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

INTERVENOR STOPAQUILA.ORG'S[1] MOTION TO DISMISS
OR DENY APPLICATION OF AQUILA
AND BRIEF IN SUPPORT

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[1] The current membership of StopAquila.org is 185 adult members, of which 109 adult members live within two miles of the South Harper site. 198 people live in those households.

I. INTRODUCTION

This application of Aquila must be dismissed for failure of Aquila to show that it has received the **consent** of Cass County. Stated differently, the application must be denied. RSMO 393.170 is the controlling statute. It states:

1. **No ... corporation ...shall begin construction ... of a ...electric plant** ...**without first** having obtained ...permission and approval of the commission.
2. *** **Before** such certificate shall be issued a certified copy of the charter of such corporation shall be filed ... together with a verified statement ... showing that (applicant) has received the **required consent** of the proper municipal authorities. (Emphasis added.)
3. The commission shall have the power to grant the permission and approval **herein specified** . . . after due hearing . . .

Subparts 1, 2 and 3 of 393.170 are all related. These subsections all deal with the procedure to follow when seeking approval from the PSC to build a power plant.

Perhaps the most important question in the present case is, what is "**consent.**" Is consent different from zoning? Is consent more expansive than "zoning"? Fortunately, we have numerous court cases and PSC decisions and the most recent decision in Cass County v. Aquila (also referred to as "Stopaquila.org v. Aquila").

As the discussion below shows, under Missouri law the county has extensive powers over the utility, with this authority based on at least three different things: a.) the "franchise" that the local government gives, b.) zoning, and c.) the consent requirement of 393.170. Some aspects of "zoning," "franchise," and "consent" may be different in that they are derived from different statutes and/or different cases.

The discussion of the cases, below, will show that the PSC cannot grant Aquila what it wants unless Aquila gets the consent of Cass County.

II. UNDER STATE STATUTES AND CASE LAW, THE COUNTY HAS AUTHORITY OVER AQUILA

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[1] 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.

[1] Cass adopted a master plan prior to the time Aquila acquired the real estate in question.

4. RSMO 64.255 states that the county shall control the **location** and use of buildings. There are no exceptions to 64.255. Section 64.255 states:

> For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the **county commission** in all counties of the first class not having a charter form of government and not operating a planning or zoning program under the provisions of § 64.800 to 64.905, is hereby empowered to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the **location and use of buildings**, signs, structures and land for trade, industry, residence, parks or other purposes, including areas for agriculture, forestry and recreation. (Emphasis added.) ***

5. 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.
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> (L. 1959 S.B. 309 § 15)

There are no exceptions stated in 64.285. This statute expresses a general intent of the Legislature that the County Commission's power given to it by 64.255 to regulate the use of land supersedes any other statute which would interfere with such power.

6. In Cass County v. Aquila (the case has also been referred to as "Stopaquila.org"), 180 S.W.3d 24 (W.D. 2005), the Court of Appeals stated that the legislature gave no zoning power to the PSC.

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.)

The fact that the Supreme Court gave the county zoning power over the city in a project proposed by the city to be located in the county gives us considerable guidance for our case, where a private company seeks to build a power plant in the county.

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. Again, the courts appeared to give considerable power to the county to govern the location of projects.

9. There is other authority for the county which will be discussed in Section III, below.

III. THE UTILITY HAS TO SUBMIT TO REGULATION BY BOTH THE PSC AND THE COUNTY AND THE PSC HAS NO POWER TO INTERFERE WITH COUNTY REQUIREMENTS.

A. THE DUAL AUTHORITY SYSTEM HAS BEEN ESTABLISHED IN MISSOURI FOR MANY YEARS.

1. RSMO 393.010 provides that any corporation supplying electricity shall need the consent of municipal authorities[2] "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. Obviously, if the Legislature believed the county should control the erection of poles and the placement of conductors, it must have believed the county should have control over more important matters, including the location of power plants.

2. Of course the legislature declared that the county has authority over power plants. RSMO 393.170 states that consent of the appropriate municipal authorities is required for an electric plant to be constructed.

