

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Application of Aquila, Inc. for an order     )  
authorizing Applicant (if and to the extent     )  
the transaction described herein would     )  
impose a mortgage or encumbrance under     )  
Section 393.190, (RSMo.)) to execute,     )  
deliver and perform the agreements     )  
and instruments necessary to assume a     )  
lease and related documents pertaining     )  
to the Aries combustion turbine generator     )  
facility owned by a subsidiary of     )  
Calpine Corporation and Cass County,     )  
which was constructed as part of a revenue     )  
bond project under Chapter 100, RSMo.     )

**APPLICATION AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW Aquila, Inc. ("Aquila" or "Applicant"), and pursuant to §393.190 RSMo., 4 CSR 240-2.060 and 4 CSR 240-3.110, hereby applies to the Missouri Public Service Commission (the "Commission") for an Order determining that an assumption of a lease and related documents pertaining to the purchase of the Aries combustion turbine generator facility located in Cass County, Missouri, which was constructed as part of a revenue bond arrangement under Chapter 100, RSMo., does not dispose of or encumber the whole or any part of Applicant's franchise, works or system, necessary or useful in the performance of its duties to the public, and therefore, Commission approval is not necessary for Applicant to proceed with the Chapter 100 revenue bond arrangement; or, if, in the alternative, the Commission determines that Commission approval is required to validate the Chapter 100 revenue bond transaction, Applicant requests an Order authorizing Applicant to execute, deliver and perform the agreements and instruments necessary to assume a lease and related documents pertaining to the Aries combustion turbine generator facility Chapter 100 revenue bond arrangement. Finally, Applicant

further requests expedited treatment of its Application pursuant to 4 CSR 240-2.080(16).

In support of this Application, Applicant states as follows:

1. Applicant is a Delaware corporation, with its principal office and place of business at 20 West Ninth Street, Kansas City, Missouri 64105-1711. Applicant is authorized to conduct business in Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions and is engaged in providing electrical and industrial steam services in portions of Missouri as a public utility under the jurisdiction of the Commission. Aquila's Certificate of Authority authorizing it, as a foreign corporation, to conduct business in the State of Missouri was filed with the Commission in Case No. EU-2002-1053 and is incorporated herein by reference in accordance with 4 CSR 240-2.060(1)(G). Likewise, copies of the registrations of fictitious names of Aquila Networks-MPS and Aquila Networks-L&P were filed in Case No. EU-2002-1053 and are incorporated herein by reference in accordance with 4 CSR 240-2.060(1)(G).

2. All pleadings, notices, orders and other communications and correspondence regarding this Application and proceeding should be directed to:

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Mr. Denny Williams  
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Kansas City, Missouri 64105  
(816) 467-3534

Renee Parsons                      MO #48935  
AQUILA, INC.  
20 West Ninth Street  
Kansas City, Missouri 64105  
(816) 467-3297

3.        Other than cases that have been docketed at the Commission, Applicant has no pending actions or final unsatisfied judgments or decisions against it from any state or federal court or agency within the past three (3) years which involve customer service or rates. Applicant has no annual report or assessment fees that are overdue.

**Factual Background**

4.        MEP Pleasant Hill, LLC ("MEP") owns and leases real estate and real property, including a 580 megawatt gas-fired combined cycle electric generating facility, all equipment, electrical transformers, and certain electrical interconnection facilities related thereto, and associated real property located in Cass County, Pleasant Hill, Missouri, (hereinafter referred to as the "Aries Facility") and within the geographic service areas previous certificated to Aquila's predecessors in interest by the Commission. MEP is an indirect wholly owned subsidiary of Calpine Corporation. On December 20, 2005, Calpine and its debtor Affiliates, including MEP, filed voluntary petitions for relief under the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.

5.        On September 22, 2006, during the pending bankruptcy proceedings, Applicant entered into an Asset Purchase and Sale Agreement ("APA") with MEP, by which Applicant will acquire, subject to the satisfaction of certain conditions precedent, certain MEP assets, comprised mainly of the Aries Facility located in Cass County, Missouri. A copy of the APA is incorporated herein by reference as Exhibit 1.

