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

AQUILA'S POSTHEARING BRIEF

Comes now Aquila, Inc. ("Aquila" or the "Company"), by counsel, and for its Posthearing Brief respectfully states to the Missouri Public Service Commission (the "Commission") as follows:

Aquila reaffirms the arguments made in its Prehearing Brief filed in this matter on April 21, 2006. In addition, Aquila submits this Posthearing Brief on "land use issues" and conditions which might be imposed by the Commission on any grant of authority to the Company.

I. LAND USE ISSUES

A. The Scope of the Commission's Review of "Land Use Issues"

The Court of Appeals held in *Cass County v. Aquila*, 180 S.W.3d 24 (Mo. App. 2005) that the purpose of section 393.170's requirement that public utilities obtain specific approval for facilities like the South Harper facility and the Peculiar substation is so that "current conditions, concerns and issues, *including zoning*, can be considered." *Id.* at 35 (emphasis supplied). In the same opinion, the Court of Appeals held that with specific approval for the facilities, Aquila would be exempt from County zoning under

section 64.235, and that there was nothing in the Court's opinion that was to be read to keep Aquila from seeking such specific authorization. Id. at 32, 41.

The County and other intervenors have read the Court of Appeals' opinion as imposing a resulting obligation on the part of the Commission to "extend consideration of land use issues in a manner that's independent from the issue of need and functionally equivalent to the process that would be afforded by the County." Tr. 401. In response to continued questioning from Chairman Davis on this topic, counsel for the County stated further that, "if this Commission is to evaluate land use issues, it should require Aquila to go through the same type of evaluation with respect to those issues as would have been afforded the public and the City of Peculiar with respect to this plant had it been annexed into the City of Peculiar, or in the County, had an application been filed in the County." Tr. 403. Counsel for the County further went on, arguing that the Court of Appeals held, "if land use is to be fairly considered, it has to be considered independent of other issues" and in "a functionally equivalent manner." Tr. 403-404. In essence, the County's argument is that the Commission must conduct a separate zoning hearing regarding these facilities, independent of any other issue associated with Aquila's application.

The Court of Appeals' decision requires no such thing. Rather, it is clear that land use concerns may be included within the Commission's consideration of whether the facilities and related service "promote the public interest." *In re Tartan Energy*, GA-94-127, 3 Mo. P.S.C.3d 173, 177. There is no need or requirement that such issues be taken up separately from a consideration of this and the other factors to be examined by the Commission in connection with Aquila's application, nor is there any requirement

that the evaluation of land use concerns be the "functional equivalent" of a hearing on a special use permit or rezoning application.

Even if there were such a requirement found within the Court of Appeals' decision, it has unquestionably been satisfied here. When a developer files an application with Cass County for a special use permit, for example, the matter is set for a public hearing before the County Planning Board. The July 13, 2004 hearing on Aquila's special use permit application at Camp Branch took between two and three hours. Further, the public hearing before the Planning Board consists only of the proponent of the application making a presentation, and an opportunity for public comment and questions from the Board. The Planning Board then makes a recommendation, which is reviewed by the Board of Zoning Adjustment in a similar format. There are no briefs filed regarding the application, no discovery, and no legal argument or cross examination of witnesses.

Moreover, despite the County's allegations that it possesses superior experience and ability in evaluating such issues, the fact remains that Cass County, the 11th most populous county in the state and the fastest-growing county in the state, has only *two* employees in its Planning and Zoning Department who do any actual planning. Tr. 1360. Neither of these employees is a certified land use planner. Tr. 1358. If Aquila filed a special use permit application for a generating or transmission facility today, the County would have to hire an outside consultant because the issues associated with such a facility are simply "more than a one or two-man shop can handle." Tr. 1361.

Conversely, the issue of the appropriateness of these facilities in their respective locations has been the subject of extensive briefing, argument, and written and live

testimony over nearly six days by numerous witnesses in this case, including land use planners (one of whom, Aquila witness Mark White, was the only AIPC-certified land use planner providing testimony in this case). Further, each of these witnesses has been subject to detailed cross examination by both counsel and members of the Commission, and there have been three local public hearings associated with this application. This is in addition to the public hearings, briefing and evidence presented in the 0248 case, as well as the public hearings associated with the City of Peculiar's plans to annex the South Harper site in the fall of 2004. Simply put, the County's stated concerns – affording its residents an opportunity to be heard on these issues, and having them evaluated by witnesses experienced in land use planning issues – have been satisfied.

