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 substations in unincorporated areas of Cass County, near the town of Peculiar	**Case Number EA-2005-0248**

BRIEF OF STOPAQUILA.ORG ET AL. OPPOSING APPLICATION FILED BY AQUILA, INC. AND REQUESTING DENIAL, OR, IN THE ALTERNATIVE, SUSPENSION, CONSOLIDATION, SCHEDULING AND A PUBLIC HEARING

PART I. THE ISSUES.

Aquila, by its conduct, has forced the County Commission, the Courts, and now the Public Service Commission to address issues involving the power of the county over a public utility that wants to build a power plant and the relationship of the Public Service Commission with the county and with the utility. Aquila wishes the county to have no power over it. Aquila wants to build a power plant in a residential area[1] despite the harm to the people in the neighborhood, despite protest, despite zoning, and despite the Circuit Court's permanent injunction against it.

[1] Although the area is zoned agricultural, there are numerous homes, primarily to the north and to the east of the site. The area has grown into a residential area with many new homes.

The local authorities (in this case, the county) have by law a considerable amount of authority over the question of whether a utility can build a power plant and where a utility can build a power plant. An electric utility has to get a franchise from a county before building a power plant in the unincorporated county, and the county also has zoning authority over it, so the county can also control the location of a power plant. The PSC does not have any **zoning** authority. In fact, as Appendix 1 to Aquila's original application in this case states, the PSC takes the position that it does not tell electric utilities where to not build their plants. (The attachment is letter from the PSC to Nannette Ham.)

Electric utilities are highly regulated. The statutes and the case law indicate that there are two aspects of control over the utility. First is the regulatory control. The regulatory control is exercised by both the PSC and by the local government.[2] This regulatory control is seen in the franchise that is given by the local authority and in the certificate that is given by the PSC. As Part III points out, the utility has to get **both** the permission from the county in the form of a franchise and the permission from the PSC in the form of a certificate. The PSC has no authority whatsoever in the decision by the first class non-charter county to grant or not grant, to limit or not limit, the franchise to the utility. On the second issue, **zoning authority**, the PSC has no involvement whatsoever. The county has been granted considerable power to control the location of power plants and the type of the building. See Part II.

[2] Although the interests of the county and the PSC are different. Of course the county has no power to regulate rates.

In this dispute, Aquila submitted an application for a special use permit to the Cass County Planning Board in June 2004 for the building of a power plant in Cass County. The Planning Board **denied** the application for a special use permit. Aquila did not appeal to the Commissioners or to the Court. Subsequently, Aquila purchased a tract of land at a different location, but also in unincorporated Cass County. This new location was two miles south of the city limits of Peculiar. The site is zoned agricultural. Aquila then made plans to build the same power plant, but did not apply for a special use permit or any kind of zoning permit from Cass County.

Contrary to what Aquila has told the PSC, Aquila to date has neither applied for a special use permit for this new site, nor has it received a special use permit or rezoning from Cass County for any zoning for the plant.

Aquila also has not received the permission to build a plant that is required by RSMO 393.170 because Aquila does not have a franchise from the County that allows it to build a power plant. The franchise from Cass County **only** allows Aquila to put in **transmissions lines**. (See January 2005 Circuit Court decision, attached to Aquila's application and also Appendix 6 to the application of Aquila, which is the county franchise.)

Numerous residences are located within a two mile radius of the site where Aquila proposes to build the plant. Over 350 people who live close by signed a petition to oppose the proposal to put in a power plant at this site. (See list attached to motion to intervene.)

The Circuit Court issued a **permanent injunction** against the building of this power plant. Aquila now seeks to "do an end run" by asking the PSC to give it a ruling that would supposedly indicate that it does not need to go through county zoning.

The issues are now on appeal to the Missouri Court of Appeals, Western District. Instead of waiting for a ruling from this Court, Aquila seeks to force the PSC to issue a ruling.

The real issues in this dispute are:

1. whether a first class non-charter county has the power to enforce its zoning laws on a public utility that seeks to build a power plant in an area zoned agricultural, which is in and near residential areas, without a special use permit or rezoning,
2. whether a utility can apply for zoning and then when it is turned down, thumb its nose at the zoning authority and proceed with no consequences, and

3. whether a county that has never given a franchise to the utility that would authorize it to build a power plant can be forced to allow the utility to build a power plant.

Aquila seeks to now drag the PSC into this dispute, in effect asking the PSC to tell Cass County that it has no zoning power over Aquila's plans to build a power plant and to tell the county that it must allow this power plant despite the fact there is no county franchise that would allow a power plant.

PART II. THE POWER OF THE COUNTY OVER THE ELECTRIC COMPANY (DISCUSSION OF CHAPTER 64 ON FIRST CLASS NONCHARTER COUNTIES AND THE CASE LAW)

1. According to Article IV, Section 1 of the Missouri Constitution, counties are recognized as legal subdivisions of the state.

