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

AQUILA'S SUGGESTIONS IN OPPOSITION TO INTERVENOR CASS COUNTY, MISSOURI'S MOTION TO DISMISS APPLICATION OR, IN THE ALTERNATIVE, TO IMPOSE CONDITIONS ON ISSUANCE OF CERTIFICATE

COMES NOW Aquila, Inc. (hereinafter "Aquila" or the "Company"), by counsel, and for its Suggestions in Opposition to the Motion to Dismiss Application Or, In The Alternative, To Impose Conditions On Issuance Of Certificate filed on March 20, 2006, by Cass County, Missouri ("Cass County" or "County"), respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

INTRODUCTION AND BACKGROUND

Cass County requests that the Commission dismiss Aquila's Application or, in the alternative, condition any Order granting it on Aquila obtaining local zoning approval from Cass County for the South Harper Peaking Facility and Peculiar Substation. In so doing, the County urges the Commission to ignore its authority under Chapters 386 and 393, as recognized by the Court of Appeals in Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. 2005). Likewise, in disregard of the language and purpose of the exemption

from County zoning found in section 64.235,[1] the County urges the Commission to cede to Cass County the Commission's authority to consider all issues associated with Aquila's Application. In effect, the County argues that the Commission should ignore the legislative intent and public policy behind section 64.235 and defer to the County the question of whether these facilities are in suitable locations. The Commission should reject these arguments and deny the County's motion.

ARGUMENT AND AUTHORITIES

I. THE COMMISSION HAS THE POWER TO CONSIDER AQUILA'S APPLICATION

In arguing that section 393.170.1 precludes the Commission from considering Aquila's application because the facilities are already constructed, the County alludes to, and then promptly discards, the Court of Appeals' statement at the end of its opinion regarding the disposition of the appeal:

> For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County's zoning law without first obtaining approval form the county commission or the Public Service Commission. **In so ruling, however, we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate**.

180 S.W.2d at 41 (emphasis added). Cass County Motion, p. 7.

Despite this clear statement of the Court's intentions regarding the import of its opinion, when Aquila sought a stay from Judge Dandurand of his January 2005 injunction so Aquila could seek the authority the Court of Appeals said Aquila needed,

[1] Statutory references are to RSMo. (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

the County argued, among other things, that the Commission would be without authority to grant Aquila's Application since the facilities were already built. Transcript from January 27, 2006 hearing (Tr.) pp. 65-67. Judge Dandurand nevertheless indicated his agreement with the last paragraph of the Court of Appeals' opinion by granting Aquila a four month stay, and further provided the "appropriate conditions" referred to by the Court by permitting only the substations to operate in the meantime.

Faced with the clear expectations of the Court of Appeals and Judge Dandurand, the County twists the provisions of section 393.170.1, dealing exclusively with obligations of public utilities like Aquila, in an attempt to contort them into a limitation on the Commission's authority in this case. No such limitation exists in that section or, for that matter, anywhere else in Chapters 386 or 393. On the contrary, an examination of sections 386.250 and 393.140 clearly indicates that the Commission's authority over public utilities is sweeping and, as at least one court has observed, essentially includes everything except the power to operate and manage them itself. State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 900 (Mo. App. 1995). Moreover, section 386.610 mandates that the Public Service Commission Act's provisions are to be "liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

The County's attempt to use section 393.170.1 as a limitation on the Commission's authority flies in the face of not only the plain language of that section and the above principles, but also the Commission's prior consideration of an Application filed by Aquila regarding these facilities. In January 2005, after the entry of judgment in the Cass County litigation, Aquila filed an Application under section

393.170.1 seeking specific authority for the South Harper Facility and Peculiar Substation or confirmation that Aquila had all the authority it needed.[2] Cass County and StopAquila likewise intervened in that proceeding and filed motions to dismiss, prehearing briefs, and otherwise vigorously contested Aquila's Application. At no time, however, did any party even suggest that the Commission lacked the authority to take up Aquila's Application because construction on the facilities had already begun. Moreover, the Commission, always free to examine its authority to proceed *sua sponte*, instead entered an Order dated April 7, 2005 confirming that Aquila had all the power it needed to construct and operate the facilities without any Commissioner questioning the Commission's authority to proceed.

Similarly, the Commission should not question its authority to proceed here. Cass County has pointed to no statutory provision which precludes the Commission from granting the relief requested by Aquila because none exists. On the contrary, the statutory provisions that govern the Commission's actions clearly show that the Commission can, and should, proceed with this case.

