IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

CASS COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV104-1443CC
	)	
AQUILA, INC.,	)	
	)	
Defendant.	)	

MOTION FOR ORDER VACATING FEBRUARY 15, 2006 ORDER, AND DISSOLVING INJUNCTION AND BONDS

Aquila, Inc. ("Aquila") requests that this Court enter an order vacating its previously-entered order of February 15, 2006 requiring Aquila to cease operation of the South Harper plant and to commence dismantling the South Harper facility and Peculiar substation on May 31, 2006. Aquila further requests that the Court dissolve the permanent injunction it entered against Aquila on January 11, 2005. Finally, Aquila requests that the Court dissolve the $350,000.00 bond Aquila posted on January 11, 2005 as well as the $20 million bond posted by Aquila on February 15, 2006. In support of this motion, Aquila states as follows:

BACKGROUND

On January 11, 2005, this Court entered a permanent injunction against Aquila in this matter. That injunction enjoined Aquila from constructing and operating the South Harper plant and Peculiar substation and ordered that Aquila remove those portions of the facilities that are inconsistent with the agricultural zoning classification for the properties. See Final Judgment, Exhibit "A," hereto, pp. 4-5. This permanent injunction was based on the Court's finding that Aquila must have specific authority in its Cass County franchise to build these facilities, or "that

Aquila must obtain a 'specific authorization' in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not." Ex. A, p. 3. Pursuant to Rule 92.03, the Court stayed the effect of that permanent injunction pending the appeal of the Court's decision, and conditioned the stay on Aquila's posting of a $350,000.00 bond, a copy of which is attached to this order as Exhibit "B."

The Missouri Court of Appeals for the Western District ultimately affirmed the Court's judgment in an opinion dated December 20, 2005. *Cass County, Missouri v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005). In that opinion the court of appeals affirmed this Court's judgment "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.*" Id. at 41 (emphasis added). The court went on to say, "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." *Id.*

On January 12, 2006, Aquila moved this Court for an order extending its previously-granted stay of the January 2005 injunction so that Aquila could obtain from the Public Service Commission the specific approval this Court and the court of appeals ruled the facilities lacked in order to be exempt from county zoning under section 64.235. On February 15, 2006, the Court granted Aquila's motion in part, and denied it in part, ordering that Aquila did not have to begin dismantling the facilities until May 31, 2006. The Court, however, prohibited Aquila from

operating the plant in the meantime, even in an emergency, and ordered Aquila to post a $20 million bond, a, copy of which is attached as Exhibit "C."

On January 25, 2006, Aquila filed its application before the Public Service Commission. During the next four months, Cass County, StopAquila.org, the City of Peculiar, three individual residents of Cass County, the Southwest Power Pool, the Sedalia Industrial Energy Users' Association, the Office of the Public Counsel, and the Staff of the Public Service Commission intervened or made appearances in the case. The parties filed extensive testimony as well as comprehensive pre-hearing briefs. Cass County and StopAquila.org filed motions to dismiss Aquila's application, which were fully briefed, argued, and ultimately denied by a 5-0 vote of the Commission. The Commission held a total of three public hearings in Cass County at which more than 50 witnesses appeared. It then heard six days of testimony, including expert witness testimony on land use issues, and all parties filed post-hearing briefs, and proposed reports and orders for the Public Service Commission's consideration.

On May 23, 2006, the Public Service Commission issued a 60-page Report and Order granting Aquila the specific approval for the facilities this Court and the court of appeals said Aquila needed in order for them to be authorized. A copy of the Commission's Report and Order is attached as Exhibit "D." Specifically, the Commission ruled: "Aquila is hereby authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage" the South Harper peaking facility and Peculiar substation ("the Facilities"), Ex. D, pp. 58-59; "The Construction of the Facilities by Aquila is hereby specifically authorized, permitted, approved, ratified, and confirmed," Ex. D, p. 59; and "The ownership, operation, control, and management of the Facilities by Aquila on a prospective basis is hereby specifically authorized and

permitted," Ex. D, p. 59.

The Commission provided a total of seven conditions to the issuance of this authority, indicating that the evidence in the record confirmed that Aquila had already satisfied all but two of those conditions. Ex. D, pp. 36-37. The remaining two conditions referred to by the Commission were: (1) Emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood; and (2) Security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would impact the surrounding area. Ex. D, p. 36. These remaining conditions have likewise been satisfied. Affidavit of Tom Miller, Ex. E.

Thus, the condition on which this Court based the issuance of its January 11, 2005 permanent injunction – that Aquila lacked "specific approval or permission" from the Public Service Commission for these facilities, and was thus not exempt from local zoning under section 64.235 – has been satisfied. Accordingly, this Court should vacate its February 15, 2006 order directing Aquila to cease operation of the plant and to begin dismantling the facilities on May 31, and should dissolve its original injunction. Likewise, the Court should dissolve the bonds Aquila has posted in this matter.

ARGUMENT AND AUTHORITIES

The Court Should Vacate its February 15, 2006 Order and Dissolve the January 11, 2005 Injunction

In the case of a permanent injunction which is based on a condition subject to change, the Court retains jurisdiction to vacate or modify the injunction's terms "in order to avoid unjust or absurd results when a change occurs in the factual setting or the law which gave rise to its existence." *Twedell v. Town of Normandy*, 581 S.W.2d 438, 440 (Mo. App. 1979) (citations omitted); *see also, Landolt v. Glendale Shooting Club*, 18 S.W.3d 101, 105 (Mo. App. 2000).

The Court's permanent injunction of January 11, 2005 was premised upon its conclusion that there must be a certificate of convenience or necessity or other order from the Public Service Commission specifically authorizing the facilities. Ex. A, p. 3. Because Aquila lacked such specific authorization, the Court entered the injunction. The court of appeals clearly concluded that this "factual setting" was a condition subject to change, explicitly stating that nothing in its opinion was to be read as suggesting that it was too late for Aquila to obtain the necessary approval for the facilities. 180 S.W.3d at 41. This Court agreed, giving Aquila until May 31, 2006 before being required to commence dismantling them.

Simply put, the factual circumstances giving rise to the issuance of the January 11, 2005 injunction *have* changed as a result of the issuance of the Public Service Commission's Report and Order approving these facilities. Ex. D. Aquila now has the specific authorization for the facilities this Court and the court of appeals ruled they lacked (and could still obtain) in order for the facilities to continue operating. Thus, there is no longer any purpose to be served by the Court's February 15, 2006 order prohibiting Aquila from operating the plant, and ordering the dismantling of these facilities, nor is there any future harm to be prevented by the original injunction. Accordingly, both orders should be dissolved. *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).

As set forth above, the Commission's order contains certain conditions related to the operation of the plant. Ex. D, pp. 36-37, 59-60. The Commission also confirmed that all but two of those conditions had been satisfied. Ex. D, p. 37. Tom Miller, the plant manager of the South Harper peaking facility, confirms that those remaining conditions have likewise been satisfied.

Ex. E.[1] Further, to the extent Aquila's operation of these facilities requires the monitoring of Aquila's compliance with these or any other conditions or regulatory requirements, it is up to the Public Service Commission and other appropriate agencies to do so. *See e.g., MCI Metro Access Transmission Services v. City of St. Louis*, 941 S.W.2d 634 (Mo. App. 1997) (It is Public Service Commission's obligation in first instance to determine whether utility is in violation of Public Service Commission Act or Commission order); *See also*, Sections 386.570, 386.600 (relating to actions by Public Service Commission to recover penalties); section 386.390 (relating to complaints filed with Public Service Commission); section 386.360 (relating to Public Service Commission's power to investigate alleged violations of law by utilities and seek injunctive relief).

From media reports regarding the Commission's decision, it appears that Cass County and the other intervenors in the Public Service Commission proceeding will seek further review of the Public Service Commission's Report and Order by seeking rehearing pursuant to section 386.500, and subsequent circuit court review under section 386.510. It is certainly these parties' right to assert and attempt to prove that the Public Service Commission's order is "unreasonable and unlawful," as would be their burden in such a proceeding. Section 386.510; *Friendship Village of South County v. Public Service Commission*, 907 S.W.2d 339, 334 (Mo. App. 1995). As to questions of reasonableness, the reviewing court will affirm the Commission's order if it is supported by substantial and competent evidence based on the whole record, and is not arbitrary, capricious, unreasonable, or the product of an abuse of discretion. *Id.* In any event, notwithstanding the pendency of a motion for rehearing or writ proceeding, the Public Service Commission's Report and Order is effective and all parties must comply with its terms. Section

[1] The condition regarding seeking approval for additional generating units was previously agreed to by Aquila.

386.500.3 (filing application for rehearing does not excuse any person or utility from "complying with or obeying" any order of Public Service Commission or operate as stay of decision). *See also*, section 386.520.1 (requiring party in writ proceeding seeking stay of Public Service Commission order from reviewing court to prove irreparable damage and to post bond).

Moreover, if the Public Service Commission's decision is ultimately reversed, Cass County will be free to seek such relief either from a circuit court in the form of a new action, or before the Public Service Commission. This is in addition to the fact that Cass County may, if it chooses, appeal this Court's order dissolving the injunction as requested by Aquila. Section 512.020(2). Thus, no prejudice to the right of the County or any other interested party to continue to seek the removal of these facilities would result from the Court's granting of this motion.

The Court Should Dissolve The Bonds Aquila Has Posted

As set forth above, on January 11, 2005, Aquila posted an appeal bond pursuant to Rule 92.03 in the amount of $350,000.00. Ex. B. The purpose of the bond was to provide security for any damage the County would incur during the pendency of the appeal. Ex. B, p. 1. The bond further provided that it would only be in force and effect unless and until it was voided by *either*: (1) Aquila's satisfaction of any proved damage after the appeal was dismissed or the Court's judgment affirmed; or (2) the setting aside of the Court's judgment. Ex. B, pp. 1-2. If the Court agrees that the injunction should be dissolved, such an action would be tantamount to the setting aside of the Court's January 11, 2005 judgment, which had no other substantive aspects to it. Therefore, under the terms of the bond itself, the bond should be voided. Under any circumstance, however, if the bond is not dissolved immediately, the County should be directed to file any claim it believes it has within the next 30 days.

The $20 million bond Aquila posted on February 15, 2006 (Ex. C) pursuant to the Court's February 15, 2006 order should also be dissolved. That bond was designed to be available to satisfy any damages incurred by the County in the event Aquila failed to comply with the Court's mandate that the facilities be dismantled commencing May 31. See February 15, 2006 Order, p. 3. If the Court agrees that Aquila has obtained the approval it has been directed to obtain, there is no further need for the bond.

CONCLUSION

Aquila has, at the direction of the court of appeals, and this Court, sought and obtained specific authority from the Public Service Commission for these facilities. Therefore, the factual foundation for the Court's injunction, its February 15, 2006 order, and the bonds posted by Aquila, no longer exists. Although opponents of the facilities may continue to seek their removal or pursue other claimed grievances regarding them, those actions can be addressed through the appeal of the Commission's May 23, 2006 Report and Order, or through the Commission itself. Under either circumstance, there is no further need for this Court to play a role in the dispute that gave rise to its January 2005 injunction. Aquila therefore requests that the Court vacate its February 15, 2006 order, that it dissolve its January 11, 2005 injunction, and that it dissolve the $350,000.00 and $20 million bonds posted by Aquila in this matter, and that the Court grant it such further relief as the Court deems just and proper.

Respectfully submitted,

J. Dale Youngs MO #36716
BLACKWELL SANDERS PEPER MARTIN, LLP
4801 Main Street, Suite 1000
Kansas City, Missouri 64112
(816) 983-8000

(816) 983-8080 (FAX)

Christopher M. Reitz MO #45546
General Counsel
AQUILA, INC.
20 West 9th Street
Kansas City, Missouri 64105
(816) 421-6600
(816) 467-9611 (FAX)

Attorneys for Aquila, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 24th day of May, 2006, via electronic mail and first class United States Mail, postage pre-paid, to:

Cindy Reams Martin
408 S.E. Douglas
Lee's Summit, Missouri 64063
crmlaw@swbell.net

Debra Moore
County Counselor
Cass County, Missouri
102 East Wall
Harrisonville, Missouri 64701
dmoore@casscounty.com

Attorneys for Plaintiff Cass County

Attorney

FILED
JAN 11 2004
CASS COUNTY CIRCUIT CLERK

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

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CASS COUNTY, MO.

STOPAQUILA.ORG, et al.,	)	
Plaintiffs,	)	Case No. CV104-1380CC
v.	)	
AQUILA, INC.	)	
Defendant.	)	CONSOLIDATED WITH
CASS COUNTY, MISSOURI,	)	
Plaintiff,	)	
v.	)	Case No. CV104-1443CC
AQUILA, INC.,	)	
Defendant.	)	

FINAL JUDGMENT
CASE NO. CV104-1443CC
(SEVERED FROM CASE NO. CV104-1380CC)

This Court convenes on January 5-6, 2005, for an evidentiary hearing on the Applications for Preliminary Injunctions filed by Plaintiff Cass County, Missouri and by Plaintiffs StopAquila.org, et al. against Aquila, Inc. These two actions were consolidated by previous order of this Court pursuant to Rule 66.01(b).