Commission authority is not required for Aquila to acquire and operate the Aries Facility which has been in commercial operation for a number of years and, as indicated, is located within its certificated service areas.

6. In consideration of the sale and transfer of the Aries Facility and certain contracts related thereto, including the Chapter 100 revenue bond arrangement, Applicant agreed to pay \$158,500,000 at the close of the sale transaction and deposited 5% of the purchase price, or \$7,925,000, into an Escrow Account. This sale is subject to the approval of the Bankruptcy Court.

7. After entering into the APA, MEP filed a motion with the Bankruptcy Court requesting an order to establish certain bidding procedures to sell the Aries Facility, which was issued on October 12, 2006. The submission deadline for any other interested parties to submit qualifying bids is November 28, 2006, and if MEP receives any other qualifying bids, it must conduct an Auction on December 4, 2006. The Sale Hearing is set for December 6, 2006, when MEP will seek the entry of an Order approving and authorizing the sale.

8. Under the APA, the Aries Facility transaction can close no sooner than the third business day after the Bankruptcy Court enters the Sale Order, or December 11, 2006, provided all other conditions precedent are satisfied or waived.

#### **Chapter 100 Arrangement**

9. The Aries Facility has been in commercial operation as part of a Chapter 100 Industrial Revenue Bond project approved by Cass County, Missouri (the "County") pursuant to Sections 100.010 to 100.200, RSMo. (the "Act"). The Act authorizes municipalities to issue revenue bonds to promote economic development. In projects

developed under Chapter 100, a municipality owns the project, and therefore the project is exempt from property taxes. In addition, Payments in Lieu of Taxes ("PILOT") are often negotiated at a lower rate than the property taxes that would, in the absence of a Chapter 100 bond issuance, otherwise be due. Accordingly, Chapter 100 bonds are a vehicle to stimulate economic development (including investment and job creation) by removing property tax liability associated with the facilities being developed. The Chapter 100 bonds are not necessarily (and in the case of the Aries Facility were not) issued to raise funds to actually finance the project. Rather, the facility is owned by a municipality and typically (and in the case of the Aries Facility) leased back to the company developing and independently financing the facility. Further, the Chapter 100 bonds are often (and in the case of the Aries Facility were) purchased by the operating lessee. The lease payments made by the lessee to the municipality (in this case Cass County) fund all payments by the municipality to the lessee bondholder. Therefore, in cases such as the Aries Facility, the Chapter 100 bond arrangement has no economic substance, apart from eliminating property tax liabilities to encourage economic development. Further, when a utility is a party to a Chapter 100 arrangement, its ratepayers benefit from these savings.

10. As is typical in such arrangements, pursuant to the Act and a Trust Indenture dated as of December 1, 1999, between the County and a corporate trustee (Commerce Bank, N.A.), the County issued a single taxable industrial revenue bond in the maximum aggregate principal amount of Two Hundred Fifty Million and no/100 Dollars (\$250,000,000) (the "Bond") in connection with the purchase and construction of the Aries Facility. See Exhibits 2 and 3. Because the County owns the Aries Facility, it

is exempt from ad valorem property taxes. See Exhibit 3. The County leased the Aries Facility back to MEP pursuant to a Lease Agreement (the "Lease") dated December 1, 1999, as subsequently amended and restated on March 15, 2000, and as further amended on August 1, 2000, and March 25, 2004. See Exhibit 4. MEP also purchased the Bond. The APA calls for Applicant to assume MEP's (the lessee's) rights and obligations under the Lease and to also acquire all of MEP's rights, title and interest in and to the Bond.<sup>1</sup>

The Lease requires MEP to operate and maintain the Aries Facility and, under an Economic Development Performance Agreement, see Exhibit 5, to make specified payments in lieu of taxes ("PILOT payments") to the County in accordance with the following schedule:

