

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**

ORDER REGARDING TRANSCRIPT

On March 1, 2004, Aquila, Inc., filed a Notice designating which parts of the in-camera transcript (Volume 2) may now be made public. On March 2, 2004, Aquila provided the parties and the Regulatory Law Judge with a copy of Volume 2 of the transcript with the portions of the transcript that need to remain highly confidential removed. A copy of that document is attached to this notice as Attachment A. Any party may file responses or objections to this attachment no later than March 12, 2004.

IT IS THEREFORE ORDERED:

1. That the portions (Attachment A) of the transcript, Volume 2, previously marked as highly confidential, are now made public.
2. That responses or objections to Attachment A may be filed no later than March 12, 2004.

3. That this order shall become effective on March 4, 2004.

BY THE COMMISSION

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, flowing style.

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(S E A L)

Vicky Ruth, Senior Regulatory Law
Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 4th day of March, 2004.

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RECEIVED

MAR 01 2004

March 1, 2004

Adjudication Division
Public Service Commission

VIA HAND DELIVERY

Mr. Steven Dottheim
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RE: Aquila, Inc. – Case No. EO-2004-0224

Dear Steve and Ruth:

Earlier today, I caused to be filed in the referenced case a tabulation of those materials contained in the in-camera transcript of the proceedings of February 24, 2003 (Volume 2) the company asserts are highly confidential in accordance with the terms of the Commission's Protective Order in this case. Tabulations of this nature are inherently difficult to reconcile with the transcript itself. Accordingly, I have taken the liberty of providing a copy of the transcript to each of you with the identified portions of the transcript whited-out.

Similarly, I am supplying a redacted copy of Volume 2 of the hearing transcript to the Administrative Law Judge, Vicky Ruth, which is identical to the copy of the transcript being provided to each of you.

If you have any questions with regard to the enclosed, please feel free to give me a call.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By.


Paul A. Boudreau

PAB/ccp
Enclosure
cc: Vicky Ruth (with enclosure)

Attachment A

**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 2

ORDER SCHEDULING ON-THE-RECORD PRESENTATION

FEBRUARY 24, 2003

COPY

ASSOCIATED COURT REPORTERS

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS
IN CAMERA

Order Scheduling On-The-Record Presentation

February 24, 2004

Jefferson City, Missouri

Volume 2

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:

Jennifer L. Leibach

ASSOCIATED COURT REPORTERS

A P P E A R A N C E S

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FOR: Staff of the Public Service
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FOR: Office of the Public Counsel and
the Public

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FOR: Aquila, Inc.

P R O C E E D I N G S

JUDGE RUTH: Let me ask Staff, first, is there anything HC that you wish to add to your opening?

PSC STAFF: Yes.

JUDGE RUTH: And I'll ask you to turn around and make sure that there aren't any parties, especially Aquila. If you will turn around and see if there are any parties that need to be cleared, and would someone check to see that the door is closed? I can't see from here if it's closed.

MR. BOUDREAU: If you give us a moment, there are folks that I do not recognize.

JUDGE RUTH: And Counsel, I will have to ask that you also keep an eye on if anyone comes in. I will try to notice, but I ask you to also notice.

MR. BOUDREAU: Very good. Thank you.

JUDGE RUTH: Okay. Parties indicate we're good then. Mr. Dottheim, you may supplement your opening.

MR. BOUDREAU: If I may, has the webcam been stopped.

JUDGE RUTH: Yes, it has been stopped.

MR. BOUDREAU: Thank you.

JUDGE RUTH: Proceed.

MR. DOTTHEIM: Yes, I made reference to a document that's attached to Aquila's latest filing, and I

1 didn't name the document or go into any details. That's the
2 waiver agreement that's attached and that which is provides
3 the impending date that Aquila has mentioned of February 27.
4 That waiver agreement deals with the default that occurred on
5 June -- on June 26th of 2003, and as Aquila indicates in its
6 pleadings, it can't assert to the Commission that anything
7 definitive may occur after that date.

8 JUDGE RUTH: Can you clarify for me, please,
9 which pleadings that document is attached to.

10 MR. DOTTHEIM: I'm sorry, that was the
11 pleading that was filed on Friday, February 20th, it's Motion
12 for Expedited Treatment, the -- I think basically all of the
13 contents that are referred to from that document are marked
14 highly confidential starting in Paragraph 6 of -- of the
15 pleading filed last Friday and the document itself, which is
16 marked highly confidential.

17 JUDGE RUTH: Thank you.

18 MR. DOTTHEIM: Oh, excuse me, and I would note
19 also that with the waiver agreement, the very first line, it
20 makes reference that the waiver agreement is made as of
21 December 22, 2003, and I think the first time that the Staff
22 has seen this document is when it was attached to the
23 pleading that was filed last Friday.

24 JUDGE RUTH: Thank you. Ms. O'Neill, do you
25 have any comments you wish to make that are HC?

1 PUBLIC COUNSEL: Not at this time, your Honor.

2 JUDGE RUTH: Thank you. And Aquila, did you
3 wish to supplement your opening?

4 MR. BOUDREAU: Yes, please. Just a quick
5 comment. I omitted one comment that I otherwise would have
6 included in my opening comments, and if it's in their items
7 that are contained in the last pleading Mr. Dottheim was just
8 referring to, the Motion for Expedited Treatment, and that is
9 the fact that

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13 it would leave the company with a total
14 obligation of as much as 22 -- or close to \$23 million per
15 year through December 31st of 2021.

16 A rather significant financial obligation,
17 which if the proposed sale is allowed to go through will no
18 longer be an issue for the company, so it's a significant
19 financial imminence that may come to pass.

20

21

22 and so we would like to avoid that
23 circumstance and take advantage of what the company believes
24 is a favorable outcome, so that's all I have to add to my
25 opening comments at this point.

1 JUDGE RUTH: So from your client's position,
2 if the Commission were to issue an Order dismissing the case,
3 it would need to be done before Friday?

4 MR. BOUDREAU: That would be the best of all
5 possible worlds, but I'm not here to tell you that if it
6 doesn't issue an Order until sometime after that, that the
7 opportunities won't be there. I mean, as of Friday,

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12 I'm not saying that if the Commission doesn't
13 issue an order by Friday that the circumstances is
14 necessarily going to flow from it.

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16
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18 JUDGE RUTH: Thank you. Okay. Let me state,
19 then, on the record, before the Commissioners came down, we
20 had discussed the anticipated nature of questions from the
21 bench as involving highly confidential information. It was
22 felt that since so much of the information that's been filed
23 is HC, that the questions themselves might involve HC
24 information, and that the answers most certainly could
25 involve HC information also, so the parties agreed that we

1 would continue with questioning from the bench, in camera,
2 and quite quickly after the transcript has been filed
3 tomorrow, Aquila will review the entire record line by line,
4 and any information that can be opened up will then be opened
5 up so that the transcript will be amended such that all
6 possible amounts of information that can be public will be
7 public. However, with the video streaming, it's not possible
8 for me to redact a question that involves HC information, so
9 it was thought best to proceed this way.

10 With that in mind, we'll start with questions
11 from the bench, and Commissioner Gaw, it's up to you whether
12 you want to start with a particular party or ask one question
13 in general.

14 COMMISSIONER MURRAY: Mr. Dottheim, I would
15 just like to ask you what is the significance of your
16 statement that the waiver agreement dealing with the default
17 of June 26th, Mwas not made available to Staff until the
18 pleading in February 20th.

19 MR. DOTTHEIM: Nothing. Just to indicate that
20 the Staff had not been advised of, to my knowledge, of any of
21 the particular dealings with the -- with this document even
22 while we were involved in discussions with the company. The
23 waiver, which started on December 22, is a waiver of the
24 default provisions that had been in effect since June 26th,
25 and I just wanted to make clear, as far as the impending

1 date, which Aquila now has identified, which is February 27,
2 the Staff was, to my knowledge, unaware of prior to Friday.

3 COMMISSIONER MURRAY: Does that change Staff's
4 position?

5 MR. DOTTHEIM: No.

6 COMMISSIONER MURRAY: Why do you think we have
7 jurisdiction -- or do you, or are you just asking us to find
8 out if we do.

9 MR. DOTTHEIM: That was -- that was the
10 purpose of the expedite. In fact, should I --

11 JUDGE RUTH: It would be best if you moved to
12 the podium.

13 MR. DOTTHEIM: The Staff intended this to be
14 an investigation, not a complaint.

15 COMMISSIONER MURRAY: Let me stop you there.
16 Investigating what? Investigating the question of
17 jurisdiction.

18 MR. DOTTHEIM: Yes, of jurisdiction.

19 COMMISSIONER MURRAY: Is that not just a legal
20 issue.

21 MR. DOTTHEIM: There is discovery that's
22 involved with that.

23 COMMISSIONER MURRAY: Is that question
24 answered -- is that a legal question that we have to answer.

25 MR. DOTTHEIM: Ultimately, yes.

1 COMMISSIONER MURRAY: And why is there
2 discovery needed to answer a legal question.

3 MR. DOTTHEIM: To identify the particulars of
4 the transaction, for example, what facilities are involved in
5 the transfer, whether its, for example, that the site, which
6 was Aquila's or is Aquila's, which can be used for other
7 units other than Aries and has its own, has its own value.
8 As a consequence, the site itself might be viewed differently
9 than the Aries unit.

10 COMMISSIONER MURRAY: And if the result were
11 that your discovery led you to the conclusion that this
12 Commission did have jurisdiction over all or part of the
13 transaction, and that exercising of that jurisdiction
14 resulted in the sale not going through, would that be
15 beneficial to Missouri rate payers.

16 MR. DOTTHEIM: If the Staff recommendation was
17 that the sale should not occur, that it is detrimental to the
18 public interest, yes.

19 COMMISSIONER MURRAY: If it resulted in that
20 before Staff was even able to make a determination as to
21 whether your recommendation would be for or against.

22 MR. DOTTHEIM: Commissioner, with all due
23 respect, the Staff might have filed its pleading earlier in
24 an ideal situation, but it was filed in November, and Aquila,
25 at that time, was indicating that it anticipated the

1 transaction closing in January, so the Staff thought that it
2 was making its filing in as timely basis as it could, and the
3 Staff is not oblivious to various states that are asserted as
4 having great consequences or great moment.

5 COMMISSIONER MURRAY: Since the Motion was
6 filed in November, what has been the delay? Is it just
7 simply the Commission's failure to address the Motion.

8 MR. DOTTHEIM: Well, there have been pleadings
9 filed back and forth. Aquila has, I think, endeavored to
10 impress upon the Commission the need for dealing with this
11 matter, of course, as far as the company is concerned, a
12 dismissal, as quickly as possible.

13 COMMISSIONER MURRAY: And that has been right
14 for Commission determination since when.

15 MR. DOTTHEIM: I'm quite sure the Commission
16 itself has -- has views on -- on that matter.

17 COMMISSIONER MURRAY: No, I'm asking you since
18 what point in time has this been right for a Commission
19 decision, whether to grant or dismiss the Motion.

20 MR. DOTTHEIM: I think one might argue it was
21 after -- at least, if not possibly earlier, than the Staff's
22 response to the company's reply.

23 COMMISSIONER MURRAY: Okay. I don't want to
24 take a lot --

25 MR. DOTTHEIM: I'm sorry, and I don't have

1 that date, Commissioner.

2 COMMISSIONER MURRAY: And I don't want to take
3 a lot of time here, because Chairman Gaw was kind enough to
4 let me go first, and I said I didn't have very much, but I do
5 want to follow up just a little bit more with what you -- you
6 indicated that in order to determine the question of
7 jurisdiction, there was a need for discovery, and I would
8 like you to tell me a scenario that would result where your
9 discovery would result in, at least in your opinion, that
10 jurisdiction would be with this Commission over this
11 particular sale.

12 MR. DOTTHEIM: Commissioner, I think it's
13 arguable at this point, but the Staff wanted to conduct
14 discovery, and the Staff didn't want to do that in some
15 context other than the case that was initiated by the Staff's
16 Motion.

17 COMMISSIONER MURRAY: But you haven't answered
18 my question. If you believe that discovery is necessary to
19 prove jurisdiction, what would you find in discovery that
20 would prove jurisdiction.

21 MR. DOTTHEIM: Items such as, I mentioned the
22 plant site, the other --

23 COMMISSIONER MURRAY: Now, let's stop there.
24 How would that give us jurisdiction over the sale of the
25 Aries plant?

1 PSC STAFF: On the basis, I don't know what is
2 the full extent of the plant site, the facilities that are
3 being -- are being transferred.

4 COMMISSIONER MURRAY: Okay. But I want the
5 scenario that you would have to find that would show
6 jurisdiction. What would be the extent?

7 MR. DOTTHEIM: That plant site could be used
8 for additional generating units, and it is difficult to
9 obtain, locate, permit plant site for generating units, so
10 that plant site, if transferred, depending upon the scope,
11 the size, the area, that may well fall under 393.190.1, or at
12 least the Staff could argue that.

13 COMMISSIONER MURRAY: And why would that fall
14 under that statute? Why would that site --.

15 MR. DOTTHEIM: Because it could be useful in
16 the provision of service to the company's customers.

17 COMMISSIONER MURRAY: And that -- which part
18 of that definition, you have that in front of you, don't you.

19 MR. DOTTHEIM: No, I don't.

20 COMMISSIONER MURRAY: If you don't mind
21 reading me the phrase within that definition that you think
22 would apply.

23 MR. DOTTHEIM: Sell, transfer, dispose of, the
24 whole or any part of its franchise works or system necessary
25 or useful in the performance of its duties to the public.

1 COMMISSIONER MURRAY: Or useful, does it mean
2 that it has to be currently used.

3 MR. DOTTHEIM: Excuse me?

4 JUDGE RUTH: I want to take a quick break
5 here.

6 (AN OFF-THE-RECORD DISCUSSION WAS HAD.)

7 JUDGE RUTH: I apologize. You may proceed,
8 Mr. Dottheim.

9 MR. DOTTHEIM: I'm sorry, Commissioner, your
10 question again.

11 COMMISSIONER MURRAY: Useful was the phrase --
12 or useful, does that mean it has to be currently used.

13 MR. DOTTHEIM: I don't think that the Staff
14 would necessarily take that position.

15 COMMISSIONER MURRAY: But you don't know.

16 MR. DOTTHEIM: I could say that the Staff
17 would likely argue that it was useful, necessary on the
18 basis, again, of the difficulty in finding plant sites,
19 getting them permitted.