2. Chapter 64 of the revised Statutes of Missouri was enacted in 1959. **RSMO 64.170 authorizes the county to control the construction of any building**.

3. RSMO 64.231 provides that a county may adopt a master plan to coordinate physical development in accordance with present and future needs and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants, and that the plan may include a land use plan, studies and recommendations relative to the locations of buildings and projects.[3]

4. RSMO 64.235 provides that **no improvement shall be constructed** without first submitting the proposed plans to the county zoning authority and receiving a written approval. The entire section is as follows:

> **64.235. Improvements to conform to plan, approval required (noncharter first class counties). —**
>
> **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 therefor 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**

[3] This was done by Cass County.

public hearing in the manner provided by section 64.231.

(L. 1959 S.B. 309 § 5, A.L. 1994 H.B. 1175)

5. RSMO 64.255 states that the county shall control the **location** and **use** of buildings.

6. **RSMO 64.285 states that zoning regulations are to supersede other laws. It says that whenever the county zoning regulations require a more restrictive use of land or impose higher standards than are required by any other statute, the provisions of the zoning requirements shall govern**. This full section reads as follows:

64.285. Zoning regulations to supersede other laws or restrictions, when (noncharter first class counties). —

Whenever the county zoning regulations made under the authority of sections 64.211 to 64.295 require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require greater percentage of lot to be left unoccupied, or require a lower density of population, or require a more restricted use of land, or impose other higher standards than are required in any other statute, local order or regulation, private deed restrictions or private covenants, the provisions of the regulations made under authority of sections 64.211 to 64.295 shall govern.

(L. 1959 S.B. 309 § 15)

7. In St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo.banc 1962), the Supreme Court had to rule on a dispute between a city and a county, and ruled in favor of the county, declaring that the county had zoning authority over the question of

where a sewage disposal plant would be **located** in the county. The dispute involved a sewage disposal plant. The Supreme Court said:

> We conclude that the zoning ordinances of **St. Louis County** are a lawful restriction upon the **location** of the sewage disposal plant and related facilities which the City of Manchester proposes to construct. (Emphasis added.)

8. In L.C. Development Co. v. Lincoln County, 26 S.W.3d 336 (Mo. App. 2000), the county was operating under a different statute, dealing with landfills, but where the statute did not specify that the county could dictate the **location** of the landfill, the Court inferred that the county had such authority. From a review of the statutes, the Court concluded that the legislature must have intended that the county have the authority to dictate the location of the landfill. Lincoln was a third class county. The Court read into the statute county control over location.

9. While the application of RSMO 64.235 seems clear, and the strength of the zoning laws is set out in RSMO 64.285 (which says zoning laws **supersede** other laws), Aquila has argued recently that under 64.235 it can avoid the county zoning laws by getting a specific siting permit from the PSC. From what Aquila has said, this argument is apparently based on the language in 64.235 that provides an exception from control of the Planning and Zoning Board of a first class noncharter county in certain circumstances.[4] However, that "exception" is **only** available to governmental entities. Aquila recognized this itself in its first brief in the Cass County litigation when Aquila

[4] Cass is a first class noncharter county.

wrote that 64.235 did not apply to it because it only applied to governmental entities. Aquila was only partly right in this December brief filed in the Circuit Court. The first part of 64.235 applies to it. The exception (the second part) only applies to governmental entities.

To understand this, we look at the language in 64.235. The pertinent language says:

> …no improvement … shall be constructed … without first … receiving the written approval … of the board…. 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 therefor to the planning board, **nor shall anything herein interfere with <u>such</u> 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. (All emphasis added.)

The exception to the rule is for a **"development or public improvement"** of a "**municipality, county, public board or commission."** This language refers to governmental entities only. The sentence then goes on, after the comma, to say: "**nor shall anything herein interfere with <u>such</u> 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 . . .** (All emphasis added.) This refers again back to the developments or public improvements of a governmental entity.

That fact that a comma is used instead of a period is important. It shows that there is one thought. If two thoughts were expressed, two sentences, or a semi-colon, would likely be used.

The part of the sentence after the comma applies to "such development or public improvement." This ties back to the first part of the sentence. The first part of this sentence applies to projects of governmental bodies.

PUBLIC IMPORVEMENTS ARE GOVERNMENTAL PROJECTS. The words "public improvement" are words used in our statutes to refer to projects of government. For example, in RSMO 64.050, it says:

> 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 commission may be overruled by the county commission, which shall certify its reason therefore to the planning commission. (Enacted 1941.) (Emphasis added.) (This section applies to first class charter counties.)

The above language was likely the model for the words in 64.235, which was enacted in 1959.

In addition to the two sections above (64.050 and 64.235), the words "public improvement" is used in the following statutes to refer to improvements of government, and not to the improvements of private companies: 64.570, 64.820, 64.665, and 70.220 The point is, the General Assembly has used the words "public improvement" in several sections to mean governmental projects. The General Assembly knew what it was doing when it limited the words "public improvement" to mean a project of a government. The words used in 64.235 by their common usage and by the context indicate that the exception to the general rule is only available for governmental projects. Private entities are not excepted from zoning in first class noncharter counties.

