

**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

PROPOSED REPORT AND ORDER

COMES NOW Aquila, Inc., by and through counsel, and, pursuant to the Commission's Order Setting Procedural Schedule of March 15, 2006, submits the following as its proposed Report and Order in this matter.

Summary

This case is before the Missouri Public Service Commission ("Commission") on the application of Aquila, Inc. ("Aquila" or the "Company") for certificates of convenience and necessity ("CCN") to acquire, 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. Involved are three (3) natural gas fired combustion turbines ("CTs") and an associated electric transmission substation (the "South Harper Facility") and a second substation (the "Peculiar Substation"), together "the Facilities." The Facilities have been constructed.

After two separate cases in Cass County Circuit Court¹ and two separate, earlier proceedings before this Commission brought by Aquila regarding matters relating to the Facilities,² Aquila filed the application that initiated this proceeding on January 25, 2006, along with Aquila's direct testimony and schedules in support thereof. Various parties intervened in the case and a procedural schedule was established which included the filing of additional testimony and prehearing briefs. Two local public hearings were held on March 20, 2006, and one local public hearing was held on March 30, 2006, all in Harrisonville, Cass County, Missouri, at which time more than 50 witnesses appeared and testified. The parties filed prehearing briefs, and, thereafter, evidentiary hearings were held in Jefferson City, Missouri on April 26, 27, and 28, and May 1, 3, and 4, 2006. Posthearing briefs and proposed reports and orders were filed by the parties.

The record in this proceeding is very comprehensive and complete and demonstrates that it is in the public interest for Aquila to be authorized to own and operate the Facilities. The evidence shows that electric consumers need the energy and capacity generated by the Facilities and need the related transmission service, that Aquila is in all respects qualified to own and operate the Facilities, and that the project is economically feasible. Therefore, this Report and Order authorizes the CCNs requested by the Company in its application. Specifically, pursuant to §393.170, this Report and Order authorizes and grants to Aquila CCNs to own, operate, maintain, and otherwise control and manage the South Harper Facility and the Peculiar Substation and also imposes certain conditions on the Company. Pursuant to §393.140, this Report and

¹ Cass County Case No. CV104-1443CC, affirmed on appeal, *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005) (zoning) and StopAquila suit against the City of Peculiar, Cass County Case No. 17V010401355 (bonds) pending before the Missouri Supreme Court as Case No. SC87302.

² Case Nos. EO-2006-0156 (turbine values and Chapter 100 financing) and EA-2006-0248 (prior CCN case).

Order also authorizes the ownership and operation of the Facilities by Aquila and approves, ratifies and confirms the construction of the Facilities.

Findings of Fact

The Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following 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 W. 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. Intervenor 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. (Ex. 19, Wood Reb., p. 12) SPP administers open-access electric transmission service in several mid-west states. (Ex. 31, Caspary Reb., pp. 2-4)

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 (Case No. 9470) 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. (Ex. 1, Empson Direct, p. 2)

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. (Ex. 1, Empson Direct, p. 3)

17. The Peculiar Substation, a related electrical transmission substation, utilizes approximately 7.5 acres of the 55 acre tract of land. (Ex. 2, Empson Surrebuttal, schedule 9)

18. By letter of November 5, 2004 (Ex. 1, Empson Direct, Schedule JRE-1), 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 CCNs 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. (Ex. 1, Empson Direct, p. 3)

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.

* * *

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 CCNs 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.³ The Facilities were constructed to partially replace the electricity Aquila was obtaining under this PPA and to meet increased customer demand. (Ex. 3, Boehm Direct, p. 3; Mantle Rebuttal, pp. 3-4)

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.” (Ex. 3, Boehm Direct, p. 6)

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. (Ex. 3, Boehm Direct, p. 8) The Aries plant is a combined cycle unit, which is an intermediate type plant and not a peaking facility. (Tr. Vol. V., pp. 695-696.)

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. (Ex. 17, Mantle Rebuttal, p.3)

³ 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.