20 COMMISSIONER MURRAY: And ownership of the
21 site is by what entity.

22 MR. DOTTHEIM: I believe that part of it, at
23 least, is Aquila at this point, and originaly was Aquila.

24 COMMISSIONER MURRAY: Have any other --

25 MR. DOTTHEIM: It's through MEPPH, which is at

1 this point, owned 50 percent by Aquila or was originally
2 owned a 100 percent, by far.

3 COMMISSIONER MURRAY: Is there any other basis
4 on which you think that discovery could lead you to assert
5 that the Commission had jurisdiction over this transaction.

6 MR. DOTTHEIM: Offhand, just in general,
7 again, the facilities that are being transferred, I'm sorry,
8 Commissioner, I can't identify, at the moment, another item
9 for you.

10 COMMISSIONER MURRAY: Mr. Dottheim, is it
11 something that the Commission normally does to open an
12 investigation to investigate whether or not the Commission
13 has jurisdiction over something.

14 MR. DOTTHEIM: No, but then again, this type
15 of transaction, I don't believe, has occurred previously, so
16 there wouldn't have been a prior opportunity or a situation
17 where that would have been addressed.

18 COMMISSIONER MURRAY: Normally, if you file
19 something asking us to do something, you can verify in your
20 Motion asking us to open a proceeding. You can verify for
21 us, that we do have jurisdiction in order to open the
22 proceeding; is that not accurate? At least you can assert
23 that we have jurisdiction.

24 MR. DOTTHEIM: Well, no, I think it would be a
25 proper proceeding for that question to be raised.

1 COMMISSIONER MURRAY: But isn't the party
2 that's asking for something to be open responsible to show
3 jurisdiction.

4 MR. DOTTHEIM: If jurisdiction was certain,
5 then it might be filed as a complaint instead of an
6 investigation because if jurisdiction was established, the
7 transaction was going to occur or there have been no filing
8 with the Commission seeking the Commission's authorization
9 for the transaction.

10 COMMISSIONER MURRAY: But is it your position
11 that we can hold up something, indefinitely, based on the
12 fact that something might be revealed that would show we did
13 have jurisdiction.

14 MR. DOTTHEIM: Depending upon the materiality
15 of the matter, which this is a very material matter, I think
16 that is something that properly raised for.

17 COMMISSIONER MURRAY: And what would be the
18 remedy of a company who's being -- whose transaction is being
19 delayed by such a proceeding or such a Motion, even, that the
20 Commission dealt with? Do they have any remedy? Can they go
21 anywhere and say, ask a court to enjoin us from doing
22 something? I don't know. We haven't done anything except
23 hold open a Motion up to this point.

24 PSC STAFF: Well, I think yesterday there was
25 a writ of prohibition filed against the Commission involving

1 a pending rate case involving Aquila Networks, L&P, on the
2 basis that the Commission didn't have jurisdiction.

3 COMMISSIONER MURRAY: But we have asserted
4 jurisdiction there and we are proceeding. We haven't done
5 anything here. What's the remedy?

6 MR. DOTTHEIM: I think Aquila might go into
7 Circuit Court and seek an alternative writ of mandamus, writ
8 of prohibition that the Commission issue an Order finding
9 that it has no jurisdiction or a writ of prohibition that the
10 Commission not issue an order that it has prohibition -- that
11 it has, excuse me, jurisdiction.

12 COMMISSIONER MURRAY: Okay. Thank you.

13 JUDGE RUTH: Let's go off-the-record for a few
14 minutes, again, I ask that you not leave the room. The
15 Commission needs to discuss a scheduling matter.

16 (A BREAK WAS HAD.)

17 JUDGE RUTH: Okay. Let's go back on the
18 record, please. Okay. We're still in camera. We are
19 however, back on the record. The Commissioners have
20 instructed me to answer one -- or I'm sorry, to ask one or
21 two follow-up questions, then they have quite a few more
22 questions. However, they wanted to leave to go to the agenda
23 session.

24 They've also put on hold the other Aquila
25 case, the rate case. They've indicated, at this time, they

1 do not want the Aquila rate case to take backup, so instead,
2 when we go off-the-record after my couple of questions, the
3 parties are instructed to stay nearby and check back in the
4 hearing room approximately every 15 minutes, and they're
5 going to try and get through the agenda session, the new
6 orders, and the discussion items only, and leave the rest of
7 the agenda session until later.

8 They seem to think they can do that in 15
9 minutes. I suspect it may take a bit longer than that, but I
10 do ask that you check back every 15 minutes, and that case,
11 if they are ready quickly, we'll be ready to go, too. If
12 you'll give me just a minute, I want to see if I can make
13 sure I understand what I'm supposed to ask. Okay. I want to
14 clarify something that Commissioner Murray was asking about,
15 and this is for Mr. Dottheim, and you may stay seated, if
16 you'll just remember to use the microphone, please.

17 The Commission was asking questions about
18 whether it's standard procedure to open a Motion to
19 investigate, as opposed to starting off by filing something
20 that indicates that the Staff believes the Commission does
21 have jurisdiction. Along that line of questioning, let me
22 ask you, then, to clarify did Staff attempt any discussions
23 or negotiations prior to filing the Motion to open case,
24 could Staff have used data requests, et cetera, to get
25 information from Aquila before filing the Motion, and if

1 Staff did not proceed along that path, was part of the reason
2 due to timing?

3 In other words, by not filing a Motion, it
4 could delay any Commission action to the point of it -- that
5 the Commission no longer having time to act. Could you
6 answer those questions.

7 MR. DOTTHEIM: Yes. The Staff could have
8 proceeded without a docket, that is, in submitting data
9 requests to Aquila, but there was the matter of timing, and
10 the Staff thought that the best procedure was to make the
11 filing with the Commission to bring the Commission's
12 attention to the impending transaction.

13 It is not unusual when the Staff proceeds
14 informally that what is originally thought of as a time frame
15 in which to conduct discovery in an informal nature takes
16 much longer than originally anticipated and longer than the
17 Staff believes would be the case in a docketed proceeding,
18 but again, because of what the Staff believes is the
19 materiality of the transaction, the Staff thought it
20 incumbent to bring the matter to the Commission's attention.

21 Also, too, I'm not highly familiar with the
22 cases, but I think there have been some cases filed, cases
23 involving both Laclede Gas Company and Southern Union where
24 they have -- each of those companies have separated off
25 employees' assets in creating a service organization or just

1 transferring assets and employees, and the Staff views
2 employees as assets, I believe.

3 In one of those cases, the Southern Union
4 case, the Staff filed a complaint and I think the Commission
5 suggested to the Staff that it should have filed for an
6 investigation, and I'm -- that it should have filed for an
7 investigation, and I'm sorry, I don't have any greater
8 details than that. I can obtain those and hopefully I have
9 not mistaken. I don't know if that answers your questions.

10 JUDGE RUTH: You said there have been some
11 cases filed involving Southern Union, do you have any idea of
12 the time frame when those were.

13 MR. DOTTHEIM: In the last year.

14 JUDGE RUTH: Are those still open cases or are
15 they closed?

16 MR. DOTTHEIM: I think they are still open
17 cases.

18 JUDGE RUTH: I don't want to go into details,
19 I was just trying to get a time frame.

20 MR. BOUDREAU: I'm familiar with that case.
21 I was Counsel on record for Southern Union. The context was
22 that there was a complaint -- Mr. Dottheim is correct, there
23 was a complaint that was filed against Southern Union
24 Company, and contemporaneously, I think it may have been the
25 same day, a Petition to open an investigation to investigate

1 certain facts and developments and transactions, and what
2 transpired there is the Commission dismissed the complaint
3 without prejudice and directed the Staff that -- to pursue
4 the investigation before going ahead with the complaint.

5 So procedurally, it was a little bit different
6 than that. The investigation is still pending. I believe
7 it's more or less been submitted to the Commission, but no
8 decision has been made until the investigation docket, so as
9 far as the exact dates, I couldn't cite those right now, but
10 it was rather recently, probably within the last couple of
11 months, brought to a culmination.

12 JUDGE RUTH: By a culmination, you mean the
13 parties have finished and it has been submitted to the
14 Commission?

15 MR. BOUDREAU: Yes, that's my understanding.

16 JUDGE RUTH: And the cases were only open
17 within the last year or so, fairly recently then?

18 MR. BOUDREAU: My senses is that the case was
19 probably open within the last year to year and a half,
20 probably more like a year and a half, that this has been
21 going on.

22 MR. DOTTHEIM: And if I might add something,
23 and Mr. Boudreau correct me if I misstate anything, I believe
24 in those questions, one of the, excuse me, in those cases,
25 one of the questions has been a jurisdictional question or a

1 legal question regarding are employees assets, so that if a
2 utility transfers employees, whether the utility needs to
3 obtain the authorization from the Commission.

4 I think, generally, utilities that have
5 encountered that situation have asserted that employees are
6 not assets and the Staff has asserted that employees are
7 assets, and I don't believe that has ever been decided by the
8 Commission. It may actually be pending.

9 JUDGE RUTH: Okay. I had another question,
10 Mr. Dottheim.

11 PSC STAFF: Yes.

12 JUDGE RUTH: You indicated that sometimes
13 Staff has found that the case can move more quickly, at least
14 as far as getting information, if it is actually a docketed
15 case as opposed to proceedings before the case. I do not
16 want to get into the subject matter of any negotiations or
17 discussions. I just want to ask if Staff has received any
18 requested or received any information regarding the
19 underlying subject matter. Do you understand my question?
20 You indicated that one reason to file it is to bring it to
21 the Commission's attention, but then also that sometimes it's
22 easier for Staff to get information in a docketed case.

23 MR. DOTTHEIM: Yes.

24 JUDGE RUTH: Has Staff had questions or
25 information requests for the company, asked those, and have

1 they been answered or not, and then as opposed to questions,
2 have you had discussions.

3 MR. DOTTHEIM: There have been discussions.
4 To my knowledge, there have been no data requests or
5 questions submitted to Aquila. I can verify that, but there
6 have been discussions that have been referred to in the
7 following that have been made in a pending case in response
8 to one of your orders, Judge Ruth, where you specifically
9 inquired whether negotiations had been occurring, and I
10 believe the Staff filed its response, maybe it was February
11 6th, and the company filed at response the 13th, or I may be
12 off by a week.

13 JUDGE RUTH: Those are the correct dates, I
14 believe.

15 MR. DOTTHEIM: Okay.

16 JUDGE RUTH: I'm sorry, it was actually Mr.
17 Boudreau had characterized some of those discussions as
18 informative or helpful, but indicated that nothing was
19 resolved. I assume that is also Staff's perception.

20 MR. DOTTHEIM: Yes, yes, that is correct.

21 JUDGE RUTH: Okay. Mr. Dottheim, in the
22 opening statement by Mr. Boudreau, he indicated that if the
23 sale were to go through, if this case were closed, and the
24 sale were to go through, that there would be no difference in
25 Staff obtaining records and at least that's what notes I took

1 down. It was my understanding, that he was indicating that,
2 the sale would not impede SStaff getting the books and
3 records, however, Staff's pleadings clearly indicate that
4 Staff believes that the sale would impede Staff obtaining
5 those records. Could you clarify that, go into a bit more
6 detail as to why there's a difference of opinion, at least,
7 and help the bench understand why you don't agree on that.

8 MR. DOTTHEIM: We've not operated in that --
9 in the situation where Mr. Boudreau has indicated with the
10 statutory provisions that are provided, I think, under PUHCA,
11 so we have no experience with -- with that situation, and in
12 that situation, the EWG in question would not be owned, in
13 any part, by Aquila.

14 JUDGE RUTH: And so Staff's concern that since
15 the EWG would not be owned, in any part, that Aquila would
16 not be able to obtain the records to give them.

17 MR. DOTTHEIM: Yes.

18 JUDGE RUTH: Am I --

19 MR. DOTTHEIM: Or the Staff independently
20 operating under the federal rules and regulations, as I
21 believe Mr. Boudreau referenced in his filing, would not be
22 able to obtain the records. Now, that in itself would not be
23 the sole reason for the Staff recommending to the Commission
24 not authorizing a transaction, such as --

25 JUDGE RUTH: And the other reason would be

1 those cost issues that you mentioned previously Staff well,
2 and again, it's -- it's the fact that what remains is if the
3 transfer -- if the transaction goes forward, what remains is
4 the power supply agreement. Aquila has no further call on
5 the capacity from the Aries unit past that power supply
6 agreement. At the moment, it is a 50 percent owner of that
7 unit, since it is a 50 percent interest in MEPPH.

8 JUDGE RUTH: Okay. I'm not sure I understand
9 your answer, and I actually am trying to even look at the
10 transcript, but could you clarify what the concern is with
11 the power.

12 MR. DOTTHEIM: I'll try. Right now, Aquila
13 owns, in essence, 50 percent of that 600 megawatt unit. If
14 the transaction occurs, Aquila will not own any portion of
15 that unit. It may enter into a power supply agreement, but
16 it will no longer be an owner of that unit. It won't have
17 the same call.

18 JUDGE RUTH: What do you mean?

19 MR. DOTTHIEM: Well, it won't have the same
20 rights, excuse me, that it would as an owner.

21 JUDGE RUTH: But if the sale were to go
22 through and Aquila were later wanting to enter into a power
23 sale agreement, would not the Staff have some obligations or
24 rights to investigate that power sale agreement at that time.

25 MR. DOTTHEIM: Aquila could submit a bid to

1 CalPine, if the power is made available and bids are taken or
2 proposals are taken, but Aquila is no longer a 50 percent
3 owner of the unit. It's just like any other electrical
4 corporation of the United States.

5 JUDGE RUTH: Can you clarify, though, how that
6 fact concerns the Staff or why.

7 MR. DOTTHEIM: From the perspective of whether
8 the sale would be detrimental to the public interest.

9 JUDGE RUTH: Okay. Mr. Boudreau, I wanted to
10 give you an opportunity to respond to some of these same
11 questions. I believe I started back with the records issue.
12 You had indicated in your opening that the records -- that
13 Staff's access to the records would not be impeded in the
14 future if the sale went through. Staff seems to be concerned
15 that that might not be true. I would like you to address
16 that, and then also the cost issues, Staff has expressed a
17 concern about those, and I am hoping that you can clarify
18 which cost issues would be involved in the current rate case
19 that's E -- I mean, just in general terms, in other words,
20 it's -- the rate case I meant is ER-2004-0034, and then what
21 other cost issues there might be that aren't addressed, and
22 tell me if -- that aren't addressed in the rate case and if
23 those would be addressed in any other case.

24 What I'm trying to get at is I would assume
25 that Staff, in the rate case right now, would have had some

1 means to get a hold of some of the records that they needed
2 for the rate case cost issues that involved Aries. My
3 question, then, really, is what other cost issues could there
4 be and how could Staff get information about those records
5 now or in the future if the sale were to go through. Do you
6 want to proceed and you can stay there if you use your
7 microphone, please.

