

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

**In the Matter of the Application by Aquila, Inc. for Authority to
Assign, Transfer, Mortgage or Encumber its Franchise, Works
or System**

Cause No. EF-2003-0465

Volume 3

ORAL ARGUMENT

October 1, 2003

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In the Matter of the Application by)
Aquila, Inc. for Authority to Assign,) Case No.
Transfer, Mortgage or Encumber Its) EF-2003-0465
Franchise, Works or System)

BEFORE:

RONALD D. PRIDGIN,
REGULATORY LAW JUDGE.
KELVIN SIMMONS, Chair
CONNIE MURRAY,
STEVE GAW,
BRYAN FORBIS,
ROBERT CLAYTON,
COMMISSIONERS.

REPORTED BY:

TRACY L. CAVE, CSR, CCR
ASSOCIATED COURT REPORTERS

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JUDGE PRIDGIN: On the record, please. Good morning. We are here for the oral argument for motion for summary determination in Case No. EF-2003-0465 in the matter of the application by Aquila, Incorporated for authority to assign, transfer, mortgage, or encumber its franchise works or system.

I am Ron Pridgin. I am the Regulatory Law Judge assigned by the Commission to preside over this hearing. This hearing is being held on October 1st, 2003. The time is about ten o'clock -- or pardon me, 10 after 10:00 in the morning. We're in the Hotel Governor Office Building in Jefferson City, Missouri.

If I could at this time, I would like to get oral entries of appearance from counsel beginning with Staff, please.

MR. WILLIAMS: Nathan Williams and Steven Dottheim appearing on behalf of the Staff of the Public Service Commission, PO Box 360, Jefferson City, Missouri 65102.

JUDGE PRIDGIN: Thank you, Mr. Williams. On behalf of the Office of Public Counsel, please?

MR. MICHEEL: Douglas E. Micheel appearing on behalf of the Office of Public Counsel and public, PO Box 7800, Jefferson City, Missouri 65102-7800.

1 JUDGE PRIDGIN: Thank you, Mr. Micheel.
2 On behalf of the Intervenor, I believe I have
3 Ag Processing and also Sedalia Industrial Energy Users
4 Association.

5 MR. CONRAD: Your Honor, on behalf of those
6 entities that you've mentioned, Stuart W. Conrad, law firm
7 of Finnigan, Conrad and Peterson, 3100 Broadway, 1209
8 Penntower Office Building, Kansas City, Missouri 641-- I'm
9 sorry, 64111. I can't remember my own zip code this
10 morning.

11 JUDGE PRIDGIN: Thank you, Mr. Conrad.
12 On behalf of the State of Missouri?

13 MR. SHANSEY: On behalf of the State of
14 Missouri, assistant attorney general William M. Shansey,
15 Post Office Box 899, Jefferson City, Missouri 65102.

16 JUDGE PRIDGIN: Thank you, Mr. Shansey.
17 And on behalf of Aquila?

18 MR. BOUDREAU: Let the record reflect the
19 appearance of Paul A. Boudreau and James C. Swearengen with
20 the law firm of Brydon, Swearengen and England, Post Office
21 Box 456, Jefferson City, Missouri on behalf of applicant,
22 Aquila, Inc.

23 JUDGE PRIDGIN: Mr. Boudreau, thank you.
24 We are here, again, for the oral argument
25 simply on the motion for summary disposition filed by the

1 joint movants, Office of the Public Counsel, the
2 Intervenors, Ag Processing and Sedalia -- let me get this
3 right -- Sedalia Industrial Energy Users Association --

4 MR. CONRAD: Yes, sir.

5 JUDGE PRIDGIN: -- and the State of Missouri.

6 At my request, those parties have appointed
7 Doug Micheel as lead counsel simply for purposes of this
8 oral argument. So what I'd like to do is to hopefully try
9 to set some sort of time frame as to how we're going to
10 proceed.

11 Mr. Micheel, do you have -- what I'd like to
12 do is try to get some sort of estimate of what kind of time
13 you think it would take to present your argument. And
14 that's understanding you don't know what kind of questions
15 you're going to get.

16 MR. MICHEEL: Your Honor, I've never read my
17 argument out. I mean, I would think that 30 minutes would
18 be sufficient. I mean, I have bullet points that I want to
19 talk about and issues that I want to discuss, so I think at
20 least initially 30 minutes should be more than adequate.

21 JUDGE PRIDGIN: Okay. And with the caveat
22 that, of course, we'd really prefer that -- the Commission
23 and I have read the motions and the supporting suggestions
24 and, you know, we don't need them read to us. We just would
25 like those summarized and, of course, to have the attorneys

1 available for questions.

2 And I don't want to cut off the other parties,
3 you know, the other joint movants' opportunity for oral
4 argument, but of course, we'd appreciate it if they don't
5 repeat.

6 And, Mr. Boudreau, any idea on how long you
7 think it would take you?

8 MR. BOUDREAU: I have a little trouble
9 estimating that as well because a good deal of it depends on
10 what is touched upon my Mr. Micheel, but I would think
11 30 minutes would be ample. My guess is it will take
12 substantially less, but if you can reserve 30 minutes for
13 me, I think that would be adequate.

14 JUDGE PRIDGIN: Thank you.

15 And I don't believe that Staff either joint in
16 this motion or filed a response. Is that correct,
17 Mr. Williams?

18 MR. WILLIAMS: That is correct.

19 JUDGE PRIDGIN: Had you planned to present
20 anything?

21 MR. WILLIAMS: No. But we are here for --

22 JUDGE PRIDGIN: If the Commission has
23 questions? All right. Thank you.

24 And another reason that I was curious about
25 the time frame is I have a motion for expedited treatment on

1 a tariff that's due and I'm expecting a Staff rec around
2 noon. So I'm going to have to adjourn -- if we're not done
3 in roughly an hour, I'm going to have to adjourn to go
4 address that. And if that's the case, I mean, of course
5 I'll announce that and we'll have to readjourn probably, you
6 know, somewhere in the neighborhood of 1:00 or 1:30. So if
7 we're not done and I abruptly bring this to a halt, that's
8 why.

9 All right, Mr. Micheel, if you would, please
10 approach the podium.

11 MR. MICHEEL: May it please the Commission.
12 Douglas E. Micheel appearing on behalf of the Office of the
13 Public Counsel. And I'm lead counsel for the joint movants
14 in this proceeding.

15 And before I get into the direct part of my
16 argument, I want to explain what we're not here on or what
17 issues we're not here on and what kind of case this case is
18 not.

19 First of all, this is not a merger case. It
20 is not an asset sale case. This is a financing case. And
21 that becomes important when we talk about the standard that
22 we're going to deal with here.

23 Secondly, it is joint movants' belief that
24 this case is a case of first impression before this
25 Commission. And in order to understand why it's a case of

1 first impression before the Commission, I just need to give
2 you a little bit of background about the posture of the
3 facts in this case and why we're here.

4 In this case Aquila, Inc. is a foreign
5 corporation. It has its charter in the state of Delaware.
6 Commission rules when a company such as Aquila, Inc. seeks
7 to finance at the corporate level, Aquila, Inc., you do not
8 have to come to the Commission for approval of that
9 financing.

10 Indeed, the four-year \$430 million term loan
11 that the company got in this proceeding, they've already got
12 the term loan, they've already got the proceeds of the term
13 loan. As we sit here today, they already have enough
14 security in place based on the lender's needs to cover the
15 term loan and so they didn't need to come here.

16 On a typical financing that you have before
17 this Commission, what happens if it's a Missouri
18 corporation, prior to the consummation of any financing, the
19 company needs to come in and get this Commission's approval.

20 So the posture that we have here in this case
21 factually is you have a company that's already got its loan,
22 that has assets to support that loan, the financing deal has
23 been consummated and now they're coming in asking to
24 encumber Missouri jurisdictional assets as part of that term
25 loan.

1 And so you'll hear applicants say and indeed
2 they said in their -- in their legal papers that they filed
3 in response to the motion for summary disposition that we
4 cited no cases. And, Commissioners, the reason we cited no
5 cases is because this has never happened before, before this
6 Commission.

7 Now, there are a couple Commission rules that
8 are applicable, in our view. First of all, let me tell you
9 the Commission rule that we don't believe is applicable and
10 that was the rule cited by applicants. Applicants cite
11 4 CSR 240-3.110. And that is filing requirements for
12 electric utility applications for authority to sell, assign,
13 lease or transfer assets.

14 Commissioners, Aquila is not selling,
15 assigning, leasing or transferring any assets. And if you
16 look to that rule specifically, it says, for example, in
17 Section 1B, A copy of the contract or agreement of sale.
18 There is no contract or agreement of sale here. D says, The
19 reasons the proposed sale of assets is not detrimental to
20 the public interest. As a matter of fact, they are not
21 selling assets.

22 However, as I said earlier on, the Commission
23 does have occasion to look at public utility company
24 financings at first blush before they're consummated when it
25 is indeed a Missouri corporation. And the Commission rule

1 that deals with that is 4 CSR 240-3.120. And I should say
2 these are the electric rules. You also have mirror gas
3 rules, but just to tuck this down instead of pointing you to
4 both the electric and gas rules, I'm just talking about the
5 electric rules right now.

6 And the electric rule is 4 CSR 240-3.120 which
7 says, Filing requirements for electric utility applications
8 for authority to issue stock, bonds, notes and other
9 evidence of indebtedness.

10 What we have here is a mortgage deed of trust
11 that is evidence of indebtedness, i.e., they want to
12 mortgage all of their Missouri utility assets. So when you
13 look at this rule, it says clearly in 1B of the rule, A
14 statement of the purpose for which the securities are to be
15 issued and the use of the proceeds. That rule,
16 Commissioners, is more akin to what we have here.

17 But what I'm telling you is due to the unique
18 factual situation and procedural circumstances that we have
19 in this case, i.e., the loan has already been consummated,
20 after the loan has been consummated, they're coming in to
21 seek encumbrance of a property. And they already have
22 enough collateral, in our view, to support the loan.

23 There is no specific Commission rule on point.
24 However, the more applicable rule and the rule that is more
25 akin to the situation that we have here is the filing

1 requirements to issue stocks, bonds, notes or other evidence
2 of indebtedness. Not the merger rule that applicants cite.

3 Let me go -- what I've done here is blown up
4 what I believe are the important paragraphs of the company's
5 application and the initial clause there. I know there's
6 been a lot of discussion -- I was in agenda yesterday --
7 about how this Commission should analyze this case and what
8 standards the Commission should use. And I think that's an
9 appropriate first step for the Commission to look at.

10 And I think for terms of the summary
11 disposition motion that we have here today, we need to look
12 at the company's application to answer the questions of what
13 statutes should you look at, what standards should you use.

14 COMMISSIONER CLAYTON: Judge, may I ask a
15 question?

16 JUDGE PRIDGIN: Absolutely.

17 COMMISSIONER CLAYTON: Mr. Micheel, do you
18 mind if I ask you a question here before we move forward?

19 MR. MICHEEL: No, your Honor.

20 COMMISSIONER CLAYTON: I do not have a copy of
21 the rule that you just cited. Was it 3.120 in which there's
22 a reference to statements of indebtedness?

23 MR. MICHEEL: Yes.

24 COMMISSIONER CLAYTON: And you believe that
25 that's the applicable rule in this instance. If we were to

1 assume that was the case, what would Aquila have to prove to
2 get authorization from the Commission?

3 MR. MICHEEL: Well, I think Aquila would have
4 to come to you and say a statement of the purpose for which
5 the securities are to be issued and the use of those
6 proceeds. In other words, they'd have to tell you we need
7 these -- we need to encumber the property for X and we're
8 going to use the proceeds we receive for Y.

9 In other words -- and again, Commissioner, I
10 want to tell you it's not on point because we don't believe
11 there's a specific Commission rule that is directly on point
12 because this situation is factually unique from any other
13 situation.

14 COMMISSIONER CLAYTON: Wait a minute. Do you
15 believe 120 is on point or not?

16 MR. MICHEEL: Well --

17 COMMISSIONER CLAYTON: You just said that you
18 thought 120 was applicable and then you say, well, it's not
19 really on point. Which is it?

20 MR. MICHEEL: It's applicable. It shows what
21 the Commission would do in a normal situation where we have
22 a question where utilities are seeking to encumber utility
23 property.

