

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

In the Matter of the Tariffs of Aquila, Inc.,)
d/b/a Aquila Networks - MPS and Aquila)
Networks - L&P Increasing Electric Rates) Case No. ER-2007-0004
for the Services Provided to Customers)
in the Aquila Networks - MPS and Aquila)
Networks - L&P Service Areas)

**SUGGESTIONS OF AQUILA, INC. IN OPPOSITION TO MOTION OF AG
PROCESSING, INC. AND SEDALIA INDUSTRIAL ENERGY USERS
ASSOCIATION FOR SCHEDULING OF A HEARING**

COMES NOW Aquila, Inc., ("Aquila" or the "Company") and for its response in opposition to a Motion for Scheduling of a Hearing (the "Motion") filed by Sedalia Industrial Energy Users Association ("SIEUA") and AG Processing, Inc. ("AGP") states the following:

1. On May 23, 2007, AGP and SIEUA filed their Motion seeking a hearing concerning Staff's Recommendation for approval of certain tariff sheets filed by the Company in the referenced case.¹ The pretext for the filing was an affidavit of James Watkins filed by Staff in support of its Recommendation. The Motion should be denied because the legal authority upon which AGP and SIEUA rely is not applicable in the circumstances and a hearing is otherwise not required by law.

2. The reliance AGP and SIEUA put in the language appearing in § 536.070(12) RSMo is not applicable to filing of Staff's Recommendation. That provision of the Missouri Administrative Procedure Act is a provision relevant to the adjudication of a "contested case". The filing of tariffs to implement a

¹ The Motion was accompanied by an Objection to Affidavit.

rate increase (and more specifically, compliance tariffs) does not constitute a “contested case” as that term is defined in the Missouri Administrative Procedure Act.

3. Section 536.010(4) RSMo defines a “contested case” as:

[A] proceeding before an agency in which the legal rights, duties or privileges of specific parties are required by law to be determined after a hearing. (Emphasis added)

The mere fact that there is a dispute about a particular request for grant of relief does not make the matter a contested case.

A contested case does not mean every case in which there may be a contest about rights, duties or privileges but instead one in which the contest is required by law to be decided in a hearing before an administrative agency.

State ex rel. Leggett v. Jensen, 318 S.W.2d 353, 355 (Mo. banc 1958).²

Thus, the question is whether the Commission is required by law to hold a hearing prior to allowing revised tariff sheets to go into effect. The answer is no.³

4. It is clear the Commission may permit new rates to take effect based on a mere tariff filing by a utility and without a hearing. § 393.140(11) RSMo. This precise question was addressed by the Missouri Court of Appeals in 1976.

² An excellent discussion concerning the difference between a contested and a non-contested case can be found in the case of *Cade v. State of Missouri*, 990 S.W.2d 32, 36-37 (Mo. App. 1999).

³ The fact that the Commission exercised its discretion to hold a hearing in which evidence was offered and received does not change this analysis. It is not the procedure actually employed by the Commission but, rather, whether a hearing is required by law that determines whether a proceeding is a contested case. See, *Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc 1995); *State ex rel. Valentine v. Board of Police Commissioners of Kansas City*, 813 S.W.2d 955, 957 (Mo. App. 1991).

The “file and suspend” provisions of the statutory sections quoted above lead inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate to go into effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion. (emphasis added)

State ex rel. Laclede Gas Company v. Public Service Commission, 535 S.W.2d 561, 566 (Mo.App. 1976). This principle was affirmed by the Missouri Supreme Court several years later.⁴

5. Ultimately, the filing of a new rate schedule (either at the commencement of a rate case or, as in this circumstance, compliance tariffs after the issuance of a rate order by the Commission) is not a contested case under the Missouri Administrative Procedure Act as defined in § 536.010 RSMo because no hearing is required by § 393.140(11) RSMo. The provisions of §§ 536.060 RSMo through 536.150 RSMo (and, specifically, § 536.070 RSMo) are not applicable and they provide no lawful basis for holding a hearing as requested by AGP and SIEUA. Consequently, the Objection to Affidavit is not pertinent to the filing of Staff’s Recommendation and the derivative Motion should be denied.

⁴ “Even under the file and suspend method, by which a utility’s rates may be increased without requirement of a public hearing, the Commission must, of course, consider all relevant factors including all operating expenses and the utility’s rate of return, in determining that no hearing is required and that the filed rate should not be suspended.” *State ex rel Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d at 41, 49 (Mo. banc 1979). (emphasis added) In this case, the Commission already has considered all relevant factors in the context of issuing its Report and Order.

6. Another required element of a contested case is that it involves a proceeding “in which legal rights, duties or privileges of specific parties” are determined after hearing.⁵ This element too is not present in the context of the file and suspend provisions of § 393.140(11) RSMo. It has long been established law that ratepayers such as AGP and SIEUA do not have a protected legal interest in the continuation of existing rates for service. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. 1975). Because AGP and SIEUA have no protected legal right in or privilege to Aquila’s existing rates, Aquila’s tariff filing in this case does not present a contested case implicating the procedural due process protections for adjudications under the Missouri Administrative Procedure Act.

7. Even if § 536.070 RSMo were applicable to the circumstances presented, the Motion nevertheless should be denied because, as AGP and SIEUA point out, subsection 12 of that provision controls the introduction of “an affidavit in evidence”.⁶ The evidentiary record in this case is closed and, consequently, there are no grounds for objection. The Commission already has held a full and comprehensive evidentiary hearing and the only question currently before the Commission is the ministerial matter of determining the correctness of the compliance tariffs filed by Aquila.

8. The Motion should also be denied because the filing of the Watkins affidavit, while customary practice on the part of the Staff, is not

⁵ “In order to be entitled to a hearing under due process of law, a plaintiff must have either a life, liberty or property interest protected by the Constitution.” [citation omitted] *Yarber*, supra., 915 S.W.2d at 328.

⁶ Objection to Affidavit, ¶ 3.

required in the circumstances. The Staff could simply have filed an unverified pleading with the Commission to the effect that the compliance tariffs should be approved. The filing of the affidavit was a mere mechanical matter and has no independent evidentiary significance for the record in this case.

9. In summary, the filing of Aquila's compliance tariffs does not present a "contested case" as that term is defined in the Missouri Administrative Procedure Act. As such, § 536.070, RSMo upon which AGP and SIEUA rely for their Motion is not relevant. Additionally, the evidentiary record in this case has been closed so an objection under § 536.070 (12), RSMo is of no consequence. For these reasons, the Motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 24th day of May, 2007, to the following:

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