BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[4]
APR 29 2004
Missouri Public Service Commission

In the Matter of the Application of Aquila, Inc. for Authority to Assign, Transfer, Mortgage or Encumber its Utility Franchise, Works or System in Order to Secure Revised Bank Financing Arrangements	)))))	Case No. EF-2003-0465

LEGAL MEMORANDUM OF AQUILA, INC. IN SUPPORT OF ITS RESPONSE TO JOINT MOTION FOR SUMMARY DISPOSITION AND REQUEST FOR ORAL ARGUMENT

Comes now Aquila, Inc. ("Aquila"), pursuant to Commission Rule 4 CSR 240-2.117(1)(C) and submits the following legal memorandum in support of its Response to Joint Motion for Summary Disposition and Request for Oral Argument:

As pointed out on pages 2 and 3 of Joint Movant's Suggestions in Support for Summary Disposition, Aquila's Application in this case has been filed pursuant to Sections 393.180[1] and 393.190.1 RSMo 2000. The operative law, § 393.190.1 RSMo, provides that:

> *No gas corporation, electrical corporation*, water corporation or sewer corporation *shall hereafter* sell, assign, lease, transfer, *mortgage or otherwise dispose or encumber whole or any part of its* franchise *works or system, necessary or useful in the performance of its duties to the public*, nor by any means, direct or indirect, merge or consolidate such works or system or franchises or any part thereof with any other corporation, person or public utility, *without having first secured from the Commission an order authorizing it so to do.* (Emphasis added.)[2]

[1] The "special privilege" language contained in § 393.180 RSMo 2000 to which Joint Movants make reference has no independent significance because it is further provided that the privilege "shall be exercised *as provided by law and under such rules and regulations as the Commission may prescribe.*" (Emphasis added.) As will be demonstrated in this memorandum, the applicable law and the Commission's rules define the standard of approval to be applied in this case. Moreover, the "special privilege" provision is limited to *corporations chartered in the State of Missouri and, therefore, does not apply to companies like Aquila which* are incorporated under the laws of other states. *Public Service Commission v. Union Pacific Railroad Company*, 271 Mo. 258, 197 S.W. 39, 40 (Mo. banc 1917).

[2] The Commission's implementing regulations are found at 4 CSR 240-3.110 and 4 CSR 240-3.115.

Exhibit No. 174
Case No(s). ER-2004-0034
Date 03-03-04 Rptr JF

This is the same provision as is applicable to utility mergers and acquisitions and asset sales. As such, the Commission is well-acquainted with the legal standard for approval of applications filed in accordance with this provision of law. Specifically, the Commission is required by law to approve Aquila's Application unless doing so would be detrimental to the public interest. This minimal benchmark for approval was established by the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W. 2d 393 (Mo. 1934). The Supreme Court's rationale is as compelling today as it was in 1934:

> To prevent injury to the public, in the clashing of private interests with the public good in the operation of public utilities, is one of the most important functions of public service commissions. It is not their province to insist that the public shall be benefitted, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. "In the public interest," in such cases, can reasonably mean no more than "not detrimental to the public."

Id. at 400.

In rejecting the argument that the Commission must find that a transaction governed by this section confers some affirmative public benefit, the Supreme Court instead stressed the importance of the property rights of the utility shareholders:

> The owners of this stock should have something to say as to whether they can sell it or not. *To deny them that right would be to deny them an incident important to ownership of property . . . a property owner should be allowed to sell his property unless it would be detrimental to the public.* (Emphasis added.)

Id. This analysis is equally applicable in the context of encumbering utility property with a mortgage or deed of trust (and thus conveying title to a mortgagee or trustee for the benefit of a lender[3]) as it is in the context of a sale of capital stock or assets because each

[3] "A deed of trust is a conveyance from a landowner . . . to a trustee for the purpose of securing an obligation owing to the beneficiary of the trust." 18 Theodore H. (footnote continued on next page)

such transaction involves the transfer of a property interest. The standard established by the Missouri Supreme Court is a judicial recognition of the compelling constitutional right of a property owner to sell, mortgage or otherwise dispose of its property free from unreasonable regulatory restraint. This standard contains the constitutional balance of interests as between shareholders and ratepayers.