Tax Year	Projected Calendar Year	Annual Fixed Payments
1-3	1999-2001 (Construction Period)	\$0
4	2002 (Operation Year 1)	\$0
5-8	2003-06 (Operation Years 2-5)	\$200,000
9-13	2007-11 (Operation Years 6-10)	\$800,000
14-18	2012-16 (Operation Years 11-15)	\$1,300,000
19-28	2017-26 (Operation Years 16-25)	\$1,320,000

<sup>1</sup> The APA acknowledges the October 4, 2005, decision of the Western District Court of Appeals in *StopAquila.org v. City of Peculiar, Missouri*, Case No. WD 65000, Missouri Court of Appeals-Western District. The Western District's *StopAquila.org* decision declared invalid a Chapter 100 industrial revenue bond project for an electrical generating facility built by a public utility. The *StopAquila.org* decision is currently before the Missouri Supreme Court (Case No. SC87302). Applicant believes that the facts underlying the *StopAquila.org* decision are materially different than the facts relating to the Chapter 100 arrangement implemented in the development of the Aries Facility. Nonetheless, under the APA, MEP, as seller, will retain liability for property taxes accruing prior to the closing date, including such property taxes which would arise out of any invalidation of the Chapter 100 arrangement based upon the *StopAquila.org* decision or otherwise.

11. The Trust Indenture provides the specific terms and details of the Bond, including a final maturity of December 1, 2027. See Exhibit 2. The Trust Indenture also contains various provisions, covenants and agreements to protect the security of the bondholder (currently MEP, but after assumption of the Lease, Applicant), including: (a) pledging and assigning the rents, revenues and receipts of the County derived from the Aries Facility to secure the payment of the Bond; (b) describing the redemption provisions and other features of the Bond; (c) setting forth the form of the Bond; (d) establishing various funds and accounts to handle the proceeds of the Bond and revenue from the Aries Facility, and setting forth covenants regarding the administration and investment of such funds and accounts by the trustee bank; (e) setting forth the duties of the trustee bank; (f) defining events of default and provisions for enforcing the rights and remedies of the bondholder in such events; and (g) restricting the issuance of additional bonds and the terms upon which they may be issued and secured. The Bond is a special limited obligation of the County payable solely from the payments to be made by MEP (and, from and after assumption of the Lease and bond, by Applicant) pursuant to the Lease.

12. Under the terms of the Lease, the County: (a) purchased the Aries Facility; (b) leased the Aries Facility to MEP; (c) issued the Bond to MEP; (d) has no authority to operate the Aries Facility; and (e) will sell the Aries Facility to MEP for \$10.00 at the expiration of the Lease term or earlier if MEP so elects (by surrendering the bond for cancellation).

13. During the term of the Lease, MEP (*i.e.* the lessee): (a) is responsible for making the PILOT payments to the County under the payment schedule outlined in

Paragraph 10; (b) agrees to equip and maintain the Aries Facility; (c) has the right, at its own expense, to make certain additions, modifications or improvements to the Aries Facility; (d) may assign its interests in the Aries Facility; (e) covenants to maintain its corporate existence during the term of the Bond; (f) agrees to indemnify the County for certain liability the County might incur as a result of its participation in these arrangements; (g) agrees to purchase the Aries Facility at the end of the Lease term; and (h) will pay all taxes and assessments that may be lawfully taxed, charged, levied, assessed, or imposed and any interest therein. Applicant, who will become the lessee under the Lease, will record the Aries Facility as an asset on its accounting books. Applicant will not incur or record any indebtedness as part of its assumption of the Lease and its acquisition of the Bond (again, because it will involve no substantive “financing”).

