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

REPLY BRIEF OF AQUILA, INC.

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I. INTRODUCTION

The record in this case and the accompanying briefs are extensive and complex. Aquila believes that many of the arguments made by the Commission's Staff ("Staff") and the self-named "Consumer Groups" were anticipated by the Company and, consequently, most of the arguments contained in those briefs were effectively rebutted in Aquila's Initial Post-Hearing Brief filed on December 8, 2003. In an effort to avoid further burdening an already extensive record, Aquila will keep its reply brief as targeted as possible by endeavoring not to repeat at length matters already addressed in its initial brief. Accordingly, Aquila's failure to respond to each and every claim or allegation contained in the briefs of Staff and the Consumer Groups should not be taken by the Commission to indicate acquiescence on the part of Aquila. Rather, it merely reflects Aquila's belief that the topic or issue already has been adequately addressed in the Company's Initial Post-Hearing Brief.

II. DISCUSSION

A. The Minnesota Public Utilities Commission May Yet Approve Aquila's "Fair Share" Proposal

At pages 5, 24 and 25 of its brief, Staff states that the Minnesota Public Utilities Commission ("MPUC") has denied Aquila's request to collateralize the Term Loan with its properties in that state. (Empson, Tr. 550-551). The MPUC's order expressly left open the opportunity to request authority to collateralize the Term Loan by an amount that is in line with that state's peak day working capital requirements. (Exh. 58). This was an issue with respect to which the initial record in that case was deficient. Since that time, Aquila has filed a "fair share" proposal with the MPUC and remains hopeful that a favorable order will be forthcoming as has been the case in both Colorado and Iowa.

B. Standard of Approval

As noted in its Initial Brief, the standard of approval of the Application in this case is essentially a settled question. On October 9, 2003, the Commission issued its Order Denying Motion for Summary Disposition pursuant to which the Commission confirmed that the appropriate standard for approval of the Application under the controlling case law and Commission rules and decisions is that the Application may only be disapproved if there was a showing that granting the relief requested would be detrimental to the public interest. At page 14 of its brief, Staff states the standard for approval of the Application is "lenient." Aquila agrees.

The brief of the Consumer Groups with respect to this topic suggests that they are still in a state of denial. Their brief simply contains a litany of familiar complaints about the standard of approval under the law. The court decisions are wrong and/or the

Commission is wrong, they claim. Aquila submits that this is no more than yet another effort to convince the Commission to reverse itself which should be disregarded along with the discredited needs test upon which their case has been premised.

Somewhat more softly, Staff gives acknowledges the correctness of the "no detriment" standard while walking the tightrope of simultaneously distinguishing and yet conceding the applicable statutory provisions and controlling case law decisions. At page 15 of its brief, the Staff complains that "utilities" claim that the timeframe for discerning a detriment must be "immediate." The comment is not attributed to Aquila, nor should it be.

The timing standard has been established by the Commission in its decision in *Re Missouri-American Water Company*, 9 Mo.P.S.C. 3d 56, 59 (2000) wherein the "direct and present" standard was applied to applications filed pursuant to §393.190.1 RSMo, the statutory authority pursuant to which Aquila's Application has been filed in this case. Aquila has not argued that an alleged detriment be either instantaneous or "immediate." Rather, Aquila's position is that this requires the Commission to find a causal connection that must be certain and identifiable. Necessarily, this means that the adverse consequence must be in the short-term. Otherwise, the cause becomes so removed from the claimed effect on both the temporal and circumstantial levels that no reliable nexus can be established. The precise time period, however, may vary given the subject matter of the Application. (Tr. 107-108) Aquila agrees with Staff that the detrimental impact cannot be something that is speculative or unknown. (Tr. 70, 107)

Similarly, Aquila does not dispute that the Commission may consider the "broad picture" surrounding the Application. (Staff brief at 11). It is for that reason and to that end, that Aquila filed the testimony of Rick Dobson and Jon Empson for the purpose of presenting the request in appropriate context. (Exh. 4, 5, 6, 7 and 9).

