

**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)
Transfer Operational Control of Certain)
Transmission Assets to the Midwest)
Independent Transmission System)
Operator, Inc.)

Case No. EO-2008-0046

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

INTRODUCTION

This brief will address several of the contested issues as identified by the parties in the Joint List of Issues filed on March 18, 2008. Although it does not address each issue, the issues addressed herein are dispositive. Specifically, it will address the ultimate question of whether granting the application would be detrimental to the public interest. In reaching that question, it will also address the questions of what considerations should go into making that ultimate determination, and what alternatives should be compared to the relief sought in making that determination. Based upon the entire record in this case, the commission should deny Aquila's application for Commission authority to join the Midwest Independent System Operator (MISO).

ISSUES

2. Should the Commission determine that Aquila's application to join MISO is not detrimental to the public interest? What considerations should the Commission take into account in making its determination?

The Commission should determine that Aquila's application to join MISO is detrimental to the public interest. The Commission should not be swayed by Aquila's (and MISO's) arguments that joining the MISO is better than the status quo. The utility business is never static, and analyzing options based upon a comparison to doing nothing is a fruitless exercise. While a decision to join an RTO is in some respects akin to a merger or a sale of property, it is more like a resource planning decision. In evaluating resource planning decisions, the Commission does not look to see whether a particular decision is better than doing nothing, but whether it is the best decision given all the alternatives. A utility decision to rely on expensive purchased power to meet load growth is likely better than doing nothing and subjecting customers to outages and brown-outs, but it is equally likely to be worse than building adequate generation.

In this case, the Commission should find that joining the MISO is detrimental to the public interest, because joining the MISO is likely to – in the intermediate and long run – cost customers more than joining the SPP. Joining either one would be better than doing nothing, but doing nothing is not a prudent action. Aquila could just as well argue that never building another power plant is better than deliberately blowing up the ones it has, and so doing nothing is not

detrimental to the public interest. The Commission must analyze all the reasonably plausible alternatives detailed in the record evidence, and if one is clearly of more benefit to customers¹, the Commission must find that the others are detrimental to the public interest. This analysis necessarily means that the Commission cannot (as Aquila and the MISO argue) simply put its blinders on, determine that joining the MISO is better than maintaining the status quo, and grant the application. The Commission must actively and explicitly analyze the alternatives and decline to authorize Aquila to pursue a sub-optimal one.

If the Commission authorizes Aquila to join the MISO, and Aquila does so, the weight of the evidence in this case clearly shows that Aquila will have foregone the greater benefits that it could have achieved if it had instead joined the SPP. Aquila witness O'Dell stated that he was certain that Aquila would oppose any imputation of those foregone benefits in a rate case:

Q. Now, I believe you answered in response to a question or two from Mr. Lumley that Aquila does support and stand behind the CRA study; is that correct?

A. That is correct.

Q. And that study shows that there are greater benefits to Aquila from joining the SPP than from joining MISO; is that correct?

A. It does show that, yes.

Q. If Aquila does, in fact, join the MISO, would Aquila oppose an adjustment in future rate cases to impute the greater benefits that it would have achieved by joining SPP?

A. I'm certain that it would, yes.

TR. 118-119

¹ Here, none of the three alternatives is significantly detrimental to Aquila shareholders, and so the Commission does not need to consider that aspect.

The only witness employed by MISO would not even concede that the “statement of position” filed by MISO accurately reflects MISO’s positions on the issues in this case. Dodged questions about computer modeling by saying he thought they were “a legal response to a narrow legal question of what the appropriate scope of the proceeding is.” TR. 193

3. If the Commission approves Aquila’s application to join MISO, should the Commission make its approval subject to certain conditions? If so, what are the conditions?

Any such approval should be contingent upon all seven of the conditions that are summarized in the list that begins on page 37 of Staff witness Proctor’s rebuttal testimony. In his Surrebuttal Testimony (Exhibit 14, page 7), Public Counsel witness Kind states that:

Public Counsel strongly supports these conditions. These conditions are consistent with the terms that were agreed upon by the parties in the Stipulation and Agreements that were approved by the Commission in Case Nos. EO-2006-0141 and EO-2006-0142.

