

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03S-539E

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY AQUILA, INC., DOING BUSINESS AS AQUILA NETWORKS-WPC, WITH ADVICE NO. 586.

**ORDER REFERRING MOTION FOR
EXTRAORDINARY PROTECTION TO
ADMINISTRATIVE LAW JUDGE**

Mailed Date: March 31, 2004

Adopted Date: March 31, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a motion filed by Aquila, Inc., doing business as Aquila Networks - WPC (Aquila) for Protective Order Affording Extraordinary Protection to Confidential Information, filed March 12, 2004. Aquila seeks extraordinary protection pursuant to 4 *Code of Colorado Regulations* (CCR) 723-16-3.2 to limit dissemination of the cost of service model software it acquired via a license agreement from Threshold Associates, Inc (Threshold). According to Aquila, Threshold objects to providing its Threshold Associates Cost of Service (TACOS) software to parties other than Advisory Staff in this matter. Commission Staff (Staff) and the Colorado Office of Consumer Counsel (OCC) filed objections to Aquila's motion.

2. Now, being duly advised in the matter, we refer the matter to an administrative law judge to determine whether the parties can reach a settlement regarding this issue, or failing that, for a recommended decision addressing the merits of Aquila's Motion

3. In Decision No. C04-0176, mailed February 18, 2004, we ordered Aquila to provide all parties in this matter with an executable copy of the TACOS software which it is utilizing for its cost of service model. However, Aquila represents that Threshold has demanded that Aquila seek extraordinary protection of its intellectual property, which it maintains is highly confidential and proprietary. Aquila states that Threshold has allowed Aquila to provide an executable electronic copy of the TACOS software to Commission Advisory Staff who sign non-disclosure forms, threshold has also stated that Staff, the intervenors and intervenors' consultants will not be provided access to it unless they purchase their own copies of the software.

4. With this motion, Aquila seeks to formalize the protections to which Advisory Staff has informally agreed. Aquila also seeks extraordinary confidentiality protection of the model through a protective order prohibiting the production or disclosure of the TACOS model to OCC, Commission Staff, the intervenors, and the intervenors' consultants.

5. Aquila argues that no parties will be prejudiced by proceeding in this manner and granting the protective order. Aquila points out that it has offered to perform alternative cost of service runs on the TACOS software model using the parties' selected inputs. It has also offered to hold an informal workshop in Denver for all interested parties to demonstrate the use of the TACOS software with the input data Aquila used in this case.

6. Aquila also requests the following extraordinary restrictions with respect to the use of the TACOS software by the Commission's Advisory Staff who sign non-disclosure forms:

- a) The TACOS software shall not be transmitted at any time using e-mail, nor shall additional electronic copies of the software be made by a party other than Aquila or Threshold.
- b) The TACOS software shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed, distributed, transmitted, modified, used, reused or provided to anyone other than Thershold, for commercial or public purposes in any manner.

- c) All persons who obtain copies of the TACOS software must return the copy to Aquila within seven days of the final Commission order in this docket.
- d) All computer files which use TACOS software must be destroyed within seven days of the final Commission order in this docket, and an affidavit of destruction shall be provided to Aquila and Threshold upon request.

7. OCC and Staff object to Aquila's motion on several grounds. OCC and Staff both assert that limiting access to Aquila's cost of service model to the Advisory Staff amounts to improper *ex parte* communications prohibited by 4 CCR 723-1-9. According to Staff, Aquila's proposal in its motion is analogous to offering an exhibit into evidence without first disclosing such evidence to all parties. Nor is Aquila's offer to perform cost of service runs on the TACOS software model an acceptable means to Staff or OCC to avoid *ex parte* communications. OCC further argues that the presentation of the computer model, which is critical to the derivation of the Company's case, clearly goes to material issues, and having the Commission consider such information, to OCC's exclusion, violates fundamental notions of fairness and should not be allowed.

8. OCC also indicates that it is having difficulty analyzing Aquila's testimony in support of its application because of several instances where the source of the information cannot be ascertained. OCC believes that such information comes from the model at issue. To the extent the model is not available to OCC, it argues that Aquila cannot provide a foundation for the testimony filed. OCC also states that it has identified cost allocations in discovery for which no basis can be determined and for which the OCC has been unable to otherwise duplicate the results. OCC asserts that only access to the software would allow it to find the appropriate information.

