BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

SUPPLEMENTARY 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"), and submits the following Supplementary Legal Memorandum in Support of its Response to Joint Motion for Summary Disposition and Request for Oral Argument ("Response"):

I. The Indenture of Mortgage and Deed of Trust is not an Evidence of Indebtedness

At the time of the oral argument on the Joint Motion for Summary Disposition and Request for Oral Argument (the "Motion") on Wednesday, October 1, 2003, lead counsel for the moving parties, Douglas Micheel, for the first time offered the argument that Aquila's Application in this case should have been conformed to the requirements of Commission rule 4 CSR 240-3.120 ("Filing Requirements for Electric Utility Applications for Authority to Issue Stock, Bonds, Notes and Other Evidences of Indebtedness") instead of 4 CSR 240-3.110 ("Filing Requirements for Electric Utility Applications for Authority to Sell, Assign, Lease or Transfer Assets"). Mr. Micheel suggested that Aquila's Indenture of Mortgage and Deed of Trust ("Indenture") is an "other evidence of indebtedness" as that phrase is used in § 393.200 RSMo 2000.

Raising this issue for the first time at the oral argument effectively denied Aquila the opportunity to brief the issue and to prepare the Commission for an informed discussion of the topic. Consequently, Aquila offers the following supplementary suggestions in support of its Response at the request of Commissioner Murray.

As a preliminary matter, the suggestion that Aquila's Application is deficient for not having been filed pursuant to § 393.200 RSMo and, also, in accordance with the Commission's implementing regulation, 4 CSR 240-3.120, was first raised in Staff's Status Report and Motion to Establish Early Prehearing Conference filed on June 3, 2003 (the "Report"). Thereafter on June 6, 2003, Aquila filed its response to Staff's Report in which it explained that the provisions of §393.200 RSMo are not applicable to Aquila because Aquila is chartered under the laws of the State of Delaware, not Missouri. The Missouri Supreme Court in 1917 concluded that the statutory reference to utilities "organized or existing or hereafter incorporated under or by virtue of the laws of this state" contained in § 393.200 RSMo means corporations created under Missouri law. *Public Service Commission v. Union Pacific Railroad Company*, 197 S.W. 39, 41 (Mo banc 1917). Aquila's response to the Report is incorporated herein by reference as though set forth at length.

As to Mr. Micheel's argument that an Indenture of Mortgage and Deed of Trust is an "other evidence of indebtedness," the great weight of authority from this and other jurisdictions supports the conclusion that a mortgage or deed of trust securing a note or other instrument of debt is not itself an evidence of indebtedness. Perhaps the most compelling decision is that of the United States Bankruptcy Court for the Eastern District

of Missouri in which the Court concluded that the phrase "stocks, bonds, notes and other evidences of indebtedness" as used in § 393.220 RSMo 2000 (another provision of the Public Service Commission Act) does not include deeds of trust. *Re Riverside Sewer Company*, 36 B.R. 171 (E.D. Mo. 1983). In doing so, the Bankruptcy Court applied the statutory interpretation principle of *ejusdem generis* which provides that general words in a statute following specific enumerated items are restricted in their meaning to objects of a like character of those specified. In other words, the Court concluded that a deed of trust is not of the same character as stocks, bonds or notes.

Decisions from other jurisdictions reinforce this general principle. In *Jones v. Hawaiian Electric Company*, 64 HI 289, 639 P. 2d 1103 (1982); *reversed on other grounds*, *Camera v. Agsalud*, 67 HI 212, 685 P. 2d 794 (1984), the Supreme Court of Hawaii, on review of a finding of the Hawaii Public Utilities Commission, upheld the Commission's finding that a thirty (30) year lease of real estate by a utility with an option to buy was not an "evidence of indebtedness." In a separate case, a chattel mortgage of trucks and trucking equipment was held not to be an "evidence of indebtedness" *Re Independent Truckers*, 212 F. Supp. 402 (DC Neb. 1963). Likewise, a contract to purchase stock over a period of years was held not to constitute an "evidence of indebtedness" in *Wisconsin Southern Gas Company v. PSC*, 57 Wis. 2d 643, 205 N.W. 2d 403 (1973). Finally, a three year lease of real estate was held not to constitute an "evidence of indebtedness" in *Red Star Transportation Company v. Silverman*, 44 Ohio App. 533, 186 N.E. 460 (1933).

