

Exhibit No. :
Witness : Gary Mallory
Type of Exhibit : Surrebuttal Testimony
Party : Cass County, Missouri
Case No. : EA-2006-0309

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Missouri Public
Service Commission

CASS COUNTY, MISSOURI

Case No. EA-2006-0309

SURREBUTTAL TESTIMONY

OF

GARY MALLORY

Harrisonville, Missouri
April 18, 2006

Exhibit No. 22
Case No(s). EA-2006-0309
Date 4-26-06 Rptr XF

**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.

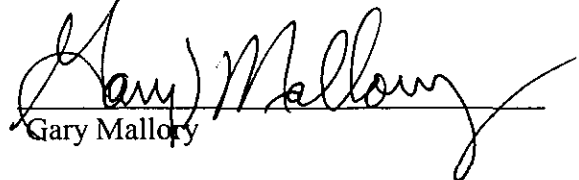
Case No. EA-2006-0309

Affidavit of Gary Mallory

STATE OF MISSOURI)
) ss.
COUNTY OF Cass)

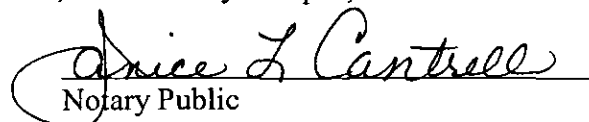
I, Gary Mallory, of lawful age, being duly sworn, do hereby depose and state:

1. My name is Gary Mallory. I am Presiding Commissioner of the County Commission of Cass County, Missouri. Cass County, Missouri is an intervener herein.
2. Attached hereto and made a part hereof for all purposes is my surrebuttal testimony.
3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my personal knowledge, information and belief.



Gary Mallory

Subscribed and sworn to before me, a Notary Public, this 18th day of April, 2006.



Notary Public

My Commission expires:

6-8-08

JANICE L. CANTRELL
Notary Public - Notary Seal
STATE OF MISSOURI
Cass County

My Commission Expires: June 8, 2008

SURREBUTTAL TESTIMONY OF GARY MALLORY

1

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS?**

3 A. My name is Gary Mallory. My business address is: 102 E. Wall, Harrisonville, MO 64701.

4

5 **Q. ARE YOU THE SAME GARY MALLORY WHO FILED WRITTEN REBUTTAL**
6 **TESTIMONY IN THIS CASE.**

7 A. Yes, I am.

8

9 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

10 A. I will respond to portions of the affidavit filed by Mr. Michael Fisher.

11

12 **Q. MR. MALLORY, ON PAGE 7 OF HIS AFFIDAVIT, MR. FISHER DISCUSSES HIS**
13 **CONTACTS WITH YOU ABOUT A POSSIBLE ANNEXATION OF HARPER ROAD**
14 **BY THE CITY OF PECULIAR. COULD YOU EXPLAIN CASS COUNTY'S**
15 **INVOLVEMENT, IF ANY, IN THAT PROCESS.**

16 A. I generally became aware that the City of Peculiar was in discussions with Aquila about the
17 possibility of locating a power plant in the City of Peculiar in about August of 2004. I learned of
18 these discussions from either Dave Kreimer, an Aquila employee with whom the County had
19 been dealing in connection with the Camp Branch application, or from Mike Fisher, the City
20 Administrator for Peculiar. Some time around August 20, 2004, I received a letter from Mr.
21 Fisher indicating that the City of Peculiar was interested in securing the County's agreement to

1 allow the City of Peculiar to annex a portion of South Harper Road. As a part of this request,
2 the City of Peculiar was agreeing to accept full responsibility for the portion of South Harper
3 Road it was desiring to annex—including all maintenance costs for the road. I was aware at or
4 near that same time that Aquila was looking to buy property next to South Harper Road to build
5 a power plant, and that Aquila intended to allow the City of Peculiar to voluntarily annex that
6 tract as well, should the City of Peculiar annex the portion of South Harper Road it was
7 discussing with the County.

8
9 **Q. DOES THE COUNTY HAVE A POLICY ESTABLISHED REGARDING MUNICIPAL**
10 **REQUESTS FOR ANNEXATION OF COUNTY ROADS?**

11 **A.** Yes. It is the County's policy anytime a municipality requests to annex a portion of a County
12 road, to honor the request. The municipality then assumes the fiscal responsibility for the
13 maintenance of the road, to the benefit of the County's taxpayers. There was no difference to
14 that policy on the City of Peculiar's request. On September 16, 2004, the County therefore
15 adopted a Resolution authorizing the City of Peculiar to annex a portion of South Harper Road
16 per Mike Fisher's request.

