

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>BLACK HILLS/IOWA GAS UTILITY COMPANY, LLC, d/b/a BLACK HILLS ENERGY (f/k/a AQUILA, INC., d/b/a AQUILA NETWORKS)</p>	<p>DOCKET NO. RPU-08-3</p>
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**ORDER DENYING MOTION TO DISMISS,
SCHEDULING PREHEARING CONFERENCE, EXTENDING DEADLINE,
AND MODIFYING PROCEDURAL SCHEDULE**

(Issued August 12, 2008)

PROCEDURAL BACKGROUND

On June 2, 2008, Aquila, Inc., d/b/a Aquila Networks (Aquila), n/k/a Black Hills/Iowa Gas Utility Company, LLC, d/b/a Black Hills Energy (Black Hills Energy), filed with the Utilities Board (Board) a proposed gas tariff pursuant to Iowa Code chapter 476 (2007) designed to increase Iowa gas rates to produce a permanent annual revenue increase of approximately \$13,560,000, or an overall annual revenue increase of 7.63 percent. The tariff has been identified as TF-08-83. On June 30, 2008, the Board issued an order suspending TF-08-83 and establishing a procedural schedule and a hearing date in Docket No. RPU-08-3 to consider the proposed general rate increase proceeding.

On July 16, 2008, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to dismiss the general rate case application. On July 17, 2008, the Board issued an order shortening the time for

parties to respond to the motion to dismiss. Black Hills Energy and MidAmerican Energy Company (MidAmerican) filed responses to the motion. On July 30, 2008, Consumer Advocate filed a reply. On July 30, 2008, Black Hills Energy filed a request for a prehearing conference and on August 4, 2008, Black Hills Energy filed a response to Consumer Advocate's July 30, 2008, reply.

PARTIES' POSITIONS

Consumer Advocate's Motion

Consumer Advocate argues that all of the numbers filed to support the general rate increase are suspect and subject to material change since the sale of Aquila's natural gas assets in Iowa has been concluded and Black Hills Energy is now the owner and operator of the utility. Consumer Advocate contends that the subject company's Iowa operations are now an entirely different utility from the one that existed on the date of the general rate case filing.

Consumer Advocate argues that there is only one appropriate remedy because of the substantive changes in the numbers supporting the general rate increase and that remedy is to dismiss the application. Consumer Advocate then argues that Black Hills Energy should be precluded from filing another general rate increase application until after 2009 since that would be the first representative test year under Black Hills Energy ownership. Specifically, Consumer Advocate contends that the change in ownership raises issues including, but not limited to:

1. Using Aquila's capital structure and cost of equity approach as filed or using Black Hills Energy's capital structure and cost of equity approach with any necessary modification to either;
2. Costs and savings which will be assigned to Black Hills Energy and/or Aquila's Iowa operations from the dissolved Aquila, Inc.;
3. Costs and savings which will be assigned from Black Hills Energy to Aquila's Iowa operations or from Aquila's Iowa operations to Black Hills Energy;
4. The number of employees and their responsibilities at Black Hills Energy and Aquila's Iowa operations;
5. The integration costs and cost savings among and between Black Hills Energy and Aquila's Iowa operations;
6. The continued applicability, if any, of Aquila's Iowa operations Cost Allocation Manual (filed with the Board) to those Iowa operations; and
7. Innumerable similar issues arising from Black Hills Energy's ownership of Aquila's operations in Iowa.

Consumer Advocate contends that updates will not be feasible or work in this proceeding because of the innumerable and unrelated costs and savings involved. Consumer Advocate argues that it and other intervenors will have little opportunity to review the changes and to conduct a complete investigation. Consumer Advocate suggests that the filing dates for direct and rebuttal testimony will have passed before the costs and savings related to the sale have been identified and measured.

Black Hills Energy's Resistance

Black Hills Energy resists the motion to dismiss and argues the motion should be denied in its entirety. Black Hills Energy argues that dismissal of the general rate case filing is directly inconsistent not only with Board precedent but with Consumer Advocate's own position in prior dockets. Black Hills Energy states that in 1996 Consumer Advocate filed a petition to reduce electric rates for MidAmerican on a test year (1995) during which Midwest Resources Inc., Midwest Power Systems Inc., and Iowa-Illinois Gas and Electric Company reorganized into MidAmerican. When MidAmerican filed a motion to dismiss, based in part upon the argument that the test year was not representative of the new company and that pro forma adjustments would not make it a representative test year, Consumer Advocate responded by arguing that MidAmerican's reasoning was unsound since it would allow MidAmerican to avoid regulation by continuing to reorganize. Black Hills Energy points out that the Board denied MidAmerican's motion to dismiss, thus adopting Consumer Advocate's argument.

