

**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)	Case No. ER-2004-0034
Networks - MPS to Implement a)	
General Rate Increase in Electricity)	

In the Matter of the Request of)	
Aquila, Inc. d/b/a Aquila Networks-)	Case No. HR-2004-0024
L&P to Implement a General)	(Consolidated)
Rate Increase in Steam Rates.)	

**SUPPLEMENTAL SUGGESTIONS OF AQUILA, INC. IN OPPOSITION TO AG
PROCESSING INC'S MOTION TO DISMISS AND REJECT AQUILA NETWORKS'
UNAUTHORIZED FILING OF PROPOSED STEAM AND ELECTRIC TARIFFS AND
FOR THE APPOINTMENT OF A CONSERVATOR FOR THE BENEFIT OF THE
SHAREHOLDERS OF ST. JOSEPH LIGHT & POWER CO.**

Comes now Aquila, Inc. ("Aquila") and offers the following supplemental suggestions in opposition to AG Processing Inc.'s Motion to Dismiss and Reject Aquila Networks' Unauthorized Filing of Proposed Steam and Electric Tariffs and for the Appointment of a Conservator for the Benefit of the Shareholders of St. Joseph Light & Power Co. (the "Motion to Dismiss").

A. Introductory Observations.

On February 4, 2004, Staff and the Office of the Public Counsel ("OPC") filed their respective responses to the Motion to Dismiss. Generally, OPC supports AG Processing Inc.'s ("AGP") Motion to Dismiss contending that the effect of the Missouri Supreme Court's Opinion Case No. SC85352 was to render the Merger Order a nullity and to void the Merger. Staff, on the other hand, generally concurs with Aquila that the

Merger was closed pursuant to a lawful, valid and operative order of the Commission issued in Case No. EM-2000-292.

Both filings contain statements to which a reply is required. Aquila will not respond to each and every statement or allegation made by OPC or Staff. This reply will be as targeted as possible in an effort to avoid repeating at length matters already addressed in Aquila's initial suggestions. Accordingly, Aquila's failure to respond to each and every claim or allegation contained in the responses of OPC and Staff should not be taken by the Commission to indicate acquiescence on the part of Aquila. Rather, it merely reflects Aquila's belief that the topic or issue has already been adequately addressed in the company's initial suggestions.

B. OPC's Suggestions in Support of the Motion to Dismiss are contrary to the controlling statutory law.

1. AGP's Motion to Dismiss is an impermissible collateral attack on the Merger Order.

OPC's Suggestions, like the Motion to Dismiss, are nothing more than an impermissible collateral attack on the Commission's Merger Order. As Aquila pointed out in its initial Suggestions, the validity of the Commission's final Merger Order in Case No. EM-2000-292 cannot be challenged in this rate case (Case No. ER-2004-0034). Section 386.550, RSMo states that all orders and decisions of the Commission "which have become final shall be conclusive" in all collateral actions. The Merger Order is a final order of the Commission as proven by the fact of AGP's appeal of that Order. AGP cannot challenge the validity of the Merger Order in this case. The Motion to Dismiss should be denied.

2. OPC's Suggestions ignore the controlling statutory law that establishes both the validity of the Merger Order and the electric and steam tariffs of Aquila Networks - L&P currently on file with and approved by the Commission.

OPC's Suggestions commence from an incorrect premise. Without benefit of legal authority, OPC simply presupposes that the Merger Order is invalid. To justify this erroneous assumption, OPC has presented a tortured interpretation of various court decisions in order to interpret the meaning of the Act. OPC also has misrepresented the circumstances surrounding the Missouri Supreme Court's opinion.

There is no need for the Commission to attempt to engage in statutory construction with regard to the effect of AGP's appeal of the Merger Order or of the effect of the Missouri Supreme Court's Opinion in Case No. SC895352 because the intent of the General Assembly is apparent from the plain and ordinary meaning of the applicable statutes. The law controlling the circumstances presented to the Commission is plainly set forth in the language of the statutes. The Commission can give the statutes effect as written and without resort to construction or interpretation.¹

The Public Service Commission Act (the "Act")² provides clear statutory guidance concerning the factual scenario presented by the AGP. It can be summarized as follows:

¹ Where statutory language is clear, unambiguous, and admits of only one meaning, there is no room for construction and the legislature is presumed to have intended what the statute says. *Corveta Abatement Technologies, Inc., v. Missouri Air Conservation Commission*, 937 S.W.2d 851 (Mo. 1998). See also, *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397 (Mo. 1986); *State ex rel. Missouri State Board for Registration for Healing Arts v. Southworth*, 704 S.W.2d 219 (Mo. 1986).

