

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In The Matter of the Application of Aquila,)
Inc. for Specific Confirmation or, in the)
Alternative, Issuance of a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own, Operate,)
Control, Manage, and Maintain a)
Combustion Turbine Electric Generating)
Station and Associated Electric)
Transmission Substations in)
Unincorporated Areas of Cass County,)
Missouri Near the Town of Peculiar.)

Case No. EA-2005-0248

**RESPONSE OF AQUILA, INC. TO APPLICATIONS
FOR REHEARING OF CASS COUNTY, MISSOURI AND
STOPAQUILA.ORG**

COMES NOW Applicant Aquila, Inc. ("Aquila") by and through the undersigned counsel, and offers the following response to the separate Applications for Rehearing filed by Cass County, Missouri ("Cass") and StopAquila.org on April 12 and 15, 2005, respectively.

1. The Commission should deny the Applications for Rehearing filed by Cass and StopAquila.org. Neither filing presents any compelling basis for the Commission to rehear this matter. Cass and StopAquila.org do not identify any legal or evidentiary errors that justify a rehearing.

2. Both Cass and StopAquila.org broadly allege lack of due process in that the Commission suspended the evidentiary hearing at the conclusion of the proceedings on Friday, March 29, 2005. This argument reveals a misunderstanding of the action taken by the Missouri Public Service Commission ("Commission") in this case.

3. The Commission's Order Clarifying Prior Certificates of Convenience and Necessity bears a name that describes precisely what the Commission has done. The Commission has not issued a new, separate or overlapping certificate of convenience and necessity to Aquila. Rather, the Commission has interpreted and clarified the meaning of its prior certificate orders in Case Nos. 3171, 9470 and 11,892. The Commission's authority to render decisions that interpret its prior orders has been recognized by the Missouri Supreme Court and the other appellate courts. *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 598 (Mo. banc 1964); *State ex rel. Missouri Pacific Freight Transport Company v. Public Service Commission*, 312 S.W.2d 363, 365 (Mo.App. 1958); *State ex rel. Orscheln Brothers Truck Lines v. Public Service Commission*, 232 Mo.App. 605, 110 S.W.2d 364, 366 (1937). Thus, the requirements of §393.170, RSMo, pleaded in the alternative in this case, do not come into play.

4. In any event, the Commission afforded the parties ample due process in this case. The Commission held an on-the-record presentation on February 25, 2002, at which time all parties were allowed to present their legal theories and arguments and to respond to questions from the Commissioners.

5. The procedural schedule later adopted by the Commission provided for the submission of a stipulation of facts in lieu of an evidentiary hearing, a filing that occurred on March 10, 2005. All parties, including Cass and StopAquila.org, agreed and stipulated to the facts necessary to provide the evidentiary basis for the issuance of the Commission's clarification order. This procedure is specifically provided for in Commission rule 4 CSR 240-2.130(9).

6. Additionally, the Commission adopted the parties' joint proposal that a local public hearing be held. In accordance with that recommendation, the Commission held a hearing at the Justice Center in Harrisonville, Missouri, on March 15, 2005. Comments of the public were transcribed and the transcript of that proceeding was made a part of the record in this case.

7. This series of events was capped by the submission of legal briefs and proposed findings of fact and conclusions of law on March 21, 2005. All parties, including Cass and StopAquila.org, availed themselves of this opportunity.

8. Based on the comments received from members of the public at the March 15, 2005, local hearing (both in support of and in opposition to the Southern Harper Facility), the Commission exercised its discretion by scheduling an opportunity for Aquila to respond to a number of complaints and allegations made by members of the public concerning the alleged conduct or practices of Aquila and/or its contractors. On March 28 and 29, 2005, the Commission heard two (2) full days of testimony by witnesses for Aquila responding to a variety of topics not previously addressed by Aquila. In stark contrast to the procedure employed at the local hearing, Aquila's witnesses were put on the stand, placed under oath and cross-examined at length by counsel for other parties.

