

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
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6 TRANSCRIPT OF PROCEEDINGS
7 Hearing
8 October 23, 2003
9 Jefferson City, Missouri
10 Volume 9
11
12 In the Matter of the Application by)
13 Aquila, Inc. for Authority to Assign,) Case No. EF-2003-0465
14 Transfer, Mortgage or Encumber Its)
15 Franchise, Works or System)
16
17 RONALD D. PRIDGIN, Presiding,
18 REGULATORY LAW JUDGE.
19
20 CONNIE MURRAY,
21 STEVE GAW,
22 BRYAN FORBIS,
23 ROBERT M. CLAYTON, III,
24 COMMISSIONERS.
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1 P R O C E E D I N G S

2 JUDGE PRIDGIN: We are on the record. We are
3 back on the record to get oral argument in
4 Case EF-2003-0465. This is October 23rd, 2003, and it's
5 approximately 1:45 in the afternoon. We are reconvening
6 this afternoon for the Bench to ask questions of counsel on
7 legal matters only. We will not take any testimony but
8 simply have questions for the attorneys.

9 Mr. Boudreau, at this time if you would
10 approach the podium and be available for questions.

11 MR. MOLTENI: Judge Pridgin, may I --

12 JUDGE PRIDGIN: Mr. Molteni, yes, sir.

13 MR. MOLTENI: -- inquire of the Bench a point
14 of order?

15 JUDGE PRIDGIN: Yes, sir.

16 MR. MOLTENI: We've got some participants on
17 the phone call, who are, I believe, Mr. Parrette, Mr. Bacon
18 and Mr. Reitz.

19 JUDGE PRIDGIN: Mr. Reitz, yes. It might be
20 better to have them identify themselves up front in case
21 they participate.

22 MR. MOLTENI: I have one question. One, are
23 they licensed in Missouri, which I believe they are; and
24 two, what's their capacity in participating in this oral
25 argument? Because Mr. Parrette is a signatory to the term

1 loan deal. He's a fact witness in this case, and I think
2 those of us who are all lawyers in this room are going to
3 have ethical problems if Mr. Parrette is both a lawyer
4 answering questions as counsel for Aquila and a fact witness
5 in this case. And that might apply to Mr. Bacon and
6 Mr. Reitz also.

7 JUDGE PRIDGIN: So your fear is it might
8 conflict them out being able to participate as lawyers?

9 MR. MOLTENI: I think it does to participate
10 as lawyers. If they're witnesses in this case, then I think
11 they need to -- we need to notice them up for testimony so
12 we can prepare cross-examination for them.

13 JUDGE PRIDGIN: Mr. Boudreau, any response?

14 MR. BOUDREAU: Well, my response is as
15 follows: When we were asked -- when we were asked to come
16 back to address some issues, frankly, my partner Jim
17 Swearngen and I didn't understand or didn't have an idea of
18 what questions might be asked.

19 And I'll be perfectly frank that I don't think
20 either Jim or I are all that familiar with the
21 idiosyncrasies of the agreements themselves, how they work,
22 how they coordinate. And the only purpose of having
23 Mr. Parrette standing by is that he has a better
24 understanding of those issues.

25 Now, if the questions aren't going to go to

1 those things, there may be no need for them to -- for
2 Mr. Parrette and his colleagues to even be standing by. It
3 was simply to have a resource available to us about to
4 answer questions about how the agreement works, if that's
5 the area into which the Commission wants to inquire.

6 So some of it is dependent on the purpose of
7 this proceeding today.

8 JUDGE PRIDGIN: Mr. Molteni, did I understand
9 your possible concerns are with Mr. Parrette and with whom
10 else?

11 MR. MOLTENI: Mr. Bacon, Mr. Reitz. I don't
12 ascribe any bad intent of the part of Aquila.

13 JUDGE PRIDGIN: I understand.

14 MR. MOLTENI: I'm just concerned because I'm
15 licensed in this state, and we all have ethical reporting
16 duties under the canons of ethics, that we need to know what
17 capacity they're here in.

18 And then I do have a concern if they're here
19 in a witness capacity to talk about the loan. Mr. Parrette
20 certainly is a signatory to the loan. He's a witness.
21 Should have been noticed up for -- on the witness list to
22 testify if that's the case.

23 JUDGE PRIDGIN: I understand. Can we -- can
24 we sidestep that problem if Mr. Swearengen or Mr. Boudreau
25 are unable to answer the questions and they want to defer to

1 Mr. Moore or Mr. Drefke, if I've pronounced their names
2 correctly?

3 MR. PARRETTE: Yes, you have.

4 MR. MOLTENI: I don't know.

5 JUDGE PRIDGIN: I mean, what concerns would
6 you have about Mr. Moore or Mr. Drefke being available for
7 questions?

8 MR. MOLTENI: Are they fact witnesses? Were
9 they noticed up to testify? If they're fact witnesses about
10 the negotiations involved in this deal, I mean, I -- that's
11 the concern that I have.

12 JUDGE PRIDGIN: Mr. Boudreau?

13 MR. BOUDREAU: I certainly wouldn't want to be
14 involved in anything that's even perceived as being
15 unethical. The reason that I asked Mr. Parrette and his
16 colleagues to be available was simply with the anticipation
17 that there might be some questions, some technical questions
18 about how the agreements work.

19 But that raises some concerns for my
20 colleagues here, I certainly don't want to put them in an
21 awkward ethical professional position, and I don't --
22 perhaps with that concern having been expressed, perhaps
23 I'll just do my best here. It may not be particularly
24 adequate in terms of answering the questions, but I
25 certainly wouldn't want to put anybody in here in an

1 uncomfortable situation or any apprehension that somehow
2 they're involved in some sort of unethical activity.

3 So with that, perhaps it would be better to
4 play it conservative and just -- and just go this route. I
5 mean, I'll leave it up to the other parties. It's okay with
6 me.

7 JUDGE PRIDGIN: Anything else? Okay. Maybe
8 we don't have to cross that bridge. I mean, maybe
9 Mr. Boudreau and Mr. Swearngen are able to answer the
10 questions. And if not, I guess we'll stumble ahead once we
11 get to that bridge and see if we think we can let -- or if I
12 think I can let these attorneys comment.

13 MR. BOUDREAU: Well, noting the objection
14 that's been made, I probably will not ask Mr. Parrette or
15 his colleagues to address any particular issue. I certainly
16 do not want to put anybody here in an awkward position.
17 Simply a convenience, I thought, or it might be a
18 convenience to the parties and to the Commission, but I'm
19 perfectly comfortable moving ahead as is.

20 JUDGE PRIDGIN: Do we want them to linger on
21 the phone with us and listen in or do they want to go?
22 Doesn't matter to me.

23 MR. BOUDREAU: Can I have a moment to confer?

24 MR. FINNEGAN: Are they on the Internet?

25 JUDGE PRIDGIN: We're webcasting, yes.

1 MR. FINNEGAN: I mean are they?
2 JUDGE PRIDGIN: I don't know. Mr. Parrette,
3 are you able to follow online?
4 MR. PARRETTE: Yes, we are.
5 JUDGE PRIDGIN: Are you watching right now?
6 MR. PARRETTE: No, we're not. I'm sorry.
7 We're just on the phone.
8 JUDGE PRIDGIN: That's all right. You
9 certainly don't have to be, but Mr. Finnegan asked if they
10 were online. Is that your preference, Mr. Finnegan, that
11 they simply observe online?
12 MR. FINNEGAN: Yes, if they're online rather
13 than being on the phone. Besides, the State's paying for
14 that call.
15 MR. PARRETTE: We can certainly hang up and
16 track things online if that's the preference of everyone.
17 JUDGE PRIDGIN: Mr. Boudreau?
18 MR. BOUDREAU: Under the circumstances, I
19 guess I'm not going to insist that Mr. Parrette or any of
20 his colleagues or anybody else participate in this in any
21 active fashion. A reservation's been expressed. I
22 understand it. Like I said, I was just trying to facilitate
23 discussion depending on where the discussion went.
24 But with that, I might suggest that
25 Mr. Parrette and his colleagues are free to go. They can

1 drop off, and if they can't hear me, I'd like to communicate
2 my appreciation for making themselves available.

3 JUDGE PRIDGIN: Sure. And, Mr. Parrette, I
4 hope you heard. I think what we're going to do is ask you
5 to simply view this online if you wish.

6 MR. PARRETTE: Okay. That's fine. We'll drop
7 off now then. Thanks very much, gentlemen.

8 COMMISSIONER CLAYTON: Hold on. Wait a
9 minute. Wait a minute.

10 JUDGE PRIDGIN: Commissioner Clayton?

11 COMMISSIONER CLAYTON: Can I say something
12 here? I don't know if it's appropriate for me to chime in.
13 For those playing at home there in New York City, this is
14 Robert Clayton, a member of the Commission. I don't know
15 how this is supposed to play out either.