3. Cass County is the local governmental entity or municipal authority that has 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 stated:

Consent of the municipality is **always required** as a condition

[2] As shall be explained in the cases cited below, the County is the "municipal authority." See, for example, In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941).

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.[3]

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

[3] In many of the cases discussed in this brief, the Courts referred to a "franchise," but the cases could have just as easily used the word "consent."

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 local government 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. If the Supreme Court says you can't even install transmission lines without municipal consent, how can you build a power plant without municipal consent?

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:
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> > "**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. *** (Emphasis added.)

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 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."** 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 local government 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**." [4]

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 analysis of the case is instructive. First, the Court noted that the opponents contended that the building of a transmission line was the same as the building of a plant. The Court held that there was a difference between the installation of lines and the building of a plant. This case only dealt with the installation of transmission lines. Therefore, the Court did not have to address the question of what would be required in the case of the building of a power plant.

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

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[4] This is also crucial, as it means the PSC cannot interfere with the right of Cass to deal fully with Aquila.

The necessity and effect of **county** court consent[5] 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:

> "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**

[5] The county court is now known as the county commission.

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."

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. 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.)

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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> ***
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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.)

22. Therefore, the requirement that the utility get both consent from the county and from the PSC is expressed in the statutes, the case law, the PSC decisions, and the regulations of the PSC.

23. Whether the above cases spoke of a "privilege," "consent," a "franchise," "zoning" or "land use controls," we see that the Courts have always given authority to the local government to have control over the utility on matters as important as the location of a power plant. Part of that comes from 393.170. Part of that comes from the land use statutes. Part of that comes from interpretations made by judges, filling in gaps.

B. THE PSC CANNOT EXPAND ON THE CONSENT OR FRANCHISE GIVEN BY THE LOCAL GOVERNMENT.

1. The "franchise" or "consent" or "permit" given by the local government is further mentioned in RSMO 393.190. That section says that the PSC cannot enlarge on the rights given in the franchise or the permit.

> 393.190. Transfer of franchise or property to be approved, procedure — impact of transfer on local tax revenues, information on to be furnished, to whom, procedure. —
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> 1. No gas corporation, electric corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system ... without having first secured from the commission an order authorizing it so to do. *** The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or

the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. (Emphasis added.)

2. In State v. Burton, 379 S.W.2d 593 (Mo. 1964) the Court said: ... the authority which the Commission confers must be in accord with the "franchise" which the **county** grants. *** ...the certificate of the Commission cannot enlarge the authority thereby conferred. *** 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 *** (Emphasis added.)

As the above statute and decision indicate, the PSC simply cannot enlarge upon what the county has granted. The certificate granted by the PSC simply cannot grant new powers.

There is no consent or permit or franchise or zoning approval of any kind ever given by the county that would allow Aquila to build this power plant or these substations. A grant of authority to put up poles and string lines is not a grant of authority to build a power plant. More to the point, it is not a grant of authority to the utility to build anything anywhere it wants.

III. AQUILA MUST HAVE CONSENT FROM THE LOCAL GOVERNMENT BEFORE IT BEGINS BUILDING ITS POWER PLANT.

1. In Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116, the applicant sought to put in a peaking plant. The PSC said:

> The applicant has satisfied all requirements of State and local agencies concerning the construction and operation of the plant. *** We should also state that parenthetically at this point that we are of the opinion that the citizens, through **proper zoning ordinances**, have **already designated** the area in question as an industrial area. *** For us to require the Applicant to move the proposed site to the alternative site suggested by the intervenors would be to suggest a location that is not now zoned for industry but is zoned residential. 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.
>
> ***
>
> We also find that the Applicant has met our Public Service Commission requirement that it has complied with municipal requirements **before** construction of the facility. (Emphasis added.)

2. 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, 6 (1914), the PSC stated:

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

3. A "condition precedent" is a condition that has to be satisfied before the next step is to begin. Saying that the consent of the local government is a condition precedent is the same as saying, as the PSC did in Missouri Power & Light, above, that the utility must comply with local requirements **before** it begins construction.

