**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 |

## POST HEARING BRIEF OF INTERVENOR CASS COUNTY, MISSOURI

Comes now Cass County, Missouri (hereinafter "Cass County"), by and through its counsel, and for its Post Hearing Brief, filed at the request of the Commission in lieu of closing arguments, states as follows:

## TABLE OF CONTENTS

## INTRODUCTION

On January 25, 2006, Aquila filed an Application ("Application") for Permission and Approval and a Certificate of Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage the South Harper Plant ("Plant") and the Peculiar Substation ("Substation") in unincorporated Cass County. At the time of the filing of the Application, the circumstances surrounding the Plant and Substation were a "mess" in the words of Warren Wood, the Director of the Missouri Public Service Commission Staff's Utility Operations Division. **[Transcript of Proceeding, Hearing, (hereinafter "Tr. Vol. ___, p. ___") Vol. 11, p. 1709, 1723]** The "mess" that is the South Harper Plant and the Peculiar Substation are a direct result of Aquila's aggressive defiance of the local land use regulatory authority of Cass County, and of Aquila's decision to proceed with construction of the Plant and Substation in the face of an injunction secured by the County. Though Aquila posted a bond to permit it to proceed with construction pending appeal, it did so aware that the injunction also imposed a mandatory obligation to dismantle the Plant and Substation should appeals prove unsuccessful. Aquila's gamble has been expensive and potentially disastrous. On December 20, 2005, the Missouri Court of Appeals affirmed the injunction ("Opinion"). Wallowing in circumstances of its own creation, Aquila seeks unconditional salvation from this Commission via its Application.

Aquila's CEO recently acknowledged to Aquila's shareholders that Aquila made a big mistake in failing to respect and listen to its neighbors before constructing the Plant and Substation. **[Exhibit (hereinafter "Ex.") 132]** Yet, in testimony before the Commission, one by one, Aquila witnesses unabashedly, and without remorse, rationalized and attempted to justify Aquila's conduct. **[Exs. 1, 2, 3, 7, 8, 10, 11, 12, 13, 14]** Without a doubt, these proceedings

represent a "no holds barred" approach by Aquila to "save" the Plant and Substation. In the process, Aquila has trampled on the legitimate interests of the County and of the residents living in proximity to the Plant and Substation, repeating, through these proceedings, the same mistake Aquila's CEO acknowledged surrounded the facilities' initial construction -- a failure to respect and listen to Cass County and its neighbors. Aquila needs to do more than espouse a "good neighbor" policy to Cass County and its citizens; it needs to manifest such sentiments into action.

It appears that PSC Staff ("Staff") shares Aquila's objective to save, at any expense, the Plant and Substation. Having embraced the Plant's and Substation's construction despite awareness of the injunction and the known fate of the facilities should appeals fail, **[Tr. Vol. 11, p. 1753-1755]** Staff has, for the purposes of these proceedings, contrived a one-sided, result-oriented, 10-step "process" by which Aquila's decision to construct the Plant and Substation at their current locations can be retroactively characterized as "reasonable." **[Exs. 19, 20; Tr. Vol. 11, p. 1707-1715; 1756-1758]** Cloaked in the ill-fitting, overstated and self-serving garb of "doom and gloom" that would allegedly result from dismantling and relocating the illegally constructed Plant and Substation, Aquila and Staff seek relief that would literally sweep the "mess" that is the South Harper Plant and the Peculiar Substation under the carpet. As can be readily discerned from the discussion, infra, of the facts which lead to this "mess," Aquila does not deserve such absolution. Moreover, as is addressed in the discussion, infra, of the legal principles necessarily raised by the Application, there is serious doubt that the Commission is authorized or positioned to extend such relief to Aquila at all, let alone in a manner that comports with the Opinion, or with the principles of due process.

## FACTUAL BACKGROUND[1]

### The Beginning of the "Mess"

On October 14, 2004, Aquila notified nearby residents that it intended to commence the immediate construction of a power plant on 74 acres of land Aquila had acquired off South Harper Road, approximately 1 and ½ miles south of the City of Peculiar ("South Harper Tract"). **[Ex. 62]** For many residents living near the South Harper Tract, Aquila's subsequent commencement of grading activities were the first they had heard of the proposed development. At the time of this notification, the South Harper Tract was located in unincorporated Cass County and was zoned agricultural. **[Exs. 21, 22, 23, 24, 89, 102; Tr. Vol. 10, p. 1457-1458, 1467]** The site remains located in unincorporated Cass County and zoned agricultural. **[Exs. 21, 22, 23, 24, 89, 102; Tr. Vol. 10, p. 1457-1458, 1467; Tr. Vol. 3, p. 191]** The land uses surrounding the South Harper Tract were almost exclusively agricultural and residential, though residential development in the area had been expanding. **[Exs. 23, 24; Tr. Vol. 10, p. 1466]** An electric generation facility is not a permitted use on land that is zoned agricultural in unincorporated Cass County. **[Exs. 104, 108]**

At the time it directed the October 14, 2004 notice to nearby residents, Aquila was anticipating that the South Harper Tract, along with an approximate 1 and ½ mile stretch of South Harper Road leading from the City of Peculiar to the Tract, would be annexed into the City of Peculiar. **[Tr. Vol. 3, p. 363-364; p. 375-376; Exs. 54, 59, 60]** Contemporaneous with these annexation proceedings, Aquila had agreed to submit itself to the City's applicable land use regulatory scheme as to appropriately designate the South Harper Tract for use as a power plant

[1] Due to the time constraints for filing this Post Hearing Brief, though counsel has made every effort to cite to supporting record references, that process is not complete, and, in many cases, supportive references cited are not exhaustive of the supporting testimony or exhibits. **Any references to testimony or exhibits that are "Highly Confidential," that remained protected as same during the proceedings, have been made in a "generic" manner consistent with comment that is a part of the public records.**

as a part of Peculiar's comprehensive plan and zoning ordinance. **[Exs. 48, 49, 51, 52, 54, 55, 59, 60]**

In this same time period, Aquila also was negotiating to purchase a 55 acre tract of land about five miles northwest of the South Harper Tract for use in constructing the Substation ("Peculiar Substation Tract"). The Peculiar Substation Tract was and remains located in unincorporated Cass County and was and remains zoned agricultural. **[Exs. 21, 22, 23, 24, 90, 102; Tr. Vol. 10, p. 1457-1458, 1467]** A substation is not a permitted use on agriculturally zoned land in unincorporated Cass County. **[Exs. 104, 108]** Aquila and Peculiar were not anticipating that the Peculiar Substation Tract would be annexed into the City. Peculiar's City Administrator contacted the County to determine what the County would require to permit the Substation to be constructed. **[Ex. 56]** In late September 2004, County officials advised Aquila that the Peculiar Substation Tract would have to be rezoned from agricultural to I1 (light industrial) before the Substation could be constructed, consistent with the County's Zoning Ordinance. **[Ex. 56]** As a result, Aquila filed an application with the County to rezone the Peculiar Substation Tract on September 29, 2004. **[Ex. 57]**

The power plant Aquila planned to construct on the South Harper Tract was a three (3) CT gas fired peaking plant. The source of the three (3) CT's intended for installation at the Plant is material to this case.

**The Source of the 3CT's/The Aries Plant**

The three (3) CT's slated for use at the Plant had originally been purchased by an Aquila merchant subsidiary for use at the Aries plant. The Aries plant was constructed in 1999 in unincorporated Cass by an entity owned 50% by a merchant subsidiary wholly owned by Aquila and 50% by Calpine. **[Tr. Vol. 5, p. 691-692]** At that time, representatives of Aquila had

worked cooperatively with Cass County to secure necessary rezoning for the Aries plant site in 1999, as the proposed site for the Aries plant was agriculturally zoned. **[Tr. Vol. 5, p. 692]**

After the Aries plant was built, Aquila was the plant's only "customer." Aquila acquired power from the plant through purchase power agreements. Plans were discussed to expand the Aries plant to incorporate the three (3) CT's that had been acquired by the Aquila merchant subsidiary, and which were being stored at the Aries plant. In 2002, Aquila sought and secured Cass County's written agreement that the Aries plant could be expanded to add the three (3) CT's without the need for further land use approvals from the County. **[Ex. 81]**

However, the planned expansion of the Aries plant did not occur. Instead, Aquila determined to divest itself of its non-regulated holdings. Aquila sold its interest in the Aries plant to Calpine in March or April, 2004. Staff was concerned about Aquila's sale of its interest in the Aries plant, and felt the plant represented a viable source for Aquila's future generation capacity. **[Tr. Vol. 5, p. 695-699, 704-705; See also Exs. 130 (HC), 131 (HC)]** In conjunction with the sale of its interest in the Aries plant, the three (3) CT's owned by the Aquila merchant subsidiary were "sold" to Aquila at an approximate value of $77 Million. **[Tr. Vol. 5, p. 706; Tr. Vol. 3, p. 227]**

**The Decision to Self Build**

Not surprisingly, contemporaneous resource planning being conducted by Aquila lead to the decision in January 2004 to "self build" a three (3) CT gas fired peaking plant with a crd of 315 Megawatt (MW) as a means of utilizing the 3 CT's transferred to Aquila from one of its non-regulated entities. **[Ex. 3, p. 3-8; Tr. Vol. 3, p. 257]** Aquila's own analysis determined the decision to construct a three (3) CT peaking plant was not the "least cost option." **[Ex. 3, p. 6]** Moreover, at the time of this decision, contemporaneous concerns were being expressed by Staff

that Aquila was focusing too heavily on natural gas as a source for its generation capacity. **[Ex. 82; Tr. Vol. 5, p. 681-682]** Indeed, at the time of Aquila's decision to self build, Aquila's existing generation capacity included, as it had since at least 1999, more peaking capacity than it needed. **[Ex. 38; See also Ex. 39 (H.C.)]** Though Aquila will not willingly so admit, it is evident the January 2004 decision to self build a three (3) CT gas fired peaking facility was a direct result of Aquila's decision to divest its non-regulated holdings, including its interest in the Aries plant, and of Aquila's related need to utilize the three (3) CT's it had acquired for $70 Million from a non-regulated subsidiary as to justify including the cost of same in its rate base. **[Tr. Vol. 3, p. 327; Tr. Vol. 5, p. 706-707]** To summarize, the "decision" to self-build a 3 CT gas fired peaking facility was nothing more than a "shell game" whereby Aquila gambled on the complicity of state regulations, on a lack of conviction by the County to enforce its land use regulatory authority, and on the misguided hope that adjacent property owners would be unwilling or unable to battle a Goliath with deep pockets.