The seven specific conditions identified by Dr. Proctor are:

- 1) Interim approval by the Commission for the Aquila joining MISO for a period of seven (7) years;
- 2) An agreement by Aquila to perform a follow-up cost-benefit study to be submitted in an Interim Report as evidence regarding continuing RTO participation prior to the end of the interim approval period;
- 3) A cap placed on MISO administrative costs over the interim period, that if exceeded, triggers a filing by the utility with the Commission;
- 4) Full consideration being given to Aquila joining MISO on the same basis as other MAPP utilities that are not now members of MISO, without Aquila incurring any MISO exit fees;

- 5) A service agreement between Aquila and MISO that prevents the transfer of transmission rate setting for existing facilities from the Commission to the FERC, with the Commission's approval contingent on FERC approval of this service agreement;
 - 6) Seams agreements involving all Missouri utilities, but specifically between MISO and AECI; and
 - 7) Provisions related to Aquila withdrawal from MISO for fundamental changes in the utilities participation in MISO, including:
 - a) Twelve months to effectuate a withdrawal from MISO;
 - b) Recognition of exit fees related to withdrawal from MISO; and
 - c) Aquila agrees to seek the Commission's approval to withdraw from MISO or take other actions that fundamentally change Aquila's participation in MISO; e.g., participation in MISO through an Independent Transmission Company.
- (Exhibit 12, Proctor Rebuttal, pages 37-38)

4. In making its determination whether to grant Aquila's application to join MISO, should the Commission compare Aquila's membership in MISO to other alternatives? If so, what are the alternatives and what do the comparisons of the alternatives show?

In making its determination whether to grant Aquila's application to join MISO, the Commission should compare Aquila's membership in MISO to other alternatives that are currently available or may become available in the foreseeable future. These alternatives include the stand-alone option, and the SPP option. The CRA cost-benefit study shows that participating in the SPP RTO is expected to provide the most beneficial long-term impacts on Aquila's cost of service so any other choices would be detrimental to the public interest.

But the "stand-alone" option is somewhat misleading in at least two ways. First, it does not accurately reflect Aquila's current status. Aquila witness O'Dell testified that:

Mr. Odell, some follow-up questions on the standalone scenario just to be clear. The standalone scenario is not today's circumstances, correct?

A. That is correct.

Q. As we discussed when I was speaking to you earlier, Aquila obtains many services from SPP today, correct?

A. That's correct. One of the -- that is one of the other assumptions that was made is that the -- the relationships that we have with the two RTOs today we assume would not be able to be maintained forever. Right now we're kind of one foot in one, one foot in the other, and we assume that we would either have to get completely out of both or that we would get completely into one of the two.

Q. So it wouldn't be a question -- if you were to pursue that scenario, it wouldn't be a question of remaining standalone but becoming standalone, correct?

A. That's correct.

TR. 131

And second, it is not at all clear that the “stand-alone” option is really a valid option at all, so it can't be a valid point of comparison. Staff witness Proctor testified that:

Q. Okay. And then the standalone transmission operator would be the third option or would -- remaining as they are today would be the third option?

A. Well --

Q. Or is that even possible to answer?

A. Yeah. Part of the concern is can Aquila go forward on a long-term basis remaining as they are? Okay. **So where they are today in a long-term concept may or may not be an option.**

Q. As they are today?

A. As they are today.

Q. Why is that?

A. Well, it just depends on what the RTOs offer. If they offer those services and it's cheaper for the RTO to provide those services than for SPP -- or I'm sorry, for Aquila to provide those services, then it makes sense to have the RTO provide those services.

TR. 348-349; emphasis added.

