

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

In the Matter of the Application of)
Aquila, Inc. d/b/a Aquila)
Networks - MPS and Aquila)
Networks - L&P for Authority to) Case No. EO-2008-0046
Transfer Operational Control of)
Certain Transmission Assets)
to the Midwest Independent)
Transmission System Operator, Inc.)

SPP'S POST HEARING BRIEF

Comes Now Southwest Power Pool, Inc. ("SPP"), by counsel, and for its
Posthearing Brief states to the Commission the following:

Introduction

This proceeding involves the Application of Aquila, Inc. ("Aquila") to transfer
operational control of certain of its transmission assets to the Midwest ISO. The
Application was made pursuant to § 393.190 RSMo. 2000 and 4 CSR 240-3.110.

It is SPP's recommendation that the Commission reject the Application because
the net effect of the transaction would be detrimental to the public interest. The evidence
in the case shows limited interconnection capacity between Aquila and the Midwest ISO,
causing the likelihood of congestion between Aquila and its proposed RTO. The
preponderance of the other evidence in the record weighs against the transaction as well.

I. Background

The impetus for this Application is the July 26, 2000 order of the Federal Energy
Regulatory Commission ("FERC") approving the merger of UtiliCorp United Inc.

("UtiliCorp") and St. Joseph Light & Power Co. ("St. Joe").¹ In approving the merger, FERC observed the following:

Applicants state that they are strong supporters of RTOs, regarding RTOs as a positive step toward the elimination of undue discrimination. However, Applicants have not made a commitment to join a specific RTO. The application notes that, among other reasons, Applicants have choices relative to which RTO to join - Midwest ISO, MAPP or SPP. Given the changing landscape in their region, Applicants request that the Commission afford them the flexibility to allow these various RTO options to become better defined before Applicants make a commitment. Applicants say that there is likely to be significant changes in the structure and configuration of the regional transmission entities in its area. In addition, Applicants state that, "[n]aturally, it has always been UtiliCorp's expectation that it will join an RTO in its own region, and with the issuance of Order No. 2000 in December 1999, there is now a definite time frame within which that decision will be made." Furthermore, Applicants also state that they "have no objection to being required to join a Regional Transmission Organization meeting the criteria of Order No. 2000 (an "RTO") as a condition of approval of their mergers" but request that "they be given the same latitude afforded to all other public utilities under that Order regarding the timing of their statement of intentions with respect to the specific RTO they intend to join."

We accept Applicants' commitment to join an RTO consistent with the requirements of Order No. 2000 and rely on it in approving these mergers. Accordingly, Applicants must make a filing on or before October 15, 2000, as required under Order No. 2000, in which Applicants, as they have indicated, will propose to transfer operational control of their transmission facilities to a Commission-approved RTO on or before December 15, 2001.²

On October 13, 2000, SPP filed a proposal with the FERC seeking authorization to establish itself as an RTO, but on July 12, 2001, FERC rejected that proposal.³ Shortly thereafter, UtiliCorp agreed to join the Midwest ISO on July 16, 2001. Ex. 1, p. 3. On March 4, 2002, in response to FERC's order rejecting SPP's application to become an RTO, SPP and the Midwest RTO entered into a Purchase and Assumption Agreement ("Purchase Agreement"). Under the Purchase Agreement, the Midwest ISO would

¹ *UtiliCorp United Inc. and St. Joseph Light & Power Co.*, 92 FERC ¶ 61,067 (2000) ("UtiliCorp Merger Order").

² UtiliCorp Merger Order, at 12-13.

³ *Southwest Power Pool*, 96 FERC ¶ 61,062 (2001).

purchase all of the assets and assume all of the obligations of SPP. The Purchase Agreement was filed with the FERC and conditionally accepted on May 31, 2002. Ex. 9, p. 3. On December 20, 2002, Aquila filed a protest with FERC challenging the Midwest ISO's proposed Schedule 10-B, claiming that it was being charged for services other than security coordination service (the only service it was receiving from the Midwest ISO) through Schedule 10-B.⁴ As part of the settlement of that protest, Aquila committed to refile with this Commission an application to join the Midwest ISO and to diligently pursue approval. Ex. 1, p. 4. On June 20, 2003, Aquila did file an application with this Commission to transfer control of its transmission facilities to the Midwest ISO. That case was subsequently dismissed on May 12, 2005. Ex. 1, p. 5. However, subsequent to the settlement and during the pendency of Aquila's application before this Commission, the Purchase Agreement was withdrawn and SPP received FERC approval to operate as an RTO. Ex. 8, p. 4. Aquila then filed the application that initiated this case on August 20, 2007. As part of its application, it filed a cost benefit study conducted by CRA International, presenting three scenarios: "Membership in MISO," "Membership in SPP" and "Move to Standalone" ("CRA Study"). Ex. 1, p. 7

II. Commission's Analysis – Not Detrimental to the Public Interest

This Commission has traditionally analyzed applications filed pursuant to section 393.190 of the Revised Statutes of Missouri under the standard of "not detrimental to the public interest." The standard is based on a Missouri Supreme Court case, *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393 (Mo. Banc 1934), quoting from a Maryland Supreme Court decision:

⁴ See *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,346. P. 23.

