

**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

PRE-HEARING BRIEF OF STOPAQUILA.ORG

Comes now STOPAQUILA.ORG, by and through counsel, and pursuant to the Commission's order presents the following as its pre-hearing brief:

**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.

STOPAQUILA: Under the statutes (RSMO393.170) and PSC case law (Missouri Power & Light Company, 1973 WL 29307, (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116), Aquila must first get consent from the local government that has jurisdiction, which in this case is the county. The Court of Appeals in the present case (Cass County v. Aquila) stated that there is no exemption for Aquila from application of 393.170. The Court also stated that the utility must apply for the permit from the PSC before the first spade full of dirt is disturbed, or at least

contemporaneous with the beginning of building of the plant. Obviously, Aquila's application is too late. An application cannot be retroactive. The statute (393.170) has never been interpreted to allow a utility to build a power plant in an area for which there was no local consent or local zoning, so if the PSC allows the relief Aquila requests, it will be setting a new precedent, and the decision will be overturned on appeal.

Aquila often cites In the matter of the application of Union Electric, 1980 WL 121971, 24 MO PSE (NS) 72. Aquila fails to note that in that decision the PSC noted that Union Electric had complied with state and local requirements regarding emissions and noise regarding the property, which was next to the prior plant. The PSC did not mention zoning, but when we trace back in the prior decisions of the courts and the PSC that involved Union Electric facilities in the St. Louis area, we see that Union Electric had already received zoning approval from the County. In the prior case of 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. 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. 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.

Therefore, when Union Electric presented an application to the PSC in the above case in 1980, it was in compliance with the rule that was stated in Missouri Power & Light that the applicant first demonstrate compliance with local zoning. No attorneys in this case have found any cases where the PSC announced that the applicant could actually build a power plant in an unincorporated area in a county when the applicant had not already received the consent of the county or had proper zoning in place.

The injunction contemplates that Aquila comply with county ordinances. (At page 4 of the injunction, the Court found that Aquila's proposed actions violate "County Ordinances.") The law indicates that Aquila is subject to the authority of the County (see in particular, RSMO 64.255, 64.285, 393.170 and Missouri Power & Light Company, 1973 WL 29307, (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116).

Additionally, the project is illegal as far as the City of Peculiar's involvement is concerned under RSMO 88.770, RSMO 77.530 and Missouri Constitution Article 6 Section 27. The two statutory sections require a public vote in order for the City of Peculiar to be involved in this project. The constitutional provision requires a public vote for financing via bonds. The financing is illegal under Article 6, Section 27. The City's involvement in the project is illegal under RSMO 88.770 and RSMO 77.530. The PSC cannot approve a project that is illegal.

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.

- (1) Is there a need for the additional capacity proposed.

STOPAQUILA: No, there is no need for expensive peaking power.

Aquila already had adequate peaking power. For quite some time, Aquila has needed a base load facility and/or an intermediate facility. The acquisition of more gas fired peaking facilities will mean increased costs for consumers (in addition to other concerns). Prefiled testimony of Blaha, Boehm, Aquila employees, Wood, PSC Staff, Stanley, public testimony.

- (2) Are there alternatives to meet the need other than erection of a peaking facility.

STOPAQUILA: Yes, there are other and better alternatives. Gas is expensive. The cost per kw of operating a peaking plant is going to mean increased costs for consumers. In its financial state and with the state of the law, Aquila will pass on the increased costs of running the gas fired facility to its customers. The operation of gas fired turbines is the most expensive way per hour of operation to produce electricity. Aquila needs to acquire more base load and/or intermediate load. The area is not zoned for a power plant and Aquila did not have consent of the county. Aquila

should either purchase a facility or enter into a contract to acquire energy through a mix of base, intermediate and peaking that provides the lowest cost to consumers and respects the rights of people near the plant. Aquila should severely limit the use of gas peaking facilities. One option that was explored and must be explored further is the option to purchase the Aries plant. There are other options as well. Prefiled testimony of Blaha, Boehm, Aquila employees, Wood, PSC Staff, Stanley, January, Noonan, public testimony.