In Missouri, we use the rule of Ejustem Generis, which is the rule that in interpreting a statute, where general words follow a specific enumeration of persons or things, the general words that follow are not given their widest extent, but are to be held as applying only to the class that was specifically mentioned. In 64.235, the exception clause begins by talking only about governmental entities, then after the comma it talks about "**such** developments and public improvements." The rule of Ejustem Generis would say that the words "such developments and public improvements" cannot expand on the enumeration earlier specified in the statute. For a number of reasons, the exception found in the second part of 64.235 does not apply to Aquila, despite what Aquila might say.

10. Aquila in the various briefs filed in litigation over the last few months has found no case that held that a **first class noncharter county** has no zoning authority over a public utility in its efforts to build a **power plant**. The fact is that no case has ever limited the zoning power of a first class noncharter county when it comes to the location of power plants.

11. Aquila wants to have the PSC rule that Aquila can build a power plant anywhere it wants. Aquila wants the PSC to say that it can ignore the county. The PSC cannot rule on the power of the county.

12. The zoning power of the county is a separate matter, totally independent of the laws regarding regulation of utilities. Even if the PSC were to grant a certificate to Aquila to build a power plant, and even if the PSC said it approved of the site chosen by Aquila, this would not in any way effect the authority of the county to stop the power plant from being built due to its zoning laws.

13. To be clear, the proper interpretation of the law is that a first class noncharter county does not have to grant zoning approval to a privately owned utility even if the PSC were to specifically say that the utility could build its plant at that site. Aquila has to satisfy both the county and the PSC, in their respective spheres of authority.

III. THE UTILITY HAS TO SUBMIT TO REGULATION BY BOTH THE PSC AND THE COUNTY.

1. RSMO 393.010 provides that any corporation supplying electricity shall need the consent of municipal authorities[5] "where located" for such things as laying conductors, under such reasonable regulations as such authorities may prescribe. RSMO 229.100 states that no person, company or corporation shall erect poles for the suspension of electric light, or power poles, or lay conductors or conduits for any purpose, through, on, under or across the public roads or highways of the county without first obtaining assent from the county, and no poles shall be erected or such conductors be laid or maintained except under such reasonable rules as may be prescribed by the county engineer, with the approval of the county commission.

2. RSMO 393.170 provides that consent of the appropriate municipal authorities is required for an electric plant to be constructed. The "consent" of the local municipal authorities is usually referred to as the "franchise."

[5] As shall be explained in the cases cited below, the County is the "municipal authority."

3. Cass County is the local governmental entity or municipal authority that has zoning authority in this case, as the land lies in the county, outside of any city.

4. In In the matter of the complaint of Missouri Valley Realty Company v. Cupples Station Light, Heat and Power Company et al., 2 Mo. P.S.C. 1 (1914), the Public Service Commission (hereafter "PSC" or "Commission") stated:

> **Consent of the municipality is always required** as a condition precedent to the granting of permission and approval by this Commission … (Ibid., at page 6)(emphasis added).

5. The case law early on made a distinction between the authority of the PSC and the authority of the city or county. In State ex rel Electric Co. of Missouri v. Atkinson, 204 S.W. 897 (Mo banc 1918), the Supreme Court indicated that the statute empowers the PSC to issue a **certificate** of convenience and necessity to an electric company or to refuse it, **but it does not empower the PSC to adjudicate the question of the validity of the franchise**. That means of course the PSC cannot tell the county what to do.

6. In State ex rel. v. Cupples Station L.H. & P. Co., 283 Mo. 115, 223 S.W. 75 (Mo.banc 1920), the City of St. Louis had promulgated zoning ordinances that designated two different kinds of districts, with one being a district in which electric companies had to place transmission lines underground and the other being a district in which electric companies had to place transmission lines above ground. The electric company did not challenge the authority of the local government to exercise this zoning power, even though the local government was actually telling the electric company whether it had to put its lines underground or overhead in certain areas. The Missouri

Supreme Court seemed to have no problem with the idea that local government had such extensive authority over public utilities.

7. In Realty & Power Co. v. St. Louis, 282 Mo. 180 (1920), the Court was dealing with a dispute between a city and an electric company. The Plaintiff had installed lines on its **own** real estate and also on the real estate of others, about twelve years prior to the litigation. The Plaintiff had never received a permit from the City to install these electric transmission lines. The City demanded removal of the lines from its streets. The Supreme Court stated that the legislature did not grant directly to electric companies the right to use the streets. Instead, the legislature gave the authority to municipalities to regulate these electric companies in this regard. In other words, the Court was saying that the grant was from the legislature to the municipality, and the municipality would then decide what kind of grant to make to the utility. The legislature also gave to the municipalities the **authority to grant or refuse to grant** to utilities the right to use the streets **and the power to impose conditions**. The Court clearly held that the City had the power to refuse permission to the Plaintiff. The Court also stated that this right of the municipality cannot be lost by "acquiescence." The result was, the City could, and did, tell the power company to remove its transmission lines twelve years after they had been installed.

