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

MOTION TO DISMISS APPLICATION OR, IN THE ALTERNATIVE, TO IMPOSE CONDITIONS ON ISSUANCE OF CERTIFICATE AND MOTION FOR ORAL ARGUMENT

Comes now Cass County, Missouri (hereinafter "Cass" or "the County") and moves to dismiss Aquila, Inc.'s application in the captioned matter. In support thereof, the County submits the following to the Commission:

PREFACE

The instant case has been filed against the backdrop of two very important Missouri appellate cases: one that involves Aquila's failure to follow the 1) comprehensive land use ordinances of a first class county and 2) the certification requirements of this Commission; and the other involves Aquila and its financing partner, the City of Peculiar, and their challenged efforts to perfect Chapter 100 financing. The appellate cases are linked in that each has as its root Aquila's South Harper Generating Station and its companion, the Peculiar Substation.

On February 22, 2006, Cass County filed a lengthy response to Aquila's motion for a highly abbreviated and unrealistic procedural schedule in this matter. In that response, the County included an extended chronicle of its dispute with Aquila at the peak of which Aquila at

this hour confronts an absolute deadline for obedience to a circuit court injunction to tear down the South Harper Plant and Peculiar Substation. There is no need to repeat the full history here. From what has already been written by the County, the Commission can discern the following themes:

1. Cass County filed its request for injunctive relief against Aquila to compel Aquila to follow the law.

2. Undeterred by the Judgment obtained against it, Aquila built South Harper and the Peculiar Substation after it was ordered to dismantle them.

3. Judge Dandurand's injunction and the appellate affirmation of that injunction were both based on an interpretation of the current status of the law.

4. Aquila posted bond in the circuit court and built South Harper and the Peculiar Substation to completion on faith that it would be victorious on appeal.

5. Aquila, and Aquila alone, took the risk that it might not prevail on appeal. Cass County did not encourage Aquila to build the plant.

6. Aquila, and Aquila alone, took the risk that notwithstanding its appeal and/or its applications before this Commission, South Harper and the Peculiar Substation would be dismantled.

7. Aquila made the gamble after presumptively calculating the risk it was taking. Aquila lost the gamble.

8. Aquila has not acquired specific authorization or approval from this Commission to construct the South Harper Plant or Peculiar Substation. Aquila has not acquired land use approval from the County for the South Harper Plant or Peculiar Substation. South Harper has been operating without Commission approval and without County approval.

9. Aquila seeks to escape the terms and provisions of the law. Its application in this Commission seeks a waiver of the law.

10. The urgency with which Aquila claims this application must proceed is based on Aquila's self created hardships, all of which could have been avoided if Aquila had followed the law in the first instance, or had exercised appropriate prudence after the injunction was entered.

In its second application for a certificate of convenience and necessity for these facilities, Aquila asks the commission to approve construction of the South Harper Plant and the Peculiar Substation *post facto* and to approve them without proof that they comply with County zoning. In paragraph 12 of its Application, Aquila quotes the closing portion of the Western District's opinion in *Cass County, Missouri v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App. W.D.2005) (WD 64985) and then claims that the Court of Appeal's opinion is prospective in reach. On those same words, Aquila seems to claim that the Western District foreordained the filing of this application. Aquila is incorrect.

The Court of Appeal's opinion is an analysis of the present state of the law, and concurs in an analysis that Judge Dandurand announced eleven months earlier, all of which Aquila ignored at its peril. The effect of the judgment is current. Aquila is still under an injunction to tear down the South Harper Facility and Peculiar Substation. Moreover, this language expresses no blessing and cannot even create the illusion that Commission approval of South Harper and appurtenant equipment is a *fait accompli*. Although the Western District will not stand in the way of Aquila's *attempt* to seek approval, it provides no predictions for Aquila's acquisition of approval, only guidance on the kind of hearing that is required ***preconstruction*** and not afterward. *Cass County* at 34.

Also in paragraph 12 of its Application, Aquila states that the necessary authority it needs to allow the plant and substation to continue operating is approval "from Cass County <u>or</u> the Commission." Cass County disagrees with this interpretation of the Western District's opinion. It is Cass County's position that an essential ingredient to Commission approval of an application for construction of a generation plant pursuant to Section 393.170.1 RSMo is proof by the applicant that the proposed plant will be in compliance with applicable zoning ordinances

and regulations. Cass County submits that the Western District did not intend by its opinion to bestow on this Commission the role of a "Super Planning and Zoning Board" but rather it expects the Commission to rely on and defer to local land regulations and their compliance when evaluating and approving applications for new generation facilities.