14. Applicant believes that Commission approval is not necessary for Applicant to assume the Chapter 100 revenue bond arrangement because under § 393.190, the Chapter 100 revenue bond arrangement does not dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public. The Aries Facility may be considered necessary and useful to the performance of Applicant’s duty to the public at the time of closing within the meaning of § 393.190. As described above, the Chapter 100 revenue bond structure is not a financing arrangement. Instead, Aries will be accounted for as an asset owned outright by Applicant, and because Applicant will own the Bond, it will not record any indebtedness on its accounting books. As a result, Applicant contends that the Aries Facility will not be encumbered in any meaningful sense because Applicant will own the



Bond and because there will be no third-party claim against the Aries Facility. In other words, although the trustee will hold a security interest in the Aries Facility for the benefit of the bondholder and the only bondholder will be Applicant. Furthermore, Applicant can unilaterally collapse the Chapter 100 facility at any time for nominal consideration (\$10.00) and cause the County to transfer legal title to Applicant free and clear of any liens. Indeed, for the reasons outlined above, the Chapter 100 revenue bond arrangement is not a mortgage or encumbrance of the Aries Facility within the meaning of § 393.190.

15. However, if the Commission determines that this transaction requires Commission approval, Applicant submits that the transaction will have no impact on the tax revenues of any political subdivision in which any structures, facilities, or equipment are located. As contemplated by the Act, because the County owns fee title to the Aries Facility and leases it to MEP, it has been exempt from ad valorem real property taxes and will remain exempt from those taxes during the term of the Lease. The Aries Facility will continue to be exempt from ad valorem real property taxes following its acquisition by Applicant, and the County will continue to receive the PILOT payments.

16. Furthermore, if the Commission determines that the bond arrangement requires Commission approval under Sections 393.180 and 393.190, RSMo, Applicant notes that it is very similar to the application approved by the Commission in Case No. EO-2003-0035 relating the Union Electric Company's Peno Creek CTG facility,<sup>2</sup> and Case No. EF-2006-0278 relating to Union Electric Company's NRG Audrain combustion

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<sup>2</sup> In Case No. EO-2003-0035, Union Electric Company requested an order authorizing it to convey to and leaseback from the City of Bowling Green, Missouri, certain real property and improvements and to execute and perform the necessary agreements under Section 100.010 through 100.200, RSMo., for the purpose of constructing an electric generating facility in Bowling Green.

turbine generator.<sup>3</sup> However, a key difference between this Application and the one approved in Case No. EF-2006-0278 is that Union Electric Company is a Missouri corporation and must have long-term indebtedness approved by the Commission, whereas Aquila, a Delaware corporation, does not require the Commission's approval to incur long-term indebtedness.<sup>4</sup> *See, State ex rel. Union Pacific Railway v. Public Service Commission*, 197 S.W. 39, 271 Mo. 258 (Mo. banc 1917).<sup>5</sup>

17. If, and to the extent authorization is required under Sections 393.180 and 393.190, RSMo, Applicant provides the following additional information pursuant to 4 CSR 240-2.060(6) and 4 CSR 240-3.110.

- a. Reference is made to the description of the Bond and the Lease and the purposes for which the Bond was issued set forth in ¶¶ 9 through 13 of this Application above (4 CSR 240-3.110(1)(B));
- b. Reference is made to the copies of the Lease, Economic Development Performance Agreement, and the Trust Indenture, described in ¶¶ 10 through 13 of this Application above (4 CSR 240-3.110(1)(B));
- c. A certified copy of a resolution of Applicant's board of directors authorizing the transaction, which is the subject of this Application is attached and incorporated herein as Exhibit 6 (4 CSR 240-3.110(1)(C))<sup>6</sup>;
- d. With reference to 4 CSR 240-3.110(1)(D), Applicant states that the Chapter 100 arrangement will not be detrimental to the public interest

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<sup>3</sup> In Case No. EF-2006-0278, Union Electric Company requested an order authorizing it to execute, deliver, and perform the agreements and instruments necessary to assume a lease and related documents pertaining to the NRG Audrain combustion turbine generator facility owned by Audrain County, Missouri, which was constructed as part of a revenue bond project under Chapter 100, RSMo.