8. In State ex. inf. Shartel v. Missouri Utilities Company, 331 Mo. 337, 53 S.W.2d 394 (Mo. banc 1932), the Supreme Court said:

> Of the nature and scope of the certificate of convenience and necessity referred to in the above section, Judge McQuillin, himself **a distinguished former member of the Public Service**

Commission of Missouri, says in his work on Municipal Corporations (2 Ed.) section 1768, vol. 4. page 703:

"Before action on the application for such a certificate, provision is made for a hearing thereon, and the commission after such hearing may issue the certificate or refuse to issue the same or may grant the application in whole or in part, and usually may attach to the exercise of the rights granted by the certificate, such terms and conditions as in its judgment the public convenience and necessity may require.

"**It is not intended by this requirement to substitute a commission for the local or municipal authorities**, when by the constitution and laws of the particular jurisdiction **the consent of such local authorities is necessary before the grant of a franchise could be complete, because the constitution and laws contemplated that such local or municipal authorities shall have power to impose such reasonable conditions as the convenience and necessity of the locality may require, and with such conditions for the exercise of the franchise a commission has no concern. Therefore, it (the PSC) cannot demand that the local authorities add to or take from the conditions upon which they were willing to consent.** The State, however by its commission, has power to say that no franchise shall be acquired or exercised unless it is necessary or convenient for the public service; and hence by virtue of such statutory grant of authority it may impose upon a corporation or individual before such a franchise can be exercised the obligation of satisfying the commission that the construction of

the proposed plant for public service, or the exercise of the franchise or privilege thereunder is necessary or convenient for the public service. This is the single question presented to such commission. ***

9. In State ex rel. City of Sikeston v. Public Service Commission, 336 Mo. 985, 82 S.W.2d 105 (Mo. 1935), the Supreme Court said:

> Furthermore, this court in the ouster case specifically and definitely held that **municipal consent is still required**, in addition to whatever requirements may be imposed by the commission … In other words, a certificate of the commission is only, where required, an **additional** condition imposed by the State to the exercise of a privilege **which a municipality may give or refuse** …
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> *** The commission held that . . . the grant of such certificate (by the commission) to an electric corporation is only required an (sic) authorized in case of, "First, the beginning of **construction** of an electric plant; second, the commencing to exercise any right or privilege under any franchise . . . (Emphasis added.)

10. In State ex rel. inf. McKittrick v. Ark.-Mo. Power Co., 339 Mo. 15, 93 S.W.2d 887 (Mo.banc 1936), the Supreme Court showed the extent of the power that local government has over electric companies. The Courts ousted the electric company from the City of Campbell, and the Supreme Court upheld this, saying that the utility had six months to vacate.

11. In State ex inf. McKittrick v. Mo. Utilities Co., 339 Mo. 385, 96 S.W.2d 607 (Mo. 1936), the City of California sought to oust the electric utility. A franchise had been given by the City to the utility. That franchise expired in 1929. The utility requested an extension, but the City refused. The utility argued that the PSC had authority over this matter, that the PSC had given it a certificate, that the PSC certificate gave it additional rights, and that under the PSC certificate it could continue to supply power in the City. The Supreme Court rejected these points. The Court said:

> [W]hen the City limits the life of the franchise granted to twenty years, as it must, and that period expires, the privilege of so using the City's public places comes to an end. The continued use is illegal.

In other words, the grant of a franchise by the local municipality does not end the power of the municipality. The municipality continues to have authority.

The Court said that the franchise was a contract between the utility and the State. The Court declared that as originally made, that contract was to expire in twenty years. As the City did not renew it, that contract expired and the utility then had no rights. The Court held that the certificate issued by the PSC did not lengthen the life of the franchise. The City could oust the utility. The Court gave the utility one month to remove its equipment from the City.

12. In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941), the water company failed to show that it had received consent from Jackson County to place its water lines along and across the roads of the particular area in which it sought to operate. Jackson County refused to give its consent. The water company argued that the county was not a "municipal authority" and therefore it did not have to get

the consent of Jackson County. The PSC found that the **County was in fact the "proper municipal authority."** Jackson County could refuse to grant that franchise.

13. In In the matter of Ozark Utilities Company, Mo. P S. C. 635 (1944), the electric utility received a franchise from the city and a certificate from the PSC. The franchise had a term of ten years. When the franchise expired in 1944, it was renewed between the utility and the city. The PSC stated that the statutes did not give the PSC the power to approve or disapprove the municipal franchise, and **did not give the PSC the power "to entertain any issue respecting the municipal franchise**."