By the time of its January 2004 decision to self build, Aquila had also determined to allow a 515 MW purchase power agreement it had with the Aries plant to expire on May 31, 2005. Aquila intended to replace this purchase power agreement with the 315 MW gas fired peaking facility, and with a 200 MW purchase power agreement. **[Ex. 3, p. 6]** The self imposed decision to allow the 515 MW purchase power agreement to expire necessitated, from Aquila's standpoint, that the 315 MW peaking plant be built and on-line by June 1, 2005 -- an aggressive schedule that ultimately formed the key ingredient for the "mess" that is the Plant and Substation. **[Tr. Vol. 3, p. 261-262; Tr. Vol. 3, p. 374-375]**

**The Initial Site Selection Process**

After embarking down the "self build" path, Aquila began an internal site selection process. Aquila's internal site selection criteria focused exclusively on the infrastructure available to service a plant -- i.e., on a site's "suitability" for a plant, -- and did not take into consideration a proposed site's compatibility with surrounding land uses. **[Ex. 5, p. 4-6; Tr. Vol. 3, p. 338-339, 341]** Aquila's internal site selection process was supplemented by a site evaluation process conducted by SEGA, an outside engineering firm. This initial site selection process took six (6) months. **[Tr. Vol. 3, p. 334-336; Ex. 12, Schedule CR1]** In June 2004, SEGA identified eight (8) potential sites for the Plant. **[Ex. 12, Schedule CR1]** The SEGA site selection spreadsheet reflects an evaluation of each proposed site's suitability for a power plant but did not evaluate each site's compatibility with surrounding land uses. **[Ex. 12, Schedule CR1]** Further, the South Harper Tract, nor any site in that same area, made the initial "short list" of preferred sites identified through Aquila's and SEGA'a collaborative efforts. **[Ex. 12, Schedule CR1; Ex. 45]** The "preferred" site initially identified through Aquila's and SEGA's collaborative six (6) month site selection process was located in unincorporated Cass County near Harrisonville, and was known as the "Camp Branch" site. **[Ex. 12, Schedule CR1]**

**The Camp Branch Application**

The Camp Branch site was zoned agricultural. Because the proposed Plant was not a permitted use on agriculturally zoned land, on June 9, 2004, Aquila filed an application with Cass County for a Special Use Permit ("SUP") for the Camp Branch site. **[Ex. 41; Tr. Vol. 3, p. 344-345]** If a proposed development is not permitted by existing zoning, a developer must either file an application to rezone or the developer must seek a SUP, which, if granted, does not alter

the existing zoning but allows the use, subject to such reasonable conditions as the County may deem appropriate. **[Ex. 21, p. 4-5; Ex. 23, p. 20-24]**

In stark contrast to the efforts that had been undertaken to garner support for, and acceptance of, the land use applications filed in connection with the Aries plant in 1999, Aquila engaged in no activities in advance of its SUP application for the Camp Branch site. **[Tr. Vol. 10, p. 1476-1477]** There was no meaningful pre-application conference with County staff or decision-makers, there was no outreach to adjacent property owners, and there was no post application discussion and negotiation of key issues with the County, atypical of the conduct of developers of proposed developments of this scale. **[Ex. 23, p. 17-19]** Predictably, the public outcry against the SUP application was substantial and vigorous. At the July 13, 2004 Cass County Planning Board public hearing convened to provide the first level of required consideration for the Camp Branch SUP application, the Planning Board recommended denial of the application. **[Ex. 32]** The application was then slated for consideration by the County's Board of Zoning Adjustments ("BZA"), the body with the ultimate authority under Cass County's Zoning Ordinance to approve or disapprove a SUP application. **[Exs. 104, 108]**

The primary Aquila representatives coordinating with County officials to promote the SUP application were Dave Kreimer and Glen Keefe. These were the same two Aquila employees with whom Gary Mallory had worked to cooperatively advance the rezoning applications for the Aries plant at a time when Mr. Mallory had been the County Clerk for the County, and an active member of the Cass County Corporation of Economic Development. **[Tr. Vol. 10, p. 1474]** Kreimer and Keefe had a good working relationship with Mallory. They approached Mallory, who had by then become the Presiding Commissioner of Cass County, shortly after the Planning Board's recommended denial of the Camp Branch SUP application,

asking his insight into the likelihood of success of the application before the BZA, on which Mallory sat as the Presiding Commissioner. **[Tr. Vol. 10, p. 1474-1475]** In an honest and non-confrontational response, Mallory advised Kreimer and Keefe the Camp Branch SUP application had a "snowball's chance in hell" of being approved by the BZA. **[Tr. Vol. 10, p. 1474-1475]**

From Mallory's perspective, because Aquila had not attempted to work with local residents before submitting the Camp Branch SUP application, Aquila had adopted a "grenade in the shorts" approach to seeking approval of its application, which had resulted in vigorous and wide spread public denouncement of the application. **[Tr. Vol. 10, p. 1476-1477]** Mallory did not convey to Kreimer and Keefe any animus held by Cass County against power plants -- an attributed view that would not have been consistent with the County's support of the construction of the Aries Plant. **[Tr. Vol. 10, p. 1475-1478]** Rather, Mallory conveyed to Aquila that, as it had during the Aries development review process, Aquila needed to work with residents in advance, demonstrating respect for, and responsiveness to, their concerns, instead of creating the impression that Aquila intended to forge ahead with the construction of a Plant, without regard for local concerns. **[Tr. Vol. 10, p. 1476-1477]**

**Solicitations By the City of Peculiar**

Contemporaneous with review of the Camp Branch SUP application by the Cass County Planning Board, Aquila was being solicited by the City of Peculiar, commencing in June and continuing into early July 2004, with a request that Aquila consider locating the plant at a site in Peculiar, or near enough to Peculiar to be annexed. **[Ex. 42]** Peculiar's City Administrator, Mike Fisher, took the lead in suggesting sites which might be available for annexation. **[Exs. 44, 45, 47, 48, 49, 50]** After several sites proposed by Fisher were discarded because of the landowner's lack of willingness to sell, Fisher located the South Harper Tract. Though Aquila

had SEGA assess the South Harper Tract for its suitability for a plant based on utility infrastructure needs, SEGA's updated site selection spreadsheet once again demonstrated no regard was given to the South Harper Tract's compatibility with local land uses. **[Ex. 12, Schedule CR2]** In fact, local land use issues, if addressed on SEGA's spreadsheet at all, were addressed in the context of whether the need to secure local land use approvals for a site would create an impediment to the aggressive construction schedule Aquila had self imposed, and thus, as SEGA characterized it, a "fatal flaw." **[Ex. 12, Schedule CR2]**

By late August 2004, Aquila had, for all intents and purposes, abandoned its pursuit of the SUP application for the Camp Branch site. Aquila notified Cass County that it desired to continue consideration of the Camp Branch SUP application by the BZA, thus removing the matter from the BZA's August 26, 2004 agenda. **[Ex. 53]** Aquila was focusing all of its attention on securing a site near Peculiar for the three (3) CT power plant, expecting, as Peculiar officials had assured, the site would be annexed into Peculiar, and approved by Peculiar's governing bodies with respect to necessary amendments to Peculiar's Comprehensive Plan. **[Exs. 54, 59, 60]**

By October 4, 2004, Aquila and the City of Peculiar had devised a schedule which contemplated: (1) the City's necessary approvals of the annexations; (2) the necessary approval of Comprehensive Plan amendments required for the site to be used for the Plant; (3) the City's issuance of Chapter 100 financing for the Plant and the Substation; and (4) a building permit issued by November 9, 2004. **[Ex. 60; Tr. Vol. 8, p. 1194]** In reliance on this schedule, Aquila purchased the 74-acre South Harper Tract on October 7, 2004 from the George Bremer Trust. **[Ex. 61]** In further reliance on this schedule, Aquila directed its October 14, 2004 letter to nearby residents announcing its plans to proceed with construction of the Plant. **[Ex. 62]** The

schedule devised between Aquila and the City of Peculiar permitted Aquila, albeit barely, to have its three (3) CT peaking plant constructed and on line by June 1, 2005, given an anticipated six (6) month construction schedule. **[Tr. Vol. 8, p. 1181 - 1182, 1195]**

**The City of Peculiar Abandons Annexation**

Aquila's plans were derailed on October 23, 2004. On that date, the City of Peculiar advised it would not proceed with annexation of the 1 and ½ mile stretch of South Harper Road and of the South Harper Tract due to litigation threatened by residents relating to the legality of the proposed annexation. **[Ex. 66; Tr. Vol. 8, p. 1199-1200]** Peculiar did advise Aquila, however, that it would be more than happy to proceed with plans to provide Chapter 100 financing for the Plant and Substation, despite the fact neither facility would be located within the Peculiar city limits. **[Tr. Vol. 8, p. 1200, 1217-1218]** Peculiar stood to gain, financially, from the construction of the Plant and Substation if it provided Chapter 100 financing. **[Tr. Vol. 8, p. 1219-1220]** It was thus motivated to work in tandem with Aquila to promote the Plant and Substation, including the provision of favorable testimony in Commission proceedings regarding the facilities, even though Peculiar officials knew Aquila intended to construct the Plant and Substation without securing County land use approval for either site, the antithesis of the respect that Aquila had been willing to afford the City of Peculiar's land use regulatory scheme. **[Tr. Vol. 8, p. 1200]** In addition to the financial advantage Peculiar stands to reap from the Chapter 100 financing, Aquila has also agreed to provide the City of Peculiar many other concessions in exchange for its support. **[Ex. 10, p. 7-8]**

**Aquila's Decision to Construct in Unincorporated Cass County**

After learning Peculiar would not annex the South Harper Tract, Aquila representatives met with Cass County representatives about the South Harper Plant in early November, 2005.

Cass advised Aquila it would require Aquila to apply for either rezoning or a SUP for the South Harper Tract before the Plant could be constructed. This was consistent with guidance the County had provided Aquila in July 2004 in connection with the proposed Camp Branch site, and again in late September 2004 with respect to the Peculiar Substation Tract. There was never any doubt the County expected Aquila to build its Plant and Substation in conformance with the County's Zoning Ordinance. Motivated by its self-imposed, aggressive desire to have the Plant on line by June 1, 2005, Aquila advised the County it would not seek County approval for the Plant's location. In fact, despite the County's objections, Aquila advised it intended to proceed with construction of the Plant as soon as it received a Missouri Department of Natural Resources (DNR) Air Permit for the plant, which it expected to receive shortly. Simultaneously, Aquila had already begun grading the site in preparation for construction of the Plant, an activity which had not required a permit from the County. **[Exs. 58, 22, p. 5]** On November 19, 2004, Aquila withdrew the rezoning application it had filed on September 29, 2004 for the Peculiar Substation Tract, signaling its intention to also construct the Substation without securing required County approvals. **[Ex. 71]**

Aquila took the position it was exempt from the obligation imposed by § 64.235 to present the Plant and Substation to the County Planning Board for development review and approval because it qualified for one of the three exemptions enumerated in the statute. Section 64.235, which is applicable to first class non-charter counties like Cass, provides:

> From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth ***no improvement*** of a type embraced within the recommendations of the master plan ***shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board***; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public

> improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefor to the planning board, ***nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission after public hearing in the manner provided by section 64.231***. [Emphasis added]

Aquila claimed that the Certificate of Convenience and Necessity ("CCN") its predecessor corporation had secured from the Commission in 1938, which authorized Aquila to provide electric service in its certificated area (an area which included a large portion of Cass County), constituted "specific authorization" from the Commission for Aquila to construct the South Harper Plant and the Peculiar Substation, and that Aquila was thus exempt from the mandatory obligation of § 64.235 to submit its proposed developments to the Cass County Planning Board for review. Cass County did not and does not agree with Aquila's interpretation of § 64.235, and advised Aquila it would oppose any efforts by Aquila to construct the South Harper Plant and the Peculiar Substation without first submitting the proposed developments to the County Planning Board for development review as required by § 64.235.