16 I'm hesitant, though, in cutting loose some
17 lawyers that may have some, not necessarily factual
18 testimony, but perhaps some insight on some legal issues I
19 know that I had questions about. I'm not saying that
20 you-all would not be able to answer those, but several times
21 during the discussion during this hearing there's some
22 things that I think are basic legal questions that I've had
23 on some process, on some procedure, and that's what I
24 thought today was about.

25 Now, if -- what I would recommend is that we

1 keep them on the line --

2 JUDGE PRIDGIN: That's fine.

3 COMMISSIONER CLAYTON: -- since we're not --

4 it's not on their dime, we keep them on the line, and if we

5 get to a point where any of the parties believe we have a

6 factual discussion or we get into a cross-examination

7 situation, then certainly a party could raise an objection

8 and we can deal with that at that point.

9 I'm hesitant letting them go until we kind of

10 go through some of the questions that I had, and if a party

11 thinks it's inappropriate, certainly raise an objection and

12 then you can rule, Judge.

13 JUDGE PRIDGIN: Mr. Parrette, I hope you're

14 still with us.

15 MR. PARRETTE: Yes, we are.

16 JUDGE PRIDGIN: Very good. It sounds like

17 you're staying with us after all.

18 MR. PARRETTE: That's fine.

19 JUDGE PRIDGIN: If you'll just listen in with

20 us, and then we may-- we may need to disconnect the call

21 later, but if you'll just listen in, we would appreciate it.

22 Thank you very much.

23 All right. Anything else before we open up

24 questions for Mr. Boudreau?

25 (No response.)

1 All right. Hearing nothing. I think it might
2 be better, instead of an opening statement, because I know,
3 Mr. Boudreau, you may be a little concerned exactly what
4 direction the Commission wanted to take, let me just open
5 this up for questions from the Bench, if that's all right.

6 MR. BOUDREAU: Please.

7 JUDGE PRIDGIN: Commissioner Simmons, do you
8 have any questions?

9 CHAIRMAN SIMMONS: I'll pass.

10 JUDGE PRIDGIN: Thank you. Commissioner
11 Murray?

12 COMMISSIONER MURRAY: I pass.

13 JUDGE PRIDGIN: Thank you. Commissioner Gaw?

14 COMMISSIONER GAW: Thank you.

15 I'd like to get some information on your
16 stance as to what would happen under the document that's in
17 evidence that we're supposed to be approving that includes
18 the collateralization of Missouri assets, what would happen
19 in the event of a default under the terms of that agreement?

20 And if you can -- if you can point out where
21 that is in the document, if you can tell me what I need to
22 look at, anything that would be of guidance there.

23 MR. BOUDREAU: I'm really not trying to be
24 evasive, but I'm not sure that I'm in a position to speak
25 authoritatively on that topic. I wasn't involved in the

1 drafting of the documents, and I would -- I would feel it
2 would be doing this Commission a disservice to hold myself
3 out as knowledgeable about how the documents and the
4 different clauses of the agreements work. And I apologize
5 for that.

6 COMMISSIONER GAW: And Commissioner Clayton
7 has pointed out to me that there is an Article 7, starts at
8 page 79, that refers to events of default. I'm not sure if
9 that answers the questions about what happens in the event
10 of a default, and I'm -- and in particular what I want to
11 know, and I'm -- if you can't answer that question today, it
12 can be handled in briefing.

13 I'm just -- it's a topic that I haven't heard
14 about up to this point in time, and I'd like to know what
15 the process is as to the use of that collateral to help pay
16 toward any debt that might be -- that might be there
17 remaining to be paid. So that's what I'm -- that's what I'm
18 interested in, and I need to know where to look. I need to
19 know if everything that governs what occurs in the event of
20 a default is contained in the exhibit that's -- I think it's
21 RD-9. Is it 9?

22 And I -- I'm not going to limit this question
23 just to Aquila, by the way. I'm interested in knowing if
24 anyone else who's counsel for any other party has some
25 insight along that line, too.

1 MR. MOLTENI: On that note, Commissioner Gaw,
2 may I chime in?

3 COMMISSIONER GAW: Judge, I don't know. I
4 would prefer to be able to ask these questions of every
5 counsel as I come to the question.

6 MR. MOLTENI: One at a time.

7 COMMISSIONER GAW: No, no. Just the opposite.
8 That's what I would like to do.

9 MR. MOLTENI: Like an open forum discussion?

10 COMMISSIONER GAW: But I've got to ask whether
11 he can handle the Internet broadcast, because I'd much
12 prefer to stay on one question at a time and then have every
13 party address that question, rather than bounce back and
14 forth. So I'm agreeing with what I think you were going to
15 say.

16 JUDGE PRIDGIN: We can certainly accommodate
17 that if we want to have one issue and then --

18 COMMISSIONER GAW: It's easier for me to think
19 through this if we can do that. Mr. Boudreau might give up
20 his podium for a brief moment.

21 MR. BOUDREAU: I may just give up altogether,
22 because I feel I'm being a uniquely poor spokesman on behalf
23 of my client with regard to this topic.

24 COMMISSIONER GAW: I don't necessarily expect
25 you-all to know the answers to these questions today. Part

1 of what I'm doing -- if you do, I'd like to know today. If
2 you don't, I understand. It can be supplied in the briefs.

3 But I do want you to know -- to convey that I
4 have an interest in understanding that. So I'm not really
5 trying to put you on the spot, Mr. Boudreau, at all, and I
6 understand what your response -- why your response is.

7 MR. BOUDREAU: I just -- I'm reluctant to
8 venture views that I don't have a high degree of certitude
9 about.

10 COMMISSIONER GAW: I understand.

11 MR. BOUDREAU: And without reviewing the
12 agreements and perhaps consulting with some folks that know
13 more about them than I do about how they work, I feel
14 reluctant to dive into that.

15 COMMISSIONER GAW: Sure.

16 MR. BOUDREAU: I will confess a degree of
17 ignorance as to the mechanics of the agreements. But I'll
18 certainly have made a note that those are topics to be
19 addressed, and I would think that the agreements are more or
20 less self-contained, and once one familiarizes one's self
21 with them --

22 COMMISSIONER GAW: They may be. They also may
23 refer to other states' laws, other laws in other places. I
24 just -- I don't know what we're contending with.

25 MR. BOUDREAU: At this point I'd be glad to

1 defer to Mr. Molteni. He had something that he wanted to
2 address.

3 JUDGE PRIDGIN: That's fine. Mr. Molteni,
4 I'll tell you what, if you wanted to keep your seat -- what
5 might be more convenient for the parties and just as good is
6 that if counsel want to keep their seats rather than playing
7 musical chairs and getting up every time, because we're
8 broadcasting audio.

9 I don't know that anybody necessarily wants or
10 needs video of us getting up and moving around, but as long
11 as we're on the microphone and broadcasting, that would make
12 it more convenient for counsel, and I think would work just
13 as fine for anybody who was wanting to follow this online.

14 And, Mr. Boudreau I understand has deferred.
15 Mr. Molteni, did you have an answer to Commissioner Gaw's
16 question?

17 MR. MOLTENI: Commissioner Gaw, and to in some
18 respect Commissioner Clayton's concern, it's not just the
19 term loan agreement that has events of default. I think --
20 and maybe from a more important perspective, the trust
21 indenture defaults are more important than the term loan
22 agreement defaults.

23 The trust indenture at page -- it's RD-10,
24 page 71, starts out Article 9 with events of defaults and
25 remedies, and it lists under Section 9.01 a list of what I

1 would consider probably pretty normal events. It defines
2 events of default, failure to pay interest, failure to pay
3 principal, defaults, breaches of any of the affirmative or
4 negative covenants or warranties in the agreements.

5 And then you go to Section 9. -- 9.2 talks
6 about it accelerates the maturity, an event of default does
7 that, and has other consequences. And it allows either the
8 trustee, who on this trust indenture is Bank One NA, they
9 act as the trustee. They essentially collect votes of the
10 investors who are the bondholders that underlie this note.

11 9.2 -- or I'm sorry. 9.4 is -- I'll just cut
12 right to the chase -- the remedy and default that concerns
13 the State of Missouri. 9.4 is a power of sale, and it says,
14 in the case of the occurrence and duration during the
15 continuance of any event of default, the trustee directly or
16 through his agents, with or without entry upon the mortgaged
17 property, in his discretion subject to the provisions, and
18 it goes on, A, may sell subject to the prior liens to the
19 highest and best bidder all or any of the mortgaged property
20 of every kind and all right, title and interest.

21 Okay. So you have Bank One on behalf of --
22 for the benefit of the trustees, if there's any event of
23 default -- and I'm not even talking about they have to be in
24 bankruptcy to do this. This is any event of default -- can
25 come in and sell the properties, Missouri properties,

1 mortgaged properties, if the Commission allows those
2 properties to fall under mortgaged properties, and they can
3 sell that to the highest bidder.

