

**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

CASS COUNTY'S PREHEARING BRIEF

On April 11, 2006, Cass County, with other parties, submitted a list of issues pursuant to the Commission's order, and for its prehearing brief, Cass County uses that list of issues as an outline. Cass County briefly sets out its arguments on each issue, and cites to the filed written testimony on those arguments and positions which are not otherwise supported by the existing record. This prehearing brief merely summarizes Cass County's positions and is not a full statement of its arguments or the evidentiary support for those arguments.

**I. ISSUES IF THE COMMISSION CONDITIONS THE GRANT OR APPROVAL
OF ANY CERTIFICATE ON ACQUISITION OF LOCAL ZONING APPROVAL**

A. Pursuant to Section 393.170, RSMo 2000, does the Commission have jurisdiction to grant a certificate of public convenience and necessity for a generating plant that has already been constructed.

POSITION:

It has already been established by the text of Aquila's application and the Motions to Dismiss filed in this matter that the South Harper Generation Plant and its Peculiar Substation

are already erected and have operated. The record needed to dispose of the case on the basis of the provisions of Section 393.170 is already developed.

B. Presuming the Commission has jurisdiction, is the proposed construction of the South Harper Plant and Peculiar Substation necessary and convenient for the public service.

POSITION:

Cass County submits that Aquila bears the burden of proving each of the following issues in connection with the certification of South Harper and the Peculiar Substation, and therefore Cass County will not have separate argument or proof on each. Where Cass County's proof at hearing may bear on any of these issues is noted below.

- (1) Is there a need for the additional capacity proposed.
- (2) Are there alternatives to meet the need other than erection of a peaking facility.
- (3) Will the plant as proposed have reasonable and economical access to fuel, water and transmission facilities.
- (4) What will be the impact on the neighboring community.

POSITION ON (4)

Cass County expects the proof at hearing to be that the impact on the neighboring community has, will be and will continue to be highly negative as evidenced by the public outcry at the local public hearing and also by virtue of the testimony of Mr. Bruce Peshoff, who discusses the planning aspects for power plants in his rebuttal and surrebuttal testimony. It is

Mr. Peshoff's opinion that the construction of the plant and substation would not comply with applicable Cass County Zoning. *Peshoff Rebuttal* p. 25.

- (5) Has the applicant satisfied all requirements of state and local agencies before construction of the plant.

POSITION ON (5):

Absent local zoning approval, the requirements of local agencies have not been satisfied and construction was commenced and finalized unlawfully as per the judgment of the court of appeals in *Cass County, Missouri v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App. W.D.2005). The record is already clear that Aquila lacks local zoning approval.

- (6) Is Aquila qualified financially and technically to construct and operate the plant and substation as proposed.
- (7) Is construction of the plant and substation in the public interest.

POSITION ON (7):

Cass County's position is that the public interest is not served by allowing electric utilities the authority to build power plants wherever they please. In order to prevent this outcome, the Commission should disapprove any plant that has been erected in violation of local zoning and other ordinances. As part of the processes it applies in consideration of applications filed under Section 393.170.1, the Commission should defer to local zoning authorities respecting issues of location of the plant proposed. The Commission has no zoning authority, has established no rules relative to zoning, and is not equipped for local land use planning considerations. Regarding South Harper specifically, the application, if approved, would allow

an electric utility to nullify the County's zoning laws, something a utility could not accomplish by its own powers of eminent domain. The public interest is not served by augmenting condemnation authority indirectly by application of the Public Service Commission Law.

II. ISSUES IF THE COMMISSION DOES NOT CONDITION GRANT OR APPROVAL OF THE CERTIFICATE UPON ACQUISITION OF LOCAL ZONING APPROVAL.

- A. See issue A above.
- B. See issue B above.
- C. Does the Missouri Public Service Commission have the statutory authority to consider zoning issues itself, rather than deferring to local authorities, as part of an application for certification of a proposed generating plant.

POSITION:

The Missouri Public Service Commission lacks independent zoning authority and is therefore without statutory authority to consider zoning issues. *Cass County* at 30. Unlike boards or commission in other states that have been granted specific powers and procedures, resembling land use approval standards, by which to site power plants; see *Peshoff Rebuttal* pp. 31-35, the Commission has no rules, regulations or statutory foundation upon which to rely in rendering decisions pertaining to siting of the plants approved under Section 393.170. *Peshoff Rebuttal* p. 36. Without that specific authority, it should defer to the local zoning authorities that have been given express authority over the location of improvements in their respective jurisdictions.