In 1980, the Eastern District Court of Appeals looked to the *City of St. Louis* decision in determining the right of a regulated sewer company to complete the sale of regulated assets. *State ex rel. Fee Fee Trunk Sewer Company v. Litz*, 596 S.W. 2d 466 (Mo. App. 1980). The Commission has routinely applied this standard when considering utility mergers, sales and acquisitions; so much so that the legal standard has been codified in the Commission's implementing regulations, 4 CSR 240-3.110 and 4 CSR 240-3.115. At subsection (1)(D) of each rule, the Commission requires that an application filed for approval under § 393.190.1 RSMo include a statement of the reasons the transaction "is not detrimental to the public interest."[4]

The Commission's application of the "not detrimental" legal standard to cases filed pursuant to § 393.190 RSMo is also well established. In 1971, in a case involving the acquisition of the common stock of Missouri Natural Gas Company by Laclede Gas Company, the Commission determined that all that needs to be shown to meet the test of no detriment is the *status quo* be maintained. Specifically, the Commission found that the

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Hellmuth, Missouri Practice, Real Estate Law – Transactions §256, p. 258 (2nd ed. 1998).

[4] Staff and OPC have filed testimony that suggests agreement with Aquila that the appropriate standard for approval of the Application in this case is whether mortgaging the Missouri utility properties would be detrimental to the public interest. *See*, Verified Rebuttal Testimony of Joan Wandel, pp. 18-23; Verified Rebuttal Testimony of Ted Robertson, p. 34, l. 19-21; p. 35, l. 1-3; filed Sept. 10, 2003.

standard was met in that case simply by showing that there would be (1) no change in rates and (2) no deterioration in the quality of service. *Re Laclede Gas Company*, 16 Mo.P.S.C. (N.S.) 328, 334 (1971).

The most recent examination by the Commission of the meaning of the "no detriment" standard of approval took place in its March 16, 2000, Report and Order in case number WM-2000-222[5]. This was a case involving the joint application of Missouri-American Water Company ("MAWC") and United Missouri Water, Inc. ("United") for authority for MAWC to acquire the common stock of United. In that case, the Commission's Staff recommended that the Commission approve the joint application, subject to the condition that MAWC not be permitted to recover any portion of the *acquisition premium* (*i.e., the amount of the purchase price in excess of book value*) associated with the transaction in a future rate proceeding.

The Commission approved the joint application of MAWC and United. In doing so, the Commission rejected Staff's recommended condition stating:

> The only purported public detriment that any party identified is the possibility of a future attempt to recover acquisition premium from ratepayers. The Commission reads *State ex rel. City of St. Louis v. Public Service Commission, supra*, 335 Mo. at 459, 73 S.W. 2d at 400, to require *a direct and present public detriment*. The acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed is not a present detriment. "[T]he Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is *compelling evidence* on the record tending to show that a public detriment will occur." *In the matter of the Joint Application of Missouri Gas Company, et al.*, Case No. GM-94-252, supra, 3 Mo.P.S.C. 3rd at 221. There was no such compelling evidence in this record. (Emphasis added.)

9 Mo.P.S.C.3d at 56. Thus, the Commission has determined that the mere possibility of

[5] *Re Missouri-American Water Company*, 9 Mo.P.S.C.3d 56 (2000).

a scenario of events that may, or may not, result in future adverse consequences is not legally sufficient to make a showing that a transaction is detrimental to the public interest. To the contrary, once the applicant has made a *prima facie* showing that the *status quo* will not be disturbed, an objecting party, Joint Movants in this case, are obliged to present "compelling evidence" of a "direct and present public detriment." This, Joint Movants have abjectly failed to do. There are absolutely no facts alleged in the Motion evidencing any direct and present public detriment that could arise out of the granting of the authority requested in Aquila's Application.

Indeed, Joint Movants have not even addressed the appropriate legal standard for approval of the Application. Rather, those parties have merely asserted that, in their view, Aquila has no "need" for the authority being sought. As noted above, this is not the legal standard for approval of the Application in this case. This is evidenced by the simple fact that the supporting legal memorandum submitted by Joint Movants contains no law, statutory or otherwise, and no Commission precedent in support of their claim.

