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 Required by 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism	)	Case No. EO-2008-0216

COMMENTS OF AQUILA, INC., IN SUPPORT OF STAFF'S RECOMMENDATION TO APPROVE TARIFF SHEET AND IN OPPOSITION TO THE MOTION TO REJECT TARIFFS

Aquila, Inc. ("Aquila" or "Company"), by and through its undersigned counsel and in accordance with the Missouri Public Service Commission's ("Commission") Rules of Practice and Procedure, hereby submits its comments in support of the *Recommendation to Approve Tariff Sheets*, which was filed by the Commission Staff ("Staff") on January 29, 2008, and in opposition to the *Motion to Reject Tariffs and Response to Staff Recommendation*, which was jointly filed on February 8, 2008, by the Office of the Public Counsel, Ag Processing, Inc., and Sedalia Industrial Energy Users' Association (collectively, the "Tariff Opponents"). Aquila's comments regarding the issues raised by the Tariff Opponents are as follows:

On December 28, 2007, Aquila filed tariff sheets designed to increase rates to reflect fuel and purchased power cost increases that the Company actually incurred during the six-month accumulation period from June 1, 2007, through November 30, 2007 (the "FAC Adjustment Tariffs"). The Fuel Adjustment Clause ("FAC") that the Commission approved in its May 17, 2007, *Report and Order* in Case No, ER-2007-0004 specified that FAC-related rates would be adjusted twice annually based on changes in energy costs actually incurred by Aquila during two, six-month accumulation periods – one running from June through November and a second running from December

through May. Thus, the accumulation period used for the Company's FAC Adjustment Tariffs fully and specifically complied with the FAC that was approved by the Commission.

As required by 4 CSR 240-20.090(4), Staff has reviewed Aquila's FAC Adjustment Tariffs and has recommended, *inter alia*, that the Commission issue an interim rate adjustment order approving the Company's filing, which would become effective on March 1, 2008, subject to true-up and prudence reviews.

In response to Staff's recommendation, the Tariff Opponents argue that Staff's recommendation should be rejected and that any rate adjustment related to the FAC Adjustment Tariffs that is authorized or allowed by the Commission should be limited to the recovery of increases in fuel and purchased power costs that occurred during an accumulation period that begins on August 1, 2007, and ends on November 30, 2007 – a period of just four (4) months. The Tariff Opponents argue that such a result in required because the tariff sheets implementing Aquila's FAC were not approved until August 1, 2007.

Aquila believes that the Tariff Opponents' motion should be denied for several reasons. First, the Tariff Opponents' arguments to the contrary notwithstanding, the result they advocate is not mandated by either the Commission's rules governing the administration of FACs or by the statute that conferred on the Commission the authority to authorize fuel and purchased power cost recovery mechanisms for Missouri electric utilities. Second, basing a rate adjustment on a four-month accumulation period is contrary to both the plain and unambiguous language of Aquila's FAC tariff and the intent of the Commission when it approved that tariff. And, finally, the Tariff Opponent's position should be rejected because it is merely the latest attempt by long-standing opponents of Aquila's FAC to prevent or delay the implementation of the FAC that Aquila sought and was authorized to implement in Case No. ER-2007-0004.

I. NEITHER THE COMMISSION'S RULES NOR THE STATUTE EMPOWERING THE COMMISSION TO AUTHORIZE AN FAC FOR AQUILA MANDATE THE RESULT PROPOSED BY THE TARIFF OPPONENTS

The rules that the Commission adopted to govern the filing and administration of FACs clearly state how periodic adjustments of FAC-related rates are to be filed:

> (A) An electric utility with a FAC shall file one (1) mandatory adjustment to its FAC in each true-up year coinciding with the true-up of its FAC. It may also file up to three (3) additional adjustments to its FAC within a true-up year with the timing and number of such additional filings to be determined in the general rate proceeding establishing the FAC and in general rate proceedings thereafter.

4 CSR 240-20.090(4)(A). The term "true-up year," as used in the preceding excerpt from the Commission's rules, is defined twice in those rules – first in 4 CSR 240-3.161(G) and again in 4 CSR 24-020.090(I). The definition that appears in each of those sections states, in relevant part, as follows:

> 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 unless the effective date is on the first day of a calendar month, then the true-up year begins on the effective date of the commission order. The first annual true-up period shall end on the last day of the twelfth calendar month following the effective date of the commission order establishing the RAM.