The absence of specific rules setting out the factors to be used by the Commission in evaluating the appropriateness of these facilities' locations does not change this conclusion. There are no specific rules defining what factors are to be considered by the Commission in determining whether requested authority is "necessary or convenient for the public service." Section 393.170.3. Rather, the issues examined by the Commission to make such a determination have been developed in prior Commission and appellate decisions. Further, there are no specific rules that define any particular set of factors that must be considered when evaluating whether the facilities at issue "promote the public interest." *In Re Tartan Energy*, 3 Mo. P.S.C. at 177.

Nevertheless, notwithstanding the lack of such rules, the Commission has in the past been able to effectively consider applications for authority to build generation

facilities. These instances have included the 1973 Commission proceeding involving Kansas City Power & Light Company's joint application with St. Joseph Light & Power Company to construct the Iatan Station in Platte County, Missouri. After a hearing in November 1973, the Commission issued its Report and Order in Case No. 17,895 granting the requested certificates.[1] Simply put, there is no evidence that the Commission has been unable to similarly fully and fairly evaluate all of the issues regarding the location of the facilities at issue here. Presiding Commissioner Gary Mallory confirmed this position when he agreed that this proceeding before the Commission was providing a full and fair review of the issues. Tr. 1413.

B. The Location of the Facilities is Consistent with the Public Interest

Aquila has established, and the Staff has confirmed, that the location of the South Harper facility and Peculiar substation were suitable sites from the perspective of operational requirements and an evaluation of the need for the facilities. Similarly, looking at their location from a land use compatibility perspective, the evidence at the hearing was essentially undisputed that their locations are appropriate and otherwise consistent with the public interest.

1. The Commission Should Evaluate Land Use Issues in Light of the Most Current Comprehensive Plan and Zoning Order

It is undisputed that the County's Comprehensive or Master Plan establishes the "vision" of the community from a land use planning perspective. Tr. 1402, 1567. It is likewise undisputed that the County's zoning ordinances are the means by which that

[1] See also Report and Order in Case No. 18,117 issued March 14, 1975, regarding Union Electric Company's application for a certificate to operate the Callaway Nuclear Plant, Case Nos. EA-77-38 and EM-78-277 regarding The Empire District Electric Company's request for specific authority to build and operate units within its certificated areas, and Case No. EA-81-323 involving Union Electric's request for authority to construct a substation in St. Charles County.

vision is implemented. If applications for zoning changes are in accordance with the Comprehensive Plan, they are "presumed to be reasonable." Ex. 118, p. 2. Cass County's current Comprehensive Plan (Ex. 118) establishes that the area encompassing the South Harper facility and Peculiar substation is designated as a "multi-use tier." Multi-use tiers are areas near cities and towns where non-agricultural development, such as commercial and industrial uses, is encouraged. Ex. 118, p. 25. These areas are: (1) positioned as transition areas from urban to rural densities; (2) located either along rural highways or major arterials, or close enough to them to provide access to non-agricultural traffic; and (3) developed for a mix of land use, including industrial uses. Ex. 118, p. 28.

Similarly, with regard to Cass County's Zoning Order,[2] the County maintains that the parcels at issue are currently zoned "agricultural." The County's Zoning Order makes it clear that the intention of such a classification is not to encourage the development of "low density residential areas." Ex. 119, p. 29. In fact, the development of a power plant as well as a number of other industrial uses is permitted with a special use permit. This variety of permitted uses includes commercial feedlots, metal and coal mining, sawmills, fertilizer mixing facilities, railroad switching and terminal services, airports, sewage systems, and sanitary landfills. Ex. 119, App. A.

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[2] A significant question has been raised regarding the validity of the County's zoning ordinance because of the failure of the County to maintain a current official zoning map. The County's expert witness, Bruce Peshoff, admitted that the County's zoning map has not been updated to reflect changes since **1999**. Tr. 1695. Both state law (sections 64.231 and 64.261) and the County's Zoning Order and Subdivision Regulations require the maintenance of an "official zoning map." See. Ex. 119, p. 27. In fact, the Zoning Order adopts the zoning maps as a part of the Order. *Id.* Municipalities have the same requirements under Chapter 89, and it has been held that a failure to attach or record a zoning map that has been incorporated into a zoning ordinance invalidates the ordinance. *Casey's General Stores v. City of Louisiana*, 734 S.W.2d 890, 896 (Mo. App. 1987). The maintenance of an official zoning map as a required part of a valid zoning ordinance (city or county) would likewise appear to require that the recorded and attached zoning map be accurate and current.

The County's insistence that the 2003 Comprehensive Plan and 1997 Zoning Ordinance should be the Commission's guide in evaluating these issues is a contrived attempt to avoid the impact of looking at the most current versions of those documents. Under the 2003 Plan, only the substation is contained within a multi-use tier. This fact simply emphasizes why the 2005 Plan applies. As even County witnesses admitted, in order to accurately determine the current "vision" of the County, one must look to the most current version of the Plan. Tr. 1403, 1568.