- (3) Will the plant as proposed have reasonable and economical access to fuel, water and transmission facilities.

STOPAQUILA: The cost of gas is very high. The high cost of gas makes the gas turbines the most expensive way per hour for Aquila to produce power for consumers. As for whether there were adequate supplies, we note that Aquila built a gas line to the South Harper site. Prefiled testimony of Blaha, Boehm, Aquila employees, Wood, PSC Staff, Stanley, public testimony.

- (4) What will be the impact on the neighboring community.

STOPAQUILA:

NOISE. The combustion turbines are loud. The tests done by Aquila show that the noise exceeded county noise ordinance levels. Neighbors report the noise is loud and disturbing. Many neighbors have complained.

The noise is harmful. Prefiled testimony of Wood, Stanley, January, Noonan, Mantle, Bender, public testimony.

POLLUTION: When running the three combustion turbines at the South Harper Plant produce pollutants at the rate of about 500 pounds of pollutants per hour. The pollutants include some substances that are said by scientific studies and by the EPA to result in health risks at any level. The pollutants produced include NOx, ozone, particulate matter 10, particulate matter 2.5, benzene and others. The pollutant level that is authorized is appropriate for an industrial area, but is not appropriate for a residential area. Prefiled testimony of EPA (Federal Register), Clean Air Task Force, Stanley, Rogers, January, Noonan, public testimony.

A. PROPERTY VALUES. The plant, substation, poles, high line wires, pollution, safety concerns and the emasculation of the county's zoning diminish the property values of the existing homes nearby, will diminish the property values of future homes and put a chill on future plans for the area. Bad zoning or lack of zoning enforcement will have a terrible effect. Prefiled testimony of January, Noonan, Stanley, Fisher, Wood, Mallory, Peshoff, public testimony, exhibit of Answer of Aquila to Data Request 27.

- B. AESTHETICS. In addition to the above, the plant is out of character for the area and is unsightly. Prefiled testimony of January, Noonan, Stanley, Peshoff, public testimony, exhibit of Answer of Aquila to Data Request 27.
- C. TRAFFIC. The plant brings in heavy traffic, including large trucks. Prefiled testimony of January, Noonan, Stanley, public testimony, exhibit of Answer of Aquila to Data Request 27.
- D. SAFETY. The transmission lines and the plant are safety hazards. The additional gas lines put in for Aquila are a hazard. Prefiled testimony of January, Noonan, Stanley, Rogers, Peshoff, public testimony.
- E. ZONING. The area was zoned agricultural and most of the nearby homes are in an area zoned for residential. The area has been evolving into a residential area. If Aquila is permitted to disregard zoning, this will be terrible for people and property values in Cass County and throughout the state. A ruling that allows Aquila to stay will eviscerate zoning enforcement throughout the state. Prefiled testimony of Peshoff, Mallory, Cass

County employees, White, January, Noonan, Stanley, Fisher, public testimony, exhibit of Answer of Aquila to Data Request 27.

F. DEVELOPMENT OF THE AREA. The area had been developing into a residential area. Placement of a power plant in this area is harmful to good development. The plant should be placed in an area that is set aside for power plants. Cass County already had an area where a power plant was placed, and good planning would lead one to build a peaking plant in that same area. (The PSC requires that the applicant demonstrate that it has complied with local zoning. See Missouri Power & Light Company, 1973 WL 29307, (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116.) Prefiled testimony of Peshoff, White, Mallory, January, Noonan, Stanley, Dunn, Fisher, public testimony, exhibit of Answer of Aquila to Data Request 27.