Significant Cass County resources have been expended to enforce the law applicable to construction of the South Harper Plant and the Peculiar Substation. Construction of those facilities has been judged unlawful and Cass County is entitled to the benefit of that judgment. Aquila's application should be dismissed on grounds that it seeks approval retroactively for construction of the South Harper Plant and Peculiar Substation. If the application is not dismissed outright, then any relief afforded Aquila by the Commission should be conditioned on acquiring Cass County zoning approval. As it has done throughout the controversy over these facilities, the County asks only that Aquila follow the law.

DISCUSSION

I. THE COMMISSION HAS NO AUTHORITY TO APPROVE THE CONSTRUCTION OF A POWER PLANT RETROACTIVELY

Aquila filed its application under the restrictive provisions of § 393.170, RSMo 2000[1] which is set forth in full below:

> 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system **without first having obtained the permission and approval of the commission.**
>
> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a

[1] Statutory citations herein are to RSMo. (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall **after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.** Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void. [emphasis added]

This statute is clear and unambiguous. It has been clear and unambiguous throughout the length of its enactment. To reiterate, this statute was the base line of interpretation for the Court of Appeals.

Aquila's application is utterly contradictory to the intention of Section 393.170.1:

By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan. [footnote omitted] *This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months before construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.* [emphasis added]

Cass County, at 37 -38.

Furthermore, the Commission lacks authority to even consider the application.

In light of the distinction acknowledged by the court in *Harline,* and examining the language of section 393.170 in its entirety, we believe that the legislature, which *clearly and unambiguously addresses electric plants* in subsection 1, *did not give the Commission the authority to grant a certificate* of convenience and necessity for the construction of an electric plant *without conducting a public hearing that is more or less contemporaneous with* ***the request*** *to construct such a facility*. [emphasis added]

Cass County at 34 (Mo.App. W.D., 2005). The Court of Appeals has placed cardinal importance upon the timing of the public hearing required under § 393.170, and the statute suffers no afterthoughts. The plain language of the statute confirms that the Commission is **powerless** to issue a certificate under § 393.170.1 unless it convenes a public hearing contemporaneously with the **request to construct**, not contemporaneously with a request **after** construction. That is the law. The Court of Appeals carved out no exception to the law for Aquila's sake. The Court of Appeals **affirmed** the injunction. Aquila is too late.

Aquila does not expressly ask for a waiver of the provisions of § 393.170, yet, in order for it to obtain the relief it seeks, the Commission must waive (or ignore) the clear, plain language of the law. The Commission is not authorized to waive the provisions of this statute. Power to waive provisions of law is truly granted to the Commission in a sister chapter of the Public Service Commission Law. In § 392.420**:**

> The commission is authorized, in connection with the issuance or modification of a certificate of interexchange or local exchange service authority or the modification of a certificate of public convenience and necessity for interexchange or local exchange telecommunications service, to entertain a petition under section 392.361 and in accordance with the procedures set out in section 392.361, *to suspend or modify* the application of its rules or *the application of any statutory provision contained in sections 392.200 to 392.340 if such waiver or modification is otherwise consistent with the other provisions of sections 392.361 to 392.520 and the purposes of this chapter.*

There is no statute or provision like § 392.420 applicable to the Commission's regulation of electric corporations. The Commission has no power to waive statutes in Chapter 393.

It appears that Aquila is not seeking a waiver of § 393.170. The County surmises that Aquila omits this request because it seems to believe that the Court of Appeals decision does not apply to South Harper. With reference again to paragraph 12 of its application in this matter,

Aquila has reached the erroneous belief that the holding in *Cass County* is prospective only. In the conclusion of paragraph 12 Aquila alleges:

> Nevertheless, the Court of Appeals expressly stated that its decision should have only prospective effect and allowed as follows:
>
> > [W]e do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate.