At the time Aquila was advancing its view of § 64.235 to the County, the County was operating pursuant to its 1997 Zoning Ordinance, Subdivision Regulations and Comprehensive Plan, as amended in 1999 and 2003. **[Exs. 104, 105]** Had Aquila applied for development review of the Plant in October, 2004, before construction commenced on the facility, and when it first became apparent the Plant was going to be located in unincorporated Cass County and not annexed into the City of Peculiar, the County would have evaluated this proposed development pursuant to the Zoning Ordinance, Subdivision Regulations and Comprehensive Plan in effect at that time. **[Ex. 21, p. 8]** In fact, Aquila's rezoning application for the Peculiar Substation was,

before being continued and then subsequently withdrawn by Aquila, scheduled for consideration by the Cass County Planning Board on October 25, 2004, **[Ex. 68]** a time that would most certainly have required evaluation of the application under the auspices of the 1997 Zoning Ordinance, Subdivision Regulations and Comprehensive Plan, as amended in 1999 and 2003. **[Ex. 21, p. 8]**

**The County Files Suit**

Given Aquila's imminent threat to commence construction of the Plant and Substation, an organization of citizens living near the proposed South Harper Plant site known as StopAquila.Org filed suit in the Circuit Court of Cass County seeking an injunction against Aquila. On December 1, 2004, Cass County filed a separate suit against Aquila in the Circuit Court of Cass County seeking a temporary, preliminary and permanent injunction enjoining the construction and/or operation of the South Harper Plant and the Peculiar Substation. These two lawsuits were consolidated, at least initially, and were set for a preliminary injunction hearing on January 5 and 6, 2005. In the interim, Aquila's DNR Air Permit was issued on December 29, 2004, and Aquila commenced, almost immediately, construction of the South Harper Plant and the Peculiar Substation. In addition, in the final few days of 2004, the City of Peculiar and Aquila proceeded to and did "close" on a $140 Million Chapter 100 bond issue to be used to fund Aquila's construction of the Plant and Substation. **[Ex. 100]** The legality of the Chapter 100 financing is the subject of separate litigation now pending before the Missouri Supreme Court.

**The Judgment of the Trial Court**

On January 11, 2005, the Cass County Circuit Court issued a judgment ("Judgment") in favor of Cass County and against Aquila. The Judgment severed the StopAquila.Org lawsuit,

though the StopAquila.Org lawsuit against Aquila remains pending. The Judgment issued a Permanent Injunction against Aquila prohibiting construction and operation of the South Harper Plant and the Peculiar Substation because Aquila had not first submitted the proposed developments to the County Planning Board for development review as required by § 64.235, and because Aquila's existing CCN and other Orders from the Commission authorizing it to provide electric service in its certificated area did not constitute the "specific authorization" for the proposed improvements necessary to secure exemption from this mandatory obligation. The Judgment allowed Aquila, at its risk and option, to post a $350,000 bond for damages the County might incur, and to proceed with construction of the South Harper Plant and the Peculiar Substation pending appeal of the Judgment. However, the Judgment warned that should this option be exercised, Aquila would be required to immediately dismantle the Plant and Substation should its appeals prove unsuccessful.

Despite the County's cooperation in stipulating to a schedule that had Aquila's appeal from the Judgment fully briefed and orally argued by early April 2005, less than three (3) months after the Judgment was entered, Aquila elected to gamble. **[Tr. Vol. 3, p. 230]** It posted the $350,000 bond pending appeal of the Judgment and proceeded with construction of the South Harper Plant and the Peculiar Substation. The Plant and Substation were constructed in their entirety after the injunction prohibiting their construction was issued. **[Ex. 40]** Though initially constructed with 3 CT's, the Plant site has been purposefully designed to allow for expansion to include a total of 6 CT's. **[Ex. 34; Tr. Vol. 3, p. 271-272]** Aquila and Staff have conceded that Aquila's future generation facility needs (which include the need for 3 additional 105 MW CT's within a few years) have included discussion of placing the additional CT's at South Harper. **[Tr. Vol. 3, p. 266, 271-272; Tr. Vol. 4 (H.C.); Tr. Vol. 5, p. 666-667]** The Chapter 100

Financing issued by Peculiar also envisions this expansion, and anticipated the related issuance of additional bonds by the City to cover the cost of adding more turbines. **[Tr. Vol. 8, p. 1224-1228]**

**The Position of the Staff**

Staff was contemporaneously aware of the Judgment and the injunction therein contained, and of Aquila's intentions to proceed with construction of the Plant and Substation despite the injunction. **[Tr. Vol. 11, p. 1726-1728]** Staff was contemporaneously aware that the Judgment ordered both facilities be immediately dismantled should Aquila's appeals prove unsuccessful. Staff, however, shared Aquila's view of its authority to construct the Plant and Substation based on its existing CCN and Commission Orders. In fact, the Commission had intervened in the Cass County lawsuit and participated as a party during the January 5 and 6, 2005 preliminary injunction hearing. During those proceedings, Warren Wood testified that the Commission does not have the statutory authority to "site" power plants, and confirmed the Commission does not have the statutory authority to tell regulated utilities they cannot build a plant at a particular location. **[Tr. Vol. 7, p. 751, 757; Ex. 1, Schedule JRE-1]** Staff has also acknowledged the Commission has no legislative authority to "locate" plants in other written communications. **[Ex. 83]**

Despite the obvious risk, Staff did not encourage Aquila to wait to construct the South Harper Plant and Peculiar Substation until appeals of the Judgment could be completed, **[Tr. Vol. 11, p. 1726-1728]** nor has Staff taken the position that the South Harper Plant and Peculiar Substation should be dismantled in compliance with the Judgment that ordered their dismantling should the Judgment be affirmed on appeal. **[Tr. Vol. 11, p. 1756]** To the contrary, influenced, perhaps, by its own mistaken view of the law, Staff has consistently supported Aquila's position

that the South Harper Plant and the Peculiar Substation should remain in their present locations, despite their illegal construction, and in conflict with two judicial rulings, going so far as to testify via Warren Wood that Aquila's decision to construct, despite the injunction, was "reasonable." **[Ex. 19, p. 9-19]** Though Staff acknowledges that the Plant's and Substation's construction in the face of an injunction created a "mess," Staff seems quick to forgive and excuse Aquila's illegal conduct anxious, perhaps, to divest itself of responsibility for its contribution to the "mess." Staff has never, for example, pressed Aquila to disclose that it had meaningful options, other than pursuing the gamble of constructing the Plant and Substation in the face of the injunction, leaving the development of such important testimony to the intervenors. Aquila acknowledged at trial that it had received a <u>competitive</u> bid to purchase power from the Aries plant by July 2004, long before it commenced construction of the Plant and Substation. **[Tr. Vol. 3, p. 275-279]** In highly confidential testimony it also disclosed how competitive this bid would have been compared to the self build option. **[Tr. Vol. 4, p. 286-287 (HC); Ex. 35(HC)]** That purchase power option would have been a mere extension of Aquila's then-existing relationship with the Aries facility. The option could easily have been accepted by Aquila, at least in the short term, allowing Aquila to responsibly exhaust appeals of the Judgment, without the overlay of potential illegal construction of the Plant and Substation, and without the risk of being required to absorb the expense of construction and of the subsequent dismantling of the facilities should its appeals prove unsuccessful. This alternative would have been, by any measure, the "least cost option" available to Aquila. Why wasn't it taken? One can only speculate Aquila elected to gamble believing that even if it lost its appeal, no one would ever truly force Aquila to dismantle the Plant and Substation. Now it appears Aquila can count on the Staff to play a "trump card," as Staff has proposed a no-fail "10-step process" against

which the Commission should measure the mere "reasonableness" of Aquila's gamble. **[Ex. 19, p. 6-9; Tr. Vol. 11, p. 1707-1718]** In doing so, Staff has yet to reconcile conflicting views: on the one hand Staff has conceded the Commission has no legislative authority to deny a utility the right to construct a plant at a particular location; on the other hand, the Staff now promotes the Commission's authority to approve a utility's choice of a particular location for a plant as "reasonable" though there has been no intervening change in the statutes which describe the Commission's authority.

**The Commission's April 2005 Clarification Order**

While the appeal was pending, Aquila filed, on January 28, 2005, an Application for Specific Confirmation or, in the Alternative, Issuance of a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain a Combustion Turbine Electric Generating Station and Associated Electric Transmission Substations in Unincorporated Areas of Cass County, Missouri Near the Town of Peculiar with the Commission, assigned EA-2005-0248. This application was filed in direct response to the Judgment's declaration that the CCN and other Orders Aquila held from the Commission did not constitute the "specific authorization" for the Plant and Substation required to earn exemption from the mandatory obligations of § 64.235. After proceedings conducted pursuant to yet another expedited schedule imposed for Aquila's benefit, this Commission issued a Clarification Order on April 7, 2005 declaring that Aquila's existing CCN and Orders from the Commission did constitute all of the authority Aquila needed from the Commission under § 393.170 to construct the Plant and the Substation. Of course, the Judgment obtained by Cass County had not directly discussed or interpreted the Commission's rights and obligations under § 393.170, but did hold that the CCN and other Orders from the Commission held by Aquila were not of the

variety envisioned by the legislature as warranting exemption from the County's land use regulatory authority outlined in § 64.235. Cass County filed a Writ of Review from the Clarification Order in the Circuit Court of Cass County (the "Writ Case"). Aquila intervened as a party. The parties believed the pending appeal of the Judgment could dispose the issues in the Writ Case. Thus, the Writ Case was stayed by agreement of the parties pending disposition of Aquila's appeal of the Judgment.

**Post Construction "Community Outreach"**

In late April, 2005, Aquila hired a new employee, Norma Dunn, as its Vice President - Corporate Communications. **[Tr. Vol. 8, p. 1020]** Dunn's title soon changed to Vice President - Corporate Communications and Stakeholder Outreach. In the summer of 2005, after the Plant and Substation were essentially fully constructed, Dunn assumed responsibility for "community outreach" to address concerns of those living near the Plant. **[Tr. Vol. 8, p. 1021, 1023]** Before this time, no Aquila employee had been responsible for such duties, and no Aquila employee had engaged in such activities. **[Ex. 10, p. 3-5; Tr. Vol. 8, p. 1124-1126]** Aquila claims to have performed a variety of tasks, such as landscaping and noise control efforts, in an effort to demonstrate it is a "good corporate citizen." **[Ex. 10, p. 2]** Yet, Aquila concedes it has done nothing to address the primary concern expressed by the County and by many local residents -- that the Plant and Substation were built in defiance of the law. Moreover, even as to the activities Aquila has undertaken, nearly all were performed after the Plant and Substation were constructed and in the context where Aquila was clearly motivated to manufacture "public support" as a litigation strategy. **[Ex. 10, p. 3-5]**

**The Court of Appeal's Opinion**

On June 21, 2005, the Missouri Court of Appeals for the Western District ("Court of Appeals") entered an opinion affirming the Judgment on narrow grounds, identifying Aquila's failure to secure a franchise authorizing construction of the facilities from Cass County. Aquila filed a Motion for Rehearing. The Court of Appeals granted the Motion and withdrew its June 21, 2005 opinion. The South Harper Plant and the Peculiar Substation went "on line" in early July, 2005. On December 20, 2005, the Missouri Court of Appeals issued the Opinion. *Cass County v. Aquila*, 180 S.W.3d 24 (Mo. App. W.D. 2005) (hereinafter referred to as *Cass County*). The Opinion once again affirmed the Judgment, on even broader grounds. In the Opinion, the Missouri Court of Appeals made the following determinations:

a. Local zoning authority, as it relates to the location of energy generating facilities, is not pre-empted by the Commission's regulatory authority over utilities; *Cass County*, 180 S.W.3d at 29-30.

b. The Commission is required to contemporaneously consider and authorize a utility to construct a power plant pursuant to § 393.170.1, before the plant is constructed; *Id.* at 32-38.

c. A utility may not rely on its general area certification issued under § 393.170.2 as the specific authority envisioned by the legislature as required before a plant can be authorized to be constructed under § 393.170.1; *Id.* at 39-40.

d. The Commission cannot grant § 393.170.1 authorization for a utility to construct a plant without conducting public hearings as required by § 393.170.3, and these hearings must occur before the first spade of dirt is turned; *Id.* at 37.