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

A. STOPAQUILA: Clearly, no. Under 64.255, 64.285, the Court of Appeals decision (Cass v. Aquila) and prior case law (see Missouri Power & Light Company, 1973 WL 29307, (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116), in building a plant, Aquila must comply with the ordinances and regulations of the County, including zoning ordinances, noise ordinances, and other ordinances. Prefiled testimony of Peshoff, White, Mallory, January, Noonan, Stanley, Dunn, Fisher, Hedrick, public testimony.

B. Additionally, we note that at various times Aquila has agreed to comply with zoning or has submitted to zoning or has at least stated that it would submit to zoning. Aquila has at various times stated that it would comply with county ordinances. (Then, as we now know, it did not.) Under the law, it must comply with zoning, get consent from the county and get permission from the PSC before it begins construction, and of course continue to comply with county ordinances thereafter. Prefiled testimony of Peshoff, White, Hedrick, Aquila employees, Mallory, Fisher, January, Noonan, Stanley, Dunn, public testimony.

(6) Is Aquila qualified financially and technically to construct and operate the plant and substation as proposed.

A. STOPAQUILA: We have concerns about the financial ability of Aquila. Aquila defaulted on the last power plant it built (Aries). Bad decisions have been made at every opportunity. Bad management raises concerns about the financial and technical abilities of the company. Prefiled testimony of Blaha, Boehm, Aquila employees, January, Noonan, Stanley, Fisher, Dunn, public testimony.

(7) Is construction of the plant and substation in the public interest.

STOPAQUILA: No. See STOPAQUILA's comments to points 1 – 6, above, and all the comments below. The public interest is served by Aquila having more base load and more intermediate load, having less gas fired peaking plant electricity generation, having the generation facilities in an area that is zoned for power plants, in an area that is good for the community, in an area that does not impinge upon residences, in an area that is not a nuisance to others, in an area where it is not a safety concern, with everything being approved before it begins construction. Same cites as above.

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.

STOPAQUILA: See comments under I A, above.

B. See issue B above.

STOPAQUILA: See comments under I A, 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.

STOPAQUILA: No. The Court of Appeals stated that the PSC has no zoning authority. Period. No statutes give zoning authority to the PSC. Even if the PSC did have some zoning authority, Aquila has at various times submitted to zoning and has at various times stated that it would comply with county ordinances (then it did not).

Under the statutes (RSMO 393.170) and PSC case law (Missouri Power & Light Company, 1973 WL 29307, (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116), Aquila must first get consent from the local government that has jurisdiction, which in this case is the county. It did not.

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

STOPAQUILA: No factual situation warrants the PSC ignoring local zoning or local ordinances in relation to building a power plant. In any event, under any interpretation of the law, the present case does not present a situation that would warrant the PSC disregarding zoning authorities and local government authority. The Court of Appeals stated that there is no exemption for Aquila from RSMO 64.255, which sets out the authority of the *County Commission*. RSMO 64.285 also has no exemption for Aquila. RSMO 393.170 also has no exemption to the requirement that local consent be gained in order to apply to the PSC for a permit to build a plant.

- (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.

STOPAQUILA: See comment to (1). If there were a possible interpretation of the law that would permit the PSC to disregard local authority, the burden would have to be on Aquila and it would have to be a very heavy burden to justify trampling the rights of the citizens. Prefiled testimony of Peshoff, Mallory, Cass County employees, public testimony.

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.

STOPAQUILA: The PSC has no zoning power. See Court of Appeals decision in Cass v. Aquila.

- (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.

STOPAQUILA: No, the plant is not in an area properly zoned, and it is near residences (which are in areas zoned for residential). See comments above, which are incorporated by reference. Prefiled testimony of Mallory, Peshoff, Cass County employees, Noonan, public testimony.

- (2) Independent of considerations of need for the proposed plant and substation, are the proposed sites consistent with the Cass County Master Plan.

STOPAQUILA: No, it is not consistent with the Master Plan. Prefiled testimony of Mallory, Peshoff, Cass County employees, public testimony.

