

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 28th day
of July, 2005.

In the Matter of the Tariff Filing of Aquila, Inc.,)	
to Implement a General Rate Increase for)	<u>Case No. HR-2005-0450</u>
Retail Steam Heat Service Provided to)	Tariff No. YH-2005-1066
Customers in Its L&P Missouri Service Area.)	

ORDER GRANTING INTERVENTION

Issued Date: July 28, 2005

Effective Date: July 28, 2005

Procedural History and Positions of the Parties:

On May 27, 2005, Aquila, Inc., which does business as Aquila Networks – L&P, submitted to the Missouri Public Service Commission certain proposed tariff sheets, Tariff File No. YH-2005-1066. The purpose of the filing, according to Aquila, is to implement a general rate increase for retail steam heat service provided by the Company in its L&P service area. Aquila states that the new retail steam heat service rates are designed to produce an additional \$5 million in gross annual steam heat revenues excluding gross receipts, sales, franchise, and occupational taxes in its L&P service area, a 44.3% increase.

The Commission issued its Suspension Order and Notice on June 1, setting Thursday, June 23, 2005, as the deadline for applications for intervention.

On June 16, The Empire District Electric Company applied to intervene, stating that it is a Kansas corporation headquartered at Joplin, Missouri, an “electrical corporation” and a “public utility” authorized to provide electric service pursuant to Commission

approved tariffs in its service area in southwest Missouri. Empire states that it has an interest in the Commission's treatment of the depreciation of Aquila's electrical and steam-heating plant and, because Empire is itself a regulated utility, its interest is different from that of the general public, may be adversely affected by the Commission's order herein, and cannot be adequately represented by any other party.

On June 23, intervenor AG Processing, Inc. ("AGP"), objected to Empire's application, stating that Empire has no protectable interest in this proceeding and that its application should therefore be denied. AGP states that Empire is not a steam customer of Aquila, nor has it asserted that it will ever become such; it is not itself a steam utility; its electric service area is not near Aquila's; and its interest is not different from that of the general public. In no way, AGP contends, can the outcome of this case affect Empire's interests. Additionally, AGP complains that Empire has not stated its position with respect to the relief sought by Aquila and that Empire has thus not complied with the Commission's rule governing intervention. For these reasons, AGP states, the Commission should deny Empire's intervention application.

Empire replied on July 1, stating that it indeed has a distinct and protectable interest in this proceeding. Empire asserts that the testimony will certainly involve the depreciation of both steam and electric plant and that Aquila's witness Susan Braun has filed testimony stating that Aquila has adjusted its depreciation rates based on the Commission's decision in Empire's recent rate case. Empire states, "a case such as this can affect another utility[.]" Empire further contends that the public interest supports its participation herein in view of Aquila's stated reliance on the Commission's decision in Empire's own recent rate case. Empire reminds the Commission that both Aquila and

AmerenUE were granted intervention in its rate case – after applying out-of-time – based on their interest in depreciation. Empire states that its position is to maintain and support the depreciation policy adopted by the Commission in its own recent rate case.

AGP responded on July 7, stating that Empire's interest is revealed as that of "an interloper and meddler." AGP asserts that Empire's interest in depreciation "differs not one whit from that of the public generally and fails to distinguish Empire from the gaggle of the public who may be 'interested[.]'" AGP concludes by urging that "Empire's attempt to interfere in this steam rate proceeding should be rejected."

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

In its application, Empire seeks intervention under only the first of the grounds authorized in Rule 4 CSR 240-2.075(4). Rule 4 CSR 240-2.075(4)(A) authorizes intervention by right. Empire states that it is a regulated electric utility and that, as such, it is interested in the Commission's treatment of depreciation in this case. Empire further asserts that no other party can adequately represent its interest and that its interest may be adversely affected by the Commission's decision in this case.

Empire's interest is not a property interest. It is a monetary interest only in the sense that Empire fears lest the Commission adopt some treatment of depreciation that would be unfavorable to Empire if it ever were applied to Empire. This is not an interest whose protection is required by Due Process. In *Ballmer v. Ballmer*, an insurance company sought to intervene in a "friendly" lawsuit in which a father sued his son for the wrongful death of another son in an automobile accident.⁶ The insurance company sought to intervene to prevent its insured from confessing judgment, a judgment that the insurance company might eventually be required to pay. Intervention was denied on the grounds that the insurer lacked an interest in the case:

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).

⁶ See *Dyer*, *supra*, 341 S.W.2d at 797.

As to whether State Farm has an "interest" in the underlying action, this court has stated that "the liability of an insurer as a potential indemnitor of the judgment debtor does not constitute a direct interest in such a judgment as to implicate intervention as a matter of right."⁷

State Farm's interest as a "potential indemnitor" in *Ballmer* was both more immediate and more certain than the interest identified herein by Empire. Thus, the Commission determines that Empire's application cannot be sustained under Rule 4 CSR 240-2.075(4)(A).

In its response to AGP's objection, Empire also argued that it should be granted intervention under Rule 4 CSR 240-2.075(4)(B). This is the "permissive" branch of the Commission's intervention rule. In support of this argument, Empire points out that Aquila is relying upon the Commission's treatment of depreciation in Empire's own recent rate case. Empire also points out that two utilities – Aquila and AmerenUE – were permitted to intervene in its rate case in order to litigate the Commission's treatment of depreciation.⁸

The Commission is of the opinion that Empire's application under Rule 4 CSR 240-2.075(4)(B) should be granted, despite AGP's objection. The interest of other regulated utilities in the treatment accorded depreciation issues in this case, while not requiring protection under Due Process, are nonetheless significant and are wholly different from the interest of the general public. Depreciation is a complex and highly technical issue that is likely to have a significant monetary impact on the outcome of this case. The Commission believes it will benefit from Empire's assistance in the consideration and resolution of this issue.

⁷ *Id.* (citations omitted).

⁸ Although untimely, those intervention applications were unopposed.

IT IS THEREFORE ORDERED:

1. That the Application to Intervene filed by The Empire District Electric Company on June 16, 2005, is granted. The Commission's Data Center shall add counsel for The Empire District Electric Company to the Service List maintained in this case.

2. That this order will become effective on July 28, 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., Murray, and Appling, CC.,
concur.

Gaw and Clayton, CC., dissent.

Thompson, Deputy Chief Regulatory Law Judge