e. The decision in *State ex rel Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960) did not hold and could not be read to support a view that a utility could build a plant anywhere within its certificated area without first securing specific authority to construct the plant, and that the Commission's 1980 determination that *Harline* could be read in this manner was not lawful; *Id.* at 33-38.

f. Aquila could qualify for an exemption under § 64.235, as that statute could not be fairly read to limit its available exemptions to developments proposed by municipalities, counties, public boards or commissions; *Id.* at 30-32.

g. Though Aquila could qualify for an exemption under § 64.235, it did not meet the criteria for an exemption, as its 1938 CCN and other Orders from the Commission involving its authority to provide service did not satisfy the requirements of § 393.170.1, and thus did not constitute the "specific authorization" from the Commission to construct a plant necessary to earn exemption from § 64.235, and as Aquila had not secured a permit from the "county commission" after public hearing in the manner provided by § 64.231; *Id.* at 32-38.

h. That utilities do not have the power of eminent domain to site power plants; *Id.* at 41.

i. That utilities do not have the right to build power plants where ever they wish without regard to local land use issues, including zoning; *Id.* at 37.

j. That all relevant issues regarding a plant's proposed construction, including zoning, must be vetted before either the Commission or the County Planning Board pursuant to § 64.231 before a plant is built, in order to secure an exemption from the

mandatory obligation to submit a proposed development to the County Planning Board for development review under § 64.235; *Id.* at 37-38.

k. That the Commission does not have any legislative zoning authority; *Id.* at 30.

l. That the Commission's authority to issue a CCN to permit construction of electric generation facilities should be harmonized with the County's interest in assuring that the exact location of the Plant and Substation are consistent with the County Zoning Ordinance; *Id.* at 30, 41.

m. That utilities are not exempt from a first class non-charter county's right to impose and enforce zoning restrictions through its County Commission as envisioned by § 64.255. *Id.* at 32, f.n. 8.

The Opinion affirmed the Judgment which held that the South Harper Plant and the Peculiar Substation were constructed illegally pursuant to § 64.235. *Id.* at 41. Aquila did not seek further review of the Opinion. The Opinion became final on January 11, 2006 when the Court of Appeals issued its Mandate affirming the Judgment, without equivocation.

**Aquila's Request for More Time**

On January 12, 2006, Aquila filed a Motion to Extend the Stay of Judgment with the Circuit Court of Cass County. Aquila sought additional time before being required to dismantle the South Harper Plant and the Peculiar Substation. Aquila argued that despite the Court of Appeals' unequivocable affirmation of the Judgment, and despite the absence of any remand with instructions, the Court of Appeals had nonetheless signaled its belief that it was not too late for Aquila to secure "authority" that might allow Aquila to continue operating the illegally constructed facilities. The language from the Opinion on which Aquila relies is found at the end of the Opinion and provides:

> "For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and the Peculiar substation in violation of Cass County's zoning law without first obtaining approval from either 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." *Id.* at 41.

This sentence in the Court of Appeals' decision has since been the subject of great debate and deliberation. There are varied, in fact disparate, views of its intended meaning, and its effect, if any, on the Judgment, which was affirmed without equivocation. Cass County submits that the sentence constitutes no more than a recognition by the Court of Appeals that it had not determined or foreclosed that which was not expressly before it for consideration. No party had proposed a suggested means for Aquila to secure "after the fact" authority to continue operating the South Harper Plant and the Peculiar Substation despite their illegal construction. The Court of Appeals simply acknowledged that despite its clear determination that the South Harper Plant and the Peculiar Substation had been illegally constructed, it could not comment on, nor foreclose, efforts yet to be attempted by Aquila to secure the "necessary authority" to continue operating the Plant. The Opinion did not create or define a means to secure such "necessary authority." The Opinion simply opened the door to the next chapter in this litigation, leaving the legality or propriety of any path subsequently taken by Aquila to attempt to secure "necessary authority" for continued operation of the Plant and Substation the subject of future judicial review.

On January 27, 2006, Judge Dandurand heard arguments on Aquila's Motion to Extend the Stay of Judgment. Despite the County's concern that the trial court had no jurisdiction to do so, the Court announced its intention to extend the stay of the Judgment, and thus the date on which Aquila would be required to commence dismantling the South Harper Plant and the

Peculiar Substation, to May 31, 2006. The Court required Aquila to post a $20 Million bond as a condition of this extension. This was the amount Aquila contended it would expend to dismantle the Plant and Substation. The Court also ordered that the operation of the South Harper Plant immediately cease. The Court entered an Order confirming its announced ruling on February 15, 2006 ("Order"). **[Ex. 33]** The Order makes no mention of Aquila securing approvals from either the Commission or the County as a means of avoiding the looming dismantling deadline. **[Ex. 33]**

After the January 27, 2006 hearing, and given the Court's announced (though as yet not formally entered) ruling, Cass County sent Aquila a letter on February 1, 2006 advising it would expect Aquila to submit a rezoning or SUP application for both the South Harper Plant and the Peculiar Substation for the County's consideration. **[Ex. 88]** Aquila has refused to do so. Aquila had attempted to file a SUP application for both facilities with the County on January 20, 2006, before it was granted a temporary reprieve from its obligation to begin immediate dismantling of the Plant and Substation. **[Ex. 21, p. 8; Exs, 89, 90]** The County was not able to accept the applications at that time, a fact known to Aquila before it attempted to file the applications, as at that moment, Aquila had not secured a reprieve from the final, non-appealable Judgment which the trial court, not the County had ordered the immediate dismantling of the Plant and Substation. **[Ex. 21, p. 8; Ex. 11, Schedule NFD2]** Aquila had been aware for some time that the County had a concern about whether the legality of accepting rezoning or SUP applications for the Plant and Substation while litigation was pending questioning the County's land use jurisdiction, or as a means of remediating the illegally constructed Plant and Substation, would be challenged by local citizens. **[Ex. 11, Schedule NFD2]** Despite being well versed about the County's concerns, Aquila acknowledged as recently as January 12, 2006 that it knew

Cass County had not predetermined the propriety of the Plant and Substation locations, but merely believed the County should have the opportunity to review the matter of location of these facilities. **[Ex. 87]** Had Aquila filed rezoning or SUP applications for the Plant and Substation shortly after the January 27, 2006 hearing, those applications would easily have been determined by the County before May 31, 2006. **[Tr. Vol. 10, p. 1472-1474]**

**The Disposition of the Writ Case**

On February 27, 2006, the parties to the Writ Case filed in response to the Clarification Order entered in EA-2005-0248 agreed to and filed Consent Judgment before the trial court. The Consent Judgment remanded the matter to the Commission with instructions that it set aside and vacate its April 7, 2005 Clarification Order.

**The Path Chosen by Aquila to Secure "Necessary Authority"**

Instead of working with the County to secure the authority it had never received under § 64.235, and from which the Court of Appeals found it had never earned exemption, Aquila has elected, once again, to roll the dice, proceeding down a path that attempts to secure from this Commission all authority that may be necessary to allow the illegally constructed Plant and Substation to continue operating. This Commission is not empowered to give Aquila all authority that may be necessary to allow the illegally constructed Plant and Substation to continue operating. This Commission must evaluate its authority to consider the Application; the process, rules and standards by which it must consider the Application if its authority to do so is presumed; and the extent of appropriate conditions which should be imposed on the requested Certificate, if issued over the objections of Cass County and other intervenors. Moreover, notwithstanding any "authority" which may be extended by the Commission to allow the Plant and Substation to continue operating, Aquila still must attempt to secure "authority" from the

County, as the Opinion did not relieve Aquila of the obligation to secure appropriate zoning for the Plant and Substation's sites pursuant to § 64.255.

## LEGAL ANALYSIS/APPLICATION OF THE LAW TO THE FACTS

### I. Matters relating to the Commission's Jurisdiction and Authority to Entertain Application

Aquila's Application seeks three things: (a) Aquila seeks a "post construction" Certificate of Convenience and Necessity ("CCN"), authorizing construction of the South Harper Plant and Peculiar Substation as required by § 393.170.1 though the facilities have already been built; (b) in recognition of the jurisdictional issue associated with this request, Aquila seeks, apparently in the alternative, an Order of this Commission issued on authority of an unspecified nature authorizing the Plant and Substation to continue operating, though illegally constructed; and (c) in connection with each of these requests, Aquila also asks that whatever CCN or Order the Commission issues be "site specific," thus asking the Commission to officially engage in the practice of evaluating and approving sites for energy generation facilities, though it has no legislative authority to do so, as the Staff has previously acknowledged.

It is necessary to address the Commission's authority to act in the manners requested by Aquila. Cass respectively submits that the Commission lacks legislative authority, and thus jurisdiction: (a) to award a "post-construction" CCN under § 393.170.1 authorizing the construction of the Plant and Substation after their construction is complete; (b) to award a CCN or other Order authorizing illegally constructed energy generating facilities to continue operating at all, let alone to the exclusion of Aquila's obligation to comply with § 64.235; and (c) to evaluate and determine the "siting" of the Plant and Substation at all, let alone in a manner that fails to afford Cass and other aggrieved parties due process given the total absence of any

lawfully promulgated rules, procedures or standards by which such an evaluation or determination shall occur. Though Cass is cognizant that some of these jurisdictional concerns were previously raised in the Motion to Dismiss it filed on March 20, 2006, which this Commission denied on April 20, 2006, it is important that this Post Hearing Brief encompass the totality of the legal positions advanced by Cass, in an orderly and comprehensive manner.

### A. The Commission lacks legislative authority, and thus jurisdiction, to award Aquila a § 393.170.1 Certificate of Convenience and Necessity authorizing construction of the South Harper Plant and the Peculiar Substation when the construction of these facilities has already been completed.

#### 1. Statutes construed in *Cass County.*

The centerpiece of the opinion in *Cass County* is § 393.170, RSMo 2000[2] which is set forth in full below:

> 1. No gas corporation, electrical corporation, water corporation or sewer corporation **shall begin construction** of a gas plant, electric plant, water system or sewer system **without first having obtained the permission and approval of the commission.**
>
> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
>
> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall **after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.** Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void. [Emphasis Added]

[2] Statutory citations herein are to RSMo. (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

The Court of Appeals RESTRICTED the Commission's authority under subsection 1 of this statute:

> In light of the distinction acknowledged by the court in *Harline*, and examining the language of section 393.170 in its entirety, we believe that the legislature, which *clearly and unambiguously addresses electric plants* in subsection 1, *did not give the Commission the authority to grant a certificate* of convenience and necessity for the construction of an electric plant *without conducting a public hearing that is more or less contemporaneous with* ***the request*** *to construct such a facility*. [Emphasis Added]

*Cass County,* 180 S.W.3d at 34 (Mo.App. W.D. 2005). The Western District went on to reason that,

> 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. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan. [footnote omitted] *This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months before construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.* [Emphasis Added]

*Id.* at 37 -38.

Because Aquila failed to acquire Commission certification in advance of construction of the South Harper Plant and Peculiar Substation, the trial court's injunction barring Aquila from constructing those facilities was AFFIRMED by the Court of Appeals. As a matter of law Aquila erected the South Harper Plant and the Peculiar Substation illegally.

The statute Aquila relies on in filing its present Application is § 393.170.1. Timing of Commission or County review of a proposal to build a power plant is critical under § 393.170.1. The plain language of the statute confirms that the Commission is **powerless** to issue a certificate

under § 393.170.1 unless it convenes a public hearing contemporaneously with the **request to construct**, not **after** construction. The legislature requires a hearing on the proposal "before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation." *Cass County*, 180 S.W.3d at 37.