Plaintiff Cass County, Missouri appears by and through counsel of record Cindy Reams Martin of Cindy Reams Martin, P.C., and Debra L. Moore, Cass County Counselor. Plaintiff StopAquila.org, et al. appears by and through counsel of record Gerard Eftink. Defendant Aquila, Inc. appears by and through counsel of record Karl Zobrist, J. Dale Youngs, and Andrew Bailey of Blackwell Sanders Peper Martin, LLP. The Missouri Public Service Commission was,

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on its Motion, granted leave to intervene in this case at the beginning of the hearing for the limited purpose of addressing possible conflict between Section 393.170 of the Revised Statutes of Missouri and Section 64.235 of the Revised Statutes of Missouri, and appears through General Counsel Dana K. Joyce, and through attorneys Steven Dottheim and Lera Shemwell.

On the pleadings and evidence adduced, and based upon the arguments of counsel, the Court makes the following findings and orders:

1. The Court, having previously consolidated these actions for hearing on the respective Plaintiffs' Applications for Preliminary Injunction, now severs Case No. CV104-1380CC from Case No. CV104-1443CC from this point forward, and for all purposes, pursuant to its discretion under Rule 66.01(b). All findings and orders hereinafter set forth relate to Case No. CV104-1443CC.

2. The Court adopts as its findings of fact all of the Joint Stipulated Findings of Fact entered into by the parties as reflected in the record.

3. The Missouri Public Service Commission was granted leave to intervene at the beginning of the hearing for the limited purpose herein described. At the conclusion of the hearing, the Court removes the Missouri Public Service Commission as a party to these proceedings with the consent of the Missouri Public Service Commission.

4. Because the Court has now severed Case No. CV104-1443CC from Case No. CV104-1380CC, and because Plaintiff Cass County, Missouri and Defendant Aquila, Inc. have rested with respect to their evidence on Plaintiff Cass County, Missouri's Application for Preliminary Injunction, the Court grants Plaintiff Cass County, Missouri's pending Motion to Advance Trial of the Action on the Merits with the hearing on Plaintiff Cass County, Missouri's

Application for Preliminary Injunction pursuant to this Court's discretion under Rule 92.02(c)(3).

5. The Court finds that the reference in Section 64.235 of the Revised Statutes of Missouri to "such" development is either vague or constructively meaningless and likely was intended by the legislature to mean "a" or "any" development. However, this Court specifically makes no conclusions of law regarding interpretation of the word "such" as used in Section 64.235. The Court bases its conclusions of law in this case as follows:

THE COURT FINDS that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not.

THE COURT FURTHER FINDS that 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. No one else has such unfettered power; not landfills, bedrock quarries, and not processing plants. Although not any of these are exactly on point, even the Missouri Highway and Transportation Commission has to go through the condemnation process before a circuit court regarding roads. Roads and landfills, at least, arguably have as much to do with the public good and welfare as power plants. The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.

THE COURT FURTHER FINDS that irreparable harm to Plaintiff Cass County is both actual as it concerns potential damage to county roads and presumed by law as the Defendant's proposed actions violate existing County Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Count I of Plaintiff Cass County, Missouri's First Amended Petition requesting a Declaratory Judgment is dismissed without prejudice at Plaintiff's request as effectively duplicative of the relief hereinafter granted under Count II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of Plaintiff Cass County, Missouri, and against Defendant Aquila, Inc. on Count II of Plaintiff Cass County, Missouri's First Amended Petition. Plaintiff's request for a temporary restraining order and for a preliminary injunction restraining construction of the Peculiar Substation and the South Harper Power Plant are, therefore, granted. Further, this Court, having advanced the hearing and cause and determination and judgment and order of this Court to a final judgment, hereby enters a mandatory permanent injunction against Aquila, Inc. as prayed by Plaintiff Cass County, Missouri in Count II of its First Amended Petition, as follows:

Aquila, Inc., and all others acting in concert with, at the direction of, on behalf of, under contract with, or otherwise in collaboration with Aquila, Inc., are mandatorily and permanently enjoined from constructing and operating the South Harper Plant, and from constructing and operating the Peculiar Substation, and are ordered to remove, at Aquila, Inc.'s expense, all improvements, fixtures, attachments, equipment or apparatus of any kind or nature inconsistent with an agricultural zoning classification placed, affixed or constructed at anytime, whether

before or after this Judgment, upon the South Harper Power Plant or Peculiar Substation sites described in the evidence.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction herein entered against Aquila, Inc. will be suspended, pursuant to this Court's discretion under Rule 92.03, during the pendency of any appeal by Aquila, Inc. from this Court's Judgment, subject to and conditioned upon Aquila, Inc. posting a $350,000.00 cash or surety appeal bond in form satisfactory to the Court for the security of the rights of Cass County, Missouri. The bond shall reflect that Aquila, Inc. is held and firmly bound unto Plaintiff Cass County, Missouri in the sum of $350,000.00 for the payment of which Aquila, Inc. and its surety, if applicable, bind themselves, on the condition that in the event the permanent injunction herein granted becomes a final non-appealable judgment, and/or is affirmed on appeal, then the bond shall be available to satisfy such damages, if any, deemed by the Court to have been incurred by Plaintiff Cass County, Missouri; otherwise the obligation shall be void. The Court finds that Plaintiff Cass County, Missouri has stipulated to a waiver of its rights under Rule 92.04 to seek from the Court of Appeals relief inconsistent with this Court's suspension of the injunction pending appeal.

IT IS SO ORDERED AND JUDGMENT IS HEREBY ENTERED, EACH PARTY TO BEAR ITS OWN COSTS.

Dated: Jan. 11, 2005

The Honorable Joseph P. Dandurand

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

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CASS COUNTY, MO.

CASS COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV104-1443CC
	)	
AQUILA, INC.,	)	
	)	
Defendant.	)	

Bond #8687774

APPEAL BOND

Know all persons by these presents, that we, **Aquila, Inc.**, as principal, and **Fidelity and Deposit Company of Maryland, 3910 Keswick Road, Baltimore, MD 21211**, as Surety, are held and firmly bound unto plaintiff Cass County, Missouri in the sum of **$350,000.00**, the payment of which, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas Cass County, Missouri has, in the Circuit Court of Cass County, Missouri, in the above-entitled cause therein pending, received a judgment granting it a permanent injunction against Aquila, Inc.; whereas Aquila, Inc. intends, according to law, to take an appeal from said judgment and wishes that the injunction be stayed during the pendency of said appeal; and whereas Cass County, Missouri claims that it may incur damage during the pendency of said appeal;

Now, THEREFORE, this Appeal Bond shall remain in full force and effect, unless and until it shall be made void, without further action of Aquila, Inc. or the Surety, if for any reason

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(1) the appeal is dismissed or the judgment is affirmed and, in either case, Aquila, Inc. does satisfy any such damage alleged, proven and reduced to judgment by Cass County, Missouri in accordance with law, or (2) the said judgment of the Circuit Court is set aside.

Signed, sealed and dated at Kansas City, Missouri, this **10th** day of **January, 2005.**

Karl Zobrist MO # 28235
J. Dale Youngs MO # 36716
Andrew Bailey MO # 49610
4801 Main Street, Suite 1000
Kansas City, Missouri 64112
(816) 983-8000
(816) 983-8080 (FAX)

Attorneys for Defendant Aquila, Inc.

Principal

Fidelity and Deposit Company of Maryland

Surety
Paige M. Turner, Attorney-in-Fact

Approved this 11th day of January, 2005.

Circuit Judge

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

On this 10th day of January, 2005, before me Judith K. Jedlicka, a Notary Public in and for the said County of Jackson, State of Missouri, residing therein, duly commissioned and sworn, personally appeared Paige M. Turner, known to me to be the Attorney-In-Fact of Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that she subscribed the name of Fidelity and Deposit Company of Maryland, thereto and her own name as Attorney-In-Fact.

Notary Public in and for the County of Jackson, State of Missouri

By: Judith K. Jedlicka
Judith K. Jedlicka

JUDITH K. JEDLICKA
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires Dec. 19, 2007

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IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

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CASS COUNTY, MO.

CASS COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV104-1443CC
	)	
AQUILA, INC.,	)	Bond No. K07339033
	)	
Defendant.	)	

BOND

Know all persons by these presents, that we, **Aquila, Inc.**, as principal, and **Westchester Fire Insurance Company, 525 West Monroe, Chicago, IL 60661**, as Surety, are held and firmly bound unto plaintiff Cass County, Missouri in the maximum sum of **$20,000,000.00**, the payment of which, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas Cass County, Missouri has, in the Circuit Court of Cass County, Missouri, in the above-entitled cause therein pending, received a judgment dated January 11, 2005, entering a permanent injunction against Aquila, Inc.; whereas Aquila, Inc. has secured an order from the Circuit Court dated on or about February 14th, 2006 which temporarily suspends to May 31, 2006 enforcement of that portion of the permanent injunction which requires the dismantling of the South Harper Plant and the Peculiar Substation as those facilities have been commonly referred to in this cause, and which temporarily suspends to May 31, 2006 enforcement of that portion of the permanent injunction which prohibits operation of the Peculiar Substation and the substation at the South Harper facility, and which reiterates Aquila's obligation to comply with that portion of the permanent

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injunction which prohibits operation of the South Harper Plant; whereas Cass County, Missouri claims that it may incur damage if Aquila, Inc. fails to comply with this order; and whereas, as a condition of the order's effectiveness, the Circuit Court has mandated the posting of this Bond;

NOW, THEREFORE, this Bond shall remain in full force and effect, unless and until it shall be made void, without further action of Aquila, Inc. or the Surety, by: (1) Aquila's satisfaction of any such damage alleged, proven and reduced to judgment by Cass County, Missouri in accordance with law, and and arising from Aquila's failure to comply with the order; or (2) the order is set aside or dissolved.

Signed, sealed and dated at Kansas City, Missouri, this **14th** day of **February, 2006**.

Respectfully submitted,

J. Dale Youngs MO # 36716
BLACKWELL SANDERS PEPER MARTIN, LLP
4801 Main Street, Suite 1000
Kansas City, Missouri 64112
(816) 983-8000
(816) 983-8080 (FAX)

Attorney for Defendant Aquila, Inc.

Aquila, Inc., Principal

Westchester Fire Insurance Company

Surety
Paige M. Turner, Attorney-in-Fact

Approved this 15th day of February 2006.

Circuit Judge

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

On this 14th day of February, 2006, before me Peggy L. Bittiker, a Notary Public in and for the said County of Jackson, State of Missouri, residing therein, duly commissioned and sworn, personally appeared Paige M. Turner, known to me to be the Attorney-In-Fact of Westchester Fire Insurance Company, the corporation that executed the within instrument, and acknowledged to me that she subscribed the name of Westchester Fire Insurance Company, thereto and her own name as Attorney-In-Fact.

Notary Public in and for the County of Jackson, State of Missouri

By: Peggy L. Bittiker
Peggy L. Bittiker

PEGGY L. BITTIKER
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires June 13, 2008

g:\notarymo.sam

Power of Attorney

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WESTCHESTER FIRE INSURANCE COMPANY 1-13650

Know all men by these presents: That WESTCHESTER FIRE INSURANCE COMPANY, a corporation of the State of New York, having its principal office in the City of Atlanta, Georgia, pursuant to the following Resolution, adopted by the Board of Directors of the said Company on November 3, 1999, to wit:

RESOLVED, that the following Rules shall govern the execution for the Company of bonds, undertakings, recognizances, contracts and other writings of the nature thereof:

That the President, any Senior Vice President, any Vice President, the Secretary, any Vice President, or any Attorney-in-Fact, may execute, or authorize the execution by, on behalf of the Company and all bonds, undertakings, recognizances, contracts and other writings in the nature thereof, the same to be attested when necessary by the Corporate Secretary, or any Assistant Corporate Secretary, and the seal of the Company affixed thereto; and that the President, any Senior Vice President, any Vice President, or any Assistant Vice President may appoint and authorize any other Officer, Clerk or Employee of the Company as Attorney-in-Fact to execute, or attest the execution of all such writings on behalf of the Company and to affix the seal of the Company thereto.

Any such writing executed in accordance with these Rules shall be as binding upon the Company as if signed by the President and attested to by the Corporate Secretary.

