

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

In the Matter of Aquila, Inc., d/b/a Aquila)
 Networks-MPS and Aquila Networks-L&P)
 for Authority to Implement Rate Adjustments) **Case No. EO-2008-0216**
 Required By 4 CSR 240-20.090(4) and the)
 Company's Approved Fuel and Purchased)
 Power Cost Recovery Mechanism)

APPLICATION FOR REHEARING

COME NOW, AG Processing, Inc. (“AGP”) and Sedalia Industrial Energy Users’ Association (“SIEUA”), pursuant to Section 386.500 RSMo., and applies for rehearing of the Commission’s February 14, 2008 Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause (“Order”) on the following grounds:

1. As the Commission recognizes in the first sentence of its Order, Aquila “submitted a tariff designed to establish rate schedules related to Aquila’s approved Fuel Adjustment Clause (FAC).” Section 386.266.4 expressly provides that: “The commission may approve such rate schedules **after considering all relevant factors** which may affect the costs or overall rates and charges of the corporation.” The Order is unlawful, unjust and unreasonable in that it purports to approve such rate schedules without any consideration of “all relevant factors” as required by Section 386.266.4.

2. The Order is arbitrary, unlawful, unjust and unreasonable in that it purports to retroactively implement the FAC tariff approved effective July 5, 2007. Specifically, the Commission now concludes that the FAC became effective with the “issuance of the Report and Order.” The Commission makes this decision based only upon a perception that it “makes more sense.” While this interpretation may comport

with the Commission's concept of what allows a utility to recover money from its ratepayers and, therefore, "makes more sense," this interpretation is contradicted by Section 386.266.1 which ties the implementation of the FAC to the approval of the FAC rate schedule, not to the issuance of any particular prior order. It cannot be disputed that the approval of the FAC rate schedule did not take place until July 5, 2007, well over a month after the date on which the Commission now attempts to make the FAC tariff effective. The Commission has no power unless granted such by the General Assembly. It is, therefore, without power to approve a RAM in a manner that differs from that authorized by the General Assembly. It cannot lawfully act retroactively, nor can the Commission act as the legislature to amend statutes with which it finds it convenient to disagree.

3. The Order is arbitrary, unlawful, unjust and unreasonable in that it violates Commission Rule 4 CSR 240-20.090(1)(I) which provides that "True-up year means the twelve (12) month period beginning on the first day of the first calendar month following the effective date of the commission order approving a RAM." In issuing its Order, the Commission found that Aquila's FAC was approved in the May 17 Report and Order. "It makes more sense to interpret the regulation to tie the beginning date of the cost accumulation period to the issuance of the Report and Order than to the issuance of the subsequent order approving a tariff in compliance with the Report and Order."

A review of the ordered paragraphs in the Report and Order clearly indicates that Aquila's FAC was not approved in that decision.

The proposed electric service tariff sheets submitted under Tariff File No. YE-2007-0001 on July 3, 2007, by Aquila, Inc. d/b/a Aquila Networks MPS and Aquila Networks L&P for the purpose of increasing rates for

retail electric service to customers are hereby **rejected**. The specific sheets rejected are:

Original Sheet No. 124
Original Sheet No. 125
Original Sheet No. 126.

Original Sheet Nos. 124, 125 and 126 were the fuel adjustment tariff sheets. The Report and Order, therefore, makes it abundantly clear that Aquila's FAC was not approved in the Report and Order. Rather, it was specifically rejected.

Revised fuel adjustment tariff sheets again were rejected on May 25, 2007, when the Commission issued its Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets. That Commission decision makes clear that the FAC tariffs had still not been approved:

The proposed electric service tariff sheets number 60 through 62 submitted on May 21, 2007, by Aquila, Inc. d/b/a Aquila Networks – MPS and Aquila Networks – L&P, originally assigned Tariff File No. YE-2007-0847 and subsequently assigned Tariff File No. YE-2007-0858, for the purpose of increasing rates for retail electric service to customers are hereby **rejected**. The specific sheets rejected are:

P.S.C. MO. No. 1, Electric Rates
Original Sheet No. 124
Original Sheet No. 125
Original Sheet No. 126.

Again, Original Sheet Nos. 124, 125 and 126 are the fuel adjustment tariff sheets.

Yet again, on June 14, 2007, in its Order Rejecting Tariff, Granting Clarification, Directing Filing and Correcting Order Nunc Pro Tunc, the Commission **rejected** Aquila's FAC.

The proposed electric service tariff sheets submitted by Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, on May 25, 2007, are **rejected**. The specific sheets rejected are:

P.S.C. MO. No. 1, Electric Rates
Original Sheet No. 124
Original Sheet No. 125
Original Sheet No. 126.

It was not until the June 29, 2007 Order Granting Expedited Treatment and Approving Tariff Sheets that fuel adjustment rate schedules for Aquila were purportedly approved.¹

The proposed electric service tariff sheets submitted by Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, on June 18, 2007, are approved to become effective on and after July 5, 2007. The specific sheets approved are:

P.S.C. MO. No. 1, Electric Rates
Original Sheet No. 124
Original Sheet No. 125
Original Sheet No. 126
Original Sheet No. 127.