4 Here's our big concern, and I don't think that
5 this has a legal answer. You'll find out only if there is a
6 default and it gets adjudicated, and this is one of the
7 things that we consider a detriment because it's a risk
8 that's imposed on the public.

9 The trustee in this case, Bank One's going to
10 take this provision if there's a default and they're going
11 to sell this property, if they want to. They have that
12 right. They're going to sell it to the highest bidder,
13 which may be themselves, which may be another syndicate.

14 And they're not going to come back to this
15 Commission for approval. They're going to say this
16 Commission approved the encumbrance of this loan and
17 everything that was part and parcel of it.

18 MR. BOUDREAU: I think at this point I'm going
19 to lodge an objection. He's starting to speculate about
20 what parties are going to do. I mean, it's one thing to
21 talk about the contents of the agreement, and it's another
22 thing to sit here and speculate about what a party is going
23 to do in the future.

24 JUDGE PRIDGIN: I'll tell you, again, we're
25 not talking evidence, and I understand this is his argument,

1 and I would obviously entertain any argument on behalf of
2 Aquila to counter that.

3 MR. MOLTENI: Second of all, this is not a
4 party. We're talking about somebody that Aquila is
5 empowering and contracting with. So they're not a party to
6 this proceeding, and I don't think it is their interest,
7 it's not Bank One's interest to look out for ratepayers or
8 anybody else, Aquila shareholders or anybody else, other
9 than their own financial interest.

10 And I'm explaining the events of default as
11 Commissioner Gaw asked, and the big concern and what -- and
12 explaining in the context of the detriment that the
13 Commission has expressed as it believes to be the standard
14 in this case, what is the detriment.

15 You are greatly increasing the risk that this
16 Commission will lose its control, because you're giving
17 somebody an argument that they don't have to come to this
18 Commission to sell Missouri regulated assets.

19 COMMISSIONER GAW: And, Mr. Boudreau, I will
20 come back to you. I want to hear your response.

21 I want to ask this subset of that question in
22 addition. You were talking about the authority to sell that
23 exists with the trustee. You mentioned something, I think,
24 about whether or not, whatever jurisdiction -- did you say
25 something about what jurisdiction the trustee is -- does the

1 trustee have discretion --

2 MR. MOLTENI: The trustee under the --

3 COMMISSIONER GAW: -- about what laws apply or
4 what laws apply to this document, what state's laws?

5 MR. MOLTENI: State of New York. Laws of the
6 state of New York apply to this document.

7 COMMISSIONER GAW: Do you know how the laws of
8 redemption and the laws of other things in regard to trustee
9 sales and things apply in New York and how they vary from
10 what our laws are here in Missouri?

11 MR. MOLTENI: I do not know, and there is no
12 evidence in the record to explain that.

13 COMMISSIONER GAW: Okay. So your argument is
14 that if there were -- if there were defaults in this
15 agreement or series of agreements, that we are already aware
16 of the terms of the agreements if we approve this
17 collateralization and, therefore, we would have given our
18 permission for those terms as they exist and as we have
19 approved them?

20 MR. MOLTENI: Correct, Commissioner. My
21 argument is, this Commission shouldn't encumber those
22 assets, that encumbering the Missouri assets is a detriment
23 to the public. The detriment to the public comes in the
24 form of the increased risk that control of Missouri
25 regulated utilities, a certificated monopolist, will be lost

1 by this Commission.

2 The risk that the Commission will be able to
3 continue the control that it has over the Missouri regulated
4 properties is greatly decreased by the fact that you're
5 approving an encumbrance which grants the trustee in this
6 case the right to step in, with or without being there in
7 person, and sell the property to the highest bidder.

8 And if I'm the trustee in that case, I'm
9 saying you don't -- I don't have to come back to you to sell
10 this. You've already approved this encumbrance. And that's
11 a detriment to the State of Missouri.

12 COMMISSIONER GAW: Is that different than what
13 would occur if these -- if these assets were not
14 collateralized?

15 MR. MOLTENI: Absolutely, because they can't
16 seize the non-collateralized assets.

17 COMMISSIONER GAW: Do you believe that they --
18 that assets -- let me set this up a little better first.

19 Let's suppose that there was a default but
20 that the Missouri assets were not collateralized. And I'm
21 talking about default of a loan and there wasn't sufficient
22 collateral to meet the obligation. And then there was a
23 judgment pursued and a judgment received, and then there was
24 execution on that judgment.

25 If you know -- and I don't know the answer to

1 this -- what would have to occur in regard to this
2 Commission, if anything, as far as action is concerned?

3 MR. MOLTENI: That's a big open-ended
4 question. I don't think anybody knows the answer to that.
5 But there's the difference between a secured creditor and an
6 unsecured creditor. An unsecured creditor has to go all the
7 way through the process of getting a judgment in order to
8 execute on it, and then only then do they have a claim to go
9 after these properties. A secured creditor, I mean, you're
10 giving them these properties.

11 COMMISSIONER GAW: There's some language, and
12 this is -- this is the point on the legal side that I need
13 some help with from everybody. The language that's in 393
14 that has to do with transfer of assets, in addition to the
15 other list of things, including -- including using things,
16 using assets as collateral, but there's some words about
17 transfer and other things.

18 I'm trying to understand if there's any
19 guidance about -- about this Commission's authority in the
20 event of an involuntary transfer, and I cannot -- I don't
21 know the answer. I need some guidance there, because it
22 seems clear to me that there -- it doesn't seem totally
23 clear to me, but it seems to me that there could be a
24 difference in reading the statutes depending upon whether or
25 not this Commission has approved the use of regulated assets

1 as collateral in the event of default and the situation
2 where there has been no approval of any kind of a transfer
3 or any prospective transfer in the event of a default on a
4 loan that does not utilize those assets as security.

5 I need to know whether there is a different --
6 if there is a distinction in 393 between those things, and
7 that's not clear to me. If you have an opinion,
8 Mr. Boudreau, I'll come back to you about that.

9 MR. BOUDREAU: The only guidance that -- I'm
10 not sure that I've seen a course of legal decisions that
11 talk about a distinction between involuntary and voluntary
12 transfers, although I think there is some guidance out there
13 in the context of a case where I think it involved a
14 condemnation of a utility's properties.

15 There was a condemnation action undertaken.
16 And in that case, the utility was, shall we say, an
17 involuntary participant in that process, opposed the
18 condemnation, and it was found that the condemnation action
19 needed to be approved by the Commission.

20 That's about as close as I can think of to a
21 case, and I'll be glad to brief, point the Commission to
22 that case. There may be others. I'm not familiar with
23 them.

24 But in terms of whether or not there's a well-
25 established body of law dealing with whether there's a

1 different way of handling involuntary versus voluntary
2 transfers, I'm not aware of it. I think I'd probably be
3 aware of it if it was out there, because I do quite a bit of
4 work in this area.

5 And as to the other, you know, getting back to
6 some of the things that have been said here, one of the
7 things that worries me about what's being said is that my
8 understanding about this agreement is that the terms that
9 are in the indenture document, which is really the mortgage
10 document, are basically commercially standard, commercially
11 reasonable. I mean, you see these sorts of events of
12 default and remedies for the secured party in many indenture
13 documents.

14 And my concern here is that this is a routine
15 financing type practice, and to condemn this idea on the
16 basis that you've been hearing from the Assistant Attorney
17 General is to basically condemn the idea of secured
18 financings altogether. And, frankly, I'm alarmed that the
19 discussion is going this way.

20 This is a commercially regular practice in
21 terms of financing utility operations to use secured
22 financings with an indenture and a mortgage, and they
23 always, they always have terms of default, remedies
24 available to the secured party.

25 And to the extent that what may happen in the

1 future, no party -- no matter what the agreement says, no
2 person can do something, even if on its face permitted by
3 the agreement, that isn't permitted under Missouri law.

4 I guess it's the reverse. If Missouri law,
5 the Public Service Commission law requires a party to obtain
6 a certain approval from this Commission, you can't contract
7 around that. I mean, that law's as old as the Public
8 Service Commission law. You can't contract around the
9 affirmative obligations under the Public Service Commission
10 Act.

11 So to prognosticate about what's going to
12 happen in the future and what these secured parties are
13 going to do and the devastation it's going to wreak on the
14 Missouri countryside is just -- it's just over the top.
15 It's really stunning to me to hear this sort of argument.

16 The fact of the matter is the Missouri Public
17 Service Commission law trumps any contrary contract law.
18 That as old as the hills. It's as old as the Missouri
19 Public Service Commission Act. And even if the contract
20 says the secured party has certain remedies available to it,
21 if by exercising those remedies they would be required to
22 get the Commission's approval, they've got to get the
23 Commission's approval.

24 MR. MOLTENI: And the argument to that,
25 Commissioner Gaw, is, one, this isn't standard, one, because

1 in all the financing cases, which are different than this
2 encumbrance case that Aquila's bringing, the financing
3 cases, the utility comes in on the front end and says, we
4 want financing to do X, Y and Z, and by the way, those are
5 all regulated activities.

