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 Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Control, Manage and 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

STAFF'S SUGGESTIONS IN OPPOSITION TO
THE PROPOSED PROCEDURAL SCHEDULE
OF CASS COUNTY MISSOURI, STOPAQUILA.ORG, AND NEARBY RESIDENTS

COMES NOW the Staff of the Missouri Public Service Commission (Staff") and for its Suggestions In Opposition to the Proposed Procedural Schedule of Cass County Missouri, StopAquila.org, and nearby residents (Frank Dillon, Kimberly Miller and James E. Doll), (collectively the "Cass County Parties") states that:

The procedural schedule proposed by the Cass County Parties should not be approved by the Commission because it contemplates a final decision by the Commission long after the May 31, 2006 deadline set by Judge Joseph P. Dandurand on January 27, 2006. As the Commission is well aware, Judge Dandurand in a related case, ordered that Aquila must begin demolition of South Harper Generating Station by May 31, 2006. Irrespective of whatever their intentions may be, the Cass County Parties have proposed a procedural schedule that goes beyond the time that Judge Dandurand has provided to Aquila to obtain an Order from this Commission.[1]

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[1] Transcript of January 27, 2006 hearing before Judge Joseph P. Dandurand in *Cass County v. Aquila, Inc.*, Cass County Case No. 17V010401443: (continued on next page)

> The Court: Okay. This is in the nature of a motion filed by Aquila to extend the stay of an injunction. Mr. Youngs, you may proceed with your argument. [Tr. 2]

1. Additionally, Staff notes that the County Parties state that their schedule "takes into account that several parties intend to file motions to dismiss this application on grounds including that it seeks approval for construction of the South Harper Generating Station and the Peculiar Substation retroactively, and seeks that approval without proof of compliance with local zoning." (Cass County Parties' Proposed Procedural Schedule, para. 3.) The procedural schedule proposed by the Staff, Aquila, Inc, (Aquila), the Southwest Power Pool, Inc. (SPP) and the City

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Mr. Youngs: But there are essentially two parts to our motion today. The first part is that the Court has the power to grant Aquila the relief that we are asking for today, to grant us a stay from the terms of your January 11, 2005, order so that we can obtain the authority that the Court of Appeals has held is necessary for us to operate the South Harper Peaking Facility and Peculiar Substation that are at issue in the case, and then under the particular circumstances of this case, the Court should exercise that power and do so. [Tr. 4-5].

Ms. Martin: If you remove the plant and substation, if you require Aquila to abide by the judgment, of course, they can still go to the PSC and seek approval generally for a plant, and as part of that process, the County will argue whatever it is that you are talking about locating it, you must have some indication of County approval. [Tr. 61].

. . . if the plant and the substation are dismantled . . . Then you have a procedure that's fair and open where no one can be accused of making decisions based upon this pending judgment and whenever it's going to be enforced and whether the time limit is coming due or not coming due. I mean, I truly can hear the arguments now. The Court imposes three months or four months or six months, or whatever it may be, anything the County may do to protect its interest will be perceived as some sort of a delay tactic or some sort of attempt to somehow prevent Aquila from getting relief. [Tr. 62].

The Court: So to begin with, as I indicated before, I am going to assume that I have the authority to fashion a remedy consistent with the request that's made by Aquila. If I do not, that's an easy matter to be taken up on a writ to the Court of Appeals, and that's a short matter, and if the Court of Appeals determines I do not have this authority, then you will know in a heartbeat, and they will say the Judge's orders are quashed and he did not have the jurisdiction to do it. So we might as well go on on that as opposed to coming back here another day with another group full of people and arguing these things again. [Tr. 78].

And waste is a concern of mine . . . and this is not a small dollar matter. . . .

The Order I am going to enter I believe to be fair. I wouldn't enter it if I didn't think it was fair, but it's not what Aquila wants, and it is certainly not what the County wants because they would like for me to order you tomorrow to tear that thing down and get it done quickly.

That Aquila is directed to dismantle the plant in its entirety commencing May 31st of 2006 under penalty of contempt of court; that they are to immediately cease operations of the plant in its entirety regardless of emergencies; that the substations will be allowed to continue to operate; that they will post a $20 million bond with the Court as security for compliance with this Court's Order. [Tr. 79-80].

of Peculiar (Peculiar), filed on March 7, 2006, is based on the Cass County Parties making such filings with the Commission.

2. The grounds, which the Cass County Parties indicate that they intend to raise, go to the Commission's jurisdiction to grant Aquila the relief it requests in its application. As briefly explained below the Staff believes that, based on what it has read or heard to date, any such motions are without merit and do not warrant the Commission adopting a procedural schedule in this case that does not permit the case to be heard and fully argued before the Commission far enough in advance of May 31, 2006 to permit the Commission to consider and to rule on applications for rehearing by May 31, 2006—the date the stay of Judge Dandurand's judgment requiring Aquila to dismantle the South Harper Generating Station and the Peculiar Substation ends.