The Tariff Opponents argue that the clause "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" must be read to mean the effective date of the order approving tariff sheets implementing a "RAM."[1] But no such interpretation is mandated by the specific language used to define "true-up year" in the Commission's rules. Indeed, such an interpretation violates well-established rules of statutory construction and interpretation because it ignores the fact that elsewhere in its FAC-related rules the Commission: 1) uses the word "tariff" when that is the meaning it

[1] The term "RAM," also is defined twice in the Commission's rules – first in 4 CSR 240-3.161(1)(E) and later in 4 CSR 240-3.161(1)G). Each definition states as follows: "Rate adjustment mechanism (RAM) refers [sic] either a fuel adjustment clause or interim energy clause." Aquila's FAC is merely one type of RAM.

intended, and 2) distinguishes between a rate adjustment mechanism and tariff's implementing such a mechanism.

Where general terms or expressions used in one part of a statute or rule are inconsistent with more specific or particular provisions in another part, the specific or particular provisions must govern. *Terminal R.R. Ass'n of St. Louis v. Brentwood*, 230 S.W. 2d 768, 769-70 (Mo. 1950); *State ex rel. City of Kirkwood v. Smith*, 210 S.W.2d 46, 48 (Mo. banc. 1948). And, where one part of a statute or rule is susceptible of two constructions but the language of another part is clear and definite and is consistent with one of the constructions, that construction must be adopted. *Jacoby v. Mo. Valley Drainage Dist. Of Holt County*, 163 S.W.2d 930, 931-32 (Mo. banc, 1942).

Aquila does not believe the phrase "order approving a RAM," which appears in the definition of "true-up year," is ambiguous. The order approving Aquila's RAM was the May 17, 2007, *Report and Order* that approved the Company's FAC; it was not the August 1, 2007, order that merely approved the tariff sheets *implementing* the approved mechanism. And the fact that the Commission approved an FAC for Aquila, and not something denoted an "RAM," makes no difference – each is a cost recovery mechanism, and, as stated in the Commission's rules, it is the order approving the *mechanism* that triggers the beginning of the true-up year.

But assuming, *arguendo*, that the phrase "order approving a RAM" that appears in the definition of "true-up year" is ambiguous, the interpretation of that phrase urged by the Tariff Opponents is contrary to, or inconsistent with, the previously cited rules of statutory construction. Several places in the rules governing the filing and administration of FACs the Commission used the word "tariff" or the phrase "tariff schedule" when that was the meaning it wanted to convey.[2] In light of this fact, and also because specific terms are preferred over general terms, it would be improper to construe the term "RAM"

[2] See, e.g., 4 CSR 240-3.161(7) and 4 CSR 240-20.090(2), (4), (5), and (12).

used in the definition of "true-up year" to mean "tariff" or even to include "tariff" within its meaning. This is especially true because in 4 CSR 240-20.090(12) the Commission makes clear that it understands there is a difference between a fuel and purchased power cost recovery *mechanism* and a *tariff* implementing such a mechanism. That is why, when it lists exemptions from its FAC-related rules, it lists adjustment *mechanisms, rate schedules*, *tariffs*, and incentive *plans* separately.

The construction proposed by the Tariff Opponents also is not mandated – or supported – by the language of Section 386.266, RSMo (Cum. Supp. 2006). As they did throughout Case No. ER-2007-0004, the Tariff Opponents urge a crabbed and hyper-technical construction of the language of Section 386.266 that is not mandated by the text of the statute and that also is inconsistent with its intent. Although subsections 1 and 4 of the statute use the phrase "rate schedules," it would be nonsensical to suggest that the General Assembly intended that its use of that phrase should be construed as narrowly and technically as the Tariff Opponents propose. For example, are "rate schedules" the same thing as "FAC tariffs"? That is what the Tariff Opponents suggest in the discussion that appears at page 7 of their pleading, but what is the basis for their conclusion? And if Section 386.266 is to be construed as technically as the Tariff Opponents suggest, how do they reconcile the language in subsection 4 of that statute, which states that "[t]he commission shall have the power to approve, modify, or reject *adjustment mechanisms* . . .."? (emphasis added) But the Commission need not concern itself with such things because the hyper-technical construction of the statute that the Tariff Opponents say is required – and the questions such an interpretation raises and the inconsistencies it creates – are only figments of the Tariff Opponents' imaginations.