6 This they're coming in on the back end. We've
7 already got the loan. Oh, yeah, it's a \$430 million loan.
8 Only 250 million are going to regulated activities,
9 180 million going to something else. The collateral covers
10 everything, and -- I'm not finished, Mr. Boudreau.

11 And the second thing is, this is kind of an
12 unusual -- it's an unusual situation because you're talking
13 about a company that has already accrued \$2 billion now in
14 unregulated activities. It's got one source of revenue, one
15 major source, and that's all from regulated activities.
16 It's not -- it's not that normal a pattern of financing, and
17 it's certainly different than anything this Commission's
18 ever seen before.

19 COMMISSIONER GAW: And if I could, I'd like to
20 go back to Mr. Boudreau, your last -- your last group of
21 statements in regard to this Commission's authority and the
22 inability of the parties to contract around that, if this
23 Commission has approved the contract, once that occurs and
24 the Commission says we approve this agreement, has the
25 Commission not arguably then given up its right then to come

1 back later and say, oh, we want to look at this again?

2 And I guess that's what I'd kind of like to
3 hear from -- not necessarily right now, but I'm -- that is
4 a -- that is a point that I think is an issue in this case
5 regard to what is being conceded or given up on this -- on
6 the -- in the future with dealing with this utility.

7 MR. BOUDREAU: So you -- excuse me.

8 COMMISSIONER GAW: Go ahead, Mr. Boudreau.

9 MR. BOUDREAU: So you would look to have that
10 issue briefed?

11 COMMISSIONER GAW: Well, if you have -- I
12 mean, you sort of raised it in your argument, and I think it
13 is an issue, but I think you have to address that
14 counterpoint, which I'm sure the parties will bring out and
15 brief it without my request, but that's something that I
16 have as a question today.

17 And, Mr. Micheel, I'm sorry that I haven't
18 gotten around to you or Staff.

19 MR. MICHEEL: Well, Commissioner, I would say
20 that I would echo the concerns of the State, but you asked
21 specifically about what was the difference between
22 unsecured, secured, and how does that work within -- in the
23 context of Section 393.190.

24 COMMISSIONER GAW: Yes, in particular.

25 MR. MICHEEL: And I just wanted to point you

1 to a sentence in that statute that I think is on point, and
2 it says, every such sale, assignment, lease, transfer,
3 mortgage, disposition, encumbrance, merger or consolidation
4 made other than in accordance with an order of the
5 Commission authorizing same shall be void.

6 My view is, once this Commission approves this
7 transaction, you-all would be ratifying the term in the
8 indenture mortgage, the 9.0 term, that would allow the bank
9 trustee to sell the property.

10 Now, on the flip side, if you have unsecured
11 debt and you've gone through the process of foreclosure and
12 you've taken a judgment and then you begin to execute on
13 that judgment, I think the law is pretty clear when it says
14 same shall be void. If they try to sell that property in
15 the unsecured way, the same shall be void.

16 And I think that dovetails with Mr. Boudreau's
17 argument about the authority of this Commission. But the
18 fact situation you have when you approve the collateral is
19 something different because you're already giving your
20 approval on this.

21 And with respect to Mr. Boudreau's concern
22 that this may upset, you know, all the financing, again, I
23 think you need to look at the facts of the case, your Honor.
24 And while -- first of all, this isn't a financing case. I
25 think everybody has said that. But in a financing case, the

1 company comes in on the front end, and one of the things
2 that even under the Commission's own rules you look at
3 what's the need for the financing.

4 And we can determine whether the company needs
5 it up front, how much they need, what the purposes are, you
6 know. And sure, you see these in there, but is the company
7 healthy, and you can make that determination up front, and
8 you're doing with your eyes open. And maybe that does
9 subject to -- subject, you know, the property to
10 foreclosure.

11 But here you have a utility that is in a
12 greatly weakened condition. I mean, they're not investment
13 grade. They've got about \$2 billion worth of debt, and it's
14 just a different fact situation.

15 I hate to keep harping on the fact that we
16 haven't done this before. I mean, it's a red herring. The
17 facts of this case are unique given the financial
18 predicament that this company is in.

19 And I can tell you for a fact if they'd come
20 in on the front end and come in and said, we want to finance
21 \$430 million under Section 393.200 and they told us, and oh,
22 by the way, we want \$430 million, but only 250 million is
23 for regulated, we would have said, no, you're not getting
24 the 108.

25 And then if they would have said, oh, by the

1 way, the 250 million is for all of our U.S. utility
2 operations, we would have said, hey, huh-uh, Missouri's not
3 paying for Minnesota or Iowa. We would have said, what's
4 your Missouri need.

5 So I just think the facts are completely
6 different on that, and I think that 339.190.1 answers your
7 question about the differentiation between secured and
8 unsecured and answers it pretty clearly.

9 COMMISSIONER GAW: Anybody else want to
10 venture into that series of discussion that hasn't to this
11 point in time?

12 Let me -- this is sort of a side issue, but
13 I'm curious about what Aquila's position is in regard to
14 which sections in 393 do not apply to them? I've heard the
15 argument that 200 may not apply and that 180 may not apply.
16 At least I thought I had that argument in the summary
17 judgment matter.

18 MR. BOUDREAU: You did hear that argument.

19 COMMISSIONER GAW: I want to know if there's
20 anything else that Aquila believe does not apply to them in
21 393.

22 MR. BOUDREAU: The only distinction that I can
23 think of that's driven by the state of incorporation, which
24 you recall correctly is the argument that I've made, is
25 the -- is the issuance of securities. A foreign chartered

1 corporation under the law as I understand it in the state
2 does not need to come to this Commission to get approval to
3 issue stocks, bonds, notes or other evidences of
4 indebtedness.

5 COMMISSIONER GAW: Do you know what section
6 that's under, off the top of your head?

7 MR. BOUDREAU: That is Section 393.200.

8 COMMISSIONER GAW: So is it Aquila's position
9 that none of 200 and none of 108 applies or just portions of
10 those two?

11 MR. BOUDREAU: Good question.

12 COMMISSIONER GAW: You don't have to answer it
13 right now.

14 MR. BOUDREAU: And I'm not sure that I can
15 answer it definitively.

16 COMMISSIONER GAW: Could you do that maybe,
17 just in letting me know what your position is when you file
18 things later?

19 MR. BOUDREAU: I can do that. I mean, I kind
20 of touched on this at the original oral argument.

21 COMMISSIONER GAW: Yeah. Unfortunately, I
22 wasn't present then.

23 MR. BOUDREAU: It was the Union Pacific
24 Railway case, and that was -- that was a case in which the.

25 COMMISSIONER GAW: Yes, I'm familiar with that

1 case.

2 MR. BOUDREAU: Yes, I know that you are. And
3 that was the case in which --

4 COMMISSIONER GAW: One of my most favorite
5 cases.

6 MR. BOUDREAU: -- in which the Missouri
7 Supreme Court said that the State of Missouri did not have
8 any -- there was no special privilege reserved to the State
9 to govern the issuance of securities by foreign
10 corporations. That's a fine point synopsis of the case.

11 And which leaves open the question -- I don't
12 think it's ever been addressed -- about whether 393.180
13 itself applies to foreign corporations. I don't think that
14 they took up that question. I don't think -- not to my
15 knowledge that question's never been taken up by any other
16 court. I think it's an open question. I think it's an
17 interesting -- you can have an interesting debate about it.
18 The fact of the matter is, I don't think it's been resolved.

19 So the only thing I can tell you, that from my
20 practice, and it's very extensive in this area, is I feel
21 very confident that 393.200 doesn't apply to a foreign
22 corporation like Aquila.

23 But as to any other statute, I'm not sure that
24 I know of any other reason or any other basis for concluding
25 that it would not otherwise be subject to the same

1 provisions of the act as any other gas or electric utility.

2 COMMISSIONER GAW: And I don't know how
3 important it is to know the answer to that question, other
4 than if we get into any of those other sections at all in
5 some analysis of this case, I'd rather know up front if
6 there's an argument about whether that -- whether those
7 sections apply. Anyone else want to touch on that?

8 MR. MOLTENI: I just want to chime in on my
9 version of the fairness doctrine, to borrow an Aquila term,
10 and that is that no Missouri corporation should be held to a
11 lesser -- or to a greater standard than a foreign
12 corporation to encumber its Missouri regulated assets.

13 MR. MICHEEL: I'll just add my two cents.
14 Obviously I think it applies, and I'll do my best in the
15 brief to distinguish the Union Pacific case. And I'll just
16 tell you that I think there are a lot of distinguishing
17 factors. It's a very old case.

18 And again, as Mr. Molteni pointed out, it
19 seems pretty odd to me that the Legislature would exempt
20 foreign corporations and subject Missouri corporations to
21 that. But I am going to brief that, Commissioner.

