

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

**IN THE MATTER OF AN INVESTIGATION INTO A
PENDING SALE OF ASSETS OF AQUILA, INC.**

Cause No. EO-2004-0224

VOLUME 1

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

February 24, 2004
Jefferson City, Missouri
Volume 1

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

VICKY RUTH, presiding,
Senior Regulatory Law Judge

REPORTED BY:
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ASSOCIATED COURT REPORTERS

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1 P R O C E E D I N G S

2 JUDGE RUTH: Okay. Let's go ahead and go on
3 the record and get started. Okay. Good morning. My name is
4 Vicky Ruth and I'm the Regulatory Law Judge assigned to this
5 case. Today is Tuesday, February 24th, 2004, and we are here
6 for an on-the-record presentation in Case E0-2004-0224 in the
7 Matter of an Investigation Into A Pending Sale of Assets of
8 Aquila, Inc.

9 This on-the-record presentation was scheduled
10 to give the Commissioners an opportunity to ask questions of
11 the parties, particularly regarding Staff's Motion requesting
12 that the Commission order Staff to investigate Aquila's
13 pending sale of assets and also the other pleadings including
14 Aquila's recent Motion for expedited treatment. We will
15 begin by allowing each party to give an overview of their
16 position in this matter.

17 We will do that during open session and then
18 we'll move to questions from the bench. I want to address
19 the HC nature of this proceeding later. We'll discuss that,
20 but I want to go ahead and do the entries of appearance.
21 Aquila, could I begin with you, please?

22 MR. BOUDREAU: Please let the record reflect
23 the appearance of Paul B. Boudreau with the law firm of
24 Brydon, Swearngen & England, 312 East Capital Ave.,
25 Jefferson City, Missouri, appearing on behalf of Aquila, Inc.

1 JUDGE RUTH: Thank you.

2 MR. DOTTHEIM: Steven Dottheim, Post Office
3 Box 360, Jefferson City, Missouri, 65102, appearing on behalf
4 of the Staff of the Missouri Public Service Commission.

5 JUDGE RUTH: Okay. Thank you. And Public
6 Counsel.

7 MS. O'NEILL: Yes. Good morning. Ruth O'Neill
8 from the Office of the Public Counsel. Our address is Post
9 Office Box 2230, Jefferson City, Missouri, 65102.

10 JUDGE RUTH: Okay. At this time, let me ask
11 if the parties anticipate offering any exhibits into the
12 record.

13 MR. DOTTHEIM: None from the Staff.

14 MS. O'NEILL: None from Public Counsel.

15 MR. BOUDREAU: Not at this time. Some of this
16 depends on the Commission's preferences.

17 JUDGE RUTH: Certainly, the Commissioners may
18 request late-filed exhibits. Okay. I want to discuss the HC
19 nature of this proceeding. When Staff originally filed their
20 Motion back in November, most of Staff's Motion was
21 designated as HC. Very, very little was considered public
22 information. Basically, the only part that would be public
23 is the fact that Staff wanted an investigation into a sale of
24 assets of Aquila.

25 As the proceeding or the pleadings continued,

1 much of the information has now been designated public
2 information; however, there is quite a bit that is still HC
3 information. I've briefly talked to the parties regarding
4 the best manner to protect the public information while still
5 allowing a free exchange of ideas and questions from the
6 Commission, and I believe that the parties have discussed
7 this among themselves and have a proposal; is that correct?

8 MR. BOUDREAU: Yes.

9 JUDGE RUTH: Then let me ask one of you to go
10 ahead and, on the record, state your proposal for handling
11 the HC nature of this proceeding.

12 MR. BOUDREAU: Yes, thank you. This is Paul
13 Boudreau for the Company. Prior to going on the record, I
14 proposed, and I believe that it's agreeable to the parties,
15 that the opening statements that are made this morning be
16 handled as part of the open record, and considered part of
17 public comment.

18 At that point, to facilitate the best exchange
19 of information, because there's still some information the
20 company considers to be highly confidential and needs to be
21 treated as such, that to facilitate the dialogue and the
22 questions that the Commissioners may have and the comments
23 that Counsel may wish to make that the -- that the proceeding
24 then go in camera with the commitment from the company that
25 it will review the transcript and designate, line by line,

1 page by page, that portion of the information that is
2 considered public record or nonproprietary, and I believe
3 that general approach has been agreed to by other counsel of
4 record.

5 JUDGE RUTH: Okay. I see Mr. Dottheim may be
6 nodding his head. Could you state whether or not that
7 procedure is acceptable?