3. The Western District Court of Appeals in *StopAquila.org v. Aquila, Inc.*[2] (*StopAquila.org* Opinion) indicated a determination by that Court that this Commission has jurisdiction to grant Aquila authorization to build the South Harper Generating Station and the Peculiar Substation, although already built, when it stated: "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."[3] Further, the Western District unambiguously stated "[m]oreover we do not intend for this decision to have anything other than prospective effect."[4] Furthermore, had the Commission had the Western District Court of Appeal's *StopAquila.org* Opinion at the time Case No. EA-2005-0248 was first

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[2] 180 S.W.3d 24, 39(Mo.App. 2005).

[3] *Id*.

[4] *Id*.

before the Commission, the Commission would have rendered a decision before the South Harper Generating Station and the Peculiar Substation had been completed.

4. Staff believes compliance with Cass County's zoning ordinances is not a requisite to Commission consideration of the pending certificate of convenience and necessity (CCN) application for the South Harper Generating Station and the Peculiar Substation. If "proof of compliance with local zoning" were a requisite to this Commission's authorization to build plant, then the exemption in § 64.235[5] based on a utility company obtaining authorization from the Commission[6] would be meaningless. This is because a utility would have to comply with the zoning requirements to obtain the exemption from the zoning requirements. In its *StopAquila.org* Opinion, the Western District Court of Appeals refused to interpret § 64.235 in a way that rendered it meaningless. Neither should this Commission. The Western District Court of Appeals' decision accords with rules of statutory construction and should be followed by this Commission.[7]

5. In interpreting § 64.235, which it found ambiguous, the Western District Court of Appeals looked to other zoning statutes, specifically §§ 64.090.3 and 64.620.3(3), and determined that "first class counties with a charter form of government and counties of the second and third class, respectively, lack the authority to interfere via zoning authority with public utility services authorized by the public service commission . . . ."[8]

6. The Court further noted that these statutory sections "place limits on *county commission* zoning powers" and that the counties governed by these statutory sections "lack the

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[5] All references are to RSMo 2000 or Supp 2004 unless otherwise noted.

[6] The exemption in § 64.235 reads: "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. . . ."

[7] *Murray v. Missouri Highway & Transportation Commission*, 37 S.W.3d 228, 233 (Mo.banc 2001): "Construction of statutes should avoid unreasonable or absurd results."

[8] 180 S.W.3d at 31.

authority to interfere via zoning authority with public utility services authorized by the public service commission." If utility companies were required to get zoning authority before Commission authorization, all of these statutory sections would be meaningless.

7. A decision of the Supreme Court construing Section 64.620 in a condemnation case further supports the idea that the Cass County Parties' position is incorrect. Here the landowner whose land was condemned argued it should have been valued as industrial property although it was zoned as agricultural property. In construing §64.620, which is also part of the county zoning enabling act, in the case of *Union Electric Co. v. Saale*,[9] the Court discussed the scheme of the enabling act and explained:

> When the purpose of this exception to the [zoning] powers granted by the enabling act is considered, it is obvious that the intent and purpose of the legislature was that a county which adopts and approves a county zoning plan for zoning, as authorized by Sections 64.510 to 64.690, cannot by zoning restrictions limit or prohibit the use of land by a public utility to provide authorized utility services. This would necessarily include use of land by a public utility to construct a power plant to generate electric energy for distribution to the public. The public utility services of respondent include the supplying of electric energy to the public generally, and electric energy cannot be supplied unless it is produced.

If local zoning is the necessary local authority required to get a CCN, that would be contrary to the overall scheme of the county zoning enabling act.

8. The requirements for the Commission to issue a Certificate of Convenience and Necessity have never explicitly included local zoning as the "required local consent" necessary before the Commission will grant a CCN to a utility company. Section 393.170.2.

9. Clearly all of this does not mean that no local consent is required. The word "franchise," not the word "zoning," appears in § 393.170.2 and § 393.170.3. The legislature has carefully balanced all of the various interests in a comprehensive statutory scheme. Public

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[9] 377 S.W.2d 427, 430(Mo. 1964).

Service Commission Act. Chapter 386. While the public utility, having received authority from the Commission is exempt from local zoning, the Commission may not grant authority unless the public utility has first obtained a local franchise(s). §§ 393.170.2 and 393.170.3 provide as follows:

> Section 393.170.2:
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> 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. [Emphasis supplied].
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> Section 393.170.3: 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 supplied].