9. OCC objects to Aquila's representation that its motion would not be prejudicial to the OCC. Rather, OCC argues that limiting access to TACOS to Advisory Staff would be

extremely prejudicial, and requiring OCC to disclose its preparations, study and process to Aquila is fundamentally unfair and may violate the attorney-client privilege.

10. Although OCC appreciates Aquila's willingness to conduct informal workshops demonstrating the software application, OCC believes it should then be allowed to work with the model and to prepare its case in the same manner afforded Aquila in the preparation of its case. Additionally, OCC argues that allowing it access to the software, subject to the protections of the Commission Rules adequately protects against Aquila's concerns.

11. OCC offers a compromise in that it represents that it would not be opposed to sharing private access to the program with Commission Staff utilizing a central computer available in the Commission offices. OCC suggests that additional protections could be offered in terms of duplication of the software, yet OCC's preparation would not be hindered.

12. Commission Staff argues that transparency of rate design is necessary to avoid prejudice in its advocacy on behalf of the public interest. However, this can not be accomplished, nor can the Commission's authority to ensure the rates are just and reasonable be accomplished, through Aquila's use of modeling software presented in the form of a "black box." Staff finds that granting Aquila's motion would render Staff unable to either prepare informed testimony or develop the record regarding Aquila's cost of service model and its foundations. Further, Staff could never state an opinion on the accuracy of the model.

13. Staff also argues that if Aquila does not present support for its model, then Aquila's model cannot form the analytical basis for developing the rate design. Staff points out that under § 40-3-101(1), C.R.S., Aquila must prove that its proposed rates are "just and reasonable." Under Commission Rule 4 CCR 723-1-82, Aquila has the burden of proof and of

going forward with its Phase II rate case. Staff concludes that Aquila cannot demonstrate that the TACOS software produces a rate design that is just and reasonable without submitting the cost of service model as evidence.

14. As an alternative, Staff proposes that the Commission order Aquila to use a cost of service model developed by Staff to support the rate design proposed in its rebuttal testimony and statement of position. Staff also proposes that the Commission issue an order requiring all other parties to either use Staff's costs of service model, or another model that is available to all parties in an executable electronic format in their cross-answer testimony and statements of position. Staff also represents that it could fully perform its role in this Docket in compliance with the extraordinary restrictions set forth in Aquila's Motion for Protective Order.

15. On March 30, 2004, Aquila filed a Motion for Leave to File Reply to Responses to Motion for Protective Order Affording Extraordinary Protection to Confidential Information (Motion for Leave to Reply). Although such a pleading is prohibited under Commission Rule 4 CCR 723-1-22(b), we nonetheless waive that prohibition and allow Aquila's response.

16. In its Motion for Leave to Reply, Aquila asserts that whether it produces the TACOS cost of service model to parties in this docket is a discovery issue, not a procedural matter for the Commission to order *sua sponte* without following the usual procedures for handling discovery and discovery disputes, or after full consideration of the ramifications and liabilities of Aquila or other that might ensue from an order to produce the cost of service model. Aquila states that OCC and Staff raise novel legal arguments, evidentiary issues that are not justifiable in resolving its Motion for Protective Order and new procedural issues that demand a response from Aquila before the Commission is sufficiently informed to determine the Motion.

Aquila concludes that it is therefore appropriate for the Commission to grant it leave to reply to Staff and OCC.

17. We find that Aquila states good cause to grant its motion for leave to reply and grant the motion.

18. In its reply, Aquila argues that if it gave copies of TACOS to Staff and OCC in response to their discovery requests, it would “foolishly expose itself to a lawsuit and potential liability as a result of giving a copy of the proprietary software to them.” Aquila points out that it has done nothing to prevent OCC or Staff from purchasing their own copies of the TACOS software at a cost of \$25,000 per license, plus a \$2,000 training fee.

19. Aquila represents that the owner of the TACOS model has asserted that his software is as proprietary as Microsoft’s Excel spreadsheet. He maintains that no one would require a free copy of Microsoft Excel if that is what Aquila utilized in this docket.