Moreover, the narrow construction of the language of Section 386.266 that is being urged by the Tariff Opponents was never intended by the General Assembly. Instead, it simply passed Section 386.266 to broadly authorize the Commission to

approve, under certain circumstances and subject to certain expressed conditions, fuel cost recovery mechanisms for Missouri electric utilities. The legislature left the details of how that objective would be accomplished to the Commission. That is why subsection 9 of the statute requires the Commission to promulgate such rules "as it deems necessary, to govern the structure, content and operation" of FACs. The Commission has adopted such rules, and it is those rules – and not the general provisions of the statute – that control the issues that have been raised by the Tariff Opponents in this case.

The Tariff Opponents offer no independent – or legally supportable – reason why their proposed interpretation of the phrase "order approving a RAM" should be adopted by the Commission. Instead, they rely primarily on the fact that Aquila, in pleadings filed after the Commission issued its *Report and Order* in Case No. ER-2007-0004, expressed concerns that failure to timely approve tariff's implementing the FAC might prohibit the Company from recovering energy cost increases incurred during June 2007. Aquila did, in an abundance of caution, express that concern in May and June of 2007 because the Company was worried that a failure to timely approve tariff sheets implementing the FAC authorized by the Commission could deny the Company, during the high-usage summer months, the very cost and earnings protections the FAC was designed to provide. In addition, Aquila anticipated that someone might later argue, as the Tariff Opponents argue now, that the recovery period would not begin until the tariff sheets implementing Aquila's FAC were approved, and the Company hoped to avoid that argument. Initially, approval of the tariff sheets was delayed because of ambiguities in the Commission's *Report and Order* regarding what was to be included in the FAC. Then Ag Processing and Sedalia Industrial Energy Users further delayed the approval process by filing an untimely and unfounded appeal, which resulted in the issuance of a Writ of Review that prevented the Commission from taking any action on the tariff sheets while the writ was in effect. Despite those delays, when it ultimately approved the tariff

sheets the Commission did not indicate that it believed the concerns Aquila had expressed about the need to quickly approve the tariff sheets were well founded.

After a more careful review of the Commission's rules, Aquila believes it would be error for the Commission to construe the definition of true-up year in the manner that is being urged by the Tariff Opponents. Instead, Aquila believes the Commission's FAC rules are clear that it is the date of the order approving the FAC, and not the date of the order approving the tariff sheets implementing the FAC, that triggers the beginning of a true-up year. Indeed, the Company is now convinced this is the only construction that is supported by the language of the Commission's rules themselves.

Finally, the Commission should reject the construction of the rules that is being urged by the Tariff Opponents because that construction would require the Commission to cede its authority to determine when an FAC is to take effect. If the relevant date for the beginning of the true-up year is the date on which the cost recovery mechanism is approved, then the Commission controls that date because the Commission, alone, controls when its order authorizing the FAC is issued. However, if the relevant date is the date on which tariff sheets implementing an FAC are approved, then the Commission loses its control because other parties – as they did in Case No. ER-2007-0004 – can indefinitely delay the approval of tariffs through the filing of groundless, but time-consuming, motions or even through the filing of an untimely and groundless appeal.

Remarkably, the Tariff Opponents have failed to provide any basis whatsoever for the Commission to resolve the question of which accumulation period should govern the FAC-related rate adjustment that Aquila is seeking in this case: the six-month period proposed by the Company, which is supported by Staff, or the four-month period proposed by the Tariff Opponents. In resolving this question, the Commission is bound to follow the applicable law, and not by the prior suggestions of one party. Here, the

result mandated by applicable law – the Commission's FAC-related rules and well-established case law governing how those rules should be construed – is clear: the accumulation of fuel and purchased power costs used to adjust FAC-related rates commences on the date of the Commission order approving the cost recovery mechanism, not the order approving the tariffs implementing that mechanism. That is what Aquila has proposed to do and that is what Staff has endorsed. The arguments in opposition offered by the Tariff Opponents have no rational support in the Commission's rules, themselves, and no legal support in applicable case law.

II. BASING AQUILA'S FAC-RELATED RATE ADJUSTMENT ON AN ACCUMULATION PERIOD OF FOUR MONTHS IS CONTRARY TO THE PLAIN LANGUAGE OF THE COMPANY'S FAC TARIFF

It is a well-established in Missouri law that rate schedules that are filed by a utility and approved by the Commission have the force and effect of law and may be modified only: 1) by a new schedule filed voluntarily by the utility, or 2) by order of the Commission, after hearing, that is supported by competent and substantial evidence. See *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n.*, 286 S.W. 84, 86 (Mo. 1926). As previously noted in these comments, the FAC-related tariff sheets that were approved by the Commission in July 2007, and which remain in effect today, call for two, six-month accumulation periods.[3] Therefore, the Company's approved rate schedules, which have the force and effect of law and which can only be changed in accordance with law, prescribe six-month accumulation periods, not the four-month period advocated by the Tariff Opponents.