8 MR. DOTTHEIM: Yes, that's the procedure we've
9 discussed and that is acceptable to.

10 JUDGE RUTH: Okay. And Ms. O'Neill?

11 MS. O'NEILL: Yes, your Honor, we would like
12 to have as much of this proceeding in the public form as
13 possible, but because of the nature of questions that we
14 expect from the bench, we are willing to accept that
15 procedure in this particular hearing.

16 JUDGE RUTH: Okay. So let me summarize to
17 make sure I understand. What we will do, then, is continue
18 -- we will have HC for -- I'm sorry, we will continue with
19 the public portion for the initial opening statements from
20 each party. We will then go into an in camera session, and I
21 will give the parties an opportunity to supplement their
22 opening statement if they have HC information that needs to
23 be brought out, at that time.

24 Then we will have questions from the bench,
25 and following the hearing, it will be Aquila's

1 responsibility, then, to promptly go through the transcript,
2 line by line, and designate what portions of the transcript
3 can be opened back into the record, and at the end of the
4 hearing, Aquila, I'll ask you how long you anticipate that
5 will take, so you can be thinking about that. I want a date,
6 an estimate, so it's something we can look forward to knowing
7 when the transcript will be finalized, as far as, M what's HC
8 and what's public.

9 MR. BOUDREAU: I will be willing to confer
10 with my client here, today, and we will make a commitment
11 over a very short time frame.

12 JUDGE RUTH: Okay. Thank you. I'd like to
13 also note, then, that if, during the opening statements
14 something is accidentally mentioned that is HC, it will be
15 the responsibility of the Counsel to bring that to my
16 attention, if part of the record needs to be struck at that
17 time.

18 As I mentioned, I anticipate allowing each
19 party an opportunity to give opening statements. We'll go
20 into in camera then. You can supplement your opening, then
21 we will bring the Commissioners in, and I have suggested to
22 them that they ask one question at a time and ask that one
23 question of each party and move along, and although they
24 agree to that in theory, I anticipate that one question will
25 lead to another question and another, but I will do my best

1 as each Commissioner finishes a series of questions to allow
2 the other parties an opportunity to respond, if you wish.

3 And of course, if you feel that I have skipped
4 one of those opportunities, you're welcome to bring that to
5 my attention. I do not anticipate, at this time, the need
6 for briefs. Part of the reason for that is the Commissioners
7 do want to address the Motion for expedited treatment and
8 deal with this matter as expeditiously as possible.

9 However, if the at the end of the hearing, the
10 parties believe that briefs are necessary, you may bring that
11 to my attention and we will discuss it at that time. Okay.
12 Are there any questions regarding the procedure at this time?

13 MS. O'NEILL: No.

14 MR. BOUDREAU: I have none, thank you.

15 JUDGE RUTH: Okay. Thank you. Okay. We're
16 going to take a five-minute break just while I notify the
17 Commissioners they can come on down. We'll go off the record
18 for that five minutes, but I do ask that perhaps, you stay in
19 the room.

20 (A BREAK WAS HAD.)

21 JUDGE RUTH: Let's go ahead and go back on the
22 record. We addressed some preliminary matters previously,
23 and now, we are ready to begin with opening statements. Let
24 me remind the parties that this opening statement period is
25 public. If you have comments that need to be made that are

1. HC, we will do a second round of -- supplementary round of HC
2 opening statements after the first round, so let's begin with
3 Aquila.

4 MR. BOUDREAU: Just as a matter of form, Staff
5 has the Motion pending, and I would be perfectly willing to
6 have Mr. Dottheim --

7 JUDGE RUTH: That's fine, but can I also get
8 you to move to the podium and be sure to use the microphone.

9 MR. DOTTHEIM: Yes. May it please the
10 Commission. The Staff requests that the Commission open an
11 investigation into Aquila, Inc.'s planned sale of its
12 remaining 50 percent share of the Aries Combined Cycle
13 Generating Unit to CalPine Corporation. Cass County is the
14 title holder of Aries, and Aquila and CalPine are
15 leaseholders, and eventually the equitable owners of Aries
16 through their co-ownership of Merchant Energy Partners
17 Pleasant Hill, MEPPH.

18 Cass County, Missouri, holds the legal title
19 to Aries for the purpose of industrial development revenue
20 bonds having been issued to finance construction of Aries and
21 exempting Aries from abnormal large taxes. UtiliCorp,
22 United, Inc., Aquila's predecessor, caused MEPPH originally
23 to be established as a subsidiary of UtiliCorp. MEPPH has
24 FERC authority to sell wholesale power of market-based rates.

