

FILED<sup>3</sup>

AUG 15 2003

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

Missouri Public  
Service Commission

In the matter of the Application by Aquila, Inc. for )  
authority to assign, transfer, mortgage or encumber ) Case No. EF-2003-0465  
its franchise, works or system. )

**JOINT MOVANTS' SUGGESTIONS IN SUPPORT FOR SUMMARY DISPOSITION**

**I. INTRODUCTION**

The Office of the Public Counsel, the State of Missouri, Sedalia Industrial Energy Users' Association and AG Processing Inc. (hereinafter "Joint Movants") request that the Commission summarily dispose of Aquila's Application to secure its Missouri regulated utility assets as collateral for its \$430 million Term Loan and related First Mortgage Bonds. The undisputed facts and the controlling language contained in the Term Loan demonstrate that as a matter of law Aquila has met the collateral requirements set-out in the Term Loan. Accordingly no meaningful relief can be granted by this Commission and no need has or can be shown that Missouri utility assets should be encumbered to support the claimed working capital requirements of Aquila. This case is now indistinguishable in law from a case where the applicant wholly failed to meet its burden to demonstrate any reasonable basis or need to support the relief it was requesting. Therefore, this case should be dismissed and the scheduled hearing cancelled.

**II. ARGUMENT**

**A. Standard For Summary Disposition**

Regulation 4 CSR 240-2.117 et. seq. delineates the Commission's authority to grant summary disposition. The purpose clause to Rule 2.117 states: "[t]his rule provides for disposition

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in the nature of summary judgment or judgment on the pleadings.” The purpose of summary judgment under Missouri law (Rule 74.04) is to identify cases in which there are no genuine disputes as to facts and that those facts, as admitted, show a legal right to judgment for movant. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 380 (Mo banc 1983). Joint Movants believe the Commission should pattern its summary disposition standard consistent with the standard set out by Missouri Rule 74.04. Following that standard, and based upon the undisputed facts as applied to the statutory requirements of Sections 393.180, 393.190.1 RSMo. 2000, Aquila’s legal obligations pursuant to the three-year Term Loan and stated financial plans, the Commission should summarily reject Aquila’s Application because Aquila has not and cannot show any need to encumber its Missouri jurisdictional utility property.

**B. Aquila’s Request**

Aquila’s Application seeks Commission approval pursuant to Sections 393.180 and 393.190.1 RSMo. 2000 to secure its Missouri utility assets as collateral for its \$430 million Term Loan and Related First Mortgage Bonds. Section 393.180 provides:

**393.180. Right to issue stocks, bonds, notes subject to regulation**

**The power of gas corporations, electrical corporations, water corporations, or sewer corporations to issue stocks, bonds, notes and other evidences of indebtedness and to create liens upon their property situated in this state is a special privilege, the right of supervision, regulation, restrictions and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe. (Emphasis added.)**

Section 393.190.1 provides, in pertinent part:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any

part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

These statutory sections give the Commission the authority to determine whether or not Aquila can secure its Missouri regulated assets as collateral for its \$430 million Term Loan and related First Mortgage Bonds. The state, through its Public Service Commission, has reserved to itself the power to control the operation and the restriction, control and encumbrance of utility properties. It is a power not lightly waived, relinquished or granted over. There must be sound reason, based in good public policy, that benefits the state, the company and the customer before the Commission should surrender this important power of state sovereignty. A grant of a "special privilege" should have a lawful need and a justifiable reason for that grant. Implicit in these statutory requirements is a requirement that **need** be shown. Aquila never had a legal obligation to secure Commission approval for the collateralization and now has no **need** for the authorization it is requesting. There simply is no reason as a matter of law to pursue its request.

As a result of Aquila's failures in its non-regulated business ventures, it was driven to construct a financial plan to improve its financial stability. (See, financial plan attached to the Direct Testimony of Rick Dobson as Schedule RD-1). This financial plan developed by Aquila has two phases. Aquila has completed Phase I. (Aquila Verified Application ¶ 1). Phase II calls for Aquila to further reduce its debt obligations through the continued sale of the Company's international and non-core domestic assets and the restructuring or termination of certain tolling contracts. (Aquila Verified Application ¶ 2). The ultimate goal of the financial plan is to return Aquila to a capital structure reflective of a "traditional" utility and restore its debt rating to investment grade. (Aquila Verified Application ¶ 3).

Aquila's putative "need" is the contractual requirement found in Section 5.13 of the Term Loan requiring Aquila to pursue "commercially reasonable" efforts to encumber the assets of its domestic regulated utility divisions. In pertinent part, Section 5.13 provides that Aquila will:

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Based on that legal obligation, Aquila filed requests to encumber its operating divisions' utility assets in Missouri, Kansas, Iowa, Minnesota and Colorado. (Dobson Direct, p. 16, l. 14-16).