The PSC also talked about the municipal franchise in terms of it being a contract between the municipality and the utility. The PSC made it clear that it could not interfere with the relationship between the municipality and the utility. The PSC noted the difference between the authority of the PSC and the authority of the municipality. If the municipality did not renew the franchise, of course the certificate issued by the PSC would not authorize the utility to continue in the municipality, according to the PSC. The PSC said:

>]W]e do hold that, absent a revocation by this Commission, it (the certificate issued by the Commission) is **good so long as the municipality permits the operation** whether by renewal of the basic franchise supporting the certificate, a new franchise, or permissively allowing the operation after the expiration of the franchise. (Ibid. at pages 643 - 641.)(Emphasis added.)

At page 639, the Commission said it would be intolerable for the Commission to be involved in trying to suggest the terms that should be in the franchise between the municipality and the utility.

At page 642, the PSC stated:

> [I]t will be found that all the legal rights and remedies between the utility corporations and the municipalities, in any controversies between them respecting the franchise and its operations, and apart from our own regulatory powers, must generally be pursued in the courts which have jurisdiction.

14. In State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934 (Mo. 1951), Union Electric acquired 375 acres of ground in St. Louis County with plans to build a power plant. The County rezoned the land for this purpose, so Union Electric could build the power plant there. This was challenged by citizens, and the Court upheld the action of the County in zoning the land so it could be used for a power plant.

15. In In the matter of the application of Union Electric Company, 3 Mo.P.S.C. (N. S.) 157 (1951), the PSC indicated that the county court (which is now the county commission) had authority over the public utilities. At page 160 the PSC said that the county court constituted the "proper municipal authority" as that term is used in the statute when we are dealing with operations in an unincorporated area. The PSC spoke of the franchise between the utility and the county as being in the nature of a contract between the two.

The PSC stated that the police power of the proper municipal authority is "transcendent" (in matters regarding the franchise). Ibid. at page 161. Speaking about the police power of the county and the city, and the notion that the utility had a contract right, the Court said:

> While contracts are impervious to impairment by statutes and municipal ordinances, at the same time the police power is **transcendent** over the contract to the extent that the municipality, if it so desires, may provide for the reasonable exercise, in the municipality, of the holder's rights under the pre-existing county franchise or one of its own. (Emphasis added.)

In other words, the PSC said the power of the county is transcendent over the utility.

The PSC said it was not its province to approve or disapprove a franchise issued by the county. The PSC stated that "its conclusions will not impair or in any manner restrict the right of local municipalities under the law to deal fully with the subject of granting or withholding of local franchises to the utility."

In 1959, after the above cases established the authority of the county and the city over utilities, Chapter 64 of the Revised Statutes of Missouri was enacted, codifying the zoning authority of counties. As far as first class noncharter counties are concerned, this legislation certainly did not in any way disagree with the case law that gave authority to the county over the utilities.

16. In State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960), the Court of Appeals dealt with a dispute over the extension of power lines proposed by Missouri Public Service Company. This case did not deal with the building of a power plant. The Court noted the important **distinction** between the running of **power lines**, which an electric utility can do in its certificated area without getting a further permit from the PSC, and the **building of a power plant**, which is something entirely different. The Court said:

We have no concern here with Sub-section 1 "authority". **The 1938 certificate permitted the grantee to serve a territory — not to build a plant. Sub-section 2 "authority" governs our determination**. (Emphasis added.)

Aquila has repeatedly misconstrued the Harline case. Harline dealt only with transmission lines.

17. The last in the line of Missouri Supreme Court cases is In State v. Burton, 379 S.W.2d 593 (Mo. 1964). In this case the Supreme Court said:

> The **necessity and effect of county court consent** to the utilization by a public utility of county roads and highways in an unincorporated area of a county has regularly been recognized by the Commission itself. In Re Southwest Water Co., 25 Mo. P.S.C. 637, 41 P.U.R. (NS) 127, the Missouri Public Service Commission refused a certificate to a water company which sought to operate in Jackson County. Refusal was based upon the failure of the appellant to show that consent of the Jackson County Court to the use of the county roads and highways had been obtained. In answer to the contention that Section **393.170** does not apply in instances where a utility proposed to operate in unincorporated areas of a county, the Commission's report stated:
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> "An examination of the findings of this Commission for many years back will show that the Commission has consistently required a showing that the

applicant has secured the consent of what is considered proper municipal authority before granting authority to own, lease, construct, maintain, and operate any water, gas, electric, or telephone system as a public utility. Consent of the city, town, village, the county court or the State Highway Commission, depending upon whether the line or system was to be placed within the incorporated city, within the unincorporated area of the county, or along a state highway, has always been made a condition precedent to the granting of such certificate by this Commission." In Re Union Electric Co., 3 Mo. P.S.C. (NS) 157, 160, 88 P.U.R.(NS) 33, the Commission recognized that the permission granted by a county court, pursuant to Section **229.100**, RSMo 1959, V.A.M.S., to a public utility to use the county roads is a "county franchise," supplying the consent required by Section **393.170**.

