BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Aquila, Inc. d/b/a Aquila Networks L&P and Aquila Networks MPS to implement a general rate increase in electricity	))))	**ER-2004-0034**
In the Matter of the Request of Aquila, Inc., d/b/a Aquila Networks-L&P to Implement a General Rate Increase in Steam Rates	))))	**HR-2004-0024 (Consolidated)**

RESPONSE OF SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION AND AG PROCESSING INC A COOPERATIVE TO COMMISSION QUESTIONS OF FEBRUARY 25, 2004

On February 25, 2004, the parties to the case were asked to respond to certain questions posed by the regulatory law judges. Those questions, as we understand them, and our responses thereto, follow.

A. What Issues In This Case Do Not Include the St. Joseph Service Area?

Missouri Public Service (MPS)-specific issues include all issues contained in Aquila's MPS minimum filing requirements schedules, MoPSC Staff's MPS Accounting Schedules and all other Public Counsel (OPC) or intervenor issues as identified in the MPS case reconciliation schedule that was filed by the Staff on behalf of the other parties. Given the limited time permitted for investigation, we are unable to provide a comprehensive list. However, it would appear that the list would include at least the following MPS-specific items:

1. All costs and issues that are identified in the minimum filing requirements schedules for the MPS electric division appear to be separate from the St. Joseph Light & Power Co. (L&P) electric and steam operation minimum filing requirements schedules.

2. In Aquila's minimum filing requirements for its various divisions, it appears that the various divisions were allocated certain common costs, but it also appears that the minimum filing requirements schedules represent Aquila's recommendations for the actual costs of service for the various divisions. Save for the allocations of these joint costs, no costs from the L&P electric operation cost of service as filed by Aquila, the Staff or by another other intervenor are included in the filed cost of service for the MPS division. The same, coincidentally, is true with respect to the L&P division.

3. The filings in the steam case, Case No. HR-2004-0024, are separate and distinct from the MPS electric division cost of service. Again, the HR case contains costs that are allocated some joint and common costs and the so-called "steam subsidy" is entirely within the L&P division. It does not appear that any L&P steam system costs are included in the filed cost of service for MPS.

4. On initial analysis, there appear to be numerous other issues that are not necessarily involved with the St. Joseph service terrritory or can be easily severed. These

include: Rate Design (limiting the existing Stipulation to MPS territory); Return on Equity; Billing Determinants; Fuel Cost including gas; Airies-related issues; Depreciation; Division-specific O&M costs that are not the result of allocation; Division-specific rate base items that are not allocations, *e.g.*, coal inventory, distribution plant; Property taxes on local facilities; Customer costs, *e.g.*, deposits and bad debts.

As a practical matter, the witness schedules and the various issues have been spread over the period scheduled for the hearing. Some minimal time would be required for counsel and the regulatory law judge to reconfigure that hearing schedule, witness list, and issue list. These matters should not take a large amount of time, perhaps part of a morning.

B. What Would Happen On The Operation of Law Date (June 2, 2004) If Nothing Else Happens in This Case?

Assuming that nothing else happens in this case given its present status the answer depends on the district.

As regards the ***MPS Division*** or service district, the Preliminary Writ has no effect on this division nor on the Commission's ability to act with respect to this tariff filing or application. If the Commission chose of its own accord to take no further action as regards the MPS Division tariffs, those tariffs would go into effect by operation of law for service rendered on and after June 2, 2004. This would not be a result of the prelimi-

nary writ of prohibition, but rather would be because the Commission chose to take no further action regarding the tariffs proposed for that division. Section 393.150 RSMo.

As regards the ***L&P Division*** or service territory, our position is that the tariffs that have been filed are a nullity because they were filed without legal authority. As a result, there is no operation of law date applicable to those tariffs. For example, were undersigned counsel to sign and file proposed tariff sheets for Kansas City Power & Light, no operation of law date would be associated with those tariffs because they were filed without legal authority.

C. Can Or Should the Commission Consider the MPS Division Tariffs Given That The Tariffs Were Filed Concurrently With Those Purporting to Affect the Former St. Joseph Light & Power Territory?