24 COMMISSIONER CLAYTON: Okay. If we assume
25 it's applicable and a statement is filed and a plan for the

1 use of the assets is filed, what does Aquila have to prove
2 to us to get Commission authorization?

3 MR. MICHEEL: I believe the Commission has
4 to -- or Aquila, the applicant, has to prove that there's a
5 need, a need --

6 COMMISSIONER CLAYTON: And is that stated in
7 the rule?

8 MR. MICHEEL: I think it is, a statement for
9 purpose of which the securities are to be issued and the use
10 of the proceeds. Yes, it is.

11 COMMISSIONER CLAYTON: The word -- okay.

12 MR. MICHEEL: The word "need" doesn't appear,
13 your Honor. If that's the question, the word "need" does
14 not appear. Which --

15 COMMISSIONER CLAYTON: Okay. Go ahead and
16 finish your thought. I don't want to interrupt you.

17 MR. MICHEEL: But when you look at that -- and
18 I don't believe that's the standard either and I'm going to
19 get to the standard. I mean, I think the standard -- first,
20 you -- I'll cut to the chase if you want me to.

21 COMMISSIONER CLAYTON: That's what I want. We
22 don't want to horse around here today.

23 MR. MICHEEL: And I'm not -- I'm --

24 COMMISSIONER CLAYTON: And I'm not saying that
25 this motion is that way, but I think we really need to

1 establish what has to be proved before we can decide
2 whether --

3 MR. MICHEEL: Sure.

4 COMMISSIONER CLAYTON: -- you know, decide
5 whether there is an issue of material fact still undisputed.
6 That's why I'm trying to get to that.

7 MR. MICHEEL: And I think what the Commission
8 needs to do is the Commission needs to balance the company's
9 need or alleged need for this alleged -- the company's need
10 to encumber their property based, on the other hand, you
11 need to look at the public detriment or the impact it will
12 have on the public at the end of the day.

13 And I think that's rooted, Commissioner -- and
14 this is where I was going initially. I think that's rooted
15 in Section 393.180 that says that encumbering property in
16 the state of Missouri is a special privilege. And it's also
17 rooted in 393.190.1 that says any time you want to encumber
18 property or sell property, you have to come to the
19 Commission and get an order approving that sale.

20 And so that's where I was going, Commissioner.
21 You know, but I think it's important that we look at the
22 facts and see, first of all, what was the need that the
23 company stated, okay, and I think we find the need that the
24 company stated in its application.

25 And what I've done here is I've excerpted what

1 joint movants believe are the three critical paragraphs in
2 the application, because that's all we're looking at at this
3 point for summary determination. It's on the application,
4 on our motion of undisputed facts and on their response.

5 And I don't know if you'd have a chance to
6 look at their response, their answer to the undisputed
7 facts, but there are no real undisputed facts. Those were
8 all admissions. They admitted all of the undisputed facts.

9 COMMISSIONER CLAYTON: Then just before you go
10 to this -- and I know you want to go ahead and get to that
11 and I know the other Commissioners do too. Basically, the
12 balancing test, the balancing, the need to encumber versus
13 the public -- is it public detriment or public benefit?

14 MR. MICHEEL: Public detriment, public
15 benefit, I think they're one in the same.

16 COMMISSIONER CLAYTON: Not to the detriment of
17 the public is the --

18 MR. MICHEEL: I think they're interchangeable.

19 COMMISSIONER CLAYTON: And that's based on the
20 Rule 3.120 and Sections 393.180 and 190?

21 MR. MICHEEL: And it's also based on certain
22 cases that -- I mean, you can look at the City of St. Louis
23 case. I think the applicants have also cited the City of
24 St. Louis case, your Honor. And I think that case supports
25 that view.

1 And we filed today -- and I apologize for
2 getting it so late to you, but joint movants filed today our
3 legal memorandum on that where we discuss -- where we
4 discuss those issues.

5 COMMISSIONER CLAYTON: Do you believe the
6 St. Louis case is applicable in this instance? It was not
7 an indebtedness case.

8 MR. MICHEEL: Well, I think the statement
9 about the public interest, your Honor, is applicable, but I
10 think you're absolutely correct none of the cases cited by
11 applicants deal with -- they're all assets sales cases. And
12 that's why I started off telling you that's not what this
13 case is. It's --

14 COMMISSIONER CLAYTON: Do you believe it's
15 applicable in --

16 MR. MICHEEL: Yes, I do. I believe the public
17 detriment portion and the statement of public detriment.
18 Now, I don't agree with applicant's manifestation of what it
19 means when something is in the public detriment. Okay? And
20 I was going to get to that later in the argument. I'll do
21 it now if you want.

22 COMMISSIONER CLAYTON: I'll take a deep breath
23 and sit back.

24 MR. MICHEEL: Okay. Thank you.

25 As I was saying, I think you need to balance

1 on the one hand the need of the company versus the public
2 detriment or public interest at issues that are arisen.

3 And you need to look at that balance and if
4 the balance tips one way, you should deny the -- if the
5 balance dips toward public detriment, you should deny the
6 application. If the balance tips toward need and less in
7 public -- if there's less public detriment and more need,
8 then you should grant the application. And where -- how
9 do --

10 JUDGE PRIDGIN: I'm sorry. Commissioner
11 Murray?

12 COMMISSIONER MURRAY: I'm sorry, but I just
13 have to ask you there. You're saying if there's some public
14 detriment, we could still grant it?

15 MR. MICHEEL: I think you could if you believe
16 the need outweighed that public detriment. I don't think
17 that would ever be the case, but I think you could balance
18 them, yes.

19 COMMISSIONER MURRAY: You don't think there is
20 a standard of no detriment to the public?

21 MR. MICHEEL: I think there is a standard of
22 no detriment to the public.

23 COMMISSIONER MURRAY: But we can find some and
24 still grant it?

25 MR. MICHEEL: Yes.

1 COMMISSIONER MURRAY: Okay. Thank you.

2 MR. MICHEEL: Let me just look at their
3 application. And the first paragraph of their application
4 that is important is paragraph 4 of the application. And
5 it's really the last sentence of paragraph 4 that's
6 important.

7 And it says, Why the company wants this. And
8 they say, It's to secure Aquila's financing arrangements,
9 which are used to support the company's utility operations.

10 In paragraph 13 they describe what those
11 financing arrangements are. Remember we have a \$430 million
12 three-year term loan. Okay? They tell you that \$250
13 million of that four-year term loan are required to support
14 the utility operations of Aquila, all of Aquila's US
15 utilities and \$180 million of those -- of the proceeds of
16 that \$430 million term loan are going to support
17 non-regulated operations of Aquila. Okay?

18 So when you look at paragraph 17 -- and they
19 tell you in paragraph 17 that they're always going to keep
20 the proper allocation between assets to support the
21 250 million and assets to support the 180 million for
22 non-regulated.

23 They also tell you in paragraph 7 -- or 13,
24 excuse me, that there is a ratio that the lenders use. It's
25 a 1.67 ratio of assets to collateral value. Now, I don't

1 disagree with what they say in paragraph 13, that they're
2 separating those loans, but they say they're going to keep
3 them separated.

4 Their answer to our motion for summary
5 judgment clearly states that they have more than enough
6 utility collateral to support the \$250 million need that
7 they say is the need.

8 So if you're going to continue to keep those
9 separated, you've already got enough utility collateral
10 there. In paragraph 17 they say, in summary, Aquila is
11 seeking Commission approval to encumber its Missouri assets
12 for essentially four reasons: First, to have full use of
13 the term loan.

14 Their answer to the motion for summary
15 disposition already indicates that they have more than
16 enough -- and it's a highly confidential number, but they
17 have more than enough utility collateral in the states of
18 Colorado, Nebraska, and Michigan to meet the term --

19 JUDGE PRIDGIN: I'm sorry. Just while you
20 brought that up, Mr. Micheel, I do want to remind everybody
21 we are web casting, we're live. And I appreciate
22 Mr. Micheel, you know, saying we had a highly confidential
23 number. I do want to remind the parties to watch what you
24 say because we are web casting.

25 Okay. I'm sorry, Mr. Micheel.

1 MR. MICHEEL: -- to meet the utility
2 collateral requirements. And so they have full use of
3 \$430 million term loan, so that need is satisfied.

4 The second need that they indicate in
5 paragraph 17 is that as a matter of equity, utility assets
6 should support working capital requirements for utility
7 operations.

8 I don't disagree with that. They have utility
9 assets. They have the utility assets in Michigan, Nebraska,
10 and Colorado supporting that \$250 million need.

11 The third point they make is that it's only
12 fair since working capital is needed to support day-to-day
13 operations of Aquila -- of Aquila's utility operations, then
14 all of Aquila's utility assets should be part of the pool.

15 That, Commissioners, is a fair and a standard
16 created in whole cloths by Aquila. And if the states of
17 Michigan, Nebraska and Colorado or Iowa, Minnesota or Kansas
18 felt it was unfair in some way or somehow everybody should
19 be in the pool, those parties would have intervened in this
20 proceeding and said, Look, you have to put the Missouri
21 assets in the pool, it's not fair to us.

22 Nobody is saying that. And, as a matter of
23 fact, Colorado went ahead and approved this application in
24 Colorado knowing good and well that other states may not
25 join that pool. I'm not surprised that Minnesota and Iowa

1 are not here.. The Staffs of Minnesota and Iowa oppose this
2 application for various reasons. And I think that's in the
3 testimony. So I don't think that that is any reason or
4 need.

5 And the fourth and final reason or need is
6 that the borrowing rate under the term loan drops 75 basis
7 points to 8 percent if Aquila adds utility assets from other
8 states.

9 And, of course, as opposed to being a benefit,
10 I think that that is a direct and immediate detriment to the
11 public interest. And let me tell you why. The 75 basis
12 point reduction that they're talk about in the term loan
13 will not reduce the rate Aquila charges utility operations
14 for its loans. They've already told you they're insulating
15 those operations.

16 The only beneficiary of the interest rate
17 reduction will be Aquila's non-regulated operations, in
18 spite of the fact that utility assets are used to achieve
19 the interest rate reduction.

20 So what I'm telling you, Commissioners, is
21 when you look on the -- what is their need side of the
22 balance, they've proven no need. The four reasons they've
23 given, three of them prove no need and the fourth reason is
24 actually a detriment because what you have there is you have
25 regulated utilities supporting non-regulated operations.

1 That should not happen.

2 And the only people that are going to benefit
3 from that are the non-regulated operations of Aquila,
4 because Aquila has already told you in their application --
5 and you can find that at page 20 -- that they're going to
6 price utility debt at the comparable triple B credit rating
7 at page 20.

8 So the only portion of Aquila that can benefit
9 is the non-regulated portion. And they're directly using
10 regulated assets. So that -- so on the one hand, on the
11 need, you have nothing. Based on their answers to the
12 motion for summary disposition, you have no need. On the
13 other hand, you have one detriment clearly that is
14 immediate, the 75 basis point reduction.

15 Secondly, you have an immediate detriment.
16 What they want to do is encumber all -- all of their assets.
17 If you encumber all of your assets -- if you have a house,
18 if you encumber all of it, everyone else is second.

19 So immediately there is a detriment to the
20 public there because all things remaining the same, it
21 reduces their financial flexibility because all of their
22 assets are encumbered by a first mortgage and that's what
23 they want.

24 JUDGE PRIDGIN: Commissioner Clayton?

25 COMMISSIONER CLAYTON: Mr. Micheel, just to

1 make sure that I understand, this may -- this proceeding may
2 be a first for a number of Commissioners, but it's certainly
3 a first for me in this environment, but I wanted to make
4 sure that I understood what you're arguing.

5 You were saying that Aquila would have to
6 prove that there is a need for them to take this action,
7 number one, and number two, that they would secondly have to
8 prove that it is not to the detriment of the public --

9 MR. MICHEEL: Yes.

10 COMMISSIONER CLAYTON: -- is that correct?

11 MR. MICHEEL: Yes.

12 COMMISSIONER CLAYTON: Would you agree that
13 there is a dispute as to facts -- as to the -- whether or
14 not there's a detriment to the public? Do you believe that
15 there is a dispute among the parties on that issue? Do the
16 parties agree? Not whether you think there's a -- you know,
17 whether you think the facts say a certain thing, but is
18 there a dispute as to that issue?