The reason for this glaring deficiency in the Motion is apparent. There is no law establishing a "needs" test based on the grounds that Aquila is alleged to have secured "enough collateral" to satisfy certain of its obligations under its financing plan. The standard for approval of the Application is not whether Aquila needs to put additional collateral in the pool. Importantly, Joint Movants provide the Commission with no prior Commission decisions making any reference whatsoever to a needs test.[6] To the

[6] Significantly, Staff and OPC have conceded that they have not previously sought to have the Commission deny an application for authority to mortgage or encumber utility assets to secure bonded indebtedness because the mortgage was not "needed" or that the indebtedness would be "over-collateralized." *See*, attached data request responses.

knowledge of Aquila, the Commission has never disapproved an encumbrance application on the basis of a needs test. Certainly, Joint Movants have failed to provide the Commission with even one example of a decision that would give any credence to their new and unprecedented claim.

There are good policy reasons for this circumstance. An examination of applicable legal and regulatory principles demonstrates that it is not the Commission's role to determine the business need associated with a utility's financing plan. To the contrary, this is a determination reserved by law to the management's informed discretion. In reviewing the Application in this case, the Commission's task is extremely limited.

This is a widely recognized regulatory principle. In *Great Pioneer National Gas Company*, 8 PUR 3d 31 (1955), which concerned an application to convert stock, the New Mexico Public Service Commission stated at page 35 that the choice of method of raising money ". . . is wholly a function of management, subject only to the paramount requirement of consistency with the public interest."

In *Re Potomac Electric Power Company*, 23 PUR 3d 310 (1958), the District of Columbia Public Utilities Commission considered an application by a public utility to sell debentures. Approving the application, the commission held at page 318:

> Ordinarily, this commission would not interfere with the discretion of management in this regard if the utility shows a substantial basis for its selection of the various possible forms of financing, since naturally the burden of selection is the prime responsibility of management.

The most compelling articulation of this principle is contained in *Kelly v. Michigan Public Service Comm'n*, 412 Mich. 385, 316 N.W. 2d 187 (Mich. 1982). It involved an appeal by the Michigan Attorney General (the "MAG") of a decision of the Michigan Public Service

Commission ("MPSC") authorizing plans by various utilities to finance the construction of several power generating stations. The MAG contended that the stations were unnecessary and that the MPSC had erred by failing to determine whether the underlying purposes for the funds were reasonable (i.e., whether the utilities needed the additional capacity). The Michigan Supreme Court concluded that the law did not contemplate an inquiry concerning the need for the power plants. Rather, the only legitimate inquiry for the MPSC was whether the funds were to be used for a lawful purpose. 316 N.W. 2d at 192.

These regulatory decisions echo an important constitutional principle enunciated by the United States Supreme Court in *Missouri ex rel. Southwestern Bell Telephone v. Public Service Commission of Missouri*, 262 U.S. 276, 43 S.Ct. 544 (1923), which concerns the Commission's authority in regard to the necessity and reasonableness of expenditures made in the operation of a public utility. Addressing the utility's important property rights in the deployment and management of their assets to the best financial advantage of the company, the Court held that:

> The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgement for that of the directors of the corporation.[7]

A utility's right to manage its property and to conduct its affairs and business is the blackest of black letter law in Missouri. Consequently, how Aquila goes about financing its utility operations is not a matter that can be directed, determined or obstructed by the Commission. The business "need" for the mortgage is a circumstance to be determined by Aquila alone. The Application and supporting testimony set forth the basis for Aquila's

[7] 43 S.Ct. at 547.

determination that its Missouri utility properties may be added to the collateral pool without causing any impairment to the public interest. The considerations have been comprehensive, coherent and compelling as explained in the verified testimony of company witnesses Rick Dobson and Jon R. Empson.

The law establishing the broad parameters of management discretion is clear and unambiguous. The Commission's authority to regulate certain aspects of a public utility's operations and practices does not include the right to dictate the manner in which the company conducts its business. *State ex rel City of St. Joseph v. Public Service Commission*, 30 S.W. 2d 8 (Mo. banc 1930). This case involved an appeal by the City of St. Joseph, Missouri of an order of the Commission affixing the value of property of St. Joseph Water Company for ratemaking purposes and approving a schedule of rates. In rejecting the Appellant's contention that the Commission should not have authorized an administrative charge imposed on the operating company by its parent company, the Missouri Supreme Court stated the following:

> The holding company's ownership of the property includes the right to control and manage it, subject, of course, to the state regulation through the public service commission, but it must be kept in mind that the commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business. *The company has the lawful right to manage its own affairs and conduct its business in anyway it may choose, provided that in doing so, it does not injuriously affect the public.* The customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the utility must employ in the rendition of that service. (Emphasis added.)

