

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

In the Matter of the Tariff Filing of Aquila, Inc., to)	
Implement a General Rate Increase for Retail)	
Electric Service Provided to Customers in its MPS)	Case No. ER-2005-0436
and L&P Missouri Service Areas.)	

In the Matter of the Tariff Filing of Aquila, Inc., to)	
Implement a General Rate Increase for Retail)	
Steam Heat Service Provided to Customers in its)	Case No. HR-2005-0450
L&P Missouri Service Area.)	

JOINTLY PROPOSED PROCEDURAL SCHEDULES

COME NOW the Staff of the Missouri Public Service Commission (Staff), Aquila, Inc. (Aquila), the Office of the Public Counsel (Public Counsel), Sedalia Industrial Energy Users Association (SIEUA), AG Processing, Inc. (AGP), the City of Kansas City, Missouri (Kansas City), AARP, The Empire District Electric Company (Empire), the United States Federal Executive Agencies (FEA), the Energy Center of the Missouri Department of Natural Resources (DNR), and the City of St. Joseph, Missouri (St. Joseph), and in accordance with the Commission's July 1, 2005 orders that extended the date for filing procedural schedules in these cases to 4:00 p.m., Thursday, July 14, 2005, state:

1. As indicated at the prehearing conferences held Thursday, July 7, 2005, the parties in each of the cases Case Nos. ER-2005-0426, HR-2005-00450 and EO-2002-0384 have attempted to reach agreement as to appropriate procedural schedules in each of these interrelated cases. Case No. ER-2005-0436 is a general electric rate increase case filed by Aquila, Inc., Case No. HR-2005-0450 is a general steam heat rate increase case filed by Aquila, Inc. and Case No.

EO-2002-384 is an electric service class cost-of-service / rate design case initiated as part of a stipulation made by the parties to Aquila's general electric rate case filed in 2001 and approved by the Commission.

2. Although considerable effort was expended in considering alternatives, unanimous agreement amongst the parties could not be reached as to an appropriate schedule for Case No. EO-2002-384; therefore, a schedule for that case is not presented here.

3. Although agreement was not reached regarding a schedule for Case No. EO-2002-384, the Signatories were able to agree to proposed procedural schedules for each of the rate cases, Case Nos. ER-2005-0436 and HR-2005-0450. Those proposals follow in this pleading. Although shown jointly below, the Signatories, some of whom are in both cases and some of whom are not, do not now have an agreement that the two rate cases should be consolidated in any respect. There is general agreement that efforts should be made to avoid unneeded duplication and the Signatories anticipate opportunities will arise between the two cases that will permit the avoidance of such duplication. The Signatories anticipate bringing such opportunities to the Commission as they are identified during the progression of the cases.

4. Other than listing initial and reply post-hearing briefs in the proposed procedural schedules to indicate a desire to file such briefs, the Signatories have proposed neither filing dates nor page limits for those briefs. There are several reasons.

a. The Signatories believe that decisions on filing dates and page limits for post-hearing briefs are best left to the end of the hearing. At that time the number and complexity of the issues that the Commission must resolve will be known. Further, the

full record before the Commission, including exhibits, bearing on the contested issues will also be known.

b. Several of the Signatories express concern with the Commission's apparent shift in reliance to pre-hearing briefs. Certainly pre-hearing briefs are useful additions to the procedure. Properly used, pre-hearing briefs identify and state the issues the Commission is expected to resolve and allow the parties to articulate their positions on those issues. Parties can also identify in pre-hearing briefs specific legal issues that may arise during the evidentiary hearing in the case, and provide the submitting parties an opportunity to make their initial arguments regarding those issues. With such an opportunity, the need for a Statement Of Positions from each party becomes redundant and is not included in the proposed procedural schedules.

c. The Signatories believe that pre-hearing briefs are not an acceptable substitute for effective and well-drafted post-hearing briefs for several reasons.