The evidence adduced at hearing simply reinforces the already inescapable conclusion that nothing in the Court of Appeals opinion in *Cass County* has amplified the Commission's statutory authority. Cass County submits that Aquila's post facto request for certification under § 393.170.1 is patently disallowed by law.

**2. The final sentences of the Opinion in *Cass County*.**

The absence of statutory authority to consider the application is not cured by the last sentences of *Cass County* but it is upon those sentences that Aquila and Staff have staked their positions. It is true that the Court of Appeals ended its Opinion with this paragraph:

> 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 from 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.

*Cass County*, 180 S.W.3d at 41.

Upon close inspection of these two sentences, the Commission will find no statute mentioned, no new authority conferred and no statement that Aquila or the Commission is relieved from the interpretation and application of § 393.170 the court had just completed. In fact, the first sentence of the last paragraph, which affirms the permanent injunction entered by Judge Dandurand that barred building of the South Harper Plant and Peculiar Substation, is confirmation of the effects of applying § 393.170. That sentence is not an independent source of

authority for entertaining the present application that has been filed post-construction of the facilities. That sentence would defeat the application.

The second sentence of the paragraph is likewise devoid of any suggestion of new or different statutory authority. The sentence is not the genesis of a new avenue for Aquila to follow in acquiring authority. It does not authorize or endorse a path, and leaves for future courts the review of the propriety of any path attempted by Aquila to secure post construction authority to operate the Plant and Substation. The Court of Appeals concluded that § 393.170 could not aid Aquila in acquiring authority to continue operating the plant, but did not want its Opinion to stand in the way of other procedures or means, <u>if any existed</u>, that Aquila might use at the late hour to acquire that authority. This sentence was no excuse to ignore what the court had ruled with respect to the Commission's authority under § 393.170—that applications of this nature must be heard **preconstruction.** As already detailed in the Factual Background above,[3] the sentence was a statement of the obvious but not an eraser of what the court had just ruled. The Court of Appeals addressed the task of interpreting § 393.170 mindful, as are other courts in similar positions, that "it is the function of the courts to construe and apply the law, and not to make it." *Eckenrode v. Director of Revenue* 994 S.W.2d 583, 585 (Mo.App. S.D.1999) citing *Dees v. Mississippi River Fuel Corp.*, 192 S.W.2d 635, 640[2] (Mo.App.1946). No matter what the second sentence of the paragraph may mean to Aquila and Staff, by law that sentence or the court that penned it cannot by implication grant the Commission more authority than what the statutes already provide.

Staff has raised several times the undoubted fact that the Public Service Commission law is a remedial statute that is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. Even so, the last sentence

[3] See the section entitled "Aquila's Request for More Time."

cannot be stretched to encompass a source of authority for Aquila's present application by a liberal construction of the Public Service Commission Law.

> Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted, *State ex rel. City of West Plains v. Public Service Comm'n,* 310 S.W.2d 925, 928 (Mo. banc 1958). **Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the commission is authorized by the statute**, *State ex rel. Kansas City v. Public Service Comm'n,* 301 Mo. 179, 257 S.W. 462 (banc 1923). [Emphasis Added]

*State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. 1979).

Furthermore, and very importantly, the Commission may scan *Cass County* indefinitely and will find **no express provision that makes the Opinion prospective as it applies to Aquila**.[4] The law of the case applies to existing plants to which the same objections were raised. Aquila's South Harper Plant and Peculiar Substation were not carved out -- they are, in fact, existing plants to which the objections were raised. Cass County has preserved its objections to these facilities. The last paragraph of the Court of Appeals' Opinion does not affect this, and does not support a contention that the Opinion is prospective with respect to Aquila.

### B. The Commission lacks legislative authority, and thus jurisdiction, to issue an Order authorizing continued operation of the South Harper Plant and the Peculiar Substation despite their illegal construction.

On pages 5-6 of Attachment A to its Prehearing Brief, Aquila again keys on the final sentence of the Court of Appeals' Opinion in *Cass County*, and in seeming recognition that the Commission's jurisdiction is in doubt, posits that all Aquila needs is the necessary authority to

[4] The Court of Appeals restricted the reach of its opinion to South Harper and the Peculiar Substation and to any other facilities to which objecting litigants had preserved the precise issue addressed in its opinion. To that extent the opinion is prospective but no further. *Cass County*, 180 S.W.3d at 39.

allow the plant and substation *to continue operating*. Such authority would be distinctively different from the certificate of convenience and necessity provided for by § 393.170 which, if timely issued, authorizes construction of electric generation facilities, and therefore raises the issue of whether the Commission has authority to enter an order, short of an order granting a certificate, that allows an illegally constructed generating facility and substation to continue operating.

The County has already set out the extent and limits of the Commission's authority under § 393.170 and without further explication states that the statute does not provide for a sub-grade order merely permitting operation of a plant and there is nothing in the Public Service Commission Law or case authority that discusses orders permitting continued operation of illegally constructed facilities. The last sentence of the Court of Appeals' Opinion provides no clue of where such authority can be found and provides no authority itself.

Aquila points the Commission to no statutory authority to issue what would be, in effect, an Order remediating illegal conduct. All Aquila claims is that the Commission has broad remedial powers. Yet, as the Court of Appeals noted, "[i]n all things [the Commission] acts by virtue of the legislative authority with which it is clothed, and necessarily within the limits of the legislative power; for the stream cannot rise above its sources nor the creature above its creator." *Cass County*, 180 S.W.3d at 34-35, citing *Mo. Valley Realty Co. v. Cupples Station Light, Heat & Power Co.*, 199 S.W. 151, 153 (Mo. 1917).

Moreover, even if the Commission could locate such authority, an order permitting the plant and substation to "operate" would not support an exemption from the requirements of § 64.235. The Court of Appeals requires that for a power plant project to be eligible for the

exemption under § 64.235, it must be specifically authorized to construct a plant by a certificate of convenience and necessity under §393.170.1 otherwise,

> electric companies in the state [would be given] carte blanche to build [power plants] 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. [emphasis original]

*Cass County*, 180 S.W.3d at 37. Thus, should the Commission enter an Order crafted only to extend to Aquila the authority to operate its illegally constructed facilities, Aquila will not have "earned" exemption from § 64.235, and will not, under any circumstances, have secured all of the "necessary authority" it needs to continue operating the Plant and Substation.

**C. The Commission lacks legislative authority, and thus jurisdiction, to award site specific Certificates of Convenience and Necessity or other Orders authorizing either construction or continued operation of the South Harper Plant and the Peculiar Substation, and any attempt to exercise such authority, given the absence of any promulgated rules, standards, processes or procedures by which such determinations are to be made and/or measured, denies Cass County due process.**

Mr. Wood was indirectly the author of the letter to Nanette Trout dated November 5, 2004, attached to Mr. Empson's testimony as JRE-1 **[Ex. 1]** in which, on behalf of the Commission, Robert J. Quinn wrote:

> The MoPSC is involved in the resource planning of Aquila and in review of its generation addition plans and timing but this authority does not extend to an ability to order that a utility not construct a generation facility in a particular location within their service territory unless they voluntarily agree to such a limitation. MoPSC authority in this generation facility's size, fuel type, timing and location will be of particular interest when Aquila request [sic] that this plant be included it its rates—which will typically happen after a plant is constructed and operating.

The Legislative Liaison for the Commission wrote a similar letter to Representative Rex Rector on June 2, 2004. **[Ex. 83]** At paragraph 5, Ms. Toni Messina wrote: "The Commission

has no statutory authority to approve or disapprove an electric utility's decision on plant location . . ."

From this correspondence it is evident that the Commission has consistently understood--and correctly understood--- that its legislative authority did not extend to the siting of power plants. During his cross examination by Cass County, Staff witness Warren Wood testified that nothing has changed with respect to the Commission's legislative authority in this respect, and if an electric utility were to commence building a power plant not certified by this Commission, the Commission could take action to stop construction but would have no way of objecting to the site where construction started. The Commission lacks zoning authority and the Court of Appeals so confirmed. *Cass County,* 180 S.W.3d at 30. The authority at law to halt construction of power plants on unauthorized locations in unincorporated Cass County still rests with the County which has local zoning control by express statutory terms.

With the advent of the Opinion in *Cass County* it is correct that, for the limited purpose of earning an exemption from the obligation to comply with § 64.235, land use issues pertaining to the construction of power plants must be considered by either County Planning Board or the Commission, (not to forget that these hearings must occur **preconstruction)** but the Court of Appeals did not conclude, nor was the Court asked to conclude, that the Commission itself was qualified to hold such a hearing. That question still remains. Aquila's application in this matter has abruptly introduced the Commission to issues which historically it did not consider; by law it is not authorized to consider; and about which currently, it has no rules or standards to rely on in rendering a decision.

Aquila and Staff have proposed to the Commission that in the aftermath of *Cass County*, the Commission now has the authority to review land use issues and siting issues, all as part of

the consideration of "public convenience and necessity." Staff witness Warren Wood has devised a 10-step process for the task. It is inadequate. The process he proposes does not rise to the level that a local planning board would follow in evaluating the land use issues attending proposed construction of the South Harper and the Peculiar Substation, and as such fails the test established in *Cass County*. It is the intent of the Court in *Cass County* that whether they are heard at this Commission or before the County Planning Board, land use issues pertinent to construction of proposed generation facilities must receive qualitatively similar evaluation and be afforded qualitatively similar importance,—a matter that is discussed in detail in paragraph II (B), infra.

Whatever the case, it is clear beyond doubt that the Commission utterly lacks any rules or regulations by which to analyze the land use issues that have been raised in this case. The absence of those rules casts the parties and the Commission alike adrift in a virtually shapeless proceeding that yearns for borders under sections of the Public Service Commission Law that are themselves silent on those issues. The parties are justifiably at a loss on appropriate evidence to adduce and offer, on the standards to apply, and as is shown by Mr. Wood's creation of a 10-step process, are left to their own devices to hastily "engineer" something that would work "just for this case." Staff and other parties are faced with the "mess" that is the Plant and Substation through which they must "fly blind." Mr. Wood has testified that cases following this one will have different rules and procedures apply. The process due has not been accurately or lawfully defined, and therefore has been denied.

It deserves to be repeated that Aquila's application in this case invites the Commission to hurriedly venture into "siting" energy generation facilities without express legislative authority to do so, and in the absence of promulgated rules. The subject matter is fraught with a multitude

of thorny issues and foreshadows future judicial review of fundamental questions relating to jurisdiction and due process. The Commission has, in contrast, the authority to avoid this problem by directing Aquila to secure, as a condition of any certificate issued in this case, local land use approval for the South Harper Plant and Peculiar Substation—a practice that is consistent with the Commission's previous practice, and with long standing cases that recognize the concurrent jurisdiction of the Commission and local governments. [5]

In its prehearing brief, the Staff at pages 8- 21 discusses Commission cases in which certificates of convenience and necessity were issued for construction of power plants. Of course all of the cases predated the opinion in *Cass County* and to the extent the Commission gave limited consideration to land use issues in the context of issuing certificates for those plants, it NEVER did so with the intention of pre-empting local control over such issues. Furthermore, it appears that in none of those cases did the Commission approve the location in lieu of approval or over the objection of a local government.