In paragraph 13 of its application, Aquila adds that among other reasons, it is filing the new application in light of the rejection by the Court of Appeals of the Commission's long standing regulatory policy embodied in *Re Union Electric Company, 24 Mo. P.S.C. (NS) 72 (1980).*

The opinion in *Cass County* is a present declaration of the law that applies not only to Aquila, other electric corporations and the Commission in future cases, but most definitely interprets the law that applies to Aquila and the Commission in this case. The Commission and the parties may scan *Cass County* indefinitely and will find **no express provision that makes the opinion prospective as it applies to Aquila**.[2] The Court of Appeals is not empowered to rewrite unambiguous legislation, and *Cass County* should not be read or construed, therefore, to create a right to seek or secure a waiver from the clear requirement of § 393.170 that a power plant receive prospective approval. Moreover, had the Court of Appeals intended for the opinion to have such an effect, the injunction issued by Judge Dandurand below would not have been affirmed by the Court of Appeals without qualification. Absent from the mandate issued by the Court of Appeals, and absent from Judge Dandurand's order of January 27, 2006, is any

[2] The Court of Appeals restricted the reach of its opinion to South Harper and the Peculiar Substation and to any other facilities to which objecting litigants preserved the precise issue addressed in its opinion. To that extent the opinion is prospective but no further. *Cass County* at 39. Aquila wants the Commission to believe that despite the Court of Appeals extensive discussion respecting the importance of ***preconstruction*** review of a generating plant project, it somehow is exempt from those rulings. The Court of Appeals did not engage in that degree of examination just to have it ignored.

provision that the affirmed injunction remains effective ***unless*** Aquila acquires Commission specific authorization in six or so months. There is simply nothing in the decree which provides an exit for Aquila. Aquila is too late.

Aquila tries mightily to slip out of the sweep of *Cass County* for purposes of this case, but there is no escape; the Commission must judge the timing and merits of Aquila's present application under the guidance of § 393.170 as interpreted by the Court of Appeals in *Cass County*. Having filed its application **after** construction of the facilities, its application is beyond the jurisdiction of this Commission and should be dismissed.

II. THE COMMISSION SHOULD ORDER AQUILA TO ACQUIRE COUNTY ZONING APPROVAL.

It is important to note at the outset that what is offered in this second section of the County's motion assumes, for purposes of argument only, that the Commission will decide to exercise jurisdiction and hear the merits of Aquila's application for a certificate. By providing argument on the following points, the County does not withdraw its position in Section I and respectfully reserves those arguments.

Although it has appeared as an adversary in these numerous contested proceedings, the County has not lost its essential characteristic as a political subdivision of the State of Missouri with powers and duties conferred by law all of which are designed to complement those of other agencies, boards and commissions in the interest of serving the public welfare. Obviously, the South Harper Plant and the Peculiar Substation trigger not only the regulatory power of the Commission but also the police power of the County. Therefore, it is not unfair to expect the County to act in team with the Commission in reaching a solution to this problem. The opinion in *Cass County* now affords both the Commission and the County an opportunity to work in tandem toward a resolution.

At the end of his opinion, Judge Newton carefully capsulated and adopted what Cass County had posited as the overriding public policy in the case: Cass County should have some authority over the placement of generation and related transmission facilities so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. It was then that the Court penned the following sentences:

> As the circuit court stated so eloquently, "to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants.... The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities."
>
> For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County's zoning law without first obtaining approval from the county commission or the Public Service Commission. In so ruling, however, we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate.

Cass County at 41.

The leading policies announced by the Court are: 1) regulated public utilities lack the unfettered power to construct generation plants anywhere they may please; and 2) **before** public utilities may be authorized to construct a generating plant, the matter must be heard by an adjudicative body where public input on local land issues and other current concerns is received and impartially considered. By virtue of the opinion in *Cass County,* there are now two qualified adjudicative bodies where that input can be considered: the planning board of Cass County, and this Commission. Cass County hears such evidence in connection with zoning applications

pursuant to authority in Chapter 64, RSMo 2000. The Commission has been given that authority as well under § 64.235.[3]

Another theme central to the Court of Appeals' opinion is that in the hearing at which a generating plant is up for approval, whether that hearing is before the County planning board or at this Commission, **land use controls and the impact on adjacent uses of property must be reviewed and evaluated by the fact finder**. Failure to do so will be error. For purposes of this pending application, and for applications for such certificates that are filed here in the future, it should be determined as a matter of policy and ongoing practice which of the two adjudicative bodies, *i.e.* the County planning board or the Commission, is more suited to evaluate existing land use controls and impacts on adjacent uses of property in connection with construction of generating plants. For reasons that follow, the County submits that its own planning board is the correct and only choice.

Therefore, the Commission should decide as soon as possible that if a certificate of convenience and necessity is approved for the South Harper Plant and the Peculiar Substation**, its issuance, or the exercise of the rights conferred thereunder, shall be subject to acquisition of County zoning approval**. Adding that condition to the certificate is appropriate because 1) it is lawful; 2) it is consistent with the past practices of the Commission; 3) it is a practical and efficient use of public resources; and 4) it prevents public utilities from indirectly condemning rights in property.

