



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY  
65102

JEREMIAH W. (JAY) NIXON  
ATTORNEY GENERAL

P.O. Box 899  
(573) 751-3321

October 16, 2003

FILED<sup>2</sup>

OCT 16 2003

Missouri Public  
Service Commission

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Public Service Commission  
Governor's Office Building  
Madison & E. Capitol  
Jefferson City, MO 65101

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

Dear Judge Roberts:

Enclosed for filing in the above-referenced case are the original and 8 copies of the State of Missouri, Office of Public Counsel, Sedalia Energy Users' Association, and AG Processing, Inc.'s motion for reconsideration of the Commission's order denying summary disposition. Thank you for your attention to this matter.

Sincerely,

JEREMIAH W. (JAY) NIXON  
Attorney General

Ronald Molteni  
Assistant Attorney General

Enclosures

cc: All Parties on the Service List

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

FILED<sup>2</sup>

OCT 16 2003

Missouri Public  
Service Commission

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

JOINT MOTION OF STATE OF MISSOURI, THE OFFICE  
OF PUBLIC COUNSEL, THE SEDALIA  
INDUSTRIAL ENERGY USERS' ASSOCIATION  
AND AG PROCESSING, INC. TO RECONSIDER  
ORDER DENYING SUMMARY DISPOSITION

Pursuant to 4 CSR 240-2.160, the joint moving parties respectfully request that the Commission reconsider its order denying summary disposition. The order contains a fundamental misconception about the nature of an asset encumbrance that has ramifications beyond summary disposition in this case, that affect this case's eventual disposition, and that may impact other requests the Commission may receive in the future to encumber Missouri regulated assets.

On pages 2-3 of the Commission's October 9, 2003 order, the Commission states, "[t]he Missouri Supreme Court has already interpreted § 393.180 to apply only to Missouri corporations. Assuming, however, that *Union Pacific* is inapposite, the Joint Movants' argument means that an applicant would have to meet a higher standard to **encumber** its assets than it would to **sell** them or to **merge** with another entity. This would be an illogical result." [emphasis in original.]

As a matter of law and public policy, it is not illogical for this Commission to require an applicant to meet a higher standard to encumber assets than to sell or merge assets. When a Missouri regulated utility merges or sells assets, it does so in a transaction that will always

ultimately involve the assets being controlled by a "public utility" as that term is defined in § 386.020(42) RSMo. who maintains a certificate of service authority to provide service under the regulation of this Commission. Decisions affecting rates and service reliability will remain within the Commission's jurisdiction because the decision-maker will remain within the Commission's jurisdiction.

When a Missouri regulated utility encumbers assets, it is pledging those assets as collateral to secure financing to a party that is not a "public utility" and who makes decisions outside of the context of responsibilities and duties statutorily imposed by chapters 386 through 394 and outside of this Commission's control.

In this case, Aquila has procured financing from Credit Suisse First Boston, Cayman Islands branch. No Credit Suisse First Boston affiliated business organization is certificated by this Commission. Credit Suisse First Boston, LLC is a foreign limited liability company organized in Delaware and registered to do business in Missouri. Its purpose is "broker/dealer." [See attached Application for Registration of a Foreign Limited Liability Company filed with the Missouri Secretary of State.] John Cavalier is the co-chairman of Credit Suisse First Boston's energy group and a managing director in the Credit Suisse First Boston's investment banking division. He testified on October 9, 2003, at his deposition in this proceeding. Mr. Cavalier stated that the Cayman Islands subsidiary of Credit Suisse First Boston is separately organized legally from the parent Credit Suisse First Boston. Relevant pages from Mr. Cavalier's deposition are attached. No records maintained by the Secretary of State on-line show a Cayman Islands affiliate of Credit Suisse First Boston registered to do business in Missouri.

Moreover, the term loan agreement between Aquila and Credit Suisse First Boston, which incidently is governed by the laws of the state of New York, contains default provisions. Those default provisions appear in Article 7 of Schedule RD9 of Rick Dobson's direct testimony. They work with Section 9.04 of the Indenture of Mortgage and Deed of Trust between Aquila and trustee, Bank One Trust Company, N.A., Schedule RD10 to Rick Dobson's testimony. According to the arrangement with Aquila, in an event of default, the trustee for the bondholders syndicated by Credit Suisse First Boston, can step in, seize the encumbered assets, and sell to the highest bidder. Bank One Trust Company, N.A., is not a "public utility" under Missouri law. It does not have a certificate of authority granted by this Commission.

