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 SUGGESTIONS IN OPPOSITION TO INTERVENOR STOPAQUILA.ORG'S MOTION TO DISMISS OR DENY APPLICATION

COMES NOW Aquila, Inc. (hereinafter "Aquila" or the "Company"), by counsel, and for its Suggestions in Opposition to the Motion to Dismiss or Deny Application filed on March 10, 2006, by StopAquila.Org ("Stop Aquila"), respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

INTRODUCTION AND BACKGROUND

Intervenor StopAquila has filed a motion asking the Commission to dismiss Aquila's application for specific approval of what have become commonly referred to as the South Harper Peaking Facility and Peculiar Substation. StopAquila argues that Aquila lacks the additional "local consent" that StopAquila claims is necessary in order for the Commission to grant the Company's application. This position is contrary to the plain language of section 393.170, RSMo[1] and ignores the distinction between "line" and "area" certificates. It also ignores the existence of section 64.235, and the recent litigation in Cass County, including the December 2005 decision of the Missouri Court of

[1] All statutory references are to RSMo. (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

Appeals for the Western District in StopAquila.org v. Aquila, Inc., 180 S.W.3d 24 (Mo. App. 2005), in which the Court of Appeals specifically stated that Aquila is exempt from local zoning under 64.235 once Aquila obtains specific approval for the Facilities from the Commission under 393.170.1.

Further, it is now well-established that in 1917, Cass County gave Aquila's predecessor the County's perpetual consent, under what is now section 229.100, to use the County's rights of way for the purpose of supplying electricity to the County. Ultimately, this 1917 franchise was presented to the Commission as part of the application in Case No. 9470 pursuant to what is now section 393.170.2, resulting in the Commission's issuance of the 1938 area certificate under which Aquila now serves most of Cass County, as well as several other counties. Contrary to the argument of StopAquila, no additional consent from the County is necessary in order for the Commission to grant Aquila specific authority for the facilities as requested by Aquila in this proceeding, nor would the County's grant of additional consent be statutorily authorized. Accordingly, the Commission should deny StopAquila's motion.[2]

ARGUMENT AND AUTHORITIES

StopAquila's March 10, 2006 motion and suggestions are largely a restatement of the claims StopAquila made in its amicus brief filed in the Court of Appeals in the South Harper litigation, all of which revolved around StopAquila's argument that the Company must submit to regulation by both the Commission and Cass County through its zoning ordinances. The Court of Appeals clearly rejected those claims, holding instead that:

---

[2] In responding to StopAquila's motion, Aquila has treated the motion as a request for summary determination and not a motion to dismiss based on the pleadings.

- Aquila qualifies for the exemption from Cass County zoning found in section 64.235. 180 S.W.3d at 32;[3]
- As held in State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177 (Mo. App. 1960), section 393.170 provides two different kinds of "certificate authority" – subsection 1 "authority" for a public utility to construct an electric plant, and subsection 2 "authority" to serve a territory. Id. at 33;
- Aquila's efforts to construct the facilities are matters governed by section 393.170.1, not 2. Id. at 35;
- "Land use issues" such as the current zoning classification of the sites at issue may be taken up by **either** the County through the zoning process, **or** by the Commission. Id. at 38 (emphasis added); and
- Aquila was not precluded by the Court's decision of December 20, 2005 from securing the necessary authority under 393.170.1 that would allow the facilities to continue operating. Id. at 41.

Notwithstanding the decision of the Court of Appeals, however, StopAquila persists in arguing that under section 393.170.2, the Commission does not have the power to issue an order providing specific authority for the facilities because Aquila lacks zoning approval from the County. Thus, StopAquila argues that Aquila cannot show it has "received the required consent of the proper municipal authorities." Section

---

[3] Specifically, the Court of Appeals stated, "Because we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek 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." Id. Thus, the Court of Appeals has clearly directed that approval of facilities must be sought from either the County or the Commission, not both.

393.170.2. This argument should be rejected by the Commission for several reasons. First, the Court of Appeals held that Aquila may seek authority under subsection 1 of section 393.170 in order to allow the facilities to continue operating. Second, the plain language of the statute confirms that no "local consent" (zoning or otherwise) is required for the issuance of a certificate under subsection 1. Third, even if the Commission were to rule that Aquila was required to show that it has "local consent" under subsection 2, the consent contemplated by that subsection is the franchise Cass County gave Aquila's predecessor in 1917 under what is now section 229.100. Thus, under any circumstance, Aquila has all the local consent from Cass County it needs and, in fact, all the County is empowered to give.