First, there is concern that the Commission's apparent desire to limit the length of post-hearing briefs to very few pages is inconsistent with litigators' responsibilities as attorneys. No litigator can or should be expected to disclose before hearing his or her trial strategy, including identification of the witnesses he or she plans to cross-examine, the content of that planned cross-examination, and the forensic exhibits he or she plans to introduce. The hearing process is, among other things, an opportunity to challenge the merits of opposing witnesses' opinions and to impeach the credibility of such witnesses. Expecting parties to reveal in pre-hearing briefs their trial strategies compromises the most basic responsibilities of an attorney to his or her client and the rights of that client.

Second, there is further concern that the limitation of post hearing briefs to very few pages runs afoul of the Commissioners' fundamental obligation to base their

decisions on competent and substantial evidence on the whole record. Granted, courts set page or word limits, as Missouri Supreme Court Rule 84.06(b)(1) sets word limits for appellate briefs. But these limits are not akin to 10 pages for the briefing of a general rate increase case for a major electric utility at the evidentiary stage of the proceeding. Moreover, *a priori*, a prehearing brief cannot be based on the record of the proceeding, since that record does not exist until the time of the hearing. Indeed, prefiled testimony—the only thing on which a prehearing brief could be based—is not part of the record until it has been offered and received into evidence.

Third, Section 536.080 confers on the parties the right to present argument to the Commission orally or in written briefs at or after the hearing and requires that the individual Commissioners certify compliance with its alternative provisions. The Section provides:

1. In contested cases each party shall be entitled to present oral arguments or written briefs at or after the hearing which shall be heard or read by each official of the agency who renders or joins in rendering the final decision.

2. In contested cases, each official of an agency who renders or joins in rendering a final decision shall, prior to such final decision, either ***hear all the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. . . .***

The statute provides three alternatives to each Commissioner: (1) hear all the evidence; (2) read the full record including all the evidence; or (3) personally consider the portions of the ***record cited in the arguments or briefs***. A commissioner cannot read only a prehearing brief and fulfill this statutory requirement. The "record" does not yet exist and cannot be cited in a

prehearing brief. Although a reviewing court may be willing to presume compliance with the statutory requirement,¹ that presumption is rebuttable, and could be easily rebutted by a showing that compliance was impossible. Moreover, several Signatories indicate they will not agree that post-hearing brief page limits which they believe are unreasonably low will comply with Section 536.080(2), and will consider judicial recourse if the Commission imposes such limits.

It is reasonable to understand that this alternative was provided by the General Assembly in recognition of the importance of post-hearing briefing in the decisional process. This is the opportunity for attorneys to "connect the dots" in their respective cases after the evidence and exhibits are "of record" and the witnesses have been subjected to the crucible of cross-examination. Not only does the Commission risk violation of the statute in spirit, if not in fact, by a procedure that cripples post-hearing briefs, it deprives itself of the benefit of the analyses of the parties who should best know their respective cases and have the greatest incentive to marshal their arguments, testimony, evidence and exhibits in proof of their respective cases.

¹ *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20, 30 (Mo., 1975):

. . . . it is presumed that administrative decisions are made in compliance with applicable statutes. *Dittmeier v. Missouri Real Estate Commission*, 316 S.W.2d 1, 5-6 (Mo. *en banc* 1958), *cert. denied* 358 U.S. 941, 3 L. Ed. 2d 348, 79 S. Ct. 347.

In *State ex rel Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo. App. 1982), the Western District, in an opinion remanding the case on other grounds, touched on the certification requirement in footnote 5 found at page 45 as follows: "The Public Counsel objected that the order in this case failed to certify its compliance with Section 536.080 RSMo 1957 and Section 386.130 RSMo 1939, as discussed in *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. Banc 1975), *cert. denied* 429 U.S. 822, 97 S. Ct. 73, 50 L.Ed.2d 84 (1976). The Commission is well aware of the certification requirement, and future orders will undoubtedly contain such certification."

