BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri near the Town of Peculiar.	)	Case No. EA-2006-0309

SUPPLEMENTAL SUGGESTIONS

COMES NOW Aquila, Inc. (hereinafter "Aquila" or the "Company"), by counsel, and for its Supplemental Suggestions in response to certain questions raised at the April 5, 2006 oral argument, respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

INTRODUCTION

On January 25, 2006, Aquila filed its application with the Commission seeking permission and approval and a certificate of public convenience and necessity with regard to the South Harper Facility and Peculiar Substation (the "Facilities").

Subsequent thereto, Intervenor StopAquila.Org filed a motion asking the Commission to dismiss Aquila's application, arguing that Aquila lacks the additional "local consent" that StopAquila claims is necessary in order for the Commission to grant the requested authority.

Additionally, Intervenor Cass County requests that the Commission dismiss Aquila's application or, in the alternative, condition any order granting it on Aquila obtaining local zoning approval from Cass County. In effect, the County urges the

Commission to ignore its statutory authority, as recognized by the Court of Appeals in *Cass County v. Aquila*, 180 S.W.3d 24 (Mo. App. 2005), disregard the exemption from county zoning found in Section 64.235,[1] and cede to Cass County the Commission's authority to consider issues associated with Aquila's application.

At the April 5 oral argument, questions were raised as to why Aquila had not returned to the County Zoning Board with an additional application. Counsel for Aquila explained that the Company is convinced that such an effort would be futile and could be used against Aquila, but counsel did not have available at his fingertips the citations to the records and pleadings to support that belief. Those citations are contained herein. Additionally, the Commissioners and legal counsel for some of the parties voiced concern over what issues would be appropriate for the scheduled evidentiary hearing in this matter. In particular, questions arose regarding the respective roles of the County and the Commission in terms of siting of the Facilities and the standard to be applied by the Commission in considering Aquila's application. These Supplemental Suggestions, with citations to prior cases, are designed to respond to those questions.

DISCUSSION AND ARGUMENT

A. Seeking County Zoning Approval is Not Required and Would be Futile

It is indisputable that the Court of Appeals recognized that the Company qualifies for the county zoning exemption under Section 64.235 and further held that the approval required to exempt Aquila could come from either the Cass County Commission or the Public Service Commission.[2] Nevertheless, the County insists the Commission should force Aquila to seek and obtain County zoning approval in addition to Commission

[1] Statutory references are to RSMo. (2000) and the Cumulative Supplement (2004) unless otherwise indicated.
[2] 180 S.W.3d 24, 32 (Mo.App. W.D. 2005).

approval for the Facilities. At the oral argument, Commissioner Gaw correctly noted that on January 20, 2006, Aquila attempted to file Special Use Permit applications for the Facilities, applications that were rejected by the County. After Judge Dandurand granted Aquila's request for a stay to seek Commission approval, the County "invited" Aquila to re-file its applications. (Letter from Cindy Reams Martin dated February 1, 2006, a copy of which is attached hereto.) Aquila determined not to accept this invitation for several reasons.

First, as stated at the oral argument, Aquila's attempted filing with Cass County on January 20, 2006 was an effort on the part of the Company to resolve the pending dispute by voluntarily submitting to the zoning process in addition to seeking Commission approval for the Facilities, even though the Court of Appeals had clearly held such action was not necessary. When the County rejected these applications, citing the pending injunction and writ proceeding, and followed up that rejection with a letter accusing Aquila of "brinksmanship" and threatening to seek an order holding Aquila in contempt, Aquila rightfully determined that the County was not interested in such a resolution. Judge Dandurand agreed when he stated:

> They (the County) continue to batter. So I think, you know, you probably pretty well assume that avenue is out and you are stuck with the Public Service Commission and what they are going to do for you, if anything.[3]

Second, the County's subsequent "invitation" to re-file these applications was a disingenuous attempt to trap Aquila into conceding the County's position that both County zoning approval and Commission approval were required. Counsel's letter made this clear when she stated that the County "assumed" Aquila would want to re-file