As part of its financial plan, Aquila determined that \$250 million of the \$430 million Term Loan was required to support the ongoing working capital requirements for the domestic utility business. Aquila also committed to separating the proceeds of the Term Loan and related collateral to ensure that the utility customer and assets will not support the non-utility debt requirement. In other words, Aquila has committed to have **non-utility** collateral cover the outstanding collateral obligations of the remaining \$180 million **non-utility** portion of the \$430 million Term Loan. (Aquila Verified Application ¶ 13).

**C. Aquila has secured enough collateral to satisfy its financial plan.**

Thus, based upon the collateral principles used by the lending institutions, Aquila needs only \*\* \_\_\_\_\_ \*\* million of **utility collateral in any jurisdiction** to support the \$250 million of working capital needed to operate the domestic utility business. The Colorado, Michigan and Nebraska utility assets combined provide Aquila's creditors with \*\* \_\_\_\_\_ \*\* million in collateral. (BearingPoint, Inc. Valuations as of March 31, 2003 and May 31, 2003). This amount exceeds the

\*\* \_\_\_\_\_ \*\* million of utility collateral that Aquila claimed to need by nearly \*\* \_\_\_\_ \*\* and is obviously well in excess of the amount that Aquila asserted it needs to support its \$250 million in working capital requirements for domestic utilities and the amounts claimed to justify this Application.<sup>1</sup>

In the case at bar, the motivating need, if need there be, has been fulfilled. The circumstances that Aquila sought to address have been addressed. Aquila has now received authorizations to encumber **more than enough** combined utility assets to meet Aquila's claimed requirement of \*\* \_\_\_\_\_ \*\* million in utility collateral to support the \$250 million working capital requirements based upon the collateral principles used by the lending institutions. Aquila has used "commercially reasonable" efforts in the form of its Application to encumber its Missouri assets to meet its obligation under Section 5.13 of the Term Loan. Those conditions have been fulfilled by this Application.

Section 393.180 grants the right to approve the encumbrance of Missouri jurisdictional property to the Commission. Section 393.180 clearly characterizes encumbrance of utility property as a "special privilege." The undisputed and indisputable facts demonstrate that, as a matter of law, Aquila has failed to demonstrate and cannot demonstrate any basis sufficient to cause the Commission to award a "special privilege" that would detriment Missouri ratepayers. There are no facts that require the Commission or the parties to expend further time considering this Application.

Further, granting the relief requested by Aquila in these circumstances would provide Aquila with roughly \*\* \_\_\_\_\_ \*\* million than even Aquila claims that it needs to support its utility

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<sup>1</sup> The \$250 million working capital requirement was set forth by Aquila. The Commission can use it for purposes of summary disposition viewing all alleged facts in favor of non-movant, but Joint Movants do not endorse this number as being the correct working capital requirement for the domestic utilities.

operations. Certainly nothing has been shown nor could be shown that would justify the Commission in granting Aquila this "special privilege" so that it can support unstated capital needs.

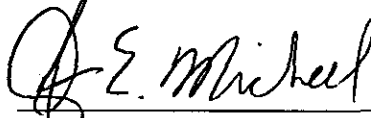
If a utility were to apply to the Commission for authority to encumber the utility property that was subject to Commission jurisdiction, the utility would quite obviously (and properly) be required to demonstrate some reason or justification for doing so. If the utility failed to offer any justification or any reason to encumber its Missouri utility property, the Commission, properly, should deny the request. As demonstrated herein, this case is in that posture, and Joint Movants are entitled to summary judgment of dismissal or rejection as a matter of law. Further, it is also irrefutable that (even if it were disposed to do so) this Commission can no longer grant Aquila meaningful relief. Aquila has already obtained more than sufficient authorizations to encumber assets in other jurisdictions that not only meet but substantially surpass Aquila's asserted needs. As a person that is six foot tall is equally accommodated by a 10' ceiling as they are by a 15' ceiling, Aquila needs no relief that this Commission may meaningfully grant. Finally, providing excessive financing authority may encourage resumption of the mischief that brought Aquila to its present financial circumstances.

For all these reasons, the Motion should be granted. The Application should be dismissed and the hearing should be cancelled.

Respectfully submitted,

**OFFICE OF THE PUBLIC COUNSEL**

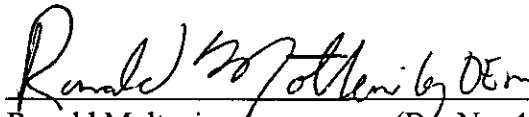
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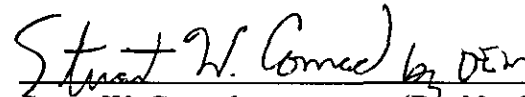
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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been faxed, mailed or hand-delivered to the following counsel of record on this 15th day of August 2003:

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