8 MR. BOUDREAU: Thank you. As far as access to
9 records, the company's addressed that and I'll just -- and
10 I'll elaborate on it a little bit, but if you look at the
11 Pleading that the company filed on December the 5th, I think
12 it's entitled Aquila's Reply to Staff's Reply, and on Page 4
13 of that document, the company recites the text of the Federal
14 Law, which we believe addresses the access to records issue,
15 and it summarizes here, but it's set out in full text in the
16 Pleading upon written Order of the State Commission, a State
17 Commission may examine the books, accounts, memoranda,
18 contracts, and records of, and there are a series of choices
19 and one of them is any exempt wholesale generator selling
20 energy at wholesale to such electric utility.

21 So to the extent that there is a power sales
22 agreement in existence between an electric utility in the
23 state and an exempt wholesale generator, which MEPPH will be,
24 even after the sale, it just won't be an affiliated exempt
25 wholesale generator. Federal law provides for the Commission

1 to access these records, so we think it addresses that issue.

2 JUDGE RUTH: Okay. Let me ask -- you may have
3 stated this, but I want to clarify. While there's a power
4 sale agreement, the Commission would have access to those
5 records. The -- one of the power sale agreements says it
6 ends in June of 2005; is that correct?

7 MR. BOUDREAU: I believe that is correct.

8 JUDGE RUTH: Okay. Once that power sale
9 agreement ends in June of 2005, would the Commission's access
10 to those records continue for a period or would it end on
11 that very date?

12 MR. BOUDREAU: I'm not sure about that.

13 JUDGE RUTH: The only reason I ask is to try
14 to understand how far out the Commission might have access to
15 records under the provision that you referenced.

16 MR. BOUDREAU: I think -- I think the Federal
17 Power Act contemplates that there will be access to records
18 as long as there's a sales of energy taking place. I think
19 that there's some flexibility in any law. I mean. To the
20 extent that it's an issue in a rate proceeding, and there was
21 an -- a transaction between an exempt wholesale generator and
22 an electric utility, I think the intent of this Act is that
23 those records will be made available to the State Commission
24 for it to carry out its responsibilities. I think that was
25 the intent of this particular proceeding, or excuse me, not

1 proceeding but provision.

2 JUDGE RUTH: Okay. So you would anticipate
3 that in the future, if there were a rate case or other
4 proceeding that wanted to review those records sometime after
5 June, 2005, that they might still be able to get them?

6 MR. BOUDREAU: I'm also -- I'm also in a
7 position to tell the Commission that the company would have
8 access to those records as well, I mean, to the extent that
9 the -- that the cost associated with the power sales
10 agreement is an issue in subsequent rate cases, it would be
11 in the company's interest to make those records available, if
12 that is an issue in future rate cases.

13 JUDGE RUTH: Okay. Mr. Dottheim, can you --
14 I'll ask you to respond to this. Do you agree with Aquila's
15 interpretation of the provision he read in, and if so, can
16 you explain to me how the Commission might still not be able
17 to access records and books that it needs in the future.

18 MR. DOTTHEIM: I can't answer that in
19 principal part because -- I can give you a reaction or a
20 reading on the face of the -- of the section of the Federal
21 Power Act that's referenced on Page 4 of Aquila's December 5
22 filing.

23 The Staff itself has had no experience in that
24 situation, so there's a concern on the part of the Staff as
25 far as access to records, and as you've touched upon,

1 continuing access or when might that access terminate, and I
2 would -- I would think since this is a Federal Power Act
3 section, if there was some dispute, the parties would be
4 before the FERC or some form other than the Missouri
5 Commission. I don't know.

6 Mr. Boudreau, he may be able to provide some
7 enlightenment on that matter, but this is a statute under the
8 Federal Power Act. Clearly there's reference to a written
9 order of the State Commission, which of course would be the
10 Missouri Commission, but if a dispute arose as to the
11 interpretation or the jurisdiction or the reach of the
12 Missouri Commission, I don't know that the Missouri
13 Commission would be citing that issue.

14 JUDGE RUTH: Can I --

15 MR. DOTTHEIM: And also, too, well, I'm sorry.

16 JUDGE RUTH: Mr. Dottheim, I just wanted to
17 ask you if Staff has had a chance to investigate how such
18 issues are being handled in other states.

19 MR. DOTTHEIM: No.

20 JUDGE RUTH: Mr. Boudreau, then, I interrupted
21 your opportunity to respond to some of the same questions.
22 If you want to address the records issue some more, you may,
23 or if you wanted to address the cost on other issues, please
24 feel free.

25 MR. BOUDREAU: The -- my understanding -- I

1 think -- I don't have anything much more to add to access of
2 records.

3 As far as what's being addressed in the
4 current rate case, I'm not sure that there's much of a
5 limitation on what is being examined. A rather substantial
6 number of documents associated with the Aries transaction,
7 the contracts, the background of that entire agreement have
8 been made available to the Staff. I think the Staff has
9 recommended an adjustment be made in the company's revenue
10 requirements associated with the Aries contract. I am not
11 personally familiar with the details of it, but I'm not sure
12 that the Staff has been limited in any way about what, you
13 know, what recommendations they're making with respect to the
14 cost that should be recognized in rates.

15 As far as is there anything else, I can't
16 think of anything else that may be out there that could be
17 addressed, because the only issue, it seems to me, is what is
18 -- what's the legitimate cost to reflect in rates, and that's
19 sort of the beginning and end of the discussion for
20 rate-making purposes.

21 JUDGE RUTH: Did you have something else to
22 add, Mr. Dottheim.

23 MR. DOTTHEIM: Moment, please.

24 JUDGE RUTH: Certainly.

25 MR. BOUDREAU: The only other thing I would

1 like -- if you would allow me to digress for just a minute,
2 there was some discussion earlier on about the ownership of
3 the site, and there's been a great deal of testimony and
4 information provided in Max Sherman's testimony in the rate
5 case associated -- or addressing the issue of the ownership
6 of the site and the structure of the deal, and the background
7 on the real estate, if that's what Mr. Dottheim's comments
8 are about, but that real estate originally was owned by
9 UtiliCorp, it was subsequently sold to a couple, I think it
10 was a married couple that farmed in that area.

11 They owned it for a number of years, and then
12 subsequently it was purchased from them by the MEPPH entity,
13 so I mean, to the extent that that's helpful, it's not --
14 it's not a utility asset and hasn't been a utility asset for
15 some substantial number of years, and that is, those
16 circumstances are addressed in Max Sherman's testimony in the
17 rate case.

18 JUDGE RUTH: And you're saying Max Sherman?

19 MR. BOUDREAU: Max Sherman is one of the
20 company's witnesses, and I think he addresses, if I'm not
21 mistaken, he addresses the Aries contract from the non
22 regulated view of how the company came to make the decision
23 that it did.

24 JUDGE RUTH: Okay. I also want to follow-up
25 on something you had said earlier, Mr. Boudreau. You had

1 referred to a diagram or chart that is in the Aquila rate
2 Case 0034. I don't have that, and I just want to make sure I
3 have enough information to find it, and can you tell me, I
4 assume then, it is a different chart than what Staff filed as
5 Appendix A to their December 3rd Pleading. This is a
6 financing structured chart that Staff had filed. You're
7 referring to something else?

8 MR. BOUDREAU: Yes, I believe it is different
9 than what Staff filed with the Pleading, and I believe it's
10 different than what the Staff filed, and the document I refer
11 to is a schedule to Mr. Sherman's testimony in the rate case,
12 it's schedule MS-9, and it's a schematic of the ownership
13 structure of the Aries plant, just a schematic diagram. I
14 said I wasn't going to make any exhibits, but I'll let you
15 take a look at it.

16 JUDGE RUTH: I'd like to take a look at it,
17 when I find it in the other case, I know that I've looked at
18 the correct item. Do the parties have any objection to my
19 taking a quick look?

20 MR. BOUDREAU: I believe it's consistent with
21 Mr. Dottheim's characterization of the structure.

22 JUDGE RUTH: Thank you. I'll make sure that
23 the Commissioners have a correct reference so that they can
24 find that.

25 MR. BOUDREAU: Okay. Thank you.

1 JUDGE RUTH: It's my understanding there's not
2 any diagram similar to that in the Pleadings in this case; is
3 that correct? I have the diagram that's the Aries financing
4 structure, but there isn't one exactly or even close to --

5 MR. BOUDREAU: To my knowledge, there's no
6 diagram that has been made a part of the record in this case
7 similar to the one that I've referred to.

8 JUDGE RUTH: Okay. And actually, I do want to
9 go over this financing one a bit later, but you've been
10 interrupted few times, and I wanted to first offer you an
11 opportunity to give any further response to some of the
12 questions that have been thrown out, and then I'll ask Ms.
13 O'Neill if she has any comments.

14 MR. BOUDREAU: I'll try to keep my comments
15 targeted, because I understand that this is a -- this could,
16 excuse me, this is quite involved. I mentioned the ownership
17 of the property of the site. I don't really think that
18 that's a -- an issue that warrants further investigation. It
19 wasn't utility property when it was acquired by MEPPH, and
20 there's no reason to believe it is now.

21 It's owned by an unregulated entity, it was
22 bought from a third party, so to me, that's not an issue that
23 warrants further investigation or review. There was some
24 questions -- one of the -- the -- one of the comments that I
25 would like to address is in response to a question from

1 Commissioner Murray about what remedies the company has
2 available to it.

3 Mr. Dottheim suggested that the company might
4 go to Circuit Court and seek a writ of prohibition, and the
5 difficulty with that concept is, that the company, I think,
6 would be subject to criticism on at least two fundamental
7 legal levels, which it exhaust all of its administrative
8 remedies by seeking to have the proceeding before the
9 Commission disposed of, which is the process that it has cast
10 itself to and is trying to take care of today.

11 And the other one is the Doctrine of Primary
12 Jurisdiction, and I can't cite you to a particular case,
13 because I wasn't prepared to address this particular topic,
14 but there is a body of law which stands for the proposition
15 that the Commission has the authority in the first instance
16 to determine the scope of its own jurisdiction, and were the
17 company to go to court, I think it would be subject to being
18 tossed right back out rather quickly on the concept that, No.
19 1, it has not exhausted its administrative remedies before
20 the Commission, and No. 2, the Commission has the authority
21 to determine whether it has jurisdiction in the first
22 instance, so that's a somewhat circular remedy, as far as the
23 company is concerned, and not to mention the additional time
24 involved in that. The company is hoping that this issue
25 could be resolved either in discussions with -- directly with

1 the Staff or, you know, in the proceeding that we've embarked
2 upon today.

3 And I guess the point that I just wanted to
4 get across is that if -- if this Motion is left unresolved,
5 if it's either granted or left unresolved for much longer, I
6 think that the proposed sale is simply not going to go
7 forward. I mean, as a practical matter, the circumstances
8 are going to change, parties are going to have different
9 views, and things are just going to go away, so there is some
10 eminency, some rather significant, I would suggest,
11 associated with getting some resolution of this question, or
12 if it likely will turn out to be basically an empty question
13 in the long run.

14 I think the discussions, at this point, if the
15 Commission has -- or if the bench or the Commission has
16 further questions, I will address them, by I'm not sure I
17 have much more to add at this point. Thank you.

18 JUDGE RUTH: That's fine. Ms. O'Neill, did
19 you have any comments.

20 MS. O'NEILL: Yes, briefly, your Honor. It
21 appears that the over -- just to look at the real purpose for
22 the filing of this by the Staff as an investigation instead
23 of a complaint asking the Commission to just take
24 jurisdiction and look at the sale has to do with the unusual
25 circumstances; however, I think these types of circumstances

1 may become less unusual the more regulated utilities are
2 intertwined with these unregulated subsidiaries,
3 parent-holding companies. We have seen problems arise
4 because of those things in the past few years.

5 The concern that the Staff has about adequate
6 access, unreasonable access, to the types of books and
7 records that are necessary to determine what's in the public
8 interest and rate cases or other proceedings is a very sound
9 and real interest and sound and real concern. Mr. Boudreau
10 has mentioned some federal statutes, and I don't want to
11 suggest that I'm as versed in those as he is, by what I
12 didn't hear from Aquila was a commitment that don't worry, we
13 will provide you with access to these records and these books
14 so that you can do your investigation.

15 If Aquila came forward and made that
16 affirmative commitment, that may resolve some of the problems
17 that the Staff has right now. We believe the Commission has
18 jurisdiction to make sure that the interest of the consumers
19 are protected. We believe that the Commission has to
20 exercise that jurisdiction in particular -- in a particular
21 fashion in different circumstances, and if this was a
22 discussion about whether or not the Commission has
23 jurisdiction already, I think we'd be more prepared to
24 address that right now.

25 As it's filed, we don't have a strong position

1 on the method in which this case is brought for the
2 Commission other than we do believe that it's important that
3 Aquila's Missouri captive utility customers are protected and
4 not receive any detriment as a result of any transactions.

5 JUDGE RUTH: I want to follow-up on something
6 you said, Ms. O'Neill. I'm sorry, I am not quite sure I
7 understand your comments about the jurisdiction. Is the
8 Public Counsel's position the Commission does have
9 jurisdiction to inquire into this area. You know Staff's
10 initial pleading requests that the Commission authorize Staff
11 to investigate whether Staff has -- or the Commission has
12 jurisdiction. Aquila has responded that in their position,
13 the Commission does not have jurisdiction. Did I hear you
14 state whether or not OPC has an opinion on that issue?

15 MS. O'NEILL: Specifically on this case, I
16 don't think we've come to a definite conclusion, but in
17 general, we believe that the Commission should exercise its
18 jurisdiction as broadly as permitted by the statutes. That's
19 about as clear as I can be. I'm sorry.

20 JUDGE RUTH: So it seems, at this point,
21 Public Counsel is not taking an official position as to
22 whether or not Aquila's correct, no jurisdiction, or --

23 MS. O'NEILL: Whether jurisdiction actually
24 exists, I'm not positive on the answer to that question, and
25 we're not prepared to make a definitive statement on that

1 today.

2 JUDGE RUTH: Okay. Thank you.

3 Let's a take a three-minute break as quick as
4 we can. I believe the Commissioners are on the way down. In
5 fact, one Commissioner is here. So we will go off the
6 record for just three minutes, we'll say. Thank you.

7 (A BREAK WAS HAD.)