10. The Western District Court of Appeals notes in its *StopAquila.org* Opinion that "the legislature has given [the Commission] no zoning authority, nor does Aquila cite any specific statutory provision giving the Commission this authority. [Citation omitted]." 180 S.W.3d at 30. Nonetheless, the Court states that the Commission may consider zoning in its decision whether to issue a CCN and the required public hearing may be conducted by the county or the Commission:

> By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. . . . the 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. [180 S.W.3d at 37-38].

11. A utility franchise is "local permission to use the public roads and rights-of-way in a manner not available to or exercised by the ordinary citizen."[10]

12. The significance of a franchise to the provision of utility service has long been recognized by the Commission, and also by Missouri courts. In 1964 a panel of the Missouri Supreme Court, where the boundary of a water utility's service area was disputed, held the franchise given by a county defined the geographic scope of the utility's service area, stating:

> If, as stated in Southwest Water Co.,[11] supra, the county 'franchise' is a condition precedent to the issuance of a certificate by the Commission for an operation involving use of county roads in unincorporated areas of the county, it must follow that the authority which the Commission confers must be in accord with the 'franchise' which the county grants. Otherwise, the requirements of Section 393.170, insofar as municipal consent is concerned, would be practically meaningless.
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> The courts have recognized that the corporate charter and the local franchise provide the fundamental bases for a public utility's operation and that the certificate of the Commission cannot enlarge the authority thereby conferred. *In State ex rel. Harline v. Public Service Comm*., Mo. App., 343 S.W.2d 177, 181(3), the court stated: 'The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent.' *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co*., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges.[12]

13. Acting within its jurisdiction, the Commission has made various grants of authority to Aquila's predecessors, specifically CCNs, after Aquila's predecessors obtained local franchises, to serve the relevant territory. The Commission's Report and Order (Case No. 9470)

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[10] *State ex rel. Union Electric Co., v. Public Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo App. 1989).
[11] *In Re Southwest Water Co*., 25 Mo. P.S.C. 637, 41 P.U.R. (NS) 127.
[12] *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964).

granting that 1938 CCN noted on page one that the company's application, filed November 23, 1937 (CCN Petition), sought a CCN "to construct, maintain and operate, as a public utility, electric transmission and distribution lines for the purposes of furnishing electric service to the public" in its certificated area, including most of Cass County. *See* Case No. 9470.

14. Over a number of years, the Commission granted Aquila's predecessors a variety of CCNs. Each grant of a CCN, required proof of a utility franchise, not proof of zoning, from the "proper municipal authorities"[13] before the Commission would issue a CCN. In addition to the CCNs issued to predecessors of Aquila, in 1922, the Commission issued a Financing Order to West Missouri Power Company (one of Aquila's predecessors) and ordered that the company could sell stock: "for the reimbursement of moneys heretofore or hereafter actually expended from income of the Company for the acquisition of property, the construction, completion, extension or improvement of the plants or distribution systems of said Company . . . ."[14] This order indicates that Aquila's predecessors had authority to construct plant in the then certificated areas in part based on the fact that Aquila's predecessors had obtained the necessary franchises.

15. In the 1938 Commission order granting Aquila a CCN to serve most areas of Cass County, among other areas, the Commission carefully reviewed the communities and areas for which Aquila had obtained local franchises. (Commission Case No. 9470)

16. Franchises that are not specifically of limited duration are perpetual in nature. "In absence of any general law limiting duration of franchises for operation of an electrical system on the roads and highways of a county, the grant of a franchise for that purpose, without specifying a period of duration, is a grant in perpetuity."[15]

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[13] Section 393.170.2.
[14] *In the Matter of the Application of the West Missouri Power Company for Permission to Issue Preferred Stock*, Case No. 3171, March 21, 1922)
[15] *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc*., 407 S.W.2d 883, 888 (Mo. 1966).

WHEREFORE Staff recommends the Commission adopt a procedural schedule for this case so that the Commission can issue a decision on the merits far enough in advance of May 31, 2006—the date Judge Dandurand's stay of his judgment requiring Aquila to dismantle the South Harper Generating Station and the Peculiar Substation ends—to permit the Commission to consider and rule on applications for rehearing by May 31, 2006. The Staff, Aquila, the Southwest Power Pool and the City of Peculiar jointly proposed such a schedule on March 7, 2006. On March 7, 2006, the County of Cass, Missouri, StopAquila.Org., nearby residents, Frank Dillon, Kimberly Miller and James E. Doll jointly proposed a schedule that would not permit a final Commission decision by May 31, 2006. The Commission should not adopt the procedural schedule proposed by these other parties.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 13th day of March 2006.

/s/ Lera L. Shemwell