19 MR. MICHEEL: I think the parties disagree on
20 that issue.

21 COMMISSIONER CLAYTON: Do you believe that the
22 parties disagree about whether or not there is a need?

23 MR. MICHEEL: Yes.

24 COMMISSIONER CLAYTON: Okay. Okay. Thank
25 you.

1 MR. MICHEEL: But I would -- I would add that
2 their answer --

3 JUDGE PRIDGIN: Mr. Micheel, I think
4 Commissioner Murray has a question.

5 COMMISSIONER MURRAY: Sorry. I just wanted to
6 follow up on that because if a need is a part of the
7 standard and there is a dispute as to the need, there is a
8 genuine issue of material fact, is there not?

9 MR. MICHEEL: And what I'm saying is in the
10 answer to our motion -- yes, if that were the case. But in
11 our answer -- in their answer to our motion for summary
12 disposition, the company admitted, your Honor -- and let me
13 get to the paragraph that they admitted it.

14 Paragraph 20, which admits our paragraph 19,
15 in paragraph 20 they say, Aquila admits the appraised value
16 of utility property located in the states of Colorado,
17 Michigan and Nebraska combined currently exceed the value of
18 utility collateral needed to support its \$250 million in
19 working capital requirements for domestic utilities.

20 COMMISSIONER MURRAY: That was not all of the
21 need that was expressed. The lowering of the -- from 8.75
22 to 8 was another need expressed. And it appears that
23 there's a genuine dispute over whether that is a need or
24 not.

25 MR. MICHEEL: I would say that there is a

1 dispute about whether that's a need, okay, but that need is
2 clearly, in my view, a detriment.

3 COMMISSIONER MURRAY: But there is a dispute
4 over it, whether it's a detriment or benefit and whether or
5 not it's a need.

6 MR. MICHEEL: I would not disagree with that,
7 your Honor.

8 COMMISSIONER MURRAY: So there is a genuine
9 dispute as to material facts in this case regardless of
10 which standard you use, is there not?

11 MR. MICHEEL: There -- there is. Our -- yes.

12 COMMISSIONER MURRAY: Then how could we
13 summarily dismiss it or give you -- grant your motion for
14 summary disposition?

15 MR. MICHEEL: Well, I think that the facts are
16 rather -- let me explain that. The company has said they
17 are going to separate the non-reg from the regulated, okay,
18 in their order -- or in their application. And that's what
19 they're going to do.

20 On the face of this application, if you grant
21 them the application, that separation does not happen. Only
22 regulated assets are supporting non-regulated costs.

23 COMMISSIONER MURRAY: I have to think about
24 that.

25 MR. MICHEEL: I mean, if you look at paragraph

1 13, that's what the company says in their application, that
2 they're going to maintain the proper separation between the
3 250 million and the 180 million.

4 And what I'm saying is the 75 basis point
5 drop, based on what they say in paragraph 20 of their
6 application, that they're not passing through those higher
7 costs to us, only benefits the non-regulated. It's only a
8 reduction that benefits the non-regulated.

9 This Commission shouldn't be concerned and it
10 shouldn't be an issue what happens to the company's
11 non-regulated operations. I mean, I understand that that is
12 an issue that the company has raised. It's right here in
13 the application. But it's not an issue that this Commission
14 should ever be concerned about. And, in fact, it is a
15 direct detriment, so --

16 JUDGE PRIDGIN: Mr. Micheel, anything else
17 you'd like to cover before I open this up for questions from
18 the Bench?

19 MR. MICHEEL: I think that's sufficient, your
20 Honor.

21 JUDGE PRIDGIN: All right. Thank you.
22 Mr. Chairman, any questions?

23 CHAIR SIMMONS: None at this time.

24 JUDGE PRIDGIN: Thank you, Mr. Chairman.

25 Commissioner Murray, any further questions?

1 COMMISSIONER MURRAY: I think not. Thank you.

2 JUDGE PRIDGIN: Thank you.

3 Commissioner Forbis?

4 COMMISSIONER FORBIS: Not right now.

5 JUDGE PRIDGIN: Thank you.

6 And, Commissioner Clayton?

7 COMMISSIONER CLAYTON: None, thanks.

8 JUDGE PRIDGIN: I don't believe I have any.

9 Mr. Micheel, thank you very much. I'm sorry.

10 Unless the other parties, you think, are going to use this
11 chart -- thank you.

12 And, again, let me remind the other joint
13 movants to try not to repeat what Mr. Micheel has said, but
14 I do want to give them the opportunity. Mr. Conrad?

15 MR. CONRAD: Well, I'm just take a few
16 moments, your Honor. Stu Conrad for the Intervenors, SIEUA
17 and Ag Processing.

18 Let me go very quickly to a couple points that
19 were raised. Commissioner Murray, you asked the question
20 about the dispute on the need. I think the problem that
21 we're seeing that I think that your question belies, that is
22 a non-regulated need which takes me to my larger point of
23 why 393.180 is there.

24 Why did the legislature, in its infinite
25 wisdom, decide that they needed to identify the ability to

1 encumber public utility property as a special privilege?
2 Why is that?

3 What often gets forgotten in this process,
4 because we deal so much with books and numbers and whether
5 this particular item of rate base is properly valued and
6 normalization and flow through, we forget the public
7 utilities are trustees.

8 The public utility property that they own is
9 encumbered already with a public trust. That's called a
10 Certificate of Public Convenience and Necessity that this
11 Commission grants.

12 And that is why when the legislature said if
13 you want to further encumber that property that is public
14 utility property, gas plant, electric plant, you have to
15 come to the Commission and obtain their approval because
16 that is a special privilege.

17 Now, there's been discussion about the
18 standard. Our position, I believe, is laid out in our
19 statement of position, that the reliance by Aquila on
20 language that does not exist, that has been made up in whole
21 cloths out of the St. Louis case about a public detriment --
22 that is certainly, Commissioner Clayton, the source of that
23 test -- that case. It's an old -- it's an old case and it's
24 a good case. It's a bank case from the Supreme Court.

25 But if you look at it, you will not find the

1 words "immediate." You will not find the words "status
2 quo." And indeed our point, Commissioners, is that if those
3 were the part -- or those were part of the standard, you
4 would never have a merger fail, you would never have any
5 transaction that a public utility brought to you ever fail,
6 which would make review by this Commission meaningless.

7 I say that because if you interpret that the
8 way Aquila does, there will be no rate increase as a result
9 of action by this Commission. Why? Well, because they
10 would have to file one. And it would be 30 days out and
11 would probably be suspended for an additional 10 months. So
12 there's no immediate rate increase.

13 And heavens to Betsy, no, do you think the
14 utility is going to immediately after this go out and pull
15 service people off of the lines or off of the gas meters?
16 Of course not. They're going to do everything they can do
17 to kind of try to maintain that.

18 So they say, well, there's never going to be
19 an immediate detriment, so, therefore, in our view, that
20 exception swallows the rule logically because you could
21 never have a case that would meet that standard as they
22 construe it.

23 JUDGE PRIDGIN: I'm sorry, Mr. Conrad.
24 Commissioner Clayton as a question.

25 COMMISSIONER CLAYTON: Mr. Conrad, do you and

1 your clients or your client -- I'm not sure how many clients
2 you have out there, the more the merrier -- do you agree
3 with the position of Office of Public Counsel that the
4 standard for Aquila to meet in this case is that the need to
5 the regulated side of the utility outweighs the public
6 detriment? Do you agree with that standard?

7 Your statement of position is a slight
8 modification of that, but I wanted to be clear on what you
9 believe that Aquila has to prove to be authorized to do
10 this.

11 MR. CONRAD: I'm not sure I'm following your
12 question, but let me approach it this way and see if we're
13 communicating.

14 At base, what the St. Louis case gives you,
15 your Honor, is a balancing test. On one hand, you have a
16 privately owned entity, it's not -- it's not a public
17 corporation in the sense that it's owned by the public.
18 It's owned by shareholders who are private individuals. So
19 it's an investor-owned utility.

20 Now, what prevents any investor-owned business
21 from doing as it wishes with its property? And the answer
22 is that public trust that I talked about. So if you
23 detrimentally impact that, then that is a transaction that
24 has to be interdicted by the larger and countervailing
25 public interest.

1 Now, I don't know if I'm responding to your
2 question because I sense that it was talking about need.
3 But any public utility or any business doesn't have to come
4 to this Commission to borrow money on its own credit. I
5 mean, that's a debenture, that's a corporate debenture. But
6 there's no encumbrance of public utility property.

7 The difference in this case and I think
8 what -- I think what Mr. Micheel was getting at, is this one
9 comes to you backward. Usually the utility comes in and
10 says, we need to borrow some money. In order to borrow the
11 money, we need to encumber our utility assets.

12 They come to you and say, here's why we need
13 it, the purposes, here's what we're going to do with the
14 proceeds, the disposition of the funds. Look at -- look at
15 the interests and balance them. And if you find that we
16 need this more than there is public detriment, then allow us
17 to do it. But if there is public detriment from the
18 transaction, then you interdict it and say, no, you've got
19 to find some other way.

20 Contrary-wise, if they have non-regulated
21 businesses, they don't have to come to you, they don't have
22 to talk to you to encumber those. They can encumber what
23 they see fit.

24 COMMISSIONER CLAYTON: I understand that,
25 Mr. Conrad. And perhaps I'm not clearly identifying what

1 I'm seeking. A motion for summary disposition, which I
2 would analogize to a summary judgment or judgment on the
3 pleadings or something in the civil court is an
4 extraordinary remedy.

5 MR. CONRAD: Probably closer to judgment on
6 the pleadings.

7 COMMISSIONER CLAYTON: And you would agree
8 that it's an extraordinary remedy?

9 MR. CONRAD: Well, I face motions to dismiss a
10 lot, so I don't know how extraordinary --

11 COMMISSIONER CLAYTON: Well, but it's not a
12 motion to dismiss. I mean, they're different things.

13 MR. CONRAD: Well, there is that aspect of it.
14 Because the case is framed -- as in a law case in the
15 courts, the case is framed by the plaintiff's petition. If
16 the plaintiff's petition is insufficient on its face or if
17 through discovery you tick off and disprove by admissions
18 from the plaintiff every item that they've put in their
19 petition, then they're not entitled to go further with that
20 case.

21 COMMISSIONER CLAYTON: What do they need to
22 include in their petition? I mean, what has to be proven by
23 the applicant?

24 MR. CONRAD: Well, if I'm the plaintiff, I'll
25 go to MAI first and I'll pull that and incorporate that in

1 my pleading here.

2 COMMISSIONER CLAYTON: In this instance --

3 MR. CONRAD: Here the basics -- here the
4 basics are --

5 COMMISSIONER CLAYTON: What have they
6 failed -- what have they failed to allege or state in their
7 petition? I mean, are you saying that it's a failure to
8 state a cause of action for which relief may be granted or
9 are you stating that if we assume all the facts that have
10 been alleged in their favor, that they still don't meet a
11 case?

12 MR. CONRAD: I think -- I think a mix of both.
13 Let me try to address both of them.

14 In the sense that they don't state a claim, I
15 think the way our motion was framed and phrased,
16 Commissioner Clayton, was that there is no meaningful relief
17 that can be granted by this Commission.

18 COMMISSIONER CLAYTON: You don't think we have
19 the ability to authorize them to encumber their --

20 MR. CONRAD: You can authorize it --

21 COMMISSIONER CLAYTON: Well, then --

22 THE COURT REPORTER: I can only write one of
23 you at a time.

24 MR. CONRAD: I'm sorry.

25 You can authorize it, but they have already

1 obtained -- as Mr. Micheel has pretty eloquently pointed
2 out, they've already obtained and acknowledge that they have
3 obtained the relief that they were seeking.

4 Now, they have not come back and sought to
5 amend that petition or that application and say, well, we've
6 taken care of these things, we've ticked these off, here's
7 the additional bill of needs that we have.

8 COMMISSIONER CLAYTON: But they haven't
9 encumbered their regulated assets in Missouri, have they?

10 MR. CONRAD: That's right.

11 COMMISSIONER CLAYTON: They have already
12 encumbered them?

13 MR. CONRAD: No.

14 COMMISSIONER CLAYTON: They're seeking to
15 encumber them?

16 MR. CONRAD: Actually, some of them are
17 currently subject to first mortgage. That's -- that
18 probably gets us into some HC stuff insofar as the amount,
19 but there is a slight -- some portion of that.