Another point of comparison is the possible development of more favorable terms under which former MAPP members may be allowed to participate in MISO markets (the MISO Module F option). Staff witness Proctor, in his rebuttal testimony (Exhibit 12, pages 39-41), discusses why this is an important option to consider:

Q. Why is the Staff requiring the parties to give full consideration to Aquila's participation in MISO on the same basis as MAPP utilities not currently in MISO?

A. MISO is currently proposing to allow utilities in the MAPP region to join MISO and participate in its markets without being subject to the system of MISO cost allocations for transmission upgrades. MISO has approved FERC tariffs regarding the allocation of costs for transmission system upgrades. Because of the weak interconnections with MISO, the Staff is very concerned about the fairness of this cost allocation and the resulting benefits that would flow to Aquila from these FERC approved cost allocations. Moreover, Aquila would be a boundary member of MISO, and benefits to Aquila will be highly restricted because of the lack of interconnections with the other parts of MISO. Given Aquila's weak interconnections to MISO, if it joins MISO, similar to the non-MISO members in MAPP, it should not be subject to allocation of costs for transmission upgrades from which it is highly unlikely to receive any benefits. Moreover, as indicated previously in my rebuttal testimony, AECI is a major barrier to market-based benefits flowing from MISO to Aquila, and it does not appear likely that this situation will change in the near future.

Q. Why would you exclude any exit fees for Aquila joining MISO on the same basis as MAPP utilities not currently in MISO?

A. While Aquila entered into an agreement to apply with this Commission to join MISO as a full member, it is not yet a member of MISO. If the Commission conditions Aquila joining MISO to be on the same basis as non-MISO MAPP utilities, then Aquila will have fulfilled its obligation to request to join MISO as a full member, and should not be subject to exit fees.

5. To what extent should the Commission take into account the following in its determination of whether or not to approve Aquila's application to join MISO?

a. The CRA International, Inc. cost-benefit study sponsored by Aquila;

The Commission should take into account the projections of the CRA study showing that the benefits from participating in the SPP RTO are expected to be greater than the benefits from participating in the MISO RTO. The main criticism leveled at the CRA study is that it models SPP as though its markets are the same as MISO's market. The record evidence shows that this is a reasonable way to model SPP markets. Aquila witness O'Dell defended the CRA study, and reiterated several times that Aquila stands behind it. Mr. O'Dell testified that the market development assumptions in that study are reasonable:

Q. And why was that decision made in terms of the markets, the market assumptions?

A. Well, we knew that SPP was working on developing those kinds of markets, and we also believed that it was likely that the ultimate result of their cost/benefit studies would be that -- that those kind of markets did make sense. And given that we were looking at a long planning horizon here in this case, ten years, it made much more sense for us to assume that those markets were going to be together, which is what we believe ultimately will happen, as opposed to assuming that they will continue to stay different.

TR. 127

Aquila witness Luciani, who is employed by CRA International and who prepared the CRA study, testified that modeling the SPP markets in a different way would not have had a dramatic impact:

Q. Now, you could have, I assume, run the study a little differently and in effect said, all right, we're looking at a ten-year period, we know that SPP doesn't have the same markets today. We're not sure when or even if they will, but we've got to use some assumptions. Let's assume it will be X years before they start comparable markets. And so for the first number of years, they have

what they have, and then from year X forward they have day two markets. You could have done that, correct?

A. Yes, we could have done that. In fact, we did something similar to that in the Ameren study, and also we did an analysis similar to that for MISO in this docket.

TR.156-157

Mr. Luciani also testified that:

Q. And isn't it also true that when the day two market came into being in that Ameren cost/benefit study, the benefits significantly increased to the tune of tens of millions of dollars?

A. No, I don't recall that. I don't recall that specifically. I believe there were general benefits -- the general benefits as I recall for SPP in that particular case were not as good as those from MISO and for the ICT option. **I don't recall a dramatic change over the years.**

Q. Well, in your experience doing these sort of studies, would you agree that a day two market would provide significant benefits to market participants?