<sup>4</sup> It was not clear under the statute whether assuming the lease agreement would be evidence of indebtedness when Union Electric Company filed the application in Case No. EF-2006-0278. The Commission approved the transaction because it was not detrimental to the public interest. To be clear, and as previously stated, it is Applicant's view that the Chapter 100 bond arrangement does not represent indebtedness.

<sup>5</sup> The Commission has long followed the reasoning of the Missouri Supreme Court. *See, Re Suburban Service Company*, 14 Mo.P.S.C. 114 (1923).

<sup>6</sup> All confidential information, not material to this proceeding, contained in the board of director's resolution was redacted.

because, as previously noted, it already is in place and, in any event, does not establish any third party claim against the Aries Facility. To the contrary, the Chapter 100 arrangement is beneficial to the interests of Applicant and its service to its customers and the public because of the substantial cost savings resulting from its tax-advantaged status and the fact that the Aries Facility will help meet Applicant's generation resource needs for the Summer of 2007 and beyond;

- e. A balance sheet and income statement of Applicant as of June 30, 2006, (with adjustments showing the effects of Applicants' assumption of the lessee's rights and obligations under the Lease) are attached and incorporated herein by this reference as Exhibit 7 (4 CSR 240-3.110(1)(E));

18. As noted in footnote 1 of this Application above, Applicant acknowledges the decision of the Missouri Court of Appeals – Western District, in the *StopAquila.Org* case, which was transferred to and is pending before the Missouri Supreme Court. While Applicant intends to assume the Lease and the related Chapter 100 documents in order to realize for itself and its ratepayers the cost savings arising from the existing tax exemption enjoyed by the Aries Facility, it will retain the option to repurchase the Aries Facility for a nominal sum and unwind the Chapter 100 arrangement if the Chapter 100 arrangement is later modified or invalidated.

19. Applicant also states that even if the Aries Facility were not structured with the Chapter 100 arrangement that provides cost savings from the property tax exemption, Application would nevertheless purchase the Aries Facility outright, in order to meet Applicant's generation resource needs, including capacity needs for the Summer of 2007 and beyond.

#### **MOTION FOR EXPEDITED TREATMENT**

20. If Commission approval of the Chapter 100 revenue bond transaction is required, Applicant needs the Commission's approval authorizing Applicant to execute,

deliver and perform the agreements and instruments necessary to assume the Lease and related documents pertaining to the Aries combustion turbine generator facility prior to December 8, 2006, so that Applicant may purchase the Aries Facility in accordance with the APA. Therefore, Applicant respectfully requests that the Commission give this Application expedited treatment and issue its order granting the relief prayed for herein on or before December 8, 2006.

21. Expediting this proceeding will benefit Applicant's customers and the public by allowing Applicant to assume MEP's rights and obligations under the Aries Facility tax-advantaged Chapter 100 revenue bond arrangement by assuming the Lease and acquiring the Bond. This Application was filed as soon as possible under the circumstances. The Bankruptcy Court entered its Order authorizing the bidding process on October 12, 2006.

22. Applicant hereby respectfully requests that the Commission immediately give notice of this case, set an expedited intervention deadline and prehearing conference, if necessary, and direct its Staff to expedite the filing of its recommendation with respect to this Application so that the Commission can issue an Order no later than December 8, 2006.

23. If, in the alternative, the Commission is unable to enter an Order in this matter by December 8, 2006, Applicant requests an Interim Order by December 8, 2006 tolling the time period during which any penalties may arise from assuming the Lease and acquiring the Bond from the closing date and up to thirty days after the Commission's final Order, thereby allowing Applicant sufficient time to unwind the Chapter 100 revenue bond (and own the Aries Facility outright).

24. Applicant further states that in light of its request for expedited treatment of this Application, as evidenced by the certificate of service appearing below, this Application has been served via e-mail on the Commission's General Counsel and the Office of the Public Counsel concurrently with its filing.