20 If the argument is that it's unfair, I mean,
21 that's -- if that's where we're going, that Colorado
22 shouldn't bear all this burden or Michigan shouldn't bear
23 all this burden, I simply would remind you the seal on the
24 wall behind you says the Public Service Commission of
25 Missouri. And it's your guys' job not to look out for

1 Colorado ratepayers.

2 COMMISSIONER CLAYTON: I agree. But how do we
3 effectively do that without taking evidence in a full
4 hearing rather than throwing the case out through summary
5 disposition?

6 MR. CONRAD: Because if they have not made a
7 submissible case in that sense, then there is no point in
8 taking your time to go further with the hearing. Because at
9 the end of the day, if they cannot show you why they want
10 the money and what they're going to do with it and those
11 whys and whats pertain to their regulated business, not
12 their non-regulated business, there's no relief you can
13 grant them.

14 COMMISSIONER CLAYTON: Okay. Thank you,
15 Judge.

16 MR. CONRAD: I mean, they can go out,
17 Commissioner, and borrow that money on their own without
18 your approval if they need it for non-regulated.

19 Why then are they here? And the answer is
20 they want to use the regulated assets that are already their
21 public trustee assets to support that borrowing. But they
22 have told you and admitted in their responsive pleadings
23 that they have no need for that based on the need that they
24 stated.

25 COMMISSIONER CLAYTON: So do they need to

1 prove need? Is that what you're saying? Do they have to
2 prove need?

3 MR. CONRAD: If they want to encumber public
4 utility assets, I think the answer is yes.

5 COMMISSIONER CLAYTON: Okay.

6 MR. CONRAD: They've got to show -- you know,
7 otherwise -- let's take this case. What is that
8 application? How many paragraphs and pages is it?

9 If they didn't have to show need, they'd just
10 come in and say, we want it, give it to us signed Aquila,
11 but they don't do that. They recognize that they need to
12 show you a justification.

13 Conversely, if they came in and said to you,
14 here's why we want it, we want to go out and put \$430
15 million in the Power Ball, are they saying that you don't
16 get to inquire as to the need?

17 COMMISSIONER CLAYTON: Well, if you're going
18 to ask me a question, I don't -- I just want to know if
19 that's something that they have to prove. Not whether I'd
20 want to know or not but whether they have to prove a need.
21 And if they do have to prove a need, is it a substantial
22 need and where is that authorized in the law? Because the
23 word "need" is not referenced in any cases. I've read the
24 St. Louis case, it's not in the rule, it's not in the
25 statute.

1 MR. CONRAD: Well, like Mr. Micheel, I'll
2 readily concede that the word "n-e-e-d" does not appear
3 there.

4 Presumptively, Commissioner -- let me approach
5 it this way. Let's hypothesize that there are two rooms.
6 You're in room one and there's another room. Between those
7 two rooms there are three doors. Your question I think is
8 focusing on which of the three doors do we go through. Our
9 issue is questioning why do you want to go to the second
10 room.

11 COMMISSIONER CLAYTON: Okay. Thank you,
12 Judge.

13 JUDGE PRIDGIN: Thank you, Commissioner
14 Clayton.

15 Let me open it for questioning. Commissioner
16 Simmons, any questions for -- all right. Thank you.

17 Commissioner Murray?

18 COMMISSIONER MURRAY: Mr. Conrad, are there
19 any cases in which we have ever applied the standard that is
20 being -- that you're proposing here that would balance a
21 need against a public detriment?

22 MR. CONRAD: Well, that gets us kind of into
23 the colloquy that we were having with Commissioner Clayton.
24 This is, we believe -- we agree with -- with Public Counsel
25 that this is a case of first impression on the very narrow

1 facts. Part of that is because it's reversed in the
2 sequence, but it's not a merger and it's not -- it just
3 doesn't quite fit.

4 So if you get them, Commissioner, to that
5 analysis and say, okay, it does not exactly lay comfortably
6 within the exact pigeon holes that we've previously
7 established, it seems then to me and I think to the joint
8 movants, that you then go back to what is the rationale for
9 doing this at all, which is what I was talking about with
10 Commissioner Clayton about the public trust and 393.180, why
11 the legislature required that.

12 COMMISSIONER MURRAY: Has this Commission
13 never addressed this fact scenario before where the parent
14 has borrowed the money and comes back later to encumber the
15 utility's assets?

16 MR. CONRAD: We've not been able to find it.

17 COMMISSIONER MURRAY: And then in your
18 statement of position and your remarks this morning, it
19 seems to me that I heard you saying that there -- there is a
20 standard that involves no public detriment, but that you
21 disagree with the standard of no immediate public detriment.

22 MR. CONRAD: Yeah. And that -- that seems to
23 be sourced, Commissioner, from that Missouri American case
24 in the year 2000. And I even brought a copy of that up
25 here, but it basically is a statement that the Commission --

1 and this is on page -- well, I don't know what page it is
2 because I'm pulling it off of Lexus.

3 The Commission Re State Ex Rel City of
4 St. Louis to require a direct and present public detriment.
5 Commissioner Lumpe dissented really on that -- on that
6 particular point.

7 That's -- you just don't find that in
8 St. Louis. And that is not really what the law is. Rather
9 clearly, as I've suggested to you, if that is the case, if
10 rates have to go up or the quality of service
11 instantaneously has to go down, you will never find a
12 merger, you will never find an acquisition, you will never
13 find a stock sale, you will never find an asset sale that
14 meets that test. You just simply -- and that to me says
15 that's illogical because the legislature did not set up the
16 Commission in order simply to be a rubber stamp.

17 COMMISSIONER MURRAY: I want to also ask you
18 the -- not detrimental to the public. Do you agree with
19 Mr. Micheel that we can approve a sale or an asset transfer
20 or an encumbrance that does have a detriment to the
21 public -- have some detriment to the public and still meet
22 the not detrimental to the public standard?

23 MR. CONRAD: I am not entirely sure. I would
24 need to look, I think, at the facts of that. It seems to me
25 that again the responsibility of the Commission -- and I

1 don't mean to sound presumptuous and tell you what your jobs
2 are and I would hope that it's not misinterpreted that
3 way -- but to respond your question, I guess I see that it
4 is difficult to reconcile any kind of a public detriment
5 with an advantage to a public utility that is already a
6 public trustee.

7 I mean, you know from your practice of law
8 that if a trustee of an estate dips into the estate assets
9 in theory even a penny, that's a breach of trust. I mean,
10 typically they would go in -- if they're going to go in it,
11 they would go in it for more, but it's not a grant theft
12 auto, it's not like \$50 or more. It's a breach of trust.

13 And it's a breach of trust if I use client
14 funds from my client trust account to pay for my grocery
15 bill even though it may just be a roll of lozenges or
16 something. So it's difficult for me to see how if you go
17 through that balancing process, that the public interest
18 does not receive very, very careful consideration.

19 I wouldn't want to rule out the possibility,
20 Commissioner, that there might be a case in which the
21 utility's need is so great, but it would need to be -- to
22 double up the term, it would, in my view, require that that
23 need be based on the continued rendition of safe and
24 adequate service.

25 COMMISSIONER MURRAY: Okay. I'm going to stop

1 you there and ask you if you would just state briefly what
2 you think the standard is that we need to apply in this
3 case.

4 MR. CONRAD: Well, I think you need to balance
5 the interests of the utility in the conduct of its regulated
6 business as against the impact that the proposed transaction
7 will have on the public interest that it has an over-arching
8 responsibility to serve.

9 I believe that that latter point is not
10 properly tested by immediacy, but has to be -- has to be
11 looked at in the future implications. And that's drawn
12 specifically from the language of the St. Louis case. That
13 if you set in motion a set of events that will work to
14 public detriment, then that would prohibit the transaction.

15 COMMISSIONER MURRAY: That's kind of hard to
16 put that into words as a standard. Do you think there's --
17 do you think there is a requirement that the utility show
18 need?

19 MR. CONRAD: You bet. Why are they here? Why
20 do they come in?

21 COMMISSIONER MURRAY: Do you think there's a
22 requirement that we find that there is at least a balancing
23 of any public detriment?

24 MR. CONRAD: I think implicit in the St. Louis
25 case and in -- and in the rest of the law there is a

1 balancing process, yes.

2 COMMISSIONER MURRAY: Do you think there is
3 any legitimate dispute between the parties over whether
4 there is a need?

5 MR. CONRAD: No, ma'am, I do not.

6 COMMISSIONER MURRAY: Do you think there is
7 any legitimate dispute between the parties over whether this
8 is detrimental to the public?

9 MR. CONRAD: I think that is -- that's an
10 ultimate question which you don't reach if they haven't
11 shown you need.

12 COMMISSIONER MURRAY: Do you think there is a
13 dispute?

14 MR. CONRAD: About?

15 COMMISSIONER MURRAY: Public detriment.

16 MR. CONRAD: About public detriment?
17 Probably. I think that's what the bulk of the case would be
18 about if you are intent on going ahead to hearing.

19 COMMISSIONER MURRAY: And do you agree we've
20 never applied a needs test in the past?

21 MR. CONRAD: I don't -- no, I don't. I think
22 implicitly you have applied a needs test in every case
23 you've dealt with.

24 COMMISSIONER MURRAY: Thank you.

25 JUDGE PRIDGIN: Thank you, Commissioner

1 Murray.

2 Commissioner Forbis?

3 COMMISSIONER FORBIS: No.

4 JUDGE PRIDGIN: Thank you.

5 Commissioner Clayton?

6 COMMISSIONER CLAYTON: No, thank you.

7 JUDGE PRIDGIN: Thank you. I don't have any
8 questions.

9 MR. CONRAD: I'm sorry. I thought you were --

10 JUDGE PRIDGIN: That's quite all right. I
11 went through the Bench. We don't have any further
12 questions. Thank you.

13 Mr. Shansey, if I'm pronouncing that
14 correctly, does the State wish to be heard?

15 MR. SHANSEY: Just very briefly, your Honor.

16 JUDGE PRIDGIN: If you would please approach
17 the podium.

18 MR. SHANSEY: Commissioners, I'm assistant
19 attorney general William Shansey. I'm representing the
20 State of Missouri. Mr. Molteni, counsel of record in this
21 case, had a conflict and apologizes for not being able to be
22 here this morning. I will be very brief.

23 Mr. Molteni had presented -- had some
24 statements, but I think they've already been covered by
25 Mr. Micheel and by Mr. Conrad. We would simply echo the

1 arguments made by Mr. Micheel and we would support the
2 position of Public Counsel.

3 JUDGE PRIDGIN: Mr. Shansey, thank you. Let
4 me see if we have any questions from the Bench.

5 Mr. Chairman?

6 CHAIR SIMMONS: No.

7 JUDGE PRIDGIN: Commissioner Murray?

8 COMMISSIONER MURRAY: No.

9 JUDGE PRIDGIN: Commission Forbis has none.
10 Commissioner Clayton? Okay.

11 I have no questions. Mr. Shansey, thank you
12 very much.

13 MR. SHANSEY: Thank you very much.

14 JUDGE PRIDGIN: Mr. Boudreau, at this time you
15 may approach again. Let me let you know just for time
16 constraints if you aren't done in probably the next 10 or 15
17 minutes, that's perfectly okay, but I'm going to have to
18 interrupt and we'll have to recess for lunch and then
19 return. Whichever you want to do is perfectly fine. I just
20 want to let you know ahead of time.

21 MR. BOUDREAU: If I might state -- if I might
22 state a preference at this point, that there's enough ground
23 that's been covered that it seems likely that my
24 presentation will be interrupted based on your need.

25 JUDGE PRIDGIN: All right.

1 MR. BOUDREAU: And my preference would be --
2 I'll proceed if you want me to, but my preference would be
3 to go ahead and adjourn now and come back at your
4 convenience when I can complete my presentation without
5 interruption.

6 JUDGE PRIDGIN: That's perfectly fine with me,
7 if that's okay with the Commission. Mr. Boudreau, thank
8 you.

9 What may be best -- I believe we have Staff
10 available in case the Commission has any questions.
11 Mr. Williams, I understand you don't have any presentation
12 but that you're simply available to answer questions?

13 MR. WILLIAMS: That's correct.

14 JUDGE PRIDGIN: Does the Commission have any
15 questions for Mr. Dottheim or for Mr. Williams?

16 CHAIR SIMMONS: I do not.

17 COMMISSIONER MURRAY: I would like to ask the
18 Staff to state what standard the Staff thinks applies to
19 this case.