22 COMMISSIONER GAW: Thank you, Mr. Micheel. I
23 will appreciate being able to read about that.

24 Let's see. I may have -- I think that's all I
25 have right now. Thank you, Judge.

1 JUDGE PRIDGIN: Commissioner Gaw, thank you.
2 Commissioner Clay-- I'm sorry. Do we have some follow-ups
3 down here? I'm sorry. Commissioner Forbis?
4 COMMISSIONER FORBIS: I will respectfully
5 yield my time.
6 JUDGE PRIDGIN: Thank you. Commissioner
7 Clayton?
8 COMMISSIONER CLAYTON: I won't need all that
9 time, I don't think.
10 Mr. Boudreau, I asked this question of some of
11 the witnesses and they were not qualified to answer. I wish
12 they would have said I don't know the answer rather than try
13 to work through it.
14 When we talk about encumbering the assets of a
15 Missouri utility, it seems like it is easy to talk about
16 this, these assets as one entity, one thing, one piece of
17 property that's out there. And my first question is, how
18 does one perfect a security interest in a Missouri utility?
19 MR. BOUDREAU: I happen to know the answer to
20 this question because I have done this. I can tell you from
21 personal experience. It's mechanically a lot of work, but
22 the concept is fairly simple, unless the law has changed
23 since I last did it. I don't think it has.
24 Some of the lawyers will, you know, go back to
25 law school, and if you have an interest in real estate, you

1 have to perfect your interest in real estate in the county
2 in which the real estate is located. So what you do is you
3 take the indenture and you drag it around to all the
4 courthouses and you file it. You pay a lot of money and you
5 stamp it and you get it filed.

6 As far as personal property -- actually, that
7 deals with both -- the county filing deals with both
8 fixtures and real estate, although the line between fixtures
9 and personal is sometimes a questionable one. But as far as
10 personalty, you file it by making a UCC filing right here in
11 Jefferson City at the Secretary of State's Office.

12 There has been some legislation that's been
13 passed, I think in the not too distant past, that says
14 that you can secure an interest, a utility can secure its
15 interest in real estate by filing with the Secretary of
16 State's Office. That was my reaction, too. But that runs
17 counter to the old school of thought of filing in the county
18 in which the real estate's located.

19 And I harken back to my law school days when
20 my UCC professor said, if in doubt, file everywhere. So to
21 the extent anybody wants some free legal advice, file
22 everywhere.

23 COMMISSIONER CLAYTON: Let me stop you right
24 there, because you've kind of -- you've kind of answered, I
25 think, part of my question in the sense that you don't just

1 do one filing. You just don't go to the Secretary of State
2 and put assets of Aquila, Inc. and file with the Secretary
3 of State. For every piece of real estate, you have to go to
4 the recorder's office in every county where there's real
5 estate?

6 MR. BOUDREAU: I would not just file in just
7 the -- if you want my professional opinion, I would not just
8 file in the Secretary of State's Office. I would file the
9 mortgage in every county in which the company has any real
10 estate.

11 COMMISSIONER CLAYTON: And how many counties
12 would you guess that that would be in the state of Missouri?

13 MR. BOUDREAU: For Aquila?

14 COMMISSIONER CLAYTON: Sure.

15 MR. BOUDREAU: It could be as many as -- it
16 could be anywhere from 20 to 50. I mean, I'd have to kind
17 of take a look at a map. But it could be a massive
18 undertaking.

19 COMMISSIONER CLAYTON: I mean, just to perfect
20 this security agreement --

21 MR. BOUDREAU: Yes.

22 COMMISSIONER CLAYTON: -- security interest,
23 you'd have to have, frankly, a massive amount of filings
24 statewide, would you not?

25 MR. BOUDREAU: Yes. I've done some filings

1 for utilities where it was several days of running documents
2 around from county to county, getting the stamps. Send off
3 teams of people to do it. So it can be quite extensive,
4 yes.

5 COMMISSIONER CLAYTON: And have you reviewed
6 the agreement, the security agreement?

7 MR. BOUDREAU: In all honesty, no, I haven't
8 looked at --

9 COMMISSIONER CLAYTON: Haven't looked at it
10 once?

11 MR. BOUDREAU: I haven't looked at the
12 specific terms of it very closely.

13 COMMISSIONER CLAYTON: I've looked through it.
14 I haven't read it closely.

15 MR. BOUDREAU: In all honesty, I have not. It
16 has not been my practice to do so in cases like this. I
17 just -- I just -- I typically haven't found a need to get
18 all that familiar with the idiosyncrasies of how the
19 agreement itself works.

20 COMMISSIONER CLAYTON: In the event of a
21 default in Article 7 or a breach of any of the covenants in
22 any of the other loan documents, then would it be your
23 opinion that if one were to, outside a bankruptcy, foreclose
24 on an asset for breach of those agreements, that you'd have
25 to have a sale at each of the courthouses in each of the

1 counties?

2 MR. BOUDREAU: Kind of wish another one of my
3 partners was here to help me out with this who does quite a
4 bit of real estate practice. Let me think about that for a
5 moment.

6 Well, if it were -- if the situation were
7 handled, like you said, on sort of a courthouse-type sale --
8 the problem is that I think that's where the analogies kind
9 of fall apart with utilities vis-a-vis other sorts of
10 interest in real estate like homes, office buildings, sort
11 of stand-alone.

12 Because when you're dealing with a utility,
13 you're dealing with a utility as a going concern, and you
14 don't -- first of all, there's not that many of them that I
15 can think of in recent history that have been liquidated.
16 I'm not sure if I can think of any example of a utility
17 having been liquidated where there's an auction on the
18 courthouse steps.

19 Typically you have a going concern. They
20 reorganize in some fashion or another, whether it be under a
21 bankruptcy filing or otherwise, and it continues. I mean, I
22 can't think of an example of a utility situation where
23 there's literally been an auction of the property at the
24 courthouse steps.

25 COMMISSIONER CLAYTON: When I was in law

1 school, I had a professor that actually taught secured
2 interest. Secured transactions was the name of his class.
3 He thought us always thinking in the worst-case scenario,
4 and that's really what I'm doing here is talking worst-case
5 scenario. If everything were to go as planned in a lot of
6 things in life, we wouldn't have to worry about this arena
7 or any other.

8 But I'm thinking worst-case scenario, and
9 since we don't have one institutional lender here but a set
10 of investors, a syndicate or whatever you want to call it of
11 people that have quite a bit of money and are investing in
12 this type of loan, what steps would they take to perhaps try
13 to maximize their interest as a security interest holder?

14 And would there be, with an entire asset,
15 would there be different strategies of foreclosing and
16 perhaps trying to hold the Commission hostage in a
17 worst-case scenario? Do you follow my --

18 MR. BOUDREAU: I think I understand the
19 question. I'm not sure that -- I think I'd go back to what
20 I said before, that the interest that the creditors have is
21 in getting paid back. They get paid back not by
22 piecemealing the company off parcel by parcel or pole and
23 wire. They get their money back by the enterprise
24 continuing and generating cash to pay the debt off.

25 And so it's hard for me to imagine a set of

1 circumstances where somebody would literally kind of force
2 the thing to the courthouse steps and start auctioning off.

3 COMMISSIONER CLAYTON: But you would agree
4 there's been a time in this country's history when things
5 like that did happen, where companies were carved into
6 pieces. And I am not equipped to sit here and value the
7 different offices around the state.

8 I'm just trying to think if there is any
9 inherent risk of a company being, not necessarily cut up
10 into many pieces, but cut up into several pieces. Would
11 there be a detriment to a ratepayer there?

12 MR. BOUDREAU: I think as long as the
13 utility -- the utility entity continues in existence and
14 continues to be regulated by the Commission, the Commission
15 continues its oversight, whoever owns it, whoever runs it.
16 It's still a regulated utility, subject to this Commission's
17 jurisdiction.

18 Because the Public Service Commission law
19 talks about any person, entity, partnership, whatever that
20 owns or runs utility properties is subject to regulation by
21 this Commission.

22 So it doesn't really -- it doesn't really
23 matter, you know, from a regulatory perspective who is
24 operating it. Whoever's operating it is the utility, and
25 they are subject to the Commission's jurisdiction.

1 Q. Do you know in the security agreements or the
2 loan documents whether there is an order of -- an order of
3 foreclosure in the sense of satisfying outstanding debt?

4 For example, do they have to start -- if there
5 was a default, would they have to start with a certain asset
6 or could they start anywhere? Like, I know my bank is going
7 to go to the biggest asset that you've got to get paid
8 first. I'm thinking in that analogy.

9 MR. BOUDREAU: I don't know whether either the
10 loan document or the security document addresses that
11 specific topic. It may or may not, but I'm not aware of it
12 if it does.