Staff did not include in its canvas of Commission cases the Commission's decision in *In the Matter of the Application of Missouri Power & Light Company,* 18 Mo. P.S.C. (N.S.) 116 (1973) which Cass County has brought several times to the Commission's attention, and which is favorably cited by the Court of Appeals in its Opinion. *Cass County*, 180 S.W.3d at 30. As best as can be determined, this is the only case in which the Commission comes near the issue of pre-empting local zoning authorities and it handled that issue consistently with Cass County's present arguments. In evaluating an intervenor's request to move the location of the proposed plant, the Commission, held:

> **For us to require the Applicant to move the proposed site to the alternative site suggested . . . would be to suggest a location that is not now zoned for**

[5] *See, eg., State ex inf. Shartel, ex rel. Sikeston v. Mo. Utilities Co.*, 53 S.W.2d 394, 398 (Mo. banc 1932); *In the Matter of the Application of Ozark Utilities Company*, 26 Mo. P.S.C. 635, 639 (1944)

> **industry, but is zoned residential. In short, we emphasize we should take cognizance of - - - and <u>respect</u> - - - the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning**. [emphasis supplied]

*Id.* at 4 .

In sum, affording the process due the parties in this case has not been achieved. Adding a condition to any certificate issued in this case requiring Aquila to obtain local zoning approval avoids due process objections and complies with past policies and practices of this Commission and meets the intent of the opinion in *Cass County.*

**II. <u>Assuming, arguendo, the Commission has the jurisdiction to entertain the relief requested by Aquila in its Application, public hearings before the Commission can only relieve Aquila, at best, of the obligation to comply with § 64.235, and in conducting its hearings, the Commission must independently evaluate land use issues in the same manner as would have been reviewed by the County Planning Board</u>.**

If the Commission concludes it has legislative authority to issue a § 393.170.1 certificate of convenience and necessity authorizing construction of the Plant and Substation despite the fact the facilities are already built; or if the Commission concludes it has the alternative authority to issue an Order authorizing the continued operation of the Plant and Substation despite their illegal construction; and if in the context of either of these determinations, the Commission concludes that the Opinion has extended it "siting authority," which the Commission believes it should exercise in this case despite the absence of any promulgated rules, standards, guidelines or processes relating to siting, the next substantive matter that must be explored is the manner in which this Commission must consider land use concerns, such as zoning, as a part of its determinations. The reference point must be the Opinion.

**A. The Opinion does not permit a "public hearing" before the Commission to supplant all County statutory authority to regulate land use, but only that authority identified in § 64.235. Aquila remains subject to the County's authority under § 64.255, which authority is manifested in the Zoning Ordinance**

Aquila and the Staff suggest that the Opinion authorizes Aquila to elect, at its option, to proceed solely before the Commission to secure authority to construct the Plant and Substation, and that such an election pre-empts all obligations Aquila has to comply with all statutes setting forth the County's authority to control land use through both a master plan process and through zoning. ***This presumption is fatally flawed***. For its source, the presumption relies on a single sentence in the Opinion which states: ". . . the legislature intended that a public hearing relating to the construction of each particular electric plant take place in the months *before* construction begins, so that current conditions, concerns and issues, *including zoning*, can be considered, whether that hearing is conducted by the county or the Commission." *Cass County*, 180 S.W.3d at 37-38. This sentence cannot be read in isolation. Rather, the sentence must be read in the context of the entire Opinion, which discusses the criteria necessary to earn exemption from the obligation to comply with § 64.235, a statute relating to the planning board's authority to conduct development review of proposed improvements to determine consistency with the County's master plan. Thus, it is erroneous to read more into the Opinion than that which was considered by the Court of Appeals. The Opinion does not hold that a public hearing before the Commission can supplant all County statutory authority to regulate land use -- but only that authority identified in § 64.235.

When it pronounced that a public hearing was required before the construction of a plant to consider issues such as zoning, and that such hearing could be conducted by "the county or the Commission," the Court of Appeals was in the midst of a lengthy discussion about what was

necessary to earn the exemptions described in § 64.235. *Cass County*, 180 S.W.3d at 30-40. The Court of Appeals first had to determine whether the exemptions set forth in § 64.235 were limited in their availability to "municipalities, counties, public boards or commissions," as the exemption language appeared to directly modify this phrase. *Id.* at 31. The Court of Appeals concluded the exemptions described in § 64.235 were not limited in their availability to the small class of developers mentioned in the statute, and, therefore, that Aquila could qualify for exemption under § 64.235. *Id.* at 32.

The Court then tackled whether Aquila met the criteria of any of the § 64.235 exemptions. The first exemption discussed by the Court was a "permit by the county commission issued after public hearing in the manner provided by section 64.231." Section 64.235; *Cass County*, 180 S.W.3d at 32. The Court of Appeals found ". . . Aquila did not seek a permit from the county commission before commencing construction of the South Harper Plant and Peculiar Substation . . ." *Id.* Because Aquila had not sought a § 64.231 permit as a means of securing § 64.235 exemption, the Court of Appeals said ". . . we must determine whether it has been authorized by the Commission to build these facilities, and, thus, is exempt." *Id.*, referring to the second potential exemption from the mandatory obligation to comply with § 64.235. The Court of Appeals then engaged in considerable discussion about what § 393.170 requires from the Commission before an electric generation facility can be constructed, and of the legislature's intent in requiring "specific authorization" to construct such facilities in order to secure § 64.235 exemption. *Id.* at 32-40. After careful and deliberate analysis, which included analysis of *Harline*, the Court of Appeals concluded that a specific CCN is required by § 393.170.1 before a plant is constructed, and may only be issued following contemporaneous public hearings, and

that in the absence of such a contemporaneously procured CCN, a utility could not claim exemption from § 64.235.

It was in the context of discussing these two exemptions that the Court then concluded that the legislature intended, in order for a utility to earn exemption from the mandatory development review obligations described in § 64.235, that a public hearing be conducted before the "county or the Commission" before a plant is built so issues and concerns, including zoning, could be discussed. *Cass County*, 180 S.W.3d at 37-38. The "public hearing before the county" the Court was referring to, of course, was the public hearing necessary to secure a § 64.231 permit as a means of earning § 64.235 exemption. *Cass County*, 180 S.W.3d at 37-38, f.n. 14. The Opinion's reference to "county" in this passage relates solely to the subject matter of the Opinion -- the means by which an exemption could be earned from § 64.235 by either a certificate authorizing the Plant and Substation from the Commission or via a permit from the "county commission" after public hearing in the manner provided by § 64.231. The reference to "county" in this passage does not refer to all statutory authority of the County to regulate land use.

Illustrative of this conclusion is a simple review of what was intended by the legislature's reference to a "permit by the *county commission* . . . in the manner provided by section 64.231." Section 64.231 discusses a first class non charter county planning board's authority to amend the master plan following public hearings. Curiously, there is no reference to the phrase "county commission" in § 64.231. However, this apparent confusion is easily solved. From 1959, when § 64.231 was enacted, until 1994, when § 64.231 was amended, the phrase "county planning board" as appears in the present version of § 64.231 formerly read "county planning commission." **[See Historical and Statutory Notes to § 64.231]** The reference, therefore, in

§ 64.235 (which was also enacted in 1959) to a "permit by the *county commission*" was an obvious reference to the phrase "county planning commission" included in § 64.231, as that is the only body mentioned in, and thus the only body authorized by, § 64.231 to issue such a permit. Section 64.235's reference to "county commission" was not modified in 1994 to correspond to the amendment to § 64.231 as to alter "county commission" to read "county planning board." However, there is no doubt that the § 64.235's reference to the ability to earn an exemption if the developer seeks a "permit by the county commission . . . in the manner provided by § 64.231" means a permit secured from the County Planning Board. Otherwise, the exemption is rendered meaningless. *State v. Winsor*, 110 S.W.3d 882, 887 (Mo. App. W.D. 2003) (courts do not presume legislature has enacted a meaningless provision), cited with approval in *Cass County*, 180 S.W.3d at32.

Thus, the Opinion's discussion of the potential exemption that can be earned from § 64.235 via public hearings before either the "county or the Commission" has no bearing on other statutory powers held by the County to regulate land use, and particularly those afforded the County Commission as distinguished from the County Planning Board. The "County Commission" is an elected body, has different statutory duties and responsibilities from those of the Planning Board, and has NO authority to take any action with respect to review of developments for consistency with the master plan under § 64.235, and no authority to amend the master plan under the unambiguous provisions of § 64.231. The Opinion recognizes and emphasizes the distinct legal rights and duties of the County Planning Board and the County Commission. *Cass County*, 180 S.W.3d at 31-32. As Aquila's eligibility for an exemption from the County Planning Board's authority described in § 64.235 was the subject of the Judgment and of the Opinion, and as that discussion has nothing to do with the authority of the County

Commission, it necessarily follows that the Court of Appeals' reference to a public hearing held "before the county or the Commission" in advance of construction of a plant was limited in its applicability solely to the means by which an exemption could be secured from the mandatory County Planning Board development review envisioned by § 64.235. The Opinion cannot be read to authorize a Commission public hearing to serve as a substitute for the exercise of all County land use authority under all statutes extending the County land use regulatory authority. In fact, the Court of Appeals made the limitation of the scope of its Opinion to § 64.235 quite clear by expressly noting that § 64.255, the statute which describes the County Commission's zoning authority in first class non-charter counties (as contrasted with the Planning Board's § 64.235 master plan review authority and its § 64.231 master plan amendment authority) "does *not* include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions." *Cass County*, 180 S.W.3d at 32, f.n. 8.

At best, therefore, the Court of Appeals envisioned this Commission could, in lieu of the County Planning Board, conduct "public hearings" before a plant is constructed to consider land use issues, including zoning, as a means for securing an exemption from the otherwise mandatory obligation to comply with § 64.235. This conclusion is borne out by the last paragraph of the Opinion. There the Court held ". . . 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 from the county commission or the Public Service Commission."* *Cass County*, 180 S.W.3d at 41. [Emphasis added] As the Judgment discussed whether Aquila had satisfied the criteria for the exemption from § 64.235, and entered an injunction because Aquila had not done so, this passage from the

Opinion is necessarily limited to an affirmation that Aquila had not met the criteria of either of the potentially applicable exemptions set forth in § 64.235.

In summary, Aquila is not exempt from the County Commission's exercise of its authority under § 64.255, which authority is manifested and embodied in the County Zoning Ordinance. Aquila admits it has not complied with the County Zoning Ordinance in constructing the Plant and Substation. **[Tr. Vol. 3, p. 229]** Though Aquila might have been able to secure exemption from § 64.235's obligation to secure the County Planning Board's review of its proposed developments for consistency with the County Comprehensive Plan had it secured, before construction, an appropriate § 393.170.1 CCN for the Plant and Substation, Aquila is not, under any reading of the Opinion, exempt from the obligation to comply with the County's Zoning Ordinance.

**B. The Commission must evaluate land use issues, including zoning, <u>independent</u> of the issue of "need" for the Plant and Subdivision, and must afford those issues a qualitatively similar review as to that which would have been employed by the County Planning Board under § 64.231 and § 64.235.**

The Court of Appeals stated that a utility could earn exemption from the mandatory obligations of § 64.235 to submit a proposed plant to the County Planning Board for development review if it submitted the proposed location of a plant to "public hearings" either before the Commission or the County Planning Board so that issues and concerns, including zoning, could be considered. The Court of Appeals did not state that it would be appropriate for pertinent issues and concerns, including zoning, to be given qualitatively different consideration if the "public hearing" required to earn exemption from § 64.235 was conducted before the Commission versus the County Planning Board. Rather, it is evident in reviewing the Opinion that the Court of Appeals intended that the public hearings and the determination made as a result, afford land use issues, including zoning, <u>qualitatively similar treatment</u>, to avoid "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 regulations . . . ." *Cass County,* 180 S.W.3d at 37. Applied to this case, Cass County submits, this Commission must consider the zoning of the Plant and Substation sites, and their compatibility with the County's Comprehensive Plan, in the same or qualitatively similar manner as these issues would have been considered by the County Planning Board under § 64.235 and thus independently from, and uninfluenced by, the issue of the "need" for the Plant and Substation.