Id. at 14. More recently, the Kansas City Court of Appeals reaffirmed this view in *State ex rel. Harline v. Public Service Comm'n*, 343 S.W. 2d 177 (Mo. App. 1960), where it is said:

> The dominating purpose in the creation of the public service commission was to promote the public welfare. To that end the statutes provided

> regulation which seeks to correct the abuse of any property right of a public utility, *not to direct its use. Exercise of the latter function would involve a property right in the utility. The law has conferred no such power upon the commission.* (Emphasis added.)

The Court of Appeals continued by observing that the Commission's powers are "purely regulatory." *Id.* at 181. The Court elaborated on this important principle of regulation:

> The utility's ownership of its business and property includes the right to control and management, subject, necessarily to state regulation through the public service commission. The powers of regulation delegated to the commission are comprehensive and extend to every conceivable source of corporate malfeasance. *Those powers do not, however, clothe the commission with the general power of management incident to ownership. The utility retains the lawful right to manage its affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to the public welfare.* (Emphasis added.)

The central and glaring deficiency of the Motion is this; the Joint Movants have not shown (indeed they have not even alleged) that the Commission's approval of the Application would cause any detriment to the public interest. They have not alleged in the Motion (much less demonstrated by undisputed facts) that approval of the Application would result in any change in the *status quo* with respect to rates and quality of service. The Motion contains no allegation, and there is no proof, that approval of the Application would cause an increase in rates or any impairment to the service being rendered by Aquila to its customers in the State of Missouri. Conspicuous by its absence is any reference in the Motion under the section entitled "Undisputed Facts" to the impact the Commission's approval would have on customer service or rates, if any. Ultimately (and obviously), the Joint Movants have failed to present in the Motion any "compelling evidence" of a "direct

and present public detriment," that will come about if the Application is approved.[8] Consequently, Joint Movants have not established that they are entitled to any relief as a matter of law[9] as to all or any part of this case.

To the contrary, genuine issues as to material facts clearly remain in dispute. In responses to requests for admissions submitted by Aquila, Joint Movants and Staff contend that approval of the Application could or will cause an increase rates paid by Aquila's Missouri customers and/or that the quality of customer service will be immediately and directly adversely impacted. (Response ¶¶ 23-26.) Additionally, Staff has offered seven (7) specific reasons for its contention that granting the relief requested in the Application would be detrimental to the public interest in prepared rebuttal testimony filed several weeks after the Motion was filed. (Response ¶ 27.) There is no principled basis for contending that material facts are not in dispute in this case. The sheer volume of rebuttal testimony filed by Joint Movants and Staff dealing with topics of cash working capital requirements, customer service indices, financial safeguards, capacity needs and alternative lines of credit is eloquent evidence that many facts have been put at issue in this case.[10]

There is no basis in fact or law for granting the Motion. As has been demonstrated, *supra*, genuine issues of material fact remain in dispute and Joint Movants are not entitled

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[8] *See*, footnote. #5.

[9] Joint Movants have no right to any relief in any event because none of them have a proprietary interest in this proceeding. Furthermore, Aquila's application does not seek any relief as against the Joint Movants in the nature of a judgment or other consideration or concession. The Application is for transactional authority from the Commission for the benefit of Aquila. Consequently, the Commission has no statutory authority to grant substantive relief in this proceeding to any party other than Aquila.

[10] Generally, see the verified rebuttal testimony of Staff witnesses Wandel, Mantle, Sommerer, Ketter, Niemeier and Bible; OPC witnesses Burdette, Robertson and Busch; and SEIUA/AGP witness Gorman.

to relief as a matter of law. The Motion does not establish that the Commission's approval of the Application would be detrimental to the public interest. To the contrary, an order granting the Motion would violate Aquila's property rights granted under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Constitution of Missouri and, also, its rights to due process. Joint Movants have fallen far short of the standard required for any relief under Commission Rule 4 CSR 240-2.117 and, consequently, the Motion should be denied for the reasons aforesaid.