Further, Mr. Peshoff confirmed that there was no legal prohibition on the Commission's use of the 2005 Plan, and that the only issue was which one made the most sense to use. Tr. 1588. Using this standard, it is clear that the County's argument that the Commission should review the outdated plan should be rejected. Mr. White testified that once the County submitted the proposed changes to the Comprehensive Plan to public review as it did in the fall and winter of 2004 (Ex. 120-123), any new developments should be evaluated in light of the most recent version. Tr. 954-956.

It simply makes no sense to argue that a special use or rezoning application submitted by a developer at the same time the County was finalizing changes to its Comprehensive Plan would be evaluated using outdated standards that would likely conflict with the County's current "vision" for the future of County development. The Commission is evaluating these facilities now, and should review them in light of the fact that the County's current vision for the South Harper plant and Peculiar Substation sites is that they be "encouraged" for those industrial uses and that such uses are "deemed reasonable" by the Comprehensive Plan.

2. The Facilities are Appropriate and Compatible Uses for the Properties

An evaluation of the various factors and policies set out in the Comprehensive Plan and Zoning Order as took place during the hearing clearly shows that the facilities are appropriate uses for the area as was testified to by several witnesses, including Aquila's certified land use planning expert, Mark White. Specifically:

- Cass County Presiding Commissioner Gary Mallory characterized the facilities as light industrial uses. Tr. 1431.
- The area of the South Harper facility is clearly a transition area from an urban to rural density as can be seen from the increased density of residential housing as one travels northeast from the plant toward Peculiar. See TSH-1.
- The facilities are near Peculiar, and both have access to roads with access to major arterials, and rural and other highways.
- Neither facility will result in any meaningful increase in traffic in the areas. Tr. 1437.
- A variety of services are available to the sites, including electricity, water, fire and police protection. Tr. 1669-70.
- There is no evidence of any nuisance or interference by the facilities with farming operations. Tr. 1670. In fact, the entire northern section of the South Harper parcel is occupied by a farm, and Aquila had previously committed to leave that section as undeveloped farm land.
- Neither facility occupies the entirety of the parcels on which they sit. In fact, both comprise only 13 percent of the total parcel.

- There is no evidence of any violation of environmental or other permits or regulations by the facilities. Indeed, there is no evidence of any adverse health impacts that have been shown to be associated with either facility. Tr. 1671.
- Neither property is located within the 100 year flood plain. Tr. 1671-72.
- There are no issues regarding actual or potential disturbance of significant natural resources at the sites. Tr. 1672.
- There are no issues regarding stormwater runoff at the sites. Tr. 1672.
- There are no issues regarding drainage easements at the sites. Tr. 1672.
- Neither parcel has any chance of being part of a residential subdivision. Tr. 1673.
- There are no applicable yard or open space requirements. Tr. 1673. In any event, it is undisputed that both facilities are significantly set back from the roadways, and both have been landscaped and bermed (where natural shielding does not already exist) to reduce the visual impact of the facilities.

The location and size of the facilities in relation to adjacent sites, as well as the nature and intensity of the use of the facilities in relation to those adjacent uses, also militates in favor of a finding that these facilities are appropriately located. Specifically, the South Harper facility is adjacent to a 6.4 acre gas compressor station facility which has been in existence in the area for more than 50 years. See Schedule WW-14, Sheet 2 of 8. The photograph of the compressor station taken by Staff witness Warren Wood from Frank Dillon's front yard clearly documents the compatibility of the South Harper facility with this pre-existing industrial use.

Most tellingly, the County's own land use expert, Bruce Peshoff, compared the use of the gas compressor station facility and the South Harper facility as follows:

> Q. (By Mr. Coffman) And so you have been to the site and seen both the South Harper power plant facility and what has been called the gas pumping station, smaller facility that's nearby?
>
> A. That's correct.
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> Q. And to the extent that you can, based on what you know and what you see, how would you compare and contrast these uses?
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> * * *
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> A. . . . [The gas pumping station] has characteristics of industrial use. It's got the outside storage, it's got the tanks, it is a – ***it is an intensive industrial use consistent with what we see at the – what one can see at the South Harper facility***.

Tr. 1534-1535 (emphasis supplied). Thus, the County's own land use expert admits that the South Harper peaking facility and the Southern Star gas compressor station are consistent industrial uses.

In summary, an evaluation of these various concerns, including zoning and land use issues, as required by the Court of Appeals' recent decision clearly indicates that these facilities are appropriately located where they sit.