The Consumer Groups at page 9 make reference to the Missouri Supreme Court's recent decision in *AG Processing v. Public Service Commission*, Case No. SC85352. Significantly, that opinion actually validates the Commission's direct and present causation standard established in the *MAWC* case. One of the three issues taken up on appeal was Appellant AG Processing's claim that the Commission misallocated the burden of proof in UtiliCorp's underlying application for approval of its merger with St. Joseph Light & Power Company ("SJLP"). In that case, the Commission found that once the applicants had made the *prima facie* showing that the transaction would not have an adverse impact on customer service or rates <u>the burden of going forward with the evidence</u> shifted to the objecting parties to demonstrate by competent evidence that the transaction would have some identifiable detrimental impact on the public interest. This finding by the Commission was specifically <u>affirmed</u> by the Missouri Supreme Court. (Slip Op. at p. 6-7).

Also at page 9 of the brief of Consumer Groups is a critique of the Missouri Supreme Court's 1917 opinion in *The Public Service Commission v. Union Pacific Railway Company* case pursuant to which the Court concluded that the Commission has no jurisdiction over the issuance by foreign-chartered public utilities of stocks, bonds, notes or other evidences of indebtedness. This discussion is not pertinent to the matter at hand in this case. The argument ignores the fact that the Commission has numerous times concluded that it has no authority to supervise or pass upon the issuance of securities issued by public utilities charted in a state other than the State of

Missouri. *See*, *Re Suburban Service Company*, 14 Mo.P.S.C. 114, 116 (1923); *Re Arkansas Power & Light Company*, Case No. EO-81-216 [held: "Since Arkansas Power & Light Company is an Arkansas corporation, this Commission is not required by (§393.200 RSMo) to approve or disapprove the above described financing method."]; *Re Arkansas Power & Light Company*, Case No. EF-81-271 [held: "Since AP&L is not a Missouri corporation, the Commission has no authority to supervise or pass upon the proposed issue of stock by AP&L, even though AP&L is permitted to do business in this state."]. This topic is well-settled as a matter of both law and regulatory policy.

Though previously filed in this case, the Consumer Groups also have omitted mention of a letter opinion of the Office of the Commission's General Counsel issued in 1969 in which the Commission's chief lawyer concluded that a foreign corporation operating as a utility in the State of Missouri is not "organized or existing, or hereafter incorporated under or by virtue of the laws of the State of Missouri" as that phrase appears in §393.200 RSMo. Op. No. 69-17.[1] The statute has not changed since 1969.

In any event, the discussion about the *Union Pacific Railway* case is beside the point. The question in this case is <u>not</u> whether Aquila needs the Commission's approval to have issued the First Mortgage Bonds that the opposing parties in this case have gone to great pains to point out to the Commission already have been issued. Rather, the question is whether encumbering Aquila's Missouri works and system to support those bonds will cause a present and direct detriment to the public interest. As demonstrated in Aquila's Initial Brief, and as further demonstrated herein, no party has identified any such detriment.

[1] A copy of this letter opinion previously has been filed with the Commission in this case. *See*, item no. 14 on the Commission's EFIS.

C. The Validity of the UtiliCorp/SJLP Merger Is Not a Question That is Properly Before the Commission for Decision in This Case

At page 11 and 12 of the brief of Consumer Groups, it has been argued that the UtiliCorp/SJLP merger "has been rejected by Missouri courts" and that merger is "void." This is an inaccurate statement which is not properly before the Commission for decision in this case in any event. These arguments are no more than a rehash of the arguments made by appellant AG Processing during the appeals process and a transparent effort to poison the well even before the case comes back to the Commission for further deliberations.

The Missouri Supreme Court's opinion in that case speaks for itself and Aquila will not repeat the contents of that opinion in the context of this case. Aquila will make only this observation. The claim at page 12 of the brief of the Consumer Groups that there is "no lawful order of the Commission approving the merger" is directly contrary to the specific language appearing in the Court's opinion and a serious misrepresentation to the Commission. At page 4 of its slip opinion, the Missouri Supreme Court stated the following:

> There is no dispute that the applicants are regulated utilities under Chapter 393. Section 393.190.1, requiring the issuance of a merger approval order from the PSC, provides the lawful authority for the PSC's decision. **Having found the PSC's decision to be lawful, the court must examine its reasonableness**. (Footnotes omitted. Emphasis added.)