Respectfully submitted,

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Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 22nd day of September 2003 to the following:

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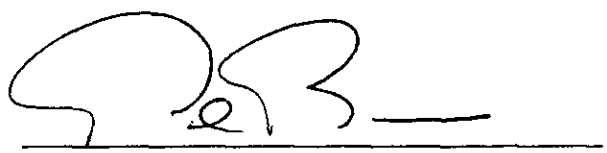

AQUILA, INC.
DATA REQUEST
CASE NO. EF-2003-0465
AQUILA DATA RQUEST NO. 1

DATE OF REQUEST: August 25, 2003

DATE DUE: September 9, 2003

REQUESTOR: Paul A. Boudreau

REQUESTED FROM: Missouri Public Service Commission Staff

QUESTION: Provide copies of any and all recommendations, in whatever format prepared (i.e., memos, testimony, pleadings, etc.) filed by or on behalf of you in any other case within the past ten (10) years in which a public utility in the State of Missouri has filed an application with the Missouri Public Service Commission to issue mortgage backed indebtedness or to otherwise mortgage or encumber its system or works with respect to which you have recommended that the application be dismissed or denied on the grounds that the obligations secured were over-collateralized.

RESPONSE: The Staff is not aware of any recommendation that it has filed in any case within the past ten years in which a public utility in the state of Missouri has filed an application to issue secured debt or otherwise encumber its system or works where the Staff has recommended that the application be dismissed or denied on the grounds that the obligations secured were over-collateralized. In the financing cases of which the Staff is aware where the issue of over-collateralization potentially could have been raised, the Staff did not raise the issue because in each case 1) the company was investment grade with reasonable access to capital and 2) the lender required that the debt be secured as a prerequisite for the company to receive the requested funds.

This case is unique from prior financing cases. The Staff is not aware of any application filed with the Commission where the company has requested authority to encumber a the company's system or works as a component of a financing where the company had already 1) closed the financing, 2) received the funds, and 3) disbursed the funds without having first obtained Commission approval to encumber the company's system or works. Staff is not aware of any other application filed with the Commission where the company requesting authority to encumber its system or works was not investment grade and had limited access to capital.

ATTACHMENT: None.

The attached information provided to the Aquila Staff in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform the Aquila Staff if, during the pendency of this review before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information.

ANSWERED BY:

R. E. Schallenberg 9-5-03
Signature/Date

Attachment
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AQUILA, INC.
DATA REQUEST

CASE NO. EF-2003-0465
AQUILA DATA RQUEST NO. 2

DATE OF REQUEST: August 25, 2003

DATE DUE: September 9, 2003

REQUESTOR: Paul A. Boudreau

REQUESTED FROM: Missouri Public Service Commission Staff

QUESTION: Provide copies of any and all recommendations, in whatever format prepared (i.e., memos, testimony, pleadings, etc.) filed by or on behalf of you in any other case within the past ten (10) years with the Missouri Public Service Commission with respect to any application filed by a Missouri utility for approval to issue mortgage backed indebtedness or to otherwise mortgage or encumber its works or system wherein you have recommended that the application be dismissed or denied on the grounds that the relief requested was not needed.

RESPONSE: The Staff is not aware of any position that it has taken prior to this case recommending that an application for approval to issue secured debt or otherwise encumber utility assets be dismissed or denied on the grounds that the relief requested was not needed. The Staff is not aware of any prior financing case in which the issue of the need for, or the amount of, collateralization was important because 1) the companies were investment grade and had reasonable access to capital and 2) the collateralization component was a requirement of the lender in order for the company to receive the requested funds.

This case is unique from prior financing cases. The Staff is not aware of any application filed with the Commission requesting authority to encumber a company's system or works as a component of a financing that the company had 1) closed the financing, 2) received the funds, and 3) disbursed funds without Commission approval. The Staff is not aware of any application filed with the Commission requesting authority to encumber a company's system or works by a company that was not investment grade and had limited access to capital.