A. In the absence of any market, yes, again subject to the administrative charges that you would incur to pay for that market. With a day one, a full-time market it's not quite as clear. It's probable you'll get more benefits. You'll also have more administrative charges. Again, that's a difficult analysis that I believe SPP's going to undertake now.

TR. 142-143; emphasis added.

Mr. Luciani also testified that the stakeholders -- including MISO and Aquila -- had input into the question of how to model the SPP markets, and that they agreed with the approach that CRA took:

Q. And were you given any directions or instructions from Aquila, be it Mr. Odell or anyone else from the company, as to how to perform the study or were you just told study these three options?

A. Well, as far as the technical matters in modeling in GE MAPS and so on and analyzing the trade benefits and things of that sort, we didn't get any direct input from Aquila. As far as the general structure, consider MISO, consider SPP, consider a standalone, what do we do about the difference in the market structure between SPP

and MISO, we did have discussions with Aquila and ultimately the stakeholders about those particular issues.

Q. Okay. Now, let's talk about the stakeholders you mentioned. Who all do you recall talking to?

A. At the initial stakeholder meeting, I don't know who all was invited. I do recall that MISO and SPP representatives were there, as well as the Public Counsel, and I know we talked to Dr. Proctor for Staff a few days later thereafter by phone.

TR. 138-139

Staff witness Proctor agreed with Mr. Luciani about the ability of the stakeholders to have input into the study design:

Q. In the stakeholder process, were the parties given ample time to raise concerns or issues that should be considered by -- by CRA in the analysis?

A. The stakeholders -- well, let's look at some of the issues here. Should SPP -- when they model SPP, should they treat them as having full markets or not? That was one of the issues that was addressed beforehand by the stakeholders. Should we do that or not do that? **And the stakeholders said, well, let's -- SPP appears to be going in that direction. Let's put it in that way, but let's make sure we put in the costs that go with that.** So those kind of -- those kinds of issues were addressed beforehand.

...

Q. So there was an opportunity for input by the stakeholders prior to the study being conducted?

A. Yes.

Q. And then there was an opportunity following the study to raise additional issues that required either further scrutiny or consideration?

A. That's correct.

Q. Okay. Now, did the stakeholders establish the three scenarios that were included within the study?

A. Yes, they did.

TR. 344-345; emphasis added.

f. The proposed acquisition of Aquila by Great Plains Energy that is the subject of Case No. EM-2007-0374;

If the Commission approves Aquila's application to join MISO and if Great Plains Energy (GPE) is able to complete its acquisition of Aquila, Missouri consumers may be harmed by constraints and/or extra costs that could arise if attempts to create additional efficiencies in the operations of its KCPL and Aquila operating companies are frustrated by having the two operating companies in different RTOs.

If the Commission's decision in EM-2007-0374 was not expected to be issued quite soon, this analysis might be different. But all indications are that the Commission will issue its decision in the merger case within the next few weeks. Indeed, that decision could very well precede this one. In any event, deliberations in that case and this will run concurrently, and if the deliberations in the merger case reveal that the Commission will approve the merger application, then that result absolutely should be taken into account in this case. None of the parties to this case disagree that having sister companies in two different RTOs would be less efficient than having them in the same RTO, and several parties (including Public Counsel) provided testimony that such a situation could be a significant detriment. Even Aquila acknowledges that there would be benefits to having Aquila and KCPL in the same RTO if the merger is consummated:

Q. In your experience, would you expect that there would be benefits to sister corporations belonging to the same RTO?

A. There would certainly be some administrative benefits, yes.

Q. And KCP&L is a member of SPP, correct?

A. That's right.

TR. 106

g. Union Electric Company's continuing membership in MISO;

While Public Counsel believes that the Commission has sufficient evidence to determine that Aquila's participation in the MISO RTO would be detrimental to the public interest, the Commission should be careful not to approve participation in the MISO RTO prior to having the current uncertainties resolved regarding AmerenUE's continued participation in MISO. There is no disagreement that Aquila would be "islanded" if AmerenUE left MISO. Aquila witness O'Dell testified that:

Q. Another change in circumstances since the 2003 settlement with MISO involves AmerenUE now considering perhaps terminating its relationship with MISO; is that correct?

