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

STOPAQUILA's REPLY TO AQUILA's SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS AND STAFF'S RESPONSE TO MOTION TO DISMISS

In its Suggestions In Opposition To Motion To Dismiss filed by Aquila on March 17, 2006, Aquila misrepresents the Court of Appeals decision in Cass v. Aquila ("the decision") and employs faulty logic.

Aquila again argues that Cass County has given all the authority that it had to give in the 1917 franchise, and that this is all Aquila needs from the County. Of course, the first problem with this contention is that the Trial Court and the Court of Appeals rejected Aquila's claim that the 1917 franchise authorized Aquila to proceed.

To support its argument, in footnote 5 on page 6, Aquila claims that the Court of Appeals in Cass v. Aquila ("the Court") said that Counties do not have the power to grant authority to a utility to build a power plant. Actually, what the Court said was different. It actually said:

> While counties may not have the authority to issue franchises as to the construction of power plants, **there is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant**. (Emphasis added.)(Page 40 of decision.)

Saying the County "may not" have power to issue franchises for "construction" is different from saying it "does not have power over location." Of course Aquila wants to change the word "may" to "shall" and the word "construction" to "location."

By using the word "may," the Court indicating it was not ruling on that point. The Court was only saying that it **might be** that Counties have no authority over "construction." It is clear that the Court did not say that Counties have no authority over "location." One reason for this is because the Court pointed out in the very same sentence that on the important question of "location" there is nothing that precludes the County from having control. That is quite different from the way Aquila spins the decision.

On page 6, Aquila attempts to twist the logic of State ex rel Public Water Supply v. Burton, 379 S.W.2d 593. In footnote 4 on page 6, Aquila argues that the Burton case was distinguishable from the present case because "the franchise at issue in Burton was limited to the use of only specified roads in Jackson County." (For comparison, we note the 1917 Cass County franchise only allowed Aquila to put up overhead transmission lines.) In this same footnote 4 Aquila explained its theory as to how Burton was

supposedly distinguishable, saying that "the Court (in Burton) ultimately held that the Commissioner's certificate improperly expanded upon this local consent..." Let's see if we can understand the "logic" put forth by Aquila. In Burton, the Court held that PSC could not take a franchise (that said the utility could use certain roads) and expand on that in the same category to allow it to use other roads. So the PSC could not even expand on something that was in the same category. However, claims Aquila, the PSC can take a franchise from Cass County that only allows Aquila to put up poles for transmission lines, and expand on that to build a power plant. So the "logic" of Aquila is that the PSC cannot expand a franchise "a little bit," but the PSC can expand on a franchise "a lot."

At page 7, Aquila falsely claims that the Court held that Aquila will not be required to show that it had obtained county consent. Aquila does not quote the language, and we can see why it did not. That is because the Court did not say this. The Court wrote extensively about the role of the county. For example, the Court wrote that:

> "... there is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant." .)(Page 40 of decision.)

The Court also noted that a.) RSMO 64.255 does not include a public-utility exemption (see footnote 8 of the decision) and b.) RSMO 393.170 does not have an exemption for the present situation.[1] We can see that RSMO 393.170 requires that the

[1] The Court wrote on page 37: "The Commission's interpretation does not accord with the plain language of section 393.170.1, which does not contain an exemption for those utilities that are already authorized to operate in a particular service territory and wish to construct an electric.plant."

applicant (Aquila) show that it has received the "consent" of the county before it begins construction of its power plant.

Because Aquila realizes that it has to get consent from the County under 393.170 and any logical interpretation of the decision, it strains to put forth an untenable argument to seek to avoid application of 393.170. At page 9 and throughout its brief, Aquila argues that it is not governed by subsection 2 of RSMO 393.170. Aquila contends that it is governed only by subsections 1 and 3 of that same statute. Aquila falsely claims on page 9 that the Court held that it only had to follow subsections 1 and 3. We have searched in vain but cannot find such a statement in the decision. In our copy, the Court emphasized that the PSC itself has said that the utility must "respect local zoning." We quote from Cass v. Aquila:

> (Quoting from a PSC decision) "In short, we emphasize we should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning." Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973)

The above quote is consistent with the idea that Aquila must follow all of 393.170.[2] It seems clear that the PSC requirement (stated, for example, in Missouri Power) that the utility show that it has complied with local zoning before making its application comes (at least) in part from the requirements set out in 393.170.2 that it demonstrate it has the consent of the local government.

