

Exhibit No.: 016  
Issues: C.W. Mining  
Witness: Abby F. Herl  
Sponsoring Party: Aquila Networks-MPS  
& L&P  
Case No.: ER-2007-0004

Before the Public Service Commission  
of the State of Missouri

**FILED**

**APR 27 2007**

**Missouri Public  
Service Commission**

Rebuttal Testimony

of

Abby F. Herl

**\*\*Denotes Highly Confidential Information\*\***

**NP**

*Aquila* Exhibit No. 16  
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Date 4-12-07 Rptr 45

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ON BEHALF OF AQUILA, INC.  
D/B/A AQUILA NETWORKS-MPS AND AQUILA NETWORKS-L&P  
CASE NO. ER-2007-0004**

**C. W. MINING.....2**

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI  
REBUTTAL TESTIMONY OF ABBY F. HERL  
ON BEHALF OF AQUILA, INC.  
D/B/A AQUILA NETWORKS-MPS AND AQUILA NETWORKS-L&P  
CASE NO. ER-2007-0004**

1 Q. Please state your name and address.

2 A. My name is Abby Herl. My business address is 20 West 9<sup>th</sup> Street, Kansas City, MO  
3 64105.

4 Q. By whom are you employed and in what capacity?

5 A. I am employed by Aquila, Inc. ("Aquila" or "Company") as Director, Coal Procurement.

6 Q. Please describe your responsibilities in that position.

7 A. As the Director of Coal Procurement, I am responsible for managing all aspects of  
8 Aquila's coal supply including coal procurement, the transportation of coal to its  
9 respective facility, and maintaining the Company's railcar fleet. Additional  
10 responsibilities include bulk diesel fuel purchases and completing SO2 allowance  
11 transactions initiated by the Environmental department.

12 Q. What are your educational qualifications, training, and experience?

13 A. I graduated from the University of Missouri – Columbia. I received a Bachelor of  
14 Science degree in Mechanical Engineering (1991). I graduated from Colorado State  
15 University with a Masters in Business Administration in 2005. I joined Aquila in 1991 as  
16 a Staff Engineer of Operations at Sibley Generating Station. I switched to the  
17 maintenance department holding several positions until I became head of the department  
18 as Maintenance Engineer. In 2000, I became Plant Manager of Arthur Mullergren (Great

1 Bend, KS) and Clifton (Clifton, KS) Generating Stations, both part of Aquila's  
2 WestPlains Energy division. In July 2005, I became Manager, Coal Procurement and  
3 subsequently Director.

4 Q. Have you previously filed testimony before any state or federal agency?

5 A. No.

6 Q. What is the purpose of your rebuttal testimony?

7 A. The purpose of this rebuttal is to support Aquila's position in this case regarding the  
8 exclusion of existing coal contract prices from inclusion in base rates. Specifically, I will  
9 respond to the testimony of Messrs. Cary Featherstone, Charles Hyneman, and Graham  
10 Vesely as it relates to C.W. Mining.

11 C. W. MINING

12 Q. What is the source of Aquila's supply of high-Btu bituminous coal?

13 A. For Aquila's Networks-MPS ("MPS) and Networks-L&P ("L&P") operating divisions,  
14 the majority of high-Btu bituminous coal is under contract from Consol Energy's  
15 Consolidation Coal Company ("Consol") which operates the Emery mine in Utah.

16 Q. What are the quantities and price per ton being purchased from this supplier?

17 A. Aquila's contract with Consol has a term of \*\*  
18 \*\*. The agreement provides that Consol will provide \*\* tons by the end of  
19 \*\*  
20 \*\*.

21 Q. Do these figures correspond to those used by the Staff?

22 A. No. Although Staff has the aforementioned numbers, it is recommending that the C.W.  
23 Mining contract price be used to determine recovery. The 2006 price under the C.W.

1 Mining contract was \*\*

2 \*\*.

3 Q. Is Aquila currently receiving any coal from C.W. Mining?

4 A. Aquila has not received any coal from C.W. Mining since April of 2005.

5 Q. Can you explain why?

6 A. In April 2005, C.W. Mining notified Aquila that C.W. Mining was terminating the  
7 contract due to a claimed force majeure, specifically citing on-going labor issues.

8 Q. Has Aquila taken legal action with respect to C.W. Mining's unilateral termination of the  
9 contract?

10 A. Yes. Aquila sued C.W. Mining on July 5, 2005, in the United States District of Utah  
11 Central Division, captioned as *Aquila, Inc. v. C.W. Mining*, case number 2:05CV00555,  
12 for breach of contract.

13 Q. What is the current status of that litigation?

14 A. The Court held a three-day bench trial from February 12-14, 2007. Following the  
15 presentation of the case, the Court instructed the parties to file simultaneous post-hearing  
16 briefs within 45 days of the Court's production of the trial transcripts (which is expected  
17 to take 30 days).

18 Q. Can you explain the basis of Aquila's lawsuit against C.W. Mining?

19 A. C.W. Mining failed to deliver the coal quantities specified in the contract. Specifically,  
20 C.W. Mining failed to deliver \*\*

21 \*\*.