20 MR. WILLIAMS: May it please the Commission.
21 Nathan Williams on behalf of the Staff.

22 The Staff feels that the Commission has some
23 discretion. The Staff chose to apply the standard of not
24 detrimental to the public interest. The Staff did not
25 include immediate as it perceives that the company has

1 applied that terminology to the standard of not detrimental
2 to the public interest. The Staff views immediate to be
3 more of a causal issue as opposed to a timing issue.

4 COMMISSIONER MURRAY: So in determining
5 whether something is detrimental, then if it sets in motion
6 something that will be detrimental, that would meet your
7 test of being detrimental?

8 MR. WILLIAMS: What I've seen in reviewing the
9 cases is that the Commission has said that in instances
10 where someone's proposed a detriment, that it's been too
11 speculative. And we believe that's where the immediacy
12 terminology has come into play.

13 It's a matter of whether the Commission terms
14 that something's speculative or it's actually, I guess,
15 reasonably likely to come to fruition that the Commission
16 decides it is a detrimental aspect and, therefore, warrants
17 not granting the relief sought.

18 COMMISSIONER MURRAY: So you would agree that
19 a future detriment that's purely speculative would not meet
20 the burden?

21 MR. WILLIAMS: I would agree that if the
22 Commission determines it is speculative, that that would not
23 be -- based on prior decisions by the Commission and the
24 courts, that that would not be a detriment that -- well, it
25 wouldn't be a detriment.

1 COMMISSIONER MURRAY: And Staff's position on
2 this is that the standard that we will apply is whether or
3 not it is detrimental to the public interest; is that
4 correct?

5 MR. WILLIAMS: That's the standard Staff is
6 applying. I think it's likely to be the standard the
7 Commission will apply, but Staff does believe that the
8 Commission does have some discretion as to what standard it
9 may choose.

10 COMMISSIONER MURRAY: And if we apply that
11 standard, is there a genuine dispute as to material fact
12 from the pleadings?

13 MR. WILLIAMS: I believe for purposes of
14 summary determination motion there are, yes.

15 COMMISSIONER MURRAY: Thank you.

16 JUDGE PRIDGIN: Commissioner Murray, thank
17 you.

18 Commission Forbis? Commissioner Clayton? No
19 questions from me.

20 Mr. Williams, thank you very much.

21 This seems to be an appropriate time to
22 recess. What I'd like to do is go off the record and we
23 will reconvene and give Mr. Boudreau an opportunity to
24 address the Commission beginning at 1:30. Anything further
25 from the parties before we go off the record?

1 Hearing nothing, we are now off the record.
2 We will reconvene at 1:30.

3 (A RECESS WAS TAKEN.)

4 JUDGE PRIDGIN: We are back on the record. We
5 are resuming the oral argument on the motion for summary
6 determination filed in Case No. EF-2003-0465 in the matter
7 of the application by Aquila, Incorporated for authority to
8 assign, transfer, mortgage or encumber its franchise or its
9 works or system.

10 As I recall when we recessed, we had heard
11 from all the parties except for Aquila.

12 And, Mr. Boudreau, I believe if you're ready,
13 if you'll please approach.

14 I'm sorry. Mr. Williams, do you have
15 something?

16 MR. WILLIAMS: I believe I may have misspoke
17 in response to one of the questions Commissioner Murray
18 posed.

19 JUDGE PRIDGIN: Mr. Williams, if you would,
20 please approach the podium.

21 MR. WILLIAMS: I believe you asked if Staff
22 was not supporting the application -- or the motion for
23 summary determination on the basis of the disputed facts. I
24 believe you limited your question in that fashion.

25 COMMISSIONER MURRAY: I believe I asked you if

1 you thought there was a dispute as to either the need or not
2 detrimental to the public interest.

3 MR. WILLIAMS: Basically it was Staff's
4 position -- Staff's view that the summary determination
5 doesn't allege sufficient facts in order for the Commission
6 to make a determination, especially in light of the
7 uncertainty of the standard, that the application should be
8 denied and that a summary determination motion granted. And
9 it was not based on any subsequent disputed facts that
10 Aquila raised. I just want to make sure that was clarified.

11 COMMISSIONER MURRAY: I'm sorry. You've made
12 that very unclear to me. Would you restate what you've just
13 said?

14 MR. WILLIAMS: Staff just reviewed app-- the
15 motion for summary determination as filed. And based on the
16 review of that, in light of the uncertainty of the standard
17 of review that might be applied, Staff was of the view that
18 the facts -- undisputed facts were not sufficient in order
19 for the Commission to grant the motion.

20 Additionally, I don't know if the Commission's
21 looked at them yet or not, but yesterday the parties filed
22 their position statements on issues in the case. And as the
23 Commission may be aware, the very first issue listed is what
24 is the standard of review. If the Commissioners would like,
25 I've brought copies of what Staff filed.

1 And, in particular, I wanted to direct the
2 Commission's attention to the fact that there is a case that
3 the Commission has pending before the Missouri Supreme Court
4 where at least in the context of a merger the issue of
5 what's detrimental to the public interest may be addressed.
6 I believe the parties probably have addressed it. The court
7 may. I don't know if the Commissioners wanted another copy
8 or --

9 JUDGE PRIDGIN: You cited that case in your
10 position statement; is that correct?

11 MR. WILLIAMS: Yes.

12 JUDGE PRIDGIN: I think we all have copies and
13 can get them, as long as you've cited the case.

14 MR. WILLIAMS: Nothing further. I didn't have
15 anything further.

16 JUDGE PRIDGIN: Commissioner Murray, I'm
17 sorry. Did you have any further questions for Mr. Williams?

18 COMMISSIONER MURRAY: If you'll wait just one
19 second, please.

20 JUDGE PRIDGIN: Certainly.

21 COMMISSIONER CLAYTON: Perhaps I could go
22 ahead then. Do you mind if I --

23 JUDGE PRIDGIN: That's fine. Commissioner
24 Clayton.

25 COMMISSIONER CLAYTON: I'm confused now. I

1 had a big lunch, I'm wearing down, slow moving here.

2 The Staff is now supporting the joint motion
3 for summary disposition?

4 MR. WILLIAMS: No.

5 COMMISSIONER CLAYTON: You're not?

6 MR. WILLIAMS: We are not supporting it.

7 COMMISSIONER CLAYTON: But you believe that
8 the application by Aquila is insufficient?

9 MR. WILLIAMS: I was referring to the summary
10 determination motion. The reason we did not support it is
11 because we didn't feel like it had sufficient undisputed
12 facts and also because of the uncertainty of the standard of
13 review, that summary determination's appropriate in this
14 circumstance.

15 COMMISSIONER CLAYTON: Okay. So you all do
16 not support summary disposition in this case?

17 MR. WILLIAMS: Not on this motion.

18 COMMISSIONER CLAYTON: Not on this motion.
19 Okay. Thank you.

20 JUDGE PRIDGIN: Thank you, Commissioner
21 Clayton.

22 Commissioner Murray?

23 COMMISSIONER MURRAY: No questions.

24 JUDGE PRIDGIN: Mr. Williams, thank you very
25 much.

1 MR. WILLIAMS: I apologize for confusing you.

2 JUDGE PRIDGIN: Mr. Boudreau?

3 MR. BOUDREAU: Thank you. May it please the
4 Commission.

5 I'm going to intentionally keep my comments
6 short because I believe a lot of the territory that I had
7 planned on covering in my own comments has been covered with
8 some detail in response to some of the questions received
9 from various Commissioners this morning.

10 That does not mean that I'm not willing to
11 address any issues or any questions that the Commissioners
12 may have to -- if they want me to elaborate on any
13 particular point.

14 I think the fact that my comments are concise
15 is simply a reflection of the fact that I think the
16 applicable law in this case is fairly clear and, therefore,
17 the outcome with respect to the motion for summary
18 disposition should be apparent, and that is that it should
19 be denied.

20 I'm going to do something similar to what lead
21 counsel for the joint movants stated earlier to sharpen the
22 difference in this debate. He opened by telling you what
23 this case was not about. And I'm going to tell you what I
24 think it's not about. And it's going to seem odd, but I
25 think that my point will become apparent as I develop the --

1 or address the cases and the statutory law that's applicable
2 later on.

3 But the case before you is not a financing
4 case. It has some reference to a financing plan put in
5 place by Aquila and some financing activity that has
6 preceded the filing of the application, but it is not a
7 financing case technically speaking. And I'll come back to
8 that, but I want you to keep that in mind, please.

9 I believe you're all familiar with the
10 standard for granting a summary -- or a motion for summary
11 disposition. It's a relatively new Commission rule. I'm
12 not quite sure it's even been on the books for a year yet,
13 but my understanding is it has been modeled very closely
14 after summary judgment practice in civil courts.

15 And it's very similar in terms of content and
16 I think very similar in terms of the intent of the rule,
17 which was to determine whether or not there was even a basis
18 for going to hearing in a particular case. So I have looked
19 at the motion that has been filed in that light.

20 The other thing that I think is important to
21 realize is that in terms of making the Commission's decision
22 today on this motion, it really is just restricted to the
23 four corners of this document and not to all of the other
24 things that have been filed and said in the case. This is
25 not a decision on the merits of the case. This is just --

1 you have to find whatever you're going to do right here
2 (indicating).

3 And I think that's an important distinction.
4 It's a little difficult to keep these things parsed apart
5 because ultimately we're headed down the road to a hearing,
6 but I do think that's important because certain facts are
7 alleged and those are the only facts that are pertinent for
8 your decision.

9 I am glad to have the opportunity to come here
10 and address the Commission about this today, because I think
11 it is important to clarify what the law is as it concerns
12 the application that's been filed by Aquila.

13 I had assumed, naively apparently, that the
14 standard was fairly well recognized and that it wasn't going
15 to be much of a point of debate. Apparently it has become a
16 point of debate and I think it's important to get it
17 straightened out because I think it's important for you in
18 terms making a decision in this case that all the parties
19 are looking at the same law and debating facts that are
20 pertinent to the law.

21 Otherwise, you're just two ships passing in
22 the night and there's not much coherence in the record. And
23 I think it makes the case much more difficult for you to
24 consider and evaluate.

25 To go back to my opening comment, it's my

1 position that the motion for summary disposition should be
2 denied. And I think the facts that point that out are that
3 there are genuine issues as to material fact. And I think
4 that was brought out this morning in response to direct
5 questions from Commissioner Clayton to the lead arguing
6 counsel that on either standard, there's material facts in
7 dispute. So on that point alone, the motion should fail.

8 But more importantly, in looking forward to
9 the case, I think that the movants are not entitled to
10 relief as a matter of law. And this is because they have
11 not identified the correct standard for approval in this
12 case.

13 And, furthermore and in conclusion, the
14 summary disposition should not -- would not be in the public
15 interest in this case and I'll address that point later on
16 as well. And those are the three standards right out of the
17 Commission rule. I'm sure you've familiarized yourself with
18 that before so you don't need to hear it necessarily from
19 me, but I think it's important to keep the point of this
20 whole discussion today front and center.

21 I've addressed many of the things -- or many
22 of the points that I wanted to make in the written pleadings
23 that I filed in terms of the response to the motion and the
24 legal memorandum in support of the response. And I will try
25 not to reiterate all of those elements because I believe

1 that I have tried to lay them out in as much detail as I
2 can.

3 But the bottom line is that we don't think the
4 movants have -- we don't think they have addressed the
5 standard that this Commission must apply in the review of
6 the application that's been filed.

7 Quite simply, it is not a needs test. There's
8 no law that would indicate it's a needs test. There's no
9 prior cases that establish that it's a needs test. And,
10 more importantly, there is some -- there was some additional
11 law with which I provided you in a legal memorandum, which
12 would indicate that the determination of need as to the way
13 the company structures its financial plan is a matter of
14 management discretion.

15 And there were series of cases, the Marlon
16 case and the St. Joseph case. And those -- the
17 determination of need, the law would indicate, is that the
18 company's management is the entity that determines whether
19 or not there's a need to do a particular thing in terms of
20 financing or using its assets to further a financial plan.

21 So I would just refer you to those cases.
22 I'll address them in more detail if you'd like me to, but
23 that's why I don't think it's the standard because the law
24 has reserved the need determination to company's management.

