Decision No. R04-0831-I

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04S-035E

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

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**INTERIM ORDER OF**
**ADMINISTRATIVE LAW JUDGE**
**DALE E. ISLEY**
**GRANTING MOTION TO REPLY**
**TO RESPONSES; DENYING MOTION**
**TO STRIKE; AND DENYING MOTION IN LIMINE**

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Mailed Date: July 21, 2004

## I. STATEMENT

1. On June 22, 2004, Aquila, Inc., doing business as Aquila Networks-WPC (Aquila), filed a Motion In Limine (Motion) in the captioned proceeding. The Motion seeks to exclude certain answer testimony and exhibits that is expected to be offered into evidence at the hearing of this matter by the Staff of the Commission (Staff), the Colorado Office of Consumer Counsel (OCC), and Cripple Creek & Victor Gold Mining Company (Cripple Creek). Aquila contends that the subject testimony/exhibits exceeds and conflicts with the Regulatory Principles set forth in a Settlement Agreement approved by the Commission in Docket No. 02S-594E.[1] *See*, Decision No. C03-0697.

[1] The Regulatory Principles are set forth at pages 5 and 6 of Aquila's Motion for Leave to Reply to Responses to Aquila's Motion In Limine (Motion to Reply); and Reply to Responses (Reply) filed on July 9, 2004. The specific testimony and exhibits Aquila seeks to exclude are identified at page 11 of the Motion.

2. On July 1, 2004, the Fountain Valley Authority, the Board of Water Works of Pueblo, Colorado, and the City of Canon City filed their Response in Opposition to the Motion. Responses to the Motion were also filed by Staff, Cripple Creek, Holcim (U.S.) Inc. (Holcim), and the Trane Company (Trane) on July 2, 2004.[2] The OCC filed a Motion to Strike the Motion (Motion to Strike) or, in the alternative, a Response to the Motion on that date as well.[3]

3. On July 9, 2004, Aquila filed the Motion to Reply along with its Reply. It also filed its Reply to the Motion to Strike on that date.

4. In support of the Motion to Reply, Aquila states that the Motion only deals with the procedural import of the language contained in Paragraphs 58 and 59 of Decision No. C03-0697 which, in its opinion, imposes a "good cause" standard for the admissibility of evidence offered by Intervenors that deviates from the Regulatory Principles. Aquila contends that it should be allowed to reply to the Responses since they deal with the substantive nature of this "good cause" requirement; *i.e.*, whether Intervenors have met this standard even if it is assumed that such a standard was imposed.

5. The Motion to Reply indicates that Staff has no objection to the submission of the Reply. Responses to the Motion to Reply were due on July 20, 2004, but none were filed. Therefore, the Motion to Reply is uncontested.

6. Rule 22(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1-22, provides that no responsive pleading may be filed to responses.

[2] The July 1, 2004, deadline imposed by Decision No. R04-0341-I for submitting responses to the Motion was extended to July 2, 2004, pursuant to a stipulation of the parties that was informally approved by the administrative law judge.

[3] Staff, OCC, Public Intervenors, Cripple Creek, Trane, and Holcim may be collectively referred to herein as Intervenors. The responses filed by Intervenors to the Motion may be collectively referred to herein as Responses.

However, in this case the Responses raise substantive issues that were not previously addressed by the Motion; *i.e.,* whether Intervenors have met the "good cause" standard allegedly imposed by Decision No. C03-0697. Fundamental fairness requires that Aquila be allowed to reply to Intervenors' arguments involving these issues. Therefore, the Motion to Reply will be granted.

7. In support of the Motion to Strike, the OCC points out that the Settlement Agreement allows Intervenors to introduce evidence in this proceeding that might depart from the Regulatory Principles and, further, that it obligates Aquila to support and defend the terms of the Settlement Agreement. It contends that the Motion violates this provision and should, therefore, be stricken. In response, Aquila points out that the OCC fails to consider the language of Paragraphs 58 and 59 of Decision No. C03-0697 which, in its opinion, effectively modifies that portion of the Settlement Agreement allowing Intervenors the unlimited ability to address all rate-related issues, including those that might exceed the Regulatory Principles.

8. The Motion raises legitimate arguments concerning the interpretation to be given to the identified portions of Decision No. C03-0697 containing an expression of the Commission's intent concerning the manner in which this "limited" rate case is to be prosecuted. Raising these issues through the Motion does not constitute a breach of the Settlement Agreement by Aquila. Therefore, the Motion to Strike will be denied.

