

In the Matter of an Investigation into a)
Pending Sale of Assets of Aquila, Inc.) Case No. EO-2004-0224

COMES NOW Aquila Inc., ("Aquila") d/b/a Aquila Networks-MPS, by and through counsel, pursuant to 4 CSR 240-2.080(15), and for its Response and Objection to Staff's Motion to Open Case states as follows to the Missouri Public Service Commission ("Commission"):

2. Generally, the Staff has requested that it be authorized to investigate whether the Commission has any jurisdiction with respect to the anticipated sale in January 2004 by Aquila to Calpine Corporation ("Calpine") of its remaining 50% ownership interest in Merchant Energy Partners Pleasant Hill, LLC ("MEPPH"), an unregulated subsidiary of Aquila (hereinafter, the "Transaction"). MEPPH is the lessee/operator of a gas-fired electrical generating facility in Pleasant Hill, Missouri known as Aries Power Project ("Aries"). The Motion should be denied because no investigation is necessary to determine whether the Commission has any jurisdiction over the Transaction. Under the facts and law, which are already known to the Commission, it is clear that the contemplated Transaction is not one over which the Commission has any statutory authority.

3. The reasons why the Motion should be denied are, in large part, apparent on the face of the Motion. The Motion establishes that the only aspect of Aries that has any Missouri regulatory implications is a Power Sales Agreement (“PSA”) by and between MEPPH and Aquila d/b/a Aquila Networks-MPS (formerly UtiliCorp United Inc. d/b/a Missouri Public Service). The Commission had authority at the time the PSA was entered into to make certain specific factual findings with respect to the contract because MEPPH was to have been an **affiliated** exempt wholesale generator (“EWG”). The Commission’s jurisdiction was solely derivative of federal law, specifically, §32(k) of the Public Utility Holding Company Act of 1935 (“PUHCA”).

4. In order to protect against abusive affiliate transactions, the PUHCA required that the Commission make certain specific determinations with respect to the PSA prior to its submission to the Federal Energy Regulatory Commission (“FERC”). Aquila (formerly UtiliCorp United Inc.) filed with the Commission an application for a determination by the Commission as required by §32(k) of the PUHCA. That application was docketed by the Commission as Case No. EM-99-369¹. On April 22, 1999, the Commission issued an Order Regarding Power Sales Agreement making the requisite findings and approving UtiliCorp’s application (the “Order”). (Copy attached.) These circumstances are summarily recounted in paragraph four (4) of the Motion.

5. The PSA is **not** part of the contemplated sale by MEPPH of its remaining interest in Aries to Calpine. This, too, is specifically noted by Staff in paragraph six (6) of the Motion. Consequently, Aquila Networks-MPS would retain its contractual rights to

¹ In the Matter of the Application of UtiliCorp United Inc. Under Section 32(k) of the Public Utilities Holding Company Act of 1935 Concerning a Proposed Power Sales Agreement Between MEP Pleasant Hill, L.L.C. and UtiliCorp United Inc. d/b/a Missouri Public Service.

take the specified capacity pursuant to the terms of the PSA. Those contract rights would in no way be modified or impeded by the contemplated Transaction. There is no allegation in the Motion that the PSA would in any fashion be modified or amended.

6. The contemplated Transaction would be *deja vu* all over again. In March of 1999 when UtiliCorp filed its application in what was docketed as Case No. EM-99-369, MEPPH was a wholly-owned subsidiary of Aquila Energy Corporation (“AEC”) which itself was a wholly-owned subsidiary of UtiliCorp. Thereafter in January of 2000, Calpine acquired a 50% interest in MEPPH from AEC and thus became a 50% partner in Aries.² This development was brought to the Commission’s attention in April of 2001 at the time UtiliCorp filed an application for, among other things, a variance concerning a contract for the sale of “test energy” at the commencement of operations, of Aries, a case docketed as Case No. EO-2001-477³. **Staff’s formal recommendation in that case recited at length, in footnote 3, the fact of the sale by UtiliCorp of a 50% interest in MEPPH to Calpine. The Commission noted the change of ownership structure at page 2 of its June 7, 2001 Order Granting Variance (the “Variance Order”). It is extremely telling that there was no suggestion either in Staff’s recommendation in that case or the Variance Order issued by the Commission that the sale by UtiliCorp to Calpine of a 50% interest in MEPPH had any Missouri regulatory implications whatsoever. The applicable law has not changed and there is no basis for reaching a different conclusion now with respect to an identical event.**

² Calpine’s investment in MEPPH was the topic of a January 14, 2000 Press Release.