One of the events of default would be Aquila's filing for bankruptcy. Under those circumstances, Aquila's secured creditors would drive terms of liquidation or reorganization subject to the decision-making of the bankruptcy court. While there are certain provisions of the federal bankruptcy code, specifically, §1129(a)(6) respecting a state's public utility commission's rate making role, there are other provisions that suggest the state regulator's role is preempted. See for example § 1123(a), which preempts laws that may obstruct transactions contemplated by a Chapter 11 reorganization plan. The California Public Utility Commission is being battered in the proceedings relating to the bankruptcy of Pacific Gas and Electric Co. For example, see *In re Pacific Gas and Electric Co.*, 283 B.R. 41 (N.D. Ca. 2002).

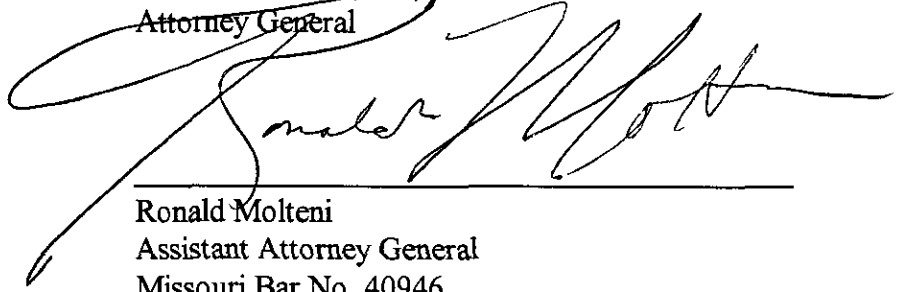
In *Public Service Commission v. Union Pacific Railroad*, 197 S.W. 39 (Mo. banc 1917), the Court ruled that the PSC did not have jurisdiction to require Union Pacific to obtain PSC approval for bonds to cover expenditures for rolling stock. The Commission cites this case for the proposition that § 393.180 does not apply to foreign corporations. However, that case does

not fit the facts of this proceeding. In Union Pacific, the railroad did not acquire charter rights or special privileges from the state of Missouri at any time, and its Missouri property was exclusively employed in the performance of its duties as an interstate carrier. In this case, Aquila operates utilities in Missouri, enjoys special privileges from Missouri, and has accepted a certificate of convenience and necessity from this Commission enabling it to operate as a monopoly in its service territories. Moreover, it is nonsensical to hold a foreign corporation to lesser standards of scrutiny than the Commission would apply to a domestic one. Finally, the case cited by the applicant in response to the motion for summary disposition, *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. banc 1934), does not stand for the proposition that public detriment is limited to an increase in rates or a reduction in the level of service.

The joint movants understand that this case really is one of first impression. None of the joint movants is aware of any case wherein the utility filed for approval to mortgage or encumber its properties to secure a debt obligation that had already been incurred with financing already provided. But, the point the joint movants want to make is that an asset encumbrance, including this one, has all the potential to have substantial effects on ratepayers and on the ability of the State, through its public utility commission, to regulate a certificated monopolist, effects as serious, if not more serious, than an asset purchase or merger. Accordingly, it is an error of logic, a misunderstanding of secured creditor and bankruptcy law, and a lack of appreciation for the practical consequences of mortgaging property, to assert that it is "illogical" to impose a higher standard on the encumbrance of assets than on sale or merger. On the contrary, it is not only logical, it would be responsible for this Commission to do so.

Respectfully submitted,

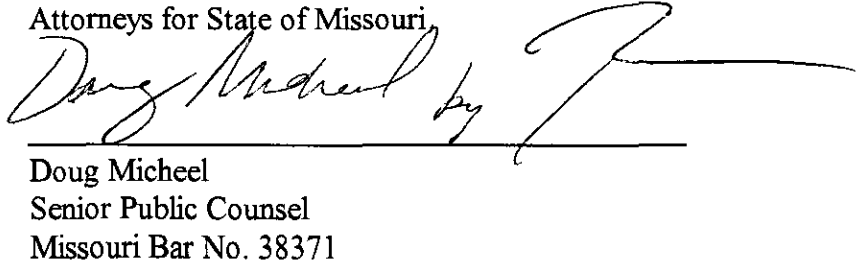
JEREMIAH W. (JAY) NIXON  
Attorney General