II. THE COMMISSION SHOULD NOT ORDER AQUILA TO SEEK COUNTY ZONING APPROVAL

Cass County concedes that "land use issues" such as the current zoning classification of the sites at issue may be taken up by either the County through the zoning process, or by the Commission in this proceeding. Motion, pp. 9-10. The County likewise concedes that if the Commission grants Aquila's Application, Aquila is exempt from County zoning authority pursuant to section 64.235. Motion, p. 16. Notwithstanding these concessions, however, the County argues the Commission

[2] Case No. EA-2005-0248.

should, as a matter of comity, require that any order approving Aquila's Application be conditioned on Aquila obtaining County zoning approval for the facilities. Such an argument is nothing more than a veiled attempt to convince the Commission to ignore section 64.235 and its obligations as clarified by the Court of Appeals in Cass County v. Aquila.[3]

This attempt is evident from the County's misleading argument that the Court of Appeals adopted an "overriding public policy" that "local governing bodies [particularly Cass County] should have the authority to regulate where a public utility builds a power plant." Motion, p. 16. On the contrary, the Court explicitly recognized that this policy would yield to any law setting forth a contrary policy, 180 S.W.3d at 30, then determined that Aquila qualified for the exemption found in just such a law – section 64.235. Id. at 32.

If the legislature did not believe the Commission competent to consider "land use issues" as a part of the certification process, it would not have created an explicit exemption from county zoning for projects authorized by Commission orders by enacting section 64.235 in the first place. Nor would it have extended this limitation on county zoning authority to first class charter or second and third class counties through the enactment of sections 64.090 and 64.620. The legislature cannot be presumed to have enacted meaningless provisions, State v. Winsor, 110 S.W.3d 882, 887 (Mo. App.

[3] To the extent the County joins in the argument of StopAquila that obtaining such zoning approval is a necessary part of Aquila's proof under the "local consent" provisions of section 393.170.2, Motion, pp. 11-14, such an argument is without merit, as Aquila has discussed in its response to StopAquila's recently-filed motion to dismiss. Aquila incorporates its arguments in opposition to that motion in these Suggestions by reference.

2003), and there is no evidence the Commission is incapable of taking up all issues associated with Aquila's Application.[4]

There is likewise no evidence that the County is more competent than the Commission to determine the myriad other issues that are considered in siting these facilities, including identifying locations near load centers to minimize electrical losses, determining the proximity of the facilities to existing gas pipelines that can deliver sufficient fuel at acceptable pressure, identifying and evaluating necessary transmission infrastructure upgrades, evaluating access to sufficient water supplies, and consideration of construction issues associated with the geographic characteristics of the sites. Aquila will be prepared to show the Commission how these issues factor into the Commission's determination of whether these sites are appropriate for these facilities, and, apparently unlike the County, is confident the Commission is more than capable of evaluating them.

Moreover, the County has never previously argued that there was any need for the Commission to cede to the County its authority to consider such land use issues. In fact, in oral argument before Judge Dandurand in the Cass County litigation, counsel for the County confirmed the legislature's intention that, in the case of Applications like this one, the Commission be the one to address these concerns:

> So when we [the legislature] turn to Cass County and we delegate that land use authority, we are going to give them the right to tell people how they can use their land via zoning. **Except, we also have the right to tell them when they can't do that. The legislature is looking at the county's interest in protecting land use regulations, and**

[4] The County's reference to the trial testimony of Energy Director Warren Wood is a misleading attempt to concoct an admission where none exists. Motion, p. 17. Even a cursory review of Mr. Wood's testimony shows he did not even allude to the possibility that the Commission "lacks staff or resources to consider zoning issues" as claimed by the County.

> **so when they pull back on their authority, they are pulling back on their authority because the assumption by the legislature is that somebody else is looking at those same issues, and we are not going to give the county the ability to interfere when the same interest, protection of public interest, safety, health, and welfare of the citizens, etc., is being protected through some other process**.
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> * * *
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> **Now I am going to be honest with you. The county would much prefer that process occur with the county, but we are going to follow the law**.

Tr., pp. 169-70, 177 (bracketed phrase and emphasis added).

Following the law, as the County promised it would, means recognizing the directive of the Court of Appeals that consideration of land use issues may be undertaken by either the County or the Commission, 180 S.W.3d at 38, and the legislature's similar directive through the enactment of the exemption from County zoning found in section 64.235. Such a conclusion is supported not only by the fact that there is no evidence the Commission lacks the ability to fairly and efficiently take up and resolve all issues associated with Aquila's Application, but by the fact that, in this instance, the County cannot be counted on to do the same.