The signature of the President, any Senior Vice President, any Vice President, Secretary, any Assistant Vice President and the seal of the Company may be affixed by facsimile on any power of attorney granted pursuant to these Rules, and the signature of a Certifying Officer and the seal of the Company may be affixed by facsimile to any certificate of which the power of attorney and such power or certificate bearing such facsimile signature and seal shall be valid and binding on the Company.

Any and all Officers of the Company, and Attorneys-in-Fact duly authorized, may certify as to copies of this Resolution, the By-Laws of the Company, and any affidavit or record of the Company necessary to the exercise of their duties.

Revocation of this Resolution does not revoke any authority granted by Resolutions of the Board of Directors.

Does hereby nominate, constitute and appoint MICKEY BICKHAM, PAMELA S. COCKE, MICHAEL J. GRANAGHER, JAMES E. JOHNSON, JON T. LOHMEIER and PAMELA M. TURNER all of the City of Kansas City, State of Missouri each individually if there be more than one named, its true and lawful attorney-in-fact, to make, execute, seal and deliver on its behalf, and as its act and deed any and all bonds, undertakings, recognizances, contracts and other writings in the nature thereof in a penalty not exceeding Twenty Five Million Dollars ($25,000,000) and the execution of such writings in pursuance of these presents shall be as binding upon said Company, as fully and amply to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its principal office.

IN WITNESS WHEREOF, the said Stephen M. Haney, Vice President, has hereunto subscribed his name and affixed the corporate seal of the said WESTCHESTER FIRE INSURANCE COMPANY, this 9th day of February, 2006.

WESTCHESTER FIRE INSURANCE COMPANY

Stephen M. Haney, Vice President

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

On this 9th day of February, A.D., 2006 before me, a Notary Public of the Commonwealth of Pennsylvania in and for the County of Philadelphia, came Stephen M. Haney, Vice President of the WESTCHESTER FIRE INSURANCE COMPANY to me personally known to be the individual and officer who executed the preceding instrument, and he acknowledged that he executed the same, and that the seal affixed to the preceding instrument is the corporate seal of said Company; that the said corporate seal and his signature were duly affixed by the authority and direction of the said corporation, and that Resolution, adopted by the Board of Directors of said Company, referred to in the preceding instrument, is now in force.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Philadelphia the day and year first above written.

NOTARIAL SEAL
Kathleen Fini, Notary Public
Philadelphia, Philadelphia County
My commission expires September 22, 2007

Kathleen Fini, Notary Public

I, the undersigned, Secretary of WESTCHESTER FIRE INSURANCE COMPANY, do hereby certify that the original POWER OF ATTORNEY, of which the foregoing is a substantially true and correct copy, is in full force and effect.

In witness whereof, I have hereunto subscribed my name as Secretary, and affixed the corporate seal of the Corporation, this 14th day of February, 2006.

George D. Mulligan, Secretary

THIS POWER OF ATTORNEY MAY NOT BE USED TO EXECUTE ANY BOND WITH AN INCEPTION DATE AFTER February 9, 2008.

FORM NO. 83003

THE BACK OF THIS DOCUMENT LISTS VARIOUS SECURITY FEATURES THAT WILL PROTECT AGAINST COPY COUNTERFEIT AND ALTERATION.

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**

REPORT AND ORDER

Issue Date: **May 23, 2006**

Effective Date: **May 31, 2006**

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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,	)	**Case No. EA-2006-0309**
Maintain, and Otherwise Control and Manage	)	
Electrical Production and Related Facilities in	)	
Unincorporated Areas of Cass County, Missouri	)	
Near the Town of Peculiar.	)	

APPEARANCES

J. Dale Youngs, Esq, Blackwell Sanders Peper Martin, LLP, 4801 Main Street, Suite 1000, Kansas City, Missouri 64112, for Aquila, Inc.

James Swearengen, Janet Wheeler and Diana Carter, Esq., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri, 65102, for Aquila, Inc.

Mark W. Comley, Esq., Newman, Comley & Ruth, P.C., 601 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102-0537, for Intervenor Cass County, Missouri.

Debra L. Moore, Esq., Cass County Counselor, Cass County Courthouse, 102 East Wall, Harrisonville, Missouri 64701, for Intervenor Cass County, Missouri.

Cindy Reams Martin, Esq., 408 SE Douglas, Lee's Summit, Missouri 64063, for Intervenor Cass County, Missouri.

Gerard Eftink, Esq., 704 West Foxwood Drive, Post Office Box 1280, Raymore, Missouri 64083, for Intervenor StopAquila.org.

John Coffman, Esq., 871 Tuxedo Boulevard, St. Louis, Missouri 63119, for Intervenors Dillon, Miller and Doll.

Matthew Uhrig, Esq., 3401 West Truman Boulevard, Jefferson City, Missouri 65109, for Intervenors Dillon, Miller and Doll.

Stu Conrad and David Woodsmall, Esq., Finnegan Conrad & Peterson, L.C., 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, for Intervenor Sedalia Industrial Energy Users Association.

Elvin S. Douglas, Esq., Crouch, Spangler & Douglas 117 South Lexington Street, Post Office Box 280, Harrisonville, Missouri 64701, for Intervenor the City of Peculiar, Missouri.

David C. Linton, Esq., 424 Summer Top Lane, Fenton, Missouri 63026, for Intervenor Southwest Power Pool, Inc.

Mark Wheatley, Esq., Assistant Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steve Dottheim, Lera Shemwell and Nathan Williams, Esq., Associate General Counsels, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Ronald D. Pridgin**

REPORT AND ORDER

Procedural History

On January 25, 2006, Aquila, Inc., applied to the Missouri Public Service Commission for a certificate of convenience and necessity for its already-built South Harper Facility and Pecuilar Substation in Cass County, Missouri. The Commission established February 27 as the deadline for interested parties to intervene. The following parties filed applications to intervene: Sedalia Industrial Energy Users' Association; StopAquila.org; Cass County, Missouri; the City of Peculiar; Frank Dillon, Kimberly Miller, and James E. Doll; and Southwest Power Pool, Inc. The Commission granted those applications.

The Commission held an evidentiary hearing on April 26-28, May 1, 3, and 4, 2006.[1] The Missouri Public Service Commission, having considered all of the competent and

[1] A more complete procedural history of the events leading up to this case may be found in the Commission's Order Clarifying Prior Certificates of Convenience and Necessity in Case No. EA-2005-0248 (April 7, 2005) (rev'd by consent of parties in light of *StopAquila.org v. Aquila*, 180 S.W.3d 24 (Mo.App. 2005)).

substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

Findings of Fact

The Parties, the Facilities, Procedural Matters, and Related Decisions

1. Aquila is a Delaware Corporation with its principal office and place of business at 20 West 9th Street, Kansas City, Missouri 64105-1711.

2. Aquila is a regulated public utility corporation subject to the jurisdiction of the Commission as provided by law. The Commission has authorized Aquila to conduct its business in its certificated areas in Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions. As such, Aquila is engaged in providing electrical, natural gas and industrial steam service in those areas of the State certificated to it by the Commission, including most of Cass County.

3. Intervenor Sedalia Industrial Energy Users' Association is an unincorporated association consisting of large commercial and industrial users of natural gas and electricity.

4. Intervenor StopAquila.org ("StopAquila") is an unincorporated association of individuals, some of whom reside in Cass County, Missouri.

5. Intervenor Cass County, Missouri ("Cass County") is a County of the State of Missouri and is a first-class, non-charter county.

6. Intervenor the City of Peculiar ("Peculiar") is a city of the fourth class of the State of Missouri.

7. Intervenors Frank Dillon, Kimberly Miller, and James E. Doll ("Certain Residents of Cass County") are individuals residing in Cass County, Missouri.

8. Intervenor the Southwest Power Pool, Inc. ("SPP") is a not-for-profit corporation organized and existing under the laws of the State of Arkansas. SPP, a FERC-approved regional transmission organization ("RTO"), serves more than 4 million customers and covers a geographic area of over 250,000 square miles. SPP's membership includes 13 investor-owned utilities, 7 municipal systems, 9 generation and transmission co-ops and several independent power producers and power marketers. Aquila joined the SPP Regional Tariff on July 1, 2005, after the transmission facilities for South Harper and the Peculiar substation were in-service. SPP administers open-access electric transmission service in several Midwest states.

9. The Staff of the Commission traditionally appears as party in Commission proceedings and is represented by the Commission's General Counsel.

10. Aquila and its predecessors have been operating electric transmission and distribution systems in unincorporated Cass County for nearly 90 years pursuant to authority from this Commission and a franchise from Cass County.

11. The two tracts of real estate which are the subject of Aquila's application herein are identified as follows: (a) an approximate 74 -acre tract of real estate at or near 243rd Street and Harper Road, and generally located in parts of Sections 29 and 32, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter, "Tract A"); and (b) an approximate 55-acre tract of real estate at or near 203rd Street and Knight Road,

and generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter, "Tract B").

12. Tracts A and B are located within Aquila's certificated service area.

13. Tracts A and B are located in unincorporated Cass County, Missouri.

14. Cass County's 1991 Comprehensive Plan (Ex. 103), 1997 Comprehensive Plan Update and Zoning Ordinance (Ex. 104), 2003 Comprehensive Plan Update and Zoning Ordinance (Ex. 105), and 2005 Comprehensive Plan Update and Zoning Ordinance (Ex. 108) reflect changes in Cass County's land use plans and intended implementation of those plans over time.

15. Cass County's 2005 Comprehensive Plan establishes multi-use tiers in which non-agricultural uses "such as commercial and industrial uses" are encouraged. Tract A is located in such a multi-use tier, as is the portion of Tract B on which the South Harper Facility is located.

16. The South Harper Facility includes a peaking power production plant consisting of three natural gas fired combustion turbines – each having a nameplate rating of 105 megawatts -- and an associated electric transmission substation situated on approximately nine acres of the 74-acre tract of land.

17. The Peculiar Substation, a related electrical transmission substation, utilizes approximately 7.5 acres of the 55-acre tract of land.

18. By letter of November 5, 2004, the Executive Director of the Commission stated that the Commission was aware of Aquila's plans to construct additional natural gas fired generation in the Company's service territory near the City of Peculiar and that no

additional authority was necessary from the Commission with regard to said construction by Aquila.

19. On January 11, 2005, the Honorable Joseph P. Dandurand, Circuit Judge of Cass County, issued a judgment in Cass County Case No. CV104-1443CC ("Final Judgment"). The Final Judgment read, in part, that Aquila was enjoined from constructing and operating the South Harper Facility and the Peculiar Substation. Aquila posted an Appeal Bond on January 11, 2005, that was approved by the Circuit Judge and that suspended the effect of the injunction pending the appeal of the Final Judgment.

20. A Notice of Appeal was filed by Aquila on January 12, 2005, in the Circuit Court of Cass County regarding the Final Judgment. Aquila's appeal of the Final Judgment in Case No. CV104-1443CC was assigned Case No. WD64985 in the Missouri Court of Appeals, Western District.

21. On January 28, 2005, Aquila filed its application with the Commission, Case No. EA-2005-0248, seeking specific confirmation or, in the alternative, the issuance of certificates of convenience and necessity authorizing it to construct, install, own, operate, control, manage, and maintain the Facilities on Tracts A and B. The syllabus of the Commission's ruling in that case (which has since been vacated by this Commission) is that the order "clarifies prior certificates of convenience and necessity of Aquila, Inc., and confirms that, in order to serve its customers, Aquila has already been granted specific authorization to build its South Harper Facility and Peculiar Substation."

22. In order to provide reliable and adequate service to its customers, Aquila constructed the South Harper Facilities. Construction was completed during the summer of

2005, and the Facilities were placed into commercial operation and began serving Aquila's customers during late June and early July, 2005.

23. On December 20, 2005, the Court of Appeals issued its opinion in Case No. WD64985, *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005), in which the Court of Appeals held, in part, as follows:

> Because we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt.
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> * * *
>
> If we consider the Public Service Commission Law as a whole and bear in mind the essential purposes of public-utility regulation, it becomes clear that a Commission order granting a service territory to one utility does not function as the "specific authority" required for the construction of an electric plant under section 393.170.1 in derogation of county zoning authority.
>
> * * *
>
> 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.

24. On January 20, 2006, Aquila attempted to file with Cass County requests for special use permits concerning Tracts A and B. Officials of Cass County would not accept the filing of Aquila's request citing the Final Judgment and the pending judicial review action concerning the Commission's order in Case No. EA-2005-0248.

25. On January 25, 2006, Aquila filed the application which is the subject of this proceeding requesting the Commission approve certificates of convenience and necessity

authorizing the Company to acquire, own, operate, maintain, and otherwise control and manage the Facilities located on Tracts A and B. Aquila further requested such other orders and findings as are appropriate under the circumstances.

26. After a hearing in Harrisonville, Missouri in Cass County Case No. CV104-1443CC, on January 27, 2006, Judge Dandurand extended the stay of the injunction portion of his Final Judgment until May 31, 2006.