For the reasons set forth in the Court's opinion, the case was remanded to the Commission "to consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC Staff and the intervenors in making its determination of whether the merger is detrimental to the public." (Slip. Op.

at 7-8). In other words, the Report and Order in Case No. EM-2000-292 was found to be lawful but the case has been remanded to the Commission for further findings concerning the reasonableness of the acquisition premium and whether, and in what manner, it may be recovered in rates; nothing more.

In circumstances such as these, the legal effect of the Commission's Report and Order in Case No. EM-2000-292 is not in question. Section 386.490 RSMo is explicit in this regard. It states as follows:

> 3. Every order or decision of the commission **shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission**, unless such order be unauthorized by this law or any law or be in violation of a provision of the Constitution of the State or of the United States. (Emphasis added.)

Clearly, the merger is not void. The Commission's Report and Order in Case No. EM-2000-292 is lawful and still operative and in force according to its terms until changed by the Commission and then only to the extent of the change, if any. Further, any change can only operate prospectively, as admitted in the brief of the Consumer Groups at page 17.[2] This can only occur in the context of Case No. EM-2000-292 after the Commission receives the Circuit Court's remand mandate and instructions. The bottom line is the merger was completed in accordance with a lawful and operative order of the Commission and it cannot now be undone.

It would be wholly inappropriate for the Commission to make any findings in this case that would have any bearing on the topic addressed in the Consumer Groups' brief at pages 11 and 12. To do so would be procedurally flawed and would be a denial of

[2] *Lightfoot v. City of Springfield*, 236 S.W. 2d 348, 353 (Mo. 1951).

Aquila's due process rights. To do so would also evidence a prejudgment of the issue before the case on remand comes back to the Commission for further deliberations. As such, the Commission should decline to consider or address the meaning and/or impact of the UtiliCorp/SJLP merger opinion in its decision concerning the Application in this case.

The Commission should give no credence to the claim of the Consumer Groups at page 12 of their brief that "there has been no lawful merger of the two entities." It should be viewed for what it is; that is, an effort to obfuscate the issue to be decided by the Commission, that is, whether approval of the Application would cause a present and direct detriment to the public interest.

D. There Are Still Legitimate Reasons for Approval of Aquila's Application

Both the Consumer Groups at pages 17- 22 and Staff at pages 18- 26 identify four reasons identified by Aquila for pursuing its Application to collateralize its Missouri works and system to support the Term Loan. Both briefs correctly indicate that there is now sufficient value in the domestic utility assets committed to the collateral pool to satisfy its collateralization requirements with respect to the $250 million of Aquila's peak cash working capital requirements of Aquila's US utility operations. Those briefs also correctly note that a recent decision of the Iowa Utilities Board will facilitate an interest rate reduction under the Term Loan.

As pointed out in Aquila's Initial Brief, the attainment of those two objectives <u>does not</u> mean there are no further legitimate business objectives to be served by the Commission's approval of the Application. Aquila continues to believe that it is fair, equitable and appropriate that its utility properties in Missouri be committed to the collateral pool to support the company's peak day cash working capital requirements for its US utility operations, including those in the State of Missouri. Otherwise, utility assets in states other than Missouri will be supporting Aquila's Missouri peak cash working capital needs.

Additionally, Aquila believes that the Commission's approval of the Application will reinforce the credibility of the Company's financial plan in the capital markets. The fact is that Aquila's relationships with the state commissions having authority over its domestic utility operations, including the Commission, are closely monitored by debt rating agencies and the investment community. The market's perception of this relationship is important to the Company and its customers at this critical juncture of the Company's retrenchment as a domestic utility company.