13 MR. MOLTENI: The trust indenture does.
14 Commissioner, the trust indenture does. As your secured
15 transactions professor may have said, the UCC is in general
16 default provisions, and you can to some degree contract away
17 from the trust indenture under Section 9.04, the power of
18 sale allows the trustee to sell part -- any part of the
19 property -- let me find the right language here -- all or
20 any part of the mortgaged property, and then the trustee may
21 fix -- at public auction, at such place, at such time, upon
22 such terms as the trustee may fix.

23 I think that answers your question. In
24 essence, I think the meaning of that is, yeah, they can
25 break up any or -- all or any part of the property under the

1 terms of the indenture.

2 MR. BOUDREAU: And to finish that thought,
3 whoever's attempting to sell whatever asset or part of the
4 property needs to come to this Commission to get approval to
5 sell it, I would say. They are the utility at the point --

6 COMMISSIONER CLAYTON: Let me ask you --
7 because I don't want to belabor that. Going into that's
8 thinking in a sense of a default with no filing in
9 bankruptcy.

10 If there were to be a bankruptcy filing, if,
11 do you see -- do you see there any additional risk in a
12 bankruptcy setting by this debt being secured versus
13 unsecured?

14 MR. BOUDREAU: I have struggled to figure out
15 the arguments that I've heard, because I don't see it as a
16 risk to the ratepayer at all.

17 All I've -- my understanding is all that
18 happens when you take secured debt versus unsecured debt is
19 the -- particularly in a utility scenario, and in a
20 bankruptcy, is you put yourself in a better position.
21 You're in the first -- well, it may not be the first group.
22 I think there's some -- under bankruptcy law there's some
23 ultra-privileged classes that get their claims paid off
24 first. It's a fairly narrow slice, but after that there's
25 the secured creditors.

1 And to the extent that in a reorganization,
2 that the company goes into reorganization, any company does,
3 the secured creditors are first in line to get all of their
4 debts paid off. And after that it goes to the unsecured
5 creditors, and they're all paid off pro rata with whatever's
6 left over.

7 If it's a reorganization, the indebtedness of
8 the company may be restructured. They may not be entitled
9 to get every dollar that they would otherwise be entitled to
10 under the note. But it just simply puts -- it just puts
11 certain creditors in a better position to have their debt
12 paid off in full than it does others.

13 COMMISSIONER CLAYTON: I think it puts them in
14 a much better position than that. What I'm trying to figure
15 out, regardless of what position it puts them in, what
16 position does it put the company versus -- does it put the
17 company in a reorganization sense in a better or worse
18 situation if it's a secured versus unsecured debt?

19 MR. BOUDREAU: I'm not sure. I'm not sure it
20 has much of an effect on the company at all.

21 COMMISSIONER CLAYTON: Well, it would shift
22 with whom you bargain. It would shift the bargaining from a
23 trustee to the committee, I guess, that would -- and I think
24 it's a committee -- that would be holding -- would be
25 organized and voting on behalf of the syndicate, I assume.

1 MR. BOUDREAU: You may have one or more
2 debtors committees, I think. How they --

3 COMMISSIONER CLAYTON: Not in bankruptcy. I'm
4 talking about the secured creditor. See, we don't -- what I
5 thought originally about this is that we'd have one secured
6 creditor, the bank, and it's not that. The bank is acting
7 as an administrative agent on behalf of a group of
8 investors.

9 Okay? So the bank doesn't make the decisions
10 on behalf of them. It's actually -- I'd assume that there's
11 like an executive committee and over 50 percent of the
12 holders of that would decide. But that's with whom you
13 would bargain, rather than a trustee who would bargain on
14 behalf of all the unsecured creditors, correct.

15 MR. BOUDREAU: Well, even under -- even under
16 a secured financing you have a trustee, and you may have a
17 number -- any number of people, hundreds, perhaps thousands
18 that own bonds from a particular series, but you have a
19 trustee that acts as the administrator for those bond
20 holders.

21 There may be numerous bond holders for any
22 particular series of bonds that are issued under an
23 indenture, which is kind of a continuing document. You may
24 have a number of series of first mortgage bonds under any
25 one indenture. But you -- it's not at all unusual to have

1 many actual holders of the bonds out there that don't get
2 directly involved in that.

3 That's why you have a trustee. The trustee
4 steps in and acts on behalf of the bond holders. So that's
5 not an unusual circumstances at all to have, for lack of a
6 better term, an administrative agent out there that's --
7 that has some duties to the bond holders, whoever they may
8 be at any one time, because they are traded out there in the
9 market.

10 COMMISSIONER CLAYTON: Well, let me just --
11 just to make sure that I understand what you're saying, to
12 Aquila, it doesn't make any difference whether this --
13 outside of the covenants of seeking to have high level of
14 collateralization, in your opinion, it doesn't make any
15 difference to Aquila whether this is a secured or an
16 unsecured debt?

17 MR. BOUDREAU: Actually, I may have misspoke.
18 It actually does make a difference in this sense, and I
19 think that -- I believe Rick Dobson touched on this topic,
20 that with a security indebtedness you make certain --
21 there's certain financial covenants that are made by the
22 company that might not otherwise be put in place. So
23 secured financing often is more restrictive in terms of what
24 the company can and can't do in terms of the promises it
25 makes under the indenture, the restrictions that are placed

1 on it.

2 So theoretically, depending on what's in the
3 document, that secured financing could be more restrictive
4 in terms of the types of business that the company can get
5 into, how it otherwise finances, you know, how much more
6 debt it can take on, what the ratios have to be. So it can
7 actually be more restrictive to do secured debt.

8 From the company's perspective, it probably
9 does have an impact, but that's -- that's the only other
10 thing I can think of.

11 COMMISSIONER CLAYTON: I don't believe I have
12 any further questions of Mr. Boudreau, if any of the other
13 attorneys want to comment on that.

14 MR. MOLTENI: If I can follow up. Because
15 Iowa allowed their assets to enter the pool, the lenders now
16 are secured. We're talking just a matter of whether
17 Missouri properties become encumbered or not under this
18 agreement.

19 Secondly, it would be better, I think, for
20 Missouri ratepayers, and if you walk down a bankruptcy
21 scenario, if Missouri's -- if they're -- if Missouri's
22 properties are not part of the collateral pool.

23 If the -- if they are part of a collateral
24 pool, one, the -- you so grossly over-collateralize the
25 \$430 million. For example, if you've got a billion dollars

1 in the collateral pool, the unsecured creditors get
2 570 million because they get -- in value. The more -- the
3 more debt -- the more debt that gets scraped off from
4 Aquila, the healthier this corporation's going to be
5 surviving.

6 So the more of it that is unsecured if Aquila
7 should go into bankruptcy, you're going to have a healthier
8 survivor in a reorganization, which means there'll be
9 less -- the only revenue-generating asset right now are the
10 -- are the regulated utilities. They will have less debt to
11 service coming out of a bankruptcy if that debt is unsecured
12 because it's getting scraped off.

13 COMMISSIONER CLAYTON: I don't have any
14 further questions. I want to thank the parties for putting
15 up with this interrogation or whatever it is. There were a
16 number of legal issues. I appreciate the conversation.

17 JUDGE PRIDGIN: Let me see if we have any
18 follow-ups from anyone else from the Commission.
19 Commissioner Gaw?

20 COMMISSIONER GAW: Not unless there's any
21 rebuttal to that last -- that last piece, because it strikes
22 me that that's a significant -- a significant argument in
23 this question. If you're looking at the potential which
24 we -- we're dealing with worst-case scenarios could exist of
25 a bankruptcy and whether or not Aquila in reality itself as

1 an entity is better off if it at some point needs to seek
2 bankruptcy relief in having the ability to write down more
3 debt, which is a lot easier to do if it's unsecured, it
4 strikes me.

5 If there is a counter to that, I'd like to
6 hear it.

7 MR. BOUDREAU: I have to think through that
8 for just a moment.

9 In the end, there's just so much value in the
10 company, and -- or in any company, and if any company were
11 to go through a bankruptcy, I don't think it matters a whole
12 lot to the ultimate outcome with respect to the secured
13 versus unsecured distinction, because there's only so much
14 value in the company, and there's only so much debt service
15 that it can support.

16 So the secured/unsecured isn't going to make a
17 difference in how that plays out and how that all sorts out.

18 COMMISSIONER GAW: Mr. Boudreau, isn't it true
19 in a Chapter 11 that, if you're dealing with a
20 reorganization, that the ability of the court to deal with
21 trying to see whether or not a company can survive
22 financially has as a significant factor whether or not
23 unsecured debt can be devalued and lowered on its potential
24 payments in the future?

25 And isn't it also true that a court is very

1 limited in what it can do to lower anything on what a
2 secured creditor is owed so long as there is sufficient
3 security to cover their debt?