Black Hills Energy points out that 199 IAC 7.9(2)"c" of the Board's rules provides for dismissal of a case only where it can be shown that the application or petition is insufficient to show grounds for relief or a breach of legal duty. Under this provision, Black Hills Energy argues that Consumer Advocate must show that the underlying application is insufficient to support the general rate increase. Black Hills Energy points out that the Board's standard is similar to the well-established standard routinely applied in Iowa courts. Iowa courts hold that dismissal is appropriate only

where no state of facts is conceivable under which an applicant might show a right of recovery. Smith v. Smith, 513 N.W.2d 728, 730 (Iowa 1994).

Under this legal standard, Consumer Advocate is required to show that the facts presented by Black Hills Energy, when viewed in the light most favorable to Black Hills Energy, would not support an increase in rates. Black Hills Energy contends Consumer Advocate cannot meet this standard since the application meets all of the Board's rules and all statutory requirements. In fact, Black Hills Energy points out, the Board has already docketed the application for investigation in a formal contested case and Consumer Advocate never asked that the application be rejected. Black Hills Energy also argues that dismissal would violate its due process rights since Iowa Code §§ 476.6(4) and 476.6(6) expressly require a hearing.

Black Hills Energy argues that the Board's rules provide an adequate remedy for Consumer Advocate if, as Consumer Advocate argues, there are potentially substantive changes in the evidence filed in support of the general rate increase. Black Hills Energy points out that the Board was not reluctant to order Aquila in Docket No. RPU-02-5 to file additional information regarding employee retention throughout the case. Black Hills Energy contends each of the issues raised by Consumer Advocate could be addressed in a similar manner.

Black Hills Energy states that Consumer Advocate did not send its first data request until July 1, 2008, and has not propounded data requests regarding many of the most significant issues in the case. Black Hills Energy states that it is willing to work with Consumer Advocate to expedite discovery, but will not accept responsibility

for delays caused by the failure of Consumer Advocate to seek information in a timely manner.

MidAmerican's Resistance

MidAmerican also resists the motion to dismiss. MidAmerican states that it would be unprecedented for the Board to dismiss a rate case request without any review of the reasonableness of the proposed rate increase. MidAmerican argues that (with limited exceptions) the Board is not permitted by Iowa statutes, the U.S. Constitution, and Board precedent to dismiss a rate increase proceeding.

MidAmerican argues that dismissal would violate Black Hills Energy's due process of law rights and would still allow rate decrease proceedings even though Consumer Advocate requests Black Hills Energy be prohibited from filing for an increase until 2010.

Consumer Advocate's Reply

Consumer Advocate argues that Black Hills Energy did not respond to the main point of the motion—that everything in the rate case application filed by Aquila potentially changed with the completion of the sale of Aquila's assets to Black Hills Energy. Black Hills Energy's argument that Consumer Advocate should be required to make its case and develop its own factual record ignores the fact that the utility, Black Hills Energy, has the burden to prove that the test year numbers are representative of Iowa operations, the need for pro forma adjustments, and the reasonableness of the proposed rate increase. Consumer Advocate argues that Black Hills Energy should be required to do more than substitute its name for Aquila.

Consumer Advocate states that Aquila objected to some of Consumer Advocate's data requests seeking information about Black Hills Energy on the grounds that the rate case was for an Aquila test year and Black Hills Energy data was irrelevant. Consumer Advocate also states that Aquila indicated it did not have access to the information requested concerning Black Hills Energy and would not have access until after the acquisition closed.

Consumer Advocate argues that the cases cited by Black Hills Energy, in which the Board had refused to dismiss a general rate proceeding after a merger occurred during the proceeding, involved the merger of two separate, intact, companies, while this case involves the dismantlement of Aquila and the piecemeal sale of its parts and components. Consumer Advocate argues that the impact of this dismantlement on Iowa customers is unknown and includes the allocation of costs by Black Hills Energy to Iowa operations and whether any of the other costs allocated by Aquila to Iowa operations have changed. This includes employees, assets, and costs related to Iowa operations.

Consumer Advocate goes on to state if the Board denies the motion to dismiss, the Board should, at a minimum extend the procedural schedule and require Black Hills Energy to file specific cost revenue information using a 2008 test year supported by testimony and exhibits explaining the basis for all allocations and all changes in costs and revenues originally filed by Aquila. Consumer Advocate points out that an extension of the procedural schedule will not harm Black Hills Energy,

since temporary rates are in effect and good cause exists to extend the ten-month time limitation.

Black Hills Energy's Response

Black Hills Energy filed a response to Consumer Advocate's reply. In the response, Black Hills Energy states that the response addresses the new arguments raised by Consumer Advocate and includes a resistance to what Black Hills Energy characterizes as two new motions. Black Hills Energy contends that Consumer Advocate's July 30, 2008, reply contains a motion requesting that the Board direct Black Hills Energy to file additional information in 2009, and the second motion asks for an extension of the procedural schedule and the ten-month statutory time limit for conclusion of the rate case. Black Hills Energy argues that under Board rules a party has 14 days to reply to the motions and Black Hills Energy reserves the right to supplement its discussion of the motions.

