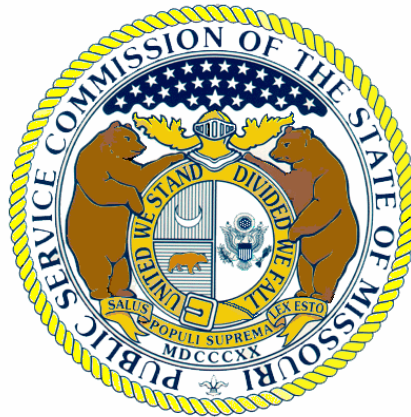


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

REPORT AND ORDER

Issue Date: December 19, 2005

Effective Date: December 30, 2005

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for Authority to Acquire, Sell and Lease Back)
Three Natural Gas-Fired Combustion Turbine)
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Peculiar, Missouri)

Case No. EO-2005-0156

APPEARANCES

Paul Boudreau, Esq., Brydon, Swearengen, and England, 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102, for Aquila, Inc.

Mark Comley, Esq., Newman, Comley and Ruth, P.O. Box 537, Jefferson City, Missouri 65102, for Cass County, Missouri.

Mark Wheatley, Esq., Senior Public Counsel, 200 Madison Street, Suite 650, P.O. Box 2230, Jefferson City, Missouri, 65102, for the Office of the Public Counsel and the public.

Nathan Williams, Esq., Associate General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Ronald D. Pridgin

REPORT AND ORDER

Procedural History

On December 6, 2004, Aquila filed its Application with the Missouri Public Service Commission under Section 393.190 RSMo and Commission Rules 4 CSR 240-2.060, 3.110. and 20.015. Aquila asked the Commission for permission to enter into Chapter 100 financing with the City of Peculiar, whereby Aquila would sell and lease back three

combustion turbines to the city. Also, Aquila asked the Commission to value those turbines and the associated equipment and to determine that Aquila's acquisition of the turbines from an unregulated affiliate did not result in a financial advantage to the unregulated affiliate. Aquila later amended its application, and withdrew a request that the Commission find that Aquila's acquisition of the turbines from its unregulated affiliate was the least cost option.

On September 1, 2005, Aquila, Staff, and the Office of the Public Counsel (OPC) filed a Stipulation and Agreement. The Agreement purported to resolve all issues among the signatory parties. The Agreement is among less than all parties to this case. But Cass County and the City of Peculiar (the non-signatory parties) stated that they neither support nor oppose the Agreement, and do not request a hearing. The Commission held a hearing on the stipulation on September 21.

After the hearing, OPC filed a Motion for Stay. OPC explained that Aquila had already sold and leased back the equipment that was the subject matter of Aquila's application. OPC later asked the Commission to declare the transaction void, and to order its General Counsel to pursue civil and criminal penalties against Aquila. The Commission held a hearing on OPC's request on December 5.

Discussion

In its Order Setting Hearing issued on November 9, the Commission listed its concerns as follows:

Should the Commission approve the Stipulation and Agreement?

Aquila, Staff and OPC filed a stipulation. OPC now asks the Commission to reject the stipulation on the grounds that Aquila misled and deceived the signatories to the

stipulation and the Commission.¹ The stipulation states that it shall be terminated in the event that, among other things, the Commission finds that Aquila misrepresented facts relevant to the stipulation.² That stipulation also states that if the Commission does not approve the stipulation in total, it shall be void.³

Should the Commission approve the Application?

If the Commission does not approve the stipulation, then the Commission must still determine whether to approve Aquila's initial application. The application asks the Commission to allow Aquila to enter into Chapter 100 financing with the City of Peculiar, whereby Aquila would sell and lease back three combustion turbines to the city. As discussed below, the Commission finds that Aquila has already sold and leased the assets back from the City of Peculiar, and that the Commission will not disturb this financing mechanism.

The Application also asks the Commission to determine that Aquila's acquisition of the turbines from an unregulated affiliate did not result in a financial advantage to the unregulated affiliate. The parties agreed upon a value of the assets in question. But the stipulation states that if the Commission does not approve the stipulation in total, then the stipulation is void. Therefore, the Commission and the signatories are not bound by the previously agreed-upon value.

