

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 22nd day
of July, 2005.

In the Matter of the Tariff Filing of Aquila, Inc.,)	
to Implement a General Rate Increase for)	<u>Case No. ER-2005-0436</u>
Retail Electric Service Provided to Customers)	Tariff No. YE-2005-1045
in its MPS and L&P Missouri Service Areas.)	

ORDER GRANTING INTERVENTION

Issue Date: July 22, 2005

Effective Date: July 22, 2005

Procedural History and Positions of the Parties:

On May 24, 2005, Aquila, Inc., which does business as Aquila Networks - MPS and as Aquila Networks - L&P, submitted to the Missouri Public Service Commission certain proposed tariff sheets, Tariff File No. YE-2005-1045. The purpose of the filing, according to Aquila, is to implement a general rate increase for retail electric service provided by the Company in its MPS and L&P service areas. Aquila states that the new retail electric service rates are designed to produce an additional \$69.2 million in gross annual electric revenues excluding gross receipts, sales, franchise, and occupational taxes in its MPS service area, a 20.3% increase over existing revenues, and \$9.4 million in additional gross annual electric revenues in its L&P service area, exclusive of gross receipts, sales, franchise, and occupational taxes, a 9.6% increase.

The Commission issued its Suspension Order and Notice on May 31, setting Monday, June 20, 2005, as the deadline for applications for intervention.

On June 14, Calpine timely filed its Application to Intervene. Therein, Calpine states that it is an independent power producer that operates the Aries Power Plant in

Pleasant Hill, Missouri. Calpine states that "[t]he majority of the Aries Power Plant's output was until recently sold to Aquila." Calpine states that it desires to participate in this case "to ensure that the Commission will have available as many relevant facts as possible" and that no other party can adequately represent its interests. Calpine further states that its intervention will serve the public interest because Calpine will bring its experience in the energy market and as a wholesale power provider to the case. Calpine asserts that its "business interests and rights" may be adversely affected by the Commission's decision in this case.

On June 16, Aquila objected to Calpine's intervention application. Aquila states that it opposes Calpine's intervention in this proceeding because, Aquila contends, Calpine does not satisfy the Commission's intervention criteria. Aquila states that "assertions regarding possessing 'relevant facts' and 'expertise in the energy market' do not establish that Calpine's interest in the case is different from that of the general public[.]" Aquila suggests that Calpine's appropriate role is that of an *amicus curiae*. Aquila denies that Calpine's intervention would further the public interest and suggests that it would, in fact, harm the public interest because Calpine, a likely future bidder to meet Aquila's purchased power needs through purchased power contracts, could obtain an unfair competitive advantage – or at least the appearance of one -- through its participation in this case. The harm is that other potential power suppliers, competitors of Calpine, might decline to bid on Aquila's contracts, resulting in higher prices for ratepayers. Aquila contends that permitting Calpine to intervene is also likely to result in unnecessary delay.

Calpine responded on June 27, stating that its interest in this case is unique because no other party is both customer and supplier of Aquila. Calpine states that it is a former partner of Aquila and that the greatest source of public harm would be to side with

Aquila on this question and thus suppress the information that Calpine desires to provide. Calpine denies that it seeks any improper competitive advantage by intervening herein and denies that its intervention would result in any delay of the proceedings.

Aquila replied on the same day. Aquila contends that Calpine seeks to intervene only to advance its own competitive agenda. Aquila states that Calpine employees recently met privately with members of the Commission, despite the pendency of its intervention application in this case, and questioned the prudence of Aquila's South Harper Generating Unit. Aquila states that Calpine evidently wants Aquila to buy its power rather than to increase its native capacity.

Discussion:

Commission Rule 4 CSR 240-2.075(4) provides:

The commission may on application permit any person to intervene on a showing that:

(A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

Intervention is the process whereby a stranger becomes a full participant in a legal action.¹ The Commission's rules, like the civil rules, distinguish between those with a right to intervene and those with a mere desire to intervene.² Due process requires that any person with a life, liberty or property interest that will be affected by the outcome of a legal matter be permitted to participate in that proceeding upon timely application, unless

¹ *Ballmer v. Ballmer*, 923 S.W.2d 365, 368 (Mo. App., W.D. 1996).

² J. Devine, *Missouri Civil Pleading & Practice*, § 10-11 (1986).

that interest is adequately represented by another party.³ Such persons have a right to intervene; however, even persons with a right to intervene must exercise that right in good time and in accordance with established procedures.⁴ In a rate proceeding upon the Commission's order suspending tariffs, the Missouri Supreme Court has stated that the Commission has "some discretion as to the parties whom it should admit."⁵

Calpine seeks intervention under both of the grounds authorized in Rule 4 CSR 240-2.075(4). First, Calpine seeks intervention under Rule 4 CSR 240-2.075(4)(A), which authorizes intervention by right. Calpine states that it is both a ratepayer and a supplier of Aquila and that the conjunction of these two roles creates a "unique" interest that no other party could adequately represent. Calpine asserts that its "business interests and rights" may be adversely affected by the Commission's decision in this case.

Calpine also seeks intervention under Rule 4 CSR 240-2.075(4)(B). This is the "permissive" branch of the Commission's intervention rule. Calpine states that it will bring relevant facts and experience to the proceeding and that the public interest thus favors granting its intervention. Although Calpine does not provide any specifics as to just what relevant facts it has that would not otherwise come to the Commission's attention or just how its experience might be helpful, the Commission believes Calpine's unique position may allow it to provide evidence in this matter that would advance the public interest.

Based upon a consideration of the arguments of the parties in the light of the Commission's rule on intervention, the Commission is of the opinion that Calpine's application should be granted because its intervention would further the public interest.

³ See U.S. Constitution, Amendment XIV; Missouri Constitution, Article I, Section 10 (1945).

⁴ *Ballmer, supra*, 923 S.W.2d at 368.

⁵ *St. ex rel. Dyer v. Public Service Com.*, 341 S.W.2d 795, 797 (Mo. banc 1960).

Although Calpine has established sufficient justification to be allowed to intervene in this matter, Aquila raises concerns about Calpine's access to sensitive information about Aquila's operations and plans that would give Calpine a competitive advantage. These concerns cannot be ignored. Therefore, the Commission will allow Aquila to suggest changes to the Commission's standard protective order that will preclude access to, and misuse of, such information.

IT IS THEREFORE ORDERED:

1. That the Application to Intervene filed by Calpine Central L.P. on June 14, 2005, is granted.
2. That Aquila may, on or before August 10, 2005, suggest any changes to the Commission's standard protective order, so that Calpine will be precluded from obtaining confidential information that could be used to further its competitive business interests.
3. That this order will become effective on July 22, 2005.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., dissents.

Thompson, Deputy Chief Regulatory Law Judge