20. Aquila disagrees with Staff’s and OCC’s arguments that providing the software only to Advisory Staff violates the rules against *ex parte* communications. Rather, Aquila argues that those rules are designed to prohibit off-the-record communications as outlined in 4 CCR 723-1-9(a), and prohibits parties to an on-the-record proceeding from making off-the-record communications to a Commissioner or presiding officer about a material issue in the case. Aquila maintains that the *ex parte* rules do not apply here to prohibit Advisory Staff from reviewing the software and advising the Commission accordingly. Aquila further maintains that it has not, of its own volition, made an off-the-record communication to the Commissioners, since the Commission ordered Aquila to provide the software to Advisory Staff. Additionally,

Aquila argues that the Commission's *ex parte* rules permit Advisory Staff to communicate with the Commissioners about material issues, including the TACOS model.

21. Aquila also takes exception with Staff's assertion that it has the responsibility to develop a complete record in this docket. Aquila states that although Staff may have at one time held such responsibility, since the bifurcation of Trial Staff and Advisory Staff, Trial Staff no longer has a responsibility to ensure a complete record. Trial Staff merely puts on its own best case just like any other party litigant.

22. Aquila finds fault with Staff's proposal to order the parties to utilize its own cost of service model in rebuttal and cross answer testimony. Aquila argues that any determination regarding this matter should occur in the normal evidentiary hearing process, rather than before the hearing is held.

II. ANALYSIS

23. After a thorough review of the parties' positions, we certainly understand the concerns raised on both sides of the issue. On the one hand, Staff and OCC raise legitimate concerns about utilizing a "black box" model which neither party can adequately decipher. This certainly raises serious due process concerns regarding Staff's and OCC's ability to properly analyze or rebut the adequacy of Aquila's model, or its rate design derived from that model. We further agree that it would at best be difficult for Aquila to satisfy its statutory burden to prove that the rates it proposes are just and reasonable if it does not present adequate support for its model.

24. On the other hand, it appears from Aquila's representations that Threshold has made clear that it will not agree to provide the software to Staff, OCC or the intervenors and their

consultants without payment of \$25,000 plus a \$2,000 training fee for each party. Providing the software to Staff and OCC would result in \$54,000 of expenditures to Aquila, which it would presumably then seek to pass on to its end users. This is something we are loath to require unless it is absolutely necessary.

25. We are faced with two stark choices in this matter. On the one hand, Staff and OCC argue that Aquila should have to provide the TACOS software to them, which could very well result in a \$54,000 ratepayer revenue impact. On the other hand, Aquila argues that it has no obligation to provide cost of service software in its case that relies on that very same software. We believe that there likely is a workable compromise falling somewhere between these two stark choices. By way of example, the software maker may believe its interests are protected by agreeing to strict use, personal liability, and return language that party participants would have to accede to before any use of the product. If a compromise cannot be worked out, one of the two stark resolutions may need to be adopted, including the possibility that the software product in question cannot be relied upon by parties presenting a rate case to the Commission. Therefore, in order to allow the parties a forum to discuss this matter and perhaps reach a creative solution to this dilemma, we defer reaching a decision and refer this motion to an administrative law judge to conduct an expedited hearing regarding the motion. We further require all parties to this matter to appear and discuss the matter in hopes that a resolution may be forthcoming. We request that the administrative law judge direct the parties to present oral arguments and comments in furtherance of a resolution. Should the parties be unable to resolve the matter at the conclusion of the hearing, we direct the administrative law judge to resolve the merits of the pending motion.

26. We find that this matter is ripe for review at this time despite Aquila's arguments that it is better left to be decided during an evidentiary hearing. We point out that ordering a utility to provide a cost of service model as part of a procedural order is not an unusual concept. For example, in Decision No. C00-104 in Docket No. 99S-609G, *Procedural Order*, we ordered Public Service Company to provide its cost of service model to all parties to the matter. Therefore, we find that this issue may be decided at this time.

III. ORDER

A. The Commission Orders That:

1. Aquila Inc.'s Motion for Protective Order Affording Extraordinary Protection to Confidential Information is referred to an administrative law judge for an expedited hearing to be conducted the week of April 5, 2004, to consider alternative proposals to making the cost of service model available to the parties in this matter, consistent with the discussion above.

2. All parties to this docket are ordered to appear at the expedited hearing to offer oral argument and discussion regarding this matter.

3. Aquila Inc.'s Motion for Leave to File Reply to Responses to Motion for Protective Order Affording Extraordinary Protection to Confidential Information is granted.

4. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 31, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners