

**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,)	Case No. EF-2003-0465
Works or System in Order to Secure)	
Revised Bank Financing Arrangements)	

**RESPONSE OF AQUILA, INC TO JOINT MOTION TO RECONSIDER ORDER
DENYING MOTION FOR SUMMARY DISPOSITION**

Comes now Aquila, Inc. ("Aquila"), by and through counsel, and for its Response to the Joint Motion of the State of Missouri, the Office of the Public Counsel, Sedalia Industrial Energy Users' Association and AG Processing, Inc. to Reconsider the Order Denying Summary Disposition (the "Joint Motion") states as follows:

1. On October 16, 2003, the Joint Motion was filed requesting that the Commission reconsider its October 9, 2003, Order Denying Motion for Summary Disposition. The Joint Motion claims the Commission has made "an error of logic" because the Commission has concluded that the standard for approval of an Application under § 393.190.1 RSMo 2000, as determined by the Missouri Supreme Court in the *City of St. Louis* case (not detrimental to the public interest), applies to mergers, sales, leases and mortgages as enumerated in the first sentence of that statute. The Joint Motion offers no compelling reason for the Commission to change its prior ruling.

2. As a practical matter, Aquila suggests that the Joint Motion for reconsideration is now moot in as much as the evidentiary hearing in this case has concluded and the record has been closed. Consequently, summary disposition of the case is no longer an available remedy.

3. Another reason for denial of the Joint Motion for reconsideration is that the record is undisputed that there is a genuine issue as to material fact regardless of whether one argues the standard for approval of the Application is a “needs” test or, as the Missouri Supreme Court has determined, a “no detriment” test. At the time of the oral argument before the Commission on October 1, 2003, the lead counsel for Joint Movants, Mr. Micheel, readily conceded that there were genuine issues of material fact regardless of which standard one chooses to advocate. That exchange with Commissioner Clayton was as follows:

- Q. Would you agree that there is a dispute as to facts - - as to the - - whether or not there's a detriment to the public? Do you believe that there is a dispute among the parties on that issue? Do the parties agree? Not whether you there there's a - - you know, whether you think the facts say a certain thing, but is there a dispute as to that issue?
- A. I think the parties disagree on that issue.
- Q. Do you believe that the parties disagree about whether or not there is a need?
- A. Yes.
- Q. Okay. Okay. Thank you.¹

Given that admission by the Joint Movants, summary disposition is not available under the standards set forth in the Commission's rule. See, § 4 CSR 240-2.117(1)(E).

4. Finally, there is no principled reason for the Commission to reconsider its ruling. The Commission correctly followed the controlling legal precedent and the Joint Movants have provided no contrary legal authority that would suggest a different outcome. The distinction the Joint Movants seek to make between an encumbrance and the other forms of property dispositions to which §393.190.1 RSMo makes reference disregards the

¹ Tr. Vol. 3, p. 47, l. 12-25.

fact that the applicable statutory language about which they argue all appears in the same sentence of the same clause of the same statute. Consequently, there is no rational basis to conclude that the Missouri Supreme Court's *City of St. Louis* standard (i.e., not detrimental to the public interest) would apply only to certain words, and not others, appearing in the same phrase. The same property rights considerations are implicated regardless of the nature of the right in property conveyed.

5. Also, the pleading of the Joint Movants makes no common sense. Mortgage-backed debt financing is a commercially customary means used by utilities to finance their operations. The Commission routinely authorizes utilities in this state to mortgage or encumber their utility properties for the benefit of bondholders who, not surprisingly, tend to have banks or other institutional lenders acting in the capacity as trustees or syndication agents. This is always the case with a secured lending instrument like Aquila's Indenture of Mortgage and Deed of Trust. The secured creditors are not interested in owning or operating a utility. Rather, they will look to a third party to acquire the operations and that buyer will be subject to the same regulatory oversight by the Commission as would a buyer in a consensual sale.

6. As to whether the Joint Movants believe the holding in the *Union Pacific Railroad Company* case is good law or not is simply beyond the scope of the Motion for Summary Disposition. The only issue before the Commission is whether the Joint Movants are entitled to summary relief. The issue is not whether the Missouri Supreme Court meant what it plainly said in 1917.

7. Generally, the Joint Motion is correct that in the event of insolvency and bankruptcy, the Commission will have little, if any, authority or control over the disposition of the stock or assets of a public utility in the context of a reorganization plan. However, the Commission will retain the authority to regulate the central elements of rates and terms and conditions of service regardless of the identity of the ultimate owner or operator. The purpose of the Term Loan was to address critical liquidity concerns and to facilitate a financial restructuring outside of bankruptcy. As such, approval of the Application should be viewed as a step that should be taken that preserves the Commission's maximum breadth of authority to regulate Aquila's operations to ensure the public interest is served.

8. The Commission properly interpreted and applied the controlling law in this case. The Commission was correct to conclude that it is required to approve the Application in this case unless there is compelling evidence of a present and direct detriment to the public interest and that summary disposition should be denied.

WHEREFORE, for the reasons aforesaid, the Joint Motion for Reconsideration should be denied.

Respectfully submitted,



Paul A. Boudreau MO #33155
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166

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 30th day of October 2003 to the following:

Mr. Nathan Williams
General Counsel's Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Mr. Douglas Micheel
Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 7800
Jefferson City, MO 65102

Mr. Stuart W. Conrad
Finnegan, Conrad & Peterson, L.C.
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111

Mr. Ronald Molteni
Assistant Attorney General
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102