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. (Ex. 3, Boehm Direct, p. 9)

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 some of the Staff's suggestions as guidance for its self-build plan. (Ex. 3, Boehm Direct, pp. 10-11) 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. (Ex. 3, Boehm Direct, p. 12)

37. While Aquila may also need baseload capacity, Aquila's load is unique in that it needs generation capacity suited to meeting peak demands. (Ex 17, Mantle Rebuttal, pp. 6-9)

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. (Ex 17, Mantle Rebuttal, p. 7) 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 10-year transmission planning study every three years. The 2002 study analyzed the

Grandview, Belton, Harrisonville, and Pleasant Hill area. (Ex. 6, Huslig Direct, p. 4) 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. (Ex. 6, Huslig Direct, p. 4) 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. (Ex. 6, Huslig Direct, pp. 4-5)

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. (Ex. 31, Caspary Rebuttal, pp. 10-11)

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. (Exhibit 31, Caspary Reb. p. 9) This addition will improve the reliability of the system in this growing area. (Exhibit 31, Caspary Reb. p. 11) The reliability benefits of the Facilities to support the future needs of this area are unquestionable. (Exhibit 31, Caspary Reb. p. 11)

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. (Tr. 1360) Neither of these employees is a certified land use planner. (Tr. 1358) If Aquila filed a special use permit application for a generating or transmission facility today, the County would have to hire an outside consultant because the issues associated with such a facility are simply “more than a one or two-man shop can handle.” (Tr. 1361)

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.

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 Segra Inc. (“Segra”), an engineering firm, on behalf of Aquila. (Ex. 5, Hedrick Direct, pp. 1-2) The RFP provided constraints such as delivery points and availability which were factors in the site study. (Ex. 5, Hedrick Direct, p. 2)

47. A preliminary study performed by Segra, 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. (Ex. 12, Rogers Direct, p. 2)

48. On July 13, 2004, Aquila's Special Use Permit Application (No. 2589) was taken up by the Cass County Planning and Zoning Board. (The transcript of that proceeding, consisting of a total of 155 pages, was admitted into evidence herein as Ex. 32.) 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 pm, 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 pm.

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. (Tr. 1371-72)

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. (Ex. 12, Rogers Direct, p. 3)

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. (Ex. 12, Rogers Direct, pp. 3-4) Each site was examined for adequacy of size and configuration for an overall plant layout template, the location of each site was examined relative to Aquila's existing electric transmission grid, each site was examined for proximity to adequate natural gas supply lines, the location and adequacy of water supply lines was examined for each site, each site was examined for proximity to existing sanitary sewer services, each site was examined and evaluated for access. (Ex. 12, Rogers Direct, pp. 4-7)

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. (Ex. 12, Rogers Direct, p. 7) 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. (Ex. 12, Rogers Direct, pp. 7-8)

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. (Ex. 12, Rogers Direct, pp. 8-9)

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. (Ex. 19, Wood Rebuttal, Schedules WW-1, WW-2) 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. (Ex. 17, Mantle Reb., pp. 7-8; Tr. 693-694)

56. The location of the South Harper Facility is geographically diverse from Aquila's other Missouri electric power generating plants. (Ex. 19, Wood Rebuttal, Schedule WW-3)

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. (Ex. 19, Wood Rebuttal, p. 11)

58. There are natural gas pipelines and transmission lines near the South Harper Facility with sufficient capacity to serve it. (Ex. 19, Wood Rebuttal, Schedule WW-4)

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. (Ex. 19, Wood Rebuttal, pp. 11-12)

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. (Ex. 19, Wood Rebuttal, pp. 22-23) 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. (Ex. 19, Wood Rebuttal, p. 20)

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. (Ex. 19, Wood Rebuttal, p. 27)

63. Cass County's Comprehensive or Master Plan establishes the "vision" of the community from a land use planning perspective. (Tr. 1402, 1567) 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." (Ex. 118, p. 2)

64. Cass County's current 2005 Comprehensive Plan (Ex. 118) establishes that the area encompassing the South Harper Facility and Peculiar Substation is designated as a "multi-use tier." Multi-use tiers are areas near cities and towns where non-agricultural development, such as commercial and industrial uses, is encouraged. Ex. 118, p. 25. These areas are: (1) positioned as transition areas from urban to rural densities; (2) located either along rural highways or major arterials, or close enough to them to provide access to non-agricultural traffic; and (3) developed for a mix of land use, including industrial uses. (Ex. 118, p. 28)

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. (Ex. 102; Tr. 1322-27)

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. (Exhibit 119, Zoning Order at p. 27; Tr. 1350-1354) That ordinance repealed Cass County's prior zoning ordinance. (Exhibit 119, Zoning Order subpart H. at p. 2; Tr. 1594). 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 108), 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. Cass County witness Peshoff testified during the hearing that Exhibit 102 has not been updated since 1999 and declined to state that Exhibit 102 was consistent with either Cass County's 2003 Comprehensive Update Plan or its 2005 Comprehensive Update Plan. (Tr. 1681-82)

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. (Ex. 108, 103, 104, Tr. 1348-49)