Is Aquila's transaction or purported transaction with the City of Peculiar void as a matter of law?

¹ See Public Counsel's Response to Order Directing Filing, ¶ 19, 20 (filed October 14, 2005).

² See Stipulation and Agreement, ¶ V.C (filed September 1, 2005).

³ See *id.*, ¶ V.E.

The Office of the Public Counsel asserts that Aquila's December 30, 2004 transaction with the City of Peculiar violates Section 393.190.1, RSMo.⁴ That statute states that an electrical corporation shall not sell a part of its franchise, works or system necessary or useful in the performance of its duties to the public without first getting Commission authority to do so. Aquila states that the sale and lease-back agreement with the City of Peculiar is not the type of transaction Section 393.190 covers because Aquila maintains control of the assets.⁵ Staff believes that the transaction was void, yet does not object to the Commission approving a new, prospective Chapter 100 financing.⁶

Did Aquila inform Staff and OPC of its transaction with the City of Peculiar, and if so, when?

The Office of the Public Counsel asserts that it did not know that Aquila had already sold and leased back the assets in question until after the September 21, 2005 hearing on the Stipulation and Agreement.⁷ OPC states that Aquila had the duty to be more forthright in its pleadings and to not rely upon testimony offered in another case for its notice to the parties and the Commission.⁸ Staff states that Aquila failed to effectively communicate the transaction to Staff.⁹ Aquila argues that it had informed OPC and Staff of the transaction in January 2005 and again in March 2005.¹⁰

⁴ See *infra* at n. 1, at page 8.

⁵ See Aquila's Response to Order Directing Filing, ¶ 10 (filed October 14, 2005).

⁶ See Staff's Response to Order Directing Filing, ¶ 8-9; Tr. 144, 343-344.

⁷ See *infra* at n. 1, ¶ 4.

⁸ See *id.* at ¶ 9-12.

⁹ See *infra* at n. 6, ¶ 5.

¹⁰ See Reply to Responses of Public Counsel and Staff, ¶ 6-9 (filed October 24, 2005).

What effect, if any, do Aquila's pending cases in the Court of Appeals, Case Nos. WD64985 and WD65000, have on this case?¹¹

Though the order is under appeal at the Missouri Court of Appeals, the Circuit Court of Cass County has enjoined Aquila from building the South Harper facility and Peculiar Substation on which the turbines and associated equipment in question are to be placed.¹² Furthermore, though the order is not final, the Missouri Court of Appeals has ruled that the City of Peculiar's issuing revenue bonds to fund the purchase of the turbines and associated equipment was void due to the city's failure to put the issue to a vote of its citizens.¹³

Findings of Fact

1. Aquila is a public utility engaged in providing electric service in Missouri, and is an electrical corporation subject to the jurisdiction of the Commission. Aquila is a Delaware corporation with its principal place of business in Kansas City, Missouri.¹⁴

2. Aquila, the Staff of the Commission, and the Office of the Public Counsel entered into a Stipulation and Agreement on September 1, 2005. Though parties to the case, the City of Peculiar and Cass County neither joined in, nor objected to, the Stipulation

¹¹ As Aquila's counsel correctly pointed out at the December 5 hearing, Aquila is not a party to Case No. WD65000; the City of Peculiar is. The City of Peculiar filed an Application for Transfer with the Supreme Court of Missouri on December 7, 2005 in Case No. SC87302. The Supreme Court ordered StopAquila.org to file Suggestions in Opposition no later than December 19.

¹² See *Stopaquila.org v. Aquila*, Circuit Court of Cass County Case No. CV104-1443CC (January 11, 2005), *appeal pending*, WD64985.

¹³ See *Stopaquila.org v. City of Peculiar*, WD65000 (opinion issued October 4, 2005), *app. for reh'g and transfer denied* (November 22, 2005), *app. for transfer pending*, SC87302.

¹⁴ See Application, ¶ 2 (filed December 6, 2004).

and Agreement.¹⁵ The Stipulation and Agreement is thus non-unanimous. The Office of the Public Counsel now wishes to withdraw from that Stipulation and Agreement.¹⁶

3. The parties filed testimony regarding the value of the turbines. However, no witnesses testified about their value at the September 21, 2005 hearing or the December 5, 2005 hearing. Without cross-examination of the witnesses, the Commission does not have adequate evidence to rule on the portion of the Application asking for a value of the turbines.