We believe that the answer to this question is yes. Indeed, in compliance with law, the Commission is charged to "give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." Section 393.150.2 RSMo. 2000. We believe that the Commission would be in default of its duty to the public generally and the parties were it to fail to process the MPS tariffs and application "as speedily as possible." *Id.*

The Preliminary Writ of Prohibition does not prohibit the Commission from considering the MPS tariffs or processing the MPS

Division rate proceeding. We believe that this proposal should proceed under the current schedule as much as possible.

Moreover, the Preliminary Writ of Prohibition does not preclude the Commission from dismissing or rejecting the ***tariffs*** that were proposed without authority for the St. Joseph Light & Power service territory by Aquila. The Commission has acted to reject tariffs many times and customarily does so on conclusion of a case, rejecting the originally filed tariffs and directing the utility to file new "compliance" tariffs in accordance with its decision.

In this case, while the tariffs were filed concurrently, they are separate filings. The territorial descriptions are filed separately for L&P (Sheet 3) and for MPS (Sheet 9). The proposed increased rates for L&P were filed as separate sheets, Sheet Nos. 18-50, and for MPS, Sheet Nos. 51-95. Certain riders that purport to apply to both divisions could be rejected in their present form with directions that they be refiled for MPS only. These actions would be consistent with the Commission's obligations to proceed with the MPS portion of the case while rejecting the unauthorized L&P filings.

D. Response to the Preliminary Writ is Due March 17, 2004. What Action Should The Commission Take In This Case In Light of the Future Hearing on the Preliminary Writ of Prohibition?

The Commission should proceed process the MPS division tariffs and the related application as indicated above. No prohibition prevents the Commission from so doing and under the law the Commission should proceed to process that application as promptly as possible and possibly within the period that is currently established for the hearing of that matter.

E. What Happens When The PSC Issues An Order In The Remanded EM-2000-292 Case?

Presumably the context of this question is directed to a ***substantive*** order that the Commission would issue in that Case and presumes that the Commission would comply with the mandate of the Supreme Court and the Circuit Court issued pursuant to the Supreme Court's reversal of its earlier decision. If so, two results could occur depending on the content of the order and the decision that was made.

First, as directed by the Supreme Court, the Commission should take into account the acquisition premium and its impact in conjunction with the other issues raised by the Commission Staff and the intervenors in making its determination of whether the merger is detrimental to the public.

As clearly suggested by the Supreme Court, the Commission should use this remand as "an opportunity to reconsider the totality of ***all the necessary evidence*** to evaluate the reason-

ableness of a decision to approve a merger between UtiliCorp and SJLP."[1/]

Nearly four years have passed since the original hearing was held and evidence taken. There have been many changes in the utility landscape since then, ***not among the least of which is the radical change in the financial situation of Aquila.*** At the time the EM-2000-292 case was heard, Aquila was an investment-grade utility and, though not rated as high as SJLP, it was still investment grade. Aquila had an ongoing gas and power merchandizing operation. In fact, the existence of that program was one point noted by the Commission in its order approving the merger.[2/]

Today Aquila is in serious self-created financial difficulty. It has fallen well below investment grade and its securities

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[1/] *State ex rel. Ag Processing, Inc. v. Public Service Commission,* 120 S.W.3d 732, 737 (Mo. *en banc* 2003).

[2/] In its now-reversed December 14, 2000 order approving the merger, the Commission had stated:

> It is not reasonable to assume that SJLP could effectively and efficiently create the marketing knowledge and resources needed to operate in the wholesale market and obtain the same results as those that could be obtained after a merger with UtiliCorp. The evidence does not indicate precisely how much merger savings could be obtained through increased activity in the wholesale market, but it is reasonable to assume that there could be savings.

In re UtiliCorp Proposed Merger, 9 Mo. P.S.C.3d 454, 463, 2000 Mo. PSC LEXIS 1646 (Mo. PSC 2000).

are rated as "junk."[3/] Aquila has been forced to pay a $26 million fine to the Commodity Futures Trading Corporation (CFTC) to settle claims regarding its energy merchandizing activities and, in the post-ENRON world, has now abandoned those activities. It has sold, is attempting to sell, or is in the process of selling many of its unregulated investments (and even some regulated ones, *e.g.*,, its Eastern gas distribution system) and faces the high probably of significant future liquidity calls that it may or may not be able to meet. This Commission well knows the story, having just issued its decision in the EF-2003-0465 collateralization case.