25 JUDGE PRIDGIN: I'm sorry. Commissioner

1 Clayton has a question.

2 COMMISSIONER CLAYTON: In your statement of
3 position you make reference to several cases and you also
4 make reference to the standard that you believe -- or
5 Aquila, the applicant, believes should be applied in this
6 case, that the Commission should approve unless it is
7 against the public -- or unless it is to the detriment of
8 the public interest --

9 MR. BOUDREAU: That's correct.

10 COMMISSIONER CLAYTON: -- is that correct?

11 Now, does that mean that any detriment to the
12 public interest would warrant denial of this application or
13 does it mean a significant or substantial, or do you believe
14 that there's any weighing of benefits versus detriments to
15 the various parties?

16 MR. BOUDREAU: I believe that it requires some
17 judgment in the sense that if -- if there is -- if there are
18 allegations that there might be some detriment here but some
19 benefit over here, if the benefits outweigh the detriments,
20 there may still be a good cause for the Commission to
21 authorize the company to go ahead and do it.

22 So to that extent, I think that there are
23 times when there's some sort of balancing going on as to the
24 matters that have been brought to the Commission's
25 attention.

1 COMMISSIONER CLAYTON: So it's more than just
2 against -- it's more than just the language -- and I would
3 cite it -- I want to make sure that I'm accurate. That it
4 is simply against the -- or excuse me, will cause a direct
5 and present detriment to the public interest. So you do
6 believe that there is a weighing of benefits and detriment?

7 MR. BOUDREAU: Well, I believe the question
8 was is it -- is it permissible for this Commission, under
9 that standard, to approve a transaction even if there might
10 be some element of detriment somewhere in the case but it's
11 outweighed by other factors.

12 And I guess my answer is yes. I don't know
13 that I -- I don't know that that's different than the
14 standard I've articulated. I think there has to be some
15 meaningful -- some meaningful detriment to the public
16 interest for the Commission to deny it.

17 I'm not aware of -- I'm not aware of any cases
18 that -- where there's been that sort of weighing process
19 going on. I'm just saying as an abstract matter I can
20 imagine that debate going on.

21 COMMISSIONER CLAYTON: If there is, let's
22 say -- let's assume just for purposes of this argument, if
23 there was a small amount of detriment to the public
24 interest, what would that have to be outweighed by for
25 approval by the Commission?

MR. BOUDREAU: Well, let me give you an example.

COMMISSIONER CLAYTON: Would it be the company, the pub--

MR. BOUDREAU: Let me give you an example of one that I think is -- and the reason I want to give it to you is because it has some substantial authority behind it. I haven't briefed this case, but it's the Love 1979 Partners case, which was argued by the Supreme Court. I'll provide a -- or it was decided by the Supreme Court I believe in 1986.

And the exact details of the transaction -- I'm not going to try to recount them because I'll probably get them wrong, but in essence, it was the sale by I believe Union Electric Company of its steam operations in the St. Louis area to another entity that was either associated with or might have been the Bistate Development Agency.

And it was appealed to the Missouri Supreme Court on the grounds that -- well, there were certain allegations of detriment, one of which is that the new owners might raise rates. In fact, I think they may have stated their intention that rates would have to go up.

And so that went to the Supreme Court. And the Supreme Court looked at that and they said there are occasions -- but the other fact you should know is the

1 Commission approved the transaction. And so that decision
2 by the Commission to approve the sale went up to the
3 Missouri Supreme Court.

4 And the Missouri Supreme Court concluded that
5 even if rates were likely to go up, the Commission could, in
6 its discretion, find that it was not detrimental to the
7 public interest because the increased rates might be
8 necessary to ensure continued good quality service.

9 So they looked at it from the perspective of
10 even given the fact that rates may go up, the Commission
11 could look at that and decide that that was not detrimental
12 to the public interest. So that -- hopefully, that somewhat
13 addresses the question as to, you know, what sort of factors
14 the Commission can take a look at.

15 But they looked at that as a factor that came
16 up in that case, the Commission had. And the Supreme Court
17 affirmed that decision of the Commission to say that that's
18 not necessarily a bad thing. There may be reasons why
19 that's a good thing ultimately for continued good quality
20 service for the company to be able to maintain and improve
21 service.

22 JUDGE PRIDGIN: Thank you, Commissioner
23 Clayton.

24 Mr. Boudreau, anything else before you take
25 any questions?

1 MR. BOUDREAU: Please. I do have a few other
2 observations. Also, to try and summarize because -- well,
3 let me do this, if I might. May I approach the Bench,
4 please?

5 JUDGE PRIDGIN: Certainly.

6 MR. BOUDREAU: There's been some question, I
7 believe, as to where the company came up with its rationale
8 for the non-detrimental standard for this case. And what I
9 wanted to do is to -- is to explain to the Commission by
10 reference to the statutory case law --

11 JUDGE PRIDGIN: Can I get you to hold up while
12 you're away from the podium because we need to pick that up?

13 MR. BOUDREAU: I'm sorry.

14 You've heard some debate by the parties about
15 what statutes apply, what rules apply, how did the company
16 conclude what it concluded. And I'd like to just take you
17 through these real quickly from front to back.

18 The statute that Mr. Micheel primarily relies
19 upon, Section 393.180, and he looks to the special privilege
20 reference, and I want the Commission to make sure that they
21 read that statute in its entirety, particularly the last
22 clause where it says, That exercise of the power by the
23 Commission shall be exercised as provided by law and under
24 such rules and regulations as the Commission may prescribe.

25 So you have to look to the rules and regu-- or

1 other applicable law and the rules and regulations of this
2 Commission.

3 I made -- I made this point in the legal memo,
4 but I think it bears repeating, that the special privilege
5 language upon which the joint movants primarily rely does
6 not apply to my client. Because my client, as Mr. Micheel
7 pointed out, is chartered in the state of Delaware.

8 And if you go to Tab B, that's a copy of the
9 Missouri Public Service Commission versus Union Pacific
10 Railroad case. If you look at page 40, I've highlighted
11 some language. I won't repeat it, but that's the section
12 where the Supreme Court looks at that language and says,
13 this does not apply, it's impossible for it to apply to a
14 foreign corporation.

15 So I would submit to you that the argument
16 that the special privilege language has any independent
17 significance in this is wrong because Missouri Supreme Court
18 says it doesn't apply to foreign chartered companies.

19 So where do you look? The primary place you
20 look for the positive law here is Section 393.190, which is
21 under Tab C. And I've highlighted the first -- or some
22 language, not even the entire first sentence.

23 But the thing to -- it's worthwhile reading
24 through that because if you read through that language, it
25 talks about asset sales, it talks about mergers and

1 consolidations and it talks about mortgages and
2 encumbrances.

3 And it's important to look for that because
4 not only is it in the same statute, but it's in the same
5 clause and it's in the same sentence of the same clause as
6 relates to mergers and acquisitions and asset sales -- and
7 stock holdings and asset sales that where this Commission --
8 where the Missouri Supreme Court and this Commission for
9 years has applied the standard of no detriment.

10 So it's not that we're looking at some
11 different provision that ought to have some different legal
12 standard that applies to it. We're looking at exactly the
13 same clause and exactly the same statute.

14 And it's, to me, a little difficult to
15 understand how legally you could conclude that a different
16 standard applies to basically the same language in the same
17 clause.

18 And also the logical consequence of the joint
19 movants' argument that some different or higher standard
20 applies for a mortgage, vis-a-vis a merger, would suggest
21 that mergers and asset sales ought to be held to a lower
22 standard of review than a mortgage. I mean, I just don't
23 think it carries through logically.

24 I mean, if it were to be anything, it would be
25 the opposite way, but the law is clear. And I don't think

1 anybody is disputing the fact that a merger is an asset sale
2 and the standard is no detriment. It's been that way since
3 1917. And the Commission has applied it uniformly since
4 then.

5 And to my knowledge -- I won't go there.

6 The fact of the matter is, asset sales and
7 these sort of transactional applications are uniformly
8 approved by the Commission.

9 Where does the not detrimental to the public
10 interest standard come from? Comes from under Tab D. I
11 don't think I'll belabor the point. It's the St. Louis
12 case.

13 And I've highlighted the language that appears
14 on page 400 where they adopted basically the standard
15 that -- the court in Maryland that had an identical statute.
16 So I'm not creating these things out of air. I'm creating
17 them out of Missouri Supreme Court decisions. That's where
18 the standard comes from.

19 It was followed in the FeeFee Trunk Sewer
20 case, which is under Tab E. And I've highlighted the
21 language on page 468 of that decision where the Court of
22 Appeals says the Commission's required to approve it unless
23 it's detrimental to the public interest.

24 And as far as the present and direct standard
25 that has been suggested that I've invented that one out of

1 whole cloth as well, that actually comes -- I'm following
2 the Commission's own determination of what that standard is
3 out of the Missouri American case. I've highlighted that
4 under Tab F.

5 And so all I can do as a lawyer is come to you
6 and say, Here's what -- here's the law, here's what we filed
7 pursuant to, here's what the law tells us is the standard
8 and that's the standard by which we measured our filing
9 before the Commission.

10 I don't know what else to say about it other
11 than -- other than if you look under the next tab, which is
12 Tab G, a copy of the Commission's filing requirements rules
13 that spin off of 393.190 and if you look under D both of --
14 both of the highlighted rules, this is so well recognized
15 that the Commission's even codified the standard in its own
16 filing requirement rules.

17 So I don't think I'm bringing up anything new.
18 I'm just following the law as I understand it, the case
19 decisions and the Commission's own filing requirements.

20 The other thing, and this was alluded to by
21 Mr. Williams for the Staff, is under Tab H. I've copied an
22 excerpt out of a brief that this Commission filed with the
23 Missouri Supreme Court I believe on August 29th.

24 It's just an excerpt, but it deals with -- the
25 reason I put it in there is the Commission at that point of

1 the brief addressed this not detrimental standard in
2 connection with the appeal that's now pending before the
3 Missouri Supreme Court about the UtiliCorp St. Joe Light and
4 Power Company merger case.

5 So if this all sounds familiar, it ought to
6 because all I'm saying is what this Commission said to the
7 Missouri Supreme Court in terms of what the standard is.

8 JUDGE PRIDGIN: Commissioner Clayton?

9 COMMISSIONER CLAYTON: Your Honor, thank you.

10 Mr. Boudreau, the cases that have been cited
11 make reference to statutes prior to the current method of
12 codification. Are those statutes identical to the statutes
13 we're operating under right now for the cases that have been
14 cited?

15 MR. BOUDREAU: When you say that, Section 54
16 versus the Section 393.180?

17 COMMISSIONER CLAYTON: Well, I know, for
18 example, in the St. Louis case there is a different
19 codification than under things currently, I believe.

20 MR. BOUDREAU: In terms of the number of the
21 statute?

22 COMMISSIONER CLAYTON: Yes. So is the
23 language identical or are we operating under different
24 language?

25 MR. BOUDREAU: My understanding is the

1 language is identical. I don't believe this language has
2 been amended since it was enacted in 1913, I believe.

3 COMMISSIONER CLAYTON: So the language would
4 be the same for the 1917 case that's mentioned in your
5 packet, which I did not have a copy of, as well as the
6 St. Louis case, as well as the FeeFee -- and I don't believe
7 I said that on the record, FeeFee Trunk Sewer case?

8 MR. BOUDREAU: I believe that is correct. And
9 what they do is in the -- as a matter of fact, if you look
10 at -- let's go back to Tab B, which is the Union Pacific
11 Railway Company.

12 If you look in the prior column of the --
13 across from the highlighted language, the court lays out the
14 statutory language. It actually recites it. So I think if
15 you compare that, it's word for word. All that's changed is
16 the numeration in the statute.

17 COMMISSIONER CLAYTON: Then let me I guess
18 kind of sum it up for me. If this case goes to evidentiary
19 hearing, what does Aquila have to prove to get their
20 authorization?

21 MR. BOUDREAU: I think, in essence, my company
22 is obliged to show that what it's asking for will not change
23 the status quo in the sense of any detriment to its
24 customers, to its ratepayers, in essence.

25 That basically this won't change the status

1 quo, won't impair -- I don't think there's any dispute it's
2 not going to have any impact on rates because the company
3 hasn't filed any tariffs in conjunction with this
4 application to change any of the rates and charges and
5 that's it's not going to have any adverse effect on customer
6 service. I mean, I think that's basically what -- that in
7 this circumstance, that's what my company has to do.