The Staff is aware of cases where utilities have sought interim rate relief where the Staff opposed the request. As indicated in comments filed by the Staff in the Commission's Case No. 00-82-277 styled, *In the matter of the inquiry into certain matters of concern to the Commission*, the Commission has broad discretion as to the standard it applies in such cases and the standard that it has used, which received court approval in *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561 (Mo. App. 1976), is that interim rate relief should only be granted "where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity." Although the Staff took no position in the case, in the interim rate relief case *In the matter of The Gas Service Company of Kansas City, Missouri, for authority to file interim tariffs increasing rates for gas service provided to customers in the Missouri service area of the company*, Case No. GR-83-207 (March 3, 1983) the Commission stated that it granted relief only in emergency or near emergency circumstances since it was without benefit of a thorough Staff audit and that after determining relief was warranted the extent of the

relief must be based on a showing by the applicant that it was "taking every measure short of impairing its ability to provide safe and adequate service to reduce expenses." In the case *In the Matter of Tariff Revisions of The Empire District Electric Company Designed to Increase Rates on an Interim Basis for Electric Service to Customers in its Missouri Service Area*, Case No. ER-2001-452 (March 8, 2001), the Staff opposed the company's request and in a footnote the Commission expressly stated that it was applying the emergency or near emergency standard.

ATTACHMENT: None.

The attached information provided to the Aquila Staff in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform the Aquila Staff if, during the pendency of this review before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information.

ANSWERED BY:

R. E. Schallenberg 9-5-03
Signature/Date

AQUILA, INC.
DATA REQUEST

Case No. EF-2003-0465
Aquila Data Request No. 1

Date of Request: August 25, 2003

Date Due: September 9, 2003

Requestor: Paul A. Boudreau

Requested From: Office of the Public Counsel

Question:

Provide copies of any and all recommendations, in whatever format prepared (i.e., memos, testimony, pleadings, etc.) filed by or on behalf of you in any other case within the past ten (10) years in which a public utility in the State of Missouri has filed an application with the Missouri Public Service Commission to issue mortgage backed indebtedness or to otherwise mortgage or encumber its system or works with respect to which you have recommended that the application be dismissed or denied on the grounds that the obligations secured were over-collateralized.

Response:

This Application is unlike any financing application that Public Counsel has been asked to review in two respects. First, Aquila already has received the $430 million loan proceeds and is seeking to encumber Missouri jurisdictional utility property after the fact. Thus, the issue of whether the obligations to be secured are over-collateralized is a matter of first impression. Second, Aquila is currently a non-investment grade company due to its forays into unregulated business ventures that failed. Public Counsel is unaware of any major utility in Missouri that has requested financing approval in the last ten years that was non-investment grade. Because this is the first time in Public Counsel's knowledge the Commission has been asked to decide a case like this, Public Counsel is unaware of any other filings requesting denial or dismissal of financing application for over-collateralization.

DATE RECEIVED: 9/29/03 SIGNED BY: [signature]

TITLE [signature]

Attachment
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AQUILA, INC.
DATA REQUEST

Case No. EF-2003-0465
Aquila Data Request No. 2

Date of Request: August 25, 2003

Date Due: September 9, 2003

Requestor: Paul A. Boudreau

Requested From: Office of the Public Counsel

Question:

Provide copies of any and all recommendations, in whatever format prepared (i.e., memos, testimony, pleadings, etc.) filed by or on behalf of you in any other case within the past ten (10) years with the Missouri Public Service Commission with respect to any application filed by a Missouri utility for approval to issue mortgage backed indebtedness or to otherwise mortgage or encumber its works or system wherein you have recommended that the application be dismissed or denied on the grounds that the relief requested was not needed.

Response:

This Application is unlike any financing application that Public Counsel has been asked to review in two respects. First, Aquila already has received the $430 million loan proceeds and is seeking to encumber Missouri jurisdictional utility property after the fact. Thus, the issue of whether the requested relief is needed is a matter of first impression. Second, Aquila is currently a non-investment grade company due to its forays into unregulated business ventures that failed. Public Counsel is unaware of any major utility in Missouri that has requested financing approval in the last ten years that was non-investment grade. Because this is the first time in Public Counsel's knowledge the Commission has been asked to decide a case like this, Public Counsel is unaware of any other filings requesting denial or dismissal of financing application on the grounds that the relief requested was not needed.

DATE RECEIVED: 9/29/03 SIGNED BY: [signature]

TITLE Accountant III

Attachment
Page 5 of 5