

**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,)	Case No. EA-2006-0309
Maintain, and otherwise Control and)	
Manage Electrical Production and)	
Related Facilities in Unincorporated)	
Areas of Cass County, Missouri Near the)	
Town of Peculiar.)	

**CASS COUNTY’S AND OFFICE OF PUBLIC COUNSEL’S
PROPOSED REPORT AND ORDER
INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW**

SUMMARY¹ - ALTERNATIVE ONE

In this Order, the Commission finds that Aquila is not entitled to 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. The Commission further finds that Aquila is not entitled to an Order authorizing it to continue to operate electrical production and related facilities in unincorporated areas of Cass County, Missouri near the town of Peculiar.

SUMMARY² - ALTERNATIVE TWO

In this Order, the Commission finds that Aquila is entitled to 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

¹ Cass County has submitted two alternative Discussions and related Conclusions of Law. This Summary corresponds with Discussion and Conclusions of Law - Alternative One.

² See footnote number 1. This Summary corresponds with Discussion and Conclusions of Law – Alternative Two.

Unincorporated Areas of Cass County, Missouri near the town of Peculiar, subject to appropriate conditions as hereinafter set forth. The Commission further finds that Aquila is entitled to an Order authorizing it to continue to operate electrical production and related facilities in unincorporated areas of Cass County, Missouri near the town of Peculiar, subject to appropriate conditions as hereinafter set forth.

PROCEDURAL HISTORY

On January 25, 2006, Aquila applied (“Application”) for 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 (hereinafter the “South Harper Plant” and the “Peculiar Substation”) in unincorporated areas of Cass County, Missouri near the town of Peculiar. The Application followed the entry of an Opinion by the Missouri Court of Appeals for the Western District on December 20, 2005 (“Opinion”) which Opinion became final, having not been further appealed, on January 5, 2006. *StopAquila, et al. v. Aquila*, 180 S.W.3d 24 (Mo. App. W.D. 2006) (hereinafter “*Cass County*”). The Opinion affirmed the January 11, 2005 Judgment (“Judgment”) of the Cass County Circuit Court which had permanently enjoined the construction and operation of the South Harper Plant and the Peculiar Substation, and which had further ordered the immediate dismantling of the facilities should Aquila elect to post a bond to allow construction of the facilities to proceed pending appeal, and should its appeal prove unsuccessful. After the Opinion became final, Aquila secured an additional stay of the Judgment to May 31, 2006 by a February 15, 2006 Order (“Order”) from the trial court.

Aquila, by its Application, is seeking authority to construct the South Harper Plant and the Peculiar Substation, (though the facilities are already constructed) or, in the alternative, to

continue operating the facilities, despite their illegal construction. Aquila further asks that any certificate or order issued by the Commission be “site specific.”

Timely applications to intervene in response to the Application were filed by Cass County, StopAquila.Org, individual property owners Frank Dillon, Kimberly Miller, and James E. Doll, the City of Peculiar, Sedalia Industrial Energy Users’ Association, and Southwest Power Pool, Inc. All were allowed to intervene. On March 15, 2006, the Commission adopted a procedural schedule. On April 5, 2006, the Commission heard arguments on various of the intervenors’ Motions to Dismiss, which Motions were denied on April 20, 2006.

On March 20, 2006 and on March 30, 2006, the Commission conducted local public hearings in Cass County during which the Commission heard comments from supporters and opponents of the relief Aquila is seeking in its Application.

The Commission conducted an evidentiary hearing on the Application on April 26, 27, 28, May 1, 3, and 4, 2006.

FINDINGS OF FACT

The Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence but indicates rather that the omitted material was not dispositive of this decision.

The Beginning of Construction Related Activities

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”). At the time of this notification, the South Harper Tract was located in unincorporated Cass County and was zoned agricultural. The Tract remains located in unincorporated Cass County and zoned agricultural. The land uses surrounding the South Harper Tract are almost exclusively agricultural and residential, though residential development in the area has been expanding. An electric generation facility is not a permitted use on land that is zoned agricultural in unincorporated Cass County. Aquila was anticipating that the South Harper Tract would be annexed into the City of Peculiar. Aquila had agreed to submit itself to the City’s applicable land use regulatory scheme.

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 Peculiar Substation (“Peculiar Substation Tract”). The Peculiar Substation Tract was and remains located in unincorporated Cass County and was and remains zoned agricultural. A substation is not a permitted use on agriculturally zoned land in unincorporated Cass County. Aquila and Peculiar were not anticipating that the Peculiar Substation Tract would be annexed into the City. 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. As a result, Aquila filed an application with the County to rezone the Peculiar Substation Tract on September 29, 2004.

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 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. 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.

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.

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. The Public Service Commission Staff ("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. 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.

The Decision to Self Build

Not surprisingly, contemporaneous resource planning being conducted by Aquila led to the decision in January 2004 to “self build” a three (3) CT gas fired peaking plant with a capacity of 315 Megawatt (MW) as a means of utilizing the 3 CT’s transferred to Aquila from one of its non-regulated entities. Aquila’s own analysis determined the decision to construct a three (3) CT peaking plant was not the “least cost option.” 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. 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. The January 2004 decision to self build a three (3) CT gas fired peaking facility was a 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 \$77 Million from a non-regulated subsidiary as to justify including the cost of same in its rate base.