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Ronald Molteni  
Assistant Attorney General  
Missouri Bar No. 40946

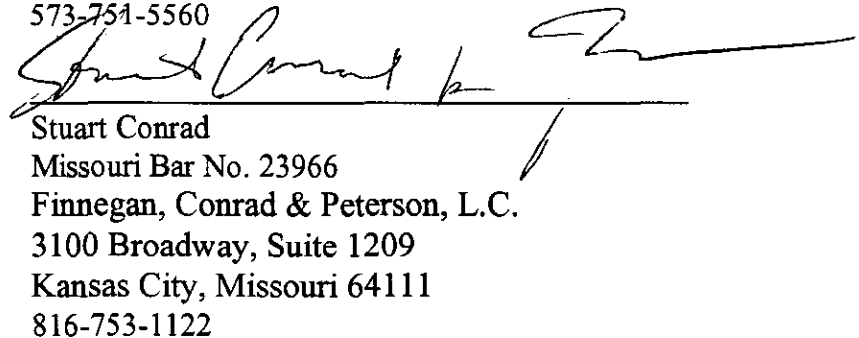
Supreme Court Building  
221 West High Street  
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Stuart Conrad  
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Finnegan, Conrad & Peterson, L.C.  
3100 Broadway, Suite 1209  
Kansas City, Missouri 64111  
816-753-1122

CERTIFICATE OF SERVICE

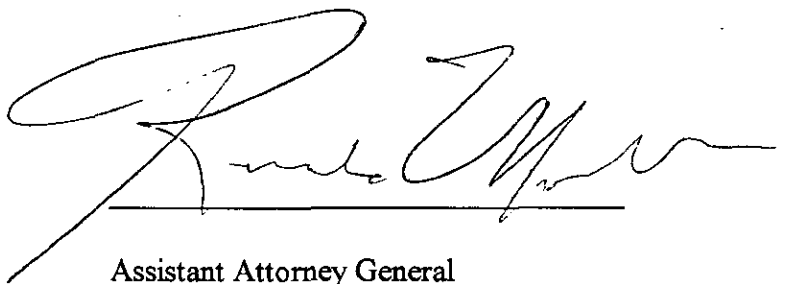
I hereby certify that a true and correct copy of the foregoing was hand-delivered or mailed, postage prepaid, this 16th day of October, 2003 to:

Douglas Micheel  
Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, Missouri 65102

Steve Dottheim  
Nathan Williams  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

Jim Swearengen  
Paul Boudreau  
Brydon, Swearengen & England, P.C.  
312 E. Capitol Avenue  
P.O. Box 456  
Jefferson City, Missouri 65102

Stuart W. Conrad  
Finnegan, Conrad & Peterson, L.C.  
3100 Broadway, Suite 1209  
Kansas City, Missouri 64111

A handwritten signature in black ink, appearing to read "R. J. [unclear]", is written over a horizontal line. The signature is fluid and cursive.

Assistant Attorney General



T0314107056



Corporations Division  
P.O. Box 778, Jefferson City, MO 65102

File Number: 200315712912  
Date Filed: 05/14/2003 02:32 PM  
Matt Blunt  
Secretary of State

James C. Kirkpatrick State Information Center  
600 W. Main Street, Rm 322, Jefferson City, MO 65101

**Application for Registration of a Foreign  
Limited Liability Company**

(Submit in duplicate with filing fee of \$105.00)

- (1) The name of the foreign limited liability company is:

CREDIT SUISSE FIRST BOSTON LLC

- (2) The name under which the foreign limited liability company will conduct business in Missouri is (must contain "limited company, "limited liability company", "LC", "LLC", "L.C.", or "L.L.C.") (must be filled out if different from line (1)):

- (3) The foreign limited liability company was formed under the laws of Delaware on the  
(state or jurisdiction)  
date of 12/19/02 and is to dissolve on perpetual  
(month/day/year, event, or perpetual)

- (4) The purpose of the foreign limited liability company or the general character of the business it proposes to transact in this state is:

broker/dealer

- (5) The name and address of the limited liability company's registered agent in Missouri is (this line must be completed and include a street address):

Corporation Service Company d/b/a  
CSC-Lawyers Incorporating Service Company 221 Bolivar Street, Jefferson City, Missouri 65101  
Name Address (P.O. Box may only be used in conjunction with a physical street address) City/State/Zip

The Secretary of State is appointed agent for service of process if the foreign limited liability company fails to maintain a registered agent. Note: failure to maintain a registered agent constitutes grounds to cancel the registration of the foreign limited liability company.