A. Conditioning issuance of a South Harper Plant certificate of convenience and necessity on County zoning approval is allowed and encouraged by law.

[3]In commenting on the intention of § 393.170.1 and the zoning laws in Chapter 64, the Court of Appeals observed:

> This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months before construction begins, *so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.* [emphasis added]

Cass County, at 37 -38.

Section 393.170.3 provides:

> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. **The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.** Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void. [emphasis added]

Throughout the entirety of this controversy, there has never been an allegation that the zoning regulations of the County are unreasonable. The allegation and contention has been that they are inapplicable, and that contention has been rejected by the courts. Adding the condition of County zoning approval to the certificate is reasonable.

Moreover, the Court of Appeals contemplated that any effort by Aquila to acquire authority at this late date would necessarily be accompanied by appropriate conditions. The Court of Appeals' concluding sentence in *Cass County* so confirms.

B. Conditioning issuance of a South Harper Plant certificate of convenience and necessity on County zoning approval is consistent with past policies and practices of the Commission.

Section 393.170.2 provides:

> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, **showing that it has received the required consent of the proper municipal authorities.** [emphasis added]

As the County has briefed for this Commission previously, a utility franchise is a license. "As a license it promotes civic responsibility and exemplary corporate conduct on the part of the utility." *State ex rel. Union Elec. Co. v. Public Service Commission of State of Missouri,* 770 S.W.2d 283, 286 (Mo.App. W.D. 1989). Aquila began generating electricity at the South Harper Station on June 30, 2005. (see Report and Order dated December 19, 2005, in EO-2005-0156, Finding of Fact #5, pg. 7.) It did so without authority from the Commission. Among other requirements, Section 393.170.2 and 4 C.S.R. 240-3.105 require a utility to demonstrate it has necessary local consent as a condition of Commission issuance of a certificate.

A long line of decisions from the Commission and from Missouri Courts describe the separate, but complementary, components of police powers delegated to 1) the Commission in Chapters 386 and 393; and 2) to local authorities in applicable state statutes including Chapter 64. In *In the Matter of the Application of Ozark Utilities Company*, 26 Mo. P.S.C. 635, 639 (1944), the Commission recognized:

> a mere cursory study of this statute, [referencing the predecessor to Section 393.170] as interpreted by the decisions of our Supreme Court, shows the clear purpose of the law is to leave the granting of municipal franchises to local authority untampered by any restraints or limitations from this Commission, and the omission from the statute shows a clear design not to confer upon this Commission any right to approve or disapprove the terms and conditions of a municipal franchise. Such power, if conferred upon this Commission, might result in an intolerable condition, if it should, in passing upon a franchise, undertake to suggest, or to impose, terms which would not be agreeable to both contracting parties, the municipality and the utility corporation."

Id. at 639. In that same case, the Commission cited *State ex inf. Shartel, ex rel. Sikeston v. Mo. Utilities Co.*, 53 S.W.2d 394, 398 (Mo. banc 1932) for the following analysis:

> It is not intended . . . to substitute (the) commission for the local or municipal authorities, when by the constitution and laws of the particular jurisdiction the consent of such local authorities is necessary before the grant of a franchise could be complete, because the constitution and laws contemplated that such local or municipal authorities shall have power to impose such reasonable

> conditions as the convenience and necessity of the locality may require, and with such conditions for the exercise of the franchise (the) commission has no concern. Therefore, it (the commission) cannot demand that the local authorities *add to or take from* the conditions upon which they were willing to consent. . . .

Id. [emphasis in original text]. In short, grant of a certificate by the Commission does not give a public utility **any right to operate in a municipality greater than the municipal consents secured by the utility**. For purposes of this analysis, municipal consents have been interpreted to include county consents. *See In the Matter of the Application of Southwest Water Company*, 25 Mo. P.S.C. 637 (1941).