Staff and the Consumer Groups have spent a good deal of time explaining in their briefs why they disagree with the Company's views on these topics. In the end, however, these contentions are not topics that have been presented for decision. The business reasons for committing Aquila's Missouri works or system to the collateral pool are matters reserved to the informed discretion of the Company's management as has been explained at pages 5 through 10 of Aquila's Initial Post-Hearing Brief. Consequently, the <u>only question</u> before the Commission is whether the action sought to be taken by Aquila would cause some <u>identifiable</u> harm to the public interest.

E. The Objecting Parties Have Not Provided Compelling Evidence of a Direct and Present Detriment to the Public Interest

Ultimately, the objecting parties have not met their burden of presenting compelling evidence of a present and direct detriment to the public interest that will come about if the Commission grants the Application in this case. The concerns of Staff and the Consumer Groups are speculative and remote and provide no lawful basis for disapproval.

Nothing in their post-hearing briefs could cause the Commission to reach a different conclusion. At page 23 of its brief, the Consumer Groups state that if the Commission grants the Application "Aquila will have no uncollateralized utility assets to support future potential debt issuances." This statement is simply untrue. As noted in Aquila's Initial Brief, the Company's Indenture of Mortgage and Deed of Trust, as amended and supplemented by the First Supplemental Indenture, specifically permit the issuance of <u>additional</u> senior secured debt in the amount of approximately \$800 - \$900 million beyond the \$430 million amount of the Term Loan. (Dobson, Exh. 8, p.3 l. 3-12).

Similarly, the Consumer Groups contend that the Term Loan prohibits Aquila from issuing additional secured debt maturing during the three-year term of the Term Loan. (Brief at p. 23). This is not so. Aquila is not prohibited from raising capital by issuing short-term secured debt, if needed. For example, the Company could issue debt securities secured by its accounts receivable that mature prior to the Term Loan's maturity. Also, the Consumer Groups do not identify any business need for additional secured debt during the 28 months still remaining on that term. The best they have offered is a claimed "need to address capacity expansion requirements sometime within this decade," a much longer term consideration. (Brief at p.23). Consequently, there is no basis to conclude that this restriction is in any way detrimental to the public interest or that it constitutes impairment of the Company's ability to raise other short-term secured debt.

The Consumer Groups also incorrectly state that any future secured debt "would be second in line behind the three year $430 million Term Loan." (Brief at p. 23). This statement misapprehends the fact that all First Mortgage Bonds issued under the Indenture and any supplement thereto are entitled to equal standing, as the Indenture defines the rights and obligations of all bondholders.

Both the Consumer Groups and Staff identify as a detriment the possibility that regulated assets committed to the collateral pool may at some day in the future under some set of supposed circumstances support non-regulated debt. Claims of this nature are purely conjecture and, consequently, provide no legitimate basis for disapproval of the Application. More importantly, however, the Company has committed to align the collateral requirements under the Term Loan such that non-regulated assets support non-regulated operations and regulated assets are aligned to support just regulated operations. This point was addressed in more detail in Aquila's Initial Brief at page 22.

Staff has argued that approval of the Application would be detrimental to the public interest because it would represent an increased risk for the Company. The risk that something bad might happen, however, is not sufficient to meeting the burden of establishing that something bad will happen if the Application is approved.

At page 28 of its brief, Staff suggests that permitting Aquila to commit its Missouri works and system to the collateral pool would leave it free to release from the lien of the Indenture its properties in the other states in which it operates. Although the Indenture does provide a means for releasing collateral, there is absolutely no evidence in the record suggesting that Aquila has any intention to do anything of the sort. To the contrary, such an action would be squarely at odds with Aquila's stated position that all of its domestic utility properties should become a part of the collateral pool because the Term Loan is being used to meet peak cash working capital requirements in each of the states in which Aquila has regulated operations. Accordingly, any argument suggesting that the Company would release its other utility assets from the lien created by the Indenture after the Missouri properties are pledged directly contradicts the record evidence.