- (6) The address of the registered office in the jurisdiction organized. If none required, then the principal office address of the foreign limited liability company is:

2711 Centerville Road, Suite 400, Wilmington, DE 19808

Name Address (P.O. Box may only be used in conjunction with a physical street address) City/State/Zip

- (7) For tax purposes, is the limited liability company considered a corporation? yes X no

In affirmation thereof, the facts stated above are true.

Lori M. Russo, Secy., Credit  
Suisse First Boston (USA), INC. member

(Authorized Signature)

(Printed Name)

(Date)

5/7/03

(Authorized Signature)

(Printed Name)

(Date)

(Authorized Signature)

(Printed Name)

(Date)



STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION BY AQUILA, INC.  
FOR AUTHORITY TO ASSIGN, TRANSFER, MORTGAGE  
OR ENCUMBER ITS FRANCHISE, WORKS OR SYSTEM.

Case No. EF-2003-0465

DEPOSITION OF JOHN A. CAVALIER  
TAKEN ON BEHALF OF THE STATE OF MISSOURI  
THURSDAY, OCTOBER 9, 2003

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

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

DEPOSITION OF JOHN A. CAVALIER

Taken on Thursday, October 9, 2003

At 8:45 o'clock a.m.

At 20 West 9th Street

Kansas City, Missouri

1 P R O C E E D I N G S

2

3 Whereupon--

4 JOHN A. CAVALIER,

5 was called as a witness, and having been first duly  
6 sworn, was examined and testified as follows:

7 DIRECT EXAMINATION

8 Q. (By Mr. Molteni) Good morning, Mr. Cavalier.

9 We're here for your deposition in a case that's  
10 pending before the Missouri Public Service  
11 Commission, and it's styled In the Matter of the  
12 Application of Aquila, Inc., for Authority to  
13 Assign, Transfer, Mortgage or Encumber its Utility  
14 Franchise, Works or System in Order to Secure  
15 Revised Bank Financing Arrangements, and it is  
16 case number EF-2003-0465.

17 Can you please state your name for the  
18 record?

19 A. John Anthony Cavalier.

20 Q. And where do you work, Mr. Cavalier?

21 A. I work with Credit Suisse First Boston in New York  
22 City.

23 Q. And what's your position with that firm?

24 A. I am co-chairman of the energy group and a  
25 managing director in the investment banking

1 division.

2 Q. Does that mean you have an ownership interest in  
3 the firm?

4 A. I own some stock in the firm, but it's -- it's not  
5 a material investment.

6 Q. Do you own any interest in Aquila?

7 A. No, sir.

8 Q. Have you ever had your deposition taken before?

9 A. Yes, sir.

10 Q. How many occasions?

11 A. Four times.

12 Q. In what capacity?

13 A. The last time I was actually deposed and then  
14 testified in a federal court, federal case in  
15 Phoenix, Arizona, involving the lawsuit of  
16 Southern Union Company against Southwest Gas of  
17 Reno.

18 Q. We don't know anything about that, Mr. Cavalier.  
19 I'm kidding, of course. Sorry.

20 A. The time before that, I was a witness in a lawsuit  
21 that Heritage Propane had filed against Scana and  
22 Suburban Propane.

23 Q. Were you an expert witness in those cases that you  
24 just mentioned?

25 A. I think I was used both as an expert witness and

1 Island subsidiary.

2 Q. And is the Cayman Island subsidiary incorporated  
3 or do you know the form of its business  
4 organization?

5 A. I don't know if it's an LLC, but I know for a fact  
6 that it is completely licensed under all of the  
7 auspices of the federal government to conduct a  
8 commercial banking business within the United  
9 States.

10 Q. And it is a separate business organization from  
11 the parent company of Credit Suisse First Boston?

12 A. I'm sure it's a wholly owned subsidiary of Credit  
13 Suisse First Boston group.

14 Q. But separately organized legally?

15 A. Yes, sir.

16 Q. Do you know whether it is registered to do  
17 business as a foreign business entity in Missouri?

18 A. I would hope so. I don't know the answer to that.

19 Q. Okay. Do you know whether the parent company,  
20 Credit Suisse First Boston, is registered to do  
21 business in Missouri?

22 A. We transact a very substantial amount of business  
23 in Missouri. I would assume that we are in  
24 compliance with all of the regulations of the  
25 state.