4. This interpretation is entirely consistent with the language of RSMO 393.170, which sets out the following for an electric plant to be constructed:

> **No ... corporation ...shall begin construction ... of a ...electric plant ...without first having obtained ...permission and approval of the commission.**
>
> ***** Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed ... showing that (applicant) has received the required consent of the proper municipal authorities.** (Emphasis added.)

5. The above statute indicates that first a utility company must have local "consent," and next it has to get the certificate from the PSC, and both these things have to occur **before** it commences to construct an electric plant. As the case law cited above and RSMO 393.190 indicate, the PSC ensures the existence of the consent from the local government, and issues a certificate based on that consent, but the PSC cannot enlarge on the authority given by the local government or ignore the decisions of the local government.

6. The PSC does not have jurisdiction to act when the applicant has already built its plant.

7. The decision in Cass v. Aquila proceeds on an assumption that the PSC will comply with its own decision (Missouri Power, above) and the statute (393.170). The above language from Missouri Power is quoted by the Court in Cass v. Aquila. This language is a building block on which the Court bases its decision. The Court of Appeals' reasoning was that, since the PSC requires that the applicant show that it has the zoning approval to build the power plant, the authority of the county and the authority of the PSC will be harmonized, consistent with the language of 393.170. The Court of Appeals believed that the PSC interpreted 393.170 the same way that it does, which is that the attainment of the consent of the county must first be demonstrated by the applicant to the PSC. If the Court of Appeals did not view the law this way, then the comments by the Court of Appeals would make no sense.

IV. IT IS IMPORTANT THAT THIS CASE NOT SET A PRECEDENT THAT A UTILITY IN MISSOURI CAN BE SAVED FROM ITS IMPROPER CONDUCT BY A LATE FILING WITH THE PSC.

1. It is important that the Courts and the PSC make the proper decision for precedent. Aquila knew when it began building its power plant that it did not have the

needed consent and did not comply with zoning;[6] in fact, Aquila declared that it did not need zoning and that its 1917 franchise granted it all the consent it needed.[7] Judge Dandurand has in fact ruled that the 1917 franchise did not provide the needed authority, and the Court of Appeals affirmed this decision.

2. Aquila would therefore violate the PSC policy that it demonstrate that it complied with all local requirements before it begins building. This is not some kind of flexible policy that can be cast aside. This requirement comes from the statutes, the regulations and the decisions. The PSC should not violate the law simply to save Aquila from its own bad conduct.

3. Aquila's gambit was as follows: if it finishes building a power plant, Aquila thinks no one will make it dismantle it. Will the PSC approve Aquila's improper acts? Will the PSC approve this post facto? Will the PSC break the rule (based on the statute) that states that the utility must comply with the local authorities before it begins construction? Will the PSC open up a Pandora's Box just to help Aquila?

4. If the PSC allows Aquila to keep and operate the plant in this residential area under the reasoning that "it is already built," and thereby rewards Aquila's bad conduct, then other utilities will follow suit. This would then become known as the Aquila Rule. Citing the Aquila Rule, we will then have utilities in Missouri building whatever they want and wherever they want, knowing that if they substantially complete the construction before we can get to a hearing, the PSC will then say, we forgive you for breaking the rules.

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[6] The suit against Aquila to enforce zoning was filed by StopAquila.org on November 15, 2004.

[7] Aquila is presumed to know the law. It is also presumed to know the fact that in Harline the Court said its certificates did **not** authorize it to build a plant.

V. WHAT THE INJUNCTION AND THE COURT OF APPEALS' DECISION SAY.

When the case was presented to the Trial Court, Aquila had neither the consent of the county nor the consent of the PSC. By the time the case was presented to the Court of Appeals, Aquila had a general approval from the PSC, and no consent from the county. The Court of Appeals decision affirmed the injunction. Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005). The Trial Court indicated that irreparable harm flowed from Aquila's failure to comply with county **ordinances**. A mandatory injunction was issued against Aquila and all acting in concert with it to remove all improvements that are inconsistent with county zoning.