If, as stated in Southwest Water Co., supra, the county "franchise" is a condition precedent to the issuance of a certificate by the Commission for an operation involving use of county roads in unincorporated areas of the county, it must follow that **the authority which the Commission confers must be in accord with the "franchise" which the county grants**. Otherwise, the requirements of Section **393.170**, insofar as municipal consent is concerned, would be practically meaningless. The courts have recognized that the corporate charter and the local franchise provide the fundamental bases for a public utility's operation and that the certificate of the Commission cannot enlarge the authority thereby

conferred. In State ex rel. Harline v. Public Service Comm., Mo.App., **343 S.W.2d 177**, 181(3), the court stated:

> **"The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent**. State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, **53 S.W.2d 394**, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges."
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> Therefore, although the application of Raytown Water Company did request that the Commission grant it authority to lay its water mains generally throughout Jackson County, the **Commission's authority to grant that prayer was necessarily limited by the requirement that the consent of Jackson County be obtained** for the use of the county roads for such purpose. (Emphasis added.)

18. In the 1971 case of State ex rel. Union Electric v. Scott, 470 S.W.2d 1 (Mo. App. 1971), we see that Union Electric applied for zoning from the county.

19. In Union Electric v. Public Service Commission, 770 S.W.2d 283 (Mo. App. W.D. 1989), the county had given a franchise to one electric utility and the city had given a franchise to another electric utility. Later, the city expanded its limits. The court discussed the fact that there was a **difference** between a certificate issued by the PSC for authority to **construct an electrical plant** and a certificate issued by the PSC for a utility to **serve an area**. This is the same distinction made by the Court of Appeals in State ex

rel. Harline v. Public Service Comm., Mo.App., 343 S.W.2d 177, and appears to be consistent with the statements of the Supreme Court in State ex rel. City of Sikeston v. Public Service Comm., 82 S.W.2 105 (Mo 1935), discussed above. The 1989 Union Electric Court discussed the type of "franchises" that had been given, to one utility by the city and to the other utility by the county. The Court commented as to how the utilities had to deal with **both** the PSC and the local government:

> The statutory scheme at Section 393.170.2, RSMO 1986 establishes **two layers of oversight** by providing that the rights and privileges granted by a franchise may not be exercised without first having obtained Commission approval. A Commission certificate becomes an **additional** condition imposed by the State on the exercise of a privilege **which a municipality or county may give or refuse under its delegated police power**. (Emphasis added.)

Aquila contends that a 1980 PSC decision involving Union Electric (24 Mo. P.S.C. 72) stands for the proposition that the utility can construct a plant without any kind of permission from the county and without any regard for what the county says. However, in the various cases involving Union Electric, set out above, Union Electric did get county zoning and did get a county franchise for its operations.

20. In what appears to be the most recent pronouncement from our Legislature related to this topic, in a 1998 enactment, found at RSMO 393.297, the General Assembly stated:

3. **Missouri has historically . . . allowed political subdivisions to require franchises for these services** (electric and gas service) . . . (Emphasis added.)

21. In the regulations of the Public Service Commission, there is a recognition that the consent of the county may be needed in order for a plant to be built, because the regulations state in pertinent part:

4 CSR 240-3.105. Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity

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1. When consent or franchise by a city or **county** is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired; and ...

(Emphasis added.)

(If Aquila were correct in its argument that the local authorities have no power over it, then there would be no need for such language in the regulation.)

22. In our case, Aquila is operating under the same 1938 PSC certificate that was reviewed and interpreted by the Court in State ex rel. Harline v. Public Service Comm., above.

23. Therefore, the certificate that is involved in this case has already been adjudicated. According to the Court in the Harline case, this certificate does **not** permit Aquila to build a **plant**. This is res judicata as to the certificate issued by the PSC.

24. Aquila has cited no case that is on all fours with the present case. That is, Aquila has not pointed to any case in which the electric utility took the position that it did not have to comply with county zoning rules and building requirements of a first class noncharter county and litigated that question in Court with the local government being involved in the litigation. In all cases that we have reviewed in which there was an issue litigated between the electric company and a local government as to the power of the local government, the local government has prevailed in Court.