8 JUDGE RUTH: Okay. I want to go back on the
9 record. We had a short break, and before I turn it back over
10 to questions from the Commissioners, Mr. Boudreau, you were
11 referencing in one of your answers, the federal provision
12 that gives access to books and records. Can you give me that
13 citation again and can you tell me -- I believe I saw
14 reference to it in one of the Pleadings, can you tell me
15 which Pleading?

16 MR. BOUDREAU: Yes, thank you. It's the
17 pleading the company filed on December the 5th, 2003,
18 entitled Aquila's Reply to Staff's Reply. The citation
19 appears on Page 4 of that document, and I've basically given
20 you two citations, one is Section 201(G) of the Federal Power
21 Acts, but the US Code Citation 16, US Code or USC 824(g).

22 JUDGE RUTH: Okay. Thank you. And I had
23 asked Staff if they have researched whether or not this
24 provision has been used to give State Commissions authority
25 to access those books and records. Let me ask you the same

1 question. To your knowledge, has this provision been used in
2 other states in the way that Staff has indicated that it
3 would need to use it to get the books and records?

4 MR. BOUDREAU: Not to my knowledge. I'm just
5 not very well versed in that. I apologize.

6 THE COURT: That's fine. Commissioner Murray,
7 earlier you were asking questions. Do you have any further
8 questions for the parties at this time?

9 COMMISSIONER MURRAY: I will pass. I may have
10 later. Thank you.

11 JUDGE RUTH: Certainly. Then I'll move back
12 to the Chairman. Commissioner Gaw, do you have any
13 questions?

14 CHAIRMAN GAW: A few, thank you, Judge. I'm
15 just trying to review some of the questions that you had
16 asked, so I haven't done that very thoroughly.

17 JUDGE RUTH: I explained to the parties that
18 --

19 CHAIRMAN GAW: I want to see if I can get some
20 clarification here on the basics, and whoever wants to answer
21 this. Who owns the property that's being sold? Who has
22 legal title to the properties that's being sold.

23 JUDGE RUTH: We are in HC, let me clarify for
24 the record. We're not streaming. We are on the record just
25 in HC. You may proceed.

1 MR. BOUDREAU: My understanding, Mr.
2 Commissioner, is the property upon which Aries is located is
3 owned by MEPPH.

4 CHAIRMAN GAW: And what is that?

5 MR. BOUDREAU: That is an -- MEPPH is a joint
6 -- a Limited Liability Company that's jointly owned by a
7 subsidiary of Aquila, 50 percent owned, and 50 percent owned
8 by a subsidiary of CalPine corporation.

9 CHAIRMAN GAW: Okay. And it is -- is it a
10 Limited Liability Corporation, partnership, what is the legal
11 status?

12 MR. BOUDREAU: I believe it is a limited
13 liability company.

14 CHAIRMAN GAW: All right. When was it formed,
15 approximately?

16 MR. BOUDREAU: I believe it was formed in
17 approximately the year 2000.

18 CHAIRMAN GAW: Year 2000. All right. And was
19 that -- and when -- when was the generation unit built?

20 MR. BOUDREAU: I believe construction commenced
21 around 1998 or 1999 and came on line approximately the year
22 2000.

23 CHAIRMAN GAW: And when did CalPine acquire
24 its 50 percent interest?

25 MR. BOUDREAU: Again, I think that was

1 approximately the year 2000. I think it was reported to the
2 Commission approximately that time in Case No. EO-2001-477.

3 CHAIRMAN GAW: So it -- what is the board cost
4 of the construction of the generation unit?

5 MR. BOUDREAU: It was bank financed, but
6 through this jointly-owned entity, ultimately MEPPH.

7 CHAIRMAN GAW: Did Aquila's interest in MEPPH
8 -- it didn't start until 2000; is that correct?

9 MR. BOUDREAU: The Aquila's interest in the
10 company started around 1998, 1999 time frame through MEP
11 Investments LLC, which is the entity through which it now
12 holds its interest in MEPPH. MEPPH didn't become an entity
13 until there was the joint enterprise between CalPine and
14 Aquila. It was the entity that was created to facilitate the
15 joint ownership of the Aries project.

16 CHAIRMAN GAW: So prior to that, to the
17 formation of MEPPH, were there costs incurred in construction
18 of the generation unit that's the subject of this hearing?

19 MR. BOUDREAU: My understanding is yes, there
20 were.

21 CHAIRMAN GAW: And who incurred those costs or
22 what entity or entities?

23 MR. BOUDREAU: It would have been the entity
24 MEP Investments, LLC --

25 CHAIRMAN GAW: All right.

1 MR. BOUDREAU: -- through bank financing.

2 CHAIRMAN GAW: MEP Investments, LLC?

3 MR. BOUDREAU: Yes.

4 CHAIRMAN GAW: All right. And this is -- when
5 I asked earlier who owns the title or who owns the plant, is
6 it correct to say that the actual title to the plant is held
7 by Cass County or not? Who owns -- who owns this plant? I
8 got an answer, but it's not the same as what's on here.

9 MR. BOUDREAU: I believe to facilitate
10 financing and access to tax advantage, revenue bonds, that
11 legal title to the project is held by Cass County, but as a
12 practical matter, MEPPH is the leasee and operator of the
13 Aries plant.

14 CHAIRMAN GAW: So, let's stick with the legal
15 title --

16 MR. BOUDREAU: Okay.

17 CHAIRMAN GAW: -- for right now. Cass County,
18 is that the County of Cass, State of Missouri, that we're
19 talking about?

20 MR. BOUDREAU: Yes.

21 CHAIRMAN GAW: Not some development
22 corporation that's under Cass County, it is the county
23 itself?

24 MR. BOUDREAU: I believe it's the county
25 itself, which is the reason that the tax advantage financing

1 was available.

2 CHAIRMAN GAW: And the tax advantages that
3 you're speaking of have to do with things like not paying
4 county taxes?

5 MR. BOUDREAU: That I don't know.

6 CHAIRMAN GAW: State property taxes, that
7 wouldn't have to be paid because it's owned by the political
8 subdivision of the state.

9 MR. BOUDREAU: That may very well be the
10 circumstance. I'm personally not familiar with the tax laws
11 that make those fundings available.

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19 MR. BOUDREAU: My understanding is that MEPPH
20 is an LLC.

21 CHAIRMAN GAW: And the terms of that lease, is
22 it a 30-year lease?

23 MR. BOUDREAU: I'm not exactly sure what the
24 full duration of the lease is, but the total obligation goes
25 to the year 2021, so I'm assuming that there's a --

1 CHAIRMAN GAW: 2021, not 2032?

2 MR. BOUDREAU: I think the total obligation
3 goes through 2021, now whether or not that corresponds
4 exactly to the term of the lease, I don't know, I'm sorry.

5 CHAIRMAN GAW: I am, Judge, do you want to
6 --

7 (DISCUSSIONS WERE HAD AT THE BENCH)

8 CHAIRMAN GAW: Let me, just so I can get
9 clarification, because I'm going off of a HC document
10 attached as Appendix A to Staff's Reply to Aquila's Reply
11 dated December 3rd of '03, and I'm trying to determine the
12 accuracy of that exhibit, so maybe it's easier just to ask
13 where is that exhibit inaccurate.

14 JUDGE RUTH: Mr. Chairman, I have not yet
15 marked that as an exhibit. For identification purposes, I am
16 marking the Aries financing structure as Exhibit 1, it's an
17 appendix to the December 3rd filing by Staff and I will get
18 the Court Reporter a copy on the next break. At this point,
19 it's been marked for identification purposes only.

20 MR. BOUDREAU: So the question, as I
21 understand it is looking at this document, can I tell you
22 from the company's perspective whether this is an accurate
23 representation of the infrastructure?

24 CHAIRMAN GAW: That would be fine.

25 MR. BOUDREAU: And I think the answer to that

1 is a simple yes. We've had an opportunity to look at it and
2 it appears to be an accurate diagram.

3 CHAIRMAN GAW: So there is an operating lease
4 that goes through 2032?

5 MR. BOUDREAU: That appears to be.

6 CHAIRMAN GAW: What is -- what is -- when I
7 use the phrase operating lease, what is that, in general?

8 MR. BOUDREAU: Just, before I answer the
9 question, just one point of clarification. You had asked
10 whether the diagram was accurate, and I was concentrating on
11 the lower half of it, unfortunately. The upper half of it,
12 the ownership structure in terms of public investors and
13 UtiliCorp that shows up in the left-hand column, that is not
14 accurate.

15 Aquila's interest in that, there is not a
16 public investor aspect to it. It's held now, entirely, 100
17 percent, by Aquila. This was a diagram that was put together
18 earlier on in the filings that the company made with the
19 Commission during some of those earlier documents, so that
20 portion of the ownership interest in the upper left-hand
21 corner is different, but beneath that, in terms of the
22 operating lease and beyond, that all appears to be accurate.

23 Now, your question was as to the operating
24 lease, the operating lease, my understanding, is the -- that
25 is the document that basically -- will you just give us a

1 moment here, please?

2 CHAIRMAN GAW: Judge, I might ask if it might
3 facilitate to have to actually have someone sworn in to --

4 JUDGE RUTH: If you anticipate your questions
5 needing to be substantive.

6 CHAIRMAN GAW: I thought it might be speedier,
7 it's not anything else other than that.

8 JUDGE RUTH: Let me ask Aquila if you have a
9 witness that would be able to be sworn in.

10 (AN OFF-THE-RECORD DISCUSSION WAS HAD.)

11 JUDGE RUTH: Now, let's go back on the record.

12 We had a short break, Commissioners, parties, are all back.

13 I have a question. Quite a few of the questions have been
14 substantive in nature. Does Aquila have a witness that would
15 be qualified to answer some of these questions?

16 MR. BOUDREAU: Yeah, the question is a good
17 one because that was part of the discussion that I was
18 having. Since these questions are going to the mechanics of
19 the agreements, I'm probably an imperfect messenger. With
20 me, today, are two Aquila representatives. One of which is
21 Keith Stamm, who I think the Commission is familiar with,
22 because I believe he testified yesterday a little bit, and
23 Mr. Stamm is willing to and prepared to take the stand in an
24 attempt to answer some of these questions from Commissioner
25 Gaw, and he would, I'm sure, be a much better messenger than

1 I'm being at this point. So, if it's agreeable to the other
2 parties, I'm willing to offer Mr. Stamm to take the stand.

3 MR. DOTTHEIM: The Staff also has a witness
4 present, Mr. Cary Featherstone, that the Staff would offer.

5 JUDGE RUTH: Okay. At this point, then, let's
6 move to Mr. Stamm and have him come over to the witness
7 chair. Sir, am I pronouncing your name correctly?

8 MR. STAMM: Correct.

9 JUDGE RUTH: Then Mr. Stamm, would you please
10 raise your right hand?

11 (THE WITNESS WAS SWORN)

12 JUDGE RUTH: And would you state your name and
13 spell your name for the record?

14 MR. STAMM: K-E-I-T-H, S-T-A-M-M.

15 JUDGE RUTH: Thank you. Aquila, did you have
16 a few identifying questions you could ask this witness to
17 make it clear his position?

18 MR. BOUDREAU: Yes, please.

19 QUESTIONS BY MR. BOUDREAU:

20 Q. Sir, would you state your name for the record,
21 please?

22 A. Keith Stamm.

23 Q. And what -- by whom are you employed; in what
24 capacity, sir?

25 A. I'm employed by Aquila as the Chief Operating

1 Officer.

2 Q. Okay. And can you give us a brief discription
3 of what your responsibilities are as Chief Operating Officer
4 of Aquila?

5 A. My responsibilities include the US and
6 International Utilities, as well as our unregulated
7 operations, so essentially operational responsibility for the
8 company. I do not have responsibility for finance or any of
9 the administrative functions.

10 Q. Are you familiar with the subject matter of
11 the proceeding currently before the Commission?

12 A. I'm generally familiar with it, yes.

13 Q. Do you consider yourself sufficiently familiar
14 to attempt to answer some questions concerning the ownership
15 structure of the Aries project?

16 A. Yes, yes, while I was not in the country at
17 the time the structure was developed, I have had
18 responsibility for this function.

19 Q. Okay. Very good.

20 MR. BOUDREAU: With that, I will offer Mr.
21 Stamm for examination by the Commission with respect to the
22 matters at hand.

23 JUDGE RUTH: Okay. Thank you, Mr. Chairman.

24 CHAIRMAN GAW: Thank you.

25 QUESTIONS BY CHAIRMAN GAW:

1 Q. Mr. Stamm, we'll go back to my -- I think my
2 last question was what is the operating lease in general
3 that's referred to.

4 CHAIRMAN GAW: What's the exhibit number
5 you've given to --

6 JUDGE RUTH: I've given it Exhibit 1 for
7 identification purposes.

8 Q. (By Chairman Gaw) That's shown as Appendix A
9 on the Staff Response Aquila Response and Aquila staff to
10 open the case.

11 A. Yes, Commissioner, my understanding of this
12 diagram, this was prepared some time ago by the company,
13 would have been two or three years ago, and this is the
14 anticipated permanent structure that would go in place with
15 Aries. The operating lease is assumed to be -- would have
16 been the permanent structure and would have been after the
17 facility converted from construction financing to permanent
18 financing. We've been unable to convert to permanent
19 financing because the banks would like Aquila and CalPine to
20 contribute more money in the form of equity to the project
21 than was originally anticipated.

22 Q. Uh-huh. Okay. Well, so is there an operating
23 lease currently in effect that's been entered into, that's
24 shown on this diagram?

25 A. I believe -- no, no, it is still in

1 construction financing. It does not have the operating
2 lease, to my knowledge.

3 Q. Well, okay. So what document is there that
4 governs the relationship regarding the -- the lease -- hold
5 on. Let me -- let me back up. On the diagram down below,
6 they're showing a capital lease. Do you see that?

7 A. Yes.

8 Q. And that shows 27 years through, according to
9 the diagram, 2027. Do you see that?

10 A. Yes, I do.

11 Q. Okay. And what's the status of that lease?

12 A. I believe that will also be part of -- would
13 be part of the permanent financing. What is in place today
14 is the tolling agreements, the obligations of Aquila and
15 CalPine to essentially pay for the facility by the year 2021.
16 That is the operator for 21 years, and that also corresponds
17 to the tolling agreements that Aquila and CalPine have
18 executed.

19 Q. What's a tolling agreement?

20 A. A tolling agreement is, effectively, a lease
21 on the power plant, so it gives the -- those that have
22 entered into the tolling agreement the ability to dispatch
23 the facility, to run the facility, and operate it.

24 Q. And that tolling agreement was initially
25 intended to be a short-term agreement, would that be accurate

1 to be replaced by capital lease?