17
18 **Q. ON PAGE 7 OF HIS AFFIDAVIT, MR. FISHER ALSO STATES THAT CASS COUNTY**
19 **KNEW OF THE PURPOSE OF THE ANNEXATION AND DID NOT OBJECT TO THE**
20 **PROPOSED LAND USE. IS THAT TRUE AND IF SO, TELL THE COMMISSION**
21 **WHY YOU DID NOT EXPRESS ANY CONCERN.**

1 **A.** Mr. Fisher states that I never expressed any concern to him about locating a power plant near
2 South Harper Road and that is true. The County has no jurisdiction over land use matters in a
3 municipality. If Aquila voluntarily annexed the tract it had acquired for the power plant into the
4 City of Peculiar, then Aquila would be obliged to comply with the City of Peculiar's land use
5 regulations, including zoning, and not the County's. I had no legitimate interest or complaint to
6 raise with the City of Peculiar. I was under the impression the power plant would be within the
7 city limits of Peculiar. Mr. Fisher's testimony improperly presumes that I, as Presiding
8 Commissioner of Cass County, would or could ever express concerns relating to the plant's
9 proposed location as an advocate for local residents. That is not the proper role of the Presiding
10 Commissioner of the County. My role is to insure that the County's land use regulations,
11 including its Zoning Ordinance, are followed. So long as the power plant near South Harper
12 Road was being discussed as a development to be constructed within the confines of the City of
13 Peculiar, the County, as a governing authority, had no governmental interest in the plant's
14 location—it was not expected to be within the unincorporated portion of the County, and the
15 County's Zoning Ordinance, therefore, would be inapplicable to the plant's construction.

16
17 **Q.** **IN CONTRAST, AT THIS SAME TIME WAS AQUILA IN THE PROCESS OF**
18 **LOCATING THE PECULIAR SUBSTATION IN UNINCORPORATED CASS**
19 **COUNTY?**

20 **A.** Yes, it was. At the same time Aquila was discussing annexation of the power plant site with the
21 City of Peculiar, Aquila had also purchased a second site for a substantial substation to be

1 constructed. This site was in the unincorporated portion of the County, and was not the subject
2 of annexation discussions with the City of Peculiar. The County expected, therefore, Aquila to
3 seek appropriate land use approval from the County for the Substation site. The Substation site
4 is zoned agricultural, and a substation is not a permitted use on agricultural land without
5 rezoning or a special use permit under the County's Zoning Ordinance. Aquila did initially file a
6 SUP application for the Substation site, as required by law. Aquila later withdrew this
7 application when it learned the City of Peculiar Board of Aldermen voted not to annex the power
8 plant site after all. At that point, the power plant site remained under the land use regulatory
9 authority of the County. When the County learned the plant was to be built on this site, and that
10 the site would not be annexed into the City of Peculiar, the County made it clear to Aquila that a
11 special use permit or a rezoning application would have to be filed to seek the County's approval
12 for the plant's construction, as the power plant site was also zoned agricultural. Aquila and
13 several other parties to this case have not disputed that both the power plant and substation
14 sites are zoned agricultural, and they stipulated to this zoning status in a Joint Stipulation of
15 Facts filed with the Commission in Case No. EA-2006-0248. I have attached a copy of that Joint
16 Stipulation to my surrebuttal as Schedule GM -2.

17
18 **Q. ALSO, ON PAGE 7 OF HIS AFFIDAVIT, MR. FISHER STATES THAT AQUILA**
19 **REQUESTED A GRADING PERMIT AND WAS TOLD THAT IT DID NOT NEED**
20 **ONE. WHAT IS CASS COUNTY'S RULE ON GRADING PERMITS.**

1 A. Cass County does not require grading permits to authorize the movement of dirt. If it did, every
2 time a farmer prepared to plow his fields, the farmer would be required to seek such a permit—a
3 ridiculous requirement. Aquila's representatives asked the County about whether a grading
4 permit was required to begin moving dirt on the proposed power plant site. To the best of my
5 knowledge, these discussions were occurring at a point when the County still had land use
6 authority over the site, because it had not yet been annexed into the City of Peculiar, but also at a
7 point when the City was still planning to annex the site. The County reviewed the proposed
8 plans for dirt movement to be sure that only dirt work was in fact involved in the site activities
9 that were expected to take place at that point. Having satisfied itself of this fact, the County
10 advised Aquila's representative that Aquila did not need a grading permit to perform the dirt
11 work it was preparing to perform. This acknowledgment by the County did NOT relieve Aquila
12 of an obligation it otherwise had, but, rather, was an acknowledgment that no grading permit is
13 ever required by the County for the type of earthwork that Aquila was preparing to engage in.
14 Mr. Fisher is not a representative of the County, or of Aquila, to the best of my knowledge. It is
15 unclear to me, therefore, what personal knowledge he would have with respect to the discussions
16 between Aquila and the County about a grading permit. The bottom line is that Aquila was not
17 required to secure a grading permit because no developer or land owner in Cass County is
18 required to secure a grading permit to move dirt around on their land. The County's
19 determination not to require grading permits from any one is evenly applied, as the County
20 believes is legally required, regardless what the County's thoughts might be with respect to a
21 landowner's intentions for moving dirt.

1

2 **Q. ON PAGE 8 OF HIS AFFIDAVIT, MR. FISHER STATES THAT CASS COUNTY**
3 **CONTINUED TO PROVIDE APPROVALS FOR THE DEVELOPMENT OF THE**
4 **SOUTH HARPER PLANT AND DID NOT REQUEST LAND USE COMPLIANCE.**
5 **DID CASS COUNTY OR ITS PLANNING BOARD GIVE APPROVAL TO THE**
6 **CONSTRUCTION OF SOUTH HARPER OR THE PECULIAR SUBSTATION? IF**
7 **NOT, WHY DID THE COUNTY EXTEND CERTAIN APPROVALS OR PERMITS TO**
8 **AQUILA IN CONNECTION WITH AQUILA'S CONSTRUCTION ACTIVITIES?**

