

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the tariff filing of)	
Algonquin 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’S RESPONSE TO STAFF’S MOTION TO DISMISS
AND, IN THE ALTERNATIVE, TO MODIFY PROCEDURAL SCHEDULE**

Comes now Algonquin Water Resources of Missouri, LLC (Algonquin or Company), and in response to Staff’s Motion to Dismiss the Application of Algonquin for a Rate Increase or, in the Alternative, to Modify the Procedural Schedule (Motion), states as follows to the Missouri Public Service Commission’s (Commission):

SUMMARY

1. On October 23, 2006, the Commission Staff (Staff) filed its Motion seeking dismissal of Algonquin’s rate increase request or, in the alternative, modification of the procedural schedule to provide the Staff sixteen (16) additional days to file its direct testimony as to revenue requirement and ten (10) additional days in which to file its direct testimony as to rate design. Algonquin explains herein that there is no lawful basis upon which to dismiss the rate request. However, Algonquin further states that it does not object to the modification of the procedural schedule suggested by the Staff.

BACKGROUND

2. The Staff correctly recites the history of the properties that are the subject of this case. These properties were owned by Silverleaf Resorts, Inc. until August 15, 2005. At that time, Algonquin purchased Silverleaf’s public utility assets only. Algonquin did not purchase

the Silverleaf entity, which continues to exist, but is no longer a public utility. Accordingly, Algonquin became a new Missouri public utility in August of 2005.

3. Because it was a new utility, Algonquin's direct testimony in this case includes eleven months of Silverleaf operation and a single month of Algonquin's operations. On October 31, 2006, pursuant to the Commission's Order Setting Procedural Schedule (issued July 5, 2006), Algonquin filed an update to its case that brings this information forward through September 30, 2006, thereby providing for over twelve months of Algonquin operational history.

MOTION TO DISMISS

4. Staff alleges that Algonquin's original use of a combination of Silverleaf and Algonquin data "was inadequate and the tariffs were not supported by operating data pertaining to Algonquin." Motion at para. 6.

5. The Commission has noted that the standard for review for consideration of a motion to dismiss for failure to state a claim has been established by Missouri courts as follows:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Public Service Commission v. Missouri Pipeline Company, et al., Order Regarding Motion to Dismiss, Case No. GC-2006-0378 (June 6, 2006), citing *Eastwood v. North Central Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo. App. W.D. 2000).

6. By this standard, the Commission must consider the Staff's Motion based on the facts alleged in Algonquin's tariff sheets and direct testimony, along with all reasonable

inferences therefrom. In the case of a general rate case, the Commission's duty to examine whether existing rates are just and reasonable arises from the utility's filing of a tariff sheet proposing new rates. No other allegation is required by the statutes. *See* Section 393.150.1, RSMo ("Whenever there shall be filed with the commission by any . . . water corporation . . . any schedule stating a new rate or charge, . . . the commission shall have, and it is hereby given, authority, . . . upon reasonable notice, to enter upon a hearing concerning the propriety of such rate . . .").

7. The Commission has a continuing obligation to set just and reasonable rates. *See* Section 393.140(5) and 393.130.1, RSMo. The Commission is not relived of this duty for any time period because the ownership of utility assets has changed. This obligation is also not relieved even in the complete absence of historical records when a new utility begins to provide a completely new service. Even in that situation, the Commission must, and does, arrive at a just and reasonable rate.

8. The Court of Appeals previously found that the Commission's "supervision of the public utilities of this State is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.' To rule otherwise would make §393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers." *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 29 (Mo. 1975).

9. This obligation to provide for just and reasonable rates is independent of the use of any particular test year or type of test year data available. Section 393.140(11), RSMo has

been said to mean that “a public utility may by filing schedules suggest to the commission rates and classifications which it believes are just and reasonable, and, if the commission accepts them, they are authorized rates, but the commission alone can determine that question and make them a lawful charge.” *Jackson County* at p. 28. No mention is made of a requirement for any certain operational history or data.

