

**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)	Case No. EO-2005-0156
Installed and Operated near the City of Peculiar,)	
Missouri)	

Staff's Reply to Aquila, Inc.'s Response to Staff's Motion in Limine

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and for its reply to Aquila, Inc.'s Response to the Staff's Motion In Limine states:

1. On June 23, 2005 the Staff filed it Motion In Limine in which it raised as an issue the admissibility at hearing of a schedule—Schedule DRW-1(HC)—attached to the prefled direct testimony of Aquila witness Dennis R. Williams. The Staff pointed out in its motion that the schedule showed on its face to be a report prepared by R.W. Beck, Inc., not Aquila; that Dennis R. Williams is an employee of Aquila, Inc., not R. W. Beck, Inc.; that Commission Rule 4 CSR 240-130(7) requires that Aquila's prefled "direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief"; and that the pre-filed direct testimony of Aquila witness Dennis R. Williams indicated Aquila received a report from R. W. Beck, Inc., but that nothing in that testimony indicated Dennis R. Williams had personal knowledge of the preparation of the report and that the report is comprised of statements made by R.W. Beck, Inc., including statements regarding valuation of the combustion turbines, where no employee of R.W. Beck, Inc. filed direct testimony upon which he or she can be cross-examined.

2. The Staff raised two issues bearing on the admissibility of the schedule. First, the Staff pointed out that Aquila had failed to authenticate the report. Second, the Staff pointed out that it objected to the schedule on the basis that it contains hearsay statements by R.W. Beck.

3. The Staff further asserted that it and the other parties in the case would be prejudiced if Aquila were permitted to support its valuation of the combustion turbines with surrebuttal testimony since the parties would be denied the opportunity to adduce evidence from their witnesses in response to Aquila's surrebuttal testimony.

4. In its response Aquila asserts that "the claimed evidentiary deficiency has been cured by the filing on June 27, 2005 of the surrebuttal testimony of Neal D. Suess, P.E., a principal and senior director with R. W. Beck, Inc. Mr. Suess was the project manager for, and principal author of, R. W. Beck's appraisal. Mr. Suess will be made available at the time of the evidentiary hearing on July 13 and 14, 2005 to answer questions about the appraisal methodologies employed and the conclusions reached by R. W. Beck."

5. The Staff respectfully disagrees. The surrebuttal testimony of Neal D. Suess, P.E. will only be admissible to respond to the testimony of those parties who filed rebuttal testimony responsive to Aquila's direct testimony, not to support Aquila's direct testimony. (Commission Rules 4 CSR 240-2.130(7)(D) and 4 CSR 240-2.130(8), both quoted below.) Nothing in the Commission's Rules requires that prefiled testimony be offered at hearing. If the rebuttal testimony to which the surrebuttal testimony of Neal D. Suess, P.E. is responding is not offered as evidence, then the surrebuttal testimony of Neal D. Suess, P.E. is not admissible.

6. Commission Rule 4 CSR 240-2.130(7) provides:

For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows:

(A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief;

(B) Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case. A party need not file direct testimony to be able to file rebuttal testimony;

(C) Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case; and

(D) **Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony.** (Emphasis added.)

Commission Rule 4 CSR 240-2.130(8) provides:

No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the commission. A party shall not be precluded from having a reasonable opportunity to address matters not previously disclosed which arise at the hearing. This provision does not forbid the filing of supplemental direct testimony for the purpose of replacing projected financial information with actual results. (Emphasis added.)

7. As the Staff stated in its Motion In Limine, Aquila, Inc. is obligated to put on its case-in-chief in its direct testimony.

8. In the recent consolidated case *In the Matter of the Request of Aquila, Inc., d/b/a Aquila Networks-L&P and Aquila Networks-MPS, to Implement a General Rate Increase in Electric Rates*, Case Nos. ER-2004-0034 and HR-2004-0024, in the face of objections to schedules offered by the Missouri Department of Natural Resources based on hearsay, the Commission excluded the schedules. A copy of the relevant transcript pages from that case are attached. The posture in Aquila's case-in-chief here is no different than the situation that existed there.

9. Under the procedure set out by the Commission's Rules, Schedule DRW-1(HC) is not admissible over a proper objection, and Aquila should not be permitted to bootstrap the schedule into its direct case by laying a foundation to admit the schedule in its surrebuttal

testimony—testimony that is to be admitted to respond to the rebuttal testimony of other parties, not bolster Aquila’s case-in-chief.

WHEREFORE, having refuted Aquila, Inc.’s response, the Staff respectfully moves the Commission to enter an order excluding Schedule DRW-1(HC) of the direct testimony of Aquila witness Dennis R. Williams from evidence in this case on the bases that said schedule is inadmissible as evidence in this case over the Staff’s objections that Aquila has not authenticated the schedule and that the schedule is hearsay.

Respectfully submitted,

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I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 6th day of July 2005.