The interplay between the authority extended a utility by an area certificate and the franchise authority required from a locality was carefully explained in *State ex rel. City of Sikeston v. Public Service Commission*, 82 S.W.2d 105, 108-109 (Mo. 1935). The Supreme Court, in discussing the statutory scheme that was the predecessor to Section 393.170, noted:

> This court . . . definitely held that municipal consent is still required, in addition to whatever requirements may be imposed by the commission . . . and we find nothing in the Public Service Commission Act or in our decisions construing the same that lends any substantial support to respondent's suggestion that this statutory requirement has been repealed, **or that the commission's grant of a certificate of public convenience and necessity is a grant of any privilege, franchise, or right which municipalities, as agents of the state, are empowered to grant or withhold at their pleasure**.' *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Company, supra*. **In other words, a certificate of the commission is only, where required, an additional condition imposed by the state to the exercise of a privilege which a municipality may give or refuse, and the commission is not to give its certificate to a company until after the city has consented that it may operate within its boundaries**.

Id. [emphasis supplied]

The Public Service Commission has long recognized the dichotomy of its regulatory authority over utilities and the authority exercised over them by local municipalities. In *In the Matter of the Application of Missouri Power & Light Company,* 18 Mo. P.S.C. (N.S.) 116 (1973), the Commission approved an application for a site specific certificate for a combustion

turbine generating plant in an area already covered by the applicant's general certificate of public convenience and necessity. In its decision, the Commission found the following:

? "The applicant has satisfied all requirements of state and local agencies concerning the construction and operation of the plant." *Id.* at 2.

? "We should also state parenthetically at this point that we are of the opinion that the citizens, **through proper zoning ordinances,** have already designated the area in question as an industrial area." [emphasis supplied] *Id.* at 4.

? "We also find that the applicant has met our **Public Service Commission requirement that it has complied with municipal requirements before construction of the facility.**" [emphasis supplied] *Id.* at 4

Is there any doubt then that the Commission, when reviewing applications for specific certificates, expects public utilities to comply with applicable zoning and land use regulations if the public utility desires a specific certificate authorizing the plant? Quite naturally, compliance with local zoning is just another species of "**required municipal** [or county] **consent."** In fact, in the aforesaid decision, the Commission, in evaluating an intervener's request to move the location of the plant, held:

> **For us to require the Applicant to move the proposed site to the alternative site suggested . . . would be to suggest a location that is not now zoned for industry, but is zoned residential. In short, we emphasize we should take cognizance of - - - and respect - - - the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning**. [emphasis supplied]

Id. at 4

Cass has supplied the above citations once more with the expectation that they will again illuminate for the Commission the deep tide of dual oversight the Commission and local

authorities have long and historically shared with respect to utility operations. If the Commission elects to hear evidence related to zoning as part of its analysis of Aquila's application, then this case will herald a sea change from this long standing relationship. The County submits that as a matter of policy the Commission must preserve and protect that dual oversight system, and in the County's estimation any shift away from that system is not only unnecessary, but is one that creates even greater complications for the Commission.

C. Conditioning issuance of a South Harper Plant certificate of convenience and necessity on County zoning approval is a practical and efficient use of public resources.

The Court of Appeals in *Cass County* offered this general discussion about the relationship between the Commission and land use authorities.

> While it is true that the Commission has extensive regulatory powers over public utilities, **the legislature has given it no zoning authority,** . . . . It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, a municipality may regulate the location of public utility installations." 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986).
>
> * * *
>
> While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because facility location has particularly local implications, it is arguable **that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant.** *See generally St. Louis County v. City of Manchester,* 360 S.W.2d 638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact location and that public interest is best served in requiring it be done in accordance with county zoning laws) [emphasis added]

Cass County at 30.

There is no statute in Missouri which **pre-empts** a county or municipality from regulating the location of public utility installations. Section 64.235 has been cited by Aquila as the means by which it is **exempted** from zoning approval by the County. The Court of Appeals found that Aquila qualified for the exemption in that statute. Section 64.235 provides:

> From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefor to the planning board, *nor shall anything herein 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, or by permit of the county commission after public hearing in the manner provided by section 64.231.* [emphasis added]

It is because the Court of Appeals also determined that Aquila had not been authorized by the Commission to build these facilities, Aquila files its present application to acquire the exemption. This does not mean though that the Commission must or should ignore the overriding public policy adopted by the Court of Appeals that "local governing bodies [particularly Cass County] should have the authority to regulate where a public utility builds a power plant."

The Commission has extensive regulatory powers **but it has no zoning authority**. As part of the hearing required under § 393.170.3, as directed by the Court of Appeals in *Cass County,* the Commission now must consider *current conditions, concerns and issues****, including zoning***. Therefore, as part of the hearing before the Commission in this case, if that hearing will

go forward, the Commission will not only hear evidence pertaining to classic regulatory issues, but----absent faith and reliance on the County in determining whether Aquila has complied with zoning laws---will also act as the functional equivalent of a County planning board, in determining whether a plant of South Harper's size and nature can be built among the other proximate uses that share the same area.[4] The Commission is neither authorized nor equipped to serve in that role.