Staff also contends that the fact that the Term Loan provides for the payment of a make-whole premium in the event of an elective prepayment of the loan. (Brief at p. 28). This is not a consequence of the mortgage. Aquila is already obligated to pay make-whole premiums if it wishes to prepay the loan as a discretionary matter whether or not the Missouri assets are pledged. As such, there is no casual connection whatsoever. Also, this is no more than a speculative scenario about what may happen if Aquila takes a particular action. There is no evidence that establishes that this series of events is certain or even likely. Ultimately, Staff concedes the Company's point that the Commission's affiliate transaction rules are already in place to protect against any abusive self-dealing. (Staff brief at p. 29).

Lastly, Staff contends that there is inadequate "ring-fencing" in place to insulate Aquila's regulated operations from the impact of its non-regulated operations. This claim is contradicted by Staff's report to the Commission in December of 2002 (the "Report") in which Staff advised the Commission that the use of a hypothetical capital structure for ratemaking purposes (as has been proposed by Aquila) would insulate Aquila's regulated customers from the adverse financial consequences caused by its exit from the energy merchant business and other downturns in its unregulated businesses. (Empson, Exh. 4, p. 4). Staff's Report advised the Commission as follows:

> To prevent or mitigate Aquila's higher cost of capital from being charged to Missouri's ratepayers, the Commission can order the use of a hypothetical capital structure for rate making purposes to determine the mix of debt and equity that is appropriate for MPS and/or L&P. The capital structure would not be dependent on the capital structure currently in effect for Aquila.
>
> Instead of using Aquila's actual cost of debt and equity, the Commission could impute debt and equity rates that it considers reasonable for Aquila's Missouri utilities.
>
> Specific examples of mechanisms that can be used to help prevent increased capital costs being passed onto the MPS and SJLP ratepayers are: use of a hypothetical capital structure, adjustments to embedded costs of debt and preferred stock, adjustments to cost of equity estimates, use of comparable companies (to more closely reflect the cost of capital for a regulated utility versus a diversified energy company).

(Wandel, Exh. 13, Sch. 1, pp. 1-23, 1-24, 1-29) Aquila agrees with Staff that the Commission has adequate regulatory tools at its disposal to insulate the ratepayers from any adverse financial impacts arising out of the Company's unregulated energy ventures.

The default and bankruptcy scenarios addressed in the briefs of Consumer Groups and Staff also provides no basis for disapproval of the Application. Again, the arguments are speculation based on hypothetical series of events that comprise no more than guesswork and what-ifs. Accordingly, these arguments provide no basis for disapproval of the Application. Nevertheless, certain specific statements deserve special comment.

At page 17 of its brief, Staff suggests that Aquila is "obligated to" surrender its properties to the trustee in the event of a default. This statement is incorrect. Aquila is obligated to surrender possession of its properties <u>only</u> if requested to do so, and even then <u>only subject to the Commission's approval</u>. The Commission should keep in mind that possession is only one remedy available to the trustee and creditors. Practically speaking, the Company would not expect the trustee to exercise this remedy unless there is an imminent risk that the Company is expected to file for bankruptcy protection, primarily because surrender (a) creates significant administrative problems (e.g., separating back-off functions provided now to all of the Company's domestic operations from those required only to service, say, the regulated properties in Missouri) and (b) might result in negative market perception (e.g., an inexperienced operator acting in its best short-term interests) that could negatively affect the fair market value of the collateral.

At page 26 of its brief, Staff states that "the Indenture casts a wide net of occurrences that would constitute a default and trigger the remedies set out in the ensuing sections of the Indenture." This statement is incorrect. The default provisions are a fairly narrow category of circumstances, which are market "standard" for indentures used by investment and non-investment grade utilities. To summarize, the Company has agreed only to (a) pay its bills, (b) not go bankrupt, and (c) perform as it has promised to perform; those promises being memorialized as covenants within the Indenture and related loan agreements.

At page 27 of its brief, Staff asserts that "the immediate acceleration of payment due would create a capital crisis for Aquila." This conclusion has placed the effect before the cause and, consequently, is misleading. The acceleration clause would not <u>create</u> a capital crisis. To the contrary, it is a remedy available to the creditors only <u>after</u>

Aquila has experienced a capital crisis. In other words, acceleration is not a reason the Company would fail to pay. Rather, it is a remedy available to the creditor if the Company fails to pay.