² Chapters 386 and 393 RSMo.

- §390.190, RSMo required that UtiliCorp and SJLP first secure an order from the Commission authorizing the Merger. This was done on December 14, 2000 when the Commission issued its Report and Order in Case No. EM-2000-292 authorizing UtiliCorp and SJLP to merge.
- The Commission made the Merger Order effective on December 24, 2000, which was subsequently extended to December 27, 2000.³
- AGP filed its application for rehearing on December 22, 2000. AGP did not request a stay of the Merger Order nor did it obtain a temporary restraining order from Circuit Court as provided in Civil Rule 92 staying the effectiveness of the Merger Order. AGP's pending application for rehearing did not stay the effectiveness of the Merger Order. Section 386.500, RSMo specifically provides that an application for rehearing "shall not...operate in any manner to stay or postpone" the effectiveness of a Commission order.
- Also on December 22, 2000, UtiliCorp filed tariff sheets adopting the existing tariff sheets of SJLP.
- The Merger Order took force and became effective on December 27, 2000. Section 386.490, RSMo states that every order or decision of the Commission becomes operative on its effective date and continues in force until changed or abrogated by the Commission. The Commission has not yet taken any action in Case No. EM-2000-292 to change or abrogate any finding or conclusion contained in the Merger Order. Indeed, the Commission has not yet had the opportunity to do so.
- On December 28, 2000, the Commission issued its Order Approving Tariffs whereby the Commission approved UtiliCorp's tariffs adopting the electric and steam tariff sheets then on file by SJLP.
- The electric and steam tariffs filed by UtiliCorp went into effect on December 30, 2000.
- The Merger was closed on December 31, 2000, as proven by Certificate of Fact issued by the Secretary of State of the State of Missouri.

³ At the request of the merging parties, the Commission extended the effective date of its Report and Order to December 27, 2000. This three day extension is inconsequential to the analysis provided herein. Aquila regrets that it failed to note this event in its initial Suggestions.

- The Commission denied all applications for rehearing (including that of AGP) on January 9, 2001 at which time the Merger Order became final for purposes of judicial review. See, §386.510 RSMo.
- AGP pursued its rights of appeal with regard to the Merger Order to the Circuit Court of Cole County (Case No. 01CV323152), the Missouri Court of Appeals (Case No. WD60631) and the Missouri Supreme Court (Case No. SC85352). Only final orders of the Commission can be appealed. See, Mo. Const. art V, § 18. The Merger Order is “conclusive” in this case. See, §386.550 RSMo.
- On October 28, 2003, the Missouri Supreme Court issued its opinion finding that the Merger Order was lawful.⁴ The Missouri Supreme Court reversed the Judgment of the Circuit Court affirming the Merger Order and remanded the case to the Commission for it to make further findings, specifically, “to consider and decide the issue of recoupment of the acquisition premium in conjunction with other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public interest.”⁵ The Missouri Supreme Court did not state that the Merger Order was invalid or that the Merger was void or a nullity.
- On January 7, 2004, the Circuit Court of Cole County issued its Order and Mandate Remanding Case (the “Remand Order”) purporting to remand Case No. EM-2000-292 to the Commission and directing the Commission to decide the issue of recoupment in rates of the acquisition premium. After further hearings, the Commission may change or modify the Merger Order, but any such changes can operate only prospectively and may not affect the rights of SJLP or UtiliCorp to merge their companies, which rights were exercised by those companies pursuant to a lawful and operative order of the Commission on December 31, 2000. See, §386.500.4 RSMo.
- The electric and steam tariffs filed by Aquila Networks – L&P remain in full force and effect and are *prima facie* lawful and reasonable and cannot be negated except in a suit brought for that purpose. See, §386.270 RSMo.

