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

STAFF'S REPLY TO MOTION TO REJECT TARIFFS AND RESPONSE TO STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its Reply To Motion To Reject Tariffs And Response To Staff Recommendation, respectfully states as follows to the Missouri Public Service Commission ("Commission"):

1. On December 28, 2007, Aquila, Inc. d/b/a Aquila Networks - MPS and Aquila Networks - L&P ("Aquila") filed a tariff sheet[1] to establish rate schedules to make a semi-annual adjustment to customer rates based on Aquila`s Commission-approved Fuel Adjustment Clause ("FAC").[2] This is the first interim rate adjustment to an FAC in Missouri under Section 386.266 RSMo, and Commission Rules 4 CSR 240-20.090 and 3.161.

2. On January 29, 2008, the Staff made a filing[3] which, among other things, recommended interim approval of the tariff sheet filed on December 28, 2007, to become effective on March 1, 2008, subject to true-up and prudence reviews. On February 8, 2007, the Office of the Public Counsel, AG Processing, Inc. and Sedalia Industrial Energy Users' Association (collectively, "OPC and Industrial Intervenors") filed a Motion To Reject Tariffs

[1] Tariff Sheet, P.S.C. MO. No. 1, 1st Revised Sheet No. 127

[2] Included with Aquila's filing was a Motion For Waiver seeking relief from Commission Rule 4 CSR 240-3.161(5) because Aquila did not submit until December 2007 the monthly reports required by the rule.

[3] Staff Recommendation To Approve Tariff Sheet And Motion For Leave To File Out Of Time

And Response To Staff Recommendation ("Motion"), whereupon the Commission on February 11 directed any party wishing to respond to the February 8 Motion to do so by 1:00 p.m. on February 13, 2008.

3. The tariff sheet at issue provides for a rate adjustment intended to achieve recovery of certain fuel and purchased power costs accumulated during the period June 1, 2007 through November 30, 2007. The Staff's recommendation reflects its belief that the June 1 start of the accumulation period is consistent with the aforementioned statute, the Report And Order, the Commission's rules, and the implementing FAC tariff sheets (Tariff Sheet Nos. 124-127), approved by the Commission on June 29, 2007 and effective July 5, 2007. As the Staff pointed out, the Commission's FAC rules could be construed in such a way as to require that the accumulation period commence on August 1, 2007 rather than June 1, 2007. In their Motion, OPC and Industrial Intervenors argue in favor of the August 1 date. Such an interpretation, however, conflicts with the Commission-approved Tariff Sheet Nos. 124-127, which call for an accumulation period of June through November.

4. The arguably relevant rule language is set out in Rules 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I), which provide the following definition:

> 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 the calendar month. If the effective date of the commission order approving a rate mechanism 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. Subsequent true-up years shall be the succeeding twelve (12)-month periods. If a general rate proceeding is concluded prior to the conclusion of a true-up year, the true-up year may be less than twelve (12) months. (emphasis added).

5. If the rule language is thought to control in this case, the underlined sentence above is the key to the dispute. In particular, the question arises as to what is meant by "the Commission order approving a RAM" (*i.e.,* Rate Adjustment Mechanism; in the instant case, a Fuel Adjustment Clause).[4] The Staff believes that the language refers to the Report And Order approving the FAC; that the Report And Order effectively approves the mechanism. The Report And Order fully describes the FAC mechanism, sets out its governing parameters and orders Aquila to file compliance tariff sheets. OPC and Industrial Intervenors, on the other hand, contend that the order referred to in the rule language is the order approving the FAC tariff sheets, which order became effective (along with the tariff sheets) on July 5, 2007. But the rule language specifically refers to the effective date of the order approving the mechanism, not the tariff sheets. In the Staff's view, the tariff sheets simply effectuate the already approved Rate Adjustment Mechanism.

6. Given that the Commission approved an FAC mechanism for Aquila in its May 17, 2007 Report And Order, effective May 27, 2007, OPC and Industrial Intervenors' assertions that Aquila's previously proposed FAC was rejected in the Report And Order, and that the Commission "never '**approved'** Aquila's FAC," are irrelevant. Section 386.266.4 RSMo specifically provides that the Commission may, after a hearing in a general rate proceeding, "approve, modify, or reject adjustment mechanisms submitted under subsection[] 1" of Section 386.266, and that is what the Commission did in specifying in its Report And Order the FAC mechanism that met with its approval.

