

**BEFORE THE PUBLIC SERVICE COMMISSION  
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 near the City of Peculiar, ) Missouri )	Case No. EO-2005-0156
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**Staff's Response to Order Directing Filing**

COMES NOW the Staff of the Missouri Public Service Commission and for its response to the Commission's Order Directing Filing issued September 29, 2005 states:

1. In its Order Directed Filing the Commission ordered the Staff to file a pleading by October 14, 2005 explaining how the Staff would like this case to proceed.

2. In its application, as amended, Aquila requests both valuation of certain combustion turbines and Commission authorization to enter into transactions to accomplish a Chapter 100 financing arrangement with the City of Peculiar.

3. Aquila, the Staff and the Office of the Public Counsel entered into a stipulation and agreement filed September 1, 2005 that addressed to their satisfaction all issues in the case.

4. At the time it entered into the Stipulation and Agreement the Staff was unaware Aquila on December 30, 2004, had participated in a closing of a Chapter 100 financing arrangement with the City of Peculiar on the same terms as the arrangement it presented to the Commission in this case.

5. The Staff is aware of no representations it has made to Aquila that Aquila could reasonably have interpreted to lead it to believe that Aquila could lawfully close the Chapter 100 financing arrangement without first obtaining Commission authorization to do so. The Staff has

begun an informal inquiry directed to ascertaining facts and circumstances surrounding Aquila's decision to close the Chapter 100 financing arrangement and failure to effectively communicate to the Staff that the closing had taken place in December 2004. If the Commission is inclined, it may wish to pursue that inquiry in the context of this case. If it elects to do so, the Staff suggests the Commission should order Aquila to produce at least Dennis R. Williams, H. Davis Rooney, Les Parrette, Beth Armstrong and Randy Miller to answer questions directed to the closing of the Chapter 100 financing arrangement and communication of the fact of that closing to the parties and the Commission in this case.

6. On October 4, 2005 the Missouri Western District Court of Appeals issued a decision in *StopAquila.Org v. City of Peculiar, Missouri*, Case No. WD65000, in which it held that Article VI, section 27 of the Missouri Constitution required the City of Peculiar to obtain voter approval to issue the bonds in the Chapter 100 financing arrangement. The Court further held that because the city had not obtained that voter approval, the bonds it issued on or about December 31, 2004 were void.

7. As the Staff noted in its suggestions in support of the Stipulation and Agreement, section 393.190.1 RSMo 2000 provides:

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 or 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. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges

contained in the grant of any franchise or permit, or to waive any forfeiture. Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any gas corporation, electrical corporation, water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

8. It is the opinion of the Staff that the transactions that Aquila entered into with the City of Peculiar on or about December 30, 2004 to accomplish a Chapter 100 financing involved the sale, assignment, lease, transfer, mortgage or other disposal of or encumbrance of a part of Aquila's "franchise, works or system, necessary or useful in the performance of its duties to the public." Therefore, Staff believes that pursuant to section 393.190.1 RSMo 2000 those transactions were void; in particular, but not limited to, Aquila's delivery of a special warranty deed of realty to the City of Peculiar. Further, in Staff's view section 393.100 provides that the Commission is without authority to ratify those transactions retroactively.

9. It is also the Staff's opinion, as expressed in its suggestions filed in support of the Stipulation and Agreement, that it would not be detrimental to the public interest for Aquila to enter into the Chapter 100 financing arrangement with the City of Peculiar as proposed in its application.

10. The revelation of Aquila's involvement in the closing of a Chapter 100 financing with the City of Peculiar in December 2004 has no effect on the Staff's agreement to the appropriate value for the three combustion turbines for regulatory purposes addressed in the Stipulation and Agreement filed in this case September 1, 2005.

**WHEREFORE**, the Staff respectfully suggests to the Commission that it issue an order approving the Stipulation and Agreement filed September 1, 2005 and ordering the parties to comply with its terms.

Respectfully submitted,

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/s/ Nathan Williams

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14th day of October 2005.

/s/ Nathan Williams