8 COMMISSIONER CLAYTON: Is there a chance that
9 the public bears any risk? Is there any risk in this
10 transaction borne by the public?

11 MR. BOUDREAU: I can't think of a circumstance
12 where the public bears a risk. The company -- the property
13 is the company's property. And that's kind of how cases
14 have been decided, is that this is a property rights issue.

15 And that the -- that the only circumstance
16 wherein the company shouldn't be able to apply its assets to
17 further its business objectives is if in doing so, it would
18 somehow impair customer service.

19 If it were, for instance, to start selling its
20 utility poles simply because it just needed some money and
21 by doing that, customers would not receive service because
22 the lines are on the ground -- I mean, that's a ridiculous
23 scenario, but something like that where the use of the
24 property would impair customer service or the quality of
25 customer service. Otherwise, it ought to be able to do with

1 its property as it sees fit in order to --

2 COMMISSIONER CLAYTON: I understand that. But
3 if we assume the best case scenario, that, you know, the
4 bills get paid and the mortgage is released and, you know,
5 there's no -- there's no harm done to the public at all --
6 but if you even take it out to an extreme of the worst case
7 scenario, let's say that there's a default and some sort of
8 execution against these regulated assets which are not
9 unregulated assets they are regulated assets that are there
10 for the public --

11 MR. BOUDREAU: Yes.

12 COMMISSIONER CLAYTON: -- there is the risk or
13 there is some risk to the public in this sort of
14 transaction.

15 MR. BOUDREAU: I would call the risk minimal
16 and here's why. Two reasons. There's -- any time the
17 company does -- any time any utility does any financing,
18 particularly debt financing, there's always a risk.

19 Just because the debt's secured doesn't mean
20 that there can't be a default and somebody filing a petition
21 to force the company into bankruptcy. That can happen even
22 with unsecured debt. There's always a risk that's going to
23 happen. All the security interest does is prioritize the
24 claims of creditors in the event of bankruptcy or
25 insolvency.

1 And if you want to talk about bankruptcy or
2 insolvency, there is something of a track record with one or
3 two notable utilities that have filed for Chapter 11
4 reorganization authority. And typically what happens there,
5 it is a reorganization. In other words, the company doesn't
6 shut down. You don't pull the poles out of the ground, the
7 wires and sell it for scrap. The value of the utility is a
8 value as a going concern.

9 So typically what happens is you have a
10 financial reorganization of the company and -- and service
11 continues. And what you -- you have some shifting of
12 obligations and what the board's supposed to do, but the
13 company continues in service.

14 But those risks are always out there. It's
15 not the security that does it. The assets are always
16 subject to the claims of creditors whether they're secured
17 or not.

18 COMMISSIONER CLAYTON: Well, but if they're
19 pledged, then there's a -- I don't know if I necessarily
20 agree with that.

21 But if the assumption is made that there is,
22 let's say, a minimal risk or a minimal detriment possibly to
23 the public, how do we determine how that is outweighed in
24 benefit to the company or to the ratepayers?

25 MR. BOUDREAU: Without conceding the point

1 that it's a minimal risk --

2 COMMISSIONER CLAYTON: I understand.

3 MR. BOUDREAU: -- and detriment to the
4 ratepayers. The way that you might balance that is look at
5 what the company's objectives are under its financial plan,
6 which is to basically get itself to pay down indebtedness,
7 to shore up its balance sheet and get back to a -- a --

8 COMMISSIONER CLAYTON: But that's not really
9 the issue in this case because the money's already
10 transferred. This is -- the money's already past and I
11 think, you know, that's the nature of the other side's
12 arguments here.

13 What is the benefit of just the pledging of
14 the securities on a past note? What is that -- I mean, is
15 there any benefit that outweighs that detriment?

16 MR. BOUDREAU: There are -- there are at least
17 two things I can think of. First of all -- and it was
18 suggested -- it was mentioned this morning is -- in
19 conjunction with the need. We're obviously going to
20 cross over into the needs analysis here. And if -- you
21 know --

22 COMMISSIONER CLAYTON: So you say the word
23 "need" is in this statute somewhere too?

24 MR. BOUDREAU: No, I'm not. But the point I
25 want to make is that the benefit to the company is that it

1 can -- if it meets another hurdle in terms of coverage under
2 the term loan, it can -- it can realize a lowered interest
3 rate on the term loan, which will save it approximately -- I
4 think the figure that I recall is about -- on an annual
5 basis, about \$3.2 million in interest costs, which is money
6 that it can use for better purposes than just paying
7 interest on the loan. It can use it to pay down other
8 obligations and again to shore up its balance sheet.

9 The other thing is a matter of -- in terms of
10 a company that's as multi-jurisdictional as this one, you
11 must always keep in mind that it needs to consider how these
12 things are perceived by other commissions in other states in
13 terms of can it go back in the future, if it needs to, to
14 other states for similar or like treatment.

15 If other states feel like they've been hung
16 out or they've signed on and helped the company out but they
17 realized that it's not going to happen across the board, is
18 it -- realistically is the company going to be able to go
19 back and have a sympathetic ear if it's necessary to do this
20 again? So for an ongoing sort of business proposition,
21 that's a consideration.

22 COMMISSIONER CLAYTON: With regard to those
23 other states, I mean, if the Missouri PSC -- if the Missouri
24 PSC were to, let's say, not authorize this, would you -- did
25 you just say that other states would feel hung out?

1 MR. BOUDREAU: That's -- I don't know how
2 other states would feel, but that is a consideration I think
3 that the company needs to take into account.

4 And that goes back to the testimony that's
5 been filed by the company about the -- basically the
6 fairness -- I mean, there's -- this also supports working
7 capital requirements of all of its utility operations in all
8 states. So I mean, there's a business driver to this as
9 well. But I think the perception is that other states are
10 going to look at what all the other states do or don't do in
11 terms of making a decision about how they may proceed.

12 And that's just a reality. I mean, if the
13 company were to come to Missouri alone and not the other
14 states, the question that would be asked is why haven't you
15 gone to other states to try and get everybody on board with
16 this plan?

17 And so that sort of perception equity argument
18 is something that I think the company legitimately needs to
19 take into account.

20 COMMISSIONER CLAYTON: The company does, but
21 do you believe that the PSC, this Commission, should take
22 into consideration whether we feel we're being fair to other
23 state commissions?

24 MR. BOUDREAU: I think it's a legitimate
25 consideration. But, like I said, that more goes to the --

1 if this does go to the need -- and, in my view, the
2 determination of need is really something for the company's
3 management.

4 COMMISSIONER CLAYTON: Well, certainly I could
5 understand where the company would make a commitment like
6 that, but certainly we're not bound by some other state
7 commission.

8 MR. BOUDREAU: No, no. I'm not saying that
9 you're bound. I'm just saying it's a legitimate
10 consideration in terms of will the -- you know, will this
11 impair the company's ability in the future?

12 COMMISSIONER CLAYTON: I understand.
13 Thank you, Judge.

14 JUDGE PRIDGIN: Thank you, Commissioner
15 Clayton.

16 Mr. Boudreau, anything further before you take
17 questions from the Bench?

18 MR. BOUDREAU: Let me check real quick. I
19 don't think I have much more.

20 Let me just touch on one thing. We've
21 discussed it a little bit, but the consideration of the
22 company's objective to shore up its balance sheet and to
23 become investment grade, get to the point where the debt is
24 investment grade again, I think this is an item that's not
25 only beneficial to the company but affirmatively beneficial

1 to the customers it serves as well.

2 And that's a public interest consideration
3 that would be not considered if the motion were granted and
4 the case summarily dismissed. So that's another reason I
5 think for not granting the motion.

6 Otherwise, I think I've covered -- I mean, I
7 don't think I've done it as artfully as I had hoped, but I
8 think I've covered most of the principal points.

9 JUDGE PRIDGIN: All right. Mr. Boudreau,
10 thank you.

11 Commissioner Murray, any questions?

12 COMMISSIONER MURRAY: Thank you. Yes. I have
13 a couple of questions.

14 Mr. Boudreau, is the health of the regulated
15 entity in any way impacted by the health of the company
16 overall?

17 MR. BOUDREAU: The company -- the way that
18 Aquila is structured is that there's the corporate entity,
19 which is Aquila, Inc. Its US utility operations are not
20 separate legal entities. And so the financial condition of
21 the -- of the corporate entity is the financial condition of
22 its utility divisions. There really is no legal
23 distinction.

24 Now, they have different tariffs for different
25 divisions in different states and they have different ways

1 that they -- they operate the different divisions in
2 different states, but legally speaking, there's only one
3 legal entity here and that's Aquila, Inc.

4 COMMISSIONER MURRAY: So is it accurate to say
5 that lowering of the interest rate would benefit the
6 regulated utility?

7 MR. BOUDREAU: I believe that indirectly it
8 will, because what it does is it allows the company to
9 reduce other indebtedness and to shore up its balance sheet.

10 And by doing that, it will be able to go to
11 the capital markets and attract capital for all of its
12 needs, utility operations being predominant among them at
13 more reasonable rates. And the cheaper capital they can
14 get, I think the better off everybody is, the company and
15 the ratepayers.

16 COMMISSIONER MURRAY: And although I
17 understand that you're not arguing that need and analysis of
18 need is a part of the standard that we apply here, does the
19 company have a position that there is a need that is also a
20 need of the public utility?

21 MR. BOUDREAU: You're correct. And we didn't
22 argue need because we don't think that's the standard. I
23 think the only way that I can answer that is to -- is to
24 restate what I was -- the prior question and answer that we
25 had, is that the overall financial strength of the company

1 inure to the benefit of its utility operations ultimately.

2 And by strengthening the financial condition
3 of the corporate entity, that will ultimately inure to the
4 benefit of its regulated operations. I think there's a
5 direct connection between the two.

6 COMMISSIONER MURRAY: And is it true that the
7 reason that you are wanting to pledge the assets is to
8 benefit the financial strength of the entire entity?

9 MR. BOUDREAU: There's a number of reasons.
10 One of them is the -- is the -- there are a number of
11 considerations, one of which is to fulfill and maintain its
12 requirements under the term loan, that it meet a certain
13 coverage.

14 The other thing is -- and it's a different
15 sort of trigger, it's one of the triggers, the interest rate
16 reduction which it hasn't yet met.

17 The other thing is the fairness argument,
18 which is if the term loan is being used for -- to meet the
19 company's peak working capital requirements, then that's a
20 requirement that it has in each state. I mean, it's
21 actually -- this term loan benefits each state in that sense
22 in that it meets that utility requirement in each state
23 which it has regulated operations. And, therefore, it's
24 only fair that it's -- that each state treat -- treat it the
25 same in the sense of allowing it to secure its obligations

1 with its regulated assets.

2 COMMISSIONER MURRAY: Do you think that
3 4 CSR 240-3.120 is applicable? And that is the rule that
4 Mr. Micheel talked about earlier?

5 MR. BOUDREAU: The short answer is no. And
6 I've actually addressed this issue early on in this case.
7 And if you care to take a look back in June 6th of 2003 in
8 response to a Staff pleading which identified a couple of
9 deficiencies in terms of the company's resolutions, Staff
10 suggested that there might be a question as to the
11 adequacy -- or the -- what was the word I'm looking for --
12 the sufficiency of the filing and whether or not the company
13 should have filed for approval also under 393.200, which is
14 the securities statute and the rule 3-- or 3.120, which is
15 the implementing regulation.

16 And I filed a pleading in that case explaining
17 why that is not the case. And rather than belabor the
18 point, I pointed again to the Union Pacific Railway Company.
19 And if you've looked at the decision, that was the issue,
20 whether or not a foreign corporation needs to get the
21 Commission's approval to issue securities. And the answer
22 was no.

23 To make a long story short, if the statute
24 doesn't apply, the implementing regulation doesn't apply
25 either.

1 COMMISSIONER MURRAY: So the authority to
2 issue evidence of indebtedness is the authority of the
3 foreign corporation?

4 MR. BOUDREAU: Let me make sure I understand
5 the question. Are you going back to the question this
6 morning about whether the mortgage is evidence of
7 indebtedness?

8 COMMISSIONER MURRAY: Yes.

9 MR. BOUDREAU: The answer is no. Let me
10 explain why. First of all, if I'd known that was going to
11 be a question that would come up, I would have briefed it.
12 But it came up this morning for the first time so I haven't
13 had a chance to brief it.