The PSC cannot issue an order that would say that Aquila does not have to get consent required by 393.170 or that Aquila does not have to comply with county ordinances. Therefore, in any event, no matter what the PSC does, Aquila still will have an injunction against it that says it has violated county ordinances.

Apparently Aquila will argue that if the PSC gives it a certificate that says it can build the plant at the specific site Aquila has chosen, then the Circuit Court would have to dissolve the injunction. One insurmountable problem with this theory is that in order to get a certificate from the PSC for a power plant, the applicant must first get **consent** from the county. See cases cited above in Parts II, III and IV. The requirements of obeying local authority are built into the requirements needed to get a certificate, and this requirement is irrefutable, with our Courts repeatedly saying that the utility has to comply with **both** the local government and with the PSC. No court decision has even said that

the utility can get a certificate to build a power plant without first getting the consent of the local government.

It is not going to make any difference what kind of certificate the PSC issues, if the county does not grant consent to Aquila. The PSC also cannot eliminate the finding of the Court that there is irreparable harm caused by failure to comply with county ordinances, and the PSC cannot remove the injunction's requirement that all improvements not in compliance with county zoning be removed.

The Court of Appeals decision can only rule on the issues raised on appeal – which was, in this recent case, whether the injunction should be affirmed. The decision did not rule on all the questions that have arisen or which may arise in the future in this litigation. Contrary to what Aquila alleges, the decision certainly does not state that Aquila can ignore the county. The decision simply ruled that the injunction is affirmed.

In interpreting the Court of Appeals decision, we must remember three things:

1.) that the "ruling" of the Court of Appeals decision is limited to the issue that was presented to it on appeal and matters necessary to the ruling,

2.) discussion by the Court of Appeals on matters that were not raised as an issue on appeal may give us guidance, but are not controlling (they may be called *dicta*), and

3.) in any event, when the Court does not say it is overruling a statute, that statute still controls.

RSMO 393.170 was not in any way overruled or otherwise diminished by the Court of Appeals' decision. 393.170 still requires that the applicant (Aquila) apply to the PSC **before** it begin construction, and that the applicant show to the PSC that it has the

consent of the county **before** it gets its certificate to build the power plant. In fact, in its discussion contained in the decision, the Court of Appeals indicated that the applicant must show to the PSC that it has zoning. For example, the Court of Appeals decision cited with approval to In re Mo Power & Light, 18 Mo. PSC (N.S.) 116 (1973). The Court of Appeals in no way relieved Aquila of the requirement that it show to the PSC that it has received the **consent** of Cass County.

The Court of Appeals gave us guidance as to how it would rule in the future. The following language from the decision in Cass v. Aquila tells us that if the issue is presented to it in the future, it would rule that the county has the authority to regulate the actions of Aquila:

> While it is true that the Commission has extensive regulatory powers over public utilities, **the legislature has given it no zoning authority**, nor does Aquila cite any specific statutory provision giving the Commission this authority. See Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973) (regarding the **location** of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states, **"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."). 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." 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986). While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because 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.** 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**). See also State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934, 938 (1951) (**upholding validity of county rezoning** to accommodate electric power plant construction).

Aquila further relies on Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo.1973) (Crestwood I), and cases in other states for the proposition that local regulation of public utilities is not allowed. This case, however, is not about local regulation; rather, the case involves the interplay between statutes enacted by the legislature and how to harmonize police powers possessed both by

local government and public utilities. *** (Citing to Crestwood II) The court did not rule that the application of a zoning ordinance to the siting of a power plant invaded the Commission's area of regulation and control. Hence, the case provides no guidance for the issues raised herein. ***

FN8. 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**. ***

... we believe that if we were to extend Harline as urged by Aquila, we would effectively be giving electric companies in the state carte blanche to build wherever and whenever they wish, subject only to the limits of their service territories and the control of environmental regulation, without any other government oversight. *** 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**. ***

[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. *** See, e.g., St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant, **court concludes that charter county's zoning ordinance restricting plant's location is lawful restriction**, stating, "the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county, and the public interest is best served in requiring it to be done in accordance with the zoning laws.").