Under the holding in *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 596 (Mo.App. W.D. 1993), the Commission may certainly consider events that have occurred following the issuance of the original reversed order. *Intercon*, incidentally was cited approvingly by Commission Staff in its February 4, 2004, Suggestions in Opposition to AGP's Motion to Dismiss, p. 16.

> [I]f the PSC order authorizing the certificate to MoGas is determined to be invalid, it

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[3/] Aquila's witness Glenn P. Keefe testified as follows in the EF-2003-0465 case:

> 13 Q. Was Aquila in financial difficulty at the time
> 14 of that case [the SJLP/UtiliCorp merger]?
> 15 A. No.
> 16 Q. Was Aquila an investment grade utility at the
> 17 time of that case?
> 18 A. Yes, it was.

Keefe, EF-2003-0465, Tr. Vol 4, p. 186.

> can be ordered to be set aside and the cause remanded to the PSC. If upon remand MoGas was not successful in obtaining authority to operate its pipeline, the PSC would have authority to seek to enjoin its operation. *Public Serv. Comm'n v. Kansas City Power & Light Co., 325 Mo. 1217, 31 S.W.2d 67 (Mo. banc 1930).* ***However, this is not to say that the completion of the project, under authority of the PSC that is later set aside on appeal, cannot be taken into consideration in determining the public interest in the event of remand. Orders of the PSC are made on the basis of the public interest. [Citing Consumers]. The PSC would be entitled to consider any relevant evidence.***

Certainly, the Commission should not be insouciant to the changes in Aquila's financial picture that have occured in the past four years. However, the Commission should not do this selectively by picking and choosing only those items of evidence and subsequent occurrence that would support a finding that the combination continued to be in the public interest without providing a reasonable opportunity for opposing parties to provide evidence regarding other events.[4/] Said another way, the Commission must now consider and address ***all relevant circumstances*** including those that have occurred since the entry of the original reversed order. *State el rel. Utility Consumers Council*

[4/] It deserves only brief note that the Commission's own Staff, now so apparently purposed on saving the merger, testified uniformly in the original EM-2000-292 hearings that the merger was a bad deal for the ratepayers, a bad deal for the shareholders, a bad deal for the public generally and quite likely a bad deal for Aquila.

of Missouri v. Public Service Commission, 585 S.W.2d 41 (Mo. *en banc* 1979) ("UCCM").

Under *UCCM*, the Commission would need to provide the parties with a reasonable opportunity to provide any relevant evidence that has surfaced in the past four years including certainly changes in Aquila's financial condition. Surely the Commission would not wish to deny parties a reasonable opportunity to produce evidence that in the interim might well indicate that the proposed transaction now has an even stronger tendency to injure the public welfare without regard to the inclusion or exclusion of the acquisition premium. The Commission has recently held that "[t]he Commission should look at the reasonableness of the risk of the increases" and should give due consideration to the law that "[n]o one can lawfully do that which has a ***tendency*** to be injurious to the public welfare."[5/] Surely the Commission, having been provided by the Supreme Court with an opportunity to "reconsider all the necessary evidence"[6/] whether in the present circumstances the reasonableness of a decision to allow these two utilities to merge is still reasonable and is not detrimental to the public interest. Failing to provide a full and fair consideration of these intrervening facts might well violate the due

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[5/] *In re Application of Aquila*, Case No. EF-2003-0465 (February 24, 2004), slip opinion at 7, *quoting from State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo. *en banc* 1934) (emphasis in original).

[6/] *Ag Processing, supra,* at 737.

process rights of all the parties. *State el rel. Fischer v. PSC*, 645 S.W.2d 39 (Mo. App. 1982).[7/] These facts would include without limitation:

- Changes in the financial condition of Aquila, Inc. wrought by its unregulated activities that would argue against the public interest being served by merging a healthy Missouri public utility with one that is below investment grade and financially imperiled.
- Changes in the financial ratings of Aquila, Inc. due to its financial condition that could create a tendency to cause a detrimental impact upon the ratepayers in the St. Joseph Light & Power service territory.
- Any changes in the financial condition of Aquila that has occurred since the reversed order was originally entered that would detrimentally affect the ability of Aquila as a surviving corporation to make good its obli-

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[7/] In *Fischer*, the reviewing court said:

> This court has authority to examine acts of the Public Service Commission for due process violations. *State ex rel. Chicago Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791, 796[2] (Mo. banc 1958).
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> Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. *Tonkin v. Jackson County Merit System Commission*, 599 S.W.2d 25, 32-33[7] (Mo.App.1980) and *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37, 39-40[2]] (Mo.App.1962). ***One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.*** *Mercy heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J.Super. 412, 330 A.2d 370, 373-374[7](1974) (Bolded italics added).

gations to the retirees and pensioners of the utility that is proposed to be acquired.