There are no ambiguities in the statutes which need to be resolved. The statutory framework is clear and comprehensive, and its meaning is plain. The Merger was consummated pursuant to a valid, operative and lawful order of the Commission.

⁴ Slip op. at Page 4.

⁵ Slip op. at Pages 7-8.

AGP's application for rehearing, pending at the time the Merger was closed, did not stay the Merger Order's operation. The opinion of the Missouri Supreme Court expressly affirmed the lawfulness of the Commission's Merger Order and merely remanded it to the Commission for further findings; nothing more.⁶ The Missouri Supreme Court did not conclude that the Merger Order was invalid or a nullity or that the Merger is void. No such language appears in its opinion. The Aquila Networks – L&P electric and steam tariffs are *prima facie* lawful and reasonable. These conclusions are no "desperate stretch" by Aquila as has been alleged by OPC at page 14 of its Suggestions. To the contrary, these conclusions are logically and inescapably based upon a dispassionate reading of the plain language of the applicable statutes.

OPC seriously misconstrues the effect of the Missouri Supreme Court's opinion. The Missouri Supreme Court cannot substitute its judgment for that of the Commission as to whether the UtiliCorp/SJLP merger is detrimental to the public interest. That is a factual finding reserved by law to the Commission. All the reviewing court can do (and all the Missouri Supreme Court has done in this instance) is to remand the case to the Commission for further action and/or findings. *See, State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 361-362 (Mo. App. 1992).⁷ The appellate courts cannot "modify the decree or entirely displace it with one of its own or attempt to

⁶ The Commission has taken no further action other than to reopen Case No. EM-2000-292 by virtue of an order dated February 6, 2004.

⁷ "The circuit court has no power to interfere with the decisions of the Commission except to affirm, reverse or reverse and remand and when a decision is reversed and remanded, it is remanded to the Commission 'for further action.'" (citations omitted)

tell the Commission what its action should be.” *State ex rel. Anderson Motor Service Company v. Public Service Commission*, 134 S.W.2d 1069, 1075-1076 (1939), *aff’d* 154 S.W.2d 777 (1941).

Since the Commission has not yet taken any further action in Case No. EM-2000-292 (other than to reopen the case), the Merger Order remains in force and in effect in accordance with its express terms. No change has occurred with respect to the terms of the Merger Order that has any bearing whatsoever on the outcome of this rate case.

OPC appears to concede at Page 5 of its Suggestions that the Commission should look to the language of §386.490.3 RSMo for guidance. Aquila agrees. There, OPC quotes the final clause which creates a narrow exception only for orders of the Commission which are found to be “unauthorized by law” or unconstitutional. However, the Missouri Supreme Court expressly concluded at Page 4 of its opinion that §393.190.1 RSMo provided “the lawful authority for the PSC’s decision.” Hence, OPC cannot sustain its perplexing claim that the Merger Order is unlawful and, therefore, invalid.

The statutory law on the topic presented is clear and there is no room for interpretation. The Act specifically provides that an order or decision of the Commission becomes operative on its effective date, before it becomes final for purposes of judicial review. Otherwise, there would be no reason for §386.500 RSMo to state that an application for rehearing does not stay the operation of a Commission order. The Merger Order became operative in accordance with its terms on December 27, 2000,

and UtiliCorp and SJLP were well within their rights under the law to close the Merger at any time thereafter. AGP's application for rehearing did not stay the legal force and effect of the Merger Order. AGP failed to request a stay of the Merger Order's effectiveness from the Commission or the Circuit Court and cannot now complain that the merging companies improperly exercised their legal rights to close the Merger in accordance with an operative order secured from the Commission, as is expressly provided for in the Act.

C. Staff's response supports Aquila's conclusion.

1. Many of Staff's key statements support Aquila's conclusion that the Merger is valid and AGP's Motion to Dismiss should be denied.