2 A. No, sir. The tolling agreement would be
3 permanent.

4 Q. Okay.

5 A. The construction financing similar to -- if
6 you build a house and you take out a construction loan and
7 convert to a mortgage, that's the type of financing that
8 would occur, but the tolling agreement is an obligation that
9 stays in place regardless of what the permanent financing
10 ultimately looks like.

11 Q. Okay. So the tolling agreement provides for
12 -- for the -- does it provide for the payment of money to
13 Cass County?

14 A. Yes, it does. Yes, it does. The tolling
15 agreement is -- a tolling agreement essentially are what got
16 banks comfortable with putting up the money for the
17 construction financing in the first place.

18 Q. Yes. But they -- okay. And so that tolling
19 agreement is as the -- the generating unit is being used
20 right now, correct?

21 A. Yes. Yes, it is.

22 Q. So somebody is paying money to somebody for
23 leasing that -- that plant from Cass County?

24 A. That's correct.

25 Q. Who's doing that?

1 A. The -- the parties of Aquila and CalPine are
2 paying for that -- paying for that unit. Now, there is a
3 purchase power agreement through June of 2005 with Missouri
4 Public Service that covers a portion of those payments, and
5 so that affects the amount of the tolling payments through
6 2005. Those tolling payments through 2005 are, in the case
7 of Aquila, about \$4 million per year, and I believe that's
8 the same for CalPine. Now, at the expiration of that
9 purchase power contract in 2005, those tolling payments
10 increase to \$23 million per year.

11 Q. And the amount that is being paid by Aquila
12 for under the power -- power contract is how much per year?

13 A. I believe it's about \$27 million per year, I
14 believe.

15 Q. Is that a set amount?

16 A. Through 2005, yes.

17 Q. And so there's no variation according to the
18 operating cost or how does it calculate?

19 A. The tolling -- or the purchase power agreement
20 essentially gives Aquila the right to dispatch that unit, so
21 Aquila pays for the fuel when it does dispatch that unit.
22 It essentially gives Aquila the right to use it so it's
23 essentially a demand charge.

24 Q. So the demand charge is 27 million?

25 A. Correct.

1 Q. Usage then would add on whatever the gas costs
2 are?

3 A. That's correct.

4 Q. Okay. And that payment goes from Aquila to
5 whom? To Cass County?

6 A. No, MEPPH.

7 Q. Okay.

8 A. Aquila, the utility to MEPPH.

9 Q. All right. And the 4 million or so per year
10 that's being paid from CalPine's companies and from somebody
11 in Aquila, who in Aquila is paying that 4 million and who's
12 receiving it?

13 A. I believe that is MEP Investments --

14 Q. Okay.

15 A. -- that is making that payment. Essentially,
16 what is happening, right now, with the payments that are made
17 by Missouri Public Service is that is being used to pay down
18 some of the construction loan. The construction loan was
19 originally, I believe, about \$270 million, and it's now about
20 \$190 million, so essentially, those are used to pay down the
21 construction loan.

22 Q. Okay. And you say that at the conclusion of
23 the -- the agreement with Aquila to have access to this plant
24 next year, that the payments will up to how much again?

25 A. In the case of Aquila, it will be \$23 million

1 per year and I believe that's the same for CalPine as well.

2 Q. So 23 million each, and that will be paid
3 from, on Aquila's side? MEP?

4 A. Yes.

5 Q. Is that correct?

6 A. I believe that's correct, yes.

7 Q. Do you know?

8 A. I can state with 95 percent certainty that
9 that's the case, yes.

10 Q. Okay. The arrangements for the construction
11 loan with -- that you mentioned earlier, what companies are
12 the abacores on that loan?

13 A. Ultimately, it is MEP Investments and CalPine.

14 Q. All right. Does Aquila have any
15 responsibility as a guarantor or in any way any liability
16 secondary or otherwise own that loan?

17 A. There is no recourse back to Aquila. The
18 Aquila would still be responsible for the tolling payments,
19 but not the loan itself.

20 Q. And the tolling payments would be what?

21 A. Twenty-three million dollars per year.

22 Q. So, in essence, there is -- there is an
23 obligation, then, on the tolling payments for 23 million a
24 year, for how long?

25 A. Through 2021.

1 Q. Through 2021. And and for what reason is
2 Aquila required to sign off on the tolling agreements instead
3 of it being placed with MEP?

4 A. The -- MEP did not have the -- I'm sure the --
5 the -- the balance sheet or the construction or for the banks
6 to get comfortable with construction financing.

7 Q. All right.

8 A. So it would have required a guarantee similar
9 to that that CalPine has provided.

10 Q. In the event that MEP -- it is MEP responsible
11 on those tolling agreements as well as Aquila?

12 A. MEP is responsible, and I believe that -- I'm
13 absolutely certain that those are guaranteed by Aquila parent
14 though.

15 Q. Yes, okay. Now I'm following you. If MEP
16 would not pay the tolling -- the tolling agreement amounts,
17 then Aquila would be responsible?

18 A. That's correct.

19 Q. Is there any agreement between MEP and Aquila
20 in regard to reimbursement to Aquila in the event that MEP
21 fails to meet its obligation on the tolling agreements?

22 A. I don't know that, since MEP doesn't have much
23 of a balance sheet, it may be a moot point that there would
24 be nothing to go after it at MEP.

25 Q. As a practical matter, it might be, but from a

1 legal standpoint, do you know whether or not that -- there
2 are agreements with, that provide some reimbursement from
3 Aquila back to MEP in the event that MEP defaults on the
4 tolling agreements?

5 A. I don't know the answer to that question.

6 Q. Do you know if anyone here does with Aquila?

7 A. We can certainly find that out in the next
8 half an hour.

9 Q. Okay. There was a reference earlier in regard
10 to the top part of this chart and the reference to public
11 investors and UtiliCorp and Aquila in that 280 percent up at
12 the top. Was that -- was that at some point in time a
13 structure that existed? Is that the reason it was done that
14 way? I'm just trying to clean that up a little?

15 A. Yes. Again, I believe this was attachment to
16 a Staff document, but it was originally an Aquila document
17 from at least two years ago, and this reflects the fact that
18 the Aquila merchant business 20 percent that was sold to the
19 public in April of 2001.

20 Q. Yeah, and at some point in time, that was
21 repurchased back by the company?

22 A. In January of 2002, I believe that closed.

23 Q. And you believe it closed -- you believe what
24 closed, I was putting words in your mouth.

25 A. The repurchase of the 20 percent.

1 Q. Thank you. So, at the present time, the
2 structure would be there's one corporation, Aquila, that with
3 shareholders but it has no parent; is that correct, Aquila
4 itself has no parent company?

5 A. That's correct.

6 Q. But Aquila does have subsidiaries?

7 A. Yes.

8 Q. And the subsidiaries include MEP?

9 A. That's correct.

10 Q. Okay. Are there other subsidiaries of Aquila
11 currently in existence?

12 A.. Yes.

13 Q. Very many?

14 A. Not as many as there used to be --

15 Q. Yes.

16 A. -- but there are dozens of structures like
17 this when Aquila -- particularly on the non-regulated side --
18 built its merchant facilities, it employed similar
19 structures.

20 Q. The issue -- there is an issue in regard to --
21 to resource planning I'd like to go into just a little. The
22 contract for the use of this generation unit expires with
23 Aquila next year, I believe you said.

24 A. That's correct.

25 Q. Are there plans in regard to Aquila's

1 replacement of that generation as a source of electricity for
2 it to serve its native load?

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10 Q. How much -- generally how much of the -- of
11 the generation needs of the company are -- does this plant
12 make up currently?

13 A. There's a couple of ways to look at that. One
14 would be what percent of the capacity, and so how much of
15 this in terms of total megawatts, and then how much of the
16 actual energy comes from this particular facility.

17 Q. Okay.

18 A. And it's about, I believe, it's about 20
19 percent of the energy, and that's probably going to be the
20 more relevant number in terms of the amount of capacity
21 versus energy, so it's 20 plus percent.

22 Q. What about the capacity side, if you know?

23 A. The capacity side, it would likely be a little
24 bit higher than that, because we would use -- we would use
25 our coal fire generation as much as possible, and then

1 purchase in the open market if this was not competitive with
2 purchasing in the open market.

3 Q. There is with regard to whether this is
4 competitive as opposed to purchasing in the open market, you
5 basically are -- are -- you already have a demand, as you
6 say, a demand charge. I don't know how you phrased it
7 earlier.

8 A. A demand charge is essentially correct.

9 Q. That you pay whether you use it or not?

10 A. Essentially it gives us the right but not the
11 obligation to use the facility, so we can buy from the open
12 market from others as they have that available, and then to
13 the extent that they don't have that available, then we can
14 fall back on this.

15 Q. But you're paying that 27 million whether you
16 use it or not, I guess, is what I'm saying.

17 A. Yes, it's similar to other purchase power
18 agreements where you -- if you want the right to that
19 capacity, you typically would pay a demand charge.

20 Q. The -- I could go a long ways down that road,
21 but I think I'm going to at least avoid it for the time
22 being. The issue of where you're going to find the 20
23 percent that you need to replace that, do you know what the
24 -- what the answer is to that question?

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Q. This -- the obligation that you have for the

1 23 million, if this transaction is complete, I assume that --
2 does that obligation go away?

3 A. If we restructure, that's correct, yes, that's
4 correct. What we're attempting to do right now is
5 restructure this arrangement and exit so that we no longer
6 have that \$23 million per year obligation.

7 Q. Does the -- I guess, I guess my question is
8 does the sale that's contemplated here, does it erase the 23
9 million by itself or does something else have to occur after
10 that sale takes place?

11 A. No, the restructuring itself would eliminate
12 our obligation for that \$23 million per year.

13 Q. I may be mischaracterizing this. Is it a sale
14 or is it really a restructuring of ownership or of rights to
15 a lease rather?

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3 Q. So the big picture here in regard to -- in
4 regard to this proposed transaction that you are eliminating
5 an obligation of not just MEP but Aquila itself in regard to
6 this -- to this plant?

7 A. Yes, it is, that is the -- it is -- that is
8 the big picture, we are eliminating this obligation, that's
9 what we would like to do. It's consistent with our overall
10 strategic objectives, consistent with what we've done in
11 Louisiana where we exited a toll where we had a \$43 million
12 per year obligation. It's consistent with our
13 publicly-stated objectives of exiting the Elwood toll, which
14 is a facility just outside of Chicago, and consistent with
15 our overall objective of exiting the merchant, non-regulated,
16 energy business.

17 Q. How much of the -- how much off system sales
18 have there been on this -- of this unit since it was built?

19 A. From Missouri Public Service or from Aries?

20 Q. Other than that which has been utilized by
21 Aquila?

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Q. Is the obligation on the construction loan with CalPine a Joint in Several Liabilities?

A. -- with the banks.

Q. Yes.

A. I'm not trained as an attorney, but my understanding is if we don't -- that there's no recourse back to Aquila if the loan goes into default. What essentially happens is the banks end up owning the power plant, taking the power plant, but the tolling obligations stay. The \$23 million per year that each of Aquila and CalPine have, those tolling obligations remain in place, but effectively, the bank owns the power plant, but there's no further recourse back to Aquila or CalPine.

Q. Except for 23 million a year for --

A. That's correct.

Q. -- how many years?

A. It goes through the year 2021.

Q. And it would be fair to say, wouldn't it, that up -- that up to this point in time, the primary purpose of this plant has been to service the customers of Aquila?

A. Yes, the -- that's correct.

1 Q. And to the tune of about 20 percent of the
2 needs of Aquila?

3 A. The energy requirements, yes.

4 Q. And that the -- that the basic financing
5 requirements that were necessary in order to get this
6 arrangement up and running, have been supplied by the parent
7 corporation Aquila?

8 A. Aquila and CalPine by -- by guaranteed the
9 tolling payments effectively, yes, that's true.

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Q. And without doing that, if you choose not to do that, then you run into these deadlines, is that in regard

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A. That's correct. The banks, then, have the opportunity, since we're in default -- or not the opportunity, but the right to foreclose on a facility and sell it, but Aquila would still have the \$23 million per year tolling obligation.

16

Q. Does Aquila believe that the rate payers are in any way responsible or would have any consequences of -- of that obligation?

19

A. The \$23 million per year? No.

20

Q. Okay. Where would Aquila get the money to pay for that?

22

A. The -- for the \$23 million per year?

23

Q. Yes.

24

A. It would essentially -- that would be added on to our existing obligations, debt and debt-like obligations,

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1 and for example, we have suspended the dividend, and we no
2 longer pay a dividend that's used to pay down the debt.
3 We've sold non-regulated assets and international assets, so
4 we would have to use those types of proceeds. It would
5 further financially weaken the company because it would be an
6 additional \$23 million per year obligation.

7 Q. Thank you.

8 CHAIRMAN GAW: Let me ask Staff a couple of
9 things here, Judge.

10 JUDGE RUTH: Do you anticipate asking more
11 questions of this witness?

12 CHAIRMAN GAW: I don't know, but if he wants
13 to step down whenever he feels comfortable with it.

14 JUDGE RUTH: You may step down, but I'll ask
15 you to stay in the room, please

16 CHAIRMAN GAW: I want to ask Staff to tell me
17 what books and records, and Public Counsel, too, what books
18 and records are you concerned about that you may no longer
19 have access to if this transaction takes place, how is that
20 relevant to this question that's before us.

21 JUDGE RUTH: I'll also note that a few people
22 have come in the room. I don't recognize everyone, so
23 counsel, if there's anyone who's in the room that should not
24 be here for the in camera portion, will you tell me?

25 MR. BOUDREAU: I don't believe so.

1 THE COURT: So you're satisfied at this point?

2 MR. BOUDREAU: I believe so.

3 JUDGE RUTH: Thank you. Sorry for the
4 interruption.

5 Mr. Dottheim, would you -- do you have a
6 witness that you would prefer to put on the stand or do you
7 want to answer this question yourself.

8 MR. DOTTHEIM: Why don't I put the witness on
9 the stand, and if the Commissioners have any related
10 questions or also matters that Mr. Stamm has addressed. The
11 Staff would --

12 JUDGE RUTH: I'm sorry.

13 PSC STAFF: The Staff would offer Cary G.
14 Featherstone.

15 JUDGE RUTH: Mr. Featherstone, would you
16 please come up to the witness chair? Mr. Featherstone would
17 you please raise your right hand.

18 (THE WITNESS WAS SWORN.)