25. In State v. Bonacker, 906 S.W.2d 896 (Mo.App. 1995), the Court said that the Public Service Commission is purely a creature of statute and its powers are limited to those conferred by statute. The Commission was set up for rate making. Protection of the rights of, the health and safety, and the convenience of it citizens, and land use planning, are within the authority of the county. See RSMO Chapter 64 and the cases cited above. The county and the PSC have different responsibilities. As indicated by the statements of the several Supreme Court cases, and other cases, cited above, we have two layers of oversight; that is, one layer of oversight involving the PSC when it comes to matters within its jurisdiction (i.e., rates), and the other layer of oversight involving the local authorities, which, in this case, concerns the proper use of land, area planning, the location of buildings, and the protection of the health and welfare of its citizens. This dual authority system has been a staple of our state law for ninety years. We must not allow Aquila to cause serious damage this long standing, dual authority system just

because it doesn't want anyone to question its wanting to put a power plant in a residential area.[7]

IV. ESTOPPEL SHOULD RUN AGAINST AQUILA.

1. Aquila has previously applied for zoning permits from Cass County. It applied for a special use permit for this plant when it proposed building it closer to Harrisonville. It also applied for a permit for the substation involved in this very case. It was only after the County Planning and Zoning Board denied the request for the site nearer to Harrisonville that Aquila decided to simply ignore the County. Aquila even applied for the zoning permit for the substation in approximately October 2004, after the aforementioned denial. In November 2004 Aquila then decided to take the stance that it did not need any zoning permits. Aquila decided not to appeal the earlier zoning denial, decided to not pursue a new zoning application for the plant, and decided to drop the application for the substation zoning.

2. The fact that Aquila submitted an application for zoning should act as an estoppel or should be considered as an admission by Aquila. Aquila wants to change the rules of the game during the middle of the game, after getting a denial.

[7] There will be testimony that children with asthma live near the plant site, and adults with asthma live near the plant site. Aquila does not want this to come out. There will be evidence of the health risks involved in putting a power plant in a residential area. In the permit issued by the Missouri Department of Natural Resources, it indicated it had no authority to regulate location and it also indicated it had no authority to regulate such things as noise pollution.

3. Our system cannot allow big corporations to apply for zoning, then after the initial decision does not go well, for the big corporation to then be able to decide that it doesn't need to follow the rules after all. Only a Court can decide that someone doesn't have to follow rules. In the litigation in Cass County, the Court issued a permanent injunction against Aquila, in essence saying that Aquila does have to follow the rules. Now, Aquila is running to the PSC to ask it to intercede, to stop the county from enforcing its rules.

4. If Aquila is not enjoined from building the plant without going first through county zoning, a terrible precedent will be set. That is, Cass County and its citizens would be rendered powerless to stop utilities in the future from building wherever, or whatever, the utilities want to build in Cass County. If Aquila can thumb its nose at the county, keep building despite the injunction,[8] and take the position that it is totally free from the county's rules, then this opens the floodgates for any utility to come out from the Kansas City metropolitan to build their plants in Cass. Cass will end up being the dumping ground for utilities, if the courts and the government agencies do not enforce the laws in this case. Further, no county in the state will be able to have any control over utilities if Aquila prevails in its arguments.

The correct interpretation of the law is that the local authorities (in this case, the county) have a considerable amount of authority over the question of <u>whether</u> a utility can build a power plant and <u>where</u> a utility can build a power plant. An electric utility has to get a franchise from a county before building a power plant in the unincorporated county, and it is limited to the authority granted in that franchise. The county also has

[8] Aquila posted a bond for the appeal.

zoning authority over it, so the county can also control the location of a power plant. The PSC does not have any zoning authority. See Appendix 1 to Aquila's original application, the letter from PSC to Nanette Ham in which the PSC says it does not tell utilities where to not build.

Aquila wants to live in a world where the PSC does not tell it where to build or not build, the county does not tell it where to build or not build, and, in fact, no one can tell it where to build or not build. The scheme of Aquila appears to be to get a ruling that says in effect that no one has authority over the location of its power plants. This would place Aquila above the law.

The PSC cannot go along with this.

IV. SUMMARY OF LEGAL ARGUMENT ON ZONING AND CONTROL OVER PUBLIC UTILITIES.

1. A utility has to have consent of the county to lay conductors or erect poles. RSMO 229.100.

2. A utility has to comply with regulations of the county to maintain conductors. RSMO 229.100.

3. A utility has to have consent of the local government to lay conductors, according to RSMO 393.010.

4.. It would make no sense to say a utility has to have consent of the county for less controversial matters such as laying conductors, erecting poles and maintaining

conductors, but is immune from regulation by the county for the more serious matter of constructing a power plant. Of course we do not have to try to guess at the intent of the legislature, because RSMO 393.170 addresses the question of the building of an **electric power plant**. 393.170 has been interpreted to meant that the utility must have the consent of the county to construct a **power plant**. The legislature covered poles, lines and power plants in these three sections. The legislature intended that the utility is under the control of the county for all of these matters.

5. Under Chapter 64, the county has the authority to exert control over the construction of **buildings.** RSMO 64.170.

6. No improvement shall be constructed without the approval of the county. RSMO 64.235.

7 To top it off, RSMO 64.285 states that if the county zoning requires a more restrictive use of land than required **any other statute**, the county zoning controls. The title to this section says **zoning supersedes other provisions** of the law.

8. Case law indicates that a county may refuse to give consent to a utility.

9. Case law indicates that the authority of the local government over a utility is based (at least in part) on the police power of the local government.