27. By the Commission's order of March 2, 2006, Sedalia Industrial Energy Users' Association, StopAquila, Cass County, Peculiar, Certain Residents of Cass County, and SPP were granted intervention in this proceeding.

28. In connection with the application, two local public hearings were held on March 20, and one local public hearing was held on March 30, all in Harrisonville, Cass County, Missouri, at which time over 50 witnesses appeared and testified.

29. Intervenors StopAquila and Cass County each filed a motion to dismiss the application. These motions were denied by the Commission's order issued April 20, 2006.

30. Evidentiary hearings were held in Jefferson City, Missouri on April 26, 27, and 28, and May 1, 3, and 4, 2006, and testimony and certain exhibits were admitted into evidence. Following the submission of posthearing briefs and proposed reports and orders, the matter was submitted on the record.

Need for the Facilities

31. Aquila was a party to a Power Sales Agreement dated February 22, 1999, ("PPA") that expired on May 31, 2005. The PPA provided that Aquila could take up to

500 MW of capacity during the summer months and 320 MW in the winter months.[2] The Facilities were constructed to partially replace the electricity Aquila was obtaining under this PPA and to meet increased customer demand.

32. Aquila issued a RFP and using MIDAS Gold and Realtime models, Aquila evaluated potential alternative resources. The lowest cost scenario under base conditions was with a plant with 5 combustion turbines (CTs), but Aquila deemed the 3-CT South Harper plan to be its "preferred plan."

33. Aquila decided not to enter into another purchase power contract with Calpine because the contract Calpine offered proposed higher prices and provided for significant operating constraints. The Aries plant is a combined cycle unit, which is an intermediate type plant and not a peaking facility.

34. In addition to the need to replace the Aries PPA, Aquila also needs capacity and energy to meet growth in its Missouri customers' electrical needs.

35. Once Aquila had decided to move forward with the South Harper Facility, Calpine did attempt to provide an unsolicited one year purchased power agreement. However, the Calpine short term offer did not excel over the long term decision to build, and, by the time the offer was received, Aquila had incurred sunk costs in pursuit of the self-build plan.

36. In January of 2004, Aquila informed the Staff and the Public Counsel that it would pursue a self-build option. Before and after this announcement, the Staff had been receiving resource planning updates from Aquila about every six months, and Aquila used

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[2] The power was supplied from a merchant plant—the Aries plant located in Cass County—that an unregulated Aquila affiliate had owned with Calpine at one time. Before the PPA expired, Aquila's affiliate had sold its interest in the plant to Calpine.

some of the Staff's suggestions as guidance for its self-build plan. If the Facilities were not in service in June 2005, Aquila would need to add capacity to meet load and reserve requirements, and the cost of other options were higher than building the South Harper Facilities.

37. While Aquila may also need baseload capacity, Aquila's load is unique in that it needs generation capacity suited to meeting peak demands.

38. This need for peaking capacity is driven by the high percentage of residential customers on Aquila's system who are very weather sensitive and have a highly variable load. Because Aquila needed capacity to serve these customers, combustion turbine units such as those at the South Harper Facility are appropriate.

39. Aquila's transmission system planning department completes a ten-year transmission planning study every three years. The 2002 study analyzed the Grandview, Belton, Harrisonville, and Pleasant Hill area. A critical issue was identified regarding the amount of load on the 69 kV system and the ability to adequately serve it. A number of options were analyzed, all of which were viewed as costly. By upgrading the local transmission system in conjunction with construction of the Facilities, Aquila was able to improve the transmission system reliability to the growing western area of the service territory of Aquila Networks-MPS.

40. During the months of July through December of 2005, the South Harper Facility was operated for a total of 429 hours on 57 days, representing nearly 74,000 MWh of power generation for Aquila Networks-MPS system customers.

41. The Facilities have been incorporated into SPP's expansion plan and will provide the energy consumers with greater access to generation resources in the region,

improve the reliability of the bulk transmission system, improve the overall efficiency and economics of transmission operations, and provide reactive support to the local loads and the overall system.

42. The residents of Cass County who have stated opposition to the Facilities, even if they are not direct Aquila customers, will be served by the energy and capacity generated by this plant. The Peculiar Substation will relieve the load on other transmission facilities in southern Kansas City and benefit the overall operation of the transmission system in that area. This addition will improve the reliability of the system in this growing area.

43. There is a public need for the Facilities and related services.

Site Selection and Land Use Matters, Including Zoning and Other Issues

44. Cass County has two employees in its Planning and Zoning Department who perform actual planning functions. Neither of these employees is a certified land use planner. 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."[3]

45. The issue of the appropriateness of the Facilities in their respective locations has been the subject of extensive briefing, argument, and written and live testimony in this proceeding. Witnesses were subject to detailed cross-examination by both legal counsel for the parties and members of this Commission.

[3] Tr. Vol. 10, p. 1361.

46. As part of Aquila's Integrated Resource Plan ("IRP") and in response to a request for proposals ("RFP") for capacity and energy for Aquila which was issued on January 22, 2003, a site selection study was prepared by Sega Inc. ("Sega"), an engineering firm, on behalf of Aquila. The RFP provided constraints such as delivery points and availability which were factors in the site study.

47. A preliminary study performed by Sega, at the direction of Aquila for siting of the Facilities, generally evaluated five different tracts of land in Cass County. This initial effort identified one fatally flawed site and recommended a site north of Harrisonville which became known as the "Camp Branch" site. The study was later expanded to include three more sites. The expanded study ranked each site and recommended the Camp Branch site as the best location.

48. On July 13, 2004, Aquila's Special Use Permit Application (No. 2589) was taken up by the Cass County Planning and Zoning Board. Darrell Wilson, Zoning Director, noted that the applicant for the special use permit would be given one hour to speak. The opposition would then have one hour, and the applicants would have 15 minutes for rebuttal. The proceeding began at 7:00 p.m., witnesses were sworn, and a few preliminary matters were addressed. Robert Hardin, Chairman of the Planning Board, stated that redundancies would not be appreciated and that there should not be rehashing of positions and opinions. He referred to Aquila's application as significant and said that he wanted all the facts to be brought forth on both sides of the issue. After Aquila presented its case, approximately ten people spoke in opposition to the application. Aquila representatives spoke for approximately 15 additional minutes, and Scott Michie, the consultant planner for the Planning Board, then made some comments. The Chairman then noted that the

Board's staff had already stated their opinions, said there may be some questions by the Board, and then a vote would be taken. Following questions from the Board, a motion was made to approve Aquila's application. A vote was taken, and the Chairman noted that the motion was voted down with a 0-6 vote. He then said the recommendation for denial of Aquila's application would be forwarded to the Board of Zoning Adjustment. The hearing was adjourned at 9:45 p.m.

49. After the Cass County Planning and Zoning Board recommended to the Cass County Board of Zoning Adjustment ("BZA") denial of the special use permit for the Camp Branch site, Aquila sought guidance from Cass County Commissioner Mallory on the expected actions of the BZA. Commissioner Mallory, who served as the Chairman of the BZA, advised Aquila that its application had a snowball's chance in hell of being approved.[4]

50. Based upon Commissioner Mallory's guidance, Aquila turned to alternatives which included the option to relocate the site for the Facilities to a community that had made overtures to Aquila. Aquila then began discussions with those communities, including the City of Peculiar.

51. Aquila also requested that Sega's investigation be expanded further to include the communities that had expressed interest in locating the Facilities, and Sega then evaluated and ranked twelve sites according to specific criteria.

52. Sega applied nine engineering criteria, and Sega personnel visited, photographed, and observed each site. Further, Sega cataloged and evaluated the physical attributes of each site. Each site was examined for: adequacy of size and configuration for an overall plant layout template; the location relative to Aquila's existing

[4] Tr. Vol. 10, pp. 1371-1372.

electric transmission grid; for proximity to adequate natural gas supply lines; location and adequacy of water supply lines; proximity to existing sanitary sewer services; and access.

53. Sega also examined each site for the ability to obtain permits in a timely fashion and evaluated each site for the likely schedule required for acquisition, permitting, and construction of the plant. Acquisition costs for the South Harper site were considered reasonable, a willing seller was ready to move forward, the City of Peculiar was favorable to annexation and tax exempt financing, and there appeared to be local support for the project.

54. The geographic and geologic features of the site appeared appropriate, there were major gas pipeline lines located on the property, an existing compression station was located adjacent to the proposed site, a competing gas transmission pipeline was located only about two miles to the south, and water capacity appeared to be adequate.

55. Cass County is an area with rapidly increasing population and energy demand so that siting a power plant in Cass County would put the plant where Aquila's load is increasing. With the increasing demand in this service area, and the need for residential peaking power, the South Harper Facility is a better choice to meet Aquila's customers' needs than Aries, which is an intermediate unit with an optimal running time of 12 hours.

56. The location of the South Harper Facility is geographically diverse from Aquila's other Missouri electric power generating plants.

57. There are two advantages of locating plants apart geographically: (1) it reduces the likelihood of losing power from multiple plants at the same time due to a common failure—for example, inadequate fuel gas pressure, and (2) it reduces

dependence on the same transmission paths (or lines) to serve customers which reduces losses and the risk of overloading the transmission system.

58. There are natural gas pipelines and transmission lines near the South Harper Facility with sufficient capacity to serve it.

59. The availability of two natural gas lines with sufficient capacity to serve the plant enhances power plant reliability and provides competition in sale of the fuel used by the South Harper Facility.

60. A comparison of land use near the Facilities with land use near other power plant sites indicates that land use in the vicinity of simple-cycle generation plants includes sparsely populated agricultural, residential and industrial areas. The South Harper Facility is in an "agricultural" area with a housing density that is "rural" in nature. This type of land use is not uncommon in the vicinity of these types of electric generation plants in Missouri. In some cases the population density around these types of plants is relatively dense, approaching that of a residential area, but often the current housing density around the generation plant includes homes that were built after the generation plant was operating.

61. The location of the South Harper Facility site drove the location of the 345 kV to 161 kV substation northwest of Peculiar – the Peculiar Substation. The Peculiar Substation was also located to minimize the needed right-of-way distance and take advantage of an existing 69 kV right-of-way.

62. Regardless of the existence of the South Harper Facility, there is a need for a substation at or near where the Peculiar Substation is sited.

63. Cass County's Comprehensive or Master Plan establishes the "vision" of the community from a land use planning perspective. The County's zoning ordinances are a

means by which that vision may be implemented. If applications for zoning changes are in accordance with the Comprehensive Plan, they are presumed to be reasonable.

64. Cass County's current 2005 Comprehensive Plan 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. 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.

65. Cass County has represented that Exhibit 102, offered by Cass County and received into evidence near the end of the evidentiary hearings in this proceeding, is a map of Cass County's zoning as of 1999.

66. During the evidentiary hearings, Presiding Cass County Commissioner Mallory testified that Exhibit 102 is the map adopted by reference in Cass County's February 1, 2005 zoning ordinance. That ordinance repealed Cass County's prior zoning ordinance. A comparison of Exhibit 102 with the Comprehensive Plan Update-2005 Land Use Tiers map, found as Schedule WW-10 to the surrebuttal testimony of Staff witness Wood and following page 38 of Exhibit 118, reveals the municipal boundaries do not match; those of the Comprehensive Plan Update-2005 Land Use Tiers map encompass more territory than those of Exhibit 102.

67. Presiding Cass County Commissioner Mallory was unable to correlate the Classification of Zones found at page 27 of Exhibit 119 with the zones drawn on Exhibit 102. Cass County offered and the Commission received into evidence Cass

County's 2005 Zoning Order (Exhibit 08), 1997 Zoning Ordinance (Exhibit 104) and 1991 Zoning Ordinance (Exhibit 103). The second page of each includes a provision that expressly repeals prior zoning ordinances upon adoption of the new ordinance. Moreover, the 2005 ordinance includes, on page 27, a table that associates a symbol with a zone name and, on page 28, a table that correlates current zoning districts with prior repealed zoning districts. The districts do not correspond with the legend shown on the Exhibit 102 zoning map. Additionally, the zoning district tables in the 1997 (at page 25) and 1991 (at page 23) zoning ordinances do not correspond with the legend shown on the Exhibit 102 zoning map.

68. Exhibit 102 has not been updated since 1999 and may not be consistent with either Cass County's 2003 Comprehensive Update Plan or its 2005 Comprehensive Update Plan.

69. Of further significance, the Exhibit 102 zoning map indicates in the lower right-hand corner that the roads shown on the map are those as of 1971 and 1972. The experts Cass County has retained in the past—Bucher, Willis & Ratliff Corporation—to assist it in developing its land use plans and zoning ordinances since at least before 1991 did not testify in this case.

70. Cass County maintains that the locations of the South Harper Facility and Peculiar Substation, Tracts A and B, 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." 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.