25 In 1999, UtiliCorp, as a result of a

1 competitive bidding process, proposed to enter into a
2 four-year power sales agreement with MEPPH for varying
3 amounts of the power from the plan Aerie unit commencing June
4 1, 2001, to meet the capacity and energy needs of UtiliCorp,
5 Missouri Public Service Division. Aries was to be an exempt
6 wholesale generator, an EWG. EWGs were created by the 1992
7 Energy Policy Act, and EWG is a wholesale generator that is
8 not considered to be an electric utility company under the
9 Public Utility Holding Company Act and is exempt from various
10 restrictions of PUHCA. There, previously, have been two
11 cases before the Commission involving the Aries unit and
12 determinations that were required to be made by the
13 Commission under PUHCA. Those two cases were EM-99-365 and
14 EO-2001-477.

15 As I previously had mentioned, Aries
16 originally was to be owned a 100 percent by Aquila, but in
17 January, 2000, CalPine acquired a 50 percent interest in the
18 Aries unit. Aquila is now seeking to sell the remaining 50
19 percent of the Aries unit to CalPine. Aries was built in
20 MPS's, Missouri Public Service's, territory to meet a
21 substantial part of MPS's retail load is needed to provide
22 safe and adequate service to Aquila's retail customers, and
23 is interconnected with Aquila, so long as Aquila, which is a
24 regulated utility, owns part of Aries. Aquila has rights to
25 Aries power after the present power supply agreement expires

1 in June, 2005.

2 The site itself, where the unit is situated,
3 is a valuable asset which would be transferred by the sale.
4 In earlier pleadings to the Commission regarding the Staff's
5 request for authorization to pursue an investigation, Aquila
6 made reference to an anticipated sale in January, 2004, of
7 its remaining 50 percent interest in Aries. Of course, that
8 date has passed.

9 In its latest filing of last Friday with the
10 Commission, Aquila refers to a document that is attached to
11 its Pleading, which is marked highly confidential, which
12 provides for a sale deadline other than the January, 2004,
13 date previously utilized by Aquila, and of course, which has
14 already passed. Regarding impending dates utilized by Aquila
15 in its most recent filing, the Staff would note that Aquila
16 has been in default of the construction loans relating to
17 Aries since June 26th, 2003.

18 The Staff has been concerned that this
19 transaction not occur without being brought to the
20 Commission's attention for some deliberation as to the
21 Commission's jurisdiction involving that unit. The Staff has
22 cited various statutory sections of the supervisory powers,
23 the necessary and proper powers of the Commission.

24 Of course, there's also Section 393.190.1,
25 which makes specific reference to no electric -- electrical

1 corporation shall sell, transfer, dispose of, the whole or
2 any part of its franchise works or system necessary or useful
3 in the performance of its duties to the public without first
4 having secured from the Commission authorizing it so to do.
5 Thank you.

6 JUDGE RUTH: Thank you. Public Counsel, do
7 you have an opening statement?

8 MS. O'NEILL: I will waive opening statement
9 at this time.

10 JUDGE RUTH: Thank you. And Aquila, would you
11 move forward to the podium also? Thanks.

12 MR. BOUDREAU: Thank you. May it please the
13 Commission. Good morning.

14 I want to -- I will keep my comments brief,
15 and I want to thank Mr. Dottheim for doing a nice job of
16 setting the stage for the discussion. I agree with him, that
17 the question before you is whether the Commission has
18 jurisdiction over the transactions that's been proposed to be
19 entered into and consummated by Aquila, and I think that is
20 the question of the day.

21 Mr. Dottheim spent a little bit of time
22 talking about the ownership structure of the Aries project.
23 I will just refer the Commission to a schedule that is in the
24 current rate case, it's Schedule MS-9. It's a schedule to
25 make sure testimony where he kind of lays out a structure

1 diagram of some ownership. Some overlaps have been discussed
2 in a couple of other cases, but that may be a helpful diagram
3 for the Commission -- to which the Commission may refer.

4 The Staff's Motion to investigate whether the
5 Commission has jurisdiction over the proposed sale by Aquila
6 of its 50 percent ownership interest in Merchant Energy
7 Partners Pleasant Hill, which is MEPPH. There's no easy way
8 to say that one, I apologize, but MEPPH is the leasee and
9 operator of the Aries power project. Now, Aquila's utility
10 interest is the right of its Missouri Utility Division,
11 Aquila's Networks MPS, to take electric power generated by
12 Aries under a power sales agreement, or a PSA, which is not
13 part of or affected by the sale, and that appears on the face
14 of Staff's Motion.

