

FILED²

JAN 12 2004

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

**Missouri Public
Service Commission**

In the matter of Aquila, Inc. d/b/a)
Aquila Networks L&P and Aquila)
Networks MPS to implement a general)
rate increase in electricity)

ER-2004-0034

In the Matter of the Request of)
Aquila, Inc., d/b/a Aquila Net-)
works-L&P to Implement a General)
Rate Increase in Steam Rates)

**HR-2004-0024
(Consolidated)**

**MOTION TO DISMISS AND REJECT
AQUILA NETWORKS' UNAUTHORIZED FILING OF
PROPOSED STEAM AND ELECTRIC TARIFFS
AND FOR THE APPOINTMENT OF A CONSERVATOR
FOR THE BENEFIT OF THE SHAREHOLDERS OF
ST. JOSEPH LIGHT & POWER CO.**

COMES NOW Ag Processing Inc a cooperative ("AGP") and moves the Commission to dismiss or reject the rate filings of Aquila Networks L&P and for the appointment of a conservator to protect the interest of the shareholders of St. Joseph Light & Power Co. and in support thereof states:

1. Under Missouri law a rate proceeding may be instituted by a tariff filing. Section 393.150 RSMo. 2000. Aquila Networks L&P sought to initiate such a filing on or about July 3, 2003 by filing with the Commission proposed tariffs that would increase the current rates and charges for electric and steam service by St. Joseph Light & Power ("SJLP") in its franchised territories.

2. Such a filing is only efficacious to trigger the statutory periods of Section 393.150 if the filing is made by an entity that is entitled to make such a filing with respect to the electric or steam plant and the franchise area that is proposed

to be affected by the proposed change.^{1/} Moreover, a public utility is only permitted to initiate a rate case by filing proposed tariffs for a service territory in which it lawfully provides service. Section 393.150 RSMo. 2000.

3. On December 31, 2000, Aquila, Inc. purported to close a merger with SJLP but did so without a final order from the Commission permitting that transaction. At the time the purported merger was "closed," not only had no final order been obtained from the Commission, but the pending Commission decision was the subject of timely filed Applications for Rehearing filed by AGP and by City of Springfield, Missouri. See In the matter of Aquila, Inc. St. Joseph Light & Power Co., EM-2000-292.

4. Section 393.130.1 RSMo. 2000 provides in part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of 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,

^{1/} Pursuant to § 393.150, a utility may file a schedule stating a new rate or charge, rule or regulation, which shall become valid unless suspended by the commission, see *State ex rel. Jackson County v. Public Service Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), cert. denied, 429 U.S. 822, 50 L. Ed. 2d 84, 97 S. Ct. 73 (1976), on its own motion or upon complaint of interested parties as authorized by the statute.

State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 48 (Mo. en banc 1979)

person or public utility, without having first secured from the commission an order authorizing it so to do. **Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.** (emphasis added)

Under Section 393.190.1 RSMo. 2000, any such purported transfer is absolutely and completely void. Aquila acted to close its merger/acquisition in the absence of a final order of the Commission approving that merger or acquisition. The purported transfer of December 31, 2000 is, therefore, void and Aquila thus acted at its own risk in closing its purported merger without a final order from the Commission allowing it to do so.

5. On January 9, 2001 the Commission issued an order denying rehearing and denying a requested stay. Thereafter a timely writ of review was sought and the process of judicial review of the Commission's decision was initiated.

6. Upon the conclusion of that judicial review process, the Missouri Supreme Court ruled that the Commission's Report and Order was not reasonable under Article V, Section 18 of the Missouri Constitution in that the Commission had failed and refused to consider the issue of the disposition of the roughly \$92 million acquisition premium that Aquila had incurred in connection with its purported acquisition.^{2/} The Missouri Su-

^{2/} According to the testimony of Mark Oligschlaeger, Commission Staff witness in this proceeding, this amount, grossed
(continued...)

preme Court directed the case back to the trial court with instruction to remand to the Commission as follows:

The judgment is reversed, and the case is remanded. The circuit court shall remand the case to the PSC to consider and decide the issue of recoupment of the acquisition premium **in conjunction with the other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public. Upon remand the Commission will have the opportunity to reconsider the totality of all of the necessary evidence to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and SJLP.**^{3/}

7. On January 7, 2004, the Circuit Court of Cole County remanded the case to the Commission quoting the language employed by the Missouri Supreme Court.

ORDERED (1): This case is remanded to the Public Service Commission to consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public. Upon remand the Commission will have the opportunity to reconsider the totality of all of the necessary evidence to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and St. Joseph Light & Power Co.; and

ORDERED (2): That within 60 days of the date of this Order, the Public Service Com-

^{2/}(...continued)
up for taxes, rather than \$92 million, may instead be roughly \$174 million.

^{3/} *State ex rel. Ag Processing, Inc. v. Pub. Serv. Comm'n*, ___ S.W.3d ___, 2003 Mo. LEXIS 142, 13-14 (Mo. en banc 2003) (emphasis added).

mission shall submit a report to this Court, with copies to the other parties, regarding the status of this matter and the steps that the commission intends to take in compliance with this Order and its schedule for so doing. This Court retains jurisdiction of this matter for the purpose of monitoring commission compliance with this remand Order and Mandate.

Copies of the Circuit Court's January 7, 2004 Order and Mandate Remanding Case and a copy of the Missouri Supreme Court's earlier Mandate are attached. The Circuit Court retained jurisdiction of the matter.