9 **A. The County and its Planning Board were never afforded the opportunity to give approval for the**
10 **construction of the South Harper Plant or the Peculiar Substation, and no such approval has ever**
11 **been given to Aquila. On December 1, 2004, when Aquila made it clear to the County that it**
12 **intended to proceed with construction of the Plant and Substation as soon as it received its air**
13 **permit from the Department of Natural Resources (which it expected to receive at any time), the**
14 **County filed suit against Aquila seeking to enjoin construction of the Plant and Substation. The**
15 **County's position was that Aquila had failed to comply with the required process to secure a**
16 **special use application or rezoning for the Plant and Substation. The County expressed no view**
17 **then, or now, with respect to whether such an application would be granted—nor could it, as the**
18 **County is unable to determine the disposition of an application for special use permit or for**
19 **rezoning until such an application is filed, and the County's procedures followed as to allow all**
20 **interested parties an opportunity to present their view about a proposed development.**
21 **Essentially, the County's position in its lawsuit was that the Plant and Substation could not be**

1 built at the South Harper Plant or Peculiar Substation sites (or at any site for that matter) until
2 the necessary land use approvals had been secured by the County. The County won this lawsuit.

3 An injunction was issued that prevented the Plant and Substation from being constructed
4 without seeking necessary land use authority from the County. However, Judge Dandurand
5 stayed the enforcement of the injunction pending Aquila's appeal, and the Judge allowed the
6 Plant and Substation to be built while Aquila appealed the injunction. At that point, the County
7 had no alternative but to conduct itself in accordance with the Court's directive that the
8 injunction was stayed pending appeal. Though the County objected to the construction of the
9 Plant and Substation without having first securing appropriate zoning for the sites, it cooperated
10 with Aquila's subsequent requests for construction related permits. The County believed that
11 had it refused to issues these requested permits, the County would have been disobeying the trial
12 court's order that allowed the Plant and Substation to be built pending appeal. To protect its
13 legal position, the County added language to each permit it issued after the injunction was
14 issued, then stayed, indicating that the permit was being provided subject to the County's claims
15 in the lawsuit that the Plant and Substation were being illegally built. The County believed that
16 the plant and Substation, if ultimately determined to be illegal improvements on appeal, would be
17 removed, as required by law and by Judge Dandurand's judgment.

18
19 **Q. ON PAGE 10 OF HIS AFFIDAVIT, MR. FISHER STATES THAT THE LOCATION OF**
20 **SOUTH HARPER IS IN A MULTI TIERED ZONE. CAN YOU EXPLAIN WHAT A**
21 **MULTI TIERED ZONE IS AND HOW IT APPLIES TO SOUTH HARPER?**

1 A. First, the South Harper Plant was not located in a multi tier zone when construction commenced
2 on the Plant. Throughout December 2004, Aquila representatives were making application to
3 the Cass County Codes Department for "Construction Permits" which related to various aspects
4 of construction of a power plant and substation in unincorporated Cass County. The County did
5 not approve those permits because of its pending suit against Aquila. Actual construction
6 commenced on the Plant in January 2005, immediately after the trial court stayed its injunction.
7 At that time, the 2003 Comprehensive Plan was in effect. The Plant site was located, pursuant to
8 this Plan, in a Rural Density Tier. The 2005 Comprehensive Plan was adopted on February 1,
9 2005, after the Plant was under construction. Had Aquila filed for a special use permit or for
10 rezoning for the Plant, as it was required by law to do, prior to the Plant's construction, there is
11 no doubt the 2003 Comprehensive Plan would have controlled the evaluation of the Application.
12 In any case, a Comprehensive Plan does not direct or dictate how special use permit applications
13 or rezoning applications will be disposed. Such applications are filed to address the current
14 zoning on a site. In the case of the South Harper Plant and the Peculiar Substation, both
15 improvements have been constructed on land that is zoned agricultural as I mentioned before. If
16 an application for special use permit or for rezoning is filed on agricultural land that is located in
17 a multi use tier, that characterization will be a factor in the County's evaluation of the
18 application, but will not guarantee or assure the application will be granted. A multi use tier is
19 described in the County's 2003 and 2005 Comprehensive Plans as principally an area along a
20 major thoroughfare where the County anticipates that mixed uses, including residential,
21 commercial and industrial may need to be considered in such areas, to achieve an appropriate and

1 progressive tiering of adjacent uses. In other words, the designation of an area as a multi use tier
2 gives the County flexibility to address growth by authorizing, though not requiring, the County
3 to consider a variety of intensities of use for an area, depending on the then circumstances. The
4 use of "tiers" in a comprehensive plan does not, however, override zoning, or the need to look at
5 all factors, included the current use of adjacent lands, to determine whether a proposed use in a
6 multi tier zone is, though technical authorized, is in fact appropriate. Applied to the South
7 Harper Plant, even if the Plant were to be evaluated under the 2005 Comprehensive Plan, just
8 because the Plant is located in a multi use tier does not mean the use of the site would be
9 approved for industrial. Many factors would have to be evaluated by the County to reach a
10 decision about whether an "industrial" intensity use for that site would be appropriate. For
11 example, the fact that the Plant site is located immediately next to land that is located in a rural
12 density tier could be a relevant factor. Land use tiers are meant to allow progressive
13 intensities—not necessarily sudden, dramatic changes in intensities. One could argue that
14 approving a industrial use immediately next to a rural density tier would not serve the vision of
15 the 2005 Comprehensive Plan, which, through tiering promotes gradual increases in land use
16 intensities.

