responses about perhaps some disagreements about how much remains to be accomplished. And so I guess I'll just open it up. I'm going to let

Mr. Woodsmall, since he started our motion to get us here quickly -- I'll let you just kind of briefly state what brings us here today, if you don't mind.

MR. WOODSMALL: Okay. Back in 2007 the Commission had a rate case involving what was then known as Aquila. The Commission authorized -- or the Commission indicated in its Report and Order that it would approve a fuel adjustment clause for Aquila if they filed tariffs consistent with the Report and Order.

The Commission then approved rate tariffs, but it took some time before they approved fuel adjustment clause tariffs. Those fuel adjustment clause tariffs were ultimately filed and approved with an effective date of, I believe it was July the 5th of 200-- 2007. Subsequently, Aquila came in -- and it was still Aquila then -- and I'm going to use Aquila rather than GMO, just to try and keep the names

straight.

Aquila subsequently came in for its fuel adj -- first fuel adjustment clause adjustment and that adjustment period -- the cost reflected in that adjustment period were from June 1 of 2007 through November 30th of 2007. So the adjustment period reflected -- preceded the approval of the fuel adjustment clause tariffs.

The Commission nevertheless approved those fuel adjustment clause tariffs. Public Counsel and SEIUA/AGP took a writ of review. Ultimately that reached the Western District Court of Appeals. And the Western District found that the Commission had exceeded its authority, that there was no statutory authority to capture cost that preceded the effective date of the fuel adjustment clause tariffs.

The Supreme Court denied transfer and that case has since been remanded all the way back to the Public Service Commission. So that's where we're at today. We have a Western District Court of Appeals decision and the question is, how do we implement that decision.

If you want me to go further, I think there is some question as to maybe the meaning of that decision, the implications of that decision. So it

would be my position that there be some pleadings to the Commission in short order where the parties explain what they think the implications are and ask the Commission to take further action. It would be my intention that that's what would come out of this case, is some kind of procedural schedule to place this matter before the Commission.

JUDGE DIPPELL: And so you would advocate perhaps each of the parties filing a pleading stating how they would see the case to proceed from here and what orders from the Commission they would expect and maybe the Commission would either hear it on the pleadings or decide if they wanted -- needed oral arguments or something to that effect?

MR. WOODSMALL: Right. Not speaking for any other party, I believe there's -- there may be two questions here. The first question is: What are the implications in the Commission order. And in my mind, the implication is that it will involve some type of refund. I believe that can be done solely on pleadings. It is, I think, entirely a legal question.

The second question if the Commission agrees that refunds are in order may involve some factual determinations, how do you make that refund; be it through a credit on bills, be it through an

actual refund, be it through the fuel adjustment clause, tariffs. But the first question, the threshold question as to how we deal with the Western District opinion, I believe is solely a legal question.

JUDGE DIPPELL: Mr. Zobrist, would you like to join in with any disagreement or agreement with Mr. Woodsmall?

MR. ZOBRI ST: I would be glad to. I think Mr. Woodsmall has accurately chronicled the decision of this Commission and of the Court's. And I think that he's focused on the issues that we have about the meeting in effect of the Court's opinion. I think that's where we disagree.

If the Court of Appeals had simply ordered a refund, we would be taking a different position. The Court of Appeals did not order a refund. In fact, at the bottom of the Slip Opinion on Page 9 it said nothing in the Commission's order attempts to justify what the Court found to be the applicable -- it's disregard -- the Commission's disregard of the applicable language and the prohibition on retroactive rate-making.

And I think it should be clear that although we call this Aquila, this is a different

company today. It's the same corporate entity, but it's under different management with different counsel. And we believe today that in the flurry to approve those tariffs that neither the Commission nor the Counsel for this company accurately analyzed the meaning and effect that the statutes that they were trying to implement at the time.

And with all due respect to the Commission, I think that when this particular proceedings, which is not the rate cases -- you know, it's 0216, the first fuel adjustment clause -- when the Commission talked about the tariffs that were finally approved being merely an administrative act, I don't think it explained as well as it should have why it was not engaging in retroactive rate-making. And I can understand why the Court of Appeals had some questions about it.