15 I don't think there's any dispute that there's
16 going to be no modification of the power sales agreement, nor
17 is the power sales agreement being transferred. That stays
18 in place. The PSA was submitted to the Commission for
19 certification under the Public Utility Holding Company Act
20 previously, and it's been found to be in the public interest,
21 and that was the Case No. EM-99-369 to which I think Mr.
22 Dottheim has previously referred.

23 This sale is just -- as he points out, the
24 second shoe dropping. In January of 2000, CalPine
25 Corporation acquired its original 50 percent interest in

1 MEPPH, and this was reported to the Commission in its Case
2 No. EO-2001-477. The sale simply would allow CalPine to take
3 full ownership of Aries.

4 No Commission approval was required upon that
5 sale originally. This sale will permit Aquila to continue to
6 make progress in its effort to exit the merchant energy
7 business and to focus on its multi-state utility commission.
8 It will end the affiliation between MEPPH and Aquila, which
9 will then provide better regulatory transferency. All
10 regulatory approvals for this transaction have been obtained
11 and the company is prepared to move ahead.

12 Now, it's important to note that MEPPH is not
13 a public utility. It has no Certificate of Public
14 Convenience from the Commission and it does not provide
15 utility service to the general public in the state of
16 Missouri. As Mr. Dottheim pointed out, it's a wholesale
17 power generator and is subject to FERC jurisdiction. And
18 that goes with the -- as he classified it, an exempt
19 wholesale generator.

20 The Motion that is currently pending before
21 this Commission has a practical matter, created for a
22 regulatory matter for the company. It impairs the ability of
23 the parties to close the transaction on schedule. There have
24 been some discussions with Staff to explore ways to address
25 various concerns about Aquila Utility Company, and I think

1 that they've been informative and meaningful, but frankly,
2 they've not resulted in a resolution of the matter between
3 the parties that would satisfy the Staff in terms of the
4 Motion currently pending.

5 In the end, the question is whether or not
6 there is subject matter jurisdiction over this and their --
7 this is a particular -- the company's position is this is a
8 transaction over which the Commission does not have subject
9 matter jurisdiction. The Staff, from my reading of the
10 pleadings that have been filed today, the Staff's primary
11 concerns appears to be access to books and records and some
12 of the cost issues associated with the Aries plant itself, in
13 terms of cost of service for the Missouri Utility.

14 Now, as far as the access to books and
15 records, the company does not view that to be an issue,
16 because under Federal Law, this Commission is provided with
17 access to those records, and I will refer the Commission to
18 Section 201(G) of the Federal Power Act. As far as the
19 affiliate issues, those to me are cost issues and more
20 appropriately dealt with in the context of a rate case, and
21 in fact, as you're probably well aware, are currently being
22 dealt with in the context of a current rate case.

23 These concerns, access to records and cost
24 issues, do not confer any jurisdiction on the Commission to
25 either approve or disapprove the sales transaction of its --

1 of Aquila's 50 percent ownership interest in MEPPH to
2 CalPine. These are rate case issues. I guess to summarize,
3 Aries is not a rate base unit of Aquila Networks, and Staff
4 doesn't allege that it is. MEPPH is not a public utility,
5 and Staff does not allege that it is. Aquila Networks
6 interest in the PSA is not being conveyed, and I don't think
7 that that's a fact that's in dispute.

8 Ultimately, there's no basis or significance
9 for the Commission to assert jurisdiction over the
10 transaction and from my review of the Staff's pleadings, I
11 haven't seen any arguable basis for the Commission to do so.
12 The regulatory uncertainty can cloud the closing of this
13 transaction to the detriment of Aquila and its customers.

14 As I have pointed out, it will cause an
15 inability to exit the energy of the merchant energy business.
16 The affiliation between the two entities will remain. I
17 don't think access to records is going to be impeded, and the
18 cost issues can be addressed in a rate case, so there really
19 is no adverse consequences in denying the Motion and allowing
20 the sale to proceed and conversely there are potentially
21 significant adverse consequences that may come about by
22 granting the Motion or simply by allowing it to remain
23 unresolved.