17
18 **Q. ALSO ON PAGE 10, MR. FISHER DISCUSSES THE IMPACT OF SOUTH HARPER**
19 **ON SURROUNDING LARGE LOT HOMES. AS PRESIDING COMMISSIONER FOR**
20 **THE COUNTY, HAVE YOU BEEN ADVISED BY HOME OWNERS IN THE AREA OF**
21 **SOUTH HARPER REGARDING THE IMPACT OF THE PLANT?**

1 A. Various County constituents have complained of odors, noise levels, and diminished property
2 values. As the Presiding Commissioner, a part of my job is to be available to listen to citizen
3 complaints. I have not, however, come to any personal conclusion about the validity of these
4 complaints. I believe it is very important for anyone serving on the Planning Board or on the
5 County Commission or on the Board of Zoning Adjustment to maintain a fair and impartial view
6 on any proposed development. As a result, though I have listened to and heard of these
7 complaints, I have not independently investigated them—nor would I feel it appropriate for me
8 to do so. In fact, I have purposefully elected not to drive by or visit or tour the Plant or
9 Substation Sites. Should Aquila file an application for a special use permit or for rezoning for
10 either of these sites, Aquila is as entitled to a full and fair hearing on its application as the citizens
11 affected by the Plant are entitled to a full and fair hearing on their grievances with the Plant and
12 Substation. The County has never expressed or held a view or opinion opposing the Plant or
13 Substation. The County has only expressed the view and opinion that neither the Plant nor
14 Substation can be built without first complying with the County's lawful land use procedures. I
15 can't speak for all of the constituents who have called to complain to me about the Plant and
16 Substation. Several have stated that, even though they oppose the Plant and Substation, had
17 Aquila followed the County's required procedures to secure approval for the locations of both
18 improvements, and had the County, after following its procedures, approved both the Plant and
19 Substation, the resident would be unhappy with the County's decision but would, in their words,
20 "live with it," because the law was followed. Many of these residents feel, as the County does,
21 that the real issue here is that local authorities should have the right to determine appropriate

1 land uses—not the Public Service Commission, or utilities who want to be able to build plants
2 any where they choose.

3
4 **Q. ON PAGE 11 OF HIS AFFIDAVIT, MR. FISHER STATES THAT AT CASS**
5 **COUNTY'S REQUEST, AQUILA PAVED 243RD AND 241ST STREETS. DID CASS**
6 **COUNTY ASK AQUILA TO PAVE THOSE ROADS?**

7 **A.** The County did not ask Aquila to perform paving work on the County's roads. Aquila
8 approached the County about paving certain roads mentioned in Mr. Fisher's testimony. Of
9 course, the County was willing to entertain the prospect of an entity other than the County
10 paying to pave roads. Though the County, at Aquila's request, solicited bids for the road work,
11 Aquila selected and paid the vendor used to do this road paving work. The County has not
12 accepted the paving work performed by Aquila. In fact, Aquila, in order to take advantage of the
13 stay of the Judgment enjoining the Plant and Substation, was required to post a \$350,000.00
14 bond. One of the components discussed in arriving at this bond amount was the likely prospect
15 of significant damage to County roads caused by Aquila's construction activities. That bond
16 remains posted. The County is gathering the necessary documentation to make a claim against
17 the bond for road damage, as such damage is considerable. Aquila recently asked the County to
18 agree to release this bond. The County advised it would not do so because of its intent to make
19 a claim against the bond.

20
21 I question on what basis Mr. Fisher claims to have personal knowledge or insight into this

1 subject. As I have already mentioned, Mr. Fisher is not a representative of Aquila, to my
2 knowledge, and was not a party to any of the discussions between Aquila and Cass about road
3 paving activities engaged in by Aquila. Further, Mr. Fisher has never talked with any County
4 representative to my knowledge about whether Aquila's road paving work had been "accepted"
5 by the County, and certainly has not talked with any County representative about the County's
6 current concerns about the condition of the County's roads due to Aquila's construction
7 activities.

8
9 **Q. HAVE YOU, SINCE THE COURT OF APPEALS OPINION UPHOLDING JUDGE**
10 **DANDURAND'S JUDGMENT, HAD ANY DISCUSSION WITH AQUILA**
11 **REPRESENTATIVES ABOUT FILING A SPECIAL USE PERMIT OR REZONING**
12 **APPLICATION, IN LIGHT OF THESE CONCERNS?**

13 **A.** Yes. I spoke with Norma Dunn, who asked me what Aquila might do to resolve the impasse
14 with the County. At the time I spoke with Ms. Dunn, the trial court's Judgment was final, and I
15 understood the appeals were final too. That meant, according to the Judgment, the Plant and
16 Substation needed to be dismantled immediately. However, Aquila had filed some sort of a
17 request with Judge Dandurand asking for more time before being required to dismantle the Plant.
18 I told Ms. Dunn that the only way I could see the impasse being resolved was for Aquila to
19 follow the law. I also told Ms. Dunn that if, and as soon as, Aquila stopped fighting the
20 Judgment (which it was at that time still doing), the County would accept for consideration a
21 special use permit or rezoning application from Aquila, and would abide by the law in