71. An evaluation of the evidence in this proceeding, including factors and policies set out in the County's Comprehensive Plan and Zoning Order, demonstrates that the Facilities are appropriate and comparable uses for the areas. For example:

- Cass County Presiding Commissioner Gary Mallory characterized the Facilities as "light industrial uses."
- 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.
- The Facilities are near Peculiar, and both have access to roads with access to major arterials, and rural and other highways.
- The Facilities will not result in any meaningful increase in traffic in the areas.
- A variety of services are available to the sites, including electricity, water, fire and police protection.
- There is no evidence of any nuisance or interference by the Facilities with farming operations. The entire northern section of the South Harper Facility site is occupied by a farm, and Aquila had previously committed to leave that section as undeveloped farm land.
- Neither the South Harper Facility nor the Peculiar Substation occupies the entirety of the parcels on which they sit – 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. There is no evidence of any adverse health impacts that have been shown to be associated with the Facilities.
- Neither property is located within the 100-year flood plain.
- There are no issues regarding actual or potential disturbance of significant natural resources at the sites.
- There are no issues regarding stormwater runoff at the sites.
- There are no issues regarding drainage easements at the sites.
- Neither parcel has any chance of being part of a residential subdivision.
- There are no applicable yard or open space requirements.
- The Facilities are significantly set back from the roadways, and have been landscaped and bermed (where natural shielding does not already exist) to reduce their visual impact.

72. 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. The South Harper Facility is fully compatible with this preexisting industrial use.

73. At no time during the Peculiar annexation process that was eventually aborted, nor during the time of Aquila's grading permit process, did Cass County raise any issues about the land use being proposed by Aquila and the City of Peculiar for the South Harper site.

74. The location and design of the Facilities are consistent with sound planning principles, were sited using defensible planning practices, are compatible with the surrounding development, and are consistent with the Cass County 2005 Comprehensive Plan and Zoning Order.

75. The 2005 Plan is designed to balance local land use policy with the type and nature of growth that Cass County is experiencing, and the County's 2005 Comprehensive Plan acknowledges that limits on development must be balanced with private economic interests.

76. The 2005 Plan provides for a multi-use tier which encourages non-agricultural uses such as commercial and industrial uses. The Facilities are located in such a multi-use tier.

77. There are no anticipated health effects from air emissions, and an air permit was issued by the Missouri Department of Natural Resources because the emissions will not significantly cause or contribute to a degradation of air quality in the area.

78. Aquila has taken a number of measures to further mitigate impacts on its neighbors.

79. The Facilities were designed to meet the County's residential noise emissions standards, and Aquila has embarked on projects to reduce the sound levels even further. Notably, Cass County has a "noise" ordinance that regulates acceptable sound levels in unincorporated areas of the county and no one has filed any formal complaints with Cass County alleging sound from the South Harper Facility violates Cass County's "noise" ordinance. Approximately 1,200 trees and shrubs were planted on the grounds and neighboring properties, and Aquila consulted with neighbors regarding landscaping.

80. The Peculiar Substation site is 55 acres, of which only 7.5 acres is being used for operations. The South Harper Facility site has a total of 73.6 acres, and the footprint for the plant and substation is only 9.3 acres. Aquila is using approximately 13 percent of the land area for the Facilities. The remainder of the property consists of "buffer zones."

81. Aquila's original land purchase for the Facilities included 35 acres north of the plant in excess of what was needed for the Facilities. Aquila has committed to leaving this land undeveloped as an additional "buffer zone" between the Facilities and the residential neighbors.

82. Over 250 local residents have signed letters of support for the Facilities, and Aquila worked with the Grand Oaks subdivision developer and the twenty current residents to design the Peculiar Substation on Tract B, and those residents are satisfied with its design and operation. Three of the four residents outside of Grand Oaks but closest to the Substation signed letters of support.

83. Both the City of Peculiar and the City of Lake Annette, the municipalities closest to the South Harper Facility, support the location of the generation plant and related substation.

84. The locations of the Facilities on Tracts A and B are suitable based on utility infrastructure needs and are compatible with local land use issues.

Financial Matters

85. Aquila financed the construction of the South Harper Facility with one hundred and forty million dollars ($140,000,000) of tax-advantaged revenue bonds issued under the economic development authority of the City of Peculiar under Article VI Section 27(b) of the

Constitution of the State of Missouri and Sections 100.010 through 100.200, RSMo. The financing issue is the subject of a case currently pending before the Missouri Supreme Court.

86. The Facilities have been constructed, the project has been funded, and Aquila has suffered no impairment to its credit as a result. Aquila has had the financial wherewithal to fund the construction and operation of the Facilities.

87. In 2004, the Company's consolidated equity ratio was approximately 32 percent. As of September of 2005, after the facilities had been constructed Aquila's consolidated equity ratio had grown to roughly 42 percent. Despite the significant capital commitment necessary to fund the construction of the Facilities, the Company's financial condition improved.

88. Since 2002, the Company has undergone financial restructuring, and the process continues to this day. Aquila has sold most of its non-regulated businesses, is in the process of selling those that remain, and is in the process of selling select domestic utility properties, with proceeds earmarked to reduce debt and further strengthen the Company's balance sheet.

89. Aquila is qualified from an operational standpoint and has the financial ability to own, operate, control and manage the Facilities and provide the related service, and Aquila's proposal is economically feasible.

Conditions

90. The Staff recommended that the Commission impose six particular conditions on a site specific certificate of convenience and necessity for the Facilities as follows:

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

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

iii. 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).

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

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

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

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Aquila is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo, and the Commission has jurisdiction over Aquila's application.

The dominant purpose in creation of the Commission is public welfare.[5] The administration of its authority should be directed to that purpose. In every case where it is called upon to grant a permit, or to authorize an additional service to be rendered by an authorized certificate holder, the Commission should be guided, primarily, by considerations of public interest.[6]

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[5] *Alton R. Co. v. Public Service Commission*, 110 S.W.2d 1121, 1125 (Mo. App. 1937).

[6] *Missouri Pacific Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

Section 386.610[7] reads, in relevant part, that "[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." The Commission must weigh the benefits and detriments to all the groups affected by its decision.

In the *Missouri Pacific Freight Transport Company* case, the Court stated that the "rights of an individual with respect to issuance of a certificate are subservient to the rights of the public . . .[8] Additionally, in a case affirming the Commission's grant of a certificate of convenience and necessity to a water utility, the Court in *Public Water Supply District No. 8* stated that "the ultimate interest is that interest of the public as a whole . . . and not the potential hardship to individuals . . ."[9] An examination of those cases in Missouri finds that the determination of public interest is a balancing test between public and private interests.[10] Further, "[n]o one factor is dispositive in balancing public versus private interests. Each case stands on its own facts and circumstances."[11]

Section 386.250, jurisdiction of Commission, reads, in relevant part, as follows:

> The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas

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

[8] *Id., citing State ex rel. Missouri, Kansas & Oklahoma Coach Lines v. Public Service Commission*, 179 S.W.2d 132; *State ex rel. Interstate Transit Lines v. Public Service Commission*, 132 S.W.2d 1082.

[9] *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. W.D. 1980).

[10] *Rhein v. City of Frontenac*, 809 S.W.2d 107 (Mo. App. 1991). See also, *Hoffman v. City of Town and Country*, 831 S.W.2d 223 (Mo. App. E.D. 1992), and *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963).

[11] *Id.* at 110.

and electric plants, and to persons or corporations owning, leasing, operating or controlling the same . . .

Section 393.140, general powers of Commission in respect to gas, water, electricity and sewer services, reads, in relevant part, as follows:

The commission shall:

(1) Have general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, and all gas plants, electric plants, water systems and sewer systems owned, leased or operated by any gas corporation, electrical corporation, water corporation, or sewer corporation.

(2) Investigate and ascertain, from time to time, the quality of gas or water supplied and sewer service furnished by persons and corporations, examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and in supplying and distributing water for any purpose whatsoever, and in furnishing a sewer system, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas, electricity, water, or sewer system, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations, water corporations, and sewer corporations.

Section 393.140 conveys upon the Commission broad supervisory powers and provides that the Commission shall have general supervision over all electric utilities operating in Missouri.[12]

[12] *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753 (Mo. banc 2003).

The Commission exercises the police power of the state, and the Commission is "to have very broad jurisdiction in the field in which it was intended to operate."[13] Therefore, 'the power of the Public Service Commission . . . overrides all contracts, privileges, franchises, charters or city ordinances.'" [14]

Section 393.170, approval of incorporation and franchises - certificate, reads as follows:

> 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 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.

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[13] *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 (Mo. banc 1944).

[14] *May Department Stores Company v. Union Electric Light & Power Company and Cupples Station Light, Heat & Power Company*, 107 S.W.2d 41 (Mo. banc 1937) (internal citations omitted).

Section 64.235, improvements to conform to plan, approval required (noncharter first class counties), reads as follows:

> 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 therefore 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.

The Facilities are a "development" or a "public improvement," as contemplated by Section 64.235.

The Commission does not conclude that Aquila requires an additional certificate of convenience and necessity for its Peculiar Substation. A utility holding an area certificate may build transmission facilities within its certificated area without having to obtain a line certificate.[15] Nevertheless, Aquila has requested a line certificate for its Peculiar Substation, and the Commission concludes that no harm will be caused if the Commission grants a line certificate for the substation. Further, acting on Aquila's request for a certificate of convenience and necessity for its Peculiar Substation may lead to a quicker final resolution of questions of the legality of that facility.

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[15] *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960).

This Commission and the Appellate Courts have both defined the "public convenience and necessity" standard of 393.170.3. "Necessity" does not mean essential or absolutely indispensable. Rather, it means that an additional service would be an improvement justifying the cost and that the inconvenience occasioned by the lack of a utility is so sufficiently great as to amount to a necessity.[16] Additionally, the "public" does not consist solely of the residents surrounding the Facilities or solely of Cass County residents. The "ultimate interest is that interest of the public as a whole . . . not the potential hardship to individuals." The rights of an individual resident with respect to the issuance of a certificate are subservient to the rights of the public as a whole.[17]

The Commission has articulated the legal standard to be met by applicants for a certificate of convenience and necessity as follows:[18]

- Whether there is a need for the involved Facilities and related service;
- Whether Aquila is qualified to own, operate, control and manage the involved Facilities and provide the related service;
- Whether Aquila has the financial ability for this undertaking;
- Whether Aquila's proposal is economically feasible; and
- Whether the involved Facilities and related service promotes the public interest.

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[16] *In re Timber Creek Sewer Co.*, EA-99-202, 8 Mo. P.S.C. 3d 312, 314.

[17] *State ex rel. Public Water Supply Dist. No. 8 v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo.App. W.D. 1980); *see also In the Matter of the Application of Union Electric Company*, Commission Case No. EO-2002-351, Report and Order dated August 21, 2003.

[18] *In Re Tartan Energy*, GA-94-127, 3 Mo. P.S.C. 3d 173, 177 (1994).

Positive findings with regard to the first four factors, will, in most instances, support a finding that an application for a certificate of convenience and necessity will promote the public interest.[19] The Courts of Appeals have articulated the standard and policy similarly to the Commission.[20]

The Missouri Court of Appeals recently stated that the Commission may also consider "current conditions, concerns and issues, including zoning," [21] matters that fall under the item "whether the involved facilities and related service promotes the public interest." Although the Court of Appeals held that this Commission had been misinterpreting *Harline*, the decision in the *Aquila* appellate opinion does not require the Commission to promulgate new rules or establish new procedures to consider an application pursuant to Section 393.170.3.

Land use and other current conditions, concerns, and issues, including zoning, may be encompassed within the Commission's consideration of whether the facilities and related service "promote the public interest."[22] 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 or zoning concerns, in particular, be the "functional equivalent" of a hearing on a special use permit or rezoning application. Even if there were such a requirement, the Commission concludes that it has been satisfied here.

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[19] *Id.* at 189.

[20] *See State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. 1993) and *State ex rel. Public Water Supply District No. 8 of Jefferson County*, 600 S.W.2d 147, 156 (Mo.App. 1980).

[21] *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 35 (Mo. App. 2005).

[22] *In Re Tartan Energy*, 3 Mo. P.S.C. at 177.

The absence of specific rules setting out the factors to be used by the Commission in evaluating the appropriateness of the locations of the Facilities 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."[23] Rather, the issues examined by the Commission to make such a determination have been developed in prior Commission and appellate decisions.

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.

Certificate cases involving power plants and substations are not unique. Until the 1980 *Union Electric* case wherein this Commission held that "it is not necessary for electric utilities to come before us to obtain permission to build plant within their certificated areas,"[24] the Commission considered applications for authority to build within a utility's certificated territory. Recently, the Commission considered and approved the application of Missouri-American Water Company for a certificate of convenience and necessity to lease, operate, control, manage and maintain a new source of water supply in Andrew County. Although the parties to that case agreed that a certificate was only necessary for the portion of the project located outside Missouri-American's current service area, the same

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[23] *Id.*

[24] *In re Union Electric Company*, 24 Mo.PSC (NS) 72, 78 (1980).