The Opinion supports this view. In discussing "pre-emption," the Court of Appeals noted Aquila's argument that "it is exempt from Cass County's zoning regulations because the Commission has exclusive authority to regulate public utilities." *Id.* at 29-30. The Court rejected this argument, finding ". . . the legislature has given [the Commission] no zoning authority, nor does Aquila cite any specific statutory provision giving the Commission this authority." *Id.* at 30. The Court of Appeals concluded that the Commission's broad regulatory powers over public utilities do not pre-empt a municipality's ability to regulate the location of a power plant. *Id.* Demonstrative of the Court's message was its favorable citation to the holding in *Mo. Power & Light Co.*, 18 Mo. P.S.C. (N.S.) 116, 120 (1973) where this Commission held, "[i]n 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." *Id.* [Emphasis added] The Court of Appeals clearly endorsed the separation of determination of the distinct issues of "need" for a plant (measured by the § 393.170.1 standard of "public convenience and necessity") and of the propriety of the location of a plant.

Separate determination of "need" versus "location" is not inconsistent with the Courts' later conclusion that the "public hearing" required to earn a § 64.235 exemption can occur before

either the Commission or the County Planning Board. In fact, the Opinion provides a road map for separate determination, and ultimate integration, of the Commission's regulatory authority over determining the need for a plant, and the County's regulatory authority over the location of a plant. After determining that zoning issues, as relate to a plant's location, are not pre-empted by the Commission's broad regulatory authority, the Court of Appeals held, "[w]hile 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." *Id.* at 30. Recall, the Court of Appeals held § 64.255, which permits the County Commission to regulate and enforce zoning in the County "does not include a public utility exemption that is to be applied across the full range of non-charter first class county zoning provisions." *Id.* at 32, f.n. 8. Thus, though the Commission may well have exclusive jurisdiction over the issue of "adequacy of customer service," or "need," it must integrate the exercise of that authority with the County's right via its Zoning Ordinance to regulate "where a public utility builds a power plant." *Id.* at 30. This is not a departure for the Commission. It is evidenced by the Commission's past practice. *Mo. Power & Light Co.*, 18 Mo. P.C.S. at 120.

In describing how these seemingly inconsistent "powers" can be harmonized, the Court of Appeals uses the example of *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. banc 1962). *Cass County*, 180 S.W.3d at 30. In *City of Manchester*, the Supreme Court found that a statute which authorized a city to construct a sewage treatment plant within a stated number of miles of its city limits did not give the city the right to select the exact location of the plant within this area, and that the public interest was best served in requiring the plant be

constructed in accordance with county zoning laws. *City of Manchester*, 360 S.W.2d at 642. In other words, though the City of Manchester had the statutory right to decide whether to construct a sewage treatment plant within a generalized area (within a range outside its city limits), that authority did not override, and could be harmonized with, St. Louis County's right to insist that the exact location of the plant be selected consistent with county zoning.

A parallel road map was intended by the Court of Appeals to be followed in this case. The Commission has the authority to decide whether to authorize, in advance, construction of an electric plant within a generalized area (in this case, Aquila's service territory). However, this authority does not override, and must be harmonized with, Cass County's right to insist that the exact location of the plant be selected consistent with the County Zoning Ordinance. See § 64.255; *Cass County*, 180 S.W.3d at 32, f.n. 8. See also *Cass County*, 180 S.W.3d at 40 ("while counties may not have the authority to issue franchises as to the construction of power plants, there is nothing . . . that precludes a county from exercising its zoning authority, if any, over the location of a power plant).

The same result would be reached if Aquila had elected to seek exemption from § 64.235 by submitting the proposed locations of the Plant and Substation to the County Planning Board for a permit under § 64.231. This process would have resulted in a "thumbs up" or "thumbs down" determination of the consistency of the proposed locations for the facilities with the County's Comprehensive Plan. As both the Plant and Substation are proposed at locations that are zoned agricultural, and as the Plant and Substation are not "permitted uses" under the County's Zoning Ordinance, the Planning Board would have required, as a condition of Comprehensive Plan review, amendment and/or approval, rezoning of the sites, or the procurement of SUP's for the sites. The Comprehensive Plan is not a zoning document and does

not override zoning. Rather, a Comprehensive Plan provides the County, and is to be considered by the County Commission as it considers zoning decisions. Had Aquila sought exemption via § 64.231, the County Planning Board would not only have been evaluating the location of the Plant and Substation independent of any determination of "need" for the Plant and Substation, but it would have required Aquila to secure proper zoning for the Plant and Substation sites from the County Commission pursuant to its § 64.255 authority as a condition of reviewing consistency with the Comprehensive Plan.

In summary, the process and determination used by the Commission must be qualitatively similar to that which would be employed by the County Planning Board. The issues of the "location" of the Plant and Substation must be evaluated and determined of their own right, independent of the Commission's existing obligation to determine "need." As the Missouri Supreme Court noted, the public interest is best served by harmonizing, while separately recognizing these "competing" authorities. *City of Manchester*, 360 S.W.2d at 642. Thus, the Commission must require Aquila to comply with the County's Zoning Ordinance (as required by § 64.255), just as the County Planning Board would require, as the proposed sites for the Plant and Substation are not properly zoned. Because the sites are not yet properly zoned, the question of the Plant's and Substation's consistency with the County's Comprehensive Plan, and the related question whether the 2003 or 2005 version of the Comprehensive Plan controls this determination, are premature issues, immaterial to the disposition of this dispute. If the Commission fails to consider "location" independently from "need," and fails to require Aquila to comply with § 64.255, consistent with past Commission practice, and with the Opinion's finding that Aquila is not exempt from that statute, then, in defiance of the Opinion, the Commission will ignore zoning.

### C. The process to review Aquila's selection of the South Harper Plant and Peculiar Substation locations proposed by Staff is not supported by the Opinion.

In sharp contrast to the approach the Opinion directs this Commission to follow, Aquila and Staff endorses a process which combines, and in fact collapses, the determinations of "need" and "location," into the phrase "public convenience and necessity" as used in § 393.170.1. By both parties' admissions, the propriety of a proposed location for an energy generation facility, including zoning considerations, would be amongst several factors to be evaluated by the Commission in determining whether to authorize construction of such a facility. Warren Wood identified a 10-step process by which the Commission would review whether a utility's site selection was "reasonable."[6] Wood's factors do not require zoning compliance. Moreover, Wood's factors leave to a utility's sole discretion the determination when it has "done enough" to address local concerns (those identified in steps 6 through 10 of Wood's process) as to warrant abandoning those steps toward the goal of getting a plant built. Wood admitted that land use issues can be consumed by the issue of need for a plant. Aquila obviously agrees with this approach. One of Aquila's Senior Vice Presidents, Jon Empson, testified that "the concern about the placement of the site is collapsed within . . . the broader public interest standard." **[Tr. Vol. 3, p. 232]**

If the Commission adopts Staff's proposed 10-step process, it will be relegating land use issues, including zoning, to the category of discardable factors. The Commission will be affording virtually no weight to such issues, instead imposing nothing more than a

[6] Wood acknowledged his "process" had been designed in response to, and for the purpose of this case. The "process" has not been submitted to or through the Commission's rule making procedures, and has never been previously utilized by the Commission. The parties, including Cass, had no input into the formulation of the "process," nor any notice that it would be the measure recommended by Staff by which to gauge the "reasonableness" of Aquila's decision until Wood's testimony was pre-filed. **[See discussion at paragraph I (C), supra]**

"reasonableness" standard on a utility to show that it has followed a "process" crafted by Staff to insure a utility's success.

If the Commission adopted the approach recommended by Staff, it is difficult to conceive why a utility would ever elect to submit location issues to the County Planning Board to secure an exemption from § 64.235 via a § 64.231 permit, as the utility's proposed location for a plant would be afforded much less, if any, meaningful scrutiny by the Commission as compared to the scrutiny of the County Planning Board. This is not the outcome the Court of Appeals envisioned or intended when it said a public hearing to procure exemption from § 64.235 could be conducted before "either the county or the Commission."

The Opinion makes it clear plants cannot be placed wherever utilities want to put them, and that utilities do not have eminent domain authority to place plants in any location they see fit. *Cass County*, 180 S.W.3d at 37, 41. Yet, the approach suggested by Staff and endorsed by Aquila yields this very result. The "power" to site plants wherever a utility wishes will be indirectly afforded to utilities, despite the Opinion's admonition, as location will be given consideration, at best, in form and not substance, as in all cases the argument can be advanced by the utility that the "need" for a plant consumes and surmounts concerns over its location. In short, this Commission would be ignoring the Opinion, which clearly notes:

> 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."

*Id.* at 41.

Unfortunately, questioning by the Commission during these proceedings served as a demonstrative example of the Commission's apparent strong reluctance to view the location of a plant as an equally important determination to be made independent of the determination of "need." Commissioner Connie Murray inquired of Warren Wood whether it would be appropriate to impose tariffs on the County should the Plant be forced to be dismantled, and should Aquila's ability to serve its customers be compromised. Her questioning suggested that Cass County customers could be required by the Commission to "bear the brunt," both as to the cost and availability of energy, if such a "predicament" arose. **[Tr. Vol. 3, p. 841-843]** Commissioner Murray's questions suggest that intervenors, like Cass, could be subjected to different rates or a lower quality of service in the form of curtailment tariffs as a result of raising issues and concerns about the Plant's and Substation's location to the Commission for due consideration. Cass is certain that the Commission would not give the generation and provision of electricity higher priority than compliance with the laws of this state and excuse lawlessness by a public utility on the ground that it was meeting public needs. More certain is that the Commission would not approve tariffs for classifications of customers based upon the exercise of their freedom to enforce the law against a public utility, or their quiet acceptance of a public utility's disobedience to the law.

## III. Notwithstanding any action taken by the Commission, Aquila will not be relieved of its obligation to submit the location of the Plant and Substation to the County Commission for rezoning and/or for a SUP pursuant to § 64.255.

Section 64.255 describes the zoning authority of the County Commission in a first class non charter County. This authority is independent from the County Planning Board's authority to review developments for consistency with the County's Comprehensive Plan under § 64.235.

As noted in paragraphs II (A) & (B), supra, the Opinion did not exempt Aquila from the obligation to comply with § 64.255. In fact, the Opinion expressly noted that § 64.255 does not include an exemption for utilities from the obligation to comply with County zoning in first class non charter counties.

Aquila concedes the Plant and Substation are constructed on agriculturally zoned tracts which do not permit such improvements according to the County's 1997 or 2005 Zoning Ordinance. If improvements, even those already constructed, are found not to have procured necessary zoning, courts will order their removal. *Heidrich v. City of Lee's Summit*, 26 S.W.3d 179, 183-184 (Mo. App. W.D. 2000) ("Even if construction is complete, we must determine whether zoning ordinances were violated and order the appropriate remedy. This Court has the authority to order the removal of the building if we determine that it was erected in violation of a zoning ordinance.")

The Opinion is final. Aquila is bound by the Court of Appeals' determination that it is not exempt from the County Commission's zoning authority under § 64.255. Thus, no matter what action is taken by this Commission, under no circumstance will Aquila be relieved from the obligation to attempt to comply with § 64.255, or from the consequences of failing to do so.