10. Case law indicates that the local government may impose conditions on the utility.

11. The PSC itself used the word "transcendent" when describing the police power of the local government over the utility. In the matter of the application of Union Electric Company, 3 Mo.P.S.C. (N. S.) 157 (1951),

12. The PSC certificate is a separate matter from the county franchise and serves a separate purpose, and the county zoning is a separate matter from each of those. A county franchise permitting the building of a power plant is necessary for a utility to build a plant in that county.

13. Cass County never issued a franchise to Aquila or its predecessor that says anything about building a power plant. The only franchise issued by Cass County to Aquila or its predecessor says it can **install transmission lines**. The Circuit Court in Cass County v. Aquila, on January 6, 2005, said this does **not** authorize Aquila to build a power plant in Cass. The PSC cannot disagree with the Court.

14. A PSC certificate alone does not authorize a company to build a plant. The utility must get full authority from both the local government and the PSC.

15. The Courts recognize a distinction between laying lines and building a power plant. State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960).

16. The authority to put in lines does not equate with the authority to build a power plant. Harline, supra.

17. In fact, in Harline the Court of Appeals stated that the certificate granted to the predecessor of Aquila did not give it the authority to build a power plant.

18. The law is clear. The utility has to get authority from the PSC (in the form of a certificate) and it has to get authority from the county (in the form of a franchise **and** zoning). In the present case, Aquila does not have a franchise that would permit it to build a power plant in unincorporated Cass, and Aquila does not have zoning. In fact, it

has been enjoined by the Court for the lack of both.[9] The PSC should not allow Aquila to turn the PSC against the county. The PSC should not allow Aquila to turn the PSC against the courts. The utility must submit to both the local government and the PSC. It is not appropriate for Aquila to ask the PSC to try to overrule the county or limit the authority of the county or or tell the county what to do.

V. PRAYER

The issues involved in this case are extremely important to the public. This proceeding should not be taken lightly by the courts or the administrative agencies. The damage to the public that would flow from an improper ruling outweighs the shortsighted interests of Aquila's management, which insists on building a power plant in a residential area rather than at a location that would make sense. STOPAQUILA.ORG et al. requests:

1. **SUSPEND PROCEEDINGS OR DISMISS PROCEEDINGS**.

STOPAQUILA.ORG et al. first requests that the PSC suspend these proceedings or dismiss these proceedings, at least until the Court of Appeals has ruled in the two appellate cases, Cass County v. Aquila, and STOPAQUILA.ORG et al. vs. City of Peculiar. The PSC should follow the rulings of the courts. The issues before the Court of Appeals in these two cases will answer important questions, including whether the Trial Court was right in saying the county can enforce its zoning laws against Aquila, whether there is an exception to the power of the county, whether that exception applies to

[9] The Circuit Court in issuing its injunction stated that the utility had to get a franchise that permits it to build a power plant, and Aquila failed to get that, and it has to submit to zoning.

nongovernmental entities, whether the utility has to get approval from both the county (franchise and zoning) and the PSC (certificate), whether the city of Peculiar can issue bonds without a vote of the people, and whether the "agreement" between Aquila and Peculiar is valid when it says that Aquila is exempt from having to pay property tax to Cass County and other taxing authorities.

2. **BRIEFING OF THE ISSUES**. If the PSC does not suspend, then STOPAQUILA.ORG asks that the PSC accept this brief and establish a reasonable briefing schedule for all to submit their positions on whether the county or the PSC controls zoning, and related issues, and that the PSC issue a preliminary ruling that says it will **not** interfere with the authority of the Courts and will **not** interfere with the authority of the county in this matter. The issues are so important that various parties should be given the opportunity to submit briefs to the PSC.

3. **CONSOLIDATION**. If the matter proceeds on Aquila's request to be permitted to build a power plant, this case should be consolidated with EO-2005-0156, which is the case in which Aquila seeks approval of its financing arrangement, which includes the issuance of bonds by the City of Peculiar and the attempt by Aquila to avoid paying property tax.

4. **PUBLIC HEARING.** If the matter proceeds on Aquila's request to seek authority to build a power plant in this particular area, over the objection of members of STOPAQUILA.ORG, then members of STOPAQUILA.ORG must be afforded a public hearing to state their objections to the power plant and present evidence. The hearing should be held in Cass County, Missouri, because there are numerous people (perhaps over 300 people) who would like to be permitted to speak. The members of

STOPAQUILA.ORG prefer that any hearing be held in front of the proper authority, which for siting we believe would be the **county** zoning board. However, if the PSC takes the position that it is the proper body to have such a hearing to determine siting, then we request a hearing before the PSC on our objections to a power plant at this location, and that such hearing be held in Cass County.

Submitted by:

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I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 2nd day of February, 2005, to the Office of General Counsel at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; Paul A. Boudreau at paulb@brydonloaw.com, Mark Comley at comleym@ncrpc.com , Debra Moore at dmoore@casscounty.com
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By_____