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[2] See footnote 1, supra. The Court indicated the present situation was not exempt from application of 393.170. The Court did not say part of 393.170 was exempted from application.

Absolutely nothing in the Court decision supports the idea that Aquila does not have to comply with subsection 2. The Court did not in any way suggest that Aquila could ignore subsection 2. The idea that a utility can pick and chose which sections of the very same law it will follow is indeed bizarre. Aquila must misquote the Court of Appeals to make this bizarre argument.

The Court indicated that Aquila had to comply with subpart 3 of 393.170. Why would Aquila not have to comply with other subparts of 393.170?

It is true that cases have said that the requirement to get a certificate for construction of a power plant emanates from 393.170.1. However, no case has ever said 393.170.2 does not apply in the construction of a power plant. The three subparts of 393.170 were enacted together and must be read together. Subpart 1 says a certificate is needed to construct a plant. Subpart 2 says the consent of the local government must be shown by the applicant in order to get a certificate. Subsection 3 says a hearing must be held.

Aquila claims that the Court directed that it could merely apply to the PSC and the PSC could give it the approval it needs. Aquila contends that it can completely ignore the County. Actually, the Court of Appeals simply said that it "did not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant . . . to continue to operate, albeit with whatever conditions are deemed appropriate.. ." This was not a directive. This was merely a statement that indicates the Court of Appeals was not ruling on matters not necessary to its decision. The Court did not suggest in any way that the County is powerless. To the

contrary, the Court apparently was suggesting that maybe all parties, including the PSC and the County, were not precluded from conferring and trying to find a solution. Such a notion simply cannot be consistent with the idea that the County is to be ignored.

In fact, the Court indicates how the County should have power over location. Consider the following quote from the decision:

> See generally St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact location and that **public interest is best served in requiring it be done in accordance with county zoning laws**). (Emphasis added.) (Decision page 30.)

In Manchester, the city was a position similar to that occupied by Aquila. If we substitute "Aquila" for "City" in the above quote, the Court is telling us:

> [The] statute on which [Aquila] relied regarding construction of [the power] plant did not give [Aquila] right to select its exact location and that public interest is best served in requiring it be done in accordance with county zoning laws.

In this and other statements, the Court certainly was saying that at least public policy is in favor of the County having the right to determine the **location**. Compare this to the Court's declaration in which it said unequivocally that the PSC had no power over zoning. (Decision page 30.)

The decision laid out certain principles for us. Aquila wants us to misread the decision.

The Response filed by the Staff speaks as if Aquila already has an exemption that would completely relieve it from having to comply with any County control. However, the Court did not say this. The Court did talk about the potential for Aquila having an exemption under 64.235. It should be abundantly clear that Aquila has not to date taken the steps necessary to procure any such exemption, because a.) the Courts said Aquila did not do what it needed to do, and b.) the Courts upheld an injunction that ordered the plant removed for lack of compliance with the law. The Court did say that Aquila qualifies for an exemption, but obviously the Court must have meant this in the sense that it could have qualified but it has not done what was necessary. To correctly relate what the Court held, we should refer to this as a potential to qualify for an exemption.[3]

Staff argues that Aquila already has an exemption (which is wrong) so it would be ridiculous to require it to comply with any requirements of the County or to get consent of the County. The correct interpretation of 64.235 is this: When this statute was enacted, the Legislature understood that in order to place utilities, the utility company had to first demonstrate to the PSC that it had the consent of the local government. Since this requirement of getting consent from the County was already in place, there was no need for the County Planning Board to intervene. The matter presumably was already passed on by the County Commission. This logic was that it would be redundant to pass on it

[3] Of course, StopAquila argues that the exemption cannot be given retroactively and also the exemption is limited to application to the County Planning Board.

again. This logic is of course is subverted by Aquila in the present case, where it seeks to evade the law.

II. WHAT AQUILA DID NOT ADDRESS.

It is important to note that Aquila did not dispute many of the assertions contained in the motion to dismiss, including but not limited to the following important points:

1. While it is true that the Commission has extensive regulatory powers over public utilities, the legislature has given it **no zoning authority...** (The Court of Appeals said this. This is not disputed in any way by Aquila.) (Decision page 30.)

2. (The PSC has said) ...we emphasize we should take cognizance of--and respect--the present municipal zoning and **not attempt**, under the guise of public convenience and necessity, **to ignore or change that zoning**."). Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973)) (The Court of Appeals said this. This is not disputed by Aquila.) (Decision page 30.)