³ In the Matter of the Application of UtiliCorp United Inc. under §32(k) of the Public Utilities Holding Company Act of 1935 Concerning Service Agreement No. 2 Between MEP Pleasant Hill, L.L.C. and UtiliCorp United Inc. d/b/a Missouri Public Service.

7. In paragraph four (4) of the Motion, Staff makes reference to a condition in the Order reserving to the Commission the right to determine the ratemaking treatment afforded the PSA in any subsequent rate case. Aquila does not dispute this condition. The pending Transaction does not impair or in any way modify or rescind that condition and, in fact, the ratemaking implications concerning the PSA costs can be addressed in Aquila's pending electric rate case (Case No. ER-2004-0034).

8. MEPPH is not a public utility. The power generated by Aries is sold exclusively in transactions at the wholesale level. This is why it is classified as an exempt **wholesale** generator. There are no direct sales from Aries to the general public at retail. Consequently, Aries is not a regulated power generation facility and the owner is not subject to the Commission's jurisdiction. See, *State ex rel. M.O. Danciger v. Public Service Commission*, 205 S.W. 36 (Mo. 1918). Because the power generated by Aries is sold at wholesale, its operations are subject to the exclusive regulation of the Federal Regulatory Energy Commission ("FERC") with respect to wholesale energy rates. **The fact that MEPPH would not be an "electrical corporation" as that term is defined in §386.020 (15) RSMo 2000 by virtue of its ownership and operation of Aries, was addressed explicitly in paragraph nine (9) of UtiliCorp's application in Case No. EM-99-369. Those circumstances were reiterated in a memorandum filed as part of Staff's recommendation and filed of record in that case on April 5, 1999.**

9. Other than its ratemaking authority over Aquila's retail rates, the Commission's jurisdiction over the relationship between Aquila and its affiliated EWG is limited to the Commission's ongoing oversight of potentially abusive affiliate

transactions. In this regard, it is worth repeating that the Order which approved the PSA specifically found that the Commission has sufficient means at its disposal to conclude that the contract was, among other things, **in the public interest**. *Order* at 3. Since that time, the Commission's authority to regulate or to prevent abusive affiliate transactions has been enhanced by the adoption by the Commission in February of 2000 of the affiliate transactions rule applicable to electric utilities in the State of Missouri. See, 4 CSR 240-20-015.

10. That authority would not be impaired by the contemplated Transaction. Rather, the completion of the Transaction would bring to an end the affiliation between Aquila and MEPPH. As it affects affiliate transactions considerations, the Transaction actually would represent an **improvement** in regulatory transparency because Aquila would no longer be buying power from an **affiliated** EWG.

11. The contemplated Transaction does not represent any change for Missouri regulation. Aries is not in the regulated rate base of a Missouri jurisdiction utility. Rather it is a plant that is an EWG subject to the exclusive jurisdiction of FERC.⁴ Clearly, Aries is not part of Aquila's franchise, works or system as that language is used in §393.190 RSMo and that statute does not afford the Commission jurisdiction over the Transaction.

12. Ultimately, there is no other basis for assertion of the Commission's jurisdiction over the Transaction. It is instructive that no arguable statutory authority for Commission jurisdiction is cited in the Motion. In this regard, it is well established that the Commission does not have plenary jurisdiction over utilities. The Commission is an

⁴ The Transaction is subject to FERC approval.