1 considering same. That would allow Aquila and the citizens affected the Plant and Substation to
2 air their positions, and it would give the County an opportunity to sort through those views and
3 to make a decision about whether the Plant and Substation should be approved at their proposed
4 locations. It would also give the County the opportunity to consider whether approval of the
5 locations should be conditioned on certain requirements being met or performed by Aquila to
6 address any of the citizens' views deemed by the County to have merit. Despite this
7 conversation, Ms. Dunn then apparently tried to file a special use permit application on January
8 20, 2006. On that date, Aquila was still fighting the Judgment and had its request for an
9 additional stay still filed with the trial court. The County rejected the application, because Aquila
10 had not, per my request of Ms. Dunn, dropped all litigation against the County. After Judge
11 Dandurand extended the time for Aquila to dismantle the plant and Substation to May 31, 2006,
12 the County advised Aquila that it assumed the special use permit application or a rezoning
13 application would be filed, and that the County would process same. That letter was sent on
14 February 1, 2006. There is no reason to believe that, had an application been promptly filed, the
15 application could not have been fully processed by May 31, 2006. In fact, the County's
16 regulations require such applications to be fully processed through the Planning Board and the
17 BZA (for special use permit applications) or the County Commission (for rezoning applications)
18 within 120 days. This is an outside time limit, and the County is usually able to complete this
19 process in less time. Despite receiving the February 1, 2006 letter from the County, Aquila did
20 not file an application, though it apparently already had a special use permit application ready to
21 file, and thus could have done so immediately.

Gary Mallory
Surrebuttal Testimony
Page 14

1

2 **Q. DOES THIS CONCLUDE YOUR TESTIMONY ?**

3 **A. Yes, it does.**

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In The Matter of the Application of Aquila, Inc.)
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.)

Case No. EA-2005-0248

JOINT STIPULATION OF FACTS

COME NOW the parties, the staff of the Missouri Public Service Commission ("Staff") by and through its counsel of record Nathan C. Williams and Lera L. Shemwell; the Office of the Public Counsel by and through the Public Counsel, John B. Coffman; Aquila, Inc. (hereinafter "Aquila"), by and through its counsel of record Paul A. Boudreau; Cass County, Missouri (hereinafter "Cass County" or "Cass"), by and through its counsel of record Mark W. Comley; and StopAquila.org, et al., by and through its counsel of record Gerard D. Eftink, and hereby stipulate to the following facts for the purposes of this proceeding. This stipulation does not constitute an admission by the parties that every fact contained herein is necessarily relevant to the issues presented for decision in this case and each party reserves the right to argue the relevance of any fact set forth herein. Additionally, the parties reserve the right to supplement the record with additional stipulated facts when and as appropriate. This stipulation does not preclude the offering of additional evidence by any party.

1. Cass is a County of the State of Missouri and is a first class, non-charter county.

2. StopAquila.org. is an unincorporated association of individuals each of whom are landowners within Cass, some of whom reside in Peculiar, Missouri.

3. Aquila is a Delaware Corporation with its principal office and place of business at 20 W. 9th Street, Kansas City, Missouri 64105-1711.

4. Cass has adopted, pursuant to the authority of Chapter 64 RSMo, various planning and zoning ordinances and regulations, including, without limitation, a Comprehensive Plan (adopted in 1991 and from time to time thereafter amended), Zoning Ordinance, and a Procedural Manual.

5. Pursuant to the authority of § 64.905.4 RSMo (2000) the Cass County Commission ordained, by duly enacted Ordinance No. 03-15 enacted on December 15, 2003 and effective on January 1, 2004, that Cass would conduct planning and zoning as provided in § 64.211 to 64.295 RSMo (2000) as applicable to first class non-charter counties, and that any and all existing regulations affecting planning and zoning, including but not limited to Cass' Comprehensive Plan and Zoning Ordinance, would remain in effect until such time as same may be revised.

6. Cass has authority to adopt a building code pursuant to § 64.170 to 64.200 RSMo.

7. On June 17, 2002, Cass promulgated Ordinance No. 02-14, thereby adopting the 2000 Edition of the International Building Code ("IBC"), including Appendix Chapters A through J. The Ordinance states that the IBC establishes "the minimum regulations governing the conditions and maintenance of all property, buildings and structures; by providing the standards for supplied utilities and facilities and other physical things and conditions essential to ensure that structures are safe, sanitary, and fit for occupation and use; . . ." Section 1 of Ordinance No. 02-14 formally adopts the IBC as the "Building Code" for Cass County to

provide "for the control of buildings and structures as herein provided; and each and all of the regulations, provisions, penalties, conditions and terms of said Building Code are hereby referred to, adopted and made a part hereof, as if fully set out in this Ordinance, . . . "

8. Section 105.3.1 of the IBC states, in part, that "If the application of the construction documents do not conform to the requirements of pertinent laws, the building official shall reject such application in writing, stating the reasons therefor. If the building official is satisfied that the proposed work conforms to the requirements of this code and laws and ordinances applicable thereto, the building official shall issue a permit therefor as soon as practical."

9. Section 105.2.3 of the IBC, entitled "Public service agencies," states that "A permit shall not be required for the installation, alteration or repair of generation, transmission, distribution or metering or other related equipment that is under the ownership and control of public service agencies by established right."