8. Judicial review of the Commission's decision is now complete. The transaction has been held not to be reasonable in that it is not supported by competent and substantial evidence on the whole record. Aquila, however, closed its merger transaction without a valid order from the Commission and such merger is, accordingly, void. Section 393.190.1 RSMo. 2000.

9. Aquila, Inc. has no authority to file tariffs proposing to increase rates and charges for electric and steam service to customers in the St. Joseph Light & Power Co. service territory, nor does Aquila, Inc. own the property that still belongs to the shareholders of St. Joseph Light & Power Co.

10. Aquila, Inc. had and has no authority to commence a rate increase proceeding pertaining to rates for electric and steam service in the service territory of St. Joseph Light & Power Co. under the provisions of Section 393.150 RSMo. 2000.

11. Insofar as this tariff filing purports to propose increases in established rates for the provision of electric and steam service in the St. Joseph Light & Power Co. service territory, such proposed increases are unlawful nullities and this Commission is without authority or jurisdiction to consider them and must, therefore, dismiss them or rejected them as having been improvidently filed.

12. From and after January 1, 2001 Aquila has purported to occupy the franchise, property and all appurtenances belonging to St. Joseph Light & Power Co. without right or entitlement.

13. All revenues, earnings and profits that have come into the possession or control of Aquila, Inc. with respect to the operation of such franchise and property from and after January 1, 20021 are the property of the shareholders of St. Joseph Light & Power Co. Aquila, Inc. should be required to make accounting for these revenues for the benefit of these shareholders and such revenues should be restored to the shareholders.

14. Insofar as no party in these proceedings or in the remanded merger proceeding represents the interest of the shareholders of St. Joseph Light & Power Co., the Commission should and is requested to direct its General Counsel to seek from the Circuit Court appointment of a conservator, guardian ad litem or other appropriate legal representative of and for those interests so that these interests may be protected.

WHEREFORE, AGP moves the Commission for its order as follows:

(1) Dismissing and rejecting Aquila Networks' filing to change the electric rates for the St. Joseph Light & Power Co. service area as an unauthorized filing that is insufficient to invoke the provisions of Section 393.150 RSMo 2000;

(2) Dismissing Aquila Networks' filing to change the steam service rates for the St. Joseph Light & Power Co. service area as an unauthorized filing that is insufficient to invoke the provisions of Section 393.150 RSMo 2000;

(3) That the Commission's General Counsel be directed to join with Ag Processing in petitioning the Circuit Court of Cole County, Missouri for the appointment of a conservator for the benefit and interest of and to otherwise protect the shareholders of St. Joseph Light & Power Co.; and

(4) For all other relief meet and appropriate in the circumstances.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, K.C.




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ATTORNEYS FOR AG PROCESSING INC A
COOPERATIVE

January 12, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Dismiss by electronic mail, by facsimile or by U.S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.



Stuart W. Conrad

Dated: January 12, 2004

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

STATE ex rel. AG PROCESSING INC A)
COOPERATIVE,)
)
Relator,)
) Case No. 01CV323152
v.)
)
PUBLIC SERVICE COMMISSION OF THE)
STATE OF MISSOURI,)
)
Respondent.)

ORDER AND MANDATE REMANDING CASE

Upon the remand of this matter to this Court by the Missouri Supreme Court in Case No. SC85352 and pursuant to the direction therein ordered by the Supreme Court, it is by this Court

ORDERED (1): This case is remanded to the Public Service Commission to consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC staff and the intervenors in making its determination of whether the merger is detrimental to the public. Upon remand the Commission will have the opportunity to reconsider the totality of all of the necessary evidence to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and St. Joseph Light & Power Co.; and

ORDERED (2): That within 60 days of the date of this Order, the Public Service Commission shall submit a report to this Court, with copies to the other parties, regarding the status of this matter and the steps that the commission intends to take in compliance with this Order and its schedule for so doing. This Court retains jurisdiction of this matter for the purpose of monitoring commission compliance with this remand Order and Mandate.

IT IS SO ORDERED.


Byron L. Kinder, Circuit Judge

Dated 1-7-04.

No. SC85352

Cole County Circuit Court Case No. 01CV323152

In the Supreme Court of Missouri

September Session, 2003

State ex rel. AG Processing, Inc.,
Appellant,

v. APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

Public Service Commission of the State of Missouri, and Aquila, Inc.,
f/k/a UtiliCorp United, Inc.,
Respondents.

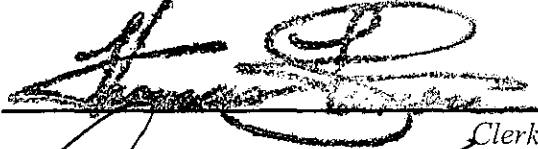
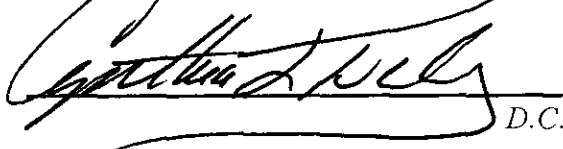
Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here now being sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County rendered be hereby reversed, annulled and for naught held and esteemed, and that the said Appellant be restored to all things it has lost by reason of said judgment and that costs be assessed per law. (Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 2003, and on the 28th day of October 2003, in the above entitled cause.

Given under my hand and seal of said Court, at the City of

Jefferson, this 15th day of December 2003.


Clerk

D.C.