To prevent injury to the public, in the clashing of private interest with 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 benefited, 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.” 73 S.W.2d at 400.

Since the Commission is constrained in its analysis to only prevent harm to the public interest, it is constrained in considering only the alternatives of the status quo and the proposal described in the Application.

However, in making its analysis, this Commission must consider the reasonable consequences of both alternatives. In reviewing this Commission’s decision in the merger case of UtiliCorp and St. Joe, the Missouri Supreme Court opined as follows:

While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the *necessary and essential issues*, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium. [emphasis added]

State ex rel. *AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 736 (“*AGP*”). The *AGP* case involved the appeal of the judgment of the Circuit Court of Cole County affirming this Commission’s decision to approve the merger of Utilicorp United, Inc. and St. Joseph Light and Power Company. The proposed merger included a regulatory plan in which the Applicants sought a five-year rate moratorium to be followed by a recovery from the ratepayers in the sixth year of a \$92,000,000 acquisition premium. The Commission and declined to consider the merger premium, finding that to consider the acquisition premium was to prejudge the ratemaking issues outside the

procedures of a rate case. The Court reversed and remanded the decision to the Commission. It determined the future rate impact of the merger premium to be a necessary and essential issue in the merger proposal.

Applying the guidance provided in *AGP*, the Commission stated in *In the Matter of Union Electric Co. d/b/a AmerenUE*,⁵

What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered . . . [I]t requires the Commission to consider this risk [the risk of future rate increases] together with the *other possible benefits and detriments* and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. [emphasis added] *Union Electric*, at 48.

The Commission went on to observe that,

A detriment, then, is any direct or indirect effect of the transaction that *tends to* make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. [emphasis added] *Union Electric*, at 49.

Therefore, the Commission has determined that it must consider “risks,” “possible benefits and detriments” and effects which “tend to” make power supply less safe or adequate or rates less just or reasonable.

III. Factors for the Commission’s Consideration

In its Prehearing Brief, SPP identified five factors which are important for the Commission to consider in this case. In the order of their significance, those factors are as follows:

1. Congestion/Reliability/Customer Service;
2. Production Cost Savings potentially to be achieved by Aquila by participation in the SPP Markets;
3. Market Development of the Midwest ISO and SPP
4. Union Electric Company’s continuing membership in MISO; and
5. The Pending Acquisition of Aquila by Great Plains Energy that is the subject of Case No. EM-2007-0374.

⁵ Case No. EO-2004-0108 (Report & Order on Rehearing), 13 Mo.P.S.C.3d 266 (2005) (“*Union Electric*”). Citations hereafter are given to page numbers in the Commission’s unpublished Report & Order.

1. Congestion/Reliability/Customer Service

Staff witness Mike Proctor presented evidence that granting the application will create significant risks from congestion due to limited interconnection capacity between Aquila and the Midwest ISO if Aquila becomes a member of the Midwest ISO market. In his Rebuttal Testimony, Dr. Proctor compared the 5,915 MVA capacity between Aquila and SPP with the 1,207 MVA capacity between Aquila and the Midwest ISO. Ex. 11, p. 29. Dr. Proctor also noted that the Dogwood plant is dispatched in the CRA Study in a less than efficient manner and at a higher cost to Aquila due to congestion indicated in the “Membership in MISO” case. Ex. 11, p. 12. SPP witness Carl Monroe agreed. He concluded that the CRA Study dispatch of the Dogwood plant in the “Membership in MISO” case is significantly different from the “Membership in SPP” case because Dogwood is needed to meet demand in the constrained Aquila area. Ex. 8, p. 21.

At the hearing, the CRA Study was the subject of extensive examination, particularly by the Midwest ISO witness Pfeiffenberger. While Staff witness Proctor rightly stated that such studies are projections and forward looking, it is also clear that the CRA Study has highlighted the potential risk of congestion arising from Aquila’s proposed joining the Midwest ISO. Tr. 301, 338, 344-345, 377. The CRA Study, at a minimum, highlighted this very risk: an additional congestion risk arising from Aquila joining the Midwest ISO. Whether this takes the form of physical constraints resulting in actual curtailment of service or seams issues between Aquila, the Midwest ISO and Associated, the issue has significant cost risks. Tr. 362. These are risks, possibilities and tendencies that the Commission must take into account.

In the final analysis, the evidence presented to the Commission in this case identifies a significant risk of a detriment to the public interest due to limited interconnection capacity between Aquila and the Midwest ISO. No other factor counterbalances this risk.