19 JUDGE RUTH: Okay. Please be seated. And
20 state, again, your name for the record.

21 THE WITNESS: Cary G. Featherstone.

22 JUDGE RUTH: And Mr. Dottheim, do you have a
23 few questions?

24 MR. DOTTHEIM: Yes.

25 QUESTIONS BY MR. DOTTHEIM:

1 Q. Mr. Featherstone, would you state the nature
2 of your employment, your job position at the Public Service
3 Commission?

4 A. I'm a Regulatory Auditor with the Missouri
5 Public Service Commission.

6 Q. Okay. And have you participated in audits
7 respecting Aries transactions?

8 A. Yes, I've been assigned to the current rate
9 case that's pending before the Commission. It's styled as
10 Case No. ER-2004-003\$4 million.

11 Q. Did you have responsibility as far as the
12 Staff review of transactions regarding Aries in Aquila's last
13 rate case, Electric Rate Case ER-2001-672?

14 A. Yes, along with two other Staff members.

15 Q. Okay. And again, you do have filed in the
16 pending electric rate case testimony related to Aries
17 transactions?

18 A. I do. I have direct rebuttal and surrebuttal
19 testimonies along with Staff witness Owen Slater and Staff
20 witness Proctor has filed surrebuttal testimony on the Aries
21 issue.

22 MR. DOTTHEIM: I'd offer Mr. Featherstone for
23 any questions.

24 JUDGE RUTH: Commissioner Gaw?

25 CHAIRMAN GAW: Thank you.

1 QUESTIONS BY CHAIRMAN GAW:

2 Q. I guess my first question had to do with what
3 books and records that Staff is concerned they may not have
4 access to if this transaction takes place that Staff is
5 asking us to look at.

6 A. You understand I'm not an attorney, so I'm not
7 familiar with the statutes and the Federal Power Act in terms
8 --

9 Q. Mr. Dottheim put you up there. If he wants to
10 answer the question, I'll ask him. Whichever one, I just
11 want to know.

12 A. That caviat, I think what we're interested in
13 in terms of the investigation is to look at the transaction
14 itself, the sale transaction, our scope of audit did not
15 include that, as part of, while we got some information with
16 regard to the Aries sale during the rate case, we did not
17 fashion our scope of audit to anticipate the sale
18 transaction.

19 Q. That has to do with the rate case. What I
20 want to know is how this transaction impacts the Staff's
21 ability to review books and records that it considers
22 important and I'm trying to -- I'm trying to understand what
23 Staff's position and concerns are in regard to this
24 transaction in regard to records.

25 A. I'm not sure that we feel that we have,

1 perhaps, even experience to deal with this kind of a
2 transaction. We believe that the transaction involves more
3 than just the power plant itself, there's the land aspect.
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9 MR. DOTTHEIM: Mr. Featherstone, your response
10 about discussing certain transactions or concerns, and you
11 mentioned company personnel, is that out of a concern that
12 certain company personnel do not have access to the documents
13 or transactions which you would refer to?

14 MR. FEATHERSTONE: We have been told by the --
15 by the company that there has been established they would
16 call it a firewall, that there are certain employees of
17 Aquila, Inc. who are not permitted to, if you will, be
18 involved in the decision-making and review process of the MPS
19 capacity, the resource planning, that they are -- because
20 they are dealing with the Aries transaction of disposing of
21 the Aries asset, they are not permitted, because I think FERC
22 code of conduct requirements is what we have been told, that
23 they are not permitted to access this information or be
24 familiar with what is the current plans of MPS capacity
25 replacement.

1 MR. DOTTHEIM: Request we go off-the-record
2 for a moment while we attempt to establish that only those
3 individuals are remaining in the hearing room who are deemed
4 to be.

5 JUDGE RUTH: Yes, let's go ahead and take a
6 seven-minute break anyway. I believe that we need to switch
7 out court reporters perhaps. It will be a brief break in
8 order to allow just a couple of things. Please stay by.
9 We'll go off the record.

10 (A BREAK WAS HAD TO CHANGE REPORTERS.)
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1 JUDGE RUTH: We're back on the record. We
2 took a short break. I've asked counsel to look around the
3 room. They've assured me that anyone who's here can be
4 here, and we'll continue then with our in-camera proceeding.
5 Right before the break, I believe Commissioner Gaw was
6 asking witness Mr. Featherstone a few questions.

7 CHAIRMAN GAW: Thank you, Judge.

8 BY CHAIRMAN GAW:

9 Q. I'm not sure whether I need to reask the
10 question. My question had to do with what books and records
11 that Staff is concerned about not having access to?

12 A. The Staff is concerned that the Aries -- the
13 sale of Aries has a direct impact on the Missouri Public
14 Service customers. They're currently presently receiving,
15 through a purchased power agreement, a 500 approximate
16 megawatts of capacity, which is what Mr. Stamm's testified
17 to represents something in excess of over 20 percent of
18 their capacity. And it's probably about 20 percent of their
19 energy. They received about 1.2 million megawatt hours of
20 energy from Aries in the past year.

21 It's an intermediate combined cycle unit.
22 It's already built. It's two years old and it's in their
23 service territory, connected to their system.

24

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and

the sale transaction, of course, would negate that.

Presently they own 50 percent of the power plant, and in terms of the books and records of the company, we would -- the investigation is an attempt to access the necessary books and records, and not just the books and records but the personnel, the individuals who have transacted this -- this sale or this proposed sale. They would, of course, lose the ownership of Aries.

Mr. Stamm has testified and identified the benefits to the company, but I don't think he's articulated benefits to the customer. As I was saying before we had to clear the room, the land site was designed for a multiple purpose facility. While it's not large enough, is what we've been told to build a duplicate combined cycle unit of 585 megawatt capacity, which is the capacity of Aries. They could build a smaller combined cycle unit or they could build combustion turbines.

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1 A. Because of the tolling arrangement, and it's
2 my understanding also because of Calpine and Aquila's
3 non-investment grade status, the banks want -- the lenders
4 want more money from the corporations, the two corporations
5 who own Aries. And the companies made a business decision
6 that they simply have not -- they're not going to put any
7 more money into the project. That's what we've been told.

8 So in essence they entered into negotiations
9 with Calpine and, in fact, I've attached that as -- I know
10 this isn't the rate case, but I've attached the sale
11 agreement, or they call it a memorandum of understanding,
12 and that's attached as highly confidential Schedule 4 to my
13 surrebuttal testimony. That is an agreement entered into
14 with Calpine, and they've identified it as a term sheet.

15 To be more specific, if you go to -- I know
16 you don't have it before you, but 4-8 gives the --
17 identifies the payments and the considerations to be made by
18 Aquila, and I think Mr. Stamm identified some of the terms
19 of it earlier.

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Q. Okay. Cleanup question that I think is inferred in all of this. The tolling agreements and whatever agreements that are out there, do they call for the transfer of title to this property to -- away from Cass County at its conclusion?

A. I'm probably not the best one to answer this, but my view of Cass County, Cass County is simply --

Q. I know it's a finance arrangement to avoid taxes.

A. They have a legal title but they're not the owners of this plant, make no mistake about it. Calpine Corporation and Aquila, Inc. own this plant. Cass County was entered into or came into existence in terms of the ownership, legal title, simply for tax abatement, property tax abatement. I think it's paid in lieu of taxes. It's called PILOT, and I'm not -- I'm not sure I'm getting the acronym correct, but it's -- it's to avoid property taxes assessed on the county level. There is a payment that's made, but it is at a greatly reduced discount.

Q. Yeah. But the ownership, does it at some point in time revert away from there?

1 over from Cass County.

2 CHAIRMAN GAW: That's what I was -- I assumed
3 there could be something similar to that. Okay. And I'm
4 going to go back to, again, are there books and records that
5 the Staff and Public Counsel is concerned about not
6 receiving? Public Counsel?

7 MS. O'NEILL: Commissioner, I think that
8 Public Counsel's always concerned that it needs to have the
9 best access to the most complete information that it can get
10 in conducting its analysis, and it is certainly less
11 complicated for us to get books and records from a regulated
12 utility than it is for us to get those kind of records from
13 an entity that is not the regulated utility. And when
14 ownership interest goes away, it becomes more difficult to
15 establish what we need to do to get those records.

16 So from that perspective, we do think that's
17 important. I don't think that formally we have a position
18 on what should happen in this particular request for an
19 investigation, but I think that if what we're talking about
20 is whether -- is does this Commission take jurisdiction and
21 if the Commission had jurisdiction over this transaction, we
22 could probably come up with a way to address those concerns.
23 And if the transaction itself appeared to be in the public
24 interest or at least not detrimental to the public interest,
25 we may be able to resolve these things.

1 I think it's difficult, in that there's all
2 this ownership interest, but it's got all these layers on it
3 to deal with that jurisdictional question. I think that's
4 the reason Staff proceeded the way they did, but we're not
5 really getting to the substance of the issue with this
6 proceeding.

7 CHAIRMAN GAW: Staff?

8 MR. DOTTHEIM: Thank you, Commissioner.

9 Yes, there's a concern. Do we have any
10 experience under Section 201G of the Federal Power Act? No,
11 and that's part of the -- that's part of the concern. And
12 also, too, I think as Mr. Featherstone indicated, it's --
13 the Staff's response may have been too limited, but it's not
14 just books and records that we have concern about access to.
15 It's also the individuals who know about those books and
16 records.

17 CHAIRMAN GAW: And the reason you need access
18 to those books and records is for what purpose?

19 MR. DOTTHEIM: For purposes of auditing.

20 CHAIRMAN GAW: Of auditing for what purpose?

21 MR. DOTTHEIM: For rate cases.

22 CHAIRMAN GAW: Pardon me. You have a rate
23 case pending currently in front of the Commission?

24 MR. DOTTHEIM: Yes.

25 CHAIRMAN GAW: Is there something that you

1 have not received in that rate case that you -- obviously at
2 this point in time, this entity is still within Aquila's
3 shop?

4 MR. DOTTHEIM: Yes, and the concern is when it
5 no longer is, but there's -- but there's a power supply
6 agreement.

7 CHAIRMAN GAW: Okay. So when would that be
8 relevant? We're talking about a contract that expires next
9 year.

10 MR. DOTTHEIM: May 31, 2005.

11 CHAIRMAN GAW: So a little over a year from
12 now. When would that be relevant in regard to some other
13 rate case?

14 MR. DOTTHEIM: It depends upon what the test
15 year is, when the company would either file a case or the
16 Staff would file or some other party would file a complaint.

17 CHAIRMAN GAW: It would take a rate case that
18 involved a test year that overlapped into that contract; is
19 that correct?

20 MR. DOTTHEIM: Yes.

21 CHAIRMAN GAW: So in reality, in regard to the
22 need for those books and records, what books and -- what
23 about -- that contract is already entered into. We're not
24 talking about any -- anything that -- that would be done
25 subsequent to that. If this transaction takes place, then

1 it's not an affiliate that owns it, what is it that Staff
2 would be trying to acquire that they wouldn't have access to
3 from Aquila itself?

4 MR. DOTTHEIM: Even with the existing
5 contract, we'd be trying to place the contract on a cost
6 basis, and with the trans-- with the transaction, the access
7 to those books and records would not be, we believe, as
8 easily accessible, but we don't have any experience under,
9 again, the Federal Power Act section.

10 CHAIRMAN GAW: And books and records -- books
11 and records of what entity?

12 MR. DOTTHEIM: MEPPH.

13 CHAIRMAN GAW: Of MEPPH, and records are the
14 ones you're concerned about?

15 MR. DOTTHEIM: Yes.

16 CHAIRMAN GAW: And MEPPH is the limited
17 liability company that is 50 percent owned by the subsidiary
18 of Aquila?

19 MR. DOTTHEIM: Yes.

20 CHAIRMAN GAW: And what changes as a result of
21 this transaction in regard to that entity, if you know?
22 Does the entity go away, is it extinguished, and what
23 happens to its books and records, are those things you're
24 concerned about?

25 MR. DOTTHEIM: Yes. I don't know if

1 Mr. Featherstone knows the answer or -- and certainly the
2 company may.

3 CHAIRMAN GAW: I'm going to ask the company
4 what happens with those books and records. Looks like I'm
5 clearing the room again. I never know when I'm doing that.

6 MR. BOUDREAU: Give me a moment.

7 CHAIRMAN GAW: Sure.

8 MR. BOUDREAU: I think the easiest way for me
9 to answer this is to say Aquila doesn't know for sure who's
10 going to -- what's going to end up is Calpine will end up
11 with custody of these records, because Calpine will end up
12 being full owner of MEPPH, and that's as quick a synopsis as
13 I can give you. The records will exist and it will be held
14 by Calpine in some fashion.

15 CHAIRMAN GAW: Is there a reason why those
16 records would not be -- well, so there is a problem in
17 regard to Aquila's access to the records after the
18 transaction, is what you're telling me?

19 MR. BOUDREAU: Aquila will have access to the
20 records that it -- that it accumulated up to this point. I
21 mean, up to the point of the sale. So Aquila will maintain,
22 I mean, a lot of historical information after the close of
23 the sale. If there's additional things that happen in terms
24 of the operation of the plant or whatnot, those will
25 probably be exclusively in Calpine's custody. But much of

1 this documentation, at least the historical documentation,
2 Aquila will still have access to.

3 CHAIRMAN GAW: Will Aquila have possession of
4 it or access to it?

5 MR. BOUDREAU: My understanding is possession,
6 that they have their own archives of documentation, because
7 they've been involved in a number of these transactions over
8 time.

9 MR. DOTTHEIM: Commissioner -- excuse me.
10 Chair?

11 CHAIRMAN GAW: Yes.

12 MR. DOTTHEIM: I think Mr. Featherstone can
13 relate difficulties we've encountered even in pending cases
14 because of Calpine.

15 CHAIRMAN GAW: Not being willing to cooperate
16 sharing records?

17 MR. DOTTHEIM: Yes, even though they're --
18 even though Aquila is a 50 percent owner of MEPPH.

19 CHAIRMAN GAW: Well, are you talking about
20 Calpine or are you talking about MEPPH?

21 MR. DOTTHEIM: Calpine, I believe.

22 CHAIRMAN GAW: Has Staff tried to seek records
23 from Calpine in this case that are not records of MEPPH?

24 MR. DOTTHEIM: Mr. Featherstone could address
25 that, if I could direct that question to him.

1 THE WITNESS: It was our understanding that
2 one of the reasons why we were put on a very restrictive,
3 very tight leash, if you will, on records in this case --
4 well, not this case, but the rate case --

5 CHAIRMAN GAW: Rate case.

6 THE WITNESS: -- was the --
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While that process took place, they've also
used that in some fashion against us in the rate case, and
you'll hear some of that in the proceeding later this week.

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We feel that our relationship or the
Commission's authority is over Aquila, Inc. and Missouri
Public Service and L&P. So we didn't feel the need to do
that.