StopAquila argued vigorously in the Cass County litigation that Aquila's "area certificate" issued in 1938 in Case No. 9470 did not provide "specific authority" for the facilities because that certificate was issued under subsection 2, and did not provide subsection 1's "line" authority necessary for the facilities' construction. See First Amended Application for Preliminary Injunction to Stop Building of Power Plant and Substation, Case No. CV104-1380CC (consolidated with Case No. CV104-1443CC), p. 10. Now, StopAquila wants the Commission to ignore the distinction between these two types of authority and the showing necessary to obtain them by arguing that the subsections of section 393.170 are all "related." StopAquila Motion, p. 2.

Such an interpretation is precluded by Harline and the Western District's opinion in State ex rel. Union Elec. Co. v. Public Service Comm'n of Mo., 770 S.W.2d 283 (Mo. App. 1989), as well as by the Western District's opinion in StopAquila.org v. Aquila, Inc. In Union Electric, the court rejected the utility's argument that the requirements of

section 393.170.1 and 393.170.2 were interchangeable, and confirmed that the subsections serve different purposes and have different requirements. Id. at 285. Simply put, 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. This conclusion is buttressed by the Court's analysis of the type of "local consent" contemplated by subsection 2:

> 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. The granting authority does not gain a right to dictate the level of utility business activity nor may it purport to grant an exclusive franchise. The statutory scheme at Section 393.170.2, RSMo 1986 establishes two layers of oversight by providing that the rights and privileges granted by a franchise may not be exercised without first having obtained Commission approval. A Commission certificate becomes an additional condition imposed by the State on the exercise of a privilege which a municipality or county may give or refuse under its delegated police power.

Id. at 285-86 (internal citations omitted).

It cannot be disputed that Aquila received this type of local consent 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 to "set Electric Light Poles for the transmission of light for commercial purposes. . . ." See Appendix 6 to Aquila's Application in Case No. EA-2005-0248, incorporated into Aquila's Application herein. This franchise does not specify any period of duration and is, therefore, a grant of authority in perpetuity. Missouri Public Service Co. v. Platte-Clay Elec. Co-op., 407 S.W.2d 883, 888 (Mo. 1966). This type of franchise has been provided to, and accepted by, the Commission on numerous occasions by Aquila and other utilities as evidence of the "local consent" necessary under section 393.170.2,

including in conjunction with Case No. 9470 when what is now Aquila's Cass County service territory was established. See also, In Re Southwest Water Co., 25 Mo. P.S.C. 637 (1941).

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)).[4] No additional consent is necessary under subsection 1, nor is the County empowered to give any consent beyond that provided for in section 229.100. See StopAquila.org v. Aquila, Inc., 180 S.W.3d at 24 (while counties are not precluded from exercising zoning authority over power plants, they lack authority under section 229.100 "to issue franchises as to the construction of power plants").[5] None of the cases cited by StopAquila in its brief supports a contrary proposition.[6]

---

[4] The Court ultimately held that the Commission's certificate improperly expanded upon this local consent, a holding that StopAquila seizes upon in its motion. StopAquila Motion, pp. 15-16, 21. However, what StopAquila fails to disclose is that, unlike Aquila's perpetual and unlimited franchise issued by Cass County, the franchise at issue in Burton was limited to the use of only specified roads in Jackson County. Id. at 597.

[5] StopAquila's statement that "Judge Dandurand has in fact ruled that the 1917 franchise did not provide the needed authority and the Court of Appeals affirmed this decision" (Motion, p. 25) misstates the Court's holding. In fact, the Court of Appeals held that the County was not empowered to grant such authority through that franchise in the first place.

[6] In fact, none of the cases cited by StopAquila has any relevance to the types of parties and issues before the Commission in this proceeding. Most simply contain general undisputed statements of law in unrelated circumstances that StopAquila attempts to twist into precedent purporting to compel dismissal of Aquila's Application. This includes In re Missouri Power & Light Co., 18 Mo. P.S.C. (NS) 116 (1973), referred to by StopAquila on pages 22 and 28 of its motion. In Missouri Power & Light, the Commission was faced with a request from intervenors that the site of the plant be moved from the proposed location (which was already zoned industrial) to another location (which was zoned residential). Id. at 120. The Commission did not, as StopAquila suggests, set forth any obligation to seek and obtain zoning approval for the plant as a prerequisite to the issuance of the certificate. Rather, the Commission simply considered the zoning classifications of the proposed locations as they related to the general