Representatives of the Commission have confirmed that it lacks staff or resources to consider zoning issues. In testimony before Judge Dandurand last January, Warren Wood, the head of the Energy Department at the Commission, testified that the Commission does not have siting authority for power plants. Tr. 312-313 [5] According to Mr. Wood, this means the Commission regularly does not participate in determining where a public utility constructs a power plant in its certificated area. Tr. 312-317 Mr. Wood specifically acknowledged that: "within service territories or outside of the service territories, our regulations do not deal with . . . the local zoning provisions or special circumstances that may be in place there. What we look at is the enforcement of the codes, rules and regulations, such as National Electric Safety Code, and construction operation of those facilities." Tr. 319. Admittedly, it has been the practice of the Commission to leave zoning issues to local governmental authorities.

Unlike the Commission, the County planning board has not only the requisite statutory authority, but has extensive resources by which to consider local land use issues. The County

---

[4] In the Suggestions in Support of [its] Proposed Procedural Schedule filed on March 13, 2006, Aquila has tried to minimize the Commission's role in examining zoning issues in this case, arguing that they are secondary and can be dismissed with no more review that what the Commission did in the past. See ¶¶ 6, 9 of Aquila's Suggestions. Acceptance of this would be error. If the Commission has given just a passing glance to local zoning matters in the past when considering applications for certificates of authority, (a hypothetical which the County does not accept as true) in the post-*Cass County* environment, current issues, local zoning and effects on land will be material considerations and integral to the decision. Those issues are no longer in the shadow of the Commission's decision but rather are very much in the spotlight.

[5] The citation to "Tr." is to the transcript of the record before Judge Dandurand in *StopAquila.Org*.

planning board is familiar with the electoral processes under which County zoning was adopted; the creation and implementation of the County Master Plan; the boundaries of the zoning districts and area uses that conform or do not conform to the district scheme; the history of generation plant location in the County; the effect on roads and other infrastructure that are caused by public improvements and the enforcement of its ordinances and regulations, to name a few.

As Aquila has noted in the Suggestions in Support of [its] Proposed Procedural Schedule, filed March 13, 2006 (Aquila's Suggestions), the County planning board's and the County Commission's procedures applicable to zoning applications are swift. They take no more than 45 days to consider applications for zoning requests from start to finish; even those that Aquila files. Aquila also acknowledges that the hearings before the planning board are trim and efficient, its chairman declaring that "Your redundancies are not appreciated. . . . . I'll ask you to step down . . . . We want to run this meeting efficiently." Aquila's Suggestions ¶ 8. Yet, what may be redundancies to the County planning board because of its historical regulation of improvements in unincorporated Cass County, will be new, fresh and original to the Commission. Since the Commission will be without the benefit of the institutional history of Cass County and its zoning approaches (much of which the County will be required to present as evidence at any hearing in this case) what takes two and a half hours to hear in the County planning board, will take days for the Commission.

The County planning board, and the County entity[6] that approves or modifies the planning board's decisions, are administrative agencies of the state. Their decisions are subject to judicial review:

[6] The entity could be the County Commission in the case of a rezoning application, or the County Board of Zoning Adjustment in the case of a special use permit application.

> Any person aggrieved by any decision of the county board of zoning adjustment, or of the county commission, or of any officer, department, board or bureau of the county may present to the circuit court having jurisdiction in the county in which the property affected is located, a petition in the manner and form provided by section 536.110, RSMo.

§ 64.281.4. The scope of review for those decisions is set out in § 536.140:

> 1. The court shall hear the case without a jury and, except as otherwise provided in subsection 4 of this section, shall hear it upon the petition and record filed as aforesaid.
>
> 2. The inquiry may extend to a determination of whether the action of the agency
>
>   (1) Is in violation of constitutional provisions;
>   (2) Is in excess of the statutory authority or jurisdiction of the agency;
>   (3) Is unsupported by competent and substantial evidence upon the whole record;
>   (4) Is, for any other reason, unauthorized by law;
>   (5) Is made upon unlawful procedure or without a fair trial;
>   (6) Is arbitrary, capricious or unreasonable;
>   (7) Involves an abuse of discretion.
>
>   The scope of judicial review in all contested cases, whether or not subject to judicial review pursuant to sections 536.100 to 536.140, and in all cases in which judicial review of decisions of administrative officers or bodies, whether state or local, is now or may hereafter be provided by law, shall in all cases be at least as broad as the scope of judicial review provided for in this subsection; provided, however, that nothing herein contained shall in any way change or affect the provisions of sections 311.690 and 311.700, RSMo.