10. Aquila is a regulated public utility corporation subject to the jurisdiction of the Public Service Commission ("Commission" or "PSC"), which has authorized Aquila to conduct its business in its certificated areas in Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions. As such, Aquila is engaged in providing electrical, natural gas and industrial steam service in those areas of the State certificated to it by the Commission, including most of Cass County.

11. Aquila and its predecessors have been operating electric transmission and distribution systems in unincorporated Cass County for nearly 90 years.

12. The earliest known franchise issued by City of Pleasant Hill, Cass County, Missouri ("Pleasant Hill") for the operation of an electric plant in Pleasant Hill was issued on or

about September 5, 1905, to the Pleasant Hill Electric Light Company and its successors and assigns to operate the electric light plant at Pleasant Hill. See Application of J.E. Rawls, et al., Case No. 1073 (August 22, 1916). This franchise was subsequently assigned to William Reader, William A. Reader, and Charles E. Reader, who were doing business as a partnership known as Reader Light, Ice & Fuel Co.

13. The Reader Light, Ice & Fuel Co. operated the electric plant at Pleasant Hill until it declared bankruptcy, as a result of which J.E. Rawls purchased all assets, including the franchise related to the electric plant, from the bankruptcy trustee in March 1915.

14. On or about August 15, 1915, City of Pleasant Hill issued another franchise to J.E. Rawls, his successors, assigns, and grantees for the purpose of "generating electricity and for the sale thereof." (Ordinance No. 407, in PSC Case No. 1074).

15. On or about September 12, 1916, the Commission issued an order authorizing and approving J.F. Johnston's purchase from J.E. Rawls, and J.E. Rawls' sale to J.F. Johnston, of the electric plant at Pleasant Hill (Case No. 1073). A companion order on the same date by the Commission (Case No. 1074) authorized and approved J.F. Johnston's exercise of the franchise granted by the City of Pleasant Hill to Rawls.

16. On or about October 5, 1916, Pleasant Hill issued a franchise to Aquila's predecessor, L.K. Green & Sons, their successors and assigns, to purchase, erect, establish, maintain and operate a plant or plants for the generation or transformation of electrical energy, among other things (Ordinance No. 421) (confirmed by vote on October 25, 1916).

17. On or about October 12, 1916, J.F. Johnston applied to the Commission (PSC Case No. 1100) for permission to transfer all the property, franchises, and contracts of Pleasant Hill Electric Light & Power Company to L.K. Green & Sons.

18. On or about January 1, 1917, the Cass County Court issued a County franchise to L.K. Green & Sons ("Cass County Franchise") to set Electric Light Poles for the transmission of light for commercial purposes, a true and correct copy of which is attached to the Application filed by Aquila on January 28, 2005, and marked as Appendix 6 thereto.

19. On or about November 23, 1917, the Articles of Association forming Green Light & Power Corporation are filed with the Cass County Recorder of Deeds.

20. On or about December 17, 1917, L.K Green & Sons applied to the Commission (PSC Case No. 1409) for permission to transfer all real estate, personal property, franchises, and contracts of every kind to Green Light and Power Company.

21. Green Light and Power Co. requested on November 21, 1921, that the Commission approve a Plan of Reorganization, whereby all of its property and franchises be transferred to a "New Company" to be known as West Missouri Power Company. See Application for Authorization of the Reorganization of Green Light and Power Co., Case No. 3171. In its Preliminary Order of December 6, 1921, the Commission granted the request and authorized the formation of the West Missouri Power Company from the assets of Green Light and Power Co. See Preliminary Order, Case No. 3171 at 3. The Commission issued further orders concerning the finances and powers of the West Missouri Power Company in January and March, 1922. See Supplemental Order, Case No. 3171 (Jan.4, 1922); Order, Case No. 3171 (Mar. 21, 1922).

22. On or about November 12, 1926, West Missouri Power Company executed a contract with National Public Service Corporation ("NPSC"), a Virginia corporation, to sell and transfer the assets of West Missouri Power Company to a new corporation named Missouri Public Service Company, which NPSC had organized. See Case No. 5109.

23. On or about April 1, 1927, the Commission authorized and approved application of Missouri Public Service Company to acquire the public utility properties of West Missouri Power Company, and issued the Missouri Public Service Company a certificate of convenience and necessity ("CCN") (effective 4/11/27) to "own, maintain and operate all the properties, works and systems acquired" See Case No. 5109.

24. On or about November 20, 1936, Missouri Public Service Corporation, a Delaware corporation, was incorporated out of the bankruptcy and court-ordered reorganization of the Missouri Public Service Company and its parent, Middle West Utilities Company. See Case No. 9070 (Mo. P.S.C., December 1, 1936).

25. On or about December 1, 1936, the Commission authorized and approved the transfer of all properties, rights, and franchises from the Missouri Public Service Company, a Missouri corporation, to the Missouri Public Service Corporation, a Delaware corporation. See Case No. 9070.

26. On or about January 18, 1938, the Missouri Public Service Corporation received a CCN from the Commission to serve an area ("1938 CCN Order"). Case No. 9470.

27. The Commission's Report and Order (Case No. 9470) granting that 1938 Certificate 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 (Case No. 9470).

28. Aquila's certificated area includes Western Missouri and North Central Missouri, including, but not limited to, the majority of Cass County.

29. In its CCN Petition in Case 9470 to the Commission, Aquila's predecessor attached maps and legal descriptions of the areas of each county to which the certificate applies. The PSC's 1938 CCN Order stated that the maps had been marked as Exhibits A-1 to A-19. 1938 CCN Order at 3. A copy of the legal description for the area of Cass County was submitted to the PSC as Exhibit A-6.

