

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

2. Under the facts and the law, it is clear that the contemplated transaction, explained

in detail in Aquila's November 19, 2003 Response, is not one over which the Commission has any statutory authority. In this regard, it is extremely telling that the Staff's Reply fails to address the arguments raised in Aquila's Response which arguments defeat any notion that the Commission has any jurisdiction over the contemplated undertaking.

3. The Staff's Reply argues that the Commission has jurisdiction over the proposed transaction because the result might mean less Commission access to books and records of the owner of the Aries plant. The Staff cites the Public Utility Holding Company Act of 1935 ("PUHCA") Section 32(k) as a basis for Commission jurisdiction in this regard. That section, however, does not give the Commission any jurisdiction over the proposed transaction beyond that provided by Missouri statutes and the reliance by the Staff on PUHCA Section 32(k) is misplaced. Congress added Section 32 to PUHCA in 1992 to provide for the creation of Exempt Wholesale Generators ("EWG"). Section 32(k)(1) provides that an electric utility company, such as Aquila, cannot "enter into a contract" to buy power from an affiliated EWG. Section 32(k)(2), however, provides an exemption from this prohibition if affected state regulators have approved the transaction by making a series of findings, including a finding that the state regulator "has sufficient regulatory authority, resources and access to books and records of the electric utility company and [the affiliate EWG]." While this section gives the Commission the ability to review an affiliated EWG power sale prior to its effectiveness, it does not give the Commission any authority to review the disposition of the interest in an affiliated EWG or a power sales contract with a non-affiliated EWG. For example, if Calpine Corporation or some other entity built a new, wholly-owned EWG and signed a contract to sell power from that project to Aquila, Section 32 of PUHCA would not give the Commission any authority to review that transaction.

4. Section 32(k) is applicable in only those instances in which a jurisdictional utility enters into a purchase power contract with an affiliate, not when the utility terminates the affiliation as is the case here. Stated another way, the subject PUHCA provisions are designed to deal with relationships between affiliates and provide for a determination by the involved state Commission that it has authority, resources and access to books and records of the jurisdictional utility and its affiliate to exercise its duties. The Commission's involvement is solely derivative of federal law. Obviously if there is no longer an affiliate involved, the PUHCA provisions do not come into play. When the contemplated transaction is consummated, the affiliation between Aquila and Aries will terminate and PUHCA Section 32(k) will no longer be applicable. Accordingly, the Staff's reliance on Section 32(k) as a source of Commission jurisdiction is misplaced.

5. The authority of the Commission over the proposed transaction must be found within the four corners of the Public Service Commission Act. The Commission is an administrative body created by statute with limited powers. As such, it has only those powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Co., v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (1943); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). The proposed transaction involves the sale of Aquila's remaining 50% ownership interest in an unregulated subsidiary. The Staff has offered absolutely no Missouri statutory basis for the Commission to assert jurisdiction over this event. That is because there is no such statutory basis and the Commission should so determine at its earliest opportunity.

6. With the consummation of the proposed transaction, the Commission will have no less access to books and records than it would have in the case of any other purchased power contract

arrangement between non-affiliated parties. The Staff's claim that the Commission would lose all access to the project's books and records as a result of this transaction is contradicted by Section 201(g) of the Federal Power Act (16 USC 824(g)), which states:

- (g) Books and records
- (1) Upon written order of a State Commission, a State commission may examine the books, accounts, memoranda, contracts, and records of -
 - (A) an electric utility company subject to its regulatory authority under State law,
 - (B) any exempt wholesale generator selling energy at wholesale to such electric utility, and
 - (C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

Moreover, because the Aries plant will continue to be located within the state of Missouri, presumably its records would continue to be subject to the Commission's subpoena powers under Section 386.440 RSMo. To that extent the Commission will have more access to books and records of a provider of purchased power than it might otherwise have.

7. Furthermore, and most important, the pending transaction will in no way reduce the Commission's ultimate ratemaking authority with respect to the existing Power Sales Agreement ("PSA"). Under the PSA, dated as of February 22, 1999, most of the near-term output of Aries will continue to be sold to Aquila Networks-MPS and the PSA will remain unaffected by the transaction. The ratemaking implications concerning the PSA costs can be addressed in Aquila's pending electric rate case, Case No. ER-2004-0034, just as they were in its last rate case. The transaction will, therefore, not represent any change for Missouri regulation.

8. In summary, Aries is not in the regulated rate base of a Missouri jurisdictional utility.

The Staff does not dispute this fact. Aries is an exempt wholesale generator subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Section 203 of the Federal Power Act requires FERC approval of the transaction. The Staff does not dispute these facts or the law. Aries is not a part of Aquila's franchise, works or system as that language is used in §393.190 RSMo. The Staff does not dispute these facts or the law. Aquila's contract rights under the PSA will remain unaffected. The Staff does not dispute these facts or the law.

WHEREFORE, for the reasons aforesaid, **and to eliminate any uncertainty surrounding these matters given the anticipated closing of the Transaction in early January 2004**, Aquila again respectfully requests that the Commission deny Staff's Motion to Open Case for lack of subject-matter jurisdiction over the contemplated Transaction at its earliest opportunity and for such other orders and relief as may be appropriate in the circumstances.

Respectfully submitted,

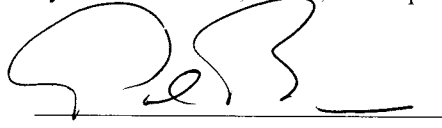


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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered or mailed by U.S. mail on this 5th day of December, 2003, to all parties of record.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a 'B' and a horizontal line, positioned above a horizontal line.