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 Related Improvements to be Installed and Operated in the City of Peculiar, Missouri	))))))	Case No. EO-2005-0156

RESPONSE OF AQUILA, INC., TO MOTION FOR REHEARING

COMES NOW Applicant Aquila, Inc. ("Aquila") and for its response to the Office of the Public Counsel's ("OPC") December 29, 2005 Motion for Rehearing, states the following:

Chapter 100 RSMo Tax Abatement

1. In its December 29, 2005, Motion for Rehearing (the "Motion"), OPC contends the Commission's dismissal of that aspect of Aquila's Application concerning tax-advantaged financing was in error. OPC's arguments fail to address the specific facts of the case or the Commission's own precedent.

2. The Commission was correct to follow the reasoning set forth in its January 23, 1981 Order in Case No. EO-81-216[1] which determined that a sale and repurchase transaction entered into to facilitate the issuance of tax-exempt pollution control bonds was not a "sale" or "transfer" of plant within the meaning of §393.190 RSMo because it did not represent the disposition of necessary or useful parts of the electric company's franchise, works or system. The facts of the *AP&L* case are on all fours with the facts in this case. Aquila submits the legal rationale articulated by the Commission in 1981 is consistent with sound

[1] *Re Application of Arkansas Power & Light Co.*

principles of statutory construction[2] and public policy. The record in this case makes it clear the South Harper power station is being used to meet system load requirements for the Aquila Networks-MPS electric division and, in fact, is being treated the same as if it were a power generation asset owned outright by Aquila for accounting purposes. (Williams, Exh. 1, p. 9, l. 7-10) There has been absolutely no disposition of any of Aquila's electric utility works or system. To the contrary, the Chapter 100 financing has been in furtherance of an important power plant addition so it cannot reasonably be argued that service to the public has been impaired. The undisputed and singular purpose of the financing is to obtain favored property tax treatment. The legal technicalities undertaken by Aquila to avail itself of the advantages available through Chapter 100 Revenue Bonds have been for the purpose of improving customer service. No one has even suggested that Aquila has ceded operational control of the power station to any third party. It is undisputed that the South Harper station will be operated by Aquila for the benefit of its Missouri electric customers for the term of the lease. It also is not disputed the transfer of title to the CTs and land took place months before the power station was constructed and placed in commercial service so it was not necessary or useful for public service at the time of the transaction complained of. The Commission's express declination of statutory authority is consistent with the law and past Commission practice and the specific facts of the case.

[2] "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility." *State ex rel. Fee Fee Trunk Sewer, Inc., v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980)

3. OPC's arguments essentially parrot the dissenting opinion of Commissioners Gaw and Clayton. Even the principal author of the dissenting opinion is on record in this case for the proposition that the legal requirements of Chapter 100 RSMo are actions lacking operational substance. In the September 21, 2005, hearing, Commissioner Gaw noted the technical transfer of legal title "is just an arrangement done as a financing mechanism to avoid the payment of taxes."[3]

4. OPC in its Motion makes no reference whatsoever to the 1981 *AP&L* decision nor attempt to distinguish it from the facts of this case.[4] As such, the Motion fails to address the principal legal/policy grounds for the Report and Order and, consequently, the Motion does not present any legitimate basis for rehearing the matter.

5. Additionally, OPC's insistence that the Commission declare the substantial property tax abatement void is bizarre viewed in its best possible light

[3] Tr. Vol 2, pp. 85-86.

[4] The attempt in the dissenting opinion to distinguish this case from the Commission's 1981 *AP&L* Order contains several material errors of fact. Commissioners Gaw and Clayton are wrong to suggest that Aquila is a "Missouri entity" whereas AP&L was not. Aquila is a Delaware corporation and is not, therefore, a Missouri corporation. (Application, ¶ 2) It, like AP&L which was an Arkansas-chartered company, is a foreign corporation. The location of the company's headquarters is of no legal consequence in determining whether a company is domestic or foreign. The current circumstances are indistinguishable from those addressed by the Commission in the *AP&L* case. Commissioners Gaw and Clayton also are wrong to draw an equivalency between this case and Union Electric's Bowling Green case. First, UE is a Missouri corporation, unlike Aquila, so any long-term indebtedness incurred by UE, including payments made under a capital lease, must be approved by the Commission. The same is not true of Aquila. *Public Service Commission v. Union Pacific Railroad*, 271 Mo. 258, 197 S.W. 39 (Mo. banc 1917); *Re Suburban Service Company*, 14 Mo.P.S.C. 114 (1923). Second, UE's turbines were actually in service when title was transferred, whereas the record in this case shows the closing took place in December 2004, several months before the turbines were placed in commercial service. Paradoxically, it is the dissenting opinion, not the Report and Order, that would open a door to potential regulatory abuse because it suggests that a power plant used to generate power for Missouri customers that is located in a neighboring state may be sold without the Commission's approval. It is hard to imagine why in such a circumstance the location of the power plant should have any bearing on the question whether it is used or useful in providing service to customers in this state.