A. There is a docket open at this point, yes.

Q. And that's a new development since your contract was made five years ago?

A. It's -- yeah. It's -- the most recent one is certainly new.

Q. And is it your understanding that Ameren has, in fact, given its termination notice to preserve its rights?

A. I think that's correct, yes.

Q. And the case is still pending before the Commission, so the result is uncertain?

A. Yes. My understanding is that there are ongoing discussions and that a resolution of that case is expected sometime this summer.

Q. Do you agree that if Ameren withdraws from MISO and Aquila was a member, Aquila would be left islanded with respect to MISO?

A. That would be the case, yes.

Q. And that's because Aquila is dependent on Ameren for a physical connection to MISO?

A. Correct.

TR. 106-107

h. Aquila's obligation to MISO made in FERC Docket No. ER02-871 to file and support Aquila's application to join MISO;

This obligation is not directly relevant to the Commission's determination of whether or not to approve Aquila's application to join MISO. This obligation only comes into consideration because of the way it has influenced Aquila's decision to seek Commission authorization to join the MISO. The testimony of Aquila witness O'Dell makes clear that this obligation was a significant factor in Aquila's decision to seek Commission authorization:

When we started the process in the late summer or fall of 2006, we recognized that there were two RTOs that we had alternatives to join, SPP and MISO, and we didn't feel that it was prudent to perform a study on just one of those two. Had we done that, we wouldn't -- we wouldn't have the information regarding how SPP's stacked up.

Q. Well, and then you end up with a study that shows on its own terms at least substantially greater benefits for participation in SPP, correct?

A. That's what the study shows, yes.

Q. Why then did you proceed to seek authorization to join MISO and at least on the surface appear to be foregoing some \$45 million of additional benefits?

A. Well, there -- there was clearly benefit to joining MISO relative to the standalone case, as you pointed out, \$21 million. So that was the first -- the first question.

The second question was in regard to the settlement obligation that we had that I think is discussed at length in the testimony, essentially requiring us, obligating us to move forward and diligently pursue filing to join MISO. When you marry those two -- those two facts together, the conclusion was as filed.

Q. Did you look at options to -- that might have addressed either otherwise resolving or being excused from the contractual obligation to reapply for MISO authorization?

A. We did explore those options and were unable to reach any conclusion that would have prevented us from making this filing.

In fact, Mr. O'Dell could not even say that Aquila would have sought Commission authorization **but for that obligation**:

Q. In your prepared testimony, also in your discussions with Mr. Robbins, you made reference to the settlement contract between your company and MISO from 2003, and that was a motivating factor for you-all to file this application and that you're obligated to exert diligent efforts to pursue that; correct?

A. That's correct.

...

Q. If that obligation did not exist, would Aquila be here now seeking approval from the Missouri Public Service Commission?

A. I -- that's a difficult question to ask -- answer. We -- you know, we obviously have had that obligation, so that's the basis upon, which we've made all of our decisions up to this point.

Q. So can I take it that your answer is that you don't know?

A. Yes.

TR. 94-95, 114-115

CONCLUSION

Public Counsel recommends that the Commission deny Aquila's application because Aquila's own cost benefit study shows that the customer benefits are expected to be much greater if Aquila joins SPP rather than MISO. Also, any potential benefits to Missouri customers that might result from Aquila's participation in MISO are highly uncertain because of: 1) the possibility that AmerenUE may leave MISO; 2) the very real and imminent possibility Aquila will be acquired by KCPL's parent company; and 3) the possibility that MISO will develop and offer more favorable terms under which former Mid-Continent Area Power Pool members may be allowed to participate in MISO markets and uncertainty about whether these same terms would be made available to Aquila as

a new member. But if the Commission nonetheless decides to approve Aquila's application, such approval should be expressly contingent upon the conditions recommended by Staff witness Proctor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this
29th day of May 2008.