

**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	)	)	Case No. ER-2004-0034 (Consolidated)
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	)	)	Case No. HR-2004-0024

**AQUILA’S RESPONSE TO STAFF’S MOTION FOR LEAVE  
TO FILE SUPPLEMENTAL SURREBUTTAL AND,  
IN THE ALTERNATIVE, AQUILA’S MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL SURREBUTTAL AND FOR EXPEDITED TREATMENT**

Comes now Aquila, Inc., d/b/a Aquila Networks - L&P and Aquila Networks - MPS (“Aquila” or “Company”), and, in response to the Missouri Public Service Commission (“Commission”) Staff’s Motion for Leave to File Supplemental Surrebuttal and for Expedited Treatment, states as follows to the Commission:

**SUMMARY**

Commission Rule 4 CSR 240-2.130(7)(D) states that “surrebuttal testimony shall be limited to material which is responsive to matters raised in another party’s rebuttal testimony.” The Surrebuttal Testimony of Aquila witness Davis Rooney responded to the Rebuttal Testimony of Staff witness Traxler. Therefore, Mr. Rooney’s Surrebuttal Testimony is consistent with Commission Rules and there is no basis for the filing of supplemental surrebuttal by the Staff.

In the alternative, if the Commission believes that Mr. Rooney’s Surrebuttal Testimony is improper, Aquila hereby moves the Commission for leave to file supplemental surrebuttal testimony as to the Greenwood lease, Aries Purchased Power Agreement, Accounting Record-Keeping and

Reporting, and jurisdictional allocation issues, and to adjust the hearing schedule accordingly, so that Aquila may have the opportunity to respond to issues raised by the Staff for the first time in Staff's surrebuttal testimony.

## **DISCUSSION**

1. On February 20, 2004, the Staff filed its Motion for Leave to File Supplemental Surrebuttal and for Expedited Treatment ("Staff's Motion"). The Staff's Motion requests that it be allowed to file supplemental surrebuttal concerning the straight-line tax depreciation issue by March 2, 2004.<sup>1</sup>

2. Certain facts regarding this dispute can be lifted from the Staff's Motion:

- "Aquila filed the direct testimony of H. Davis Rooney on July 3, 2003 at the time it filed the tariffs initiating this case. Among the issues that Mr. Rooney addressed in his direct testimony was straight-line tax depreciation deductions. (Rooney Direct, pp. 6 – 10) Mr. Rooney opined, at page 9, that the issue might be worth \$17 to \$23 million." (Staff's Motion, para. 1);
- "Staff witness Steve Traxler addressed the issue in his direct testimony filed December 9, 2003, at pages 3 and 4." (Staff's Motion, para 2);
- "Staff witness Traxler rebutted Mr. Rooney's direct testimony on the issue in his rebuttal testimony filed on January 26, 2004." (Staff's Motion, para. 3); and,
- "Aquila witness Rooney did not address the issue of straight-line tax depreciation in

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<sup>1</sup> The Staff also requests that the Commission expedite the matter by requiring that any responses to Staff's Motion be filed by close of business on February 24, 2004. As Aquila has filed this response prior to close of business on February 24, 2004, Aquila has no issue with this aspect of the Staff's Motion.

his rebuttal testimony filed on January 26, 2004.” (Staff’s Motion, para. 4).

3. Thereafter, on February 13, 2004, Aquila provided the Surrebuttal Testimony of Mr. Davis Rooney, wherein he provided material that is responsive to the Rebuttal Testimony of Staff witness Traxler.

4. As indicated, Commission Rule 4 CSR 240-2.130(7)(D) states that “surrebuttal testimony shall be limited to material which is responsive to matters raised in another party’s rebuttal testimony.” Mr. Rooney’s Surrebuttal Testimony is so limited as required by the Commission Rule; is, therefore, in accordance with the Commission Rule; and, contrary to Staff’s statement, cannot be stricken for violation of a Commission rule.

5. Staff recites Commission Rule 4 CSR 240-2.130(7)(B) as support for its motion. This rule describes rebuttal testimony and states that:

Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party’s direct case. A party need not file direct testimony to be able to file rebuttal testimony.