For these reasons, the Signatories have declined to make a recommendation regarding the timing and the length of post-hearing briefs and reserve all their rights regarding such issues.

5. The Signatories propose the following procedural schedules for Case Nos. ER-2005-0436 and HR-2005-0450:

PROCEDURAL SCHEDULE
ER – 2005 – 0436 and HR – 2005 – 0450

Case Number	Date	Event
ER – 2005 – 0436 HR – 2005 – 0450	May 24, 2005	Direct Testimony – Aquila
ER – 2005 – 0436 HR – 2005 – 0450	Friday, October 14, 2005	Direct Testimony (excluding class cost of service and rate design issues) – All Parties except Aquila
ER – 2005 – 0436 HR – 2005 – 0450	Thursday, October 20, 2005	Reconciliation (created by Staff and circulated to parties)
ER – 2005 – 0436 HR – 2005 – 0450	Friday, October 28, 2005	Direct Testimony (class cost of service and rate design issues) – All Parties except Aquila
ER – 2005 – 0436 HR – 2005 – 0450	Week of October 31-November 4, 2005	Settlement Conference
ER – 2005 – 0436 HR – 2005 – 0450	Friday, November 4, 2005	Preliminary List of Issues (Not filed)
ER – 2005 – 0436 HR – 2005 – 0450	Monday, November 7, 2005 and Wednesday, November 9, 2005	Local Public Hearings ²

² The November 7, 2005 on-the-record hearing to commence at 6:00 p.m. at either Raytown South High School or the Raytown City Council Chambers in Raytown, Missouri and the November 9, 2005 on-the-record hearing to commence at 6:00 p.m. in the Saint Joseph, Missouri City Council Chambers. Both hearings to be preceded by an informational session commencing at 5:30 p.m.

ER – 2005 – 0436 HR – 2005 – 0450	Friday, November 18, 2005	Rebuttal testimony – All Parties Seven (7) calendar days DR response turnaround period begins – All Parties
ER – 2005 – 0436 HR – 2005 – 0450	Tuesday, December 13, 2005	Surrebuttal Testimony – All Parties
ER – 2005 – 0436 HR – 2005 – 0450	Wednesday, December 14, 2005	List of Issues
ER – 2005 – 0436 HR – 2005 – 0450	Friday, December 16, 2005	Reconciliation
ER – 2005 – 0436 HR – 2005 – 0450	Thursday, January 5, 2006	Prehearing Briefs (Because parties’ positions will be stated in their prehearing briefs, position statements are not part of this schedule.)
ER – 2005 – 0436 HR – 2005 – 0450	January 9 through February 10, 2006, excluding weekends and holidays	Evidentiary Hearing
ER – 2005 – 0436 HR – 2005 – 0450	To be determined at or near the time of hearing.	Initial Briefs (All Parties)
ER – 2005 – 0436 HR – 2005 – 0450	Thursday and Friday, February 23-24, 2006	True-Up Hearing (If necessary)
ER – 2005 – 0436 HR – 2005 – 0450	To be determined at or near the time of hearing.	Reply Briefs (All Parties)
ER – 2005 – 0436 HR – 2005 – 0450	To be determined at or near the time of hearing.	Proposed Findings of Fact and Conclusions of Law (All Parties)
ER – 2005 – 0436 HR – 2005 – 0450	April 21, 2006 April 24, 2006	Operation of Law Date Operation of Law Date

- Data Requests copied to all Parties, with electronic delivery preferred.

- Parties to provide copies of work papers to other Parties within three (3) working days of the filing of the witness' testimony, without the necessity of a special request.
- Data Request responses provided in one rate case may be utilized in the other rate case.
- Parties anticipate receipt of hearing transcripts to be expedited.

WHEREFORE the Signatories propose the procedural schedules for Case Nos. ER-2005-0436 and HR-2005-0450 set forth above.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 15th day of July 2005.

/s/ Nathan Williams