2. Production Cost Savings potentially to be achieved by Aquila by participation in the SPP Markets

One significant legal issue that the Commission should consider is how it looks at the “Membership in SPP” verses the “Move to Standalone” cases in the CRA study and the production cost savings anticipated from the SPP Markets anticipated therein.⁶ As is clear from the case law, the Commission can not pick and choose options for the Applicant. It must decide to accept or reject the proposal in the application based on its determination of whether the proposal is detrimental to the public interest when compared to the status quo.

It is true that the “Membership in SPP” case does not precisely describe the status quo. Neither does the “Move to Standalone” case precisely describe the status quo. Indeed, Aquila has been an SPP Member for many years; it receives transmission service from SPP and has received significant benefit from that membership. Tr. 346-347. Ex. 8. However, Aquila does not participate in the SPP markets as the “Membership in SPP” case presents.

It is the Commission’s responsibility, therefore, as discussed above, to assess the possible risks and benefits of the “Membership in MISO” case. It must compare that proposal to the possible risks and benefits of the status quo, which must be a reasoned synthesis of the two hypothetical “Membership in SPP” and “Move to Standalone” cases.

⁶ It is SPP’s position that there is significant potential risk which was presented in the form of potential congestion. Can the “Membership in MISO” case overcome that significant risk?

SPP suggests that the Commission would be correct in considering the potential production cost benefits of the “Membership in SPP” as part of the status quo for several reasons. First, Aquila is already a Member of SPP as a Regional Reliability Council. Ex. 8, p. 4. Second, UtiliCorp and St. Joe are on record at the FERC as being supportive of RTOs; they are on record as desiring to join an RTO in their region. Third, Aquila implicitly considered SPP a viable development of the status quo in developing the CRA Study as it did. Fourth, Staff witness Proctor questions whether Aquila can remain as it is today. Tr. 349. In the words of Dr. Proctor, “Well, it just depends on what the RTOs offer. If they offer those services and it's cheaper for the RTO to provide those services than for . . . Aquila to provide those services, then it makes sense to have the RTO provide those services.” Tr. 349. The CRA Study does indicate that Aquila would achieve greater production cost savings from participating in the SPP markets anticipated in the “Membership in SPP” case than in the other cases. Tr. 271. Furthermore, as Dr. Proctor consistently comments, if the SPP cost benefit analysis indicates that SPP should not proceed with the markets anticipated in the “Membership in SPP” case, the CRA Study underestimates the benefits to Aquila in the “Membership in SPP” case. Tr. 272.

Therefore, if the Commission approves the application, it will not only permit the considerable risk of greater congestion on the transmission system, it will foreclose the potential production cost savings for Aquila in participating in the SPP markets.

3. Market Development of the Midwest ISO and SPP

City of Independence, Missouri witness Volpe has alleged that since SPP does not yet have a Day Ahead Market, SPP is less beneficial to Aquila than described in the CRA Study. Ex. 10, pp. 6-9. While the observation is worthy of the Commission’s

consideration, his short-term analysis should not override longer term considerations. A short-term benefit should not outweigh longer term benefits. The Commission itself has said as much.

The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. *Union Electric*, at 48.

Therefore, Staff witness Proctor is right to conclude that the Commission should base its decision on the long-term view. Tr. 272.

4. Union Electric Company's continuing membership in MISO

In *Union Electric*, the Commission concluded that it must consider possible benefits and detriments and determine whether the transaction "tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable." Id. at 49. Union Electric Company is the only Midwest ISO Member through which Aquila has interconnection with the Midwest ISO. Tr. 361. Since it is unclear how Union Electric Company will relate to the Midwest ISO, the proposed transaction will certainly tend to create uncertainty in how Aquila will be able to relate to its RTO. Tr. 362. This is an implication of the application which would be detrimental to the public interest and one which the Commission must consider.

5. The Pending Acquisition of Aquila by Great Plains Energy that is the subject of Case No. EM-2007-0374

Likewise, the pending acquisition of Aquila by Great Plains Energy introduces issues that are complicating factors for Aquila joining the Midwest ISO. One of the affiliates of Great Plains Energy, KCPL, has previously been granted permission by this Commission to transfer functional control of its transmission assets to SPP in Case No.

EO-2006-0142. Aquila, the other affiliate in the proposed merger and Applicant in this case, is presently a Member of SPP. Granting the Application may create uncertainty between the two potential affiliates. This is also a factor the Commission should consider.

Conclusion

These factors, when weighed in balance, make it clear that the transfer of operational control of Aquila's transmission assets to the Midwest ISO would be detrimental to the public interest. The issue of transmission congestion between Aquila and its RTO alone is a sufficient detriment to give the Commission pause. Based on the evidence in the record, there are not benefits to be derived from the transaction that will counterbalance that detriment. As a matter of fact, the preponderance of the remaining evidence weighs against the proposed transaction. For these reasons, the Commission should reject Aquila's Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was sent via e-mailed on the 29th day of May, 2008, to the following:

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