[3] Transcript from January 27, 2006 hearing, pp. 14 and 15.

because "evidence of local consent" was necessary before the Commission could process the application. (Martin letter, p. 1)

Other public comments by the County around this same time period clearly indicated to Aquila that seeking County zoning approval again would be a futile effort that would later be used against Aquila in this proceeding, and that the County's primary motivation remained the destruction of the facilities:

- **"County lawyers insist that until Aquila has a [zoning] permit and approval from the Missouri Public Service Commission, which regulates utilities, it must begin dismantling the plant**. County Counselor Debbie Moore said the county made that clear to the utility in letters on Aug. 16 and Jan. 5 and during a Jan. 6 conference call with Aquila General Counsel Chris Reitz. Martin said Reitz expressed disappointment with that stance during the Jan. 6 call because he said Aquila wanted its special use permit application heard first. **'I pretty much came unglued,' Martin said. 'They want to ask us for a favor? We got a judgment. I think it's pretty damn clear that there's nothing left to be done with this judgment.'"** (*Kansas City Business Journal*, January 13-15, 2006 (bracketed material and emphasis supplied))

- "Even if the plant remains in operation, legal experts said they doubt Aquila will be able to secure the [zoning] permit. **The decision falls to the same county commissioners who watched the utility ignore the customary process and initially shunt surrounding residents**." (*Kansas City Business Journal*, January 13-15, 2006 (bracketed material and emphasis supplied))

- **The Court**: And how fast do you think they are going to get this thing torn down while they are waiting for the decision of the PSC? I mean, practically, how quick do you think they are going to do it? I mean, do you think I am supposed to say, you know, have it all torn out in thirty days? Ninety days? Six months? I mean, again, we are talking about – I am not arguing with the position you are taking. I am talking about the practicality of the position you are taking.

  Ms. Martin: The practicality on that issue would be very manageable, Your Honor. **The practicality on that issue is that the Court would direct Aquila to immediately abide by the judgment and to commence dismantling the plant. . . . [M]aybe it is wasteful of $150 million of Aquila's money, but it is not wasteful of the process. It is not wasteful of the integrity of the procedure**. . . . [Granting a stay] puts us in a position where we are almost assured of additional litigation over issues that we did not create, over matters that are not of our making. **We are denied the opportunity to evaluate [a zoning] application clean, and that injects so many potential wrinkles, I am**

> **not sure I can stand here and tell you all of them**, ... The County is the one that has to be concerned all along that if its follows the law and applies the factors as it believe it is supposed to apply factors in evaluating a rezoning application or SUP application, that somehow or another, whether it is you, respectfully, Your Honor, or the Court of Appeals or the Supreme Court, **the overriding impact of this case has been so persuasive that the County cannot make an independent judgment**. . . . **Waste is irrelevant when the affect [sic] of this Court giving time will be to emasculate the practical value of our process and to put the County in a position where it makes it darn near impossible for us to fully and adequately do our job without being accused of some motivation that we don't have**. (Transcript from January 27, 2006 hearing, pp. 60-64 (bracketed material and emphasis supplied))

- "The County appreciates the Judgment requires Aquila to immediately remove the Plant and Substation, an exercise that Aquila deems would be "wasteful" should Aquila subsequently security the necessary authority it **requires from both the Commission and the County** to construct the Plant and Substation at their present locations. **However, Aquila created this predicament**." (County suggestions, p. 7)

- "Aquila's plea that it should be spared from a predicament born [sic] of its own greed, arrogance, and sense of supremacy invokes no sympathy." (County suggestions, p. 13)

In addition, although the County has recently said to this Commission that an application for a Special Use Permit could be processed quickly, in January, the County argued the exact opposite was true when it opposed Aquila's request for a stay, saying instead, "The procedure for securing a special use permit, or rezoning, from the County **can take several months or longer**." (County suggestions, p. 18 (emphasis supplied)) Further, when making the decision whether to accept the County's February 1, 2006 invitation to re-file its applications, Aquila had to consider the County's recent argument that the County lacked authority to consider the application because the facilities were already constructed:

> **[T]he County has expressed concern to Aquila that its Zoning Ordinance may not contemplate allowing an applicant to remediate an existing illegal use via an "after the fact" application for rezoning**

> **and/or for a special use permit**, particularly where, as here, the County has already sought and secured an injunction declaring the improvements to be illegal and ordering their removal. The suspension of the Judgment would not determine this complex issue, and would, in fact, inject mind-boggling circular reasoning into the mix, **as Aquila would undoubtedly argue that by suspending the enforcement of the Judgment this Court was implicitly directing the County to accept and process an application that attempts to seek "post facto" approval of an existing illegal use.**

County suggestions, p. 19 (emphasis added). Thus, it appeared clear to Aquila that the County was poised to determine innumerable ways to reject any application Aquila filed, much as the County has done here in asking the Commission to either refuse to exercise its broad authority or to cede part of it to the County.

The ultimate position of the County was further expressed in its Motion to Dismiss wherein the County characterized the South Harper project as a "colossal unplanned for use of property," and it was stated that the "County contends that the Commission could not divine any set of circumstances by which to: (1) justify Aquila's construction and maintenance of an unplanned and large scale offense to a graduated and progressive plan of land usage and development in Cass County,. . ." (Motion, pp. 22-23). The County repeatedly has made it clear to Aquila that its earlier desire to work through the County's zoning process as a supplement to the Commission proceeding would be pointless. It is also clear that the County's purported invitation that Aquila do so is a disingenuous one, as stated by counsel for the Company at the oral argument. Moreover, it would be an effort that is clearly not required by the Court of Appeals' recent holding.

B. Applications Under RSMo. 393.170

Aquila's application is not the first of its kind. It is simply a request for a certificate of convenience and necessity under Section 393.170.1, wherein the

Commission is to apply the "public convenience and necessity" standard in determining whether to authorize electric production facilities. The Commission need not establish new law or new procedures with this case, as the Commission has a history of processing applications under Section 393.170.1 in which it applies this statutory standard. The Commission need not expand its prior practice in order to take "current conditions, concerns and issues, including zoning" into account.

1. The Standard to be Applied. Aquila is seeking a certificate of convenience and necessity pursuant to Section 393.170.1.[4] Section 393.170.2 is not applicable.[5] To determine if the authority requested by Aquila should be granted, the Commission is to conduct a hearing and, among other things, may take into account "current conditions, concerns and issues, including zoning"[6] and determine if "such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service."[7]

To accomplish this, the Commission need not expand its prior practice, but may simply consider land use issues as part of its public interest review. Although the Court

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[4] 180 S.W.3d 24, 35.

[5] In *State ex rel. Union Elec. Co. v. Public Service Comm'n of Mo.*, 770 S.W.2d 283, 285 (Mo. App. 1989), the court rejected the utility's argument that the requirements of section 393.170.1 and 393.170.2 are interchangeable. Subsection 1 "sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate. . . . The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority." *Id.* The "local consent" requirement in subsection 2 applies only to applications for area certificates, not to applications under subsection 1 as is the case here.

In any event, it is clear that Aquila received the type of "local consent" contemplated by subsection 2 from Cass County when, in 1917 and pursuant to what later became section 229.100, the County Court granted Aquila's predecessor the right to utilize County rights of way. "Utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." *Union Electric.* 770 S.W.2d at 285-86. The Missouri Supreme Court later confirmed, in *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593 (Mo. 1964), that "the permission granted by a county court pursuant to Section 229.100 . . . to a public utility to use the county roads is a 'county franchise,' supplying the consent required by Section 393.170." *Id.* at 599 (quoting *In Re Union Elec. Co.*, 3 Mo. P.S.C. (NS) 157 (1951)).

[6] 180 S.W.3d 24, 35.

