

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

In the Matter of the Application of Aquila,)
Inc., for Authority to Acquire, Sell and Lease)
Back Three Natural Gas-Fired Combustion)
Turbine Power Generation Units and) Case No. EO-2005-0156
Related Improvements to be Installed and)
Operated in the City of Peculiar, Missouri)

RESPONSE OF AQUILA, INC. TO MOTION TO STAY

COMES NOW Applicant Aquila, Inc. (“Aquila” or the “Company”), by and through counsel, and for its response to the Motion to Stay filed by the Office of the Public Counsel (“Public Counsel”) states the following:

1. On September 22, 2005, Public Counsel filed a Motion to Stay proceedings in the referenced case to allow it to make further inquiry into certain facts and circumstances associated with the Chapter 100 RSMo tax-advantaged revenue bond financing entered into by and between Aquila and the City of Peculiar, Missouri (hereinafter, the “Motion”). Public Counsel states in the Motion that a number of the actions for which Aquila has sought Commission approval in this case have “already been undertaken” by Aquila on December 30, 2004.

2. Subject to certain caveats and concerns set forth below, Aquila does not oppose an order staying that portion of the proceedings associated with Chapter 100 financing to allow the parties to achieve a better understanding of what actions have been taken by Aquila with regard thereto since the filing of its Application in early December 2004. Given the apparent confusion, it may be advantageous to grant Public Counsel's request.

3. Public Counsel states in paragraphs 5 and 6 of the Motion that it “has discovered” the existence of a Special Warranty Deed between Aquila and the City of Peculiar (Attachment A to the Motion), a Memorandum of Lease Agreement (Attachment B to the Motion) and a Trust Indenture, two of which have been filed of record in the Cass County Recorder of Deed's Office. The suggestion is that the Company has been less than forthcoming about the timing of these transactions and that the terms of § V.C. of the Stipulation and Agreement concerning reliance of the signatory parties on information supplied by Aquila may justify a different outcome. The suggestion is inappropriate and the cited provision of the Stipulation and Agreement is not applicable for the reasons set forth below.

4. As a matter of background, legal title to the three natural gas-fired combustion turbines (“CTs”) and the real estate owned by Aquila along South Harper Road in Cass County, Missouri was transferred to the City of Peculiar shortly before the end of the year 2004. This transaction removed these items from the tax rolls so they would not be subject to an *ad valorem* taxation assessment on Aquila by the various counties within which it has regulated operations, as otherwise would have been the case had they been owned by Aquila as of January 1, 2005. It should be noted that this transaction took place before the CTs were installed at the South Harper location and placed in service at the end of June 2005.

5. Additional facilities associated with the installation of the South Harper peaking power station, such as service buildings, substations and

transformers, automatically have been titled in name of the City of Peculiar as those assets have been acquired by virtue of the fact that Aquila has been acting as the City's agent under the financing agreements in constructing the facilities.

6. Execution copies of documents involved with these transactions were supplied to Public Counsel in January of 2005 in response to data requests OPC-2, OPC-3 and OPC-4 (copies attached). Staff was made aware of this in March of 2005 in the Company's response to data request MPSC-33 (copy attached). Finally, the Commission, its Staff and the Office of the Public Counsel all were expressly informed of these matters in a public hearing held in Harrisonville, Missouri on March 15, 2005 in the proceedings of Case No. EA-2005-0248.¹ The Mayor of the City of Peculiar, George Lewis, testified that evening and said, among other things:

Now, the City of Peculiar has completed the 100 financing for this project 130 million dollars worth. This was closed on December 28, 2004. The land and the generator substation are titled to the City of Peculiar. Turbines and related equipment are also titled to the city.

(Tr. Vol. 3, p. 13) It simply is not plausible to suggest at this late date that Public Counsel, Staff and the Commission were less than fully informed about the timing of these transactions.

¹ *In the Matter of the Application of Aquila, Inc., for Specific Confirmation or, in the Alternative, Issuance of a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Combustion Turbine Electric Generating Station and Associated Electric Transmission Substations in Unincorporated Areas of Cass County, Missouri, Near the Town of Peculiar.*

7. None of the property under discussion has yet been placed in rate base. To the contrary, this is a question expressly reserved to the pending Aquila electric rate case in the Stipulation and Agreement. (See, §V. B. 3.)

