

**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                )

**Public Counsel's Response to Order Directing Filing**

**COMES NOW** the Office of the Public Counsel (**Public Counsel**), and for its response to the Commission's Order Directing Filing issued on September 29, 2005, respectfully states as follows:

1. On December 6, 2004 Aquila, Inc. (**Aquila**) filed its Application regarding its new electricity generating station located near the City of Peculiar, Missouri, (**Peculiar**) commonly known as the "South Harbor Station (**the Project**).” In particular, the Application requested that the Commission enter its Order:

(E) Authorizing Aquila to sell and convey to Peculiar all real estate, facilities, equipment and installations necessary to install, construct, control, manage and maintain the Project;

(F) Authorizing Aquila to lease the Project from Peculiar and operate the Project;

(G) Authorizing Aquila to cause the Project to be pledged to the Trustee under the terms of the Indenture as security for the holders of the Bonds;

(H) Authorizing Aquila to enter into and perform in accordance with the terms of the Agreement;

(I) Authorizing Aquila to enter into and perform in accordance with the terms of the Lease;

(J) Authorizing Aquila to enter into and perform in accordance with the terms of the Indenture;

(K) Authorizing Aquila to enter into and perform in accordance with any and all other necessary agreements and instruments under the Act;

(L) Authorizing Aquila to do any and all other things incidental, necessary or appropriate to the performance of any and all acts specifically to be authorized in such order or orders.

2. On June 3, 2005, Aquila filed its First Amended Application which amended its original Application by withdrawing its request for a finding that the Project was the least cost option for additional power generation. Aquila then stated that “in all other respects, the Application, as filed on December 12, 2004, is restated, ratified, and confirmed”, including the relief set forth in Paragraph 1 above.

3. On September 21, 2005, the Commission conducted a hearing in the above-entitled cause.

4. Subsequent to the hearing, Public Counsel discovered that the actions for which Aquila was seeking Commission approval, as set forth in subparagraphs (E) through (L) of Paragraph 1 above, had already been undertaken by Aquila on December 30, 2004, shortly after the filing of its original Application in this matter on December 6, 2004, and approximately five months prior to the filing of Aquila's First Amended Application on June 3, 2005.

5. Based upon this newly discovered information, Public Counsel filed its Motion to Stay further action in this matter on September 22, 2005 in order to allow the parties to further investigate this newly discovered information.

6. On September 23, 2005, the Staff of the Missouri Public Service Commission (**Staff**) filed its Response to Public Counsel's Motion to Stay in which the Staff agreed with Public Counsel and asked the Commission to temporarily suspend its deliberations in this matter.

7. On September 28, 2005, Aquila filed its Response to Public Counsel's Motion by stating that "given the apparent confusion, it may be advantageous to grant Public Counsel's request".

8. Perhaps in an effort to clarify the "apparent confusion", Aquila, in Paragraph 6 of its Response, stated that "Execution copies of documents involved with these transactions were supplied to Public Counsel in January of 2005 in response to Data Request OPC-2, OPC-3 and OPC-4". The documents provided to Public Counsel were, in fact, **unsigned** "execution copies".

9. Public Counsel readily submits that, in a complicated financial transaction such as the one proposed by Aquila, it is common practice to have the financing documents prepared in advance, particularly when the transactions need to be approved in advance by a governmental body, such as the Commission. However, it is ludicrous for Aquila to assert that Public Counsel was made aware that the Chapter 100 financing was closed on December 30, 2004, by referring to unsigned copies of the documents supplied to Public Counsel in late January of 2005. If Aquila truly desired to make Public Counsel aware that the transaction had been completed, Aquila could have supplied Public Counsel with copies of the existing signed documents in response to its' data requests.

10. In its Response, Aquila further asserts as follows:

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. 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 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 the City. (Tr. Vol. 3, p. 13)<sup>1</sup>

11. Based upon the foregoing, Aquila concludes in its Response the following:

**“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.”** (emphasis added)

12. Public Counsel asserts that, rather than relying upon the inaccurate comments of the Mayor of Peculiar in a public hearing held in another case, 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 regarding the Chapter 100 financing.

13. As set forth in Public Counsel’s Motion to Stay, 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

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<sup>1</sup> The bond financing for the Project was in a principal amount not to exceed \$140 million, rather than \$130 million as stated by the Mayor of Peculiar and was closed on December 30, 2004, rather than December 28, 2004.

consolidation made other than in accordance with the order of the commission authorizing same **shall be void**. ... (emphasis added)

14. Rather than informing the Commission that the bond financing and other related transactions were closed on December 30, 2004, it clearly appears from the existing record that Aquila has intentionally and blatantly misrepresented the status of these transactions.

15. For example, Aquila's original Application and the First Amended Application, filed June 3, 2005, both asked the Commission for prospective action in approving the transactions set forth in Paragraph 1 of this Response.

16. In its Suggestions in Opposition to Application of Cass County, Missouri to Intervene, filed January 7, 2005, Aquila stated that "the County is not party to any of the Chapter 100 financing documents that are being submitted to the Commission for its review and approval". In its Reply to the Response of Cass County to Aquila's Suggestions in Opposition to Application of Cass County, Missouri to Intervene, filed January 24, 2005, Aquila states that one of the principal topics presented in this case is "whether Aquila will be permitted to enter into a number of transactions the collective purpose of which is to fund the construction of the South Harbor Station with low cost revenue bonds".