/s/ Nathan Williams

MS. WOODS: And with that, Department of
20 Natural Resources would move the entry into the evidence of
21 Exhibit 1077 and 1078 and tender Ms. Randolph for
22 cross-examination.

23 MR. CONRAD: Your Honor, before you rule on
24 that, I need to get clarification. There were a number of
25 schedules that were attached or were filed along with that.

1 Is that encompassed by the offer?

2 MS. WOODS: Yes.

3 MR. CONRAD: I will have an objection then and
4 we'll probably need to work through that. We can do it in
5 the form of voir dire as you prefer.

6 JUDGE JONES: That will be fine.

7 VOIR DIRE EXAMINATION BY MR. CONRAD:

8 Q. Ms. Randolph, I'm looking at Schedule 2 that
9 was filed. That appears to be a document, Standard
10 Procedures for Meteorological Measurements at a Potential
11 Wind Turbine Site. Did you prepare that report?

12 A. I did not prepare that report.

13 Q. Did you participate or supervise in its
14 preparation?

15 A. May I see it, please?

16 Q. You don't have your schedule?

17 A. I don't have the schedules.

18 Q. Well, ma'am, I only have it on my computer
19 here.

20 A. Okay.

21 Q. Okay. The question was whether you had
22 participated in or supervised in any manner the production
23 of that report?

24 A. We did not.

25 Q. If you would, look at -- I believe it's going

1 to be Schedule 4, which purports to be a report prepared for
2 DNR but by someone named Roger D. Colton. You are not, if I
3 recall, Roger D. Colton; is that correct?

4 A. That is correct.

5 Q. Did you prepare this report?

6 A. We engaged Mr. Colton to prepare the report on
7 our behalf.

8 Q. Did you prepare this report?

9 A. I personally did not prepare the report.

10 Q. Did you personally participate in its
11 preparation?

12 A. No.

13 Q. Next item is Schedule 5, which purports to be
14 something by Fisher, Sheehan and Colton. I really can't
15 tell what it is. It is simply marked -- appears maybe to be
16 part of a website printout because it makes reference to,
17 Simply click on the state. Did you prepare that report?

18 A. No, I did not.

19 Q. Did you participate or in any way supervise
20 its production?

21 A. No.

22 Q. The next is Schedule 6, which is divided into
23 two parts. Appears to be something from the World Wildlife
24 Fund. At least I recognize that logo. Utility Deregulation
25 a Bust. Did you participate in preparing that report?

1 A. I did not.

2 Q. And you did not prepare that report?

3 A. That's correct.

4 Q. And does it have two parts, as I've described?

5 A. Yes, it does.

6 Q. Okay. Let's look at Schedule 7, which appears

7 to be from the Lawrence Berkeley Laboratory and appears to

8 be a report authored by J. Eto, E. Vine, L. Shown,

9 R. Sonnenblick and C. Payne. You're not any of those

10 persons?

11 A. Correct.

12 Q. Did you participate in the production of that

13 report?

14 A. No.

15 Q. In any way supervise in its preparation?

16 A. No.

17 Q. Schedule 8 is a final report of the Missouri

18 Policy Task -- Missouri Energy Policy Task Force. Did you

19 in any way participate in that report?

20 A. Yes, I did.

21 Q. If you would, turn to the end of that report,

22 Appendix J. Is your name listed there as a member of the

23 task force?

24 A. No, it is not.

25 Q. And that is whom the report is from; is that

1 correct?

2 A. The report is from the task force.

3 Q. It is from the people listed on Appendix J?

4 A. These are the members of the actual task
5 force, yes.

6 Q. I'm looking at Schedule 9. This is a report
7 to the Missouri Legislature EIERA, which I'm not sure what
8 that is. Did you author that report?

9 A. No, I did not.

10 Q. Did you participate or in any way supervise in
11 its preparation?

12 A. No.

13 Q. And if I recall, that has three parts, am I
14 correct, to Schedule 9? They're subdivided.

15 A. I'm not sure what you mean when you say parts
16 of this one.

17 Q. Well, as it was filed with the Commission, it
18 was divided into three parts, parts one, parts two and parts
19 three, creatively named, and it's Schedule 9 in all of them.
20 So I'm presuming that altogether they constitute the
21 Schedule 9?

22 A. Yes. That is correct.

23 Q. Okay. Let's look at Schedule 10. And that
24 purports to be a report from the Oak Ridge National
25 Laboratory by a Linda Berry, Marilyn Brown and Laurence

1 Kinney. You're not any of those persons, I take it?

2 A. Correct.

3 Q. Okay. Did you participate in the preparation
4 of that report?

5 A. No, I did not.

6 Q. Did you in any way supervise in its
7 preparation?

8 A. No.

9 Q. Schedule 11, also from Oak Ridge National
10 Laboratory, Metaevaluation of National Weatherization
11 Assistance from Marvin -- Martin rather Schweitzer and a
12 Linda Berry. Did you participate in any way or supervise
13 the production of that report, ma'am?