The safeguards and review procedures that motivate this Commission to decide cases fairly and in accord with the constitution and laws of the state of Missouri, are the same that apply to the County planning board and the County Commission. There should be no realistic claim that a zoning application filed by Aquila before the County planning board will be treated without these protections. In fact, Aquila itself, with respect to its own zoning applications, has never filed a review petition concerning the decisions rendered by the planning board.

By deciding very soon in the life of this proceeding that the certificate, if any, that issues from the Commission will be conditioned on County zoning approval, the Commission will be liberated from the duty of duplicating the Cass County planning board (or board of adjustment) in its own offices, will confine the issues it addresses to those regulatory issues historically reserved by law to the Commission; will reduce the size of the record, minimize the public resources that are being expended by both County and Commission; will be following established law and policy that has been endorsed by *Cass County*; all without sacrifice of speed,[7] fairness or the process that is due Aquila.

D. Unless the dual system of oversight is preserved, public utilities can use the Commission as a means of indirect exercise of eminent domain.

One of Aquila's arguments before the Court of Appeals was that public utilities have the power of eminent domain and are therefore immune from local zoning because such power is "superior to property rights" and "subject only to such limitations as are fixed by the constitution itself." The court rejected the argument:

> A public utility's power of eminent domain and a county's power to zone are derived from a legislative grant of authority. Both powers are police powers derived from statute and are without a constitutional basis, thus neither trumps the other, and both powers can be exercised in harmony. See, e.g., St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant, court concludes that charter county's zoning ordinance restricting plant's location is lawful restriction, stating, "the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county, and the public interest is best served in requiring it to be done in accordance with the zoning laws.").

Cass County at 41.

Unless the Commission adheres to its past practices and defers to local authorities (in this case, Cass County) regarding local land use issues, public utilities have the liberty to use §

[7] More than 45 days remains between the filing of this motion and May 31, 2006.

393.170 as a vehicle to indirectly condemn the zoning restrictions of the county in which construction is planned (or as here where construction is completed). For example, a regulated power company seeks but cannot acquire zoning approval for a proposed plant in an unincorporated area of a Missouri county. Whether the county is a first class charter, first class non-charter, second or third class county makes no difference.[8] The power company foregoes further appeals regarding its county zoning application and files for authority to construct the plant at this Commission, not to show that it complies with county zoning, but rather to nullify that zoning by virtue of the Commission's "special authorization." Unless the Commission is prepared to enforce the zoning ordinances of the affected county as part of the conditions it imposes for construction approval, it will tolerate a public utility practice --- avoidance of the laws of a coordinate branch of government---that the utility would otherwise be powerless to do.

This case is a specimen of the practice that will develop under the "Aquila Rule" as intervenor StopAquila.Org has coined in its motion to dismiss. Aquila has not filed this application claiming that the location for the South Harper Plant and Peculiar Substation complies with Cass County zoning; Aquila has filed the application as a way of nullifying Cass County zoning. If it succeeds, it will have achieved through a "back door" a right of condemnation it has no lawful power to exercise.

E. If the Commission does not condition Aquila's certificate on County zoning approval, what standards will it formulate by which to justify disregard of local zoning regulations, and under what authority will it adopt those standards.

[8] Section 64.235 pertaining to First Class Charter Counties provides that nothing therein,

> shall 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 of the public service commission, ...

Zoning statutes applicable to the other county classifications contain similar provisions. See §§ 64.090 (First Class Charter Counties) and 64.620 (Second and Third Class Counties).

In order to implement county wide zoning in a First Class Noncharter county, for example, the issue must first be approved by a vote of the people. The election and form of the ballot measure are controlled by statute. § 64.211. If the measure passes, a county planning board is appointed by the county commission; § 64.215; which in turn has authority to promulgate rules and regulations. § 64.221. It may hire a planning director and other employees and it has power to propose and adopt a master plan for the "purpose of bring about coordinated physical and future needs." The master plan cannot be adopted unless first presented at a public hearing. § 64.231. The planning board is a quasi-judicial body and its decisions are subject to appeal. § 64.281 and *infra.*

These procedures underscore the importance the legislature places upon careful consideration of land use controls in unincorporated areas. It should go without saying that creation of the planning board, creation of the master plan and the retention of qualified planners and other employees is a significant outlay of County means and resources.