[7] 393.170.3.

of Appeals held that the Commission had been misinterpreting *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960), the Court's decision does not require the Commission to promulgate new rules or establish new procedures to consider a §393.170.1 application.

The Commission and the Appellate Courts have both defined the "public convenience and necessity" standard to be applied in this proceeding. Necessity does not mean essential or absolutely indispensable. Rather, it means that an additional service would be an improvement justifying the cost and that the inconvenience occasioned by the lack of a utility is so sufficiently great as to amount to a necessity. *In the Matter of the Application of Timber Creek Sewer Co.*, EA-99-202, 8 Mo. P.S.C. 3d 312, 314. In the Commission proceeding of *In Re Tartan Energy*, GA-94-127, 3 Mo. P.S.C. 3d 173, 177, the Commission articulated the legal standard to be met by applicants for a certificate of convenience and necessity:

1) There must be a need for the service;
2) The applicant must be qualified to provide the service;
3) The applicant must have the financial ability to provide the service;
4) The applicant's proposal must be economically feasible; and
5) The service must promote the public interest.

Positive findings with regard to factors 1-4, will, in most instances, support a finding that an application for a certificate of convenience and necessity will promote the public interest. *In Re Tartan Energy* at 189. The Courts of Appeals have articulated the standard and policy similarly to the Commission. *See State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. W.D. 1993), and *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission of Missouri*, 600 S.W.2d 147, 154, 156 (Mo. App. W.D. 1980).

Certificate cases involving power plants and substations are not unique. In fact, the Commission considered two applications for power plant authority under Section 393.170.1 in the mid-1970s and two more in the late 1970s, and the Commission considered an application for a substation in the early 1980s.

In 1973, Kansas City Power & Light Company and St. Joseph Light & Power Company filed their joint application pursuant to 393.170 requesting certificates of public convenience and necessity to construct and operate Iatan Station including what has become known as Iatan 1 in Platte County, Missouri. After hearings, the Commission issued its Report and Order in Case No. 17,895 granting the requested certificates. Although land use issues were addressed by the applicants and the Commission, in reviewing a condemnation issue related to Iatan, the Court of Appeals stated that "the joint application of KCP&L and SJL&P for rezoning of the property was neither a prerequisite to the project, nor necessary to it." *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 561 (Mo.App. W.D. 1983).

Union Electric Company filed its application for a certificate of convenience and necessity in 1974 to construct and operate the Callaway Nuclear Plant. In its application, Union Electric addressed siting concerns such as population, land use, transmission requirements, access to water, access to road and rail transportation, and site geology, hydrology, seismology, and meteorology. After hearings, the Commission granted the requested authority to Union Electric.[8]

The Empire District Electric Company sought and obtained specific authority to build and operate two units within its certificated area of Jasper County in Commission

[8] The Commission's Report and Order granting the certificate in Case No. 18,117 was issue March 14, 1975 and became effective on April 1, 1975.

Case No. EA-77-38 and Commission Case No. EM-78-277 involving the Empire Energy Center near LaRussell. When approving the application of Empire in Case No. EA-77-38, the Commission noted that the location was chosen by Empire after study with its consultants and that a report on power plant site selection was admitted into evidence.

On May 8, 1981, Union Electric Company filed its application with the Commission seeking a certificate of convenience and necessity to construct and operate a substation in St. Charles County. The Commission's Report and Order of August 13, 1981 in Case No. EA-81-323, addressed three general categories: the company, the need for the proposed substation, and the proposed construction. The Commission noted that St. Charles was one of the fastest growing counties in the nation and stated that the proposed location was surrounded by farmland. With regard to siting, the Commission stated as follows:

> A Commission Staff engineer has performed an inspection of the proposed site and reviewed the consideration of alternate sites. The Staff investigation has generated no objection to the appropriateness of the substation site.