And so I think there ought to be an opportunity not only to have the legal discussion Mr. Woodsmall talked about, but also to introduce testimony. I believe there are fact questions about what the Commission in fact did and why it was not retroactive rate-making.

And then I also do agree with Mr. Woodsmall on the refund issue that there are

factual questions dealing with if a refund is warranted, if the Commission finds that a refund after reviewing the facts of this case and what happened in this case and what the tariffs actually purport to do, if it still thinks it was retroactive rate-making, we have significant questions about, you know, the format of the refund, what period of time should it cover. And again, we believe that that would require factual testimony.

And we would request a hearing in this case. We would request a procedural schedule of -- permit the applicant, KCP&L Greater Missouri Operations Company to present its case in direct testimony, allow the other parties to take whatever positions they may have, allow us a brief time to rebuttal and then proceed to hearing.

JUDGE DIPPELL: And so explain to me again exactly where those fact issues lie.

MR. ZOBRI ST: Well, for example the Court of Appeals did not understand that there were other tariffs that were effective June 1, 2007, that mentioned the fuel adjustment clause. One of the major problems that the Court of Appeals had was that they thought that there was retroactive rate-making. And I don't think the record fully reflects the

Commission's reasoning on why it was not retroactive rate-making.

There were certain tariffs that took effect -- actually I think a certain set took effect either May 27th or May 31st in front of that June 1 date. And I think that those facts need to be brought before the Commission. This need not be lengthy testimony, but I think that to the extent that there are factual issues here, that the record would benefit from more than just the argument of counsel, but actually presenting the chronology of the events that occurred that shows that retroactive rate-making and it did not occur in those critical dates in May and June and July of 2007.

JUDGE DIPPELL: I'm just trying to get my head around how those are fact issues as opposed to legal issues with -- I mean, is the date of tariff became effective a fact or a legal conclusion?

MR. ZOBRIST: Well, I think it is perhaps a mixed question of law and fact. And although my client has not made a decision as to whom, you know, would be the person who would testify, I would expect that Mr. Rush, who's here in the hearing room today, and who tends to testify about these kinds of tariff issues in his testimony of a variety per

seasoning -- in a variety of proceedings, would be the logical person.

But I just think to avoid having an oral argument where commissioners, say well, I'd like to have somebody come up and tell me about how these tariffs came into effect and what exactly happened, then we're kind of getting into factual issues. And I think that the record would benefit from having that kind of testimony brought before the Commission in this proceeding.

JUDGE DIPPELL: Mr. Mills, did you have anything that you wanted to add to this discussion?

MR. MILLS: Yes, Judge, I do. I think with all due respect to Mr. Zobrist, he's trying to have the Commission come up with some reason why the Court of Appeals got it wrong. Mr. Zobrist had his chance to convince the Court of Appeals that what the Commission did was not retroactive rate-making -- I'm sorry -- retroactive rate-making and the Court disagreed with him.

I don't think we have to go back to the Commission and have the Commission get a completely different decision based on some new fact and a new -- the Court of Appeals decision was very clear. The record before them was very clear. The Court of

Appeals had no doubt it was retroactive rate-making. And I think the proper remedy for that, as Mr. Woodsmall said, is that we owe a refund. I don't think there's any need at this point to take new evidence about what happened four years ago with respect to the tariffs.

JUDGE DIPPELL: Okay. Mr. Comley, did you have anything you wanted to add?

MR. COMLEY: No, thank you.

JUDGE DIPPELL: Mr. Williams?

MR. WILLIAMS: I'm going to add to the history a little bit based on recollections, so if the record varies, I'm sure the record's more accurate. But my recollection is that --

MR. MILLS: Judge, I can't hear Mr. Williams.

JUDGE DIPPELL: Can you speak up Mr. Williams? Come closer.

MR. WILLIAMS: I was saying I'm going to speak from my recollection about what I recall about the past and if it varies from the record, the record would be accurate. But my recollection is the Commission issued a Report and Order and approved some tariffs. I believe the tariffs were approved effective May 27th, but those were the general revenue

tariffs. They weren't the fuel clause tariffs. The fuel clause tariffs weren't approved, I believe, until July -- to become effective July 5th.