7. The Staff's interpretation of the above-quoted rule language, in contrast to that of OPC and Industrial Intervenors, is consistent with the FAC tariff sheets, which received

[4] The Commission has the power to determine any reasonable interpretation and application of its own rules. *Deaconess Manor v. Public Serv. Comm'n*, 994 S.W.2d 602, 609 (Mo.App. W.D. 1999).

Commission approval and became effective July 5, 2007 and which are currently in effect. Those tariff sheets provide for a June 1, 2007 commencement of the six-month accumulation period. The Staff believes that lawful tariff sheets, having been approved by the Commission, are controlling in this instance. OPC and Industrial Intervenors cite *State ex rel. Missouri Gas Energy v. Public Service Commission*, 210 S.W.3d 330, 337 (Mo.App.W.D. 2006) ("*Missouri Gas Energy* case") for the proposition that (as stated on page 8 of their Motion), "where conflict exists between a tariff and either Missouri statute or properly promulgated rules, the tariff must give way. Thus, any conflict between the tariff and a properly promulgated rule is ruled in favor of the rule."

8. As explained above, the Staff believes there is no conflict between the Commission's rule and the tariff approving an accumulation period beginning June 1, 2007. Furthermore, the *Missouri Gas Energy* case is easily distinguished from the situation here. The relevant issue in that case involving the proposed Emergency Cold Weather Rule ("ECWR") and the existing Cold Weather Rule ("CWR") was whether a tariff containing CWR language that conflicts with proposed ECWR language operates to prohibit the Commission from promulgating the ECWR without a contested case. The Court's answer was that it does not.[5] In the instant case, however, the FAC tariff sheets establishing a cost accumulation period commencing in June do not set up any such conflict between old and new rules. Indeed, the FAC tariff sheets were filed pursuant to the Commission's implementing rule for the FAC. Accordingly, they do not in any way constitute a threat to the Commission's ongoing rule-making authority. Moreover, those Commission-approved tariff sheets are currently in effect and lawful. As the Court in the *Missouri Gas Energy* case cited by OPC and Industrial

[5] The Court stated: "We hold that although a properly passed tariff becomes the law of Missouri, placing the text of rules, which the Commission has already passed, into a tariff does not limit the power of the Commission to promulgate conflicting rules that it has the statutory authority to create." *Id*.

Intervenors pointed out, "A tariff has the same force and effect as a statute, and it becomes state law." *Id*.

9. OPC and Industrial Intervenors make a retroactive ratemaking argument in paragraphs 16-18 of their Motion. Their statement that the "Staff's position that the Aquila tariff is controlling would essentially amount to *carte blanche* for the Commission to engage in retroactive ratemaking, so long as that authority was embodied in a utility tariff" is mere hyperbole. The tariff sheets must be lawful and Original Tariff Sheet No. 124, approved June 29, 2007 by the Commission, effective July 5, 2007, and proposed 1st Revised Tariff Sheet No. 127 filed December 28, 2007 by Aquila are lawful. The Staff is not recommending or suggesting to the Commission that the accumulation period can start any earlier than June 1, 2007. Aquila filed its rate increase case including its FAC proposal on July 3, 2006, and the Commission on July 5, 2006 issued its Suspension Order And Notice suspending Aquila's filing the full statutory period until May 31, 2007. The Commission's Report And Order authorizing the FAC was issued May 17, 2007 and had a May 27, 2007 effective date and the Commission's Order Granting Expedited Treatment, Approving Certain Tariff Sheets And Rejecting Certain Tariff Sheets was issued May 25, 2007 and had a May 31, effective date.

10. In paragraph 17 of their pleading, OPC and Industrial Intervenors quote from *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41 (Mo.banc 1979) ("*UCCM* case")[6] in support of their contention that an accumulation period commencing June 1, 2007 is retroactive and therefore unlawful. The Staff has explained how the accumulation period commencing June 1, 2007 is not retroactive but the Staff will seek to

[6] There are three *Utility Consumers Council of Missouri, Inc.* cases. This is the second *UCCM* case and the one that people usually are noting when they refer to "the *UCCM* case."

provide context for the quotation from the *UCCM* case that OPC and Industrial Intervenors have chosen not to provide.