- (1) Under what standard or set of circumstances may the Commission disregard local zoning authorities in approving the site for new generation facilities.

- (2) Has Aquila met that standard or supplied proof of the required circumstances for the Commission to disregard local zoning authorities in approving the site for South Harper and the Peculiar Substation.

POSITION ON ISSUES (1) AND (2)

The Commission undertakes review of Aquila's present application without benefit of any promulgated rules on the subject matter. Absence of those rules results in a denial of due process to those affected by the application. There is no clear or cogent statement from the Commission to suggest its view of its role in siting, or the manner in which it will consider siting, including the factors it will deem relevant. As a result, the parties are left to guess about the nature of the evidence they should introduce, and the record they should develop. There is nothing in authoritative print from which the parties can discern the appropriate standards to apply. This denies the parties a meaningful opportunity to be heard.

Given the seriousness of this matter, the time that has been given for preparation (i.e. the Procedural Schedule) is itself a denial of due process. Compare the Commission's approach to other jurisdictions who, unlike the Commission, have legislative authority to "site" power plants. In those jurisdictions, the determination of the propriety of a plant's site can take many months, and even a year to two years.

Regarding the standard the Commission must create, there is appearing in this case an unwritten factor or standard that is derived from the fact that the South Harper facilities have already been constructed and face a looming deadline for dismantling. This is not a relevant factor in determining (whether in front of the Commission or the County) the propriety of South

Harper's location and the location of the Peculiar Substation. Yet, by all accounts, that factor appears to be controlling these proceedings, including the break neck speed with which the parties have been expected to prepare for, at a minimum, an eight-day hearing on the propriety of the location of these facilities (again without benefit of any related rules and regulations). The Commission is improperly weighing a sense of need to "rescue" Aquila and "save" the South Harper facilities in a case designed by law to determine whether the South Harper facilities should be erected at all. The Commission must set aside that sense of need.

Cass County contends that under no circumstances can the Commission disregard local zoning authorities in considering sites for new generating power plants. Zoning has been entrusted by the state legislature to local political bodies and not the Commission. Even so, if the Commission elects to consider land use issues as part of this application, it must declare a standard or set of circumstances by which to justify its decision to exclude the Cass County Planning Board from that process.

Cass County has not predetermined the outcome of any application Aquila may file concerning South Harper and the Peculiar Substation. The decisions of the Planning Board and Cass County Commission are subject to judicial review. The guarantees and safeguards of due process are as sound at the County level as they are at the Commission level. There is still time for the application to be processed by Cass County. Aquila is familiar with the process having done it before with respect to the Aries plant and most recently, the Camp Branch location. Aquila has prepared a special use permit application for South Harper and the Peculiar Substation already and attempted to file them despite Cass County's advisories that while the injunction remained as initially granted, Cass County would not accept the filing. Aquila can claim no reason for not filing an application with the Cass County Planning Board at this time.

D. Assuming the Commission does have the statutory authority to consider zoning issues, does the proposed location for the South Harper Plant and Peculiar Substation conform to the requirements of Cass County zoning.

- (1) Independent of considerations of need for the proposed plant and substation, are the proposed sites for the South Harper Plant and Peculiar Substation within a district zoned for generating plants and related facilities.
- (2) Independent of considerations of need for the proposed plant and substation, are the proposed sites consistent with the Cass County Master Plan.
- (3) Independent of considerations of need for the proposed plant and substation, will the proposed sites qualify for a special use permit under Cass County zoning ordinances in the event they are not located within an industrial district, or are otherwise inconsistent with the Cass County Master Plan;
 - (a) What will be the impact on the local community if a special use permit for the South Harper Plant and the Peculiar Substation is approved.
 - (b) What will be the impact on the County Master Plan if a special use permit for the South Harper Plant and the Peculiar Substation is approved.
 - (c) What conditions would Cass County be likely to impose on issuance of a special use permit for the South Harper Plant and Peculiar Substation and should those conditions be imposed by the Commission.
 - (d) Considering that the South Harper Plant and Peculiar Substation are already erected, is Aquila able to secure at this late date a special use permit to remedy any unlawful uses Aquila created itself.

POSITION ON ISSUES D. (1) – (3) AND SUBPARAGRAPHS.