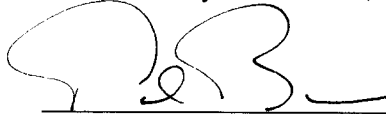
administrative body of limited powers, created by statute. As such, it has only those powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W. 2d 1044, 1046 (1943); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W. 2d 925, 928 (Mo. banc 1958). Although the Public Service Commission Law is remedial in nature, and should be construed liberally, neither convenience, expediency or necessity are proper matters for consideration in the determination of whether an act of the Commission is authorized by law, *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W. 2d 41, 49 (Mo. banc 1979).

13. The relevant facts in this case are either well known or undisputed. They have been the subject of the two (2) prior Commission decisions referenced above and the subject of approximately 70 pages of prefiled testimony in Aquila's last electric rate case, Case No. ER-2001-672. In its testimony and various recommendations in these proceedings, the Staff has never suggested that the Commission's jurisdiction over Aries extended beyond the PSA. There is no need to embark in an investigation to determine the facts or the law. Because the facts are either well known or undisputed and the basis for the Commission's jurisdiction can be found in the laws of this State, there is no reason to open a case to examine the subject matter of the Transaction. There is simply nothing to investigate.

WHEREFORE, for the reasons aforesaid, and given the anticipated timeframe from closing of the Transaction, Aquila respectfully requests that the Commission deny Staff's Motion to Open Case for lack of subject-matter jurisdiction over the contemplated

Transaction at its earliest opportunity and for such other orders and relief as may be appropriate in the circumstances.

Respectfully submitted,



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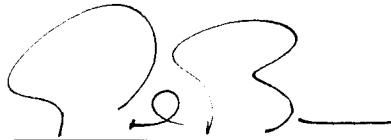
Attorneys for Aquila, Inc.

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 9th day of January 2004 to the following:

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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 22nd
day of April, 1999.

In the Matter of the Application of)
UtiliCorp United Inc. Under Section)
32(k) of the Public Utilities Holding)
Company Act of 1935 Concerning a)
Proposed Power Sales Agreement Between)
MEP Pleasant Hill, L.L.C. and UtiliCorp)
United Inc. d/b/a Missouri Public)
Service.)

Case No. EM-99-369

ORDER REGARDING POWER SALES AGREEMENT

On March 1, 1999, UtiliCorp United Inc. (UtiliCorp) d/b/a Missouri Public Service filed an Application with the Commission seeking an order of the Commission regarding a Power Sales Agreement (PSA) between UtiliCorp and MEP Pleasant Hill, L.L.C. (MEPPH). UtiliCorp proposes to enter into a PSA agreement with MEPPH whereby UtiliCorp would purchase electric power generated by MEPPH beginning on June 1, 2001. MEPPH is an exempt wholesale generator of electric power and is an affiliate of UtiliCorp.

Section 32(k) of the Public Utility Holding Company Act of 1935 (PUHCA), codified at 15 U.S.C. 79z-5a(k), provides that "an electric utility company may not enter into a contract to purchase electric energy at wholesale from an exempt wholesale generator if the exempt wholesale generator is an affiliate or associate company of the electric utility company." The federal statute then goes on to indicate that an electric

utility company may enter into such a contract with an affiliate if every state commission having jurisdiction over the retail rates of such electric utility company makes certain specific determinations in advance of the electric utility company entering into such contract. UtiliCorp's Application asks that the Commission enter an order making the required specific determinations. Because of the need to begin construction of a combustion turbine generation plant by the end of July of 1999, UtiliCorp asked that the Commission issue its order regarding this Application no later than May 1, 1999.

On March 5, the Commission issued a Notice Establishing Time for Filing of Recommendation that directed the Staff of the Public Service Commission (Staff) to file its recommendation regarding approval or rejection of UtiliCorp's Application no later than April 5. The Office of the Public Counsel (Public Counsel) was also allowed until April 5 to file its recommendation.

