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

POST-HEARING BRIEF OF THE NEARBY RESIDENTS

COMES NOW Frank Dillon, Kimberly Miller and James E. Doll (hereinafter collectively as "Nearby Residents"), and submits their post-hearing brief regarding the above captioned matter:

The Nearby Residents reaffirm their positions on the law as previously stated in their Prehearing Brief and beg the Commission to consider the interests of those who live closest to the illegally-built South Harper power plant. The Commission should resist the artificially contrived "emergency" posited for itself by Aquila and follow the law. Even if the Commission believes that a need exists for a "power plant certificate" in the general area of Cass County, it should grant it only if it can find that permission has been granted by the local zoning authority (or provided that such certificate can be conditioned upon local zoning approval). There is no good reason for the Commission to take the extra step that Aquila is

requesting and attempt to take away any chance that the Nearby Residents would have to present their land use concerns to their locally elected government representatives. The Nearby Residents ask only that they be given the same rights and opportunities given the residents who lived near the Camp Branch site which was proposed by Aquila prior to the South Harper site.

An attempt to by this Commission "preempt" the rights of the Nearby Residents would be even more outrageous than direct condemnation of their property by eminent domain. At least through eminent domain, property owners are granted compensation for their loss.

The Nearby Residents concur in the well-stated description of the facts and the well-reasoned analysis of the law as contained in the "Post-Hearing Brief of Intervenor Cass County, Missouri" Ibid., pp. 4-55. Particularly important is Cass County's insightful analysis of the Western District Court of Appeals decision, Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005). Cass County's post-hearing brief does a superb job of summarizing the actually holdings of the Cass County opinion (Cass County Post-Hearing Brief, pp. 23-25), as well as explaining the final sentences of that decision, upon which Aquila and the Staff have gambled their entire case (Cass County Post-Hearing Brief, pp. 32-34). Those final sentences of the Cass County opinion do not create prospective authority for the Public Service Commission to ignore Missouri statutes nor do they grant Aquila the right to request a certificate retroactively, in direct violation of Section 393.170 RSMo.

Reparation Fund Condition

At the conclusion of the hearing on Aquila's Application for retroactive approval of a certificate, Chairman Jeff Davis, during his questioning of Aquila witness Jon Empson, specifically asked whether the Commission's granting of the Application should be conditioned upon Aquila creating a fund from which the Nearby Residents may make claims for and receive reparations. Tr. 1776-1778.

Although the Nearby Residents maintain that it would be unlawful for the Commission to approve the Application without proof that Aquila has prior permission from the local zoning authority to build the South Harper power plant, the Nearby Residents appreciate the acknowledgment that they have sustained damages in various forms. If Aquila is granted a certificate to build the plant, the Nearby Residents expect that Aquila will be required make them whole and compensate them for the value their properties has been lost and for the damages that they have sustained from the nuisances it creates. In that regard, the Nearby Residents submit the following argument and analysis regarding the Commission's authority to establish a reparation fund for the Nearby Residents and regarding the most reasonable manner in which to do so. [*However, any suggestion of a reparation fund condition made by the Nearby Residents in this brief is offered without waiving any of its legal positions previously taken in this case.*]

The Commission Has the Authority to Impose Whatever Conditions are Necessary to Ensure that a Certificate is in the Public Interest

The Commission has broad statutory authority to impose any condition on the approval of a certificate that the Commission deems "reasonable and necessary." § 393.170.3 RSMo. This authority is clearly recognized in the recent Cass County decision. Conversely, the Commission does not have the authority to approve a certificate that would violate the public interest. It is inherently logical that if a certificate would be unreasonable without a particular condition, then the Commission has the authority to order that whatever condition is necessary to be linked to the approval of that certificate. If Aquila does not want to comply with any such condition, then it may decline to act on the order granting the conditioned certificate.

The Nearby Residents are not suggesting that the Commission may determine any issue of damages or engage in any exercise of law or equity powers which are outside of its statutory authority. However, the Commission could condition the approval of Aquila's Application upon a condition that required Aquila to set aside an amount of money and establishing a fund with it from which damages may be paid after settlement, judgment or verdict in a proper court of law. The Nearby Residents suggest that the Commission make it a condition of any certificate ordered in this case that a fund be established and held in trust or escrow for a period of time equal to the statute of limitations (i.e.,

five years for an unabatable, permanent nuisance) for the purpose of satisfaction of any civil court judgment against Aquila obtained by those property owners who reside closest to the proposed facilities.

The Appropriate Amount For A Reparations Fund Condition

In determining an appropriate amount for the reparations fund, it should be noted that, regardless the outcome of this proceeding, the South Harper Plant and Peculiar Substation are nuisances under Missouri law. The issue is not whether Aquila's use of the land is unreasonable, but whether Aquila's "interference with the use and enjoyment of the [Nearby Residents'] land" is unreasonable. Moore v. Weeks, 85 S.W.3d 709, 716 (Mo. App. 2002). Weight would be given to the fact that the land upon which the South Harper Plant and the Peculiar Substation sit is zoned agricultural and that Aquila built the South Harper Plant and the Peculiar Substation without prior approval from the Commission as is required by § 393.170 RSMo. Weight would also be given to the fact that Aquila built these facilities after they it had been ordered by the Cass County Circuit Court not to do so. (Exhibit 33).