30. Aquila's service territory in Missouri is also set forth in its tariff, which is on file with and maintained by the Commission.

31. Exhibit B-5 to the CCN Petition in Case 9470 is the Cass County Franchise.

32. In its 1938 CCN Order, the Commission stated that the Cass County Court, as well as the courts of the other counties covered by the CCN, had authorized the construction and maintenance of electric distribution lines across "public streets, roads and alleys, and other public places and grounds." 1938 CCN Order at 2, 5.

33. On or about April 5, 1938, Pleasant Hill issued a franchise (Ordinance No. 608) to Missouri Public Service Corporation to operate an electric light, heat and power system (subject to a vote on April 26, 1938) within the City of Pleasant Hill.

34. On or about April 7, 1950, Missouri Public Service Company was incorporated in Missouri.

35. On or about April 28, 1950, the Commission issued a CCN to Missouri Public Service Company, a Missouri corporation, authorizing and approving the merger of the Missouri Public Service Corporation, a Delaware corporation, with and into the Missouri Public Service Company. Case No. 11,892.

36. In Case No. 11,892, the Commission granted Missouri Public Service Company a Certificate to:

. . . own, maintain and operate all properties and assets, and to acquire, hold and exercise all contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; including, without limitation, all rights to construct, own and maintain electric utility facilities in the areas in the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.

Case No. 11,892 at 4.

37. On or about May 31, 1950, the Missouri Public Service Corporation merged fully with and into Missouri Public Service Company.

38. On or about May 2, 1985, Missouri Public Service Company changed its name to UtiliCorp United Inc., a Missouri corporation.

39. On or about March 20, 1987, the Commission issued an order (effective April 1, 1987) authorizing and approving the merger of UtiliCorp United Inc., a Missouri corporation, with and into UtiliCorp United Inc., a Delaware corporation. Case No. EM-87-26.

40. On or about April 1, 1987, UtiliCorp United Inc., a Missouri corporation, merged fully with and into UtiliCorp United Inc., a Delaware corporation.

41. On or about February 21, 2002, the Commission issued an order (effective March 3, 2002) authorizing the merger and name change between UtiliCorp United Inc. and Aquila, Inc. Case No. EM-2002-297.

42. On or about March 15, 2002, UtiliCorp United Inc. changed its legal name to Aquila, Inc.

43. Aquila is the owner of two tracts of real estate identified as follows:

- a. An approximate 74 acre tract of real estate at or near 243rd Street and Harper Road, and generally located in parts of Sections 29 and

32, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter "Tract A").

- b. An approximate 55 acre tract of real estate at or near 203rd Street and Knight Road, and generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter "Tract B").

44. Tracts A and B are located in Aquila's certificated area as identified in the PSC's 1938 CCN Order (Case No. 9470).

45. Tract A is located in unincorporated Cass and is currently zoned as an agricultural district.

46. Tract B is located in unincorporated Cass and is currently zoned as an agricultural district.

47. Pursuant to Cass' Zoning Ordinance, the intent of an Agricultural District is "To preserve and protect land valuable for agriculture and as open space from urban-type activities.

The intent is not the development of low density residential areas." (Emphasis in original).

48. "Agricultural Purposes" is defined by the Cass Zoning Ordinance as:

The use of a tract of land of not less than forty (40) acres for the growing of crops, pasturage, nursery, or the raising of livestock and poultry, including the structures necessary for carrying out farming operations and maximum of two residences of those owning or operating the premises, a member of the family thereof, or persons employed thereon, and the family thereof, but such use shall not include feedlots as defined by State statute (additional residences may be permitted with a special use permit).

49. Permitted Uses for Agricultural Districts are listed in Appendix A to the Cass Zoning Ordinance.

50. Appendix A to the Cass Zoning Ordinance indicates that Industrial Machinery and Equipment, including engines and turbines, are not permitted uses in an Agricultural District.

51. Appendix A to the Cass Zoning Ordinance indicates that Electronic and Other Electronic Equipment, including electric distribution equipment and electrical industrial apparatus, are not permitted uses in an Agricultural District.

52. Appendix A to the Cass Zoning Ordinance indicates that Electric, Gas and Sanitary Services, including electric services, are permitted uses in an Agricultural District if a Special Use Permit is secured.

53. The Cass Zoning Ordinance empowers the Zoning Officer to "administer and enforce the provision of these zoning regulations."

54. Aquila has commenced construction on Tract B of an electric utility substation ("Peculiar Substation") on an approximate 10-acre parcel situated within the property boundaries of the larger 55-acre tract.

55. The Peculiar Substation is designed to support the electric utility power plant on Tract A ("South Harper Facility") by allowing the power output of the plant to flow to an adjacent, higher voltage transmission line. From there, power would then flow through Aquila's transmission grid to where it is needed. The Peculiar Substation would also serve load growth in the area.

56. Aquila has commenced construction of the South Harper Facility within the property boundaries on Tract A. The proposed South Harper Facility is a 315-megawatt peaking power plant that will generate electric power by use of three 105 MW gas-fired combustion turbine generating units, fueled by natural gas.