In an attempt to circumvent the law but still offer some basis for the Commission to disregard the six-month period specified in Aquila's approved tariff, the Tariff Opponents cite the decision of the Missouri Court of Appeals for the Western District in

[3] See Original Tariff Sheet 124 of Aquila, Inc., d/b/a Aquila Networks, effective July 18, 2007.

State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n., 210 S.W.3d 331 (2006). Tariff Opponents claim this decision stands for the proposition that where a conflict exits between a tariff and a rule the tariff must give way; but a review of the decision shows that the court's holding is not what the Tariff Opponents suggest. In fact, the holding in *Missouri Gas Energy* is both very narrow and fact-specific: where a utility incorporates a Commission rule as part of its tariff, the Commission is free to change the rule and, by so doing, effect a change in the tariff. Accordingly, *Missouri Gas Energy* does not provide authority for the Commission to do what the Tariff Opponents suggest. And Aquila is aware of no other Missouri case that does.

III. THE TARIFF OPPONENTS' MOTION SHOULD BE REJECTED BECAUSE IT MERELY THE LATEST ATTEMPT BY THE MOVANTS TO FRUSTRATE THE INTENT OF THE MISSOURI GENERAL ASSEMBLY AND AQUILA'S EFFORTS TO IMPLEMENT THE FAC THAT THE COMMISSION AUTHORIZED IN CASE NO. ER-2007-0004

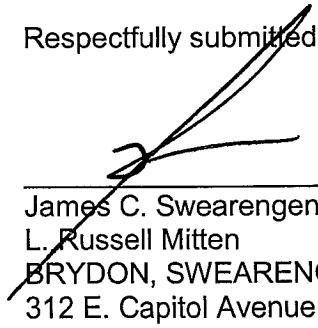
The Commission is well aware that each of the parties comprising the Tariff Opponents actively opposed the FAC that Aquila proposed in Case No. ER-2007-0004 as well as the FAC that the Commission ultimately approved. Since the decision in that case, the Tariff Opponents have looked for any means, however tenuous, to frustrate the intention of the General Assembly, the decision of this Commission, and the efforts of Aquila to successfully implement a fuel and purchased power cost recovery mechanism that will allow the Company to timely recover its prudently-incurred energy costs.

One example of the lengths to which the Tariff Opponents will go to derail or delay Aquila's FAC was the Writ of Review that Ag Processing and Sedalia Industrial Energy Users' Association obtained from the Circuit Court of Cole County on June 14, 2007. The fact that the court concluded the Writ was improvidently granted and dissolved it just twelve days later is testament to both the lack of merit of that gambit. But it illustrates the true objective of the Tariff Opponents: to delay or frustrate, through any means, Aquila's attempt to implement its FAC.

Although they make arguments opposing the Company's FAC, the Tariff Opponents provide little or no legal support for those arguments. The Tariff Opponents' motion is just the latest step in an effort to confuse and, through confusion, to delay implementation of Aquila's FAC and the recovery of costs under that clause. These efforts to undermine the process should not be allowed to succeed. Instead, consistent with its own rules, and with Staff's recommendation, the Commission should deny the Tariff Opponents' motion. This will allow the Commission to issue an order approving Aquila's FAC-related rate adjustment or, in the alternative, to simply allow the proposed adjustment to go into effect by operation of law on March 1, 2008, as specified in the rate schedules that the Company filed on December 28, 2008.

WHEREFORE, for the reasons stated above, Aquila urges the Commission to reject the Motion to Reject Tariffs filed by the Tariff Opponents and to, instead, adopt the recommendation of Staff and allow the Company to implement interim adjustments to its FAC-related rates that will allow Aquila to collect the excess costs it incurred for fuel and purchased power for the period June 1, 2007, through November 30, 2007, subject to later true-up and prudence review.

Respectfully submitted,



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ATTORNEYS FOR AQUILA, INC.

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent electronically, hand-delivered or mailed, United States Mail, postage prepaid, this 13th day of February, 2008, to all parties of record.

/s/ L. Russell Mitten