4 MR. BOUDREAU: The focus in bankruptcy is to
5 maximize the recovery on behalf of the debtors of the
6 company.

7 COMMISSIONER GAW: The creditors?

8 MR. BOUDREAU: The creditors. Excuse me. The
9 creditors of the company. Thank you for the correction.

10 COMMISSIONER GAW: That's okay.

11 MR. MOLTENI: Commissioner, I don't think you
12 can emerge from a Chapter 11 without at least an agreement
13 to pay your secured creditors in an ongoing security
14 agreement. I don't think you can get your -- if you're a
15 secured creditor in Chapter 11, you can't get the debt
16 scraped off. In fact, you even get your interest payments
17 during the pendency of the bankruptcy. You are protected.

18 COMMISSIONER GAW: I think -- I'm not sure
19 about the interest portion, but that's my recollection in
20 regard to the secured interest, unless the value of the
21 security can be shown to be less than the amount that's owed
22 to the secured creditor, which as far as I can tell isn't an
23 issue in this matter. It's the opposite scenario.

24 MR. MOLTENI: You're right. You get your
25 interest payments if you're over-collateralized.

1 COMMISSIONER GAW: Yes. But if it's
2 unsecured, then we read about all of the time major
3 international corporations that have sought bankruptcy
4 relief and had significant amounts of unsecured debt written
5 down because the creditors see that as a creditor committee
6 as something that is better than other options, including
7 piecemealing out a company at the courthouse steps and other
8 things. But their ability to negotiate for full recovery is
9 very, very limited.

10 At least it strikes me that that is a
11 significant difference in the position in bankruptcy of
12 secured and unsecured creditors. And I'm more than welcome
13 to be -- to say I was incorrect on that, and feel free to
14 correct me in the briefing.

15 MR. BOUDREAU: Yeah. You probably reached the
16 limit of what I consider my area of -- I'm probably a little
17 bit beyond my area of competence. I mean, I will address
18 these topics in the brief, because they do deal with legal
19 issues, but at this point I think what I'll do is just take
20 that under --

21 COMMISSIONER GAW: That's fine.

22 MR. BOUDREAU: -- take that thought home with
23 me and address it in the post-hearing brief. Thank you.

24 MR. MICHEEL: Commissioner, I just wanted to
25 add, it's 11 USC Section 507 of the bankruptcy code that

1 dictates who gets paid and in what order, and a debtor must
2 pay each creditor within a certain priority the same
3 percentage. No payments can be made to the lower priority
4 creditor until the higher priority creditors are paid in
5 full.

6 And then my understanding from my bankruptcy
7 classes when I was in law school is, at that point, if you
8 can't pay everybody, you get to do what's called the
9 cram-down and you just say, hey, this is what you get.

10 But the priorities are found in the bankruptcy
11 code at 11 USC Section 507, your Honor.

12 COMMISSIONER GAW: Thank you. I don't have
13 anything further, Judge.

14 JUDGE PRIDGIN: Thank you, Commissioner Gaw.
15 Anything else from the Bench? Seeing nothing.

16 I think I just have what I hope is a really
17 brief line of questioning on the worst-case scenario,
18 because that is a concern. And, Mr. Molteni, if I could
19 address this to you.

20 Is it my understanding that you think the
21 worst-case scenario is some unknown creditor or creditors
22 could come in and own these Missouri assets without getting
23 permission from the Commission?

24 MR. MOLTENI: I think they would -- I think
25 the trustee would argue that the Commission has granted its

1 permission already by allowing the encumbrance of these
2 assets under this application.

3 JUDGE PRIDGIN: So if we go down that road,
4 and let's presume the worst thing happens and that now we
5 have Joe Creditor who owns these assets, that's -- and
6 didn't have to ask the Commission beforehand. That's the
7 worst-case scenario, correct?

8 MR. MOLTENI: I think so.

9 JUDGE PRIDGIN: And I do not mean this in a
10 flippant way at all, but I guess my one thought I have is,
11 so what, because -- and the reason I'm saying that is we've
12 got Joe Creditor out there who doesn't want to own the
13 utility company, who wants to get paid, in much the same way
14 that a bank doesn't want to foreclose on a house. It
15 doesn't want to be in the real estate business. It wants
16 its money back.

17 And so Joe Creditor wants to sell this, and to
18 be able to sell this, a utility company more than likely is
19 going to have to buy it, and won't that utility company have
20 to have a certificate from the Commission to be able to use
21 it and operate it?

22 MR. MOLTENI: I don't know the answer to that.
23 I can only assume, though, that the Legislature has given
24 this Commission to review mergers and sales of utilities,
25 they want this Commission involved in that process. And

1 what you do if you allow this encumbrance and give somebody
2 the ability not to be involved, you've already done it.

3 Whether that will in the long run affect
4 service or rates, I don't know. It certainly might. But I
5 think that's why the Legislature has empowered and made it
6 your responsibility as a Commission to review mergers and
7 acquisitions.

8 JUDGE PRIDGIN: And because I addressed it to
9 Mr. Molteni, let me give Mr. Boudreau a chance to comment.

10 MR. BOUDREAU: I think your point is well
11 taken. If you take the worst-case scenario, the point is
12 that ultimately, if a creditor were to come in, take over or
13 hire a management company to manage the utility, then put it
14 on the market and try to sell it, presumably that sale, it's
15 a whole another transaction. They'd have to come before
16 this Commission.

17 That's what I mean about the Public Service
18 Commission law trumping any contrary contract law. So in
19 the end, you'll have -- you'll have an oversight of that,
20 whoever -- whoever in this worst-case scenario that's been
21 put up ends up with running the company.

22 I mean, that's why I think it's not that big
23 of a deal. It's just, you know, the protections are in
24 place for this Commission to continue its oversight,
25 continue to look at whoever takes it over, and to regulate

1 for the -- regulate as it always has, regulating rates and
2 terms and conditions of service.

3 So I just go back to the point. If the
4 granting of the mortgage itself doesn't adversely affect the
5 customers through rates or service -- and that's really the
6 only way that they can be impacted -- then there's really
7 nothing much more to get -- there's no place else to go with
8 it.

9 I mean, that's basically what's going on. The
10 regulatory scheme is still there and the public will still
11 be protected. It will still be a public utility subject to
12 the regulation of this Commission.

13 JUDGE PRIDGIN: Mr. Micheel?

14 MR. MICHEEL: I mean, you know, that assumes
15 that the creditor comes in and says, gee whiz, I want to --
16 I want to submit myself to the Commission's jurisdiction.
17 There's nothing in the law that says they're automatically
18 submitted to this jurisdiction.

19 I mean, what if they foreclose on the Sibley
20 generating station and all of a sudden the creditor says,
21 well, you know what, I don't want to submit the Sibley
22 generating station as a regulated generating station
23 anymore. I want to sell it to somebody else and make it an
24 IPP, an independent power producer, or something like and
25 that say, yeah, we'll sell it back to whatever's left of

1 that regulated utility, but now you've got to get a
2 purchased power contract from us.

3 I mean, there -- there are a lot of different
4 what ifs, your Honor, and although Mr. Boudreau suggested
5 one what if, I just gave another one what if. I mean, they
6 could -- they could seize -- let's say it's the Sibley
7 generating station, seize it, say no, we're going to make it
8 an independent power producer now and we're going to be
9 selling low-cost energy and we're going to run that as a
10 going concern. There's nothing that prevents them from
11 doing that.

12 MR. BOUDREAU: What prevents them from doing
13 that is they've got to get authority from this Commission to
14 sell it.

15 JUDGE PRIDGIN: Commissioner Clayton?

16 COMMISSIONER CLAYTON: I just have one
17 question. If the parties don't want to address this, they
18 can address it in briefing because we've kind of gone back
19 and forth on factual external information and whether or not
20 it's appropriate here or not.

21 Mr. Boudreau, recently there was a newspaper
22 article making reference to what other states are doing.
23 With Iowa, which supposedly has approved the encumbrance of
24 their assets, has the -- has Aquila met its level of
25 collateralization sufficient to drop its interest rate?

1 MR. BOUDREAU: I think the answer to that is
2 it's not going to be known for certain until there's an
3 appraisal of those properties, but --
4 COMMISSIONER CLAYTON: Is that where you go
5 out to the title company and have an appraisal done?
6 MR. BOUDREAU: Before I spoke out of turn
7 without authority, it would seem likely that would be the
8 case.
9 COMMISSIONER CLAYTON: Okay. Thank you.
10 JUDGE PRIDGIN: I see no other questions from
11 the Bench.
12 MR. WILLIAMS: Judge, if I might?
13 JUDGE PRIDGIN: I'm sorry. Mr. Williams.
14 MR. WILLIAMS: I just wanted to point out that
15 if a creditor obtains an ownership interest in utility
16 assets, it needs to have some lawful authority to operate
17 those if it's going to continue them as a utility operation.
18 JUDGE PRIDGIN: Thank you. I see no other
19 questions from the Bench.
20 I think that leads us into briefing, and
21 before I can get to briefing, I think that leads us into an
22 issue with Mr. Robertson. I understand we still have his
23 testimony still outstanding.
24 Mr. Micheel?
25 MR. MICHEEL: Your Honor, I had one over

1 matter I'd like to -- I passed it out. It's the Decision
2 and Order in the Minnesota case, Docket No.
3 G-007,011/S/03-681, and I'd like the Commission to receive
4 that into evidence. I guess it would be Exhibit 58.

