

**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

**RESPONSE TO SUGGESTIONS OF AQUILA IN OPPOSITION TO
MOTION FOR SCHEDULING OF A HEARING**

COMES NOW, AG Processing, Inc. ("AGP") and Sedalia Industrial Energy Users' Association ("SIEUA") and for their Response to Aquila's Suggestions in Opposition to the Motion for Scheduling of a Hearing filed by SIEUA / AGP respectfully state as follows:

1. On May 23, 2007, SIEUA / AGP filed their Motion For Scheduling Of A Hearing. In their Motion, SIEUA / AGP request that the Commission schedule a hearing for the purpose of: (1) providing parties the opportunity to cross-examine Staff Witness Watkins on the contents of his affidavit and (2) receiving any evidence regarding the appropriateness of Aquila's compliance tariffs.

2. On May 24, 2007, Aquila filed its Suggestions in Opposition to the Motion in which it opposes such a hearing. Aquila notes, *inter alia*, that: (1) a hearing is not required under Section 536.070(12) because the current proceeding does not constitute a contested case; (2) Section 393.140(11) permits new rates to take effect without a hearing; and (3) the evidentiary record is closed and there are no grounds for

objection to Watkins' affidavit. As will be shown, Aquila's arguments are contradictory and without merit.

3. Aquila asserts that the requirements of Section 536.070 are not applicable because the current matter is not a "contested case," but rather is merely a tariff filing. Specifically, Aquila now claims that "[t]he filing of tariffs to implement a rate increase (and more specifically, compliance tariffs) does not constitute a "contested case" as that term is defined in the Missouri Administrative Procedure Act."¹

Previously Aquila had claimed that the Commission could not extend the effectiveness of the tariffs beyond May 31, 2007 because the maximum statutory suspension period had already been met in this rate case.² Given that these compliance tariffs appear to have been filed in the ER-2007-0004 contested case, Aquila argued that it is inappropriate for the Commission to extend its consideration of those tariffs beyond May 31, 2007. "While RSMo. §393.140(11) specifies that, unless the Commission orders otherwise, a change shall not be made to any rate filed by an electrical corporation except after thirty-days' notice to the Commission and publication for thirty days as required by order of the Commission, that statute has been satisfied in the case at hand."³

These two assertions by Aquila are difficult to reconcile. Perhaps, the ER-2007-0004 case was somehow magically transformed from the contested (rate) case with all the attendant requirements of Section 536.070, to a non-contested (tariff) case which is no longer subject to the requirements of Section 536.070.

¹ *Suggestions of Aquila, Inc. in Opposition to Motion of AG Processing, Inc. and Sedalia Industrial Energy Users' Association for Scheduling of a Hearing*, at pages 1 and 2.

² See, *Revised and Amended Motion for Expedited Consideration and Approval of Tariff Sheets Filed in Compliance With Commission Report and Order*, Case No. ER-2007-0004, filed May 21, 2007.

³ *Id.* at page 2.

Or, perhaps we've misunderstood Aquila's intent. Perhaps these compliance tariffs were not actually filed in the ER-2007-0004 contested case, but were filed to begin a new general rate case proceeding. If so, the tariffs in ER-2007-0004 are now moot and the entire rate case process starts anew. Furthermore, Aquila's previous assertion that the Commission was legally precluded from suspending the tariffs under Section 393.150 is immediately undermined.

4. Next, Aquila argues that the Commission may allow the requested rate to go into effect through non-action. Again, we may have misunderstood Aquila's intent, for we had thought that Aquila was **not** requesting that the Commission allow the rates to go into effect through Commission inaction. Rather, we thought that Aquila had asked that the Commission take the affirmative action of approving the tariffs on an expedited basis.

In order for such tariffs to go into effect on an expedited basis, the Commission would necessarily have to issue an order. As with all decisions of the Commission, such an order must be based upon competent and substantial evidence. There is no competent and substantial evidence for the Commission to rely upon to support a finding that the tariffs comply with its Report and Order. Such evidence can now only be gathered at an evidentiary hearing. It is for this reason that SIEUA / AGP filed its Motion to Schedule a Hearing.

But this Aquila argument seems inconsistent with what Aquila now contends is a "ministerial act" – to approve its compliance tariff. Resolving an obviously significant dispute about compliance and resolving what is meant by "substantial" compliance seems beyond the scope of a "ministerial act."

5. Finally, Aquila claims that “the evidentiary record is closed and, consequently, there are no grounds for objection” to Mr. Watkins’ affidavit. If so, from where comes the competent and substantial evidence necessary to support a finding that the tariffs comply with its Report and Order? In these circumstances, the Commission (and ultimately Aquila) needs an evidentiary hearing to provide the record necessary to support a Commission order regarding these tariffs.

6. As one Commissioner astutely recognized in today’s agenda session, “I think we take a lot of things for granted. We think we know what we’re doing.” This statement is particularly appropriate in these circumstances. In some past cases, the Commission may have accepted a Staff affidavit as evidentiary support for the expedited approval of tariffs. Here, however, there is colorable reason to believe the “compliance” tariffs are not such and an objection to them has been timely raised. Competent and substantial evidence through a hearing is required.

WHEREFORE, SIEUA / AGP respectfully renews its request that the Commission schedule a hearing for the purpose of providing the parties an opportunity for cross examination and for the receipt of any evidence regarding the appropriateness of Aquila’s compliance tariffs.

Respectfully submitted,



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ATTORNEYS FOR AG PROCESSING,
INC. AND SEDALIA INDUSTRIAL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: May 24, 2007