14 The answer is no. There's -- there are a
15 number of cases in other states -- I'm not going to tell you
16 there's one in the state of Missouri -- where the question
17 has come up with similarly worded language stocks, bonds,
18 notes, other evidences of indebtedness, where other courts
19 have looked at whether mortgage type documents are an other
20 form of indebtedness and they have concluded they are not.

21 They say when you have a phrase that ends with
22 the term "other evidence of indebtedness," it relates back
23 to instruments that are specified, stocks bonds, notes. And
24 they've -- they've specifically concluded that mortgage
25 documents don't fit in that category.

1 Now, I didn't have a chance to brief it and
2 I'd be glad to provide the Commission with copies of the
3 cases if they'd like or citations to them if they'd like to
4 have them, but the short answer is no.

5 COMMISSIONER MURRAY: How long would it take
6 you to do that?

7 MR. BOUDREAU: A day. I've got it in my ready
8 reference file.

9 COMMISSIONER MURRAY: I would suggest it might
10 be wise to do that.

11 MR. BOUDREAU: I'd be glad to do that. Would
12 you prefer the copies or just the citations? Do you have a
13 preference?

14 COMMISSIONER MURRAY: Citations are adequate
15 for me.

16 MR. BOUDREAU: Okay. I will provide those.

17 COMMISSIONER MURRAY: Thank you. I think
18 that's all I have.

19 MR. BOUDREAU: Very good. Thank you.

20 JUDGE PRIDGIN: Commissioner Forbis?

21 COMMISSIONER FORBIS: Mr. Boudreau, how you
22 doing?

23 MR. BOUDREAU: I'm doing very well. Thank
24 you.

25 COMMISSIONER FORBIS: Glad to hear that.

1 I'm suffering from the same lunch fallout as
2 Commissioner Clayton, so I'll do my best here. Just a
3 couple of quick questions.

4 One is, you've talked about today and you also
5 have in your legal memorandum this issue that a utility has
6 a right to manage its property. And while I don't
7 necessarily dispute that, don't you believe there's some
8 sort of a threshold question there where the Commission does
9 have some authority if it believes that management of the
10 company is taking it down the wrong path?

11 MR. BOUDREAU: I'm not sure that I disagree
12 with that. And that's one of the reasons the company filed
13 the Direct Testimony that it did along with the application
14 to explain its rationale for why it wants to do what it
15 does, laying out the elements of its financial plan, the
16 circumstances, how they found themselves in the
17 circumstances they have found themselves and why this is, in
18 their view, the way to go.

19 So I think that they have submitted that to
20 the Commission so that you can see that this isn't just
21 some, you know, flight of fancy on their part. There's a
22 reasoned rationale for what the company wants to do. And I
23 don't think it's inappropriate for the Commission to take a
24 look at that and make sure that that they're comfortable
25 with the company's plans and objectives.

1 COMMISSIONER FORBIS: So it's your position we
2 do -- the Commission does have some authority and
3 responsibility to take a look at that and make sure that
4 everything is heading appropriately?

5 MR. BOUDREAU: I don't think it's an
6 inappropriate thing for the Commission to do under the
7 circumstances to take a look at what the company's financial
8 plan is, why it wants to do what it's doing.

9 I -- I will still stand by the standard, that
10 it's -- ultimately the application needs to be approved
11 unless it can be shown that it's detrimental to the public
12 interest, but I -- something of a fine line, but I think the
13 Commission ought to -- I don't think it's inappropriate for
14 the Commission to want to feel comfortable with what the
15 company's doing, why it's doing it, what objectives that
16 it's trying to meet because the company is asking for relief
17 from the Commission.

18 COMMISSIONER FORBIS: And on that stand, I
19 mean, we're talking about not detrimental to the public
20 interest. There's also, of course, standards in the public
21 interest. Do you see a distinction in there or am I making
22 one up?

23 MR. BOUDREAU: I've always looked at them
24 differently. To me, in the public interest is something of
25 an affirmative showing. There has to be some benefit, there

1 has to be some positive consequence of the action taken. So
2 I do see that differently than the language not detrimental.
3 Not detrimental just means that you're not causing any harm.

4 COMMISSIONER FORBIS: And you talk about again
5 status quo and immediacy and that sort of thing when the
6 harm might occur. But if, for example, in some case the
7 Commission were to have a fairly good indication that
8 some -- that a series of events could be put in place where
9 there might not be harm today, tomorrow, the next day, but
10 next year, would you see the Commission still has some
11 responsibility to act in that case?

12 MR. BOUDREAU: Let me do this. I'll echo the
13 comments of the Staff lawyer, Mr. Williams, which is that it
14 can't be speculative. I think there's -- yeah, I think -- I
15 don't think -- I would disagree -- if the line of reasoning
16 says this might happen in the future and if that happens,
17 something else bad might happen and if that happens, this
18 ultimate bad thing might happen, that to me is too far of a
19 leap.

20 That's not to say that some evidence couldn't
21 be submitted to the Commission where they could conclude
22 that there's a direct sort of causal link between what the
23 company's doing and a consequence that will happen, you
24 know, in the fairly short term, something that's measurable
25 and identifiable.

1 COMMISSIONER FORBIS: Short term being?

2 MR. BOUDREAU: I'm not sure that I can tell
3 you. I mean, I -- I think it would have to be something
4 that happens within -- I hate to identify it by time because
5 I think it depends.

6 The amount of time probably depends on what
7 the thing that's being spoken about is. But I would think
8 that if you're talking a year -- you know, that something
9 that everybody thinks is going to happen in a year from now,
10 that's -- that's a stretch. I mean, I don't know how close
11 you come to the cut-off point. I'm not sure that I'm in --
12 in a position to tell you where I think the cut-off point
13 is. It's a good question. I just don't know that I know a
14 good answer to it.

15 COMMISSIONER FORBIS: And I'm struggling with
16 it too. Cut-off point being you think beyond -- beyond a
17 certain limit we haven't quite decided yet it's hard to
18 predict and then it becomes, by definition, speculative
19 or --

20 MR. BOUDREAU: That's a pretty fair
21 characterization. It's probably more kind of a legal
22 analysis between whether or not there's going to be a causal
23 link between the action that the utility's asking that it be
24 allowed to take and a particular outcome or consequence that
25 can be assured is going to happen as a result of that.

1 So to me it's more kind of a legal standard of
2 causation than it is a matter of timing, but then also
3 timing figures into that because if it happens too far out
4 in the future, I don't think there's much of a legal
5 causation. I don't think that I'm helping the dialogue here
6 much, but --

7 COMMISSIONER FORBIS: No, you are. That's why
8 I was writing that down. I'm trying to put that together.
9 And I'm sure we'll have opportunity to develop this, maybe,
10 maybe not.

11 We talked about need. I know you're not
12 arguing need necessarily if I got your position --

13 MR. BOUDREAU: Yeah. My position is need is
14 not the standard and I'm not even arguing it.

15 COMMISSIONER FORBIS: So is it -- I'll ask you
16 tell me. Is it fair to ask, do you need it?

17 MR. BOUDREAU: Under the legal standard for
18 approval?

19 COMMISSIONER FORBIS: Yeah.

20 MR. BOUDREAU: Technically speaking, no. I
21 mean, it shouldn't be -- it shouldn't be the factor upon
22 which this Commission decides whether to approve or deny the
23 application. I don't think need is the standard. There
24 will be some dialogue about that in this case because the
25 issue, you know --

1 COMMISSIONER FORBIS: Has been raised?

2 MR. BOUDREAU: -- it's been raised so there's
3 going to be dialogue about it. But I would say that as a
4 technical legal issue, that's not -- you know, if this
5 Commission were to decide there's no need for this, that's
6 not the standard for approving or disapproving this
7 application.

8 COMMISSIONER FORBIS: Not the motion, the
9 application itself you're talking about?

10 MR. BOUDREAU: The application itself.

11 COMMISSIONER FORBIS: Thank you.

12 JUDGE PRIDGIN: Commissioner Forbis, thank
13 you.

14 Commissioner Clayton?

15 COMMISSIONER CLAYTON: Thank you, Judge. I'll
16 try to be very brief. I want to thank all the parties for
17 their patience with us.

18 You mentioned the savings on interest would
19 be, what, 3.2, 3.5 million dollars?

20 MR. BOUDREAU: I think 3.2 on an annual basis.

21 COMMISSIONER CLAYTON: Okay. 3.2 on an annual
22 basis. Directly benefiting, does that -- when I make
23 reference to that, will it directly benefit or be realized
24 on the regulated or the unregulated side of Aquila's
25 business?

1 MR. BOUDREAU: I'm not sure I --

2 COMMISSIONER CLAYTON: Before, you said --

3 MR. BOUDREAU: Go ahead.

4 COMMISSIONER CLAYTON: Before, you said that
5 there would be benefits, you know, if it helps the company,
6 it helps the business plan and continuity of service and
7 things like that. But directly is that something that's
8 going to go on the balance sheet that would reduce rates for
9 ratepayers or is it on the -- because part of the debt is
10 for unregulated business ventures or working capital?

11 MR. BOUDREAU: This has a number of facets and
12 I'm just trying to organize my thoughts so as not to further
13 confuse everybody.

14 The difference in the interest rate between
15 8.75 and 8, which is -- is the matter that was raised this
16 morning, I've alluded to it, but the difference in the
17 interest rate is something that will be -- is being borne by
18 the company and the shareholders of the company. So there
19 is -- basically the company has -- I'm going to confuse
20 everybody, including myself. Let me think for a second.

21 It's basically a shareholder or company issue.
22 From a rate-making perspective, the overall cost of capital
23 to the company is always an issue, but there's -- ultimately
24 in a rate case, the cost of capital of the company is taken
25 along with all the other costs and expenses and so forth in

1 terms of cost of operations in determining rates.

2 Company Witness John Emson has filed some
3 testimony that addresses how the company plans -- how the
4 company currently does and how it plans to continue to
5 insulate ratepayers from any interest rate costs that are
6 associated with the company's current financial
7 circumstances.

8 So there's not a direct -- there's not a
9 direct link between the interest rate that's paid on any
10 particular series or obligation and rates other than, you
11 know, later on it's ultimately taken in the same mix.

12 So is there a direct connection between the
13 interest rate reduction and customer rates? I wouldn't say
14 there's a direct connection. It's a factor that's taken
15 together with all the other factors in a subsequent rate
16 case.

17 COMMISSIONER CLAYTON: I'm going to ask a
18 question. You tell me if it is a bad question, if the
19 premise is bad.

20 If I were to phrase this case as does the
21 3.2 million annual savings to shareholders outweigh the
22 risk, no matter what the level of risk to the public by
23 mortgaging these assets, that we should approve this deal,
24 is that a fair statement of what we're talking about here?
25 You follow me? Fair question?

1 MR. BOUDREAU: I'm not sure it's the only
2 question. Are you asking me is that the only issue that's
3 before you?

4 COMMISSIONER CLAYTON: Well --

5 MR. BOUDREAU: I'm going to ask you to restate
6 the question.

7 COMMISSIONER CLAYTON: The way I jotted it
8 down quickly is does the \$3.2 million in annual savings to
9 shareholders outweigh the risk, no matter what the risk
10 level, whether it be minimal or great, to the public
11 interest by mortgaging these assets -- does it outweigh --
12 the savings outweigh the potential risk? Do you think that
13 is the question of this case and that we have to find that,
14 yes, that that's -- that annual savings in this business
15 plan outweighs any risk to the public? Do we have to find
16 that?

17 MR. BOUDREAU: No. Because I'll tell you, I
18 think that that question goes -- that really is more of a
19 needs analysis than it is a not detriment analysis. So
20 my -- I guess my answer would be, no, that's not the
21 question that's before the Commission.

22 The question that's before the Commission, in
23 my view, is whether doing this would be detrimental to the
24 public interest. And I guess my answer -- I mean, obviously
25 the position I'll be taking on the ultimate question is no,

1 because it doesn't change the stat-- doesn't change the
2 current status quo.

3 COMMISSIONER CLAYTON: Thank you, Judge. I'm
4 finished

5 JUDGE PRIDGIN: I don't have any questions.
6 Mr. Boudreau, thank you very much.

7 I believe that we've heard from all the
8 parties. That will conclude this oral argument. We will go
9 off the record. Thank you very much.

10 (ORAL ARGUMENT ADJOURNED.)
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