WHEREFORE, for all of the foregoing reasons, Applicant respectfully requests the Commission to issue its order as follows:

- a. Granting expedited treatment of this Application;
- b. Granting Applicant's request that notice of this case be given immediately, expediting the intervention deadline and prehearing conference, and directing its Staff to expedite its filing of a recommendation with respect to this Application so that the Commission can enter an Order no later than December 8, 2006;
- c. Issuing an Order by no later than December 8, 2006:
  - i. Finding that the Commission's approval is not necessary for Applicant to assume the Chapter 100 revenue bond arrangement for one or more of the reasons set forth in ¶ 14 of this Application, or
  - ii. Finding that the assumption by Aquila of the Chapter 100 revenue bond arrangement described herein is not detrimental to the public interest for the reasons set forth in ¶ 17(d);
- d. Issuing an Order authorizing Applicant (if and to the extent the transaction described herein would constitute a mortgage or encumbrance on Applicant's assets that are necessary and useful in the performance of its duties to the public under Sections 393.180 and 393.190, RSMo.) to execute, deliver and perform the agreements and instruments necessary to assume a lease and related documents pertaining to the Aries combustion turbine generator facility owned by Cass County, Missouri, which was constructed as part of a revenue bond project under Chapter 100, RSMo;
- e. Authorizing Applicant to do any and all other things incidental, necessary or appropriate to the performance of any and all acts specifically authorized in such Order; and
- f. Granting such other and further relief as the Commission may deem just and proper under the circumstances.

If this Application cannot be expedited and a final Order cannot be entered by December 8, 2006, Applicant respectfully requests an Interim Order tolling the time period during which any penalties associated with assuming the Lease and acquiring the Bond might otherwise apply if the Commission ultimately decides to deny the relief requested during the period between the closing date and up to thirty (30) days after the Commission enters its final Order, thereby allowing Applicant sufficient time to unwind the Chapter 100 bond arrangement (and thereby own the Aries Facility outright).

Dated: October 31, 2006

Respectfully Submitted:

BRYDON, SWEARENGEN & ENGLAND, P.C.

/s/ Paul A. Boudreau

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Attorneys for Applicant Aquila, Inc.

## **LIST OF EXHIBITS**

Exhibit 1—Asset Purchase Agreement

Exhibit 2—Trust Indenture

Exhibit 3— Bond Purchase Agreement

Exhibit 4— Amended and Restated Lease Agreement and subsequent Amendments

Exhibit 5—Economic Development Performance Agreement

Exhibit 6—Certified Copy of Applicant's Board of Director's Resolution Authorizing the  
Aries Transaction

Exhibit 7—Applicant's Balance Sheet and Income Statement

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via hand delivery to the following parties on the 31<sup>st</sup> day of October.

Office of the General Counsel  
Missouri Public Service Commission  
Governor Office Building  
200 Madison Street, Suite 100  
Jefferson City, MO 65101  
gencounsel@psc.mo.gov

Office of the Public Counsel  
Governor Office Building  
200 Madison Street, Suite 650  
Jefferson City, MO 65101  
opcservice@ded.mo.gov

/s/ Paul A. Boudreau  
Paul A Boudreau



# VERIFICATION

STATE OF MISSOURI     )  
                                  )  
COUNTY OF JACKSON    )     ss

Dennis R. Williams, of lawful age, being duly sworn, deposes and says that he is Vice-President of Electric Regulatory Services, that he is duly authorized and did sign the foregoing Application on behalf of Aquila, Inc , that he has knowledge of the facts stated in the foregoing Application, and that said facts are true to the best of his knowledge, information and belief

AQUILA, INC.

BY: *Dennis R. Williams*  
Dennis R. Williams  
Vice President-Electric Regulatory Services

Subscribed and worn to before me, the undersigned, a Notary Public in and for the county and state aforesaid, on the 27th day of October, 2006.

*Terry D. Lutes*  
Notary Public  
Terry D. Lutes

My Commission Expires:

8-20-2008



TERRY D. LUTES  
Jackson County  
My Commission Expires  
August 20, 2008