- Changes in impact on Aquila's MPS ratepayers since Aquila's liquidity and its availability of funds to provide safe and adequate service is certainly affected by the amount of the acquisition premium that ***was*** paid, whether or not it is currently sought to be recovered.

- Any other changes in the conditions surrounding Aquila, changes in its cash positions, changes in its business plan and related other matters that would negatively affect the reasonableness of a decision to approve a merger between Aquila and St. Joseph Light & Power Co. as viewed from the perspective of the entire public interest including that of the SJLP shareholders.

If upon consideration of this presently incomplete list of items, the Commission were to issue a valid order approving the merger and finding the necessary facts as noted above in support of that order, that order would again become subject to potential rehearing and thereafter potential judicial review. However under Sections 386.270 and 396.490.3, that order would be presumptively efficacious until found otherwise at the conclusion of any judicial review process that might be initiated.

In that circumstance, Aquila would thereafter be free to propose new tariffs for the St. Joseph Light & Power service territory ***subject to the outcome*** of any judicial review process. The Commission decision would not, however, have retroactive effect and the originally filed tariffs would have to be rejected. *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 353 (Mo. 1951)

Missouri law follows the general rule that upon reversal of an administrative decision the case stands as if no decision had ever been made. 73A C.J.S. *Public Administrative Law and Procedure* § 258 (1983). *See also Cremer v. Police Pension Fund Bd. of Mount Prospect*, 387 N.E.2d 711 (1978). The Supreme Court of Illinois in *Illinois Commerce Commission v. N.Y. Central Ry. Co.*, 398 Ill. 11, 75 N.E.2d 411, 415, 72 PUR (NS) 227 (1947) articulated the rule where it said

> . . . the court in reviewing an order of the Commerce Commission must either confirm or set aside the order as a whole; and where the court reverses the order because a part of the same is invalid, it need not consider the validity of any other part of the order, since the invalidity of a part renders the entire order void." *See also, Gulf Transport Co. v. Illinois Commerce Commission,* 402 Ill. 11, 83 N.E.2d 336, 345 (1948); *Transcontinental Bus System, Inc., v. State Corp. Commission,* 56 N.M. 158, 241 P.2d 829 (1952).

Accordingly, the tariffs filed by Aquila in this proceeding on July 3, 2003 to increase rates for the St. Joseph Light & Power service territory would have to be rejected as unauthorized when filed.[8/]

Presumably Aquila's new filing would involve a different and much more current test year, and would be the subject to a new

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[8/] Suppose, hypothetically, that John Driver is pulled over and issued a ticket for going 70 in a 55 mph zone on a particular stretch of road. After his court date and his payment of the ticket, the legislature raises the speed limit on the same stretch of highway to 70. Does this mean that he gets his fine back? Could he have the conviction, plea or points expunged from his driving record?

rate case before the Commission that would proceed subject to the outcome of any judicial review process that might be initiated.

Second, if upon the consideration of all the foregoing evidence, the Commission should issue an order that would deny approval of the proposed merger as being contrary to the public interest (including the interest of the shareholders of the St. Joseph Light & Power Company),[9/] then any person aggrieved by that order would have the right to seek rehearing and, following action on that rehearing, potentially judicial review. However, under Sections 396.270 and 396.490.3 the decision would be in force unless and until it was reversed by a court at the conclusion of the process of judicial review.

In that case, quite obviously, Aquila would have no right to continue to maintain a rate increase proposal for the St. Joseph

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[9/] *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo. *en banc* 1934).

Light & Power Co. and that portion of the proposed filing would have to be rejected or dismissed.

Respectfully submitted,

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ATTORNEYS FOR SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION AG PROCESSING INC A COOPERATIVE

February 26, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Dismiss by electronic mail, by facsimile or by U.S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.

Stuart W. Conrad

Dated: February 26, 2004