

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

In the Matter of the Tariffs of Aquila, Inc, d/b/a)
Aquila Networks–MPS and Aquila Networks–)
L& P Increasing Electric Rates for the Service)
Provided to Customers in the Aquila Networks)
MPS and Aquila Networks–L&P Service Areas.)

Case No. ER-2007-0004
Tariff No. YE-2007-0001

**AARP’s Response in Opposition to Aquila’s Motion
Regarding ‘Transitional Procedures’ for a Fuel Adjustment Clause**

COMES NOW the AARP, by and through counsel, pursuant to Commission Rule 4 CSR 240-2.080, and in response to the “Motion of Aquila, Inc., For An Order Applying The Transitional Procedures Included In 4 CSR 240-20.090(16) To The Current Case” (“Motion”), filed on August 11, 2006, states as follows:

1. Aquila’s Motion seeks relief based upon an invalid authority. Aquila’s citations to “4 CSR 240-3.161(2)”, “4 CSR 240-20.090(2) and (9)”, and to “4 CSR 240-20.090(16)” are not valid citations in that they do not refer to actual rules. They are, in fact, *proposed rules* which are being vigorously opposed by various consumer interests that hope to convince the Commission to reject (or significantly modify) those proposed Fuel Adjustment Clause rules (FAC Rules) in the context of a separate Commission proceeding, Case No. EX-2006-0472. A rulemaking hearing is scheduled in that case for September 7, 2006. Aquila acknowledges that the proposed rules do not have the

force and effect of law and that there is some uncertainty as to their applicability to this rate case. Aquila Motion, Paragraph 4.

2. If the Commission grants the relief requested in Aquila's Motion and "applies to the current case the transitional procedures contained in 4 CSR 240-20.090(16)", then the Commission will have unlawfully prejudged its rulemaking case, Case No. EX-2006-0472. The official comment period set for the proposed rules in Case No. EX-2006-0472 ends on September 7, 2006—the same day that the final hearing on the rules is to be held in Jefferson City, Missouri. Aquila's Motion apparently assumes that the Commission has already made up its mind regarding the proposed rules before this comment period has run its course. However, AARP would like to believe that the Commission is still open-minded to arguments calling for the rejection of, or amendment to its proposed rules and that the Commission is fully committed to giving due consideration to all comments throughout the rulemaking process, as required by law.

3. The legal requirements for notice and comment in a rulemaking are controlled by Section 536.021 RSMo. 2000, which states in part:

1. No rule shall hereafter be made, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent order of rulemaking . . .

7. Except as provided in section 536.025 [*emergency rule procedures*]¹, any rule, or amendment or rescission thereof, shall be null, void and unenforceable unless made in accordance with the provisions of this section.

¹ The Commission chose not to initiate an emergency rulemaking procedure in conjunction with the proposed FAC Rules.

The importance of the notice and comment period for a proposed rule was underscored by a unanimous Missouri Supreme Court decision, NME Hospitals v. Dept. of Social Services, 850 S.W.2d 71 (Mo. banc 1993). The Court struck down an administrative action by the Department of Social Services because of its failure to properly follow rulemaking procedures, stating, “The very purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification. . . To neglect the notice . . . or to give effect to a *proposed* rule before the time for comment has run...undermines the integrity of the procedure.” Id., p. 74. (emphasis in original).

4. Aquila’s Motion also requests that the Commission act in an unlawful manner because Aquila is asking that the Commission issue an order regarding a rate adjustment in violation of Section 386.266.12 RSMo 2000. Subsection 12 of the new law (SB 179) states that the Commission “shall have previously promulgated rules to implement the application process for any rate adjustment mechanism under this section prior to the commission issuing an order for any rate adjustment.” The law does not say that the Commission may issue an order based upon merely proposed rules; rather, the Commission must previously issue a final order of rulemaking before it may issue an order regarding a RAM.

5. The “transitional procedures” that Aquila is requesting be ordered in this rate case are themselves deficient with regard to due process. Aquila’s Motion, Appendix A. Parties would be given extremely short timelines to respond to any newly

adopted rule or new Rate Adjustment Mechanism (RAM) procedure. Due process requires that Commission proceedings be fair and consistent with rudimentary elements of fair play. *State ex rel. Fischer v. Public Service Commission*, 645 S.W. 2d 39, 43 (Mo. App. 1982). The procedures proposed by Aquila are insufficient to allow adequate opportunity to address the fundamentally significant changes that could be proposed at a late date in this rate case. Aquila itself chose the timing of its rate case filing. Other parties should not be prejudiced simply because Aquila wishes to propose a FAC or RAM proposal in this rate case after procedural deadlines controlling when parties must file their direct case.

WHEREFORE, AARP respectfully requests that the Commission reject Aquila's Motion.

Respectfully submitted,

/s/ John B. Coffman

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to counsel for each of the parties on the service list for this matter on this 31st day of August 2006:

/s/ John B. Coffman