Given that 4 CSR 240-20.090(1)(I) focuses on “the effective date of the commission order approving a RAM,” Aquila’s FAC was not approved until the June 29, 2007 Order that was effective on July 5, 2007. The Commission’s new interpretation is contrary to that rule and is arbitrary and unlawful. The General Assembly directed the Commission to develop a rule. It did not authorize the Commission to develop a rule and then authorize recovery mechanism in contradiction to the rule it directed be developed.

4. The Order is unlawful, unjust and unreasonable in that it ignores Aquila’s judicial admissions contained in pleadings filed in Case No. ER-2007-0004. As those judicial admissions demonstrate, contrary to the inconsistent interpretations suggested by Aquila and adopted by the Commission, the fuel adjustment clause and accruals under it

¹ Please send point 7 regarding the unlawful nature of the presiding officer’s June 29 decision. Given the unlawful nature of the June 29 decision, any subsequent adjustment is similarly unlawful.

could not commence until the first day of the first calendar month *after the rate schedule had been approved*.

Based upon its own interpretation and its desire to have the FAC implemented, Aquila urged the Commission to approve its FAC, even to the point of denying parties their statutory due process rights. Specifically, Aquila suggested a legal subterfuge which the Supreme Court has recently found to be an “abuse of discretion” in connection with the Commission’s handling of Case No. ER-2006-0315. Aquila suggested that the Commission approve the FAC, by delegation, on a Friday afternoon and thus deny parties a “reasonable” opportunity in which to prepare and file an application for rehearing. One must necessarily ask, why would Aquila suggest such a questionable tactic if it believed that, no matter when it was approved, the FAC would be retroactively effective to June 1? Why did Aquila, and the Commission, not want to provide the parties the opportunity to properly vet their concerns over that FAC tariff if it was going to be retroactively effective to June 1? Certainly a party would not act in such an urgent manner and suggest such questionable legal positions unless it believed that time was of the essence. In this case, Aquila knew, and judicially admitted that each day of Commission delay would preclude recovery under the FAC. The Commission’s Order is contrary to the judicial admissions contained in those Aquila pleadings.

5. The Order is arbitrary, unlawful, unjust and unreasonable in that, in reaching its decision, the Commission claims that it “must attempt to reach a resolution that is fair to both the utility and its ratepayers.” Despite claiming to be mindful of the need to be fair to ratepayers, the Commission’s decision is utterly devoid of any discussion of how the ratepayers’ needs were identified, considered, balanced or

implemented. By seeking to provide for the unlawful collection of under-recoveries that occurred in the months prior to the effective date of the FAC tariff, the Commission disregards the statute, the ratepayer protections contained in that statute as well as all other ratepayer concerns. In fact, in direct contravention of the interests of the ratepayers, the Commission finds that its decision “allows Aquila to recover costs for two months that it would otherwise not be able to recover.” That is not the test, nor does Aquila’s self-induced failure to propose a compliant tariff until June 29, 2007 justify Commission action in violation governing law. The Commission’s perception of whether or not Aquila should be permitted to recover for what may or may not have been expended prior to August 1, 2007 is not the appropriate standard upon which to base the appropriate start date of this tariff. Rather, as discussed in a previous point, Section 386.266 expressly provides that the appropriate start date is based upon the approval of the rate schedule.

6. The Order is unlawful, unjust and unreasonable to the extent that it grants Aquila a waiver of any of the provisions of 4 CSR 240-20.090. While waivers of those provisions may be granted (See, 4 CSR 240-20.090(15)), such a waiver may be granted only after providing “an opportunity for a hearing.” In this case, no opportunity for a hearing was provided.

7. The Order is arbitrary, unlawful, unjust and unreasonable in that it purports to grant Aquila an adjustment in rates under a tariff that was never properly approved. As detailed earlier, the FAC tariff was approved in a June 29 decision that was purportedly issued by the presiding officer through a delegation of authority. Section 386.240 expressly provides that:

The commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility of any person unless expressly authorized or approved by the commission.

Contrary to Section 386.240, the presiding officer's ability to issue final orders or to approve or reject tariffs has never been expressly authorized or approved by the Commission. In fact, Missouri law prohibits the Commission from issuing a final decision through delegation.² Furthermore, Courts have questioned whether the Commission's attempt to act in such a manner is a violation of the Missouri Sunshine Law.³ Given that the June 29 decision approving the FAC tariff is unlawful and not "binding on any public utility or any person," any adjustment tariff, including that addressed in the context of the Commission's February 14 order is similarly unlawful.

WHEREFORE, AGP / SIEUA respectfully request that the Commission grant this rehearing and issue its order consistent with the points raised herein.

² *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696 (Mo. 1977).

³ *State ex rel. Churchill Truck Lines, Inc. v. Public Service Commission*, 555 S.W.2d 328 (Mo.App.W.D. 1977).

Respectfully submitted,



Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122 Ext. 211
Facsimile: (816) 756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR AG PROCESSING,
INC. AND SEDALIA INDUSTRIAL
ENERGY USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: February 29, 2007