Assuming, without waiver of Cass County's arguments to the contrary, that the Commission does have jurisdiction to hear this case and furthermore has the statutory authority to consider zoning issues, then in accordance with the Western District Court of Appeals opinion in *Cass County*, the Commission will be expected to conduct itself as the functional equivalent of the Cass County Planning Board if it elects to consider zoning issues on its own. As the opinion of the court announces, the hearing the Commission convenes for this purpose must be conducted so that zoning issues *can be considered*. This is not an inquiry that is connected to issues of need for the plant. Consideration of zoning issues is an independent element of the Commission's approval process.

In order to understand the appropriate zoning issues to consider, the Commission must become familiarized with the history of zoning in Cass County, its application to industrial uses of property, its history involving power plants and other industrial uses of property and the governing master plan, comprehensive plan and zoning ordinances.

The zoning process for Cass County began in 1958 and was first established in 1959. The first Planning Board for the County was appointed October 13, 1959. The original zoning order has been amended in successive years as the Planning Boards, staff and the County Commission itself are constantly looking forward to account and reflect the county's growth and projected growth. *Mallory Rebuttal* pp. 3-5. Zoning is important to Cass County. It is a growing community and has seen an 11% increase in population growth in the last five years. Zoning is a form of planning and planning advances the goals of consistency in how Cass County land is developed and the valuation of that land. If a land development occurs without

compliance with the zoning ordinance, then development as a whole may suffer, and in turn investment in Cass County may decline, all of which affects the county tax base. *Mallory Rebuttal* pp. 6-7.

On November 27, 1990, Cass County adopted its 1991 Comprehensive Plan which was reviewed and updated in 1997 and again in 2003. *Peshoff Rebuttal* pp. 11-12. Cass County has approved applications related to industrial uses of property. These approved uses include an industrial park, a small parts assembly and manufacturing business, a waste transfer station *Peshoff Rebuttal* pp. 14-15, and also include review and approval for generating plants. Aquila's application pertaining to the Aries facility was approved. Aquila also filed for approval of a plant at the "Camp Branch" site and that application, while appropriately reviewed by the Planning Board, was voluntarily withdrawn by Aquila at the Board of Zoning Adjustment level and no decision was rendered. *Peshoff Rebuttal* pp. 17-18.

If Aquila were to file an application for special use permits regarding the South Harper Plant and the Peculiar Substation, the Cass County Planning Board would consider a number of factors in its deliberations including:

- Location, size, nature and intensity of proposed use in relation to the site and to adjacent properties;
- Accessibility of property to emergency and municipal services, traffic impacts and parking availability;
- Location, availability, capacity and compatibility of utilities and services;
- Location, nature and height of all site improvements, their relation to adjacent property and uses, and the need for buffering or screening;
- Adequacy of required yard and open space requirements and sign provisions; and

- General compatibility with adjacent properties, other properties in the district and the general safety, health, comfort and general welfare of the community.

The ruling of the Planning Board would depend upon consideration of several other factors including:

- The impacts of development on the community.
- Land use efficiency.
- The public health, safety and welfare.
- Locational requirements and implications.
- Consistency with the Comprehensive Plan.

Peshoff Rebuttal pp. 21-22. Mr. Peshoff offers a thorough analysis of each of the factors above in his rebuttal testimony at pages 21-23.

Cass County's 2003 Comprehensive Plan would control review of Aquila's hypothetical application and under its guidance, Aquila's South Harper Facility would not be consistent with that plan or the 1997 Cass County zoning ordinance. Even so, the Cass County Planning Board or the County Board of Zoning Adjustment would have the authority to approve the permit albeit with conditions that would accommodate the interests of all concerned. *Peshoff Rebuttal* p. 26.

E. If the Commission grants the certificate sought in Aquila's application and ignores Cass County's zoning and development ordinances and regulations, and further fails to treat Cass County's zoning and development ordinances and regulations as a consideration independent from need, has the Commission effectively extended to utilities the right to build generation plants wherever they may want.

POSITION:

The Western District Court of Appeals opinion in *Cass County* has as its dominant hallmark that regulated electric utilities do not have unbridled discretion in the location of their power plants. *Cass County's* signature ruling should not be circumvented by unlawful erection of those facilities and an application filed under Section 393.170 essentially requesting forgiveness for past wrongs. Cass County argues that yes, the Commission will have allowed Aquila the right to build its peaking plant wherever it wanted if the application is granted in the manner described in this issue.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 21st day of April, 2006 to:

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