Each of these factors would most likely support a finding that those structures, the plant and the substation, constitute a nuisance per se - as a matter of law, and that Aquila's conduct was unreasonable. Acts done in violation of a statute or activities openly carried on that a Court considers flagrantly against moral standards are a nuisance per se. Tichenor v. Vore, 953

S.W.2d 171, 177 (Mo. App. 1997).

As such, the Nearby Residents, and others directly impacted by the plant and substation are entitled to money damages in an amount equal to the reduction in the overall value of their properties as a whole. Moore v. Weeks, 85 S.W.3d 709, 716 (Mo. App. 2002). However, the damages to which the Nearby Residents are entitled to also include "compensatory damages 'for any actual inconvenience and physical discomfort which materially affected [their] comfortable and healthful enjoyment ... of [their] home'". Moore, 85 S.W.3d at 716, [quoting Byrom v. Little Blue Valley Sewer Dist., 16 S.W.3d 573, 576 (Mo. banc 2000)].

There is no question, based on the testimony from the local public hearings in this matter, that the damage done to this community's comfortable and healthful enjoyment of their homes is profound and sweeping. See testimony of Frank Dillon, Local Public Hearing, March 30, 2006; see testimony of Linda Doll, Local Public Hearing Transcript, March 20, 2006, pp. 230-234; see written statement of Kimberly Miller; also, see testimony of Vernon Everly, Local Public Hearing Transcript, March 20, 2006, pp. 60-71; and, see testimony of Rick Manfredi, Local Public Hearing Transcript, March 20, 2006, pp. 84-92.

Moreover, the factors that support a finding of nuisance per se would also support a finding that punitive damages are equally warranted. Punitive damages are appropriate in a nuisance action when it can be shown that the offending structures were knowingly and willfully maintained. Vaughn et ux v. Missouri

Power & Light, Co., 89 S.W. 2d 699, 702 (Mo. App. 1936). Governmental approval of the plant "is no defense". Id. at 702. "Nuisance is a condition and does not depend on the degree of care used." Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876, 880 (Mo. App. 1985).

In this case, Aquila received a clear message that it needed to postpone construction of the South Harper Plant and Peculiar Substation when it was enjoined from further construction by the Cass County Circuit Court by injunction. Aquila "rolled the dice" and constructed the plant and substation anyway and did so without prior approval from the Commission as is required by § 393.170 RSMo. Aquila has since knowingly and willfully maintained the plant and substation, thus subjecting itself to exemplary damages.

Aquila believes the Southern Star compressor station provides it some sort of shield from liability. However, a "nuisance may be found as a factual matter independent of prior cases and conduct." Frank, 687 S.W.2d at 880. "[E]ach case must stand upon its own special circumstances, and no definite rule can be given that is applicable in all cases…." Crutcher v. Taystee Bread Co., 174 S.W.2d 801, 805 (Mo. 1943). The facts and circumstances relating to the compressor station (a non-conforming grandfathered use that is incompatible with agricultural zoning—Tr. 1534) have no bearing on the situation created by Aquila.

Without waiving any of legal arguments advanced by the Cass County Commission, StopAquila, and the Nearby Residents are rejected, it is the position of the Nearby Residents that any reparation fund as suggested by Chairman

Davis must be large enough to accommodate all those who have been materially affected by the South Harper Plant and related Substation. Additionally, because recoverable damages go beyond mere loss of property value, any such reparation fund must be of an amount that will compensate all damaged parties for all of their damages. While Commission should not engage in a determination of those damages, the Nearby Residents ask the Commission to consider the types of damages that can be awarded and the impact that the plant and substation have had on the community, particularly those who live closest to the power plant. **Fifteen Million Dollars** is a reasonable sum to be set aside (in escrow for the purpose of satisfying any civil court judgment against Aquila) in light of such considerations and the potential liabilities that are related to Aquila's hasty decision to build without the necessary approvals.

Conclusion

It should go without saying, but it must be acknowledged that it is Aquila's actions that have been found to be illegal and wrongful. Aquila's aggressive and risky behavior has generated this entire controversy. Any attempt by this Commission to disenfranchise and harm those who live closest to the South Harper site in order to simply grant Aquila a "mulligan" on this one would be arbitrary and capricious.

The Commission will have to live with the practical precedent that this decision sets for all future power plant proposals. Approval of the Application as

requested by Aquila in this case would be setting a shamefully low bar for utility behavior—not to mention an unlawful usurpation of local zoning authority and an unlawful taking of private property rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to the following counsel on this 15th day of May, 2006:

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