8. None of the actions taken to date by Aquila are other than in full accordance with requirements of the law including § 393.190 RSMo., which is cited by Public Counsel in its Motion, and prior decisional guidance from the Commission. In an Order dated January 23, 1981, in Case No. EO-81-216² (copy attached), the Commission in nearly identical factual circumstances determined that a transaction of this nature does not involve a sale or transfer of assets as contemplated in § 393.190 RSMo. In that case the Commission concluded that a sale and repurchase agreement of Arkansas Power & Light Company ("AP&L") to facilitate tax-advantaged financing is a transaction:

set up to finance construction of pollution control facilities, not to dispose of operating parts of the utility's franchise works or system. The practical effect is not a sale, since the facilities are repurchased as part of the sale transaction. (emphasis added)³

The Commission further elaborated on the legal posture of such a transaction.

The facilities are encumbered by a lien, but the facilities to be encumbered do not yet exist as necessary and useful parts of the utility system, since the facilities are still to be constructed. Furthermore, there is no evidence that the facilities are necessary and useful parts of the generating system supplying electricity to Missouri residents....Consequently, these facilities are not considered useful and necessary in the performance of the utility's

² *In the Matter of the Application of Arkansas Power & Light Company Regarding the Selling of Certain Pollution Control Facilities and Other Facilities and the Repurchasing of these Facilities.*

³ In this regard, it should be kept in mind that the South Harper power station will be recorded as a capital lease which allows it to be treated the same as if it were a power generation asset owned outright by Aquila. (Williams, Exh. 1, p. 9, l. 7-10)

duties to Missouri customers, even if the transaction were technically construed to be a sale. (emphasis added)

As noted above, the CTs and real estate were titled to the City of Peculiar before they were placed in service. Similarly, the installation facilities have been acquired by Aquila in the name of the City of Peculiar when purchased. The circumstances currently before the Commission are factually indistinguishable from those addressed in the AP&L case.

9. Ultimately, Aquila simply is attempting to obtain low-cost tax-advantaged financing, which benefits will flow through to the customers of its regulated electric operations. Aquila believes that this is a prudent and appropriate undertaking on its part. The entire transaction is, however, capable of being undone at Aquila's option and legal title to the CTs and real property reconveyed to Aquila if the Commission so determines. What is before the Commission in this case is no different than any other transaction that is the subject of a binding contract that is subject to the contingency of regulatory approval. In this case, some of the predicate events such as the technical transfer of title have taken place to realize the tax advantage envisioned by the General Assembly, but the transfers are not indefeasible so the practical effect is the same. As such, the Chapter 100 financing is very much still subject to the Commission's approval. Aquila will accede to the Commission's judgment in this regard and is prepared to unwind those transactions which have taken effect to date and cease pursuing a completion of the transaction by further conveyance of production facilities now located at the South Harper power station. The only beneficiaries of the tax-advantaged financing arrangement are the local tax

jurisdictions that benefit from the PILOT payments that have been made (and will continue to be made) under the terms of economic development agreement with the City of Peculiar and Aquila's customers; not Aquila's shareholders.⁴ The lower tax costs are expected to be flowed through and reflected in rates. As such, Aquila has no vested interest in the outcome of this aspect of the Application.

10. Should the Commission decide to grant Public Counsel's Motion, Aquila believes that any such order should not be for an indefinite period of time but, rather, should incorporate a reasonably prompt date by which Public Counsel and/or Staff, should state whether the positions they have agreed to in the Stipulation and Agreement regarding Aquila's Chapter 100 financing request have changed and the basis for any such change. If the Commission does not approve the Chapter 100 financing by December 31, 2005, the existing agreements are subject to expiration. More to the point, in order to recover \$630,000 of the issuance fee associated with the Chapter 100 financing, the transaction must be unwound before the end of the year. Consequently, questions raised by Public Counsel must be resolved sufficiently in advance of that date such that Aquila can make an informed decision about whether to keep the tax-advantaged financing in place. Additionally, Public Counsel's Motion is only with respect to the Chapter 100 financing and should not act to stay any action or order with respect to that aspect of the Application addressing the

⁴ On March 15, 2005, Mayor George Lewis of the City of Peculiar said, "Now, the Ray-Pec School District will benefit from this at least five-fold. They will receive over five million dollars. Because of the 100 the West Peculiar Fire Protection District will benefit and the Cass County hospital, library, roads and bridge and water district." (Tr. Vol. 3, p. 13)

agreed-to valuation of the CTs and auxiliary equipment associated with the affiliate transaction as provided for by the terms of the Stipulation and Agreement. There is no reason for the Commission to delay its decision on that topic.

WHEREFORE, Aquila states that it does not oppose Public Counsel's Motion for Stay subject to the caveats set forth in paragraph 10 above.

Respectfully submitted,

/s/

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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 electronic mail, first class mail or by hand delivery, on this 28th day of September, 2005 to the following:

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