70. Despite concerns raised by Staff, 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.” (Ex. 119, p. 29) In fact, the development of a power plant, as well as a number of other industrial uses, is permitted with a special use permit. This variety of permitted uses includes commercial feedlots, metal and coal mining, sawmills, fertilizer mixing facilities, railroad switching and terminal services, airports, sewage systems, and sanitary landfills. (Ex. 119, App. A)

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.” (Tr. 1431)
- The area of the South Harper Facility is clearly a transition area from an urban to rural density as can be seen from the increased density of residential housing as one travels northeast from the plant toward Peculiar. (See TSH-1)

- The Facilities are near Peculiar, and both have access to roads with access to major arterials, and rural and other highways.
- The Facilities will not result in any meaningful increase in traffic in the areas. (Tr. 1437)
- A variety of services are available to the sites, including electricity, water, fire and police protection. (Tr. 1669-70)
- There is no evidence of any nuisance or interference by the Facilities with farming operations. (Tr. 1670) 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. (Ex. 7, Block Direct, pp. 5-9; Tr. 1671)
- Neither property is located within the 100 year flood plain. (Tr. 1671-72)
- There are no issues regarding actual or potential disturbance of significant natural resources at the sites. (Tr. 1672)
- There are no issues regarding stormwater runoff at the sites. (Tr. 1672)
- There are no issues regarding drainage easements at the sites. (Tr. 1672)

- Neither parcel has any chance of being part of a residential subdivision. (Tr. 1673)
- There are no applicable yard or open space requirements. (Tr. 1673)
- 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. (Ex. 20, Schedule WW-14, Sheet 2 of 8; Ex. 14, White Surrebuttal, p. 7) The South Harper Facility is fully compatible with this pre-existing 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. (Ex. 2, Empson Surrebuttal, pp. 14-16)

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. (Ex. 14, White Surrebuttal, p. 5)

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. (Ex. 14, White Surrebuttal, p. 6)

76. The 2005 Plan provides for a multi-use tier which encourages non-agricultural uses “such as commercial and industrial uses.” (Ex. 108; Ex. 14, White Surrebuttal, p. 6) The Facilities are located in such a multi-use tier. (Ex 108; Ex. 14, White Surrebuttal, p. 7)

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. (Ex. 7, Block Direct, pp. 6-7)

78. Aquila has taken a number of measures to further mitigate impacts on its neighbors. (Ex. 11, Dunn Surrebuttal, p. 2)

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. (Ex. 11, Dunn Surrebuttal, pp. 2-3; Ex. 10, Dunn Direct, p. 3) 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. (Tr. 1348) Approximately 1,200 trees and shrubs were planted on the grounds and neighboring properties, and Aquila consulted with neighbors regarding landscaping. (Ex. 11, Dunn Surrebuttal, p. 3; Bender Reb., pp. 3-4)

80. The Peculiar Substation site is 55 acres, of which only 7.5 acres is being used for operations. (Ex. 2, Empson Surrebuttal, schedule 9) 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. (Ex. 13, Rogers Surrebuttal, pp. 3-4) 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. (Ex. 10, Dunn Direct, pp. 4, 7-8)

82. Over 250 local residents have signed letters of support for the Facilities (Ex. 11, Dunn Surrebuttal, p. 4), 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. (Ex. 2, Empson Surrebuttal, pp. 20-21)

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. (Ex. 2, Empson Surrebuttal, p. 24)

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 §§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. (Ex. 9, Armstrong Direct, pp. 1-2) Aquila has had the financial wherewithal to fund the construction and operation of the Facilities. (Ex. 9, Armstrong Direct, p. 1)

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. (Ex. 9, Armstrong Direct, p. 2)

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. (Ex. 9, Armstrong Direct, p. 2)

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. (Ex. 19, Wood Reb., pp. 20-21)

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.⁴ 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

⁴ *Alton R. Co. v. Public Service Commission*, 110 S.W.2d 1121, 1125 (Mo. App. 1937).

an authorized certificate holder, the Commission should be guided, primarily, by considerations of public interest.⁵

Section 386.610⁶ 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”⁷ 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. . . .”⁸ An examination of those cases in Missouri finds that the determination of public interest is a balancing test between public and private interests.⁹ Further, “[n]o one factor is dispositive in balancing public versus private interests. Each case stands on its own facts and circumstances.”¹⁰

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

⁵ *Missouri Pacific Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

⁶ All statutory references are to RSMo (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

⁷ *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.

⁸ *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).

⁹ *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).

¹⁰ *Id.* at 110.