"necessary or convenient" standard of Section 393.170 was applied in that case as is to be applied to Aquila's application herein.

Perhaps most relevant to the case at hand is the 1973 Commission proceeding wherein Kansas City Power & Light Company ("KCPL") and St. Joseph Light & Power Company ("SJLP") filed their joint application pursuant to 393.170 requesting certificates of public convenience and necessity to construct and operate Iatan Station in Platte County, Missouri. The proposed facilities were within SJLP's service territory, but outside KCPL's service territory. After hearings, in November of 1973, the Commission issued its Report and Order in Case No. 17,895 granting the requested certificates. Although land use issues were addressed by the applicants and the Commission, county zoning was not viewed as a prerequisite to granting the requested authority.

The Report and Order granting the certificates of public convenience and necessity was issued by this Commission on November 14, 1973, when the subject property was still zoned "agricultural." KCPL and SJLP did not seek a change in zoning until March of 1974, and Platte County did not approve the change until April of 1974.

In reviewing a condemnation issue related to Iatan Station, the Court of Appeals stated that "the joint application of KCP&L and SJL&P for rezoning of the property was neither a prerequisite to the project, nor necessary to it."[25] The Court continued by stating:

> . . . although rezoning was unnecessary for construction of the generating plant, KCP&L and SJL&P sought the rezoning. The evidence shows that from the inception of the Iatan project KCP&L's power sales staff promoted sales to firms which would locate at or near the project site. . . . A fair conclusion from this and similar evidence is that KCP&L sought rezoning not to construct the plant itself, but to enable it to surround itself with satellite customer

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[25] *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 561 (Mo.App. W.D. 1983).

industries. The rezoning, then, was necessary not to generate electricity, but to generate business.[26]

Dealing with Section 393.170 and the zoning exemption contained in Section 64.620,[27] the Western District Court of Appeals has held as follows:

> Although Platte County is authorized by §64.620 to restrict the use of land within the county, that is, zone the land as it deems advisable, that section provides as well that the powers granted "shall not be construed . . . to authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission . . ." The public service commission is specifically empowered in §393.170 to grant permission and approval for construction of an electric plant "whenever it shall . . . determine that such construction . . . is necessary or convenient for the public service." **These sections, taken together, necessarily mean that the county could not have interfered with the construction of the latan Plant by means of its zoning regulations.**[28]

The Court also noted that its holding was consistent with a Supreme Court of Missouri case which held that a county cannot by zoning restrictions limit the use of land by a public utility to construct a power plant to generate electric energy for public use.[29] In the *Saale* case, the Missouri Supreme Court stated:

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

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[26] *Id.*

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

[28] *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555 (Mo.App. W.D. 1983) (emphasis added).

[29] *Union Elec. Co. v. Saale*, 377 S.W.2d 427 (Mo. 1964).

construct a power plant to generate electric energy for distribution to the public.[30]

The facts in the case recited above call into question the enforceability of Cass County's zoning. 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."[31] 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.[32] 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 as of the date the ordinance is adopted. Cass County witness Peshoff testified that Cass County's zoning map stopped being current in 1999, and that his firm is involved in updating it.[33] Given the purported significance of this issue, the activities of the County in this regard are inexplicable.

Nevertheless, the Commission need not make any conclusion of law regarding the enforceability of Cass County's zoning to make its decision in this case. The foregoing issues weigh against deferring to Cass County for siting the facilities at issue in this case. Cass County's current land use plan and zoning ordinance, as well as its prior plans and ordinances, are part of the many factors the Commission weighed in determining whether to grant Aquila the certificates of convenience and necessity it requests.

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[30] *Id.* at 430.

[31] *See* Ex. 119, p. 27.

[32] *See Casey's General Stores v. City of Louisiana*, 734 S.W.2d 890, 896 (Mo. App. 1987).

[33] Tr. Vol. 10, p. 1615.

The Commission concludes that it is no less capable than Cass County to consider land use concerns. As the Missouri Supreme Court has recognized, "the statutes relative to the Public Service Commission constitute a 'legislative recognition that the public interest and proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the state.'"[34] Without such a system "chaos would result."[35]

The Public Service Commission Act and the exemptions from county zoning found in Chapter 64 are legislative recognitions that the Commission is not only capable of examining any land use issues associated with Aquila's application, but is the preferred authority to do so, free from local political restraints. In this instance there have been three local public hearings and six days of evidentiary hearings with respect to the Facilities at which current conditions, concerns and issues, including zoning, were considered. This is in contrast to the more abridged process that occurs before the Cass County Planning and Zoning Board and Board of Adjustment. In this regard, the Commission's process has been more than the "functional equivalent" of the process involving a special use permit or rezoning application before the County.

Section 393.170 provides that an electrical corporation shall not begin construction of an electric plant "without first having obtained the permission and approval of the commission." That statute, however, does not impose a restriction on the Commission that

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[34] *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 482-83 (Mo. 1973) (quoting *In re Public Service Elec. & Gas Co.*, 173 A.2d 233 (N.J. 1961)).

[35] *Id.* at 483; *see also*, *Union Elec. Co. v. City of Crestwood*, 562 S.W.2d 344, 346 (Mo. 1978) (application of zoning ordinances to intercity transmission line invaded area of regulation and control vested in Commission).

would prevent the issuance of the requested authority. Moreover, while Commission precedent is not *stare decisis*, it appears this Commission has given such retroactive authorization in the past. In its 1973 Report and Order authorizing Missouri Power & Light to construct a combustion turbine in Jefferson City, Missouri, the Commission stated, "At the time of the June 5[, 1973] session of the hearing, no complaints concerning noise had been voiced by any residents of the Schellridge Subdivision."[36] This statement implies that the combustion turbine was operating before the Commission issued its report and order.

In addition, Section 393.130 requires every electrical corporation to furnish and provide safe and adequate instrumentalities and facilities. Section 393.140 then confers upon the Commission broad supervisory powers and provides that the Commission shall have general supervision over all electric utilities and electric plants, with the power to order reasonable improvements to the property of electrical corporations. The Commission concludes that Sections 393.170 and 393.140 each independently authorizes it to issue the type of certificate of public convenience and necessity or order contemplated by Section 64.235. In addition to powers expressly conferred upon the Commission by statute, it, by inference, is also vested with all other powers necessary and proper to carry out fully and effectively the duties delegated to it.[37]

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[36] *In re Missouri Power & Light Company*, 18 MoPSC (NS) 116, 118, Case No. 17,737 (Report and Order dated July 27, 1973).

[37] *State ex rel. Public Service Commission v. Padberg*, 145 S.W.2d 150 (Mo. 1940).

Conditions

Section 393.170.3 allows the Commission to impose on certificates of convenience and necessity such condition or conditions "as it may deem reasonable and necessary." Any such conditions, in addition to being reasonable and necessary, must also be allowed by law.

The Staff recommended the Commission impose six particular conditions on a site specific certificate of convenience and necessity for the South Harper Facility, but Staff stated four of those conditions had been satisfied. The Commission concludes the following conditions, which include the two the Staff was unable to state were satisfied, are reasonable, necessary, and lawful and will address certain concerns and issues. As such, the certificate of convenience and necessity granted to Aquila will be conditioned as follows:

1. Roads on the site must be worked on at least weekly to repair any ruts or holes, and dust abatement measures must be adopted for unpaved roads.

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

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

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

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

6. No construction or modification of the existing South Harper Facility shall be done in preparation for adding any generating unit(s) to the site before obtaining a certificate of convenience and necessity from the Commission to add the unit(s).

7. Emissions from the South Harper Facility affecting air quality must comply with all federal and state permit requirements.

The record reveals that Aquila is satisfying conditions 1, 2, 4, 6 and 7. Aquila shall comply with conditions 3 and 5 and demonstrate to the Commission its compliance with those conditions.

Certain parties have requested that the Commission condition the grant of a certificate on the Company obtaining county zoning approval. The Commission concludes that such a condition would be contrary to law, unreasonable, and unnecessary. If Aquila has specific Commission approval for the Facilities, the Company is exempt from local zoning under Section 64.235. It would be nonsensical to require that before the Commission can give specific approval for the Facilities, Aquila must show that it has obtained local zoning approval. Such circular reasoning would render the exemption in Section 64.235 meaningless.

It was also requested that Aquila be required to provide a pool of resources to be made available for residents to make claims against for alleged devaluation of their property. The Commission concludes that it lacks the authority to impose such a condition.

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 previously stated that the proposed condition was clearly outside the Commission's jurisdiction.[38] Decisions of the Missouri Supreme Court support this conclusion: "'The Public Service Commission is an administrative body only, and not a court, and hence the

[38] *In re Union Electric Company*, Case No. EO-2002-351, 229 P.U.R.4th 148 (Report and Order issued August 21, 2003)).

commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund."[39] This Commission will not require that Aquila set aside a pool of money, from any source, to compensate landowners. The Commission further concludes that such a condition would be unnecessary and unreasonable.

It was also requested that the Commission impose conditions that "must be so substantive as to deter Aquila and any other utility from taking this course in the future" and would "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 and provide no means by which this Commission could make a determination as to the reasonableness of the conditions. As such, the Commission concludes that it would be inappropriate to attempt to fashion any such conditions.

Discussion

Aquila submitted a list of issues for determination by the Commission. Staff concurred in Aquila's list. Cass County submitted a different list of issues.

Aquila filed its application under Section 393.170, RSMo. Aquila's list of issues relies more heavily on that statute than does Cass County's list. The Commission will, therefore, articulate the issues as Aquila has, which is as follows:

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[39] *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)).

1. Does the Commission have the jurisdiction to consider the application?

StopAquila argues that Aquila must first obtain Cass County zoning approval for the facilities at issue here because, under Section 393.170.2, Aquila is required to show it has received "the required consent of the proper municipal authorities." However, Section 393.170 provides two kinds of certificate authority – subsection 1, authority for a public utility to construct an electric plant, and subsection 2, authority to serve a territory.[40]

Aquila's application is a request for a certificate of convenience and necessity under Section 393.170.1.[41] Section 393.170.2, which contains the local consent requirement and which StopAquila urges the Commission to apply here, is simply inapplicable to this case. Sections 393.170.1 and 393.170.2 are not interchangeable.[42] Subsection 1 "sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate. . . . The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority."[43] 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.

Further, even if Aquila were obligated to make such a showing, Aquila received the type of local consent contemplated by subsection 2 when, in 1917, and pursuant to what later became Section 229.100, the Cass County Court granted Aquila's predecessor the

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[40] *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960); *Aquila*, 180 S.W.3d at 33.

[41] *Aquila*, 180 S.W.3d at 35.

[42] *State ex rel. Union Elec. Co. v. Public Service Comm'n of Mo.*, 770 S.W.2d 283, 285 (Mo.App. 1989); *Aquila*, 180 S.W.3d at 33, 35.

[43] *Union Elec. Co.*, 770 S.W.2d at 285.

right to utilize county rights of way.[44] "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."[45] The Supreme Court of Missouri has stated 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."[46]

According to Cass County, timing of Commission or county review of a proposal to build a power plant is critical under Section 393.170.1. The plain language of the statute confirms that the Commission is powerless to issue a certificate under Section 393.170.1 unless it convenes a public hearing contemporaneously with the request to construct, not after construction. The legislature requires a hearing on the proposal "before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation." *Cass County*, 180 S.W.3d at 37.

That same opinion, however, stated that even though it affirmed the trial court's injunction against Aquila, ". . . 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."[47] The Court of Appeals understood that the plant was already built, and discussed at great length the portion of Section 393.170 which requires

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[44] The 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. *See also* Appendix 6 to Aquila's application in Case No. EA-2005-0248. The Commission takes administrative notice of this franchise.

[45] *Union Elec. Co.*, 770 S.W.2d at 285.

[46] *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964)(quoting *In re Union Elec. Co.*, 3 Mo. P.S.C. (N.S.) 157 (1951)).

[47] *Aquila* at 41.

pre-construction approval. Aquila cannot get pre-construction approval for the plant and substation. The Court of Appeals knew this, yet expressly stated that Aquila could still seek authority to operate the already built facilities. The Commission concludes, based upon the Court of Appeals final sentence of its *Aquila* opinion, that Aquila is not too late.

Also, the Western District said that a Commission order granting a service territory to one utility does not function as the "specific authority" required for the construction of an electric plant under Section 393.170.1 in derogation of county zoning authority.[48] That implies that "specific authority" does function in derogation of county zoning. Again, such grant of specific authority would be under Section 393.170.1, which is distinct from subsection 2 authority.