Black Hills Energy argues that the Consumer Advocate motions are based upon innuendo and speculation and Consumer Advocate does not reference any legal support for any of the motions or proposals. Black Hills Energy argues that Consumer Advocate does not reconcile its motions or proposals with any analysis of case law or statutes.

Black Hills Energy contends that Consumer Advocate is mistaken that everything in the rate case application has potentially changed. Groundless speculation about what potentially could happen is insufficient to overcome the presumed truth of the matters alleged in the application. Black Hills Energy contends

that the only pro forma adjustment at this time caused by the sale of the Aquila assets to Black Hills Energy is an increase in rate base resulting from the elimination of Aquila's deferred tax balance, which generates a \$1.8 million increase in the annual revenue deficiency. Black Hills Energy states that virtually all employees and facilities have been, and will continue to be, retained following the sale.

Black Hills Energy argues that extension of the time limit for conclusion of the rate case would cause harm since the temporary rates now in effect do not reflect the capital additions tracker or the revenue normalization mechanism. Black Hills Energy states that it will be harmed by any delay in implementation of these essential revenue protection measures.

Black Hills Energy states that all of the employees that charge time directly to Iowa operations have been retained and additional field employees have been added to address construction needs and to further improve safety response times. Additionally, Black Hills Energy suggests that the major sources of allocated payroll and benefit costs, the call centers and customer service staff, have been replicated. Black Hills Energy argues that it should be able to show that the largest cost category of operation and maintenance (O&M) costs will be similar to Aquila's cost structure. Black Hills Energy requests the Board retain the existing procedural schedule for all issues.

Black Hills Energy argues that if Consumer Advocate finds some evidence before hearing that Black Hills Energy's cost structure will significantly change, the Board can delay the procedural schedule by a relatively brief period to afford

Consumer Advocate the opportunity to review the O&M costs. Black Hills Energy points out that Consumer Advocate has the right under Iowa statutes to file a rate reduction case in 2009 immediately following the conclusion of this case, if Consumer Advocate believes such a case is appropriate.

BOARD DISCUSSION

The Board has reviewed the motion to dismiss, the two responses resisting the motion, Consumer Advocate's reply, and Black Hills Energy's response to the reply. Based upon its review, the Board finds that the standard for dismissal of a case as established in 199 IAC 7.9(2)"c" and Iowa case law has not been met. To dismiss a filing, the Board would be required to find that all of the evidence filed by Black Hills Energy in support of the general rate increase, considered in the most favorable light, was insufficient to support a rate increase above current levels. This is a heavy burden for any party to meet for any proceeding and especially for a general rate case filing where the Board is required to consider all of the relevant factors in determining whether current rates are just and reasonable. Not until the Board has weighed all of the evidence filed concerning a utility's costs and revenues is the Board able to make a factual determination of whether the facts support the proposed rate increase. Since the filing by Black Hills Energy met the Board's rules, the Board considers the filing legally sufficient to go forward with consideration of the evidence.

Adjustments to the testimony and exhibits are part of a normal rate case proceeding and, although the complete sale of the utility assets is not a usual case, the Board's authority and the Iowa statutes are flexible enough to allow for updating the testimony and exhibits under these circumstances. The Board understands that the change in ownership will change some of the evidence in support of the proposed rate increase; however, those changes do not rise to the level that would require dismissal of the case. The Board would not be fulfilling its statutory responsibility if it did not conduct a hearing and consider all of the evidence, as updated, presented by Black Hills Energy in support of the proposed rates. The Board will deny the motion to dismiss filed by Consumer Advocate.

The Board does not agree with Black Hills Energy that the sale of the Iowa operations has little effect on the evidence in support of the proposed rate increase. With new ownership, the cost of capital, cost of debt, allocations to Iowa, and other material information is very likely to be significantly different than originally filed. The denial of the motion to dismiss by the Board does not relieve Black Hills Energy of the responsibility to update the testimony and exhibits that were based upon ownership by Aquila. It is necessary for Black Hills Energy to file supplemental testimony and exhibits with the information concerning effect of the new ownership on Iowa operations. Since the supplemental information will need to come from Black Hills Energy, updating of the information requires the Board to modify the procedural schedule to allow for the filing of supplemental testimony and exhibits, change the hearing date, and to accommodate the modified schedule and additional

discovery. The Board will therefore extend the ten-month time limit for issuing an order regarding the suspended rate increase tariffs. Iowa Code § 476.33 provides that upon the request of a party the Board may extend the ten-month time limitation for good cause shown.

