

**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)
Electric Service Provided to Customers in its)
Aquila Networks—MPS and Aquila Networks—)
L&P Missouri Service Areas.)

Case No. ER-2007-0004

**APPLICATION FOR REHEARING OF ORDER GRANTING EXPEDITED
TREATMENT, APPROVING CERTAIN TARIFF SHEETS AND REJECTING
CERTAIN TARIFF SHEETS**

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

1. On May 17, 2007¹ the Commission issued its Report and Order, in which it, *inter alia*, rejected the tariff sheets requesting a general rate increase filed by Aquila, Inc. to initiate this case. The Commission also ordered Aquila to file – before midnight on May 20 – new tariff sheets that would produce a very substantial increase, albeit somewhat less than Aquila originally requested.

2. On May 18, Aquila filed new tariff sheets that bear an effective date of May 31. On May 21, Aquila filed new tariff sheets that bear an effective date of June 20. The May 21 tariff sheets necessarily supersede and replace the May 18 tariffs.

3. On May 25, the Commission issued its Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets (the “May 25 Order”). The May 25 Order is unlawful, unjust, unreasonable, arbitrary and capricious and an abuse of discretion for the following reasons:

¹ Unless otherwise noted, all dates refer to calendar year 2007.

4. The Commission failed to adequately separate its findings of fact from its conclusions of law, and so the reader or a reviewing court cannot determine the basis for the Commission's decision to approve some of the pages in the tariff filing and its decision to reject some of the pages.

5. The Commission failed to make findings of basic facts that form the basis for its conclusions that some of the pages in the May 21 tariffs (as "substituted" on May 23) comply with the Report and Order, and some do not.

6. The Commission erred in determining that some parts of a single case can be a "contested case" while other parts are not. Different actions by the Commission during the course of a single case may require different procedures, but that does not mean that part of a case can be contested while other parts are not. The Commission need not (and should not) allow parties to relitigate all the issues raised at the evidentiary hearing during the review of compliance tariffs, but it must allow them a meaningful opportunity to weigh in on the issue before the Commission at that stage: whether the compliance tariffs actually do comply with the Report and Order.

7. The Commission erred in relying on only two parties to make its determination that the May 21 tariffs (as "substituted" on May 23) comply with the Report and Order. Aquila, given the fact that it has had to make multiple attempts to file tariffs that the Commission would approve, given its obvious self-interest in the outcome of the tariff filing, and given the fact that it has represented that each new set of tariffs (at least four separate tariff filings at this point) comply with the Report and Order, is not a reliable source. Having the Staff perform a cursory review may be better than the Commission simply relying on Aquila, but it does not satisfy due process. First, the

Commission has not allowed Staff time to adequately analyze and review the tariff filing. Second, the Staff is a party to this case, and has actively advocated positions on contested issues. While Public Counsel has the utmost respect for Staff's impartiality (when impartiality is called for), due process does not allow any party – even the Staff – to stop being an advocate and become an advisor to the Commission during the course of a case.

8. The Commission erred in approving rather than rejecting the “substitute” tariff sheets filed on May 23. Although they were filed and published on May 23, they bear an issue date of May 21, two days before the date of filing and publication, and an effective date of June 20. Those sheets violate Section 393.140(11) RSMo 2000 which requires thirty days notice of tariff changes. Simply backdating the date of issuance to a date before filing, notice, and publication cannot make the period between May 23 and June 20 (the issue and effective dates, respectively) thirty days. These “substitute” sheets do not merely correct typographical errors on the sheets they are meant to substitute for; they are substantively different, and those differences have an impact on ratepayers.

9. The Commission erred in finding that the tariff sheets filed on May 21 (as “substituted” on May 23) comply with the Report and Order. The Report and Order explicitly **required** Aquila to file tariff sheets in compliance with the Report and Order no later than midnight on May 20. The tariffs that the Commission approved were filed on May 21 and May 23, obviously not in compliance with this requirement.

10. In its motion for expedited treatment filed on May 18 (and later amended and supplemented numerous times), Aquila argued that Section 393.150 RSMo 2000 **requires** the Commission to approve the tariffs it filed on May 21 (as “substituted” on May 23) no later than May 31. This is a strained and incorrect reading of that statute.

Section 393.150 allows the Commission approximately eleven months to act on a tariff filing that initiates a general rate case. By issuing its Report and Order on May 17 that rejected Aquila's tariffs, the Commission satisfied the requirements of that statute. Aquila's tariff filings on May 18 and May 21 (and subsequently) were new tariffs, and the Commission could suspend the new tariffs – if its suspension was necessary to fully investigate them – for a period of time up to approximately eleven months in accordance with 393.150. Of course, having just ordered the filing of the tariffs, the Commission should not need eleven months to ensure that they comply with the Report and Order, but it should not be forced to approve them in just a few days under a misguided reading of 393.150. According to Aquila's argument, the Commission has no recourse if it determines that it needs time to investigate whether the tariffs comply with the Report and Order; Aquila argues that the Commission must approve them within thirty days. The May 25 Order does not reject Aquila's arguments, and it does grant Aquila's request for relief. As such, the May 25 Order is unlawful in that it relies on invalid legal reasoning, specifically the argument that it is required by law to approve the compliance tariffs to be effective by May 31.

11. The Commission erred in approving only a portion of Aquila's tariff filing. Having found that the tariff filing as a whole does not comply with the Report and Order, the Commission should have rejected the tariff filing. Instead, it approved some pages and rejected other pages. Black's Law Dictionary, Fifth Edition (1979) defines tariff (in the utility context) as: "A public document setting forth services of common carrier being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services." The Commission cannot pick and

choose which pages or which words in that document are in compliance with its orders; it must approve, reject, or suspend the tariff as filed.

12. The Commission's Report and Order found that a certain very specific set of changes to Aquila's filed tariff would produce just and reasonable rates. By definition, a tariff that implements only a part of that set of changes will not produce just and reasonable rates.² The Commission erred in approving tariffs that produce different charges and different revenues than those found to be just and reasonable in the Report and Order.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its May 25 Order.

Respectfully submitted,

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² Unless the Commission, based on record evidence, finds that a different set of changes will also produce just and reasonable rates. The Commission did not do so here.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 29th day of May 2007.

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