Also on page 27, Staff asserts that utility ratepayers would "bear a heavy weight" relating to interest costs. This is misleading because it is not correct to suggest that the Company's ratepayers may have bear any heavier burden after the assets are pledged than they currently bear. The Company will continue to be subject to the Commission's ratemaking process and it would not expect the Commission to pass on in rates significant increases in interest cost resulting from the Company's overall poor financial condition.

Finally, on page 28 of its brief, Staff asserts that the trustee under the Indenture "would assume possession and operation of Aquila's regulated assets." This claim, too, is misleading. **As noted in Aquila's Initial Brief, the trustee and lenders could not take possession and operate Aquila's utility properties in the State of Missouri without the Commission's approval because the entire remedies section is subject to applicable law, and Commission approval is required before a third party could take ownership through an asset acquisition and operate a Missouri utility.** If the Commission has any residual concerns in this regard, however, an order approving the Application could be expressly conditioned to authorize the Company to pledge its Missouri properties to the collateral pool but withhold any approval for any other parties (including the Company's creditors) to take possession of, own, operate or otherwise control Aquila's works or system without having first obtained the Commission's approval.

At page 30 of its brief, Staff suggests that the indebtedness evidenced by the Term Loan could more easily be discharged in a bankruptcy proceeding if the Application were to be denied. Staff contends that this would be a favorable outcome because the Company would then be less burdened by residual debt. This argument misses the obvious point that the Term Loan debt obligations are fully secured by utility collateral in the States of Nebraska, Michigan and Colorado (and now, Iowa) as Staff has pointed out at page 5 of its brief. Consequently, a denial of the Application by the Commission will not transform it from a secured to an unsecured obligation.

Although Staff and even Consumer Groups concede the standard of approval for the Application is "no detriment," their arguments are barely-camouflaged complaints that there is no need for the relief requested. Consumer Groups argue that Aquila has "full use" of the proceeds from the Term Loan and that the interest rate hurdle has been achieved. (Brief at pp. 18-20). The reasons for the encumbrance request "have been satisfied," they state. The Company has "failed to offer any justification or any reason" for the mortgage. (Brief at p. 22). These are simply variations of the discredited "needs" test.

Staff, too, concedes "no detriment" is the standard for approval of the Application but argues there is no need. "Aquila no longer needs authority to pledge Missouri assets as collateral" Staff claims. (Brief at p. 21). It sees "no tangible benefit" to be gained. (Brief at p. 22).[3] Staff alleges the loan has "already been granted and proceeds received." (Brief at p. 23). This litany, like that of the Consumer Groups, comprises a dogged application of the wrong legal standard to the facts presented.

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[3] This statement is at odds with the holding of the Missouri Supreme Court in *City of St. Louis* in which it concluded there was no requirement that the public be benefitted.

Ultimately Staff and the Consumer Groups oppose the Application claiming there is no need for the relief requested. As previously determined by the Commission, approval of the Application is not to be based on a needs test. Consequently, the arguments of the opposing parties should be disregarded by the Commission.

F. Credibility Issues

Staff has included a section in its brief questioning the Company's credibility in this case. Staff's first observation is the violation of certain interest coverage ratio covenants in the $650 million revolving loan facility with Citicorp (the "Revolver") which was refinanced in part by the Term Loan.

The reasons for this event were explained in the direct testimony of Rick Dobson filed on April 30, 2003. That explanation, given in complete historical context is set forth at pages 2-8 of Mr. Dobson's testimony (Exh. 4). In summary, however, unanticipated changes in the business environment which led to Aquila disaggregating its merchant business and eliminating its energy trading capability caused the Company to incur substantial asset impairment charges which, in turn, caused the Company to fail to comply with certain interest coverage ratio covenants set forth in the Revolver. To suggest that this is done toward a nefarious end is unfair. Clearly, it was an unfortunate consequence of an unavoidable business decision taken in response to circumstances that were out of Aquila's control. Mr. Dobson testified that the Company did everything in its power to keep that loan covenant. (Dobson, Tr. 423) Also, there was no technical default as the breaches of the financial covenants were either cured by the Company or remedied by waivers and consents from the lenders. (Dobson, Tr. 429-430)

At page 33 of its brief, Staff states that Aquila has defaulted on a loan that it had made in connection with the construction of the Aries plant in Missouri. The fact of the matter is that Aquila has not breached the Aries loan agreement. Rather, a non-recourse subsidiary of Aquila that is 50% owned by Calpine has breached those financial covenants. This is a separate legal entity over which Aquila does not have operational or management control.

