

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

In the Matter of the tariff filing of)
Aquila, Inc. d/b/a Aquila)
Networks - L&P)

Case No. GT-2003-0038 ✓
Tariff No. 200300096

In the matter of the tariff filing of)
Aquila, Inc. d/b/a Aquila)
Networks - MPS)

Case No. GT-2003-0039
Tariff No. 200300095

FILED³
AUG 1 4 2002

**RESPONSE TO MOTION TO REJECT
OR, IN THE ALTERNATIVE, SUSPEND
AND MOTION TO CONSOLIDATE**

Missouri Public
Service Commission

Comes now, Aquila, Inc. d/b/a Aquila Networks - L&P and Aquila Networks - MPS ("Aquila"), and, in response to the Motion of the Missouri Public Service Commission Staff ("Staff") to Reject Tariff or, in the Alternative, Suspend Tariff and Motion for Expedited Treatment, and, as its Motion to Consolidate, states as follows to the Missouri Public Service Commission ("Commission"):

SUMMARY

The Staff seeks a Commission order rejecting or, in the alternative, suspending the tariff sheets Aquila filed in the above-captioned matters. The Staff indicates that the tariffs should be rejected because they address subjects in addition to those concerning school aggregation mandated by Section 393.310, RSMo (2000). While Aquila prefers that the tariffs not be suspended until November 1, 2002, as suggested by the Staff in the alternative, such an outcome would be acceptable. However, the filed tariff sheets are not unlawful merely because they include subjects beyond those found in Section 393.310. Most of the tariff language cited to by the Staff is, in fact, currently found in Aquila's approved tariffs. Therefore, the tariffs should not be rejected.

Additionally, Aquila moves the Commission to consolidate the above referenced

cases in order facilitate the processing of these matters.

THE STAFF MOTION TO REJECT SHOULD BE DENIED

1. The discussion regarding the form of the tariff must begin with a review of the history of Aquila's small volume aggregation tariff. Previously a group of Missouri school districts and members of the Missouri legislature asked Missouri natural gas utilities to consider filing with the Commission aggregation tariffs. Aquila (then Missouri Public Service) was the only Missouri natural gas utility to voluntarily implement such a tariff. This Commission approved Aquila's small volume aggregation tariff by order issued August 29, 2000.¹ Based upon testimony at the Senate Hearing this past legislative session concerning the substance of the Experimental School Transportation Program, it is Aquila's understanding that the legislative initiative that resulted in the enactment of Section 393.310 was undertaken by school districts to require other utilities to implement programs similar to that which Aquila already had in place.

2. In response to Aquila's filing, the Staff has filed its Motion to Reject Tariff or, in the Alternative, Suspend Tariff and Motion For Expedited Treatment (the "Motion"). On August 12, 2002, the Commission issued its Order Setting Time for Response and Directing Filing, which directed that Aquila file any response by August 14, 2002.

3. The Staff, in support of its Motion, states that the tariffs filed by Aquila provide for aggregation beyond that required by the Experimental School Transportation Program. The Staff then alleges that "because Section 393.310.1,

¹ *In the Matter of Missouri Public Service's Tariff Designed to Establish an Experimental Small Volume Aggregation Program*, Case No. GT-2001-61 (August 29, 2000).

RSMo 2002 only applies to school districts and because it clearly provides that it does not affect any other law, it follows that Aquila cannot invoke Section 393.310.1 as a basis for implementing similar changes for other customers."

4. There is a fundamental factual error in this allegation. Aquila has NOT invoked Section 393.310.1 as a basis for anything other than that portion of the tariffs concerning school districts. Aquila's cover letter cited three issues addressed by its tariff filing:

- "The impending expiration of the Company's small volume aggregation program for the MPS system";
- "The recent statutory requirement for an aggregation program for schools"; and,
- "The proposed September 1, 2002 adoption of daily scheduling and balancing by Williams Pipeline-Central. If the FERC approves these provisions, the Company will need tariff provisions to address possible penalties and charges that could be caused by end user imbalances."

