

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04S-035E

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY AQUILA, INC., DOING BUSINESS AS AQUILA NETWORKS-WPC, WITH ADVICE NO. 588.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
GRANTING MOTION IN LIMINE**

Mailed Date: July 21, 2004

I. STATEMENT

1. On July 12, 2004, the Trial Staff of the Colorado Public Utilities Commission, the Colorado Office of Consumer Counsel, Cripple Creek & Victor Gold Mining Company, Holcim (U.S.) Inc., The Trane Company, the Fountain Valley Authority, the Board of Water Works of Pueblo, Colorado, and the City of Canon City (collectively, Movants) filed a Motion In Limine (Motion) in the captioned proceeding.

2. The Motion seeks to exclude certain portions of the rebuttal testimony of Donald A. Murry, Ph.D. that is expected to be offered into evidence at the hearing of this matter by Aquila, Inc., doing business as Aquila Networks-WPC (Aquila).¹ Movants contend that the subject testimony violates Aquila's settlement obligations contained in a Settlement Agreement

¹ The introductory paragraph of the Motion generally refers to a request to exclude "certain rebuttal testimony and exhibits." However, Movants fail to identify any rebuttal exhibits sponsored by any Aquila witness they seek to exclude.

approved by the Commission in Docket No. 02S-594E in that it conflicts with the Regulatory Principles set forth therein.² *See*, Decision No. C03-0697.

3. On July 21, 2004, Aquila filed its Response to the Motion (Response). Aquila contends that the subject rebuttal testimony is not being offered for the purpose of deviating from the Regulatory Principles, but rather for the purpose of defending them. It argues that excluding such testimony would prevent the Commission from properly considering all relevant factors in setting rates and would violate its due process rights.

4. Resolution of the Motion involves the interpretation to be given to Paragraph 6 of the Settlement Agreement. That paragraph provides, in pertinent part, that Aquila will file this “limited” rate case and, in connection therewith, will be bound by the Regulatory Principles. It further provided, however, that other parties to the Settlement Agreement would not be so bound and could “...argue, present, and support positions on any issue, monetary amounts, data, regulatory principle, or numbers filed in or relevant to the limited rate case filing, even if different than those to which the Parties have agreed to in this Settlement Agreement.”

5. In approving the Settlement Agreement, the Commission summarized the above-described agreement and at Paragraph 59 of Decision No. C03-0697 and went on to state that “[W]e approve the filing of a limited rate case **as described in the Settlement**. We recognize that the Settlement binds Aquila to certain regulatory principles, while simultaneously allowing other parties the right to argue, present, and support positions on any issue, including regulatory principles.” (Emphasis added). The Commission then ordered that the Settlement Agreement be approved. *See*, Paragraph 1, Section IV.A. of Decision No. C03-0697. Accordingly, the terms of

² The Regulatory Principles are set forth at pages 4-6 of the Settlement Agreement. The specific testimony Movants seek to exclude is identified in paragraph 6 of the Motion.

the Settlement Agreement afford the parties very different treatment regarding their ability to deviate from the Regulatory Principles. Movants are allowed to do so, but Aquila is not.³

6. Consistent with the above-described provision of the Settlement Agreement, some of the Movants submitted answer testimony and exhibits advocating positions that vary from the Regulatory Principles. That testimony and those exhibits are identified at page 11 of the Aquila Motion In Limine. Dr. Murry's testimony is designed to rebut that testimony/exhibits and/or to defend the Regulatory Principles. However, Movants argue that it goes further by advocating for and recommending that the Commission adopt a rate of return higher than is allowed by the Regulatory Principles. Movants contend that, to that extent, such rebuttal testimony violates the Settlement Agreement and should be excluded.

7. The undersigned agrees with the position advanced by Movants. Aquila is free to attempt to rebut the deviations from the Regulatory Principles advanced by Movants or to defend those Regulatory Principles. However, the rebuttal testimony of Dr. Murry identified by Movants actively recommends that the Commission adopt a rate of return on equity of 11-12 percent and a cost of debt of 7.67 percent. That exceeds the 10.75 percent rate of return on equity and the 7.55 percent cost of debt established by the Regulatory Principles.⁴ This violates the obligations assumed by Aquila in the Settlement Agreement not to request any departure from the Regulatory Principles in connection with this limited rate case.

³ In its Motion for Limine filed on June 22, 2004 (Aquila Motion in Limine), Aquila argued that the language contained in Paragraph 59 of Decision No. C03-0697 effectively modified the terms of the Settlement Agreement so as to require Movants to make a preliminary showing of "good cause" with regard to any evidence that might deviate from the Regulatory Principles. However, that argument has been rejected. *See*, Decision No. R04-0831-I.

⁴ Due to these recommended increases in the rate of return on equity and higher cost of debt, the overall rate of return on rate base recommended by Dr. Murry also increases to 9.25-9.73 percent as compared to the 9.07 percent established under the Regulatory Principles.

8. As a result of the foregoing, the Motion will be granted and those portions of Dr. Murry's rebuttal testimony identified in paragraph 6 of the Motion will be stricken.

9. Aquila's argument that excluding such testimony will prevent the Commission from properly considering all relevant factors in setting rates in this matter is not persuasive. As recognized by Aquila in its Response, the Commission has the authority to narrow the issues to be litigated in limited rate cases. *See, Public Service Company of Colorado v. Public Utilities Commission*, 653 P.2d 1117 (Colo. 1982). Here, the Commission did that when it imposed limitations on Aquila's ability to deviate from the Regulatory Principles by approving the Settlement Agreement.

10. Similarly, Aquila's argument that excluding the involved rebuttal testimony will deprive it of due process rights is unavailing when, as here, it agreed to the limitations imposed upon it by the Settlement Agreement.

II. ORDER

A. It Is Ordered That:

1. The Motion In Limine filed by Trial Staff of the Colorado Public Utilities Commission, the Colorado Office of Consumer Counsel, Cripple Creek & Victor Gold Mining Company, Holcim (U.S.) Inc., The Trane Company, the Fountain Valley Authority, the Board of Water Works of Pueblo, Colorado, and the City of Canon City, is granted.

2. Those portions of the rebuttal testimony of Donald A. Murry, Ph.D. submitted on behalf of Aquila, Inc., doing business as Aquila Networks-WPC, identified in paragraph 6 of the above-described Motion in Limine are stricken.

3. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

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