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 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. *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.” *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 (Mo. banc 1944). “The police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.’ [Sec. 5, Art. XII.] Therefore, ‘the power of the Public Service Commission . . . overrides all contracts, privileges, franchises, charters or city ordinances.’” *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 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.

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.

Cass County and StopAquila challenged the Commission’s authority to grant Aquila the CCNs it seeks in this application. In addition to requesting such other orders and findings as may be appropriate under the circumstances, Aquila’s application requests CCNs under Section 393.170.1. Section 393.170.2, which references local consent, is inapplicable. Sections 393.170.1 and 393.170.2 are not interchangeable. 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.” 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 right to utilize county rights of way.¹¹ “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.”¹² 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.”¹³

In *Aquila*,¹⁴ the Court of Appeals recognized that Aquila qualifies for the exemption from county zoning found in section 64.235 and further held that the approval required to exempt Aquila could come from either the Cass County Commission or the Public Service Commission.¹⁵ The *Aquila* court stated, “(b)ecause we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a

¹¹ 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.

¹² *State ex rel. Union Elec. Co. v. Public Service Comm’n of Mo.*, 770 S.W.2d 283, 285 (Mo.App. 1989).

¹³ *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)).

¹⁴ *StopAquila.org v. Aquila*, 180 S.W.3d 24 (Mo.App. 2005).

¹⁵ *Id.* at 32.

permit from the county commission before commencing construction of the South Harper Facility and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt.”¹⁶

In light of the Court of Appeals’ statement that Aquila could still apply for permission for the Facilities,¹⁷ and in light of the Circuit Court of Cass County’s order further suspending its injunction until May 31,¹⁸ the Commission is unwilling to conclude, as a matter of law, that it cannot consider Aquila’s application. This comports with the concept that the Commission’s authority over public utilities is sweeping and, as at least one court has observed, essentially includes everything except the power to operate and manage them itself.¹⁹ Moreover, the Public Service Commission Act’s provisions are to be “liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.”²⁰

The Commission does not conclude that Aquila requires an additional CCN for its Peculiar Substation. Pursuant to the holding of *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960), a utility holding an area certificate may build transmission facilities within its certificated area without having to obtain a line certificate. 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

¹⁶ *Aquila* at 32 (emphasis added).

¹⁷ *Id.* at 41.

¹⁸ Circuit Court of Cass County, Case No. CV104-1443CC (Order dated February 15, 2006).

¹⁹ *State ex rel. PSC v. Bonacker*, 906 S.W.2d 896, 900 (Mo.App. 1995).

²⁰ Section 386.610.

request for a CCN for its Peculiar Substation may lead to a quicker final resolution of questions of the legality of that facility.

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. *In the Matter of the Application of Timber Creek Sewer Co.*, EA-99-202, 8 Mo. P.S.C. 3d 312, 314. 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.²¹

In the Commission proceeding of *In Re Tartan Energy*, GA-94-127, 3 Mo. P.S.C. 3d 173, 177, this Commission articulated the legal standard to be met by applicants for a CCN. As applied to Aquila in this case, the standards may be summarized as follows:

- 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

²¹ *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.

- Whether the involved Facilities and related service promotes the public interest.

Positive findings with regard to factors 1-4, will, in most instances, support a finding that an application for a CCN will promote the public interest. *In Re Tartan Energy* at 189. The Courts of Appeals have articulated the standard and policy similarly to the Commission. See *State ex rel. Intercon Gas* and *State ex rel. Public Water Supply District No. 8 of Jefferson County*.

The Missouri Court of Appeals recently stated that the Commission may also consider “current conditions, concerns and issues, including zoning,”²² matters which 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 *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960), the decision in 180 S.W.3d 24 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.” *In re Tartan Energy*, GA-94-127, 3 Mo. P.S.C.3d 173, 177. There is no need or requirement that such issues be taken up separately from a consideration of this and the other factors to be examined by the Commission in connection with Aquila’s application, nor is there any requirement that the evaluation of land use or zoning concerns, in particular, be the “functional

²² *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 35 (Mo. App. 2005).

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.

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.” *In Re Tartan Energy*, 3 Mo. P.S.C. at 177; Section 393.170.3. Rather, the issues examined by the Commission to make such a determination have been developed in prior Commission and appellate decisions.

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. Up 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,”²³ the Commission had the occasion to consider 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 (Commission Case No. WA-

²³ *In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate and Maintain Two Combustion Turbine Generating Units in the State of Missouri*, 24 Mo.PSC (NS) 72, 78 (1980).