6. Staff’s Motion relies on a very literal meaning of this rule focusing on the language stating that rebuttal testimony “shall include *all testimony* which is responsive . . .” (emphasis added). Aquila believes this rule has consistently been interpreted to mean that responses which a party desires to make to direct testimony, must be contained in its rebuttal. The rule has not been interpreted to foreclose the possibility of responding to rebuttal testimony. The best evidence of this is the fact that the Commission’s rules, as well as the procedural schedule in this case, provide for “surrebuttal testimony.” If parties truly were required to provide “all testimony” in rebuttal, there

would be no need for surrebuttal testimony.

7. It is common for new aspects of arguments regarding an issue to be developed in surrebuttal testimony, which is responsive to rebuttal testimony. As will be discussed below in Aquila's alternative Motion for Leave, the Staff has done just that in this case in at least three instances.

8. Any time a party decides to file rebuttal testimony, it runs the risk that its rebuttal testimony will not be the last word on the subject. Aquila made a decision to not file rebuttal testimony concerning the straight-line tax depreciation issue because it was comfortable going to hearing with only the Company direct testimony and the Staff direct testimony being in the record and framing the issue. Staff's decision to address this subject further in its rebuttal testimony opened the door by creating a situation where Aquila could, and felt it should, address the matter in surrebuttal testimony. There is nothing about this that is inconsistent with the Commission rules and nothing about this that justifies the filing of supplemental surrebuttal. Staff's Motion For Leave should be denied.

**IN THE ALTERNATIVE,  
MOTION FOR LEAVE TO FILE SUPPLEMENTAL SURREBUTTAL**

9. As mentioned above, Aquila believes that there are at least three examples from the Staff's surrebuttal where it does exactly that of which it complains – i.e. introduces new aspects of issues in its surrebuttal, which, according to the Staff's interpretation of the rules, should have been contained in its rebuttal. These examples are as follows:

- The Surrebuttal Testimony of Staff witness Cary G. Featherstone addresses for the first time the lease of the Greenwood generating facilities in regard to the Aries

Purchased Power Agreement issue (p. 33-45);

- The Surrebuttal Testimony of Staff witness Mark L. Oligschlaeger provides a significant change in method for his theoretical calculation of the value of all capacity from the Aries power plant (Schedule 6); and,
- The Surrebuttal Testimony of Staff witness Alan J. Bax addresses for the first time why Staff chose to include Odessa in its jurisdictional allocation factors (p. 1-3).

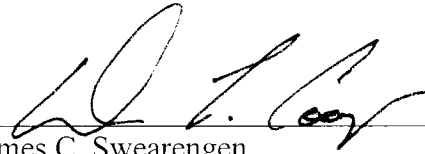
10. Additionally, Office of the Public Counsel witness Ted Robertson raises for the first time in his Surrebuttal Testimony certain issues he describes as “Accounting Record Keeping and Reporting” (p. 2-18).

11. Should the Commission agree with the Staff’s reading of the Commission rules, Aquila, in the alternative, moves the Commission for leave to file supplemental surrebuttal in regard to the Greenwood lease, Aries purchased power agreement, jurisdictional allocation, and accounting record keeping and reporting issues. Aquila suggests that this supplemental surrebuttal be due by March 2, 2004, and that any cross-examination to be conducted concerning the supplemental surrebuttal be conducted at the end of the evidentiary hearing (out of order, if necessary).

12. Aquila asks that the Commission expedite its ruling on this motion by directing any party wishing to respond to do so by close of business on Wednesday, February 25, 2004, and ruling the motion promptly. Aquila has filed this motion as promptly as possible upon receipt and review of the Staff’s Motion.

WHEREFORE, Aquila respectfully requests that the Commission issue its order denying the Staff’s Motion for Leave or, in the alternative, granting Aquila’s Motion for Leave contained herein.

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, by electronic mail or hand-delivered, on this 23<sup>rd</sup> day of February, 2004, to all parties of record.