In a case arising out of Florida, the United States Circuit Court of Appeals for the Fifth Circuit has observed that a mortgage or deed of trust, which itself contains no

covenant for the payment of the debt, is not evidence of indebtedness. *Hilpest v. Commissioner of Internal Revenue*, 151 F. 2d 929 (1945). The Indenture contains no admission of indebtedness evidencing liability against the mortgagor, Aquila. Consequently, no debt is created under the terms thereof and, therefore, the Indenture simply evidences a pledge of property to secure the repayment of the debt obligation embodied in the First Mortgage Bonds issued pursuant to the First Supplemental Indenture.

Finally and ultimately, if Joint Movant's are correct that the Indenture *is* an "evidence of indebtedness" as that language is used in § 393.200 RSMo 2000, Aquila is not subject to the requirements of that provision and, consequently, Aquila would not required to seek the Commission's approval in any event. See, *Union Pacific Railway Company*, *supra*.

II. Utilities do not Hold Their Properties "in Trust" for the Benefit of Their Customers

Joint Movant's various and continually evolving legal theories offered in support of the Motion have not been accompanied by any compelling statutory or case law. A prime example is the inventive argument offered by Stuart Conrad, counsel for intervenor SIEUA/AGP, at the time of the oral argument that Aquila holds its property "in trust" for the benefit of the public. This is simply not correct. In *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W. 2d 8 (Mo banc 1930), the Missouri Supreme Court rejected the concept that ratepayers have any property interest in the assets used to provide them utility service. Quoting the United States Supreme Court in *Board of Public Utility Commissioners v. New York Telephone Company*, 271 US 23, 46 S. Ct. 363, 366, the Missouri Supreme Court stated that "[c]ustomers pay for service, not for property used to

render it. Their payments are not contributions to depreciation or other operating expenses or to the capital of the company. **By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company**. Property paid for out of monies received for service belongs to the company just as does that purchases out of proceeds from its bonds and stock." (Emphasis added.) *Id.* at 14.

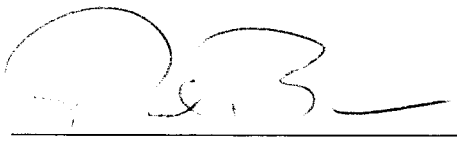
III. A Utility's Customers are not Entitled to Maintenance of the *Status Quo*

In response to a question from Commission Clayton, the undersigned counsel for Aquila made reference to a 1986 Missouri Supreme Court decision wherein the Court concluded that customers are not entitled to a guarantee of the *status quo* in the provision of utility service, even faced with the prospect of a rate increase. The citation to that case is *Love 1979 Partners v. Public Service Commission*, 715 S.W. 2d 482 (Mo banc 1986).

IV. Any Detrimental Aspects of a Transaction may be Offset by Benefits Derived as a Result of the Transaction

At the time of the oral argument, Commissioners Murray and Clayton asked whether the Commission could approve a transaction even if a detriment were identified. Without admitting that the Commission's approval of the Application would cause any detriment to the public interest, the answer would appear to be "yes." The Commission previously has concluded that a detriment that is short term or that is "offset by benefits or mitigated by conditions" can be approved under the *City of St. Louis* "not detrimental" standard. *Re Union Electric Company*, 1 Mo. P.S.C. 3d 501 (1992); *Re Gateway Pipeline Company*, ___ Mo. P.S.C. 3d ___, 2001 Mo. P.S.C. Lexis 1371 (2001).

Respectfully submitted,



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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 2nd day of October 2003 to the following:

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