97-49, Report and Order, October 9, 1997). 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 "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.” *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 561 (Mo.App. W.D. 1983). 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 latan 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 industries. The rezoning, then, was necessary not to generate electricity, but to generate business.**

Id. (emphasis added)

Dealing with section 393.170 and the zoning exemption contained in section 64.620,²⁴ 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.**

Kansas City Power & Light Co. v. Jenkins, 648 S.W.2d 555 (Mo.App. W.D. 1983) (emphasis added). The Court also noted that its holding was consistent with *Union Elec. Co. v. Saale*, 377 S.W.2d 427, 430 (Mo. 1964), which held that a county cannot by zoning restrictions limit the use of land by a public utility to construct a power plant to

²⁴ 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."

generate electric energy for public use. 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 construct a power plant to generate electric energy for distribution to the public.

Union Elec. Co. v. Saale, 377 S.W.2d 427, 430.

The facts in this case recited above regarding Cass County's zoning ordinances 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." See. Ex. 119, p. 27. Municipalities have the same requirements under Chapter 89, and it has been held that a failure to attach or record a zoning map that has been incorporated into a zoning ordinance invalidates the ordinance. *Casey's General Stores v. City of Louisiana*, 734 S.W.2d 890, 896 (Mo. App. 1987). The maintenance of an official zoning map as a required part of a valid zoning ordinance (city or county) would likewise appear to require that the recorded and attached zoning map be accurate and current as of the date the ordinance is adopted. 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. However, the foregoing issues do 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 has weighed in determining whether to grant Aquila the CCNs it requests.

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.’” *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)). Without such a system “chaos would result.” *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).

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 which 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 CT 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."²⁵ This statement implies the CT 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 conveys 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 the Commission to issue the type of certificate of public convenience and necessity or order contemplated by section 64.235. In addition to

²⁵ In the matter of the Application of Missouri Power & Light Company for Permission and Authority to Construct, Operate and Maintain a 54 MegaWatt Combustion Turbine Generating Unit in Jefferson City, Cole County, Missouri, 18 MoPSC (NS) 116, 118, Case No. 17,737 (Report and Order dated July 27, 1973).

powers expressly conferred upon the Commission by statute, the Commission is also vested with all other powers necessary and proper to carry out fully and effectively the duties delegated to it. *State ex rel. Public Service Commission v. Padberg*, 145 S.W.2d 150.

Conditions

Section 393.170.3 allows the Commission to impose on CCNs 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 CCN 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 CCN 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. The acceptance of 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 addressed this issue in a recent proceeding and concluded then, and concludes now, 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. (*In the Matter of the Application of Union Electric Company*

for Permission and Authority to Construct, Operate, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage, and Pulaski Counties, Missouri, Case No. EO-2002-351, 229 P.U.R.4th 148 (Report and Order issued August 21, 2003))

Decisions of the Missouri Supreme Court support this conclusion: “The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund.” (*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)) In light of the above authority, 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 which “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, however, 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.

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 whether 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.

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.

Aquila is an experienced operator of power production facilities. Aquila has, for many years, provided electrical service in those areas of the state certificated to it by this Commission. 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 Commission has previously stated the importance generally of company-owned generation instead of heavy reliance on power purchase agreements to meet Missouri load requirements and to protect Missouri customers. Likewise, the Staff has encouraged Aquila in particular to reduce its reliance on power purchase agreements in favor of power plant ownership when justified. Since as early as May of 2003, Aquila has presented to representatives of Staff and Public Counsel information demonstrating the need for peaking capacity of 300 MW during regular reviews of its Integrated Resources Plan ("IRP"). If the South Harper Facility were not available, Aquila would need to immediately add capacity to meet its load and reserve requirements. Adding capacity could come in the form of importing capacity or building at another site within Aquila's system. These other options had been evaluated previously and were found to be more costly than the South Harper Facility.

The construction of the South Harper Facility is consistent with the Company's IRP. 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. If generation and transmission are located far from load centers, there is increased opportunity to experience service interruptions, outages, and voltage issues. 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 which Aquila now 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 is granted a waiver from the requirement of 4 CSR 240-3.105(1)(B)2.

2. Pursuant to RSMo §393.170 and/or §393.140, 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. Pursuant to RSMo §393.170 and/or §393.140, 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 impact 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 CCN 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. This order shall become effective on May 31, 2006.

Respectfully submitted,

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ATTORNEYS FOR AQUILA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered electronically, by first class mail, or by hand delivery, on this 18th day of May, 2006, to all parties of record. A copy was also sent by electronic transmission to the Administrative Law Judge.

_____/s/ Diana C. Carter_____