Aquila's application tempts the Commission to ignore the zoning laws of a political subdivision of the State of Missouri. If the Commission ignores those zoning laws, it will be the County, not the Commission, which will contend with what is left of a Master Plan and piece it back together to account for a colossal unplanned for use of property. It will be County residents, who have relied on the strength of the Master Plan in buying, mortgaging and improving their respective properties, who will shoulder unexpected burdens caused by industrial use of a property that was zoned for passive agricultural uses.

Is there a set of circumstances so compelling that could conceivably justify a decision by this Commission which treats Cass County as an inferior branch of government and which ignores its elections, its officers and legislation, and disregards the reliance to date by its

residents upon the zoning in force? Aquila would have the Commission believe that its defeat on appeal, the County's justified rejection of its special use permit application and Aquila's self righteous refusal to resubmit that application are enough. The Commission must reject these as unconvincing and meaningless. Aquila tries often to blame Cass County for its woes, but it has no one to blame but itself.

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, and 2) overturn the expectations of County governance, County planning and constituent reliance on that planning in favor of the abrupt construction of a land use completely contrary to what has been ordained by County regulation.

CONCLUSION

In its final sentences of the opinion in *Cass County,* the Court of Appeals did not reverse its ruling as it applied to Aquila. Aquila constructed the South Harper Plant and the Peculiar Substation unlawfully and the court of appeals, in affirming the trial court, ordered the facilities demolished, and not spared, while Aquila sought a way to remedy its mistakes. Any effort to allow the plant to continue operating must be consistent with the ruling in *Cass County*. Construction of a generating plant must be approved in advance after a hearing. § 393.170. The application in this case seeks approval of a plant after construction. It is untimely and should be dismissed.

If the Commission elects to proceed, the certificate, if any, that it issues as a result of this case, should be conditioned upon Cass County zoning approval. The law generally and the Court of Appeals encourage the condition. The task of reviewing zoning applications affecting

land in Cass County, Missouri is properly within the County's compass, and not the Commission's. The dual system of supervision over public utilities that has been historically observed between the Commission and local governments should not be shelved because of Aquila's present circumstances. Aquila alone is to blame for its missteps, and the price of rescuing Aquila from itself is high. Aquila's applications for zoning modifications have been swiftly and fairly considered by Cass County in the past, and by law Cass County cannot do otherwise for any future application Aquila may file. The current climate is for narrower rights of eminent domain. The Commission has no reason to expand them indirectly.

REQUEST FOR ORAL ARGUMENT

The County respectfully requests oral argument on its motion. If the Commission grants either form of relief requested by the County, then the hearing in this matter will be canceled or will be dramatically shorter thus reducing the time and expense commitment for case disposition by all parties. Moreover, if the Commission grants the County's alternate request for relief, it is possible that a decision about the plant in both forums, whether the Commission or the County, can issue earlier than proposed by the procedural schedule. There is more than ample justification to specially set this motion for oral argument.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: **/s/ Mark W. Comley**

Mark W. Comley #28847
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266
(573) 636-3306 (FAX)
comleym@ncrpc.com

/s/ Debra L. Moore by M.W.C.
Debra L. Moore #36200
Cass County Counselor
Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701
(816) 380-8206
(816) 380-8156 (FAX)
dmoore@casscounty.com

/s/ Cindy Reams Martin by M.W.C.
Cindy Reams Martin #32034
Attorney at Law
408 SE Douglas
Lees Summit, MO 64063
816-554-6444
816-554-6555 FAX
crmlaw@swbell.net

ATTORNEYS FOR CASS COUNTY, MISSOURI

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 20th day of March, 2006 to:

Office of General Counsel at gencounsel@psc.mo.gov;
Office of Public Counsel at opcservice@ded.mo.gov;
James C. Swearengen at lrackers@brydonlaw.com.
Stuart Conrad at stucon@fcplaw.com and
David Linton at djlinton@earthlink.net;
John B. Coffman at john@johncoffman.net;
Matthew B. Uhrig at muhrig_lakelaw@earthlink.net;
Gerard Eftink at geftink@kc.rr.com;

and by U.S. Mail, postage prepaid, to E. Sid Douglas, 2405 Grand Blvd., Suite 1100, Kansas City, MO 64108.

/s/ Mark W. Comley
Mark W. Comley