II. CONDITIONS

Section 393.170.3, RSMo, provides in part that "The Commission may by its order (granting permission and approval) impose such condition or conditions as it may deem reasonable and necessary." This statutory language does not mean, however, that the Commission has unfettered discretion to impose any and all conditions. Rather, any such conditions, in addition to being reasonable and necessary, must also not be prohibited by law.

The Staff, through the testimony of its witness Warren Wood, recommends that the Commission should condition a site specific certificate of convenience and necessity for the involved facilities as follows:

1. Roads must be repaired at the conclusion of work to equal or better condition than when Aquila first started working on this site.

2. Roads must be worked on at least weekly to repair any ruts or holes, and dust abatement measures are adopted.

3. Sound abatement measures must be fully utilized (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer).

4. Emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood.

5. Security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort.

6. Security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would impact the surrounding area.

In this regard, the Staff has stipulated that Aquila has satisfied conditions 1, 2, 3, and 5. Aquila has no objection to satisfying conditions 4 and 6 and reporting back to the Commission regarding the same.

Other parties have argued that the Commission should condition the grant of a certificate to Aquila on the Company obtaining county zoning approval. As asserted by Aquila in its Prehearing Brief and other filings in this case, such a condition would be contrary to law.[3]

It has also been suggested that Aquila should be required to provide a pool of resources to be made available for residents to make claims against for alleged

[3] For a full discussion of Aquila's position on this issue, please refer to Aquila's Prehearing Brief, including attachment A, as well as Aquila's Suggestions in Opposition to Intervenor Cass County Missouri's Motion to Dismiss.

devaluation of their property. Mr. Bruce Peshoff, a witness for Cass County, testified regarding this suggestion, and he referred to a specific example in Huntington Township, New York. (Tr. pp. 1536-1538). Mr. Peshoff testified that the pool of money was offered before the fact and was a way for the utility to work with the local community before going through much time and expense. (Tr. p. 1538). A similar discussion was held later in the hearing. At one point, Chairman Davis asked Mr. Coffman whether it was customary in other states for businesses to set aside a fund for reparation to local landowners. (Tr. p. 1787). Mr. Coffman replied that this statement was correct, and that he had heard reference to cases in Florida and Ohio. (Tr. p. 1788).

First, what may be "customary" in other states, is certainly not relevant to this proceeding. Second, and more importantly, this Commission, as a creature of statute, has no authority to require Aquila, as a condition to the grant of a certificate, to set aside a pool of resources to compensate landowners for potential property devaluation. In fact, this issue has been addressed previously by both the Commission and the Courts.

In response to a party's proposed condition that a utility be required to compensate property owners for diminution in value to their property and to fully compensate them for economic losses caused by the existence of a transmission line, this Commission stated that the proposed condition was clearly outside the Commission's jurisdiction.[4] This Commission went on to state that it "has no authority to determine or grant monetary damages." *Id.*

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[4] *In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage, and Pulaski Counties, Missouri*, Case No. EO-2002-351, 229 P.U.R.4th 148 (Report and Order issued August 21, 2003).

Decisions of the Missouri Supreme Court further support this conclusion. The Supreme Court has stated, "'The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund."'[5] "The commission 'has no power to declare or enforce any principle of law or equity' . . . and as a result it cannot determine damages or award pecuniary relief." *Id.* at 668-669. In light of the above authority, this Commission may not require that Aquila set aside a pool of money, from any source, to compensate landowners.

Finally, in its prehearing brief, StopAquila.Org suggests that this Commission should impose conditions, which "must be so substantive as to deter Aquila and any other utility from taking this course in the future." (StopAquila Prehearing Brief, p. 15). StopAquila goes on to argue that "the conditions must address and fully satisfy concerns regarding decreased property values, noise, aesthetics, nuisance, pollution, safety, road damage and traffic." These generalized suggestions fail to set out what actual, tangible concerns are at issue. In fact, in a footnote, StopAquila admits that some of the concerns may not be known for many years. Further, StopAquila fails to describe what specific conditions should be imposed to address the concerns, and provides no means by which this Commission may make a determination as to the reasonableness of the conditions.

In summary, the conditions proposed by Cass County, StopAquila, Frank Dillon, Kimberly Miller, and James E. Doll are unsupported by the facts of this case and the

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[5] *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 668 (Mo. 1950) (citing *State ex rel. Laundry, Inc. v. Public Service* Commission, 34 S.W.2d 37, 46 (Mo. 1931) (remaining citations omitted).

applicable law, and do not meet the reasonable and necessary requirement set out in section 393.170.3.

Respectfully submitted,

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ATTORNEYS FOR AQUILA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered electronically, by first class mail or by hand delivery, on this 12th day of May, 2006, to all parties of record.