Further, the Western District stated that county zoning statutes also give an exemption to county zoning if a utility gets permission from a county commission.[49] The Court footnoted that sentence and italicized the last portion of Section 64.235.[50] Therefore, the Court ruled that a utility may be exempt from county zoning either by a permit of the county commission after public hearing in the manner provided by Section 64.231, or by becoming ". . . specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission." Indeed, earlier in that paragraph, the court stated

> "(b)y requiring public utilities to seek Commission approval each time they begin to construct a power plan, the legislature ensures that a broad range of

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[48] *Aquila* at 34 (emphasis supplied).

[49] *Id.* at 37 (emphasis supplied).

[50] *Id.* at 37, fn. 14.

issues, including county zoning, and be considered in public hearings before the first spadeful of soil is disturbed."[51]

The Court's reference to "Commission", means the Public Service Commission, not the county commission.[52]

Moreover, the court stated that ". . . (b)ecause we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt."[53] The exemption discussed is not an exemption merely from a county planning board; it is an exemption that would allow Aquila to build if authorized by the Commission, even "in derogation of county zoning", as discussed above.[54]

2. Is the authority requested by Aquila necessary or convenient for the public service?

Necessary and convenient means that an additional service would be an improvement justifying the cost and that the inconvenience occasioned by the lack of a

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[51] *Id.*

[52] *Id.* at 27.

[53] *Id.* at 32.

[54] Even Cass County's witness Peshoff testified that land use regulations should apply unless there is an "explicit express exemption." Tr. Vol. 5, p. 1507.

utility is so sufficiently great as to amount to a necessity.[55] The Commission has articulated this standard as follows:[56]

- Whether there is a need for the involved facilities and related service;
- Whether Aquila is qualified to own, operate, control and manage the involved facilities and provide the related service
- Whether Aquila has the financial ability for this undertaking
- Whether Aquila's proposal is economically feasible, and
- Whether the involved facilities and related service promotes the public interest

The Commission discusses elements one through four sufficiently in its Findings of Fact. The public interest element, however, requires further discussion.

Siting and Land Use

Staff witness Warren Wood lists a ten-step process for determining a reasonable site for a natural gas-fired simple-cycle electric power plant. Those steps follow:

> 1) Identification of areas within a utility's service territory where significant energy usage is occurring and areas where energy usage is expected to increase;
>
> 2) Identification of areas noted in step (1) that are not in close proximity to existing generation facilities, are near an existing generation facility that will likely be retired in the near future, are near an existing generation facility that has room for additional generation units, or are near an area where required energy needs are expected to significantly exceed an existing generating facility's capabilities;
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> 3) Identification of major natural gas transmission pipelines that have sufficient available capacity, adequate pressure and access to natural gas supplies to serve

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[55] *In re Timber Creek Sewer Company*, Case No. EE-99-202, 8 Mo. P.S.C. 3d 312, 314.

[56] *In re Tartan Energy*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173, 177.

such a prospective generation facility and pass through the areas identified in step (2);

4) Identification of electric transmission lines that have sufficient available capacity, or can be reasonably upgraded, to serve such a prospective generation facility, provide transmission to the areas that need to be served by the planned generation facility and pass through the areas identified in step (2);

5) Identification of areas where the natural gas transmission pipelines in step (3) and the electric transmission lines in step (4) come within a reasonable distance of each other;

6) Review county plat books for the areas identified in step (5) to determine if there are properties in the areas identified in step (5) that appear suitable for such a prospective generation facility and begin visiting with landowners to determine ability to purchase potential parcels of land for such a prospective facility;

7) Carefully evaluate each of the potential sites identified in step (6) for line-of-site population density, natural buffers between the generation facility and nearby residents or the ability to construct buffers, natural gas pipeline extension cost, transmission line upgrade and extension costs, land acquisition cost, suitability of geology for construction of generation facility foundations, emissions compliance cost, possible air or land permitting problems, access to other needed infrastructure such as water and other potential costs to address potential concerns of the nearby communities and residents;

8) Communicate with any nearby communities and residents to receive feedback on concerns with construction of the planned generation facility in the area;

9) Address concerns of the nearby communities and residents to the greatest extent possible associated with the "optimal site"; and

10) If the concerns of the nearby communities and residents cannot be addressed at the "optimal site", go back to step (6) to determine if another site is reasonable and repeat the steps after step (6), unless there are reasons why going back to step (6) is not reasonable.[57]

Comparison of Staff witness Wood's "major steps" with factors the Commission has considered in granting certificates of convenience and necessity to build a power plant reveals that Mr. Wood's step one considers the factors of comparing where load arises and

[57] Ex. 19, pp. 6-8.

is increasing relative to the location of the proposed plant. Step two considers the factor of the location of the proposed plant relative to other existing power plants. Steps three and five consider the availability of infrastructure to supply fuel, while steps four and five consider the availability of infrastructure to transmit the generated power into the system. Step six deals with land acquisition—an issue unlikely to arise in a case where a utility is seeking authority to build a plant on a site for which it had not yet acquired ownership rights. Step seven considers the factors of population density near the site, aesthetic impact of the power plant on the area surrounding it, the geology of the site, environmental impacts, zoning, planned land use and noise. Steps eight and nine consider input from nearby communities and residents and responses to them, which address land use near the site.

Cass County is an area with rapidly increasing population and energy demand so that siting a power plant in Cass County would put the plant where Aquila's load is increasing.[58] The location of the South Harper Power Plant is geographically diverse from Aquila's other Missouri electric power generating plants. To address why Aquila should not simply have added more turbines to its Aries plant, Mr. Wood explains that two advantages of locating plants apart geographically are: reduced likelihood of losing power from multiple plants at the same time due to a common failure—for example inadequate fuel gas pressure, and reduced dependence on the same transmission paths to serve customers, which reduces load losses and the risk of overloading the transmission system.

Mr. Wood's rebuttal testimony shows the location of natural gas pipelines and transmission lines near the South Harper Power Plant with sufficient capacity to serve it.

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[58] Ex. 19, p. 10; Sch. WW-1, WW-2.

He testifies that the availability of two natural gas lines with sufficient capacity to serve the plant enhances power plant reliability and provides competition in sale of the fuel used by the plant. Cass County witness Peshoff stated that alternative locations to South Harper should include a builder's needs, size, access to infrastructure, including roads, water, and gas lines.[59] Mr. Peshoff conceded that his suggested alternatives to South Harper weren't necessarily better ones.[60]

Land use in the vicinity of the simple-cycle generation plants Mr. Wood has seen includes sparsely populated agricultural, residential and industrial areas. The South Harper plant is in an agricultural area with a housing density that is rural in nature. This type of land use is not uncommon in the vicinity of these types of electric generation plants. In some cases, the population around these types of plants is relatively dense, approaching that of a residential area, but those often includes homes that were built after the generation plant was operating.

Mr. Wood further testifies that the South Harper Power Plant is located immediately adjacent to an interstate natural gas pipeline compressor station that was sited and built long before Aquila built the South Harper Power Plant. When Mr. Wood asked Cass County for its zoning map that defines zoning districts, the county was unable to produce the map and, therefore, the Staff stated that it is unsure of the zoning restrictions, if any, that apply to the South Harper Power Plant.[61]

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[59] Tr. Vol. 10, p. 1507.

[60] *Id.* at p. 1564.

[61] Ex. 19, p. 23; Ex. 20; p. 3.

Regardless of how, or if, the land is zoned, Mr. Wood states that most of the South Harper Power Plant is located within an area designated by Cass County in its most recent land use plan Multi-Use, including industrial uses.[62] He further states that the Commission should use this most recent land use plan and zoning ordinance to evaluate Aquila's application.

As to the siting of the Peculiar substation, Staff witness testifies:

> "The location of the South Harper Power Plant site drove the location of the 345 kV to 161 kV substation northwest of Peculiar. This substation was also located to minimize the needed right-of-way distance and to take advantage of an existing 69 kV right-of-way."

Staff witness Wood testifies that regardless of the South Harper Power Plant, there is a need for a substation at or near where the Peculiar Substation is sited.[63]

In arriving at his conclusion that South Harper is at a reasonable site, Mr. Wood was not "locked into" a conclusion that the plant should stay simply because it was already there.[64] In fact, he concluded that location would be reasonable even if the plant did not already exist.[65] Furthermore, he stated it was reasonable for Aquila to continue to build despite the injunction, and that South Harper was a superior site to Camp Branch, which was a site Aquila previously sought for the combustion turbines.[66]

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[62] Ex. 20, pp. 4-5; see also Sch. WW-10.

[63] Ex. 19, p. 27.

[64] Tr. Vol. 5, pp. 719, 894.

[65] Id. at pp. 826, 889.

[66] Id. at. pp. 788-791, 900-901.

Screening

Noise

Staff witness Bender addressed improvements Aquila made to the South Harper Power Plant site to screen the facility from sight and noise testing done of sound created by operating the generating units.[67] He related that the plant is visible from some neighboring properties and that sound from the plant did not exceed county ordinances or manufacturer guarantees. He stated that when vehicles passed on the roadway he could not hear the plant operating, and that sound levels measured when the plant is operating approximated the sound level of rustling leaves or a whisper, when measured about one-half mile from the plant. He provided schedules showing sound levels measured at different frequencies and distances from the plant.

StopAquila.org witness Stanley asserts that the noise studies that Aquila's noise study predicted violations of Cass County ordinances, and also failed to include offensive low-frequency noises.[68] According to Mr. Stanley, a noise study showing potential Cass County ordinance violations was inconclusive due to summer insects perhaps contributing to the noise.[69] In contrast, Aquila witness Andrews testified that its noise study showed Aquila complied with Cass County noise ordinances.[70] Aquila witnesses testified that the South Harper plant was not even running part of the time during those noise studies, that the noise could also come from the Southern Star gas compressor, and that there were

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[67] Ex. 15, pp. 3-7.

[68] Ex. 26, pp. 11-14.

[69] Ex. 76.

[70] Ex. 7, p. 3-7.

several instances when the noise when the plant was not running was significantly higher than the noise when the plant was running.[71]

Based upon the evidence, the Commission does not find that the South Harper plant is unreasonably sited due to noise.

Sightlines

Aquila landscaped the surrounding area with berms and roughly 1200 trees, and has left a 35-acre buffer between the plant and adjacent homeowners.[72] Cass County's witness dismisses Aquila's landscaping as inadequate.[73] In addition to those some 1,200 trees, Aquila plant another 400 trees and 300 shrubs on private land with the design input of each individual family.[74] Based upon the evidence, the Commission does not find that the South Harper plant is unreasonably sited due to sightlines.

Property Values

Aquila stated that it purchased four homes from homeowners near South Harper. It has already sold two of them for near the purchase price.[75] StopAquila.org maintains that Aquila has taken huge losses on the sale of the two other homes.[76] The Commission will refuse to speculate what effect, if any, South Harper has on the value of any of these

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[71] Tr. Vol. 5, pp. 568, 588-589; Ex. 11, pp. 7-8.

[72] Ex. 11, p. 3; Ex. 10, p. 4.

[73] Tr. Vol. 10, pp. 1621-1622.

[74] Ex. 10, p. 5.; Ex. 11, p. 3.

[75] Ex. 11, p. 5.

[76] Ex. 91 (HC), Ex. 92 (HC).

homes. Based upon the evidence, the Commission does not find that the South Harper plant is unreasonably sited due to a decrease in property values.

Pollution

StopAquila witness Stanley testified that South Harper could emit pollutants that are more than 1,000 times greater than a diesel pickup would emit.[77] The turbines could emit up to 558 pounds per hour of pollutants, as permitted by the Missouri DNR.[78] This evidence is in line with Aquila witness Andrews' testimony that Aquila operates within applicable environmental guidelines.[79] According to Aquila, two University of Kansas toxicologists concluded, "If not for the heat, standing in the center of the stack would result in an acceptable work environment" and "there could not possibly be any adverse health impacts to those living in the immediate vicinity."[80]

StopAquila also complains that South Harper emits particulate matter, which can be extremely hazardous to human health.[81] Of the emissions South Harper is allowed, particulate matter would be 18 pounds per hour, less than four percent of the total permitted emissions.[82]

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[77] Ex. 26, p. 9.

[78] Id. at p. 7 (emphasis supplied).

[79] Ex. 7, pp. 2-4.

[80] Id. at p. 4.

[81] Ex. 29, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule)*, 69 Fed. Reg. 4566 (proposed January 30, 2004).

[82] Ex. 26, pp. 9-10.