Consumer Advocate in its reply has suggested the time limitation be extended and the Board finds there is good cause shown for the extension based upon the completion of the sale of Aquila to Black Hills Energy and the need for Black Hills Energy to file supplemental testimony and exhibits and any changes to the evidence that will result from the new ownership. For purposes of its own review, the Board will require Black Hills Energy to update certain information, at a minimum, to ensure the Board has evidence concerning all relevant factors about Black Hills Energy's Iowa operations. Black Hills Energy will be directed to file supplemental testimony and exhibits that provide the following information, at a minimum:

1. The cost of capital and cost of equity testimony and evidence using Black Hills Energy data;
2. Costs and savings which will be assigned to Black Hills Energy Iowa operations as a result of the sale;
3. Costs and savings which will be assigned to Black Hills Energy's Iowa operations from the dissolved Aquila operations;
4. The number of employees and their responsibilities in Iowa under Black Hills Energy's ownership;

5. Any integration costs and savings among and between Black Hills Energy and Aquila's Iowa operations;
6. An updated organization chart for Black Hills Energy, including those personnel responsible for regulatory affairs in Iowa; and
7. Testimony regarding any other costs and savings, or operational changes, that result from the sale of Aquila's Iowa assets to Black Hills Energy.

To accommodate the need for the filing of supplemental information, the Board will extend the ten-month time limit for consideration of the general rate increase request by three months, from April 2, 2009, to July 2, 2009. A modified procedural schedule is established below with new filing deadlines and a new hearing date. The Board is also scheduling a prehearing conference to allow the parties to discuss unresolved issues and other matters.

Iowa Code § 476.33 provides the Board sufficient authority to extend the ten-month time limit and does not consider the Black Hills Energy arguments to be persuasive for retaining the current procedural schedule. The temporary rates now in effect provide Black Hills Energy sufficient protection over the winter months and even under the existing schedule Black Hills Energy would not have new rates in effect until after the 2008-09 winter heating season. In addition, the delay in consideration of the automatic adjustment proposals filed by Black Hills Energy in this case will allow the Board to give consideration to those proposals based upon a full and complete record under the new ownership of Black Hills Energy.

Black Hills Energy is correct that 199 IAC 7.12 allows a party 14 days to respond to a motion. Regardless of whether the filing made by Consumer Advocate contained two motions, Black Hills Energy has filed a response. The Board is issuing this order based upon that response and does not consider it necessary to allow the full 14 days for a response to be filed. If Black Hills Energy, or another party, insists on additional time to file additional pleadings, the Board could be required to further extend the procedural schedule to accommodate those responses.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The motion to dismiss filed by the Consumer Advocate Division of the Department of Justice on July 16, 2008, is denied.
2. A prehearing conference is set for 9 a.m. on August 26, 2008, in the Board's Hearing Room, 350 Maple Street, Des Moines, Iowa. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at (515) 281-5256 in advance of the scheduled date to request that appropriate arrangements be made.
3. The deadline for consideration of the general rate increase filed by Aquila, Inc., d/b/a Aquila Networks, n/k/a Black Hills/Iowa Gas Utility Company, LLC, d/b/a Black Hills Energy, is extended from April 2, 2009, to July 2, 2009, pursuant to Iowa Code § 476.33 (2007).

4. Black Hills Energy shall file supplemental direct testimony as described in this order on or before August 29, 2008.

5. The following modified procedural schedule is established:

a. Consumer Advocate and intervenors shall file prepared direct testimony, with underlying workpapers and exhibits, on or before December 3, 2008.

b. If Consumer Advocate and intervenors find it necessary to file testimony in rebuttal to each other's direct testimony, they shall file rebuttal testimony on or before January 5, 2009.

c. Black Hills Energy shall file rebuttal testimony, with underlying workpapers and exhibits, on or before January 20, 2009.

d. Consumer Advocate and intervenors shall file rebuttal testimony on any issue raised initially in that party's direct testimony and responded to by another party on or before February 2, 2009.

e. The parties shall file a joint statement of the issues on or before February 23, 2009.

f. Any party may file a prehearing brief on or before February 27, 2009.

g. A hearing shall be held beginning at 10 a.m. on March 10, 2009, for the purpose of receiving testimony and the cross-examination of all testimony. The hearing shall be held in the Board's Hearing Room, 350 Maple Street, Des Moines, Iowa. The parties shall appear one-half hour prior to the

time of the hearing for the purpose of marking exhibits. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at (515) 281-5256 in advance of the scheduled date to request that appropriate arrangements be made.

h. The parties may file simultaneous initial briefs on or before April 6, 2009.

i. All parties who file initial briefs may file reply briefs on or before April 27, 2009.

UTILITIES BOARD

/s/ John R. Norris

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 12th day of August, 2008.