17. On January 13, 2005 Aquila prefiled the direct testimony of Dennis R. Williams in support of its Application subscribed and sworn to by him on January 3, 2005. As the following excerpt from that testimony shows, Aquila's witness testified as if the Chapter 100 RSMo transaction was prospective, i.e., that it had not yet occurred (emphasis added):

Q. How, generally, **will** the Project transaction be structured?

A. **In the event** the Bonds are issued, **it is expected** that the Project **will be** conveyed to and owned by Peculiar and leased back to Aquila, an arrangement that **will** exempt the Project from property taxes levied by any applicable taxing authority for as long as Peculiar owns the Project. The Lease payments made by Aquila to Peculiar shall be equal to and timed to coincide with the due date, and pledged to pay, all applicable principal and interest as it shall become due and payable with respect to the Bonds. A copy of the summary term sheet is attached to my testimony as Schedule DRW-4.

Q. How **will** this structure come about?

A. Aquila **first will cause** AE to transfer the CTs to Aquila Networks-MPS. **At the conclusion of construction of the new power station**, the Project **will be transferred** to Peculiar. **Concurrently with the issuance of the Bonds**, Peculiar **will lease** the Project back to the Company pursuant to a lease agreement between Peculiar and Aquila (the "Lease"). The term of the Lease **will be** the same as the final maturity of the Bonds and **will be** a net lease with the applicant being responsible for rental payments in an amount sufficient to pay the debt service on the Bonds. Aquila **will be** responsible to maintain, ensure and pay any taxes related to the Project. During the term of the Lease, Aquila **will be** responsible to operate and control the Project and have the right, at its own expense, to make certain additions, modifications or improvements thereto. A copy of the Lease is attached to my testimony as Schedule DRW-5.

Q. **Will** the Project assets be pledged or encumbered in connection with the financing structure you have described?

A. Yes. The Lease also provides that the Project **will be** pledged to a trustee (the "Trustee") under the terms of an Indenture of Trust (the "Indenture") and a Deed of Trust and Security Agreement ("Security Agreement") as security for the benefit of the holders of the Bonds. Copies of the Indenture and Security Agreement are attached to my testimony, respectively, as Schedule DRW-6 and Schedule DRW-7.

(Exhibit 1, page 7, line 18 to page 9, line 3).

18. In the Surrebuttal Testimony of Dennis R. Williams, which was prepared and filed on June 27, 2005, Mr. Williams responded to the suggestion of Public Counsel's witness Ted Robertson that the requests enumerated in (G) through (L) of Aquila's Application are "...completely unwarranted and unsupported ..." by providing the following Surrebuttal Testimony:

Q. What are requests G through L?

A. They are requests for necessary authorizations to Aquila as follows:

- G. Authorizing Aquila to cause the Project to be pledged to the Trustee under the terms of the Indenture as security for the holders of the Bonds;
- H. Authorizing Aquila to enter into and perform in accordance with the terms of the Agreement;
- I. Authorizing Aquila to enter into and perform in accordance with the terms of the Lease;
- J. Authorizing Aquila to enter into and perform in accordance with the terms of the Indenture;
- K. Authorizing Aquila to enter into and perform in accordance with any and all other necessary agreements and instruments under the Act;
- L. Authorizing Aquila to do any and all other things incidental, necessary or appropriate to the performance of any and all acts specifically to be authorized in such order or orders.
- Q. To what do these requests relate?
- A. Except for Request L, which I understand to be a broad provision to Aquila of the legal authority to carry out whatever it is ordered to do in this docket, including performance of Chapter 100 Bond Agreements, the other requests are all specifically related to the performance of agreements associated with the issuance of the Chapter 100 Bonds. **Without approval of these requests, the Chapter 100 financing mechanism will not take place.** (emphasis added) (Exhibit 3, page 11, line 7 to page 12, line 6).

19. It is abundantly clear from the few examples set forth above that Aquila has throughout this proceeding misled and deceived this Commission, the Staff and Public Counsel as to the status of the bond financing and related transactions. Since Aquila has already performed the acts listed in subparagraphs (E) through (L) of Paragraph 1 of this Response without first having secured Commission authorization to do so, these transactions are void under the above provisions of Section 393.190.1 RSMo 2000.<sup>2</sup> Furthermore, it is Public Counsel's opinion that the Commission is without authority to now ratify those transactions.

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<sup>2</sup> In a slip opinion handed down on October 4, 2005, the Court of Appeals for the Western District of Missouri declared that the revenue bonds are void due to the fact that the revenue bonds were issued without a majority vote of the qualified voters.

20. 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. Accordingly, the Commission should immediately pursue all civil and criminal remedies available to it, including those set forth in Sections 386.560 through 386.600 RSMo 2000, to punish Aquila and all of its employees and agents who participated in this deception as a warning to all other public utilities under this Commission's jurisdiction that this Commission will not tolerate this or any such similar behavior.

**WHEREFORE**, Public Counsel respectfully requests that the Commission issue its Order declaring each and every transaction or action entered into or performed by Aquila as enumerated in Paragraph 1 of this Response to be void as a matter of law; that the Commission direct its General Counsel to immediately commence and prosecute to final judgment in the name of the State of Missouri all civil and criminal penalties permitted by law against Aquila and each and every one of its employees and agents who participated in the perpetration of these illegal acts 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

**/s/ Mark D. Wheatley**

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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 14<sup>th</sup> day of October 2005:

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**/s/ Mark D. Wheatley**

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