The overriding public policy from the county's perspective is that it should have some authority over the placement of these facilities so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. **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 other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants**.... The Court simply does not believe that such unfettered

power was intended by the legislature to be granted to public utilities."

The decision comes down to this ruling: Cass County has an interest in having authority over what happens. The Trial Court agreed. The decision of the Trial Court is affirmed.

Since Aquila had neither the required consent of Cass County nor of the PSC, the only issue in front of the Trial Court and the Court of Appeals was whether Aquila would be enjoined when it had the consent of neither. What if Aquila had the consent of the PSC but did not have the consent of the County? That issue was not in front of the Trial Court or the Court of Appeals. Therefore, they could not have been ruled on that question. However, we see the answer in the statute (393.170) and the case law, including the above quotes from this recent Court of Appeals decision. The answer is, Aquila must have the **consent of both**.

This is clear because when the case was presented to the Court of Appeals, the PSC had entered its order in case number EA-2005-0248. In that case the PSC indicated that its position was that Aquila had all the authority it needed. The Trial Court disagreed with this position (when stated by Aquila) and the Court of Appeals specifically disagreed with this PSC decision. If only the consent of the PSC was needed, the Court of Appeals would have simply said that the decision in EA-2005-0248 was sufficient. Why did the Court of Appeals decide that the decision in EA-2005-0248 was insufficient? What was lacking? The main ingredient lacking in EA-2005-0248 was the consent of the county.

Without compliance with 393.170, Aquila cannot begin building its power plant. Under 393.170, Aquila must show that it has the consent of Cass County. This is a condition precedent to it applying to the PSC for a certificate.

Whatever name you call it (the franchise or the consent or zoning approval or compliance with county ordinances), the fact is that 393.170 requires that Aquila must have the consent of the County and case law has given authority to the county. Aquila does not have the consent it needs.

You can search in vain in this decision issued by the Court of Appeals, but you will not find any ruling by the Court that would relieve Aquila of the requirement contained in 393.170 that it show that it has the consent of Cass County.[8] The Court of Appeals wrote extensively and approvingly about the County's desire to have control over location. The Court of Appeals also firmly indicated that the PSC had no control over zoning. Nothing in this decision can be said to support the idea that Aquila is free from all control by the County. Nothing in this writing can be said to support the idea that Aquila does not have to comply with the requirement stated in 393.170 that it first get the consent of the County.

Clearly, the decision of the Court of Appeals proceeded through a logical progression that started with the premise that the PSC itself viewed 393.170 properly to mean that before an applicant asked for a certificate from the PSC it must first get the

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[8] You also will not find any ruling by the Court of Appeals that would take away the authority of the county to act under 64.255. In footnote 8 to the decision of the Court of Appeals, it pointed out that there is no exemption to the application of 64.255. The Court of Appeals likely was pointing out to all the parties that 64.255 is another source of authority for the county over Aquila.

consent from the county, and if the injunction of the Trial Court were upheld, the PSC would require that Aquila demonstrate to it that it has the consent of the county before it seeks a certificate from the PSC. This explains why the decision said that the PSC had no zoning power and that hearings (rather than the singular form ["a hearing"]) would be held before the power plant was constructed, with zoning issues being addressed at the hearings. Since the Court made it clear that the **PSC had no zoning authority**, the Court could not have meant to say that the PSC would handle zoning issues at its hearing. Rather, the Court meant that since the PSC had no zoning authority, zoning matters would have to be handled by the county. After all, the PSC had said in its previous decision (Missouri Power) that it required that the applicant demonstrate that it complied with local zoning. It all makes sense if it is viewed that way. Aquila's interpretation is that the PSC has no zoning power, but the PSC will hold zoning hearings. That makes no sense.

