

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

In the Matter of the Application of Aquila, )	
Inc. for Authority to Assign, Transfer, )	
Mortgage or Encumber its Utility Franchise, )	Case No. EF-2003-0465
Works or System in Order to Secure )	
Revised Bank Financing Arrangements )	

**AQUILA’S RESPONSE TO JOINT MOTION TO STRIKE**

COMES NOW, Aquila, Inc. (“Aquila”), by and through counsel, and for its response to the Motion to Strike filed by the Office of the Public Counsel (“Public Counsel”), Sedalia Industrial Energy Users Association (“SIEUA”), AG Processing, Inc. (“AGP”), and the State of Missouri (hereinafter “the Joint Motion”) states as follows:

1. On December 11, 2003, Public Counsel, SIEUA/AGP and the State of Missouri (collectively, the “Objecting Parties”) filed their Joint Motion to strike certain portions of Aquila’s Initial Post-Hearing Brief. The Joint Motion requests that the Commission strike those portions of Aquila’s Initial Post-Hearing Brief which make reference to the deposition testimony of John A. Cavalier taken on October 9, 2003. Generally, the Objecting Parties claim that Aquila has not established any grounds for the use of the deposition of Mr. Cavalier. The Joint Motion should be denied.

2. The Joint Motion should be denied because the Objecting Parties themselves previously have used selected portions of Mr. Cavalier’s deposition testimony in pleadings they have filed with the Commission in this case.<sup>1</sup> On October

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<sup>1</sup> Similarly, the Objecting Parties have made use of the depositions of Rick Green (Tr. 330-331) and Beth Armstrong (Tr. 299) throughout the course of the hearing even though neither of those individuals were witnesses in this case and the depositions were not made part of the record.

16, 2003, they filed a joint motion urging the Commission to reconsider its October 9, 2003 Order Denying Summary Disposition. Attached to that motion were copies of several pages out of the transcript of Mr. Cavalier's deposition.

3. That has not been the only purpose to which Mr. Cavalier's testimony has been put by the Objecting Parties. In the opening statement by counsel for the State of Missouri on October 20, 2003, reference was made to certain facts that were elicited during the course of Mr. Cavalier's deposition without the benefits of those particular pages of the deposition ever having been offered into or made a part of the record in this case. (Tr. 167). The door to the use of Mr. Cavalier's deposition has already been opened by the Objecting Parties. Aquila simply has availed itself of the same opportunity to which the Objecting Parties have already availed themselves. There is no reason why Aquila should be the only party to the case that cannot make use of Mr. Cavalier's deposition transcript.

4. The argument in paragraph three (3) of the Joint Motion that somehow the Objecting Parties' due process rights have been violated by reference to Mr. Cavalier's deposition testimony has no merit whatsoever. How is it possible that their right to due process has been violated by Aquila's use of a deposition that they took? Mr. Cavalier was noticed up to be deposed by the State of Missouri on or about September 19, 2003, and thereafter on or about September 30, 2003. Both notices were filed of record with the Commission in this case. All parties of record, including counsel for the Objecting Parties, were present at the deposition of Mr. Cavalier on October 9, 2003. As such, each party has had an opportunity to place questions to, and elicit information from, Mr.

Cavalier. The due process rights of the parties to this case have not been violated in any fashion.

5. The Joint Motion is particularly difficult to fathom given the fact that the Objecting Parties included in their initial brief at page 21 a reference to language contained in Aquila's most recent Form 10-Q filed with the SEC on November 6, 2003 and relating to the quarter ending September 30, 2003, a document which is not part of the record in this case. In fact, this was one of the documents which were the subject of Staff's November 14, 2003, Motion to File Exhibits Late which was denied by the Commission on December 4, 2003, several days prior to the filing of the joint brief of the Objecting Parties.<sup>2</sup> Thus, with full knowledge of the Commission's refusal to recognize that document as part of the record in this case, the Objecting Parties ignored the Commission's ruling and included a reference to the excluded document in their joint brief. At paragraph 5, the Joint Motion states that the "integrity of the record in this case is important" but the Objecting Parties have shown little regard for the principle. They do not come to the Commission with clean hands.

6. In summary, the Objecting Parties have already made use of Mr. Cavalier's deposition transcript in this case for their purposes. Aquila should be permitted to do so as well. There is no due process concern because counsel for all parties attended the deposition. Finally, the Objecting Parties have made reference to extra-record information in their joint brief in contravention of a prior ruling of this Commission. As such, they are in no position to lodge an objection to Aquila's use of

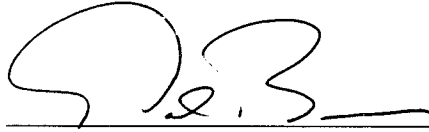
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<sup>2</sup> See, Order Denying Staff's Motion to File Exhibits Late.

Mr. Cavalier's deposition transcript on those grounds.

WHEREFORE, for good cause shown, the Joint Motion should be denied.

Respectfully submitted,



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James C. Swearingen      MO #21510  
Paul A. Boudreau        MO #33155  
BRYDON, SWEARENGEN & ENGLAND, P.C.  
312 East Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102  
(573) 635-7166 Phone  
(573) 635-0427 Fax  
paulb@brydonlaw.com

Attorneys for Applicant, Aquila, Inc.

**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 19<sup>th</sup> day of December 2003 to the following:

Mr. Nathan Williams  
General Counsel's Office  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102-0360

Mr. Douglas Micheel  
Office of the Public Counsel  
Governor Office Building  
200 Madison Street, Suite 650  
P.O. Box 2230  
Jefferson City, MO 65102-2230

Mr. Stuart W. Conrad  
Finnegan, Conrad & Peterson, L.C.  
1209 Penntower Office Center  
3100 Broadway  
Kansas City, MO 64111

Mr. Ronald Molteni  
Assistant Attorney General  
Supreme Court Building  
207 West High Street  
P.O. Box 899  
Jefferson City, MO 65102



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