3. It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, a municipality may regulate the **location** of public utility

installations . (The Court of Appeals said this. This is not disputed by Aquila.) (Decision page 30.)

4. The Commission's interpretation does not accord with the *plain language* of section 393.170.1, **which does not contain an exemption** for those utilities that are already authorized to operate in a particular service territory and wish to construct an electric plant. (The Court of Appeals said this. This is not disputed by Aquila.) (Decision page 37.)

5. **[B]ecause facility location has particularly local implications, it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant.** (The Court of Appeals said this. This is not disputed by Aquila). (Decision page 30.)

6. The non-charter first class county statutory provision that parallels 64.090 and 64.620 in placing limitations on **county commission zoning authority is section 64.255, and it does not include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions.** (The Court of Appeals said this in footnote 8. This is not disputed by Aquila).

7. By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, **including county zoning**, can be considered in public **hearings** before the first spadeful of soil is disturbed. (The Court of Appeals said this. This is not disputed by Aquila.) (Decision page 37.)[4]

8. **[T]here is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant.** (The Court of Appeals said this. This is not disputed by Aquila.) (Decision page 40.)[5]

9. The overriding public policy from the county's perspective is that it should have some authority over the **placement** of these facilities... As the circuit court stated so eloquently, "to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone... (The Court of Appeals said this. This is not disputed by Aquila). (Decision pages 40-41.)[6]

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[4] Obviously, since the Court said the PSC has no zoning authority, the Court must have meant that the proper zoning authority would have hearings on zoning issues. (The Court also noted that 64.255 relates to the County Commission and it does not contain an exemption that would apply to Aquila.) It is illogical to say the PSC has no zoning authority, but that the PSC will have nonetheless have zoning hearings.

[5] Note again that the Court said that an applicable zoning statute, 64.255 , provides no exemption for Aquila from the power of the County Commission (as opposed to the Planning Board). See footnote 8 to the decision in Cass v. Aquila.

[6] By first stating that the County wanted control over location, and then immediately quoting with approval the statement by the Trial Court that "to rule otherwise" would be problematic, the Court must have meant that it was correct to give authority to the County over the matter of location.

10. The Court pointed out that RSMO 64.235 related to the ***Planning Board***. Then the Court in footnote 8 stated that there is no public utility exemption in 64.255, which relates to the ***County Commission***. The Court considered 64.235 to be a section that describes the relationship between the Planning Board and others. (StopAquila.org stated this in its motion, using language of the decision. This is analysis was not disputed in any way by Aquila).

While any person who reads the Court of Appeals decision will conclude that the Court of Appeals said that the County must have at least some significant role, with its interest being strongest on the matter of location, Aquila attempts to misrepresent the language of the decision, use selective quotes, and use faulty logic to make the argument that the County must have absolutely no role. Aquila's contention that the County has no role is untenable.

The Court spoke of harmonizing the role of the County and the PSC. The logic is clear: ratemaking matters are for the PSC, location should be for the County. The Court noted with approval a prior decision of the PSC that said it must respect the local zoning. Aquila is wrong in trying to convince the PSC that the Court did not say these things. Aquila is wrong in trying to convince the PSC that it only has to comply with subsections 1 and 3 of 393.170 and that it can choose to not comply with subsection 2 of that same statute.

III. SUMMARY

What does it all mean? Let's recap:

1. The Court said 64.235 deals with the Planning Board.
2. The Court said that 64.255 refers to the County Commission, and there is no exemption for utilities in 64.255.
3. The Court said 393.170 does not contain an exemption for this situation.
4. The Court said the PSC does not have zoning power.
5. The Court said before the first spadeful of dirt is disturbed there must be "hearings."
6. The Court said there is nothing in the statute that precludes a county from exercising zoning authority over location.
7. The Court approvingly referred to cases that said that public policy is in favor of counties having control over location.
8. The Court said facility location has particularly local implications.
9. The Court said it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant.
10. The Court said the PSC itself has said it must respect local zoning and not attempt to change it.
11. The Court quoted the entirety of 393.170 (which requires the applicant first get County consent).

12. The Court concluded by affirming the judgment that enjoined Aquila from violating County ordinances.

The only logical conclusion that can be reached is that under 393.170, 64.255, 64.285, and the case law, Aquila must get the consent of the County before it seeks permission from the PSC to build its power plant, and this must be done before it begins construction.

An oral argument is critically needed to discuss these important issues with the PSC.

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