22 extend the contract for \*\*



1 Q. Will Aquila be seeking damages for any additional freight costs incurred as a result of the  
2 breach of contract?

3 A. No. C.W. Mining and Consol load out coal at facilities located next door to one another  
4 in Price, Utah. Other suppliers in Colorado and Southern Wyoming would have lower  
5 freight rates than movements out of Utah.

6 Q. Will Aquila be seeking recovery for legal, litigation and court costs associated with the  
7 lawsuit?

8 A. The prayer for relief in Aquila's Complaint requests damages suffered by Aquila plus its  
9 attorney fees and costs. Aquila is seeking all damages to which it is entitled under all  
10 applicable state and federal laws as well as any damages available under the agreement  
11 between Aquila and C.W. Mining.

12 Q. Do you know how much in damages Aquila is requesting in the pending litigation?

13 A. Aquila is seeking nearly \$54 million in damages.

14 Q. In reviewing Mr. Featherstone's direct testimony, Aquila's due diligence of C.W.  
15 Mining's labor practices seems to be questioned. Is it a general business practice to  
16 review the labor relations and practices of its suppliers?

17 A. No. In fact I am not aware of any policy, requirement, or expectation that would prompt  
18 even a cursory review of labor relations/practices for a supplier. Any company registered  
19 in the United States would be expected to follow State and Federal labor laws as required  
20 and as enforced by their respective agencies.

21 Q. What is a reasonable standard of review when determining the suitability of a supplier?

22 A. There are two primary criterion used when determining the suitability of a coal supplier.  
23 The first is determining the credit worthiness/financial stability of the supplier. Each

potential supplier is subject to a financial credit review. This evaluation is performed by Aquila's Credit Risk Management group. The second criterion relates to the availability of the product being purchased, in this case, coal. Aquila evaluates, to the best of its ability, the existence of suitable coal reserves, mining capacity to remove it from the ground, and the ability to transport/loadout the coal.

Q. Was Aquila the only company taking coal from C.W. Mining during the term of the agreement?

A. During the request for proposal process, the only indication of other users of C.W. Mining coal was \*\*

records publicly available from the Federal Energy Regulatory Commission ("FERC"), C.W. Mining coal supplied coal to TVA, PacifiCorp, Northern Indiana Public Service Company (NIPSCO), Nevada Power, and Portland Gas and Electric in 2001. In 2002, TVA, PacifiCorp, and NIPSCO received C.W Mining coal. TVA and PacifiCorp continued to receive coal from C.W. Mining in 2003.

Q. Do the historical records available through FERC give any indication that C.W. Mining would have difficulty meeting Aquila's contracted quantities?

A. No. Given that the C.W. Mining agreement was dually executed in September 2003, the full year data available at the time reflects production levels from C.W. Mining in 2001 at 1,100,000 tons and 850,000 tons in 2002. This production level far exceeded the required deliveries under Aquila's contract with C.W. Mining.

Q. In Mr. Featherstone's testimony, he questioned why Aquila did not withdraw from the agreement with C.W. Mining in December 2003 when it was first notified that C.W.



1 Mining was experiencing labor problems. Can you explain why Aquila did not withdraw  
2 from the agreement at that time?

3 A. Yes. While the term of the coal contract between C.W. Mining and Aquila did not begin  
4 until January 1, 2004, the parties executed the agreement on September 16, 2003.  
5 Therefore, had Aquila terminated the agreement in December 2003, it would have  
6 materially breached the agreement subjecting Aquila to all applicable legal damages.

7 \*\*

8 \_\_\_\_\_ days.

9 Q. Did Aquila obtain other coal suppliers in December 2003 to supplement the coal supply  
10 that C.W. Mining was supposed to deliver in January to March?

11 A. No, because \*\*

12 \_\_\_\_\_  
13 \_\_\_\_\_  
14 \_\_\_\_\_  
15 \_\_\_\_\_  
16 \_\_\_\_\_  
17 \*\*

18 Q. Does this conclude your testimony?

19 A. Yes it does.

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the matter of Aquila, Inc. d/b/a Aquila )  
Networks-MPS and Aquila Networks-L&P, )  
for authority to file tariffs increasing electric )  
rates for the service provided to customers in )  
the Aquila Networks-MPS and Aquila )  
Networks-L&P area )

Case No. ER-2007-0004

County of Jackson )  
 ) ss  
State of Missouri )

AFFIDAVIT OF ABBY F. HERL

Abby F. Herl, being first duly sworn, deposes and says that she is the witness who sponsors the accompanying testimony entitled "Rebuttal Testimony of Abby F. Herl;" that said testimony was prepared by her and under her direction and supervision; that if inquiries were made as to the facts in said testimony and schedules, she would respond as therein set forth; and that the aforesaid testimony and schedules are true and correct to the best of her knowledge, information, and belief.

Abby F. Herl  
Abby F. Herl

Subscribed and sworn to before me this 20th day of February, 2007.

Terry D. Lutes  
Notary Public  
Terry D. Lutes

My Commission expires:

8-20-2008



TERRY D. LUTES  
Jackson County  
My Commission Expires  
August 20, 2008