Aquila has not, by coming to this Commission, sought all of the "necessary authority" it needs to allow the Plant and Substation to continue operating. Cass County advised Aquila on February 1, 2006, that it would expect Aquila to file an SUP or rezoning application given the trial court's extension of the dismantling date because Cass County believed, based on the Opinion, that Aquila was required to do so. **[Ex. 88]** Aquila ignored the County, once again. Regardless, of the action this Commission takes as it determines Aquila's Application, Aquila won't have what it needs to continue operating the Plant and Substation. It will be up to Aquila

to then persuade Judge Dandurand why it should be provided more time beyond May 31, 2006 to secure the authority it must have from the County, given it once again rolled the dice by ignoring the County's February 1, 2006 guidance that Aquila would be required to comply with the County's Zoning Ordinance in addition to securing "authority" from the Commission.

**IV. Without waiving, and without prejudice to, the positions otherwise herein advanced by Cass County, should the Commission determine it has the jurisdiction and authority to entertain and to grant, in some measure, Aquila's Application, it should impose appropriate conditions on any CCN or Order issued authorizing either post facto construction of the Plant and Substation, or continued operation of the Plant and Substation despite their illegal construction, which conditions must take into consideration the facts and circumstances giving rise to the "mess" that is the South Harper Plant and the Peculiar Substation.**

Though Cass County vigorously contests the Commission's authority to issue a retroactive § 393.170.1 CCN authorizing the construction of the Plant and Substation, should the Commission nonetheless issue such a CCN, it is empowered by § 393.170.3 to "impose such condition or conditions as it may deem reasonable and necessary." Further, though the heavily relied on last sentence of the Opinion identifies no source for the "necessary authority" therein described, for Aquila to secure the ability to continue operating the illegally constructed Plant and Substation, it is not contested that this sentence anticipates that such "necessary authority" will be subject to "whatever conditions are appropriate."

The circumstances of this case warrant the imposition of conditions on any CCN or Order issued by the Commission that take into consideration the fact that Aquila undertook, at its risk, to build the Plant and Substation despite the issuance of a injunction that placed Aquila on clear notice it was not exempt from the obligation to submit its proposed improvements to the County Planning Board for development review under § 64.235. The conditions must take into consideration that Aquila admittedly did not listen to or respect its neighbors or Cass County by forging ahead with its plans to construct the Plant and Substation to achieve its self-imposed

construction deadline. The conditions must take into consideration that Aquila has never secured proper zoning for the Plant and Substation sites and that it is not exempt from the obligation to do so. The conditions must take into consideration the impact of the Plant and Substation on neighboring residents, and must seek, so long as the Plant and Substation are in operation, to minimize, and/or to compensate for that impact. In short, the conditions must be framed to discourage Aquila or any other utility from the type of arrogant disregard for the law portrayed by Aquila's "build it now, seek permission later" attitude so smugly "wrapped" in the disguise of the obligation to provide service. *As such, the following conditions should be attached to any CCN or Order issued from this Commission*:

**a. Aquila must comply with the County Zoning Ordinance, adopted pursuant to the County Commission's § 64.255 authority, and must secure, pursuant to the Zoning Ordinance, approval for rezoning or a SUP for the Plant and Substation sites (subject to such conditions as the County might reasonably impose) within nine (9) months of the Commission's ruling, and if it does not do so, Aquila must dismantle the Plant and Substation within eighteen (18) months of the Commission's ruling.**

Aquila is not exempt from the obligation to comply with the County's Zoning Ordinance. Without compliance with the County's Zoning Ordinance, the Plant and Substation remain illegal, non-conforming uses, which is not acceptable. Without compliance with the Zoning Ordinance, Aquila will not have secured all "necessary authority" to continue operating the Plant and Substation. Though approval of applications for rezoning and/or for a SUP for the Plant and Substation cannot be assured, the County is entitled to make this decision, subject

to the established and accepted standards and factors by which such decisions are made and measured. Moreover, should the County deem it appropriate to favorably entertain the applications, it would have the authority to impose such conditions as are reasonable, including, without limitation, increased screening and buffering requirements, and other steps designed to minimize the environmental and detrimental visual impacts of the facilities and to lessen their impacts on surrounding properties. This is the function of the County zoning process, and Aquila is not exempt from the obligation to submit to this process.

**b. Should aggrieved citizens initiate suit against the County relating to the County's processing of rezoning or SUP applications as a means to remediate the illegally constructed Plant and Substation, Aquila must reimburse the County the costs, expenses, expert witness fees and attorneys' fees it incurs.**

Aquila has created the predicament which causes the County to be required, for the first time, the consider rezoning and/or SUP applications as means of remediating illegal land uses. Though after the trial court extended the time before which Aquila was required to dismantle the facilities, Cass County immediately advised Aquila it expected Aquila to submit rezoning or SUP applications for the Plant and Substation, the County should not be required to bear the expense of any litigation commenced by others challenging its authority to consider such applications.

**c. Aquila may not expand the South Harper Plant under any circumstances beyond the existing 3 CT's located on the "south half" of the parcel, and may not expand the Substation.**

To allow the expansion of the Plant or the Substation, given the circumstances of their construction, would only compound the deleterious impacts of the facilities complained of by neighboring property owners. Given the circumstances of the Plant's and Substation's construction, they simply should not be allowed to be expanded.

**d. Aquila must reimburse the County the costs, expenses, expert witness fees and attorneys' fees it incurs in this proceeding and in all of the related proceedings and litigation which have preceded this proceeding, whether before the Cass County Circuit Court, the Court of Appeals or this Commission.**

The taxpayers of Cass County should not be forced to pay legal and other fees and expenses incurred in an effort to successfully enforce land use and development regulations intended to protect the health and welfare of County residents and their property. By gambling in the face of an injunction, Aquila chose to transfer its burden as a property developer to obtain land use approvals to the County, forcing the County to prove its regulatory authority, and to prove that construction of the Plant and Substation were proceeding illegally. Cass County has maintained a consistent position—that it has the authority and right to review all development proposals for uses not expressly reserved by statute, and the right to enforce its Zoning Ordinance.

**e. Aquila will not utilize the South Harper Plant to generate "off-system sales."**

Aquila has made the point throughout these proceedings that the need for the Plant and Substation are due to the increased population and demand for power

within Cass County. Thus, the Plant and Substation should only be used to generate necessary power, not to accrue additional profits to Aquila so it might benefit from unapproved and illegal construction. Additionally, "off-system" sales would increase the amount of time that the Plant runs, increasing the noise and pollution that neighbors will be forced to accept.

**f. Aquila must pay the County $1,000.00 a day from January 1, 2005 through the date the Plant site secures rezoning or a SUP, or is dismantled, which ever first occurs, as the penalty for an illegal use envisioned by the County's Zoning Ordinance.**

Aquila must accept responsibility for its actions. It has yet to do so. Choosing to ignore the County's development review and zoning process with the anticipation that it was more palatable to "receive forgiveness [from the Commission] than ask permission [of the County]" sets an alarming precedent with which counties and cities across Missouri will have to contend regardless of Staff's assertion that this is only a "one-time" event.

**g. Aquila must pay the County $1,000.00 a day from January 1, 2005 through the date the Substation site secures rezoning or a SUP, or is dismantled, which ever first occurs, as the penalty for an illegal use envisioned by the County's Zoning Ordinance.**

See Comment to the immediately preceding condition.

**h. Aquila must place in escrow cash in the amount of $5 Million which sum can be drawn upon by any aggrieved person or entity toward satisfaction of a final non-appealable judgment against Aquila relating to personal or**

**property damages occasioned by the Plant and/or Substation, with the proviso that the posting of said sum will not control or limit the civil rights of any person or entity, the amount of any judgment that may be secured, or the sources for seeking satisfaction of any judgment.**

Aquila must provide a readily available pool of resources for recovery for those whose property has been negatively impacted, and for those who have otherwise been damaged by Aquila's actions.

**i. Aquila must agree to purchase at fair market value, arrived at following acceptable appraisals, the property of any interested resident living within one mile of the boundaries of the 74-acre South Harper Tract, and within one mile of the boundaries of the 55-acre Peculiar Substation Tract.**

Those property owners most impacted by Aquila's illegal actions should have the opportunity to sell their property to Aquila at its fair market value before the facilities were constructed.

**j. Aquila must agree to relinquish its presently posted $350,000 bond to the County for its future use for road repair and maintenance in the areas in and around the South Harper Plant.**

**k. The $20 Million bond posted by Aquila as a condition of securing additional time before being required to dismantle the Plant and Substation shall remain posted until Aquila either secures § 64.255 approval for the Plant and Substation or the Plant and Substation are dismantled, as required by these conditions.**

**l. Aquila must agree to stipulate that the Judgment entered by Judge Dandurand on January 11, 2005, shall remain in force and effect, subject to further appropriate enforcement proceedings, including without limitation, contempt proceedings, in the event these conditions are not performed.**

**m. In the event the Plant or Substation are transferred in any manner as to be owned or operated by any person, entity or municipality other that Aquila, the facilities will be immediately dismantled.**

This condition is needed to insure that any subsequent "business decisions" by Aquila do not circumvent judicial process or the actions of this Commission.

**n. These conditions must be placed in recordable form, and executed by Aquila, and shall be duly recorded in the Cass County Recorder of Deeds office against the 74-acre South Harper Tract and the 55-acre Peculiar Substation Tract, and will constitute covenants and restrictions running with the land.**

## CONCLUSION

Cass County requests the Commission deny Aquila's Application as it seeks relief beyond that which this Commission can award, and seeks relief that denies Cass County due process, for the reasons herein stated. In the alternative, Cass County requests the Commission determine the propriety of the Plant and Substation locations independent of determining the "need" for the facilities, employing the same or similar process as that which would be employed by the County Planning Commission. As such, the Commission should reject Staff's suggested 10-step process as inadequate, and must in any case find that whatever action the Commission may take, in no event is Aquila relieved of the obligation to comply with the County's Zoning Ordinance pursuant to the authority afforded the County Commission to adopt same under § 64.255, a statute not limited in its reach by an exemption that favors public utilities. Finally, and again in the alternative, should the Commission issue a CCN retroactively authorizing the construction of the Plant and Substation, or should the Commission issue an Order authorizing the illegally constructed Plant and Substation to nonetheless continue operating, such CCN or Order should be appropriately conditioned as herein described.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: /s/ Mark W. Comley
Mark W. Comley No. 28847

601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537

Telephone (573) 634-2266
Facsimile (573) 636-3306
Email comleym@ncrpc.com

CINDY REAMS MARTIN, P.C.

By:___/s/Cindy Reams Martin__ _____
Cindy Reams Martin No. 32034

408 S.E. Douglas
Lee's Summit, Missouri 64063

Telephone (816) 554-6444
Facsimile (816) 554-6555
Email crmlaw@swbell.net

CASS COUNTY COUNSELOR

By:___/s/Debra L. Moore_____
Debra L. Moore No. 36200

Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701

Telephone (816) 380-8206
Facsimile (816) 380-8156
Email dmoore@casscounty.com

Attorneys for Cass County, Missouri

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 12th day of May, 2006 to:

Office of General Counsel at gencounsel@psc.mo.gov;
Office of Public Counsel at opcservice@ded.mo.gov;
James C. Swearengen at lrackers@brydonlaw.com.
Stuart Conrad at stucon@fcplaw.com and
David Linton at djlinton@earthlink.net;
John B. Coffman at john@johncoffman.net;
Matthew B. Uhrig at muhrig_lakelaw@earthlink.net;
Gerard Eftink at geftink@kc.rr.com; and
E. Sid Douglas at SDouglas@gilmorebell.com.

**/s/ Mark W. Comley**
Mark W. Comley