

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

In the Matter of an investigation into a)
Pending Sale of Assets of Aquila, Inc.)

Case No. EO-2004-0224

Dissenting Opinion of Commissioner Steve Gaw

I write this dissent to express my concern about the sale of the Aries generation unit owned in part by Aquila's subsidiary, without additional scrutiny. While I acknowledge that a significant argument exists that this asset is not within the jurisdiction of the Commission, factors appear to be present in this case which may place the generation facility and property within the Commission's purview.

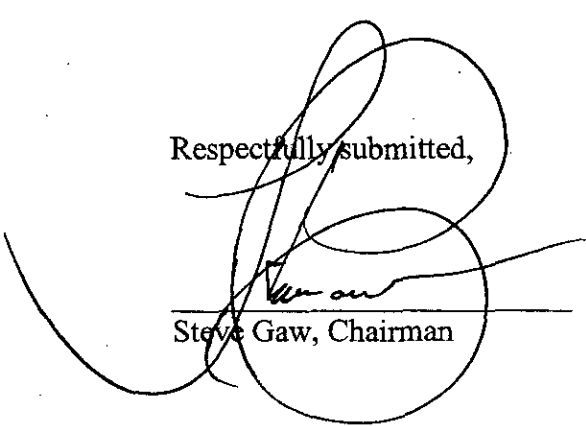
Aries is a natural gas combined cycle generator, which is a significant part of providing electricity needed to meet the legal obligations of Aquila to provide safe and reliable service. Its location in Cass County is close to Aquila's load. Combined cycle generators provide intermediate cost generation and can be an important element of a utilities generation portfolio. The sole question in this case is whether this Commission has jurisdiction over the sale of this generation facility. The on-the-record presentation made in this case raised significant questions which demand further inquiry. Because much of the presentation was designated as Highly Confidential (HC), it is not possible to delineate here the items of concern. Inquiry in this case established that there are important transactions by Aquila and between Aquila and its affiliates, which could mean that this Commission has jurisdiction over the sale of Aries, especially in light of the historical use of the plant.

It is a certainty that this decision impacts ratepayers. The generation unit can no longer be counted on as a reliable component of service to Aquila's native load. The Company is moving toward more susceptibility to the whims of the market with this decision. This question arises about

whether Aquila's decision is in the best interest of ratepayers and in general. No inquiry will be done in this case.

The Missouri Supreme Court, in *State ex rel. Atmos Energy Corp. v. PSC*, 103 S.W.3d 753 (Mo. banc 2003), affirms the Commission's authority to enact affiliate transactions rules. This authority includes the ability to gain access to records of certain non-regulated affiliates of a regulated company. The *Atmos* decision is an indication that the limit of this Commission's authority is not simply answered by what is or is not housed under the regulated division of a corporation.¹ In *Atmos*, Court stated that an important factor is whether an affiliate is substantially kept separate and apart. The transactions and history in the current case give cause to believe this Commission may have authority over the sale of Aries. Once the facility is sold, the only possible cure of a poor decision will be review in a rate case. But rate cases will not bring back a generation facility that might have been the best resource of needed generation for Aquila's customers. We will not be able to do anything about that then. The horse will be gone from the corral. I believe that sufficient question exists to cause further inquiry into this transaction and its effect on Aquila's consumers.

Respectfully submitted,



Steve Gaw, Chairman

(S E A L)

Dated at Jefferson City, Missouri,
on this 3rd day of March, 2004.

¹ The majority seems to infer that failure by the Staff to raise issues on this plant during construction or when its 50% interest was sold to Calpine somehow impacts jurisdiction. Jurisdiction of the Public Service Commission is not determined by a failure of Staff to exercise it, however. It is determined by the Commission's authority under statute.