9. The record consists of a 14-page stipulation of facts containing eighty-two (82) undisputed facts. The record also includes six (6) volumes and over six hundred (600) pages of hearing transcripts taken at the February 25, 2005, on-the-record presentation in Jefferson City, the March 15, 2005, local public hearing in Harrisonville and the subsequent March 28 and 29, 2005, evidentiary hearing in Jefferson City. The

record also contains many documents offered as exhibits. The case has been briefed. This represents more than ample due process. Cass and StopAquila.org have no entitlement to unfettered discretion as to the scope of evidentiary record particularly when all the facts necessary for the issuance of the clarification order are contained within the four corners of the Joint Stipulation of Facts. To the contrary, it is the responsibility of the Commission to determine whether the evidence and issues have any relevance to the issue properly before it. There is no basis for arguing the Commission did not afford all parties due process in this case with the numerous opportunities to make their views known.

10. The conclusion that due process has been properly satisfied is even more compelling in light of the prohibition contained in §386.550 RSMo that the Commission's findings set forth in its orders in Case Nos. 3171, 9470 and 11,892 are final and conclusive and are not subject to collateral challenge. The only genuinely relevant facts in this case had to do with what the prior orders said, what type of plant was under construction and where it was being constructed. The parties stipulated to these facts! The only conceivable purpose of permitting additional evidence would have been to challenge the adequacy or validity of the Commission's prior orders.

11. StopAquila.org has argued that the Commission's order is contrary to the Final Judgment of the Circuit Court of Cass County, Missouri. Aquila strongly disagrees. A copy of the Final Judgment is attached as Appendix 2 to Aquila's Application, and it is clear that the order the Commission issued is fully consistent with the express terms of Judge Dandurand's Judgment. The contention that the two orders are in conflict is without merit.

12. Cass argues that the Commission has misinterpreted Aquila's certificates of convenience and necessity. Again, Aquila disagrees. The Commission has exclusive jurisdiction to make decisions within the specialized expertise reserved to it by the law. The Missouri Supreme Court and other appellate courts in this state have recognized that the Commission has primary jurisdiction to interpret its enabling legislation in its prior rules, decisions, and orders. *State ex rel. MCI MetroAccess Transmission Services v. City of St. Louis*, 941 S.W.2d 634, 644 (Mo.App. 1997); *Union Electric Company v. Crestwood*, 499 S.W.2d 482, 484 (Mo. 1973); *Union Electric Company v. City of Crestwood*, 562 S.W.2d 344, 346 (Mo. banc 1978); *State ex rel. Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943). It is apparent from a reading of the Commission's order that it carefully considered the language of its prior Reports and Orders in Case Nos. 3171, 9470 and 11,892, and appropriately clarified the scope of what was intended in those prior orders. The Commission's order is a public policy determination anchored in a robust evidentiary record that follows the substantial case law and decisions that preceded its decision in this case.

13. Cass and StopAquila.org each argue that the Commission has unlawfully expanded Aquila's franchise in Cass County. This argument is a simple red herring. The order has no effect whatsoever on the perpetual franchise granted Aquila by Cass County in 1917. The authority for Cass County to grant this franchise "was derived from [§49.270], which invested in the county court the control and management of the real property belonging to the county, and [§229.100], requiring that the assent of the county court be obtained before poles for electric light wires could be erected on the public roads and highways of any county." *Missouri Public Service Company v. Platte-Clay Electric*

Cooperative, 407 S.W.2d 883, 889 (Mo. 1966). Cass County simply does not have the authority to assent — nor can the franchise lawfully extend — to the construction of electric plant on real property that the County does not own. In issuing the franchise to Aquila, Cass County granted Aquila all the authority that it possessed, *i.e.* consent to construct plant on the County's public roads and highways, and the Commission's order in no way addresses, restricts, expands or modifies the terms of the Cass County franchise.

14. The Commission has properly applied the facts and the law, giving due and appropriate consideration to the public policy that furthers economic development statewide by the extension of adequate electric facilities to customers in this state needing electric power for personal and business uses. It is a policy that has served the State of Missouri well since 1913. Cass and StopAquila.org have provided no basis for the Commission to depart in such a radical fashion from the *status quo*.

WHEREFORE, Aquila requests that the Commission deny the Applications for Rehearing of Cass and StopAquila.org for the reasons set forth above.

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 delivered by first class mail, electronic mail or hand delivery, on this 2nd day of May, 2005 to the following:

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