11. On February 1, 1974, the Commission issued a Report And Order in Case No. 17,730[7] giving temporary authorization for application of a FAC to all sales of electricity for a two year period. The Commission began review of the 1974 FAC on September 12, 1975, extended the February 1, 1974 Report And Order to April 15, 1976, held hearings in February 1976, and on April 14, 1976 issued another Report And Order in Case No. 17,730.[8] In its April 14, 1976 Report And Order, the Commission extended the original FAC to May 31, 1976, authorized use of a modified FAC effective on billings commencing June 1 1976, and made the modified FAC effective until May 31, 1978. The 1976 FAC was extended by order of the Commission until either decision of the Missouri Supreme Court on the FAC in the *UCCM* case or December 31, 1978, whichever was earlier, and was further extended by order of the Commission until such time as the Commission ruled on the appropriate amount of the of the electric utilities' annual fuel adjustment, which did not occur by the time the Missouri Supreme Court rendered its *UCCM* decision. 585 S.W.2d at 44-45.

12. In addition to the 1974 FAC and the 1976 FAC, the Commission also authorized under a surcharge collection plan submitted by each electric utility, recovery of uncollected fuel cost increases incurred up to April 30, 1976 for which increases in fuel adjustment costs had not been charged to customers because these costs were not collectible under the lag procedures of the 1974 FAC before the 1974 FAC expired on May 31, 1976. These costs also were not

[7] In the Matter of the Investigation of the Fuel Adjustment Method for the Recovery of Fuel Costs by Electric Utilities Operating in the State of Missouri, Case No. 17,730, Report And Order, 18 Mo.P.S.C.(N.S.) 371 (February 1, 1974).

[8] In the Matter of the Investigation of the Fuel Adjustment Method for the Recovery of Fuel Costs by Electric Utilities Operating in the State of Missouri, Case Nos. 17,730 and 18,663, Report And Order, 20 Mo.P.S.C.(N.S.) 563 (April 14, 1976).

permitted to be collected under the 1976 FAC approved on April 14, 1976 effective for billings commencing on June 1, 1976. 585 S.W.2d at 46. Thus, the Commission permitted the electric utilities to utilize a surcharge to recover these costs that (1) were incurred when the 1974 FAC was in effect but were not collectible before the 1974 FAC expired and (2) were not collectible under the 1976 FAC. It is this surcharge that the Missouri Supreme Court in the *UCCM* case found to constitute retroactive ratemaking, stating as follows:

> . . . The utilities were aware at the time they filed their fuel adjustment tariffs that the 1974 clause might be discontinued or changed in 1976. It was changed and certain expenses which would have been recoverable had the old clause remained in effect were not recoverable, under the terms of that clause, before it expired, just as expenses which might have been recoverable under a hypothetical filed base rate would not be recoverable if a new and lower base rate became effective. The commission could not in the latter case, and cannot in regard to the FAC, put a surcharge into effect to allow recovery of expenses which would only have been recoverable had the old rate continued in effect.
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> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i. e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established, *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. at 31, 46 S.Ct. 363; *Lightfoot v. Springfield*, 236 S.W.2d at 353. Past expenses are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses, but under the prospective language of the statutes, §§393.270(3) and 393.140(5), they cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses.

585 S.W.2d at 59.

13. OPC's and Industrial Intervenors' equating using June 1, 2007 as the beginning of the accumulation period for Aquila's fuel and purchase power costs in excess of Aquila's base rates to retroactive ratemaking fails any *UCCM* analogy.

WHEREFORE**,** the Staff respectfully recommends that the Commission deny the Motion, and renews its recommendation that the Commission issue an interim rate adjustment Order: a) approving Aquila's Tariff Sheet, P.S.C. MO. No. 1, 1st Revised Sheet No. 127, as filed on December 28, 2007, to become effective on March 1, 2008, subject to true-up and prudence reviews; and b) granting the requested variance from Commission Rule 4 CSR 240-3.161(5), while clarifying that these reports are to be submitted, pursuant to rule 4 CSR 240-3.161(5), starting 60 days after the end of the first month of the approved FAC.

Respectfully Submitted,

/s/ Dennis L. Frey

Dennis L. Frey
Senior Counsel
Missouri Bar No. 44697

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8700 (Telephone)
(573) 751-9285 (Fax)
denny.frey@psc.mo.gov (e-mail)

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 13th day of February 2008.

/s/ Dennis L. Frey