This case involved the first recovery period, which was subsequent to that. And the issue that was in front of the Court of Appeals and the Commission was whether the accumulation period, which is the period where you look at the difference between actual costs and the costs embedded in the base for the fuel clause tariffs, if that could go back to June 1 or some later date. And my reading of the Court of Appeals' opinion is that it can't precede July 5th.

JUDGE DIPPELL: Thank you. All right. Well, I think it sounds like if nothing else, everyone agrees that some additional filings are in order with regard to where the Commission should go from here. You -- the Company pretty much covered -- I think covered a lot of their position in their response to the motion for this, but I'll give everyone a chance to file a -- not necessarily a proposed procedural schedule, but an outline of where you think this needs to go and what the, I guess, first decision the Commission needs to make with regard to is this something that needs further fact issues or is this strictly a legal issue and you're a commission, you

can decide it this way or that way.

So how quickly do you all think you could file such a pleading?

MR. WOODSMALL: End of this week.

MR. ZOBRI ST: A pleading indicating where the case goes or a pleading indicating what our positions are?

JUDGE DIPPELL: Both actually.

MR. WOODSMALL: We haven't talked about it and maybe it would help if we did, but off the top of my head I think we can at least file some indication to you of the upcoming pleadings by the end of this week possibly. And as far as the first pleading indicating what our positions are, what are the legal implications of the Court of Appeals decision, I would say three weeks. I want to make it quicker, but I'm going to be on vacation, so three weeks possibly.

JUDGE DIPPELL: Okay. Well, then I'll let you all decide -- talk about that kind of procedural schedule, when you might file those briefs, for lack of a better term; position, statements, briefs, requests for hearing or whatever they turn out to be. And then if -- do you all think then that by the end of the week you could get me a general outline

of when you'll file those or do you --

Are you still there, Lewis? I think I lost, Mr. Mills. Do I have to hang up and start over? Let's go off the record.

(Off the record.)

JUDGE DIPPELL: Okay. We have Mr. Mills back on the line and I was just trying to, I guess -- the procedural schedule part of this I was trying to find out how quickly you all could file that. And note the Commission does not have any particular schedule, but I am mindful of the fact that this is an old case and the, you know, people who --

Are you gone again, Mr. Mills? Okay. Let's go off the record.

(Off the record.)

JUDGE DIPPELL: I was saying that the Commission's mindful that this is an older case and it's come back to us and the people who may or may not be entitled to a refund are entitled to that as quickly as we can get it, so that's the reason I was asking how quickly you can get a procedural schedule. So we can keep this moving. It's also a good time, some rate cases settling and so forth. The Commission may actually have time to look at these before the next round starts.

MR. ZOBRI ST: Judge, I understand that and I respect that. But the regulations provide for interest --

JUDGE DIPPELL: Right.

MR. ZOBRI ST: -- so nobody's going to be out any cash. And you know, taking whatever -- you know, three months to resolve this as opposed to trying to do it in six weeks, I think given the length, that's not a huge amount of time. And I don't know that we're going to be able to agree on a procedural schedule because we're -- I think we're at a little bit of a disagreement in terms of how the case ought to proceed. My client's just got a bunch of things going on at the end of the week and I'd like until next week to file something, at least like Tuesday or Wednesday.

I just got people I know I'm going to have to -- I won't be able to have access to them until over the weekend. The Kansas rate case is filing and there's another rate case that's going to trial in another matter. So if I could have at least seven days that would be -- that would be good.

JUDGE DIPPELL: Okay. Okay. Well, you all discuss then the schedule from here and file something regarding that schedule either jointly or

independently next Tuesday, a week from today.

Is there anything further that anyone would like to put on the record?

Seeing nothing, then, this will conclude the on-the-record portion of this prehearing conference. And I will excuse myself and Mr. Mills can stay on the line and you guys can discuss the future schedule.

Off the record.

(Off the record.)

CERTIFICATE OF REPORTER

I, Lisa M. Banks, CCR within and for the State of Missouri, do hereby certify that the witness whose testimony appears in the foregoing proceeding was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Lisa M. Banks, CCR