9. Resolution of the Motion involves the interpretation to be given to Paragraphs 58 and 59 and Paragraph 1 of Section IV.A. of Decision No. C03-0697. That decision approved a Settlement Agreement entered into by the parties in Docket No. 02S-594E, Aquila's 2002 Phase I rate case.[4] The Settlement Agreement provided, in pertinent part, that Aquila would file this

[4] Except for Holcim and Trane, the parties to this docket are the same as the parties to Docket No. 02S-594E.

"limited" rate case and, in connection therewith, would 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." *See*, Settlement Agreement at page 8.

10. In approving the Settlement Agreement, the Commission summarized the above-described agreement at Paragraph 58 of Decision No. C03-0697 and went on to state as follows:

> We 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. **However, part of the purpose of the limited rate case is to avoid protracted litigation, thus we put the Parties on notice that in the absence of good cause we are not enthusiastic about any proposal that results in a departure from the regulatory principles reached in the settlement.** (Emphasis added). *See,* Paragraph 59 of Decision No. C03-0697.

The Commission then ordered that the Settlement Agreement be approved "…with the clarifications and encouragement to the Company and interested parties as articulated above." *See*, Paragraph 1, Section IV.A. of Decision No. C03-0697.

11. Aquila argues that the language contained in Paragraph 59 of Decision No. C03-0697 effectively modifies the terms of the Settlement Agreement so as to require Intervenors to make a preliminary showing of "good cause" with regard to any evidence that might deviate from the Regulatory Principles. According to Aquila, Intervenors must obtain a ruling from the Commission allowing them to introduce such evidence after making the required "good cause" showing at an evidentiary hearing to be held prior to commencement of the substantive hearing.

12. Intervenors generally argue that the Commission imposed no such requirement, that the subject language merely sets forth a "weight-of-the-evidence" standard (as opposed to an "admissibility-of-the-evidence" standard), or, if it did impose such a requirement, that the pre-filed testimony of Intervenors' witnesses establishes "good cause" for deviating from the Regulatory Principles.

13. The language employed by the Commission in Decision No. C03-0697 approving the Settlement Agreement is somewhat confusing and, as is obvious from the positions taken by the parties, subject to varying interpretations. However, on balance, the Administrative Law Judge is convinced that the Commission did not intend to modify the Settlement Agreement by imposing upon Intervenors the "good cause" standard described by Aquila in its Motion and Reply. Rather, the subject language merely articulates the Commission's position that, notwithstanding the provisions of the Settlement Agreement, it may be displeased with attempts to expand the issues involved in this proceeding beyond those typically involved in a "limited" rate case. The manner in which the Commission may ultimately decide to register that displeasure, if at all, is unknown. It could, for example, discount or afford lesser weight to evidence submitted by Intervenors that does not conform to the Regulatory Principles. The subject provisions of Decision No. C03-0697 does not, however, require Intervenors to make a "good cause" showing prior to the admission of such evidence.

14. The terms of the Settlement Agreement clearly afford the parties very different treatment regarding their ability to deviate from the Regulatory Principles. Intervenors were allowed to do so, but Aquila was not. Had the Commission wished to modify this most important provision it would have done so in the clearest possible way by, for example, prohibiting Intervenors from departing from the Regulatory Principles or by specifically stating

that it was modifying the Settlement Agreement and by fully describing those modifications. However, the Commission did not do that. Instead of prohibiting Intervenors from departing from the Regulatory Principles, it merely stated that it would "not be enthusiastic" about such a departure. Instead of stating that the Settlement Agreement was being modified and clearly describing the modifications, it ordered that the settlement be approved with the "…clarifications and encouragement…" (not modifications) described in Decision No. C03-0697.

15. In sum, the Commission would not have approved "…the filing of a limited rate case **as described in the Settlement**…" had it wished to impose an additional condition (*i.e.*, the "good cause" requirement advanced by Aquila) that was entirely inconsistent with a fundamental provision of the Settlement Agreement without more clearly articulating its intention to do so. (Emphasis added). For these reasons, the Motion will be denied.

## II. ORDER

### A. It Is Ordered That:

1. The Motion to Strike Aquila, Inc.'s Motion In Limine filed by the Colorado Office of Consumer Counsel is denied.

2. The Motion for Leave to Reply to Responses to Aquila's Motion In Limine filed by Aquila, Inc., doing business as Aquila Networks-WPC, is granted.

3. The Motion In Limine filed by Aquila, Inc., doing business as Aquila Networks-WPC, is denied.

4. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Administrative Law Judge

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