57. Immediately adjacent to Tract A is a gas compressor facility operated by Southern Star Gas Pipeline since about 1951 when the facility began operation. Cass did not have a zoning ordinance at the time the pipeline was constructed. When Cass first adopted a zoning ordinance in June, 1972, the gas pipeline property was zoned I1 (light industrial) based on its pre-existing use. This gas compressor facility will provide the natural gas for the operation of the South Harper Facility.

58. Aquila is party to a Power Sales Agreement dated February 22, 1999, ("PPA") that expires on May 31, 2005. The PPA is for 500 MW of capacity during the summer months and 200 MW in the winter.

59. Aquila has expressed its desire to complete construction of the South Harper Facility and the Peculiar Substation by June 2005.

60. In a letter dated October 4, 2004, Presiding Cass County Commissioner, Gary L. Mallory, informed Aquila that "Cass County does not require a grading permit for the Aquila South Harper Peaking Facility."

61. On December 1, 2004, Aquila applied to Cass for an entrance permit for Tract B, which application was approved.

62. On December 3, 2004, Aquila applied to Cass for a building permit, application number 241206, to construct a plant service building as part of the South Harper Facility on Tract A. A construction permit for the foundation of the turbines and the service building was issued by Cass on February 24, 2005 subject however to special conditions.

63. On December 14, 2004, Aquila applied to Cass for a permit (Application No. 241217) to setup temporary power on Tract A. This application was not approved.

64. Pursuant to a meeting between the parties held on January 22, 2005, Cass granted permission to Aquila's construction manager, SEGA, Inc., to proceed with the installation of a transformer near the service building with the understanding that it will be used as temporary power during construction, but will become the permanent power transformer upon completion of all construction. It was understood that Aquila's request to install a temporary power transformer was made in conjunction with Aquila's filing of Application Number 250206 which is still under review by Cass.

65. On December 17, 2004, Aquila applied to Cass for a building permit (Application No. 241219) to install a control enclosure structure for a substation at the South Harper Facility on Tract A. A construction permit for this control enclosure was issued by Cass on February 1, 2005 subject to special conditions.

66. On December 17, 2004, Aquila applied to Cass for a building permit (Application No. 241220) to install a control enclosure structure at Peculiar Substation on Tract B. A construction permit for this control enclosure was issued by Cass on February 1, 2005 subject to special conditions.

67. Aquila has not secured a Special Use Permit or Rezoning of Tract A or Tract B from Cass to authorize or permit construction of a substation or power plant at these locations.

68. In June, 2004, Aquila filed an Application for Special Use Permit in Cass to construct a 315-megawatt peaking power plant to generate electric power by three combustion turbine generators fueled with natural gas on a site located in unincorporated Cass near Harrisonville and commonly referred to as the Camp Branch Energy Center.

69. The Application for Special Use Permit was denied after public hearing by the Planning and Zoning Board on July 13, 2004. The Application for Special Use Permit was then

scheduled for a public hearing before the Board of Zoning Adjustment ("BZA") for August 26, 2004. On August 19, 2004, Aquila requested that the hearing before the BZA of its Application for Special Use Permit be postponed until rescheduled by Aquila.

70. Aquila's Application for Special Use Permit for the power plant at the Camp Branch Energy Center was withdrawn on January 11, 2005.

71. On or about March 26, 2004, Aquila applied to the Missouri Department of Natural Resources ("MDNR") for a Prevention of Significant Deterioration construction permit ("PSD Permit") for the proposed Camp Branch Energy Center near Harrisonville, Missouri. A revised PSD Permit application was submitted to MDNR on or about September 13, 2004, reflecting a change in location of the proposed peaking facility to the South Harper location (Tract A).

72. MDNR conducted a public hearing on the draft PSD Permit on November 22, 2004.

73. MDNR issued a final PSD Permit to Aquila for the South Harper Facility at Tract A on December 29, 2004 a true and correct copy of which has been attached to the Application filed by Aquila on January 28, 2005, and marked as Appendix 7 thereto.

74. Aquila has commenced construction of the South Harper Facility now that it has received a final PSD Permit from MDNR.

75. Aquila could not have commenced construction of the South Harper Facility until it had a final PSD Permit from MDNR.

76. On September 29, 2004, Aquila filed an Application for Rezoning of Tract B from agricultural to I1 (light industrial) for purposes of constructing the Peculiar Substation.

77. On October 25, 2004, Aquila, through its counsel, requested that its Application for Rezoning of Tract B be continued from the Planning and Zoning Board hearing scheduled for October 26, 2004.

78. On November 19, 2004, Aquila withdrew its Application for Rezoning of Tract B.

79. A true and correct copy of the Final Judgment of the Honorable Joseph P. Dandurand, Circuit Judge of Cass County issued in Case No. CV104-1443CC on January 11, 2005, ("Final Judgment") is attached to the Application filed by Aquila on January 28, 2005, and marked as Appendix 2 thereto.

80. Aquila posted an Appeal Bond on January 11, 2005, that was approved by the Circuit Judge and that stayed the injunction portion of the Final Judgment.

81. A Notice of Appeal was filed by Aquila on January 12, 2005, in the Circuit Court of Cass County regarding the Final Judgment.

82. Aquila's appeal of the Final Judgment in Case No. CV104-1443CC has been assigned Case No. WD64985 in the Missouri Court of Appeals, Western District, which has scheduled oral argument for April 14, 2005.

Respectfully submitted,

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