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BY CHAIRMAN GAW:

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Q. Okay. I'm trying to understand -- we're not
talking about records that you need in the current rate
case, first of all?

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A. That is correct.

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Q. I'm talking about as far as your future needs
are concerned. You have seen the records, albeit under some
difficulty, have you seen the records you feel you need to
see?

1 A. Yes.

2 Q. At this point?

3 A. Yes.

4 Q. If there were a rate case in future and this
5 transaction took place, would there be records that you
6 would want that you haven't seen in some future rate case
7 that MEPPH might have?

8 A. Pure speculation, but it's likely. In fact, I
9 would even think that it would be very likely that Calpine
10 would dissolve MEPPH. MEPPH was created because of the
11 ownership relationship with Calpine and Aquila. In fact, in
12 the very beginning, MEPPH didn't exist. It was MEP
13 Investments, and it was 100 percent Aquila. And MEPPH only
14 was created because of the joint ownership issue.

15 Q. But let's assume it was dissolved. What
16 records you would be trying to seek from Calpine in some
17 future rate case, since it would no longer -- well, let me
18 just ask that.

19 A. I think if -- one of the concerns we have is
20 that they're going to enter into another agreement with --
21 with another purchased power agreement with Aries being the
22 source, but --

23 Q. Aquila?

24 A. Aquila will enter into another agreement
25 with -- if Calpine is the sole owner, with Calpine, and so

1 then we would have that need to get access to the books and
2 records.

3 Q. And why would you need the books and records
4 of Calpine at that point?

5 A. It would be whatever entity that Calpine
6 chooses to operate Aries. If it's -- if they leave it as
7 MEPPH, it would be the books and records and personnel of
8 MEPPH.

9 Q. My question is, why would you -- if there was
10 a new agreement with a nonaffiliate, why you would be
11 seeking the books and records of the nonaffiliate? What
12 would be unique about that or different than what you would
13 be doing with any other nonaffiliate long-term purchased
14 power contract?

15 A. I think it depends on when this transaction,
16 this sales transaction closes and when they would decide to
17 enter into an extension or a new agreement to replace the
18 current -- we call it June 2005. It's actually May 31,
19 2005, the current capacity agreement. Any replacement of
20 that capacity agreement in relationship to Calpine.

21 Q. What's the critical timing that you're talking
22 about?

23 A. It's my understanding that the company wants
24 to close this immediately.

25 Q. I guess what I'm asking you is, you said it

1 would depend upon whether they did that, and I thought you
2 were saying when they did it. Are you talking about whether
3 or not some renegotiation or extension or new purchased
4 power contract would occur prior to or after this transfer?

5 A. I think prior to.

6 Q. So your concern is, if there is a transfer
7 prior to the closing of this transaction that's proposed
8 with Calpine to transfer this interest over to 100 percent
9 to Calpine, that then it would be an affiliate transaction
10 and you would want access to those records? Am I following
11 you?

12 A. Yes, or shortly thereafter the close of the
13 transaction and we miraculously end up with a purchased
14 power agreement.

15 Q. And your concern might be that it really was
16 an affiliate transaction and it was related to these other
17 transfers and was a part of some -- even if it recited that
18 it was not, that it might in reality be a part of the total
19 transaction?

20 A. Yes.

21 Q. And if that occurred, there might be some --
22 Staff might be concerned about whether additional money was
23 being paid for Aquila -- by Aquila over to -- indirectly to
24 Calpine in order to get the transfer to take place?

25 A. Yes.

1 Q. Okay. So if that's -- if that's the case,
2 does the company have anything that would make Staff feel
3 comfortable in regard to access to those records if
4 something like that occurred?

5 MR. BOUDREAU: Can you give me a moment to
6 confer with my client, see if there's maybe some way we can
7 make a commitment to address some of those concerns.

8 CHAIRMAN GAW: Sure.

9 (AN OFF-THE-RECORD DISCUSSION WAS HELD.)

10 JUDGE RUTH: We're back on, and you may answer
11 the question.

12 MR. BOUDREAU: Let me offer this approach.
13 The company would be willing to agree that it would not
14 enter into another purchased power agreement with MEPPH or
15 whatever successor entity would be relevant without filing
16 for obtaining prior approval from this Commission. That, it
17 seems to me, would give the Commission an opportunity to
18 take -- and the Staff as well to take a look at the proposal
19 and evaluate it, make the recommendations to the Commission,
20 and if it's thought to be a bad idea or if there's thought
21 to be some suspicion or some shenanigans going on, that
22 would give the Commission an opportunity to control that
23 transaction. That may be just kind of a quick way to cut
24 right to the choice, and the company is willing to make that
25 commitment here.

1 CHAIRMAN GAW: Staff?

2 MR. DOTTHEIM: It offhand sounds like
3 preapproval legislation.

4 CHAIRMAN GAW: It sort of does.

5 MR. BOUDREAU: With the understanding that any
6 order approving it would contain the typical not binding for
7 ratemaking purposes.

8 CHAIRMAN GAW: I don't know if you-all want to
9 respond to that. You can.

10 MR. DOTTHEIM: I think that's -- offhand I'm
11 not certain that we would be interested in accepting that
12 proposal as stated. I think we'd need to probably talk a
13 little further with the company, but I don't think we want
14 to make any commitment or suggestion on our part just based
15 on what Mr. Boudreau has set out without, again, talking
16 further with the company and internally.

17 CHAIRMAN GAW: I'm done. Thank you.

18 JUDGE RUTH: You may step down. I may bring
19 you back.

20 COMMISSIONER CLAYTON: What's our plan?

21 JUDGE RUTH: I thought we would keep going.

22 QUESTIONS BY COMMISSIONER CLAYTON:

23 Q. I want to make sure that I understand Staff's
24 role in this, and I've gotten a little confused here.
25 Basically, Staff's role in reviewing this power sales

1 agreement relationship at MEPPH basically is determining
2 whether the price for power, I guess, reflects a fair cost
3 or a fair market value; is that a fair statement?

4 A. Yes. And I think also we have expanded that a
5 little bit to include what is the best optimal way of this
6 company meeting its capacity needs.

7 Q. So basically --

8 A. Today and in the future.

9 Q. We have two issues. We've got an issue of
10 whether or not they have sufficient capacity, and No. 2,
11 whether or not the price paid in this PSA is, I guess,
12 relatively fair under the circumstances?

13 A. Yes.

14 Q. I guess what would be the standard that
15 you-all would use in determining whether that price is a
16 fair price or reflects costs, or tell me exactly what you
17 would look at?

18 A. Mr. Oligschlaeger -- and I'll push this off on
19 him -- but he really addresses that in his testimony, that
20 it's the lower of cost market standard, the affiliated
21 transaction rules of the Commission.

22 Q. So it's more of a market standard rather than
23 looking at what their individual costs are going to be, is
24 it not?

25 A. It's the lower of cost or market. So in our

1 instance, we have presented in the rate case what we think
2 are the costs.

3 Q. Okay. All right. Then let me ask you this.
4 If you had a power sales agreement between Aquila and an
5 unaffiliated independent power producer, would you-all be
6 able to get into the records of that independent entity to
7 determine their costs?

8 A. I'm not an attorney. I don't -- I don't think
9 so.

10 Q. Okay. So if you were evaluating that, that
11 would be purely a market-based evaluation?

12 A. I believe so.

13 Q. Okay. The fact that they are an affiliated
14 entity is what causes the double analysis, the market
15 analysis as well as the cost analysis, correct?

16 A. Absolutely.

17 Q. In terms of cost, wouldn't the way to deal
18 with that in rate cases would be to hold the company -- I
19 guess, as we look forward, hold the company to no greater
20 than a certain amount in terms of the power that they buy?

21 A. I think that's been our approach in this -- I
22 keep calling it this pending case, but the rate case.

23 Q. And the pending rate case?

24 A. Yes.

25 Q. What is the Commission's role in dealing with

1 the capacity issue? Do we have the ability to tell the
2 company how they reach their capacity needs?

3 A. That might be a question you -- you refer to
4 Mr. Dottheim. There are Commission-integrated resource plan
5 rules, as I understand them, and I'm not the expert on them.
6 There's Staff members that can speak to these much better
7 than I. But as I understand, there is a integrated resource
8 planning rule that the companies have -- electric utilities
9 have been obligated to fall under. They have an exemption
10 to that rule, all of them, all of the major electrics, that
11 was given to them in the 1997-1998 time frame.

12 COMMISSIONER CLAYTON: Okay. I don't want to
13 let you go yet. Take a break, but don't go anywhere. I
14 mean, stay where you are. I want to ask Mr. Dottheim.

15 Mr. Dottheim, when MEP Investments, LLC was
16 created, the original subsidiary owning Aries 100 percent,
17 did the Missouri Public Service Commission approve the
18 creation of that LLC?

19 MR. DOTTHEIM: Not to my knowledge, no.

20 COMMISSIONER CLAYTON: Did we approve the
21 construction or the construction costs of the Aries
22 facility?

23 MR. DOTTHEIM: No.

24 COMMISSIONER CLAYTON: I say we. Did the
25 prior Commission do that?

1 MR. DOTTHEIM: No.

2 COMMISSIONER CLAYTON: Was there an analysis
3 of the sale of the 50 percent of Aries from MEP Investments,
4 LLP to Calpine and --

5 MR. DOTTHEIM: No, not by the Staff there was
6 no proceeding. There -- it is mentioned in a proceeding
7 involving the EWG, the Aries unit.

8 COMMISSIONER CLAYTON: EWG?

9 MR. DOTTHEIM: Exempt wholesale generator.
10 And that -- and that occurred with the purchased power
11 agreement that's in place and the case number's been
12 mentioned.

13 COMMISSIONER CLAYTON: Hang on. I'm going to
14 get to that. So we didn't approve the sale of the
15 50 percent to Calpine, but my next question was, did we
16 approve the power sales agreement between Aquila and -- and
17 I guess it would be MEPPH at that point?

18 MR. DOTTHEIM: No. The power sale agreement
19 involving Aries and Aquila was not -- was not approved by
20 the Commission. There was -- well, it was not approved by
21 the Commission for ratemaking purposes. There -- under the
22 Public Utility Holding Company Act, there's Section 32K,
23 which involves affiliate transactions respecting power
24 supply agreements, and under Section 32K, in order for that
25 transaction to pass muster on the federal level, the

1 Missouri Commission must make certain determinations.

2 And those determinations are that the
3 Commission has sufficient regulatory authority, resources
4 and access to books and records, the transaction will
5 benefit consumers, the transaction does not violate any
6 state law, the transaction would not provide the EWG an
7 unfair competitive advantage, and the transaction is in the
8 public interest. Those determinations were made by the
9 Commission based upon a recommendation.

10 COMMISSIONER CLAYTON: I'm going to stop you
11 right there before we go any further. I want to go through
12 that list again. You have the resource planning issue, you
13 have books and records are available for review.

14 MR. DOTTHEIM: Yes.

15 COMMISSIONER CLAYTON: Benefit to consumers.

16 MR. DOTTHEIM: Yes.

17 COMMISSIONER CLAYTON: No violation of state
18 law.

19 MR. DOTTHEIM: Yes.

20 COMMISSIONER CLAYTON: That there is no unfair
21 competitive advantage.

22 MR. DOTTHEIM: Provided to the EWG.

23 COMMISSIONER CLAYTON: And what else? That's
24 how far I got.

25 MR. DOTTHEIM: And the transaction is in the

1 public interest.

2 COMMISSIONER CLAYTON: And what year would the
3 Missouri Commission have made that analysis?

4 MR. DOTTHEIM: It was, I think, 1999. It was
5 in -- again, the case number is EM-99-369. I earlier today
6 said EM-99-365, I believe. The last three digits are 369.

7 COMMISSIONER CLAYTON: Okay. And the
8 Commission went through that -- the Missouri Commission went
9 through that and found that each of those standards were
10 met?

11 MR. DOTTHEIM: Yes. Based upon Staff's
12 recommendations, memos were filed with the Commission, but
13 the Commission exclusively stated in its order where it made
14 those determinations that it was not making any of those
15 determinations for any ratemaking purposes.

16 That was the recommendation made to the
17 Commission by the Staff, that no ratemaking be determined by
18 those items, and the Staff believes that the company in its
19 application in EM-99-369 agreed that if the Commission made
20 those determinations positively, it would not have any
21 ratemaking effect.

22 COMMISSIONER CLAYTON: Okay. Why would Staff
23 want that determination that -- or the -- why would Staff
24 want no binding ratemaking principles being found in that
25 approval or --

1 MR. DOTTHEIM: Because amongst other reasons,
2 Staff resources, the amount of effort that it would take for
3 the Staff to perform the analysis, conduct the review, to
4 make a recommendation that the Staff would be comfortable
5 would not have any ratemaking impact, that the Staff has
6 generally, over the years, not suggested or recommended to
7 the Commission proceeding in that manner.

8 COMMISSIONER CLAYTON: By the basic nature of
9 an affiliate transaction, is it -- is there a fear that the
10 cost for power will be too high or too low or neither?

11 MR. DOTTHEIM: Well, if the company is
12 purchasing the power, that the cost would be too high.

13 COMMISSIONER CLAYTON: That the cost would be
14 too high?

15 MR. DOTTHEIM: Yes. And by its nature it
16 being an affiliate transaction, there may be an abuse or --

17 COMMISSIONER CLAYTON: Okay. So there would
18 be an inherent concern that the price for power would be too
19 high, yet now staff is looking at this and saying, well,
20 we're not sure we want to let this power sales agreement go,
21 because it could -- because it's too good a price?

22 MR. DOTTHEIM: No. Because right now we're
23 not dealing with a power sales agreement, Commissioner, if I
24 understand you correctly. What we're dealing with is
25 Aquila's selling its remaining 50 percent ownership interest

1 in Aries to Calpine.

2 COMMISSIONER CLAYTON: But the only way that
3 that brings you back is because of the power sales
4 agreement, otherwise there would certainly be no
5 jurisdiction. Would you agree with that?

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15 COMMISSIONER CLAYTON: Well, I'm struggling
16 with this, because the Commission has not been involved at
17 any stage other than approving the affiliate transaction
18 under Section 32K. The Commission has not been involved
19 from the creation of the LLC, nor from the construction of
20 the plant.

21 And now -- they sold half of it, there wasn't
22 a problem then, and now they want to sell the rest of it,
23 now there's a question of whether the Missouri Public
24 Service Commission has jurisdiction in this. And I think
25 with the witness, we went back through, there's a capacity

1 issue and the price issue and the PSA, correct?