14 A. No.

15 Q. I'm now at 12. Again, I can't really tell,
16 ma'am, where this is from, but at the top of it,
17 BTS: Weatherization Assistance Program. Appears to be
18 something again from Oak Ridge National Laboratory. Did you
19 participate in the preparation of that document?

20 A. No, I did not.

21 Q. You're not its author?

22 A. No.

23 Q. Schedule 13, Lawrence Berkeley Laboratory, it
24 looks like the same names, Eto, Kito, Shown and Sonnenblick,
25 which we've established you're not. Did you participate in

1 any way in the preparation of that report?

2 A. No, I did not.

3 Q. And you're obviously not its author; is that
4 correct?

5 A. Correct.

6 Q. And finally, Schedule 14, which talks about
7 energy codes. Did you participate in that report --

8 A. No.

9 Q. -- in the preparation of that report?

10 A. No.

11 Q. You're not its author?

12 A. Correct.

13 MR. CONRAD: Well, to begin with, Judge, it
14 looks like Schedules 2, Schedules 4, 5, 6, parts one and
15 parts two, Schedule 7, parts one and part two, Schedules 8,
16 Schedules 9, parts one through three, Schedules 10, 11, 12,
17 13 and 14 I have an objection because they are complete and
18 utter hearsay.

19 JUDGE JONES: She did indicate she had some
20 participation at least in Schedule 8.

21 MR. CONRAD: And if that is -- well, we asked
22 about the nature of that participation. She was not a
23 member of the task force, she acknowledged that. So if it's
24 offered to say what the task force says, it's hearsay
25 because those people are not here and I can't cross-examine

1 them nor can I cross-examine the report.

2 JUDGE JONES: What participation did you have
3 in Schedule 8?

4 THE WITNESS: The participation consisted of
5 two kinds of activities. One was to represent a member of
6 the task force, which was my department director, on
7 opportunities when he could not attend. The second method
8 of participation was to provide research and staff work and
9 language for the task force's consideration.

10 JUDGE JONES: I'm not sure I followed you.
11 Did you help prepare or --

12 THE WITNESS: Yes.

13 JUDGE JONES: Why isn't your name included on
14 the list of those who included in the preparation?

15 THE WITNESS: I don't know that there is a
16 list of those who participated in preparation. The official
17 members of the task force are listed.

18 JUDGE JONES: Are there persons other than the
19 people listed on the task force who participated in making
20 that document?

21 THE WITNESS: There are a -- a few others,
22 yes.

23 JUDGE JONES: Ms. Woods, do these documents
24 fall under any exception to the hearsay rule?

25 MS. WOODS: Well, your Honor, Ms. Randolph has

1 been offered up as the Department's expert on the issues of
2 low-income weatherization, energy efficiency and wind
3 assessment.

4 I think there is a well-recognized exception
5 where experts may rely on hearsay and include it and base
6 their opinions upon that hearsay, which is, in fact, what
7 Ms. Randolph has done. Those specific schedules are all
8 referenced in and cited to in her testimony and form the
9 basis of that testimony and her opinions.

10 JUDGE JONES: Well, if she's using it to aid
11 in testimony, then it's not necessary that they be part of
12 the evidence, is it?

13 MS. WOODS: I think the specific citations to
14 those portions of those documents that appear in her
15 testimony are of benefit and, as I understood the rule,
16 should be included.

17 MR. CONRAD: Your Honor, if it's my turn, I
18 would point you to GS Technologies, Missouri Public Service
19 Commission, 116 S.W. 3d, 680 in which the court returned to
20 the Commission a decision in which it had erred in relying
21 on hearsay that had not been objected to, but also pointed
22 out that while an expert may rely on hearsay to support
23 their testimony, it does not follow from that that the
24 hearsay materials themselves are admissible. They can't be
25 cross-examined, the expert can.

1 JUDGE JONES: Ms. Woods, of what benefit are
2 all these schedules if what's necessary from them is
3 included in her testimony?

4 MS. WOODS: They form the foundation for her
5 testimony. There's specific citations in them to specific
6 portions of those documents. And they are included so that
7 the Commissioners and the Judge could confirm, in fact, that
8 those specific cited portions did say what Ms. Randolph
9 purported that they said.

10 I'd also like to point out on I believe it's
11 Schedule 8 on page -- well, it's Roman numeral -- small
12 Roman numeral six that Ms. Randolph is specifically named as
13 someone who has provided support for that schedule, which is
14 the final report of the Missouri Energy Policy Task Force.

15 JUDGE JONES: I don't believe it's necessary
16 for an expert to supply all the books and documents and
17 papers upon which they base their expert opinions. In that
18 case, I will exclude Schedules 2, 4, 5, 6, 7 -- with the
19 exception of 8 -- 9, 10, 12, 13 and 14. The objection is
20 sustained with the exception of Schedule 8.