10. The phrase “test year” is not found in the Commission statutes, nor for that matter is it found in the Commission’s regulations. The test year is merely a vehicle for ascertaining a just and reasonable rate for the future, a “predictor” of future events. The Court of Appeals has described the test year as follows:

A test year is a tool used to find the relationship between investment, revenues, and expenses. Certain adjustments are made to the test year figures; "normalization" adjustments used to eliminate non-recurring items of expenses or revenues and "annualization" adjustments used to reflect the end-of-period level of investment, expenses and revenues. Adjustments are also made for events occurring outside the test year. The criteria used to determine whether a post-year event should be included in the analysis of the test year is whether the proposed adjustment is (1) "known and measurable," (2) promotes the proper relationship of investment, revenues and expenses, and (3) is representative of the conditions anticipated during the time the rates will be in effect.”

GTE North v. Public Service Commission, 835 S.W.2d 356, 368 (Mo.App. W.D. 1992):

11. Test periods and adjustments thereto have been said to be factual questions. “Test periods for determining prospective operating costs have been traditional in rate cases. The extent of adjustment for known variations is essentially a fact question.” *GTE North* at p. 370. “[T]he choice of method to adjust the test year for known and measurable changes rests in the expert discretion of the administrative body and the court will not dictate the choice of method to the Commission.” *Id.* Thus, the question of test year and what adjustments to a test year are appropriate are factual determinations and, as such, within the expertise of the

Commission and not appropriate for resolution through a motion to dismiss.

12. Ultimately, the Commission must determine a just and reasonable rate, not a rate that corresponds to a specific test year. The Court of Appeals has pointed out that because the “the central purpose of the ‘test year’ is as a predictor, it makes sense for the Commission to be allowed flexibility in order to establish that the best possible data be analyzed for its predictions to achieve a degree of accuracy.” *GTE North* at p. 372.

13. Staff additionally complains about delays in responses to Staff data requests. It is unfortunate that there have been delays. However, the Commission must remember that Algonquin’s Missouri operations are very small. There are only three employees devoted exclusively to these properties. The records and information which Staff has requested, spans two sets of records – Algonquin’s own records and the records pertaining to the prior owner. This situation makes it difficult for the Company to provide the detailed information sought by the Staff for multiple year periods. However, Algonquin understands its obligation to provide access to relevant information within its possession, custody or control and will attempt to provide such information at the earliest date possible.

14. Staff’s complaints about the discovery process seem to indicate that dismissal of the rate application should be used as a discovery sanction. Such a remedy would be extremely drastic and without precedent. This is especially so in this case as prior to the Motion the Staff has not felt strongly enough about this discovery issue to file a motion to compel or to even request a teleconference with the law judge as described by 4 CSR 240-2.090(8).

MOTION TO MODIFY PROCEDURAL SCHEDULE

15. The real issue seems to be the Staff’s need for additional time to review the data

provided in the Company's October 31, 2006 update filing. Motion, para. 5 ("... it is crucial that the Staff have a timely opportunity to review and audit Algonquin's most current financial information ..."). Staff therefore proposes in the alternative to dismissal that the Commission modify the procedural schedule as follows (with other dates remaining unchanged):

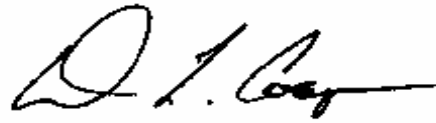
<u>Event</u>	<u>Present Date</u>	<u>Revised Date</u>
Other parties file direct testimony on revenue requirement	November 15, 2006	December 1, 2006
Other parties file CCOS and rate design testimony	December 1, 2006	December 11, 2006

16. Algonquin believes that the proposal to modify the procedural schedule in this manner is reasonable and, therefore, supports such a modification. In fact, Algonquin joined in a proposed procedural schedule in this case that would have provided Staff with even more time to prepare its direct testimony than is requested by the Motion to Modify Procedural Schedule.

WHEREFORE, Algonquin respectfully requests that the Commission deny the Staff's

Motion to Dismiss and grant the Staff's motion to modify the procedural schedule.

Respectfully submitted,



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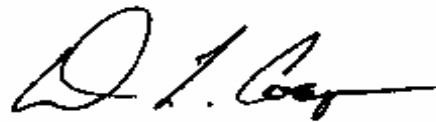
ATTORNEYS FOR ALGONQUIN WATER
RESOURCES OF MISSOURI, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 1st day of November, 2006, to:

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