2 MR. DOTTHEIM: Yes.

3 COMMISSIONER CLAYTON: Let me ask you the
4 question on the capacity. Do we have the ability to dictate
5 to the company on that capacity issue?

6 MR. DOTTHEIM: As to how it will meet its
7 capacity needs?

8 COMMISSIONER CLAYTON: Yes.

9 MR. DOTTHEIM: I think that's an open
10 question. I don't think there is any authority.

11 COMMISSIONER CLAYTON: There's one thing about
12 reviewing -- reviewing a plan or reviewing the capacity.
13 It's another thing telling the company exactly what they're
14 going to do. Now, I guess I'm asking, do we have the
15 ability to tell them how they're going to meet their
16 capacity, or do we say we make a recommendation at their
17 peril?

18 MR. DOTTHEIM: Certainly I think the
19 Commission can make a recommendation and the company proceed
20 at its peril, once the Commission has made that
21 recommendation or issued a Report and Order which contained
22 that recommendation to the company. In part this ties back
23 to the on-the-record presentation last Friday involving
24 Public Counsel's motion for an investigation respecting
25 Empire District Electric Company, how it meets -- is

1 planning to meet its capacity demands.

2 There is a case -- and I'm sorry to go back in
3 the history. There is a case one that I'm aware of, where
4 the Commission indirectly told a company how it would
5 address its capacity needs. It's a St. Joseph Light & Power
6 case, back in the 1970s, and St. Joseph Light & Power was
7 part owner of a generating unit that was being built by
8 Kansas City Power & Light. And the -- St. Joseph Light &
9 Power, in order to finance the -- its portion of that unit,
10 was before the Commission on a somewhat regular basis
11 involving rate cases.

12 And in one rate case the Commission -- it was
13 an interim rate case. The Commission granted interim rate
14 relief, but told the company that if it did not sell 67 to
15 57 megawatts, I believe, of its share of the Iatan plant,
16 the Commission would order the company to refund all the
17 rates that they had been collecting on an interim basis.
18 St. --

19 COMMISSIONER CLAYTON: Is that an excess
20 capacity issue?

21 MR. DOTTHEIM: Yes. It was an excess capacity
22 issue, yes.

23 COMMISSIONER CLAYTON: Which generally is now
24 taken up in rate cases, is it not?

25 MR. DOTTHEIM: It has been, yes. It --

1 generally, it occurs in rate cases, and the difference was
2 that issue arose while Iatan was being built. It did not
3 arise after Iatan had been completed. So St. Joseph Light &
4 Power did, to my recollection, sell 67 to 57 megawatts of
5 power back to Kansas City Power & Light, and the Commission
6 let the interim tariffs, the interim rates go into effect on
7 a permanent basis.

8 The Commission's Chapter 22 resource planning,
9 what the Commission reviews under Chapter 22 when those
10 rules are in effect is the planning process. It was not the
11 purpose of those rules for the Commission to tell the
12 companies how would they meet their capacity needs. So I'm
13 sorry, Commissioner. I don't know if I've answered your
14 question.

15 COMMISSIONER CLAYTON: Well, I forgot my
16 question. Can you tell me -- and I know this question's
17 been asked, but I'm going to ask it again. In the current
18 rate case that we're going to go to at some point this week,
19 this afternoon probably, has Staff had access to all the
20 books and records to review sufficiently the PSA in the
21 current rate case? Whoever wants to answer that.

22 MR. DOTTHEIM: I believe the answer is yes.

23 COMMISSIONER CLAYTON: Okay. So we're looking
24 into the future, is what our concerns are?

25 MR. DOTTHEIM: Yes.

1 COMMISSIONER CLAYTON: The concern, as we look
2 forward -- either of you answer -- the concern is about
3 since it will no longer be an affiliate, some sort of
4 negotiation here in the sale, is that what I understood you
5 to say, either of you?

6 MR. DOTTHEIM: Well, I think -- and I'll let
7 Mr. Featherstone answer, too. The principal concern or one
8 of the principal concerns is that the unit is being sold by
9 Aquila to Calpine.

10 COMMISSIONER CLAYTON: That's a capacity
11 issue, right?

12 MR. DOTTHEIM: Yeah.

13 BY COMMISSIONER CLAYTON:

14 Q. On the PSA, on the power sales agreement,
15 basically it won't be an affiliate in the future. So is
16 that part of Staff's position here or not? And that it
17 won't have access to books and records because it's no
18 longer an affiliate and it will just have to do a
19 market-based study of that cost.

20 A. We keep getting back and forth, kind of going
21 between the rate case.

22 Q. I know. I apologize for that.

23 A. We'll hear this issue -- we'll have a chance
24 to maybe redo it between now and then, try to get it right
25 at least one time. Part of the other testimony presentation

1 that you'll see later in the week is that this company never
2 looked at the build option for the regulated entity. Aries
3 represents the plant that the company examined to build, and
4 while MPS was told that it could not build it, another part
5 of the company did build it.

6 And that is this unit that is being sold or
7 proposed to be sold. We see that that unit still has value
8 and benefit, certainly not only as generator but also as its
9 land there we've talked about, its permitting. It's just
10 the acreage that's out there.

11 Q. So it's primarily a capacity issue is what
12 you're -- you're saying?

13 A. It's a capacity issue and ownership issue. If
14 they release this to Calpine, they won't own that plant, and
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18 Q. In the rate case, did Staff make an evaluation
19 of whether the price of power under the PSA was one that was
20 very competitive or is one that was better than all others
21 that were available on the market?

22 A. Like most issues that will come before you,
23 there's, I think, a disagreement. When the company analyzed
24 the -- it was not called Aries but it was a 500-megawatt
25 combined cycle unit, the company proposed initially to build

1 the unit as part of MPS, but as a part of EWG, a
2 non-regulated part of the regulated operations. I know
3 that's a little awkward. The decision was made that they
4 were not going to do that, that Aquila Merchant or the
5 non-regulated part of Aquila, at that time called UtiliCorp,
6 would build the 500 megawatt unit.

7 The proposal that was looked at in 1998, the
8 500 megawatt unit was actually the least cost, and they
9 entered into negotiation -- what I called they entered into
10 negotiation with themselves, MPS entered into negotiation
11 with Aquila Merchant, the affiliate, and the result is the
12 PSA, the purchased power agreement.

13 Q. Would the company always be able to buy
14 capacity if it didn't own this plant somewhere on the market
15 or would there be a problem with it not being available or
16 is it just cost prohibitive or too expensive?

17 A. They have an obligation to serve their
18 customers, an obligation to get the capacity at whatever
19 cost, so I don't think the question is the capacity's not
20 going to be available. The question is, in what form will
21 it take, who owns that capacity, who controls the capacity?
22 There's a reliability issue beyond just ownership, in terms
23 of cost, but the reliability of it's -- there's advantages
24 to owning your own generating assets.

25 So that capacity can be replaced. I don't

1 think we have a concern about that. It's that -- the cost
2 and the reliability issue.

3 Q. But can't we monitor that in a rate case and
4 hold rates to what Staff believes is prudent or what Staff
5 believes that a more reasonable or fair market value would
6 have been and address a bad decision in that manner, rather
7 than dealing with an unregulated entity? Does that question
8 make sense? My blood sugar's down.

9 A. Absolutely your question makes sense. I don't
10 know if my answer is going to make sense or not. Yes, I
11 think you have latitude in a rate case, and the parties --
12 not just the Staff but others who want to investigate or
13 review the company's building or not building decisions,
14 pricing for contracts, those are always -- can be issues
15 that can be raised before the Commission.

16 COMMISSIONER CLAYTON: I believe most of my
17 other questions are going to have to wait for the rate case.
18 So I think I'll go ahead and stop, I think. Thank you.
19 Thank you, each of you.

20 JUDGE RUTH: Let me ask if Commissioner Murray
21 has additional questions for any party.

22 COMMISSIONER MURRAY: No, I don't. Thank you.

23 JUDGE RUTH: And Commissioner Gaw?

24 CHAIRMAN GAW: I have one more, real quick.
25 Would the analysis of this matter be different if the

1 ownership of this facility were directly with Aquila, as
2 opposed to the indirect ownership through MEP?

3 MR. DOTTHEIM: I don't believe that the
4 analysis would be any different.

5 CHAIRMAN GAW: Company?

6 MR. BOUDREAU: I'm not sure if I understand
7 the question.

8 CHAIRMAN GAW: I can restate it, but I don't
9 know if I can say it in another way that will help. I'm
10 asking if this were a circumstance where the ownership in
11 the limited liability -- if the ownership and the interest
12 in the generation unit were directly held by Aquila, would
13 the analysis in regard to whether this is jurisdictional to
14 the Commission be any different from the company's
15 standpoint?

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22 CHAIRMAN GAW: Okay. Let me stop you, because
23 I want to make sure that I'm -- I'm not being clear enough,
24 because I know -- because your answer is assuming something
25 I'm not.

1 MR. BOUDREAU: Okay.

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4 MR. STAMM: If I might take a stab at that,
5 Judge.

6 JUDGE RUTH: I'm sorry. I couldn't see.
7 Who's speaking?

8 MR. STAMM: This is Keith Stamm.

9 JUDGE RUTH: You already are under oath, but I
10 need you to come up to a microphone.

11 MR. STAMM: Is this better?

12 JUDGE RUTH: That works.

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25 CHAIRMAN GAW: I guess I'm talking about

1 purely from a jurisdictional standpoint. Would it be --
2 would the analysis be different?

3 MS. O'NEILL: I think the answer would be
4 clear, Commissioner.

5 CHAIRMAN GAW: Would the result be different?
6 I'm sorry.

7 MS. O'NEILL: I don't know. I think it would
8 be very -- a very clear case that this Commission would have
9 jurisdiction if Aquila directly owned Aries, as opposed
10 to --

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16 I'm trying to understand whether this analysis
17 is impacted by the corporate structure or not. That's why
18 I'm asking the question.

19 In your-all's opinion. I'm not --

20 MS. O'NEILL: And I think that the corporate
21 structure makes the analysis more complicated. I'm not sure
22 that the answer ends up being different, but again, I mean,
23 if this was a filing asking you to take jurisdiction and
24 make a decision, I think that my office would probably be
25 arguing that you should accept jurisdiction and then

1 determine whether or not this is a good idea. But I think
2 that it's a clearer path to that decision the closer you get
3 to the corporate parent, as far as whether jurisdiction
4 holds.

5 CHAIRMAN GAW: Okay. And the company?

6 MR. BOUDREAU: I think I understand the nature
7 of your question better, and I don't think the analysis
8 would be any different. And let me -- it would be the same
9 result as any of the other Merchant plants Aquila has been
10 selling and have not been coming to the Commission for
11 permission to sell. It's just another Merchant plant that's
12 not a rate base unit, so I don't think the analysis changes.

13 CHAIRMAN GAW: Those other plants that have
14 been sold, though, have not been used for native load
15 customers of Aquila MPS or L&P, though, right?

16 MR. BOUDREAU: That's right. The places
17 they're located, the loads they've been serving are
18 different circumstances. I don't think that changes it from
19 a legal analysis.

20 CHAIRMAN GAW: Okay. I wanted to know
21 everybody's position.

22 Staff, I think you answered my question, but I
23 can't recall for sure.

24 MR. DOTTHEIM: Yes. The analysis would not be
25 different.

1 CHAIRMAN GAW: And your conclusion would be
2 the same?

3 MR. DOTTHEIM: Yes.

4 CHAIRMAN GAW: All right. That's all. Thank
5 you, Judge.

6 JUDGE RUTH: Okay. Let me verify that that is
7 all the questions from the Bench.

8 Okay. Although this hearing started out as a
9 question-and-answer session between the Commissioners and
10 the parties, we did end up having considerable testimony
11 offered in response to those questions. Therefore, I will
12 offer the parties an opportunity to briefly have
13 cross-examination for each of the witnesses based on the
14 questions from the Bench, and then a redirect, if you feel
15 that's necessary.

16 And since the first witness was Mr. Stamm, I'd
17 like Mr. Featherstone to step down and, again, this is just
18 an opportunity. I'm not forcing you to ask questions. Go
19 ahead and have Mr. Stamm come up to the --

20 MR. BOUDREAU: Perhaps before we go through
21 this exercise, is there interest on the part of the other
22 counsel to place any additional questions?

23 MS. O'NEILL: I have no questions.

24 MR. DOTTHEIM: I have no questions for
25 Mr. Stamm.

1 MR. BOUDREAU: And for what it's worth, I'd
2 offer the same. I have no questions that I particularly at
3 this time would like to place to Mr. Featherstone either. I
4 can't speak for --

5 MS. O'NEILL: Nor do I.

6 JUDGE RUTH: Okay. It sounds like all the
7 parties are willing to dispense with any cross-examination
8 or redirect, so you may step down, Mr. Stamm.

9 Then there are only a few matters that we need
10 to look at before we conclude the hearing, and they're
11 procedural matters. Let's go -- I think we can -- these
12 procedural matters can be public as opposed to in-camera, so
13 let me open this back up. Okay.

14 MR. BOUDREAU: Commissioner Gaw, I hate --

15 JUDGE RUTH: We're in open. Do you want me to
16 close it back? Is this a comment that should be in closed
17 session?

18 MR. BOUDREAU: It's responsive to a question
19 that Commissioner Gaw asked of Mr. Stamm earlier in the
20 proceeding.

21 JUDGE RUTH: If your answer is going to
22 contain closed information, let me close this.

23 MR. BOUDREAU: Let's go ahead and do that.

24 JUDGE RUTH: Okay. Let's put it back on
25 closed session.

1 MR. BOUDREAU: I apologize for that. I think
2 earlier in the proceeding Commissioner Gaw asked Mr. Stamm
3 about recourse back to the corporate parent. And we
4 committed to get an answer to you on that, and if it's all
5 right, I'd ask Mr. Stamm to address that question.

6 JUDGE RUTH: You're still under oath. You may
7 proceed, Mr. Stamm.

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12 CHAIRMAN GAW: Okay. Thank you.

13 MR. BOUDREAU: I apologize for that.

14 CHAIRMAN GAW: Thank you very much.

15 JUDGE RUTH: Since we've had a bit more
16 testimony, let me ask then the other two parties, Staff and
17 OPC, if you have recross.

18 MS. O'NEILL: No questions, your Honor.

19 MR. DOTTHEIM: No questions from the Staff.

20 JUDGE RUTH: Okay. Then, Mr. Stamm, you may
21 step down, if you will. All right. Now we will go into the
22 public session. And if there are people in the lobby that
23 you wish to bring in, you may do so.

24 WHEREUPON, the in-camera portion of the
25 proceedings was concluded.