5 JUDGE PRIDGIN: Let me double check my
6 schedule. I think you're right.

7 MR. MICHEEL: And I would say that, now that
8 Iowa has also made a decision, I'd be more than happy to
9 leave a late-filed exhibit open for Exhibit 60, the Iowa
10 decision, and file that also.

11 JUDGE PRIDGIN: I do see we are now at
12 Exhibit 58, that is correct.

13 MR. MICHEEL: Or Exhibit 59 for the Iowa
14 decision then, if you'd like to have a late-filed exhibit.

15 COMMISSIONER CLAYTON: Judge, those could
16 probably just be listed in a post-hearing brief, couldn't
17 they? I mean, they're not factual exhibits, are they?

18 JUDGE PRIDGIN: It has been offered. I mean,
19 I don't know if the Commission can take -- this is really an
20 Order from another Commission. If it needs to come into
21 evidence, if the Commission can simply take administrative
22 notice of it, but it has been offered into evidence, and let
23 me first see if we've got any objections.

24 MR. WILLIAMS: Staff has no objection.

25 MR. BOUDREAU: I think I appreciate the

1 distinction between evidence and just taking notice. I
2 don't -- the bottom line is I don't care if it's made an
3 exhibit to the case or not. Whether it's an exhibit or
4 whether, you know, people can freely attach it to their
5 brief, I don't care. I'll leave it to your discretion. I
6 have no objection to this being made an exhibit to the case.

7 JUDGE PRIDGIN: All right. Thank you.
8 Hearing no objection, we'll receive Exhibit No. 58 into
9 evidence.

10 (EXHIBIT NO. 58 WAS RECEIVED INTO EVIDENCE.)

11 JUDGE PRIDGIN: And, Mr. Micheel, you
12 mentioned Exhibit 59 as well being an Iowa. Would you
13 rather take care of it more with --

14 MR. MICHEEL: I'll just do it in the briefing,
15 attach it to the brief.

16 MR. BOUDREAU: Well, if we're going to make
17 one an exhibit, I'd like them both to be made exhibits.
18 Let's be consistent if not correct is I guess my view of it.

19 MR. MICHEEL: Okay. I'm happy to be
20 consistent also and incorrect or consistent and correct. I
21 just want it in.

22 MR. WILLIAMS: Judge, I anticipate that will
23 be out before next Friday.

24 JUDGE PRIDGIN: I've got that marked as a
25 potential Exhibit 59, and it's going to be a late-filed

1 exhibit, and I'm hearing no objection. I understand it's
2 going to be the same.

3 MR. BOUDREAU: I have none.

4 The other thing as far as the record is
5 concerned, you correctly observed that Mr. -- there's the
6 outstanding question of Mr. Robertson. I think the
7 parties -- correct me if I've misstated this. I don't know
8 that anybody had any questions for Mr. Robertson were he to
9 take the stand. It would seem to me the only reason he
10 would need to take the stand is if the Bench had some
11 questions for him.

12 So it might be worth discussing whether or not
13 we need to reserve or keep the record open until next Friday
14 to do that or whether we can go ahead and, with the
15 exception of 59 as a late-filed, go ahead and wrap things up
16 today. Doesn't matter to me.

17 JUDGE PRIDGIN: And let me put the Commission
18 on the spot and see if everyone -- okay. I'm seeing a bunch
19 of nos. Looks like we will have no questions for
20 Mr. Robertson. So with the parties' agreement, if the
21 parties want to just stipulate to his testimony coming in.

22 MR. BOUDREAU: I have no objection to
23 Mr. Robertson's. I think he's got two versions of
24 testimony, five different exhibits.

25 MR. MICHEEL: It's Exhibits 34 through 37,

1 your Honor, and he also had a new schedule to his direct
2 testimony, TJR-8 that I provided to the Bench and the court
3 reporter when we put his testimony in.

4 JUDGE PRIDGIN: All right. Thank you. And
5 I've been remind, I think we still have these gentlemen from
6 New York on the phone. Can they go about their way?

7 MR. BOUDREAU: I would be appreciate if you
8 would advise Mr. Parrette that he's free to go and thank him
9 for me for making himself available.

10 JUDGE PRIDGIN: Mr. Parrette, thank you and
11 your colleagues so much. You've been so quiet. I'd
12 forgotten about you. Thank you for being available for
13 questions.

14 MR. PARRETTE: Thank you.

15 JUDGE PRIDGIN: Thank you.

16 All right. Mr. Micheel, do you have some
17 exhibits then to offer on behalf of Mr. Robertson?

18 MR. MICHEEL: Yes. I would offer Exhibits 34
19 through 37, your Honor.

20 JUDGE PRIDGIN: Any objections?

21 MR. BOUDREAU: None. Thank you.

22 JUDGE PRIDGIN: Hearing none, Exhibit 34, 35,
23 36 and 37 are all admitted.

24 (EXHIBIT NOS. 34, 35, 36 AND 37 WERE RECEIVED
25 INTO EVIDENCE.)

1 JUDGE PRIDGIN: As far as a briefing schedule,
2 I understand that the transcript would normally be done in
3 ten business days from today, So by my math that would make
4 the transcript available November 7th, if I'm not mistaken.
5 Pardon me. That's not correct. November 6th. I see that
6 as being two weeks from today.

7 All right. Normally I think the practice is,
8 and somebody correct me if I'm wrong -- is to give -- to
9 give Aquila 20 days to brief from that, which would make it
10 November 26th, and then give --

11 MR. BOUDREAU: Isn't that Thanksgiving?

12 JUDGE PRIDGIN: It's the Wednesday before.

13 MR. BOUDREAU: It's better getting it done
14 before than having to think about it during.

15 JUDGE PRIDGIN: There are always motions for
16 extension.

17 MR. MICHEEL: Judge, should we go off the
18 record?

19 JUDGE PRIDGIN: For what purposes?

20 MR. BOUDREAU: I'm sorry. That's
21 November 26th?

22 JUDGE PRIDGIN: Yes. And then my count, 20
23 days from November 26th would be December 16th for replies.
24 Do I hear any objections to a schedule like that? And
25 obviously because of holidays or whatever, if a party needs

1 more time, they can file a motion.

2 Okay. Let's make that a briefing schedule,
3 then, from Aquila, their brief due November 26th, from the
4 other parties December 16th, and I'll leave it to the
5 parties if they want to file a joint brief or individual
6 briefs, that's fine.

7 Yes, Mr. Dottheim?

8 MR. DOTTHEIM: You're not providing for
9 simultaneous briefs on November 26th from all parties and
10 then reply briefs?

11 MR. BOUDREAU: I kind of had the same -- I
12 think I'm going down the same. That's my process that
13 Mr. Dottheim has, so I'll defer to him, because I think he's
14 sharing my thought.

15 JUDGE PRIDGIN: That's fine. If that's what
16 the parties want to do, that's fine. That would just speed
17 things up.

18 MR. MOLTENI: I would prefer the procedural
19 schedule that you originally set up. I think Mr. Dottheim
20 was that kid in the back of the room at school that said,
21 teacher, you haven't assigned any homework.

22 JUDGE PRIDGIN: Mr. Dottheim, go ahead.

23 MR. DOTTHEIM: Well, I should maybe have let
24 you finish that entire schedule because I didn't -- well, I
25 thought possibly there might not be other than one brief

1 from the parties other than Aquila, and I was seeking to
2 address that in particular; that is, all the parties have an
3 opportunity for initial and reply briefs.

4 JUDGE PRIDGIN: I'm sorry. Anyone else? Do
5 the parties just want to talk about this? I don't care.

6 MR. BOUDREAU: Well, I'll express my
7 preference, for what it's worth, and then maybe we can
8 break. I think customarily we've had a round of initial
9 briefs and then a round of reply briefs, and I frankly
10 prefer that because I think as applicant I ought to at least
11 have a chance at some point to reply to what everybody else
12 is saying, similar to the order of evidence. I ought to be
13 able to at least close.

14 I think if we do simultaneous initial and
15 simultaneous reply, hopefully everybody's satisfied that
16 they've had a chance to have their say and then have their
17 response. I'll just throw that out for consideration.

18 JUDGE PRIDGIN: Would the parties then be
19 agreeable to have everyone have a brief in on
20 November 26th -- whether the other parties do joint or
21 separate that's fine -- and then replies in 20 days
22 thereafter?

23 Again, I don't care, and if we need to go off
24 the record and you-all discuss it, that's fine. Would you
25 like some time to go off the record and talk about this?

1 MR. BOUDREAU: That would be fine.

2 JUDGE PRIDGIN: Let's just go off the record,

3 then. We are off the record.

4 WHEREUPON, the hearing of this case was

5 adjourned.

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