Stopaquila.org believes that consent of the county is required before the PSC can have jurisdiction and that in any event the proper forum for land use issues and local issues is a hearing before the county. Stopaquila.org will urge that the power plant not be allowed to remain in the present location, because it is too close to residences, but also because it would be a terrible precedent if Aquila were allowed it to ignore the authority of the local government.

A careful review of the Court of Appeals decision also shows that the Court made a distinction between the County Planning Board and the County Commission. See footnote 8 and the text related to footnote 8. The Court pointed out that 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 the County Commission, and also the relationship between the Planning Board and the PSC. The Court treated 64.235 as simply relating to the procedure for the Planning Board to follow if the PSC or the County Commission has already approved a development. Then the Court went on to elaborate how the County, or the County Commission, had zoning authority, how the PSC did not, why zoning authority is important, and how there needs to be a balance of the different interests of the PSC and the county. The distinction mentioned by the Court between the Planning Board and the County Commission is important.

The PSC alone cannot give Aquila what it must have to keep the power plant at the South Harper location.

Aquila has recently announced that it will not seek approval from the County. The legal issue to be presented at an appropriate time in this litigation will not simply be whether the PSC can proceed where the utility never applied to the county; rather, the issue will apparently be whether the PSC can proceed when the County objects to the project (where Aquila refuses now to apply for county approval).[9]

The PSC does not have jurisdiction to approve the construction of a power plant when the consent of the county has not been obtained.

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[9] When Aquila first proposed building this plant near Harrisonville, where the objection was that it would also have been close to residences, Aquila did submit an application (in 2004) to the Planning and Zoning Board of Cass County, and the Board turned down its request. Aquila decided to not appeal. Then Aquila decided to build the same plant two miles outside of Peculiar, and decided to not seek any consent from the county. Recently, Aquila's lawyers have announced that Aquila will not seek any kind of consent from the county. For example, see Missouri Lawyers' Weekly, February 27, 2006, page 4. Aquila is asking the PSC to "trump" the county.

Additionally, the PSC does not have jurisdiction to approve the construction of a power plant that has already been built.[11]

The application should be dismissed, or, in the alternative, stayed until such time as Aquila comes back to the PSC with the requisite consent from the county.

Submitted by:

/s/ Gerard D. Eftink
Gerard D. Eftink MO Bar #28683
P.O. Box 1280
Raymore, MO 64083
(816) 322-8000
(816) 322-8030 Facsimile
geftink@comcast.net E-mail
Attorney for STOPAQUILA.ORG et al.

I hereby certify that a true and correct copy of the above and foregoing document was delivered by electronic mail or mailed, on this 10th day of March, 2006 to the following:

James C. Swearengen
Brydon, Swearengen & England, P.C.
312 East Capitol Ave.
P.O. Box 456
Jefferson City, MO 65102

[11] This is not a case in which the application to the PSC was submitted "contemporaneously" with the start of construction. Work on the foundation was started in about October 2004 and construction of the buildings was started in January 2005. Construction was finished by July 1, 2005. Suit to stop it was filed in November 2004. This application to the PSC was submitted a full twelve months after the construction of the buildings began (and fourteen months after Aquila began working on the foundation).

General Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P Box 2230
Jefferson City, MO 65102-2230

Mark Comley
Newman, Comley & Ruth
P.O. Box 537
Jefferson City, MO 65102-0537

Sid E. Douglas
2405 Grand Blvd., Suite 1100
Kansas City, MO 64108

Cindy Reams Martin
408 S.E. Douglas
Lee's Summit, MO 64063-4247

Debra Moore
Cass County Courthouse
102 E.Wall
Harrisonville, MO 64701

Stuart Conrad
Finnegan, Conrad & Peterson
3100 Broadway, Suite 1209

Kansas City, MO 64111

John Coffman
871 Tuxedo Blvd.
St. Louis, MO 63119

David Linton
424 Summer Top Lane
Fenton MO 63026

By /s/ Gerard Eftink