Of special concern to StopAquila is $PM_{2.5}$.[83] The portion of the maximum possible emissions of 18 pounds per hour that might be $PM_{2.5}$ is unknown, because Aquila does not measure it.[84] Aquila does not measure it, because it is not required to under its environmental permit.[85] StopAquila claims that any amount of $PM_{2.5}$ is dangerous.[86] While this may be true, the evidence is inconclusive whether South Harper will emit any $PM_{2.5}$. Furthermore, attributing $PM_{2.5}$ to any one source would be impossible.[87] A Clean Air Task Force report that StopAquila.org submitted complained of pollutants from coal-fired plants, not from natural gas plants like South Harper.[88] Thus, the Commission is unwilling to conclude that South Harper emits an unreasonable amount of pollutants. The Commission will, however, condition Aquila's certificate upon Aquila's continual compliance with all pertinent state and federal environmental laws.

3. May such a certificate be conditioned and, if so, in what manner?

The Commission has authority under Section 393.170.3 to impose whatever conditions upon the certificate that it deems reasonable and necessary. The Commission will not impose a zoning requirement on Aquila, as that would defeat the purpose of the exemption in Section 64.235. The Commission may, however, consider zoning as a

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[83] Ex. 29, 69 Fed. Reg. 4571 (highlighted not by the Commission, but presumably by StopAquila.org)(defining $PM_{2.5}$ as particles with aerodynamic diameters smaller than a nominal 2.5 micrometers.

[84] Tr. Vol. 5, p. 600.

[85] *Id.* at 599-600.

[86] Ex. 29, 69 Fed. Reg. 4571.

[87] Tr. Vol. 5, pp. 599-601.

[88] Ex. 30, p. 1.

relevant factor in its decision.[89] In doing so, the Commission is mindful that the regulatory powers accorded the Commission, which ultimately answer to the public interest, "**must of necessity address conditions existing at the time the power is exercised . . . .**" [90]

A recent case, the AmerenUE Callaway-Franks transmission line case,[91] involving the same statute, Section 393.170, was vigorously contested, and the Commission finds this case instructive. There, the Commission balanced all the relevant factors, both benefits and detriments, to determine whether the public benefits of AmerenUE's request outweighed the individual detriments.

As set forth in that case and in the Staff's prehearing brief in this matter, the Commission "must weigh the benefits and detriments to all the groups affected by its decision" in determining whether to issue to Aquila certificates of convenience and necessity for the South Harper Plant and the Peculiar Substation. The Commission should not ignore those individuals supporting the South Harper Plant, many of whom testified in favor of the plant at the local public hearings the Commission held on March 30 and April 6, 2006, nor should it ignore the support for the plant of the cities of Peculiar and Lake Annette, both located in Cass County.

As it did in the AmerenUE Callaway-Franks transmission line case, the Commission should not step into the Aquila's shoes as to management decisions nor should it require the South Harper Plant and Peculiar Substations be the "best" solutions; instead the

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[89] Aquila, 180 S.W.3d at 37-38.

[90] *Id.* at 35 (emphasis supplied).

[91] In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage, and Pulaski Counties, Missouri ("Callaway-FranksLine"), Case No. EO-2002-351, 12 MoPSC3d 174 (Report and Order dated August 21, 2003).

Commission should independently determine whether each of Aquila's requests for authority to build the South Harper Plant and Peculiar Substation are in the public interest.

The land is now in a multi-tier use. [92] Cass County encourages land in a multi-tier use area to be zoned commercial and industrial where major thoroughfare roads serve sites.[93] Cass County's zoning order contemplates allowing power plants in agricultural zones.[94]

The Commission by statute may impose reasonable or necessary conditions and Staff witness Warren Wood recommends that the Commission should condition the site-specific certificate of convenience and necessity for the South Harper Power Plant and associated substation 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 must be 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.

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[92] Ex. 14, pp. 5-10; Ex. 20, pp. 16-17; Ex. 22, pp. 10-11; Ex. 24, pp. 13-14.

[93] Ex. 108, Part 1, pp. 33-34, Ex. 118, pp. 32-33.

[94] Ex. 119, Part 2, p. 60.

Mr. Wood states that Aquila has already satisfied conditions 1, 2, 3 and 5. Staff witness Leon Bender's rebuttal testimony provides details regarding Aquila's efforts to satisfy condition 3. Staff has not confirmed whether Aquila may have also satisfied conditions 4 and 6.

Among other suggestions presented at the hearing was a condition that Aquila create a pool of funds from which those claiming injury from erection of the South Harper Plant or Peculiar Substation might obtain compensation. When a similar proposal was made in the UE Callaway-Franks transmission line case, the Commission appropriately stated that such matters were within the purview of the courts because the Commission has no authority to grant monetary damages.

Aquila counsel Dale Youngs stated during the hearing that the neighbors represented by John Coffman in this case had brought civil actions against Aquila seeking compensation for damages resulting from the erection of the Facilities. Mr. Coffman, present during the statement, did not dispute Mr. Youngs' assertion. The homeowners are seeking legal damages from Aquila in the proper forum, which is circuit court.

Cass County asked Staff witness Wood about requiring zoning as a condition, who responded that the Commission should not impose that condition. When asked whether imposing a condition that roads should be brought to a grade satisfactory to Cass County, Staff witness Wood indicated that Aquila had already made significant improvements and that any condition should recognize that.[95] Terry Hedrick represented to Cass County that

[95] Tr. Vol. 6, p. 797.

"[a]s per previous discussions, the road project will be designed and constructed under the direction of Cass County."[96]

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes its findings of fact and conclusions of law. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

Decision

After applying the facts as the Commission has found them to be to its conclusions of law, the Commission has reached the following decision. The Commission has independently determined that Aquila's request for authority to build, own, and operate the South Harper Plant and Peculiar Substation is in the public interest. After evaluating all the relevant factors before it, including the availability of transmission, fuel, improved reliability, shortfall in generating capacity, growth in demand for electricity, Cass County's land use plan, Aquila's need for peaking capacity, the needs of the public as a whole (not just those of nearby landowners or Aquila's ratepaying customers), proximity of the South Harper Facility to other generating sites, surrounding land use, environmental impacts, population density near the site, financial impacts on Aquila and impacts on other utilities, the Commission concludes the Facilities and related service, and Aquila's ownership and operation of the same, will promote the public interest.

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[96] Ex. 129.

The evidence clearly demonstrates that there is a need for the Facilities and related service and that Aquila is fully qualified, from both a financial and operational standpoint, to own, operate, control and manage the Facilities. The evidence also demonstrates the economic feasibility of the project and that Aquila's ownership and operation of the Facilities and provision of the related service through the improvements to its property will promote the public interest. This Commission has previously established that the public convenience and necessity is served by Aquila's extension of its electrical facilities and services throughout those areas of Missouri, including Cass County, currently served by the Company. The Facilities have been constructed and have operated successfully. The construction of the South Harper Facility and Peculiar Substation has been fully funded, and Aquila has suffered no impairment to its credit as a result.

The construction of the South Harper Facility is consistent with and integral to Aquila's Integrated Resource Plan. Actual experience has borne out Aquila's need for the capacity produced by the plant. During the months of July through December of 2005, the South Harper Facility was fully operational and was used for a total of 429 hours on 57 days, representing nearly 74,000 MWh of power generation for Aquila Networks-MPS system customers.

The location of the South Harper Facility is desirable because of its relative proximity to the load center of the Western side of the Aquila Networks-MPS service area, existing electrical transmission facilities and the availability of fuel from natural gas pipelines. For reliability purposes, the most appropriate self-build option for Aquila is a facility near the center of the load growth of the Company's system, i.e., Cass County, Missouri. Aquila has

conducted extensive site evaluation studies in Cass County and has not identified any site that is more suitable in terms of infrastructure than the site of the South Harper Facility.

Construction of generation outside the load center or purchasing capacity from outside Aquila's system would result in higher costs, less reliability, and greater impact on land use through miles of additional transmission structures and facilities that Aquila currently has the authority to construct. The evidence also demonstrates that the sites of the Facilities are compatible with surrounding land uses. The record in this proceeding demonstrates that it will promote the public interest for Aquila to continue operating the Facilities and that Aquila satisfies the factors set forth in *In Re Tartan Energy*, *State ex rel. Intercon Gas*, and *StopAquila.org v. Aquila, Inc.*

In constructing the Facilities without the "specific authority" deemed necessary by the Court of Appeals in *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005), the record reflects that Aquila did not intend to act in disregard for the law. In fact, the Commission concludes that in proceeding to construct the Facilities pursuant to its area certificates issued in Case Nos. 9470 and 11,892, Aquila acted in conformity with the Commission's prior decisions, long-standing policy, interpretation of prior Appellate Court opinions, and the decision in Case No. EA-2005-0248.

Pursuant to Commission Rule 4 CSR 240-3.105(1)(B)(2), a company seeking authorization to build an electric power plant is required to file the plans and specifications for the complete construction project and the estimated cost of the project. While Aquila had made available this information to all parties in this case, Aquila sought to avoid duplicating this information and requested a waiver of 4 CSR 240-3.105(1)(B)2, and the Commission hereby concludes that such a waiver should be granted and waives said

requirement. The Commission concludes that, with its application filed herein, Aquila satisfied the requirements of Commission Rule 4 CSR 240-3.105(1)(B).

IT IS THEREFORE ORDERED THAT:

1. Aquila, Inc., is granted a waiver from the requirement of 4 CSR 240-3.105(1)(B)2.

2. Under Section 393.140 and/or Section 393.170, RSMo, Aquila is hereby specifically authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage public improvements consisting of electric power production and related facilities, including three (3) 105 MW natural gas fired combustion turbines, and an associated transmission substation, as well as all facilities, structures, fixtures, transformers, breakers, installations, and equipment related thereto at the following described location in Cass County, Missouri:

> The Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-Nine (29), and the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32) containing approximately 74 acres at or near the intersection of 243rd Street and Harper Road.

3. Under Section 393.140 and/or Section 393.170, RSMo, Aquila is hereby specifically authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage public improvements consisting of an electric transmission substation together with any and all other facilities, structures, fixtures, equipment and installations related thereto at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW1/4) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW ¼ a distance of 2,508.18 feet more or less to the South line of said NW ¼; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning containing approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road.

4. The construction of the Facilities by Aquila is hereby specifically authorized, permitted, approved, ratified, and confirmed.

5. The ownership, operation, control, and management of the Facilities by Aquila on a prospective basis is hereby specifically authorized and permitted.

6. As conditions on the grants of authority provided for in ordered paragraph 2 above: (a) roads on the site must be worked on at least weekly to repair any ruts or holes, and dust abatement measures must be adopted for unpaved roads; (b) sound abatement measures must be fully utilized and maintained (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer); (c) emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood; (d) security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort; (e) security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would have an impact on the surrounding area; (f) no construction or modification of the existing South Harper Facility shall be done in preparation for adding any generating unit(s) to the site before obtaining a certificate of convenience and necessity from the Commission to add the unit(s); and

(g) emissions from the South Harper Facility affecting air quality must comply with all federal and state permit requirements.

7. All pending motions are denied.

8. This Report and Order shall become effective on May 31, 2006.

9. This case may be closed on June 1, 2006.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., and Murray, CC., concur;
Appling, C., concurs, with separate concurring opinion attached;
Gaw and Clayton, CC., dissent, with separate dissenting opinions to follow;
and certify compliance with the provisions of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 23rd day of May, 2006.

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

CASS COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV104-1443CC
	)	
AQUILA, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT OF TOM MILLER

STATE OF MISSOURI)
)
COUNTY OF Jackson)

Tom Miller, being first duly sworn on his oath, states as follows:

1. I am the plant manager for the South Harper Peaking Facility at 243rd Street and South Harper Road in unincorporated Cass County.

2. On May 23, 2006, the Missouri Public Service Commission issued a Report and Order specifically authorizing Aquila to, among other things, construct, install, own, operate, maintain, and otherwise control and manage the South Harper Peaking Facility. Report and Order, pp. 58-59.

3. I understand that the Commission conditioned this grant of authority in seven respects, indicating that the evidence in the record confirmed that Aquila had already satisfied all but two of those conditions. Report and Order, pp. 36-37. The remaining two conditions referred to by the Commission concerning the South Harper Peaking Facility were: (1) Emergency horns and sirens must be focused to the attention of site personnel and not the entire

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neighborhood; and (2) Security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would impact the surrounding area. Report and Order, p. 36.

4. Aquila has previously addressed the issue in the first condition as follows: All emergency sirens have been relocated inside turbine enclosures and the plant control room.

5. Aquila has previously addressed the issue in the second condition as follows: The facility was designed for "minimal sky shine" by using shoe box lighting which directs light onto the ground. When the plant not operating most plant lighting is turned off.

FURTHER AFFIANT SAYETH NOT.

TOM MILLER

Subscribed and sworn to before me this 24 day of May, 2006.

Susan L. Steen
Notary Public Susan L. Steen

My Commission Expires:

Sept 20, 2009

[SEAL]

SUSAN L. STEEN
Notary Public - Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires: Sept. 20, 2009
Commission #05403588