because the tax savings is a flow-through item in the ratemaking process. In fact, the savings is reflected in the test year in Aquila's current rate case; a circumstance that would not be but for Aquila's decisive action at year-end 2004. This means the ratepayers, OPC's statutory client, are one of the primary beneficiaries of the tax benefit of the Chapter 100 Bonds.

6. What Aquila did was the right and reasonable thing. It sought and obtained financing for the South Harper plant that is projected to save $18 million in tax expense over the life of the Bonds. No party disputes this salient fact. The Motion should be denied.

No Imposition of Sanctions

7. In the Motion, OPC renews its call for the imposition of sanctions on Aquila. This argument too fails to provide any basis for a rehearing.

8. The Report and Order concludes, correctly, that the Commission had no statutory authority to approve or disapprove the elements of the Chapter 100 Bonds based on the principles enunciated in the *AP&L* case. Consequently, there are no grounds to conclude Aquila violated any provision of law, Commission rule or order.

9. OPC also is wrong in that its sanctions request is procedurally flawed. Aquila, the applicant in this case, is the only party entitled to affirmative relief. To grant OPC's request for summary sanctions would be a denial of Aquila's due process rights in violation of the procedural requirements and protections set out in the Commission's enabling legislation and its rules of practice and procedure.

10. In retrospect, the record in this case was less than a model of clarity, a circumstance for which the undersigned takes ultimate responsibility. The facts were examined in depth at the hearing on December 5, 2005, and it is clear from that transcript that the confusion caused by the company's testimony was inadvertent and does not rise to a level that would justify a complaint to seek statutory fines or penalties. By far and away the primary focus of the case from the beginning was the affiliate transfer of the CTs. As such, the Chapter 100 financing question suffered from a benign neglect.

11. Ultimately, OPC's feigned outrage at Aquila's alleged "deception" is no more than an attempt to mask the inconvenient fact that Aquila did inform OPC about the timing of the closing of the Chapter 100 RSMo financing.[5] OPC's witness in this case, Ted Robertson, was given that information on March 23, 2005, when he was provided with a copy of a response to a Staff data request stating the following:

> Current legal title to this equipment is held by the City of Peculiar in accordance with the Chapter 100 arrangement. Title was transferred December 30, 2004.

Either Mr. Robertson failed to read the document, he read it and did not understand it or he read it, understood it and did not care. His negligence or carelessness does not, however, translate into a failure on the part of Aquila to

[5] Aquila was not the only one who told OPC the transaction had closed. At a public hearing in Harrisonville on March 15, 2005, in companion case EA-2005-0248, the Mayor of the City of Peculiar testified that it had "completed the 100 financing for this project…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; emphasis added) OPC was present at the time of that hearing.

present to OPC the fact of the closing in clear, unambiguous English well in advance of the September 21, 2005 hearing.

12. Additionally, Aquila filed a pleading in this case on June 29, 2005, [6] that included the following statement:

> The request for relief regarding tax-advantaged Chapter 100 RSMo financing is still relevant to the operation of the South Harper Station. The financing is in place and the Company is making payments to the City of Peculiar in lieu of property taxes for 2005. If the Commission denies this aspect of the relief requested, the financing will be unwound and replaced with more conventional but costlier forms of debt obligations.[7] (emphasis added)

This was a statement filed as a matter of public record in this case.

13. Despite having been told on several occasions that the transaction had closed, OPC claims to have been shocked…*shocked* to have found out on the afternoon of September 21 that the transaction had closed in December of 2004. OPC's contention that sanctions are warranted cannot mask the reality that it was put on actual notice that the transaction had been closed long before the hearing in September of 2005 and OPC apparently remained, inexplicably, unaware.

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

[6] EFIS Document No. 59.
[7] ¶ 5.

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 electronic mail, first class mail or by hand delivery, on this 17th day of January, 2006 to the following:

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