On April 5, Staff filed two memorandums, one submitted by Michael S. Proctor, Chief Regulatory Economist for the Commission, and the other submitted by Mark L. Oligschlaeger, Regulatory Auditor V, and Steven Dottheim, Chief Deputy General Counsel. Both memorandums evaluate the PSA and recommend that the Commission approve UtiliCorp's application. Staff did, however, recommend that the Commission's approval be subject to several conditions. Public Counsel also filed its recommendation on April 5. Public Counsel recommended approval but only upon certain conditions. 4 CSR 240-2.080(12) provides that parties are allowed ten days from the date of filing in which to respond to any motion or

pleading. No timely response was filed to the recommendations of either Staff or Public Counsel.

The Commission has reviewed and considered the Application filed by UtiliCorp and the recommendations of Staff and Public Counsel. The Commission finds that the Application of UtiliCorp should be granted subject to the conditions recommended by Staff and Public Counsel.

IT IS THEREFORE ORDERED:

1. That, in compliance with Section 32(k) of the Public Utility Holding Company Act of 1935, the Commission determines that:

- a) the Commission has sufficient regulatory authority, resources and access to books and records of UtiliCorp United Inc., MEP Pleasant Hill, L.L.C. and any relevant associate, affiliate or subsidiary company to exercise its duties under subparagraph (k) of Section 32 of the Public Utility Holding Company Act of 1935;
- b) the transaction will benefit consumers;
- c) the transaction does not violate any Missouri law;
- d) the transaction would not provide MEP Pleasant Hill, L.L.C. with any unfair competitive advantage by virtue of its affiliation or association with UtiliCorp United Inc.; and
- e) the transaction is in the public interest.

2. That the Commission's approval of UtiliCorp United Inc. d/b/a Missouri Public Service's Application is specifically conditioned upon the following conditions:

- a) That UtiliCorp United Inc. shall make available to the Commission, its Staff and the Office of the Public Counsel, at reasonable times and reasonable places, all books and records and employees and officers of MEP Pleasant Hill, L.L.C. and any affiliate or subsidiary of UtiliCorp engaged in any activity with MEP Pleasant Hill, L.L.C.
- b) MEP Pleasant Hill, L.L.C. shall employ accounting and other procedures and controls related to cost allocations and transfer pricing to ensure and facilitate full review by the Commission and its Staff and to protect against cross-subsidization of non-Missouri Public Service business by Missouri Public Service's customers.
- c) This order is in no way binding on the Commission or any party regarding a future rate or earnings complaint case to contest the ratemaking treatment to be afforded the Power Sales Agreement. UtiliCorp United Inc. shall not seek to overturn, reverse, set aside, change or enjoin, whether through appeal or the initiation or maintenance of any action in any forum, a decision or order of the Commission which pertains to recovery, disallowance, deferral or ratemaking treatment of any expense, charge, cost or allocation incurred or accrued by MEP Pleasant Hill, L.L.C. or UtiliCorp United Inc. d/b/a Missouri Public Service in or as a result of the Power Sales

Agreement on the basis that such expense, charge, cost or allocation has itself been filed with or approved by the Federal Energy Regulatory Commission, or was incurred pursuant to the Power Sales Agreement.

3. That the Commission's approval of the instant Power Sales Agreement does not imply or assure approval of any future contracts to purchase electric energy at wholesale from an exempt wholesale generator that is an affiliate or associate company of an electrical corporation within the Commission's jurisdiction.

4. That UtiliCorp United Inc. is authorized to enter into, execute and perform in accordance with the terms and conditions of the proposed Power Sales Agreement by and between MEP Pleasant Hill, L.L.C. and UtiliCorp United Inc. d/b/a Missouri Public Service.

5. That UtiliCorp United Inc. is authorized to enter into, execute and perform in accordance with the terms of all documents reasonably necessary and incidental to the performance of the transactions that are the subject of the Application.

6. That this order shall become effective on May 4, 1999.

7. That this case may be closed on May 5, 1999.

BY THE COMMISSION

A handwritten signature in black ink, reading "Dale Hardy Roberts". The signature is written in a cursive style with a large initial "D".

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer
and Drainer, CC., concur
Crumpton, C., absent

Woodruff, Regulatory Law Judge