

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

In the Matter of the Tariff Filing of Aquila, Inc.,)	
to Implement a General Rate Increase for Retail)	<u>Case No. ER-2005-0436</u>
Electric Service Provided to Customers in its)	
MPS and L&P Missouri Service Areas.)	

RESPONSE TO MOTION TO STRIKE PORTIONS OF TESTIMONY

COMES NOW the Office of the Public Counsel and for its response states as follows:

1. On July 21, 2005, the Commission issued its Order Concerning Test Year and True-up, and Adopting Procedural Schedule. In that order, the Commission stated:

That the following procedural schedule is adopted, subject to the conditions set out above, with which the parties are hereby directed to comply:

...	
Direct Testimony, all parties except Aquila	October 28, 2005
Rate Design, Class Cost of Service	4:00 p.m.

2. On October 28, 2005, Public Counsel filed the Direct Testimony of Barbara Meisenheimer on the issues of Rate Design and Class Cost of Service, as ordered by the Commission.

3. On November 8, 2005, the Industrial Intervenors'¹ filed a "Motion to Strike Portions of Testimony." In that motion, they ask that the substantive portion of the text of Public Counsel witness Barbara Meisenheimer's Direct testimony be stricken.² The Industrial Intervenors ask that testimony of Staff witnesses be stricken as well, partly on the same basis as

¹ Sedalia Industrial Energy Users' Association, AG Processing, and the Federal Executive Agencies

for striking Public Counsel's testimony. Public Counsel also opposes the striking of Staff's testimony.

4. In a subsequent pleading (Motion for Expedited Consideration and Motion to Shorten Response Time), the Industrial Intervenors asked the Commission to shorten the time for responses to their motion to strike. Although Public Counsel objected to the shortened time requested, Public Counsel offered to respond in an expedited manner. The Commission did not grant the motion to shorten time, so Public Counsel is timely filing this response pursuant to 4 CSR 240-2.080(15).

5. In its motion to strike, the Industrial Intervenors note that the Commission, in its Order Regarding Consolidation and Procedural Schedule issued August 23, 2005 in Case No. EO-2002-384, stated: "...that the best course of action would be to resolve this class cost of service case separately from the rate case now pending." The context of that statement was in a decision about whether to consolidate the class cost of service case with the rate case. The language quoted above simply shows that the Commission decided that the best course of action was to keep the cases separate and not consolidate them. The Industrial Intervenors attempt to portray this straightforward and narrow decision of the Commission on the ministerial action of consolidating cases as a pronouncement that parties were to be precluded from complying with the Commission's scheduling order in this case. The Commission's order stated that the cases would not be consolidated and that class cost of service issues would be addressed in Case. No. EO-2002-384; it did not state that those issues were to be addressed **only** in that case and not in this case.

² They do not ask that the Commission strike the summary of the witness's qualifications, nor do they ask that the Commission strike the schedules attached to Ms. Meisenheimer's testimony, but do ask the Commission to strike all the rest.

6. Indeed, for the Commission to preclude the parties from addressing class responsibilities for Aquila's revenue requirement – a relevant factor in ratemaking by anybody's definition – would be unlawful. The language in Section 392.370 RSMo 2000 that requires the Commission to give "due regard, among other things" to certain facets of the ratemaking process has been consistently held to mean that the Commission must "consider all facts which in its judgment have any bearing upon a proper determination" of a utility's rates State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704, 718-719 (Mo. 1957). The Commission cannot ignore class cost of service issues in setting rates in this case.

7. It would no doubt be expedient to preclude evidence in this case on class cost of service issues in relation to setting rates. It would reduce the number and complexity of the issues in this case. But "neither impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by competent and substantial evidence upon the whole record.'" (State ex rel. Missouri Water Co. v. Public Service Commission, *supra*, at 720).

8. Furthermore, the Commission cannot preclude a party from addressing relevant issues in a rate case.³ In the Fischer case, Public Counsel sought to present evidence in a rate increase case, but the Commission ruled that he would be limited in the issues he could present. The court determined that the hearing procedure adopted by the Commission failed to satisfy the due process requirement. Because the Commission had previously decided to limit the Public Counsel's ability to present issues, the hearing afforded Public Counsel was not meaningful. Thus, the hearing procedure adopted in that case was a violation of the due process which should have been accorded to Public Counsel in his capacity as the representative of the public. The

³ State ex rel. Fischer v. Public Service Com., 645 S.W.2d 39 (Mo. Ct. App. 1982).

Commission, in this case, would be committing the same error if it precluded Public Counsel from presenting evidence on class revenue responsibilities.

9. Finally, the Industrial Intervenors' motion to strike testimony is an impermissible collateral attack on the Commission's scheduling order in this case. That order became effective on July 21, 2005. The Industrial Intervenors waited until November 4, 2005 to ask that the testimony filed in compliance with it be stricken. If the Industrial Intervenors had an objection to the filing of class cost of service testimony, that objection should have been raised when the Commission ordered the filing, not when parties complied with the Commission order. Courts have so frequently held that decisions of the Commission are not subject to collateral attack that, in State ex rel. State Highway Com'n v. Conrad, 310 S.W.2d 871, 876 (Mo. 1958), the court stated that it need not even elaborate on the effect and meaning of § 386.550 RSMo 2000.

WHEREFORE, Public Counsel respectfully requests that the Commission deny the Motion to Strike Portions of Testimony filed on November 8, 2005.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 18th day of November 2005:

/s/ Lewis R. Mills, Jr.