2. Relationship with County Zoning. Although land use concerns may be considered by the Commission as part of the "public convenience and necessity" review, that does not make the instant case a "zoning" or "special use permit" proceeding. Aquila need not prove all elements necessary to support a change in zoning or a special use certificate, and the Commission need not find it appropriate to rezone the property in order to grant the requested certificate. This, of course, is not necessary, as Aquila qualifies for the exemption from County zoning under RSMo. 64.235.[9] Pursuant to the opinion of the Court of Appeals, if Aquila's application is

[9] 180 S.W.3d 24, 32 (Mo.App. W.D. 2005).

approved by the Commission and Aquila is thus granted the specific authority to operate the Facilities, the Facilities will be exempt from county zoning. The Court of Appeals held as follows:

> Because **we find that Aquila qualifies for an exemption** under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities **and, thus, is exempt.**[10]

Cass County recognized this exemption at page 16 of its Motion to Dismiss, stating as follows: "The Court of Appeals found that Aquila qualified for the exemption of that statute." Additionally, Cass County counsel clearly stated to Judge Dandurand at the December 7, 2004 hearing that if the Court decided that Aquila was "exempt from compliance with the county's master plan", there were "three different ways an applicant . . . would be able to say to the county you do not have the police power authority to regulate zoning or land use for the land I'm going to develop, . . ." Cass County counsel went on to say that the three ways are (1) specific authorization from the Public Service Commission, (2) an order from the Public Service Commission authorizing and permitting that particular development, or (3) compliance with the County. (Transcript, p. 11, lines 14-25; p. 12, lines 1-24)

It is simply nonsensical to argue that if Aquila has specific Commission approval for the Facilities, Aquila is exempt from local zoning under section 64.235, but before the Commission can give specific approval for the Facilities, Aquila must show that it has obtained local zoning approval. The Commission's acceptance of such circular reasoning would render the exemption in Section 64.235 meaningless.

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[10] *Id.* (emphasis added)

It is established law that a county may not interfere with authorized construction by a Missouri utility by means of county zoning regulations. Dealing with Section 393.170 and the zoning exemption contained in Section 64.620,[11] the Western District Court of Appeals held as follows:

> Although Platte County is authorized by §64.620 to restrict the use of land within the county, that is, zone the land as it deems advisable, that section provides as well that the powers granted "shall not be construed . . . to authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission . . ." The public service commission is specifically empowered in §393.170 to grant permission and approval for construction of an electric plant "whenever it shall . . . determine that such construction . . . is necessary or convenient for the public service." **These sections, taken together, necessarily mean that the county could not have interfered with the construction of the Iatan Plant by means of its zoning regulations.**

Kansas City Power & Light Co. v. Jenkins, 648 S.W.2d 555 (Mo.App. W.D. 1983) (emphasis added). The Court also noted that its holding was consistent with *Union Elec. Co. v. Saale*, 377 S.W.2d 427, 430 (Mo. 1964), which held that a county cannot by zoning restrictions limit the use of land by a public utility to construct a power plant to generate electric energy for public use. In the *Saale* case, the Missouri Supreme Court stated:

> When the purpose of this exception to the powers granted by the enabling act is considered, **it is obvious that the intent and purpose of the legislature was that a county which adopts and approves a county plan for zoning, as authorized by Sections 64.510 to 64.690, cannot by zoning restrictions limit or prohibit the use of land by a public**

[11] Section 64.235 applies to first class nonchartered counties and requires construction in Cass County to conform to the County's plan, but specifically states that the statute shall not "interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission. Section 64.620 applies to building restrictions for second and third class counties and also states that the statute shall not be construed to "authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission." The Court of Appeals has confirmed that Sections 64.235 and 64.620 should be interpreted and applied consistently.

utility to provide authorized utility services. This would necessarily include the use of land by a public utility to construct a power plant to generate electric energy for distribution to the public.

Union Elec. Co. v. Saale, 377 S.W.2d 427, 430 (emphasis added).

CONCLUSION

Aquila requests that the Commission deny the motions of StopAquila and Cass County and allow Aquila to proceed with its application.

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, mailed by U.S. mail, or electronically transmitted on this 10th day of April, 2006, to all parties of record.

Diana C. Carter