The argument presented in Staff's response appears to support Aquila's conclusion that AGP's Motion to Dismiss should be denied. However, it is unclear to Aquila precisely what formal position Staff is taking with respect to the Motion to Dismiss. In fact, Staff's "conclusion" section on page 26 of its Response appears to be unrelated to the matter at hand, that is, whether there is any lawful basis for the Commission to grant the Motion to Dismiss and reject the proposed electric/steam tariffs filed in this case by Aquila Networks – L&P.

It appears that Staff concurs with Aquila that the Merger has not been made void by having been closed before the Commission denied the application for rehearing. (Staff Response, p. 6). Staff notes, correctly, that UtiliCorp and SJLP had secured an Order from the Commission authorizing the Merger. In that regard, Staff states "there has been no allegation from AGP or OPC that the merger was made other than in

accordance with an order of the Commission authorizing the merger.” (Staff Response, p. 7).

Staff further notes that the Missouri Supreme Court “clearly stated ... that the Commission’s decision in [Case No. EM-2000-292] was lawful.” (Staff Response, p. 8). It is further observed by Staff that the argument of AGP that the Merger is void was presented to the Missouri Supreme Court during the appeals process and the Missouri Supreme Court refused to adopt the rationale. (Staff Response, pp. 8-9).

Staff, like Aquila, points the Commission to the language of §386.500.4 RSMo which sets forth the legal effect of an order of the Commission after rehearing. Staff concludes the following:

Thus, as a result of the Commission’s Report and Order issued on December 14, 2000, UtiliCorp and SJLP had the right to merge, and if the Commission had granted rehearing and had abrogated, changed or modified the original decision authorizing the merger, the Commission’s order or decision on rehearing would not have affected any right, or enforcement of any right, arising from or by virtue of the original order or decision of the Commission.

(Staff Response, p. 11). These elements of Staff’s response support and echo Aquila’s contention that the Merger is not void as a consequence of it having been closed before the pending applications for rehearing were denied.

Finally, Staff notes the filing of adoption tariffs by UtiliCorp on December 22, 2000, and the Commission’s subsequent approval thereof. (Staff Response, pp. 11-12). Staff states “[a] tariff, when approved by the Commission, becomes Missouri law.” (Citations omitted). (Staff Response, p. 12). Aquila agrees and once again directs the

Commission's attention to the controlling statutory provision, §386.270 RSMo, stating that such tariffs are *prima facie* lawful and reasonable.

Staff's recitation of historical Commission practice, too, is instructive. Staff points out, correctly, that "it is not unusual for the Commission to deny applications for rehearing after the effective date of Reports and Orders in rate increase cases." (Staff Response p. 12). In point of fact, this circumstance is the rule rather than the exception. Only a moment's reflection will make the reason apparent. Under the Act, an application for rehearing must be filed prior to the effective date of a Commission order or decision. See, §386.500.2 RSMo.⁸ This means an application for rehearing may be filed up to including the day before the effective date of an order. As a practical matter, many applications for rehearing are filed on or near the last possible day for doing so. Thus, the Act is not designed to permit the Commission to rule on an application for rehearing before an order becomes operative. This is why §386.500.3 RSMo specifically states that an application for rehearing does not stay an order's effectiveness. This illustrates the fundamental fallacy of AGP's argument; that the Act contemplates the mere act of filing of an application for rehearing negates the binding effect of a Commission order.

Finally, Staff's Response appears to concur with Aquila with respect to AGP's request that the Commission direct its General Counsel to join with AGP in filing in the

⁸ "No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing."

Circuit Court for the appointment of a conservator concerning the management of the former SJLP utility properties. On Pages 22 and 23 of its Response, Staff notes that there is no statutory authority for the Commission to seek the appointment of a conservator under the circumstances presented in this case.

- 2. Staff's request that the Commission convene a prehearing conference in Case No. EM-2000-292 presupposes the need for additional evidence in that case and its suggestion that new electric and steam rates for Aquila Networks – L&P in this case be made interim and subject to refund is (i) not responsive to the Motion to Dismiss and (ii) otherwise unauthorized by law.**

In its Response, Staff ultimately requests that the Commission convene a prehearing conference in Case No. EM-2000-292. Assuming that the Circuit Court's Remand Order has in fact placed jurisdiction of the Merger case back in the hands of the Commission, Aquila would not be opposed to attending a prehearing conference, but such an event would, by definition, presuppose the need for further evidentiary hearings in the Merger case; a prospect which would not appear to be warranted under the circumstances.

