

**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 near the City of Peculiar, Missouri)	

MOTION FOR REHEARING

COMES NOW the Office of the Public Counsel (**Public Counsel**), and respectfully moves the Commission to enter its Order granting a rehearing in the above-entitled cause and, in support thereof, states as follows:

INTRODUCTION

The Public Counsel respectfully requests a rehearing of portions of the Report and Order issued on December 19, 2005 in the above-entitled cause for the reason that the portions described in this motion are unlawful, unjust, unreasonable, arbitrary, capricious, unsupported by substantial and competent evidence, against the weight of the evidence considering the whole record and constitute an abuse of discretion and a misinterpretation of the law, all as more specifically and particularly described in this motion.

DISMISSAL OF APPLICATION

In its Report and Order, the Commission stated “That the portion of the Application that Aquila, Inc., (**Aquila**) filed on December 6, 2004, asking for approval of its Chapter 100 financing arrangement with the City of Peculiar is dismissed”. 4 CSR 240-2.116(4) entitled “Dismissal” states as follows:

(4) A case may be dismissed for good cause found by the Commission after a minimum of ten (10) days notice to all parties involved.

Since the Commission “dismissed” the portion of the Application regarding the Chapter 100 financing arrangement, the Commission failed to comply with the above requirements of 4 CSR 240-2.116(4).

SECTION 393.190

In its Report and Order, the Commission finds that Section 393.190 RSMo 2000, does not apply to this transaction for the reason that the turbines and associated equipment were not necessary or useful because those assets were not providing electricity to Missourians on December 30, 2004, the date upon which Aquila transferred these assets as well as two parcels of real estate to the City of Peculiar, Missouri. In this regard Section 393.190.1 RSMo 2000 clearly provides, in pertinent part, as follows:

393.190.1 No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole of any part of its franchise, works or system, **necessary or useful** in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having **first** secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same **shall be void**. ... (emphasis added)

The Commission’s finding that the assets were not “necessary or useful” misinterprets the words “necessary or useful”. In the Dissenting Opinion of Commissioner Gaw and Commissioner Clayton, the Commissioners cited the St. Louis Court of Appeals in State ex rel. Union Electric Company v. University City, 449 S.W.2d 894 (Mo. App. 1970), in which the Court found the word “necessary” to mean “suitable, proper and convenient to the ends sought”. Webster’s Third New International Dictionary defines the term “useful” as meaning “capable of

being put to use”. Clearly, given these definitions of “necessary” and “useful”, the combustion turbines and associated equipment as well as the two parcels of real property transferred to the City of Peculiar, Missouri, on December 30, 2004, were “necessary or useful” within the meaning of Section 393.190.1 RSMo 2000 in that they were “suitable, proper and convenient to the ends sought” or “capable of being put to use” at the time they were transferred by Aquila to the City of Peculiar.

As noted in the Dissenting Opinion, Aquila’s own Application evidences the fact that Aquila considered the assets and land transferred to the City of Peculiar to be “necessary” under the above definition in that these assets were “suitable, proper and convenient to the ends sought”. In the same manner, these assets were “useful” in that they were “capable of being put to use”. Otherwise why would Aquila have acquired the turbines, the associated equipment and the parcels of real property for the construction of its South Harbor Station.

As a result, Aquila did transfer assets and real property which were “necessary or useful” without having first secured from the Commission an order authorizing it to do so in violation of the above provisions of Section 393.190.1. As a consequence of having done so, the transfer is void under the clear provisions of the statute.

SANCTIONS

In its Report and Order, the majority of the Commission determined that Aquila did not need Commission approval before the transaction and that, therefore, “the Public Counsel’s request for civil and criminal penalties against Aquila are not properly before it”. However, as Public Counsel stated in its Response to Order Directing Filing, Aquila had a duty in this case to fully comply with the applicable law and to be honest and forthcoming in all of its pleadings, testimony and other representations made to this Commission. Public Counsel asserts that not

only did Aquila violate the provisions of Section 393.190.1 RSMo 2000, but, in addition, the Commission should not tolerate a deception of the nature perpetrated by Aquila on the Commission in this proceeding from any regulated public utility subject to its jurisdiction.

The dissenting commissioners recognized this fact in their dissenting opinion by stating as follows:

“It is apparent that the Company has been less than forthright with the Commission. Specifically, we note: (1) Aquila never voluntarily disclosed to the Commission that the December 2004 transfer occurred; (2) Aquila’s failure to provide executed copies of the relevant documents; (3) Aquila’s use of the future tense in its pleadings and testimony in describing a transaction that had already occurred; (4) Aquila’s claims that the Commission should have been aware of the executed transaction based upon public statements made by the mayor of Peculiar in a different proceeding, despite Aquila’s principal witness denying he was aware of the December 2004 transaction at the time of the September 21, 2005 hearing; and (5) Aquila’s failure to address Commissioner inquiries or correct the Commission and the parties belief that the transaction had not yet occurred. Explanations by counsel and Aquila’s witness were not satisfactory and proved elusive, vague and questionable. No where in the majority’s Order is Aquila admonished for its representations or omissions. As such, it appears that such lack of candor is acceptable practice before this tribunal. Such representations and omissions deserve further inquiry from the Commission for possible future action”.

As a consequence, Public Counsel respectfully submits that the majority of the Commission erred in finding that Public Counsel’s request for civil and criminal penalties against Aquila were not properly before it.

WHEREFORE, for the reasons herein stated, Public Counsel respectfully moves the Commission to enter its Order granting a rehearing of the above issues and further prays for such other and further relief as to the Commission shall seem just and proper under the circumstances.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 29th day of December 2005:

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