Nor in any event would Aquila be required to show that it had obtained County zoning approval for the sites in order for the Commission to grant Aquila's application as StopAquila argues. The Court of Appeals in the South Harper litigation held precisely the opposite. Id. at 38. At the January 27, 2006 hearing before the trial court on Aquila's request that the trial court stay the effect of its January 2005 injunction so Aquila could seek the approval the Court of Appeals held it lacked, it was clear that Judge Dandurand read the opinion the same way:

> Mr. Youngs: The only point I want to make is at the end of that process, if the Public Service Commission grants our application and issues us specific authority for the South Harper plant and Peculiar Substation, subject to whatever review comes after that, that disposes of the matter. There's been an argument by the County that no, no, we need zoning approval to deal with the land use issues from us and you need PSC approval. The only point I want to make is –
>
> The Court: I don't think the Court of Appeals said that.
>
> Mr. Youngs: Okay. I agree. So that's all I have to say about that.
>
> * * *
>
> The Court: Let me ask you this: While I don't think the Court of Appeals said that you have to go back and get permission from the County, while I believe their directive was you need to get it one place or the other, you said if the PSC gives it to you, that ends it. It there no appeal process from there?
>
> Mr. Youngs: There is.
>
> The Court: Don't they come right back here? If you or they are upset with the decision that they make, don't you come right back here and ask for it to be reviewed again?
>
> Mr. Youngs: That's correct. That's correct.

---

impact of both on the citizens of the community. This is precisely the same process the court of appeals has confirmed may be undertaken by the Commission here.

The Court: Okay. So it's not the end of it.

Mr. Youngs: It's the end of it from the PSC standpoint subject to further review.

The Court: And the procedural – the procedural directive of the Court of Appeals has been followed.

Mr. Youngs: Right.

Transcript from January 27, 2006 hearing in Case No. CV104-1443CC, pp. 17-18.

As the Court of Appeals recognized, and Judge Dandurand confirmed, it is simply nonsensical to argue that: (1) If Aquila has specific Commission approval for the South Harper Peaking Facility and Peculiar Substation, Aquila is exempt from local zoning under section 64.235; but (2) before the Commission can give specific approval for these facilities, Aquila must show that it has obtained local zoning approval for them. The Commission's acceptance of such circular reasoning would render the exemption in section 64.235 meaningless.[7]

CONCLUSION

Aquila already has the only "local consent" Cass County is empowered under section 229.100 to give, and has had this "consent" since 1917. In 1938, after providing this 1917 order to the Commission, Aquila received an area certificate pursuant to section 393.170.2, under which it serves the territory that includes Cass County. The application which is the subject of this case is sought pursuant to section 393.170.1.

---

[7] Considering, and not ignoring, section 64.235 also disposes of StopAquila's contention that the Commission cannot, by its order, change the fact that the injunction currently in effect in the South Harper litigation requires the facilities to be dismantled. StopAquila Motion, p. 26. If the Commission issues the order requested by Aquila, the facilities will not be in violation of local zoning. Rather, they will be exempt from local zoning under section 64.235, and Judge Dandurand will be empowered to dissolve the injunction. Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 Mo. App. 2002 (quoting Fugel v. Becker, 2 S.W.2d 743 (Mo. 1928)) (purpose of injunction is not to afford remedy for past wrong, but to prevent future action).

This subsection does not require Aquila to show the type of additional consent StopAquila argues is a necessary prerequisite to the Commission's exercise of its authority. Rather, as the Court of Appeals held, the grant of authority by the Commission pursuant to subsection 1 of section 393.170 simply requires the Commission to follow the procedures set forth in subsection 3 of that statute – namely to hold a hearing like the one currently scheduled. StopAquila.org v. Aquila, Inc., 180 S.W.3d at 34. Accordingly, StopAquila's motion should be denied.

Respectfully submitted,

J. Dale Youngs MO #36716
Blackwell Sanders Peper Martin, LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112
816-983-8000 Phone
816-983-8080 Fax
dyoungs@blackwellsanders.com

James C. Swearengen MO #21510
Diana C. Carter MO #50527
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166 Phone
(573) 635-0427 Fax
lrackers@brydonlaw.com

Attorneys for Aquila, Inc.

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 17th day of March, 2006, to all parties of record.