The record in Case No. EM-2000-292 was extensive and complete in all material respects as is necessary for the Commission to comply with the Supreme Court's targeted directive that the Commission make additional findings concerning the recoupment of the acquisition premium. UtiliCorp presented substantial evidence concerning the reasonableness of the price it offered for SJLP stock, which testimony was offered and received into evidence. UtiliCorp developed the offer price after considering five factors and then compared the offer price to average industry multiples for merger and acquisition transactions announced during the previous fourteen months

and concluded the 29% premium was comparable to the industry norm of 27%.⁹ UtiliCorp's evidence on this issue was not disputed by any adverse party.¹⁰ Additionally, UtiliCorp's regulatory plan outlining a structure for the recovery of the premium was the focal point of the hearing and was extensively litigated and briefed at length by the parties.

Additionally, in this rate case, Staff recommends that the Commission move forward with the procedural schedule and, to the extent that the Commission approves a rate increase, put those rates into effect on an interim basis subject to refund pending the outcome of the Merger case (Case No. EM-2000-292). Aquila believes that such an action would be entirely inappropriate and, further, unauthorized by law. From a purely procedural perspective, Staff's suggestion is improperly put forth because the only matter before the Commission at this time is AGP's Motion to Dismiss the rate case and to reject the Aquila Networks – L&P tariff filings. Staff has filed no motion with the Commission that, if granted, would entitle it to any affirmative relief concerning whether the tariffs can or should be made interim and subject to refund if and when a rate increase is authorized by the Commission.

Also, given the statutory authority validating the lawfulness and effectiveness of the Merger, which legally secures the property rights obtained by Aquila by virtue of the Merger, and the statutory law stating that any change in the Merger Order can operate

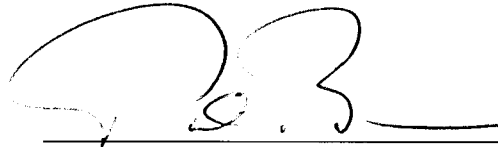
⁹ Exh. 1, pp.9-10; prepared direct testimony of Robert K. Green.

¹⁰ The fact that the reasonableness of the acquisition premium was not disputed in Case No. EM-2000-292 explains why the topic was not addressed in the Commission's Report and Order, that is, it was not a contested issue presented to the Commission to be decided.

only prospectively, there is no principled basis for Staff's recommendation. Should the Commission find that a rate increase for Aquila Networks – L&P is appropriate in order to achieve a reasonable return on property dedicated to the public service, Staff has presented no reasonable or lawful basis for thereafter making a refund to ratepayers. The owners of the utility properties of the former SJLP (e.g., current Aquila shareholders) would be the only ones entitled to those revenues. There appears to be a disconnect between Staff's proposal and the solitary matter at hand.

WHEREFORE, for all the foregoing reasons, Aquila renews its request that the Commission deny AGP's Motion to Dismiss and grant any other relief on behalf of Aquila as may be appropriate in the circumstances.

Respectfully submitted,



James C. Swearengen MBE#21510
Paul A. Boudreau MBE#33155
Sondra B. Morgan MBE#35482
Dean L. Cooper MBE#36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166
(573) 635-7431 facsimile

Attorneys for Aquila, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered or mailed by U.S. mail on this 18th day of February, 2004, to the following:

Nathan Williams
Missouri Public Service Commission
200 Madison Street, 8th Floor
Jefferson City, MO 65101

John B. Coffman
Office of the Public Counsel
200 Madison Street, 6th Floor
Jefferson City, MO 65101

Stuart Conrad
Finnegan, Conrad & Peterson
3100 Broadway, Suite 1209
Kansas City, MO 64111

Mark Comley
Newman, Comley & Ruth
601 Monroe Street, Suite 401
Jefferson City, MO 65102

Shelley Woods
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

Major Craig Paulson
Utility Litigation and Negotiation Attorney
139 Barnes Drive
Tyndall Air Force Base, FL 32403