The County has made it clear during the last few months of this dispute that, despite its claimed singular interest in protecting the welfare of the citizens of Cass County, it has only one goal – the destruction of the South Harper Facility and Peculiar Substation, no matter what the cost to those same citizens. At the oral argument on Aquila's request that Judge Dandurand give it time to seek Commission approval for the facilities, the County continued its "destroy the plant and substations at all costs" mantra, arguing:

- That Judge Dandurand should condition any order giving Aquila time to process this Application on Aquila's immediately beginning work to dismantle the facilities regardless of the potential for waste involved in such action;
- That if allowed to remain pending this Commission's review of Aquila's Application, even the substations should be shut down, regardless of the impact such an action would have on the ability of Aquila and other utilities to provide uninterrupted electrical service in the County and throughout the region;
- That there is a "concern" that substations "emit frequencies that are, potentially cancerous" (ignoring scientific evidence to the contrary), Tr. p. 52, and that they actually "generate" electricity, Tr. p. 54;
- That Aquila could somehow accommodate the shutdown of the substations by "buying power," Tr. p. 53.

Lastly, when directed by this Commission to propose a procedural schedule in this case, the County proposed a schedule that purposefully refused to contemplate even a hearing until late June and early July, much less Commission action by May 31st. Can there be any real question as to the outcome of a zoning application filed with Cass County now? Commenting on Aquila's most recent attempt to do so, Judge Dandurand certainly made it clear he believed there was not:

> THE COURT: You had to ask them, and you had to get their answer.
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> MR. YOUNGS: I think we have got their answer –
>
> THE COURT: I think so, too.

MR. YOUNGS: -- in no uncertain terms.

THE COURT: I think so, too.

Tr. p. 16.

Judge Dandurand is correct. The County has characterized the South Harper Facility and Peculiar Substation as "a colossal unplanned for use of property," claiming that County residents "relied on the strength of the Master Plan in buying, mortgaging and improving their respective properties, who will shoulder unexpected burdens caused by industrial use of a property that was zoned for passive agricultural uses." Motion, p. 22. The County's rhetoric ignores what Aquila anticipates the evidence before this Commission will be. For example, during the last 50 years, a seven-acre natural gas compressor station has operated next to what is now the South Harper site.

Further, while the South Harper site is zoned agricultural,[5] the following areas are designated as a "multi-use tier" in the Cass County Comprehensive Plan Update 2005: (1) the entire eastern strip of the site to the west of Harper Road (including the land occupied by the gas compressor station and at least a portion of the plant); (2) the land north of the northern site boundary (241st Street), extending west to the end of 241st Street; and (3) the land east of the eastern site boundary (Harper Road), extending south beyond 251st Street. According to the Cass County Comprehensive Plan, multi-use tiers are areas "where non-agricultural development, such as commercial and industrial uses, and residential development that is denser than 20-acre lots, is encouraged. Large-scale development is allowed, **including commercial and industrial zoning**, provided there are provisions for direct access to paved roads."

[5] Aquila has previously committed to leave the 35 acres to the north of the peaking facility undeveloped to serve as an additional buffer between the facility and the residents who live north of the plant.

Cass County, Missouri Comprehensive Plan Update 2005, p. 25 (emphasis added). These facts belie the County's arguments on page 22 of its Motion that these facilities were never conceived of as possible uses of the property at issue.

The Commission is no less capable than the County to consider these and other land use concerns that involve not only the County's interests, but those of other intervenors as well, including the City of Peculiar. In fact, the County's actions underscore the political realities that prompted the passage of the Public Service Commission Act in the first place. As the Missouri Supreme Court has recognized, "the statutes relative to the Public Service Commission constitute a 'legislative recognition that the public interest and proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the state.'" Union Elec. Co. v. City of Crestwood, 499 S.W.2d 480, 482-83 (Mo. 1973) (quoting In re Public Service Elec. & Gas Co., 173 A.2d 233 (N.J. 1961)). Without such a system "chaos would result." Id. at 483. See also, Union Elec. Co. v. City of Crestwood, 562 S.W.2d 344, 346 (Mo. 1978) (application of zoning ordinances to intercity transmission line invaded area of regulation and control vested in Commission). The Public Service Commission Act and the exemptions from county zoning found in Chapter 64 are legislative recognitions that the Commission is not only capable of examining any land use issues associated with Aquila's Application, but is the preferred authority to do so, free from the local political restraints that have apparently bound the County throughout this dispute.

CONCLUSION

The Commission has the power under section 393.170 to grant Aquila the relief it has requested, and should exercise its statutory authority and obligation to consider Aquila's Application in its entirety, without forcing Aquila to engage in a futile effort to obtain County zoning approval for the facilities. The County's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, sent by U.S. mail, or electronically transmitted on this 30th day of March, 2006, to all parties of record.

/s/ Diana C. Carter