4. Aquila sold and leased back three combustion turbines to the City of Peculiar on December 30, 2004.¹⁷ At that time, Aquila was not using those turbines to generate electricity.¹⁸

5. Aquila began generating electricity at the South Harper Station on June 30, 2005.¹⁹

Conclusions of Law

1. Aquila is an "electrical corporation" and a "public utility" within the intendments of the Missouri Public Service Commission Law.²⁰

2. The Missouri Public Service Commission has jurisdiction over the services, activities and rates of Aquila.²¹

¹⁵ See Cass County's Notice of Position on Stipulation and Agreement (filed September 8, 2005); City of Peculiar's Notice of Position on Stipulation and Agreement (filed September 16, 2005).

¹⁶ Tr. 104, 240, 258-59.

¹⁷ See Ex. 1 to September 21 hearing, Schedule DRW-5; Tr. 123-124; 132-133; 159; 166; 220.

¹⁸ Tr. 125, 214

¹⁹ Tr. 223.

²⁰ Section 386.020, (15) and (42), RSMo Supp. 2001. Section 386.010 states that Chapter 386 shall be known as the "Missouri Public Service Commission Law."

²¹ Sections 386.020(42) and 386.250(1), RSMo Supp. 2005.

3. The Commission is authorized to hear and determine complaints made by "any corporation or person" concerning "any act or thing done or omitted to be done by any corporation, person or public utility."²² The Commission therefore has jurisdiction to hear the Office of the Public Counsel's request to reject the September 1, 2005 Stipulation and Agreement due to Aquila's alleged malfeasance.

4. An electrical corporation's sale of any part of its franchise, works or system necessary or useful in the performance of its duties to the public is void without having first obtained an order from the Commission authorizing the sale.²³ Because the turbines and associated equipment were not providing electricity to Missourians on December 30, 2004, those assets were not necessary or useful at that time. Therefore, Section 393.190 does not apply to this transaction.

5. Aquila's December 30, 2004 sale and lease-back of the facilities was not the type of transaction that Section 393.190 was meant to govern because Aquila maintained complete control over the assets.²⁴ A separate issue, which the Commission will address in Aquila's pending rate cases, is who will pay for the cost of South Harper. An asset must be used and useful before an electrical corporation can charge for operating or financing it.²⁵

²² Section 386.390.1, RSMo 2000.

²³ Section 393.190.1 RSMo 2000.

²⁴ See *In re Arkansas Power and Light*, Commission Case No. EO-81-216 (January 23, 1981)(in which the Commission held that a similar transaction was a financing transaction, and did not come within the purview of Section 393.190.

²⁵ Section 393.135 RSMo 2000.

6. Because Aquila did not need Commission approval before the transaction, the Office of the Public Counsel's requests for civil and criminal penalties against Aquila are not properly before it.

7. A Missouri electrical corporation must seek Commission approval to issue debt;²⁶ Aquila is not a Missouri electrical corporation. A Missouri electrical corporation needs Commission approval before issuing debt that is based upon assets that are necessary or useful to meet the public needs.

IT IS THEREFORE ORDERED:

1. That the portion of the Application that Aquila, Inc., filed on December 6, 2004, asking for approval of its Chapter 100 financing arrangement with the City of Peculiar is dismissed.

2. That the Stipulation and Agreement that Aquila, Inc., the Staff of the Commission and the Office of the Public Counsel filed on September 1, 2005, is rejected.

3. That the portion of the Application asking the Commission to assign a value to the turbines now located at the South Harper Station is denied due to a lack of competent and substantial evidence.

4. That nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.

²⁶ Section 393.200 RSMo 2000.

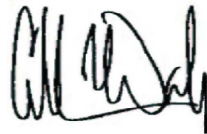
5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.

6. That the Office of the Public Counsel's requests for relief, and all other pending motions, are denied.

7. That this Report and Order shall become effective on December 30, 2005.

8. That this case may be closed on December 31, 2005.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 19th day of December, 2005.