5. The fact that the aggregation provisions apply to Aquila small-volume customers other than school districts is nothing new. Aquila's current Commission-approved tariffs already provide for small volume aggregation by customers other than school districts. This is something that the Commission has previously authorized as in the public interest.

6. The portion of Section 393.310 quoted by the Staff as the basis for its Motion, thus, confirms that a tariff such as that utilized in the past by Aquila is still viable. The statute states that it "shall not affect any existing laws and shall only apply

to the program established pursuant to this section.” The Commission previously had the authority to approve a tariff such as that proposed here by Aquila. Nothing contained in the Experimental School Transportation Program changes that fact.

7. The Staff suggests that the Aquila’s tariff should be rejected because it does not comply with Section 393.310. In essence, the Staff is raising a motion to dismiss for failure to state a claim.

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It ***assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.***²

8. There is nothing unlawful or procedurally improper about the proposed tariff language contained in Aquila’s filing. While the Commission may later decide that these tariffs should not go into effect for some substantive reason, the Staff has not made a sufficient argument at this point for rejection. The Staff’s Motion to Reject should be denied.

9. An additional alternative is to litigate the question raised by the Staff in the hearing of these matters. To that end, Aquila suggests that it would be willing to accept the earliest available hearing date, in order to provide the Commission additional time to consider these matters.

SUSPENSION OF EFFECTIVE DATE

10. The tariffs filed by Aquila carry a proposed effective date of October 1,

² *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001) (emphasis added).

2002. In the alternative to its Motion to Reject, Staff moves that the tariffs be suspended from October 1, 2002, until November 1, 2002. Aquila does not object to this suspension. However, it would like to take this opportunity to explain to the Commission why time is of the essence to Aquila and its customers.

11. As stated above, Aquila currently has a small volume aggregation program under which customers are currently taking service. These tariffs expire on August 31, 2002. In discussions with the Staff, Aquila originally proposed to file the new tariffs with an effective date of September 1, 2002, in order to ensure that there would be no lapse in service for Aquila's customers. The Staff suggested that it would be better to request an effective date of October 1, 2002.

12. The October 1, 2002 effective date proposed by Aquila will already create a thirty day lapse in the program for certain customers. A November 1, 2002 effective date will create an even larger lapse for these customers. Accordingly, if the Commission does suspend the effective date until November 1, 2002, Aquila may consider filing revised tariffs seeking to extend its current program for an additional sixty days beyond August 31, 2002, or until November 1, 2002.

EXPEDITED TREATMENT

13. Aquila agrees that the Staff's motion should be addressed on an expedited basis.

MOTION TO CONSOLIDATE

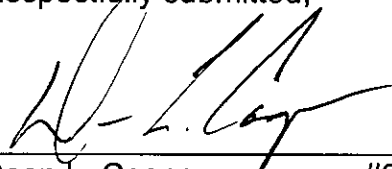
14. Cases Nos. GT-2003-0038 and GT-2003-0039 involve common questions of law and fact in that the cases concern identical tariffs proposed by Aquila, Inc. Thus far, the pleadings filed by the parties and the orders issued by the Commission in these

two cases have also been identical. A consolidation of Cases Nos. GT-2003-0038 and GT-2003-0039 into one case with a common procedural schedule would serve judicial economy both for the Commission and the parties by reducing the number of document copies that must be filed and the number of orders that must be generated.

WHEREFORE, Aquila respectfully requests that the Commission issue its order:

- 1) denying the Staff's Motion to Reject Tariff;
- 2) suspending these tariffs until November 1, 2002;
- 3) consolidating Cases Nos. GT-2003-0038 and GT-2003-0039; and,
- 4) granting such further orders as may be consistent with the foregoing.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 14th day of August, 2002 to the following:

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