24 I think that the fact and the law are pretty
25 apparent on the face of the pleadings, and doesn't require

1 any further inquiry for the Commission to sit here today and
2 determine whether or not there's a basis for pursuing an
3 investigation over the transaction. Aquila respectfully
4 requests that the Commission immediately deny this Motion and
5 close this case and allow the sale to proceed. Thank you.

6 JUDGE RUTH: Thank you. Before we move to
7 questions, I want to go to the in-camera session. I will
8 pause the video streaming so that the parties may offer any
9 supplemental information that they wish, that supplemental
10 information being HC.

11 (REPORTERÆS NOTE: At this point, an in-camera
12 session was held, which is contained in Volume 2.)

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1 JUDGE RUTH: Okay. At the beginning we
2 discussed how most of the hearing would be in-camera, Aquila
3 indicated that at the conclusion they would be able to give
4 us an estimate of when they would be able to go over the
5 transcript and file a pleading which indicates which lines
6 or pages can be made open.

7 Now, we have had two different court
8 reporters. However, it's my understanding that both court
9 reporters anticipate having their portions filed by
10 tomorrow; is that correct?

11 THE REPORTER: Yes.

12 JUDGE RUTH: So the transcript will be filed
13 tomorrow. Now, that doesn't mean it will be on EFIS, so if
14 you've not made arrangements with the court reporter to get
15 your own copy, it won't be on EFIS until at least the next
16 day. That would be Thursday.

17 With that in mind, Mr. Boudreau, can you give
18 me an estimate?

19 MR. BOUDREAU: Yeah. I've talked with
20 Mr. Stamm and I believe if we're given 48 hours we can -- or
21 two working days, in essence, the company will be able to
22 review the transcript and identify by page and line what
23 items need to remain highly confidential.

24 JUDGE RUTH: So are you anticipating you would
25 make your filing on Friday or on Monday? Assuming the

1 transcript comes out -- is filed tomorrow, and you may have
2 made arrangements then to get your own copy. I'm just
3 asking to make it clear.

4 MR. BOUDREAU: End of the day Friday. If for
5 some reason a problem comes up, I'll notify the Commission
6 and the parties, if it looks -- if it becomes necessary to
7 be Monday instead of the end of business Friday, but our
8 target is to look at the end of business Friday.

9 JUDGE RUTH: That's satisfactory. I'll make a
10 note that we'll anticipate having that filing by the end of
11 the day Friday. If not, I will hear something from the
12 parties. I also mentioned at the beginning of the hearing
13 that the Commission did not anticipate Briefs from the
14 parties, and I am just asking you now if you feel that there
15 is a need to file any type of supplemental brief?

16 MS. O'NEILL: I don't think so, your Honor.

17 JUDGE RUTH: Do you want a moment to discuss
18 this among yourselves?

19 MR. DOTTHEIM: I don't believe the Staff sees
20 any need to file a Brief. I was just thinking, though, that
21 earlier in the proceedings we had discussed a Southern Union
22 case and a Laclede Gas case, and I thought we might provide
23 to the Bench those case numbers if there's any interest in
24 that.

25 JUDGE RUTH: That might be helpful, but it

1 could be in the form of a very, very short notice, if you
2 will.

3 MR. DOTTHEIM: Certainly.

4 JUDGE RUTH: And then there shouldn't be
5 anything substantive otherwise that would raise issues for
6 responses.

7 MR. DOTTHEIM: And that is not the intention.
8 It's just to identify those cases and provide the case
9 numbers.

10 JUDGE RUTH: That will be helpful. We'll
11 leave it at that, that Staff intends to file the case number
12 information, but there will be no other Briefs.

13 MR. DOTTHEIM: And before I file that, I will
14 provide copies to Aquila and Office of Public Counsel for
15 their review.

16 JUDGE RUTH: And I also want to mention that
17 for identification purposes, the Commission marked an
18 Exhibit 1 which was Attachment A of Staff's December 3rd,
19 2003 filing. It's a chart, one-page chart, marked that as
20 Exhibit A -- I'm sorry -- Exhibit 1 for identification
21 purposes only. That document is not being admitted into the
22 record. I just want to clarify that it was identified.

23 And I have nothing further. Do the parties
24 have any additional matters that need to be taken up at this
25 time?

1 MS. O'NEILL: No, your Honor.

2 MR. BOUDREAU: I have nothing further, other
3 than to thank the Commission and everybody else for this
4 opportunity today on such short notice.

5 JUDGE RUTH: Okay. Thank you. We will
6 adjourn. That concludes the hearing.

7 WHEREUPON, the hearing was concluded.

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