- (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;

STOPAQUILA: No, it will not qualify for a special use permit. It is incompatible with the area. Without waiving any other arguments on this point, we suggest that there is in existence an area that is proper for power generation facilities, and Aquila could have built there or acquired assets

there (i.e., the location of the Aries plant). There are also other areas that are more appropriate. Prefiled testimony of Mallory, Peshoff, other Cass County witnesses, Noonan, Stanley, Blaha, Boehm, public testimony, exhibit of Answer of Aquila to Data Request 27.

- (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.

STOPAQUILA: The power plant should not be permitted to remain in any event because the plant is inconsistent with the area and allowing the plant to remain will have a deleterious impact on the people who live nearby, and on the general public. The public will suffer unless power generation facilities are placed in an area that is proper for power generation facilities and the applicant follow the law. Prefiled testimony of Mallory, Peshoff, other Cass County witnesses, Noonan, Stanley, January, Blaha, Boehm, Fisher, public testimony, exhibit of Answer of Aquila to Data Request 27.

- (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.

STOPAQUILA: The power plant should not be permitted to remain in any event because the plant is inconsistent with the area and allowing the

plant to remain will have a deleterious impact. If utilities are allowed to build and later seek retroactive approval, and/or if utilities are permitted to seek approval from the PSC without seeking approval from local authorities, the adverse effect will be felt throughout the state, in addition to being felt in Cass County. Prefiled testimony of Mallory, Peshoff, other Cass County witnesses, Noonan, Stanley, January, Blaha, Boehm, Fisher, public testimony, exhibit of Answer of Aquila to Data Request 27.

- (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.

STOPAQUILA: While STOPAQUILA does not wish to concede any of its arguments, as it wants the plant to be moved, but we suggest that if conditions are considered, the conditions must be so substantive as to deter Aquila and any other utility from taking this course in the future, and also the conditions must address and fully satisfy concerns regarding decreased property values, noise, aesthetics, nuisance, pollution,¹ safety, road damage and traffic. Prefiled testimony of Mallory, Peshoff, other Cass County witnesses, Noonan, Stanley, January, Cass County employees,

¹ Some of the more serious health concerns may not be known for many years. For example, with about 500 pounds of pollutants being emitted every hour when the three turbines are running, being disbursed by 70 foot stacks, children who live in the area may develop illnesses immediately or after many years of exposure. Any solution would need to consider that some of the effects may not be fully known for many years. Prefiled testimony of Clean Air Task Force, EPA Federal Register, Stanley, public testimony.

Boehm, Fisher, public testimony, exhibit of Answer of Aquila to Data Request 27..

(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.

STOPAQUILA: No. An applicant simply cannot be allowed to build a facility and then seek retroactive approval. This makes a total mockery of the law and the ability of a government or its citizens to enforce the law. It is absurd that we are even engaged in a proceeding where an applicant asks for retroactive approval! Same cites, above.

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.

STOPAQUILA: Yes. If the PSC somehow allows the plant to remain, this sets a terrible precedent in public utility law, land use law and matters involving health and welfare. "A retroactive approval of a power plant in an area not zoned for its, without prior consent, near a residential area, with disbursal of pollutants and

other adverse effects for the people who had previously built their homes nearby before Aquila intruded by building its plant?" Such a ruling would:

- 1.) allow utilities to build anywhere they desire,
- 2.) allow utilities to build first and seek approval later,
- 3.) allow utilities to totally ignore the local government,
- 4.) allow utilities to build in or next to a residential area or a hospital or a grade school without concern for the people who live there, and
- 5.) allow utilities to build facilities that might be good for the utility but not good for the consumer. Same cites as above.

CONCLUSION: Clearly, there is only one ruling that is possible. The PSC must deny the application.

Submitted by:

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I hereby certify that a true and correct copy of the above and foregoing document was delivered by electronic mail or mailed, on this 21st day of April, 2006, to the following:

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