Also, Staff states that Aquila borrowed all the funds available under the Revolver by the Fall of 2002 "for reasons its Chief Financial Officer was unable to state." Mr. Dobson, Aquila's CFO, stated that he did not recall the reason for the draw-down in the Fall of 2002 because he was not the Company's CFO at the time the action was taken. (Dobson, Tr. 429)

Staff also takes issue with what it characterizes as Aquila's "changing financial plan." (Brief at p. 34). Aquila's financial plan is a necessarily fluid one. As the various elements of the restructuring occur, other elements of the plan or stated objectives can be expected to be modified or adjusted accordingly. This is neither surprising nor inappropriate. Consequently, to question the Company's credibility on the grounds that its financial plan is being executed successfully truly is a strange take on the facts.

At page 36 of its brief, Staff suggests that the Company has mischaracterized the purpose of the three-year Term Loan. Staff suggests that using the Term Loan for "general corporate purposes" is a different purpose than using it for peak day cash working capital purposes. This is not the case. Working capital is simply a subset of a number of items that make up the general corporate use of funds. To suggest that the Company is saying two different things or that it is going back on its word, is inaccurate.

G. Proposed Staff Conditions

It is not unusual for Staff to propose conditions in a case of this nature. However, in this case Staff's proposed customer service conditions are postured very strangely indeed.

Staff proposes that the Commission direct the Company to provide certain quality of service measures on a monthly basis rather than on a quarterly basis as is currently the case. The interesting thing about Staff's proposal is that the proposed conditions are not necessarily connected to an approval of the Application. Indeed, Staff proposes that the "conditions be approved or be imposed on the Commission's disapproval of the Application as well."

There is no lawful or procedural basis for the Commission to impose any conditions whatsoever in the event that it disapproves the affirmative relief being requested by the Application. No party other than Aquila is entitled to any affirmative relief in this case because it has filed the Application. Staff has initiated no proceeding that would entitle it to anything if the Application were to be denied. Consequently, imposing these "conditions" in the event the Commission would disapprove the Application would render the whole exercise a nullity. The proposed conditions would only be appropriate if the Application were to be approved.

In that regard, the proposed "conditions" are neither necessary nor appropriate. As noted in Aquila's Initial Post-Hearing Brief, Staff's evaluation of the data is seriously flawed and, consequently, makes no case for closer scrutiny. Staff admittedly has failed to adjust its data for the effects of the ice storm of 2002 or the tornadoes of May 2003 despite its testimony that such events should be the basis for normalizing the numbers to reflect regular operations. Submission of customer service performance data on a quarterly basis is adequate to monitor the Company's performance and the additional time involved in preparing reports on a monthly basis will simply divert the attention of key Company employees from the more important task of actually improving the levels of its customer service. (Keefe, Tr. p. 181). Finally, these are proposals that have been made by Staff in Aquila's current electric/steam rate case, Case No. ER-2004-0034, which is where the matter can be better addressed so that the costs of compliance can be included in cost of service.

III. CONCLUSION

Nothing contained in the Initial Briefs of either Staff or the Consumer Groups provide any basis for the Commission to deny Aquila's Application. No objecting party has met its burden of providing compelling evidence of a present and direct public detriment that would come about if the Commission were to approve the Application and Aquila were permitted to commit its Missouri works and system to the collateral pool to service the Term Loan. They have only provided the Commission with conjecture, supposition and speculation.

WHEREFORE, Aquila restates its request that the Commission issue an order authorizing the Application containing such mitigating conditions as it deems necessary or appropriate to address any perceived detrimental impacts on the public interest.

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 23rd day of December 2003 to the following:

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