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. 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.

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. 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. In June 2004, SEGA identified eight (8) potential sites for the Plant. 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. 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’s collaborative efforts. 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.

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. 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.

Aquila engaged in no community development activities in advance of its SUP application for the Camp Branch site. 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 improvements of this scale. The public outcry against the SUP application was substantial. 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. 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.

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 board member of the Cass County Corporation of Economic Development. 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. Mallory advised Kreimer and Keefe the Camp Branch SUP application had a "snowball's chance in hell" of being approved by the BZA.

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. 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. 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.

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. Peculiar's City Administrator, Mike Fisher, took the lead in suggesting sites which might be available for annexation. After several sites proposed by Fisher were eliminated 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. 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."

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. 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.

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. In reliance on this schedule, Aquila purchased the 74-acre South Harper Tract on October 7, 2004 from the George Bremer Trust. 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. The ambitious schedule devised between Aquila and the City of Peculiar called for Aquila to have its three (3) CT peaking plant constructed and on line by June 1, 2005, given an anticipated six (6) month construction schedule.

The City of Peculiar Abandons Annexation

Aquila's plans were disrupted 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. Peculiar did advise Aquila, however, that it would 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. Peculiar stood to gain, financially, from the construction of the Plant and Substation if it provided Chapter 100 financing. In addition to the

financial advantage Peculiar stood to reap from the Chapter 100 financing, Aquila also agreed to provide the City of Peculiar many other concessions in exchange for its support.

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. Motivated by its 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. 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.

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. 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. 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.

Cass County did 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 of these discussions, the County was operating pursuant to its 1997 Zoning Ordinance, Subdivision Regulations and Comprehensive Plan, as amended in 1999 and 2003. 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, Aquila’s application and proposed development would have been evaluated by the County Planning Board pursuant to the 1997 Zoning Ordinance, Subdivision Regulations and Comprehensive Plan as amended in 1999 and 2003. Aquila’s rezoning application for the Peculiar Substation, a necessary companion to the Plant, was, before being continued and then subsequently withdrawn by Aquila, scheduled for consideration by the Cass County Planning Board on October 25, 2004. Clearly, the governing zoning ordinance and related land use documents for both the Plant and the Peculiar Substation would have been the 1997 Zoning Ordinance, Subdivision Regulations and Comprehensive Plan, as amended in 1999 and 2003. Any subsequent amendments to those ordinances and regulations, which according to the County’s evidence at hearing were adopted effective February 1, 2005 by the County Commission, would have no bearing on Aquila’s development of the two Tracts.

The County Files Suit

In response to Aquila's announced intention to commence construction of the Plant and Substation immediately, 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. 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 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 fairly warned that should this option be exercised, Aquila would be required to immediately dismantle the Plant and Substation should its appeal prove unsuccessful.

Aquila 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. 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. The need for additional peaking power has been discussed by Aquila and the Staff during ongoing integrated resource planning sessions, and the addition of 3 additional 105 MW CT’s within a few years at South Harper can meet that need. 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.

The Position of 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. Staff was also aware that the Judgment ordered both facilities immediately dismantled should Aquila’s appeals prove unsuccessful. The Commission itself 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, it was the Staff’s position and

testimony that the Commission does not have statutory authority to “site” power plants, and Staff confirmed that the Commission does not have the statutory authority to tell regulated utilities they cannot build a plant at a particular location. Staff has also acknowledged the Commission has no legislative authority to “locate” plants in other written communications.

Post Construction “Community Outreach”

In late April, 2005, Aquila hired a new employee, Norma Dunn, as its Vice President - Corporate Communications. 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. Before this time, no Aquila employee had been responsible for such duties, and no Aquila employee had engaged in such activities. 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.” 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.

The Court of Appeals’ Opinion and Aquila’s Request for More Time

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. 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.

On January 27, 2006, Judge Dandurand heard arguments on Aquila's Motion to Extend the Stay of Judgment. 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"). 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.

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. 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. 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 wherein the trial court had ordered the immediate dismantling of the Plant and Substation. 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. 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. Had Aquila filed rezoning or SUP applications for the Plant and Substation shortly after the January 27, 2006 hearing, those applications could easily have been determined by the County before May 31, 2006.

DISCUSSION³ (ALTERNATIVE ONE)

Determinations of the Opinion

The parties to this case generally agree, and the Commission does not dispute, that the Opinion, and its interpretation of § 393.170, constitute the foundation for analysis of the instant application. 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.

³ Cass County submits two alternative Discussion and Conclusions of Law sections. It does so, however, without waiving its legal positions as set forth in previously filed pleadings and without prejudice to its ability to seek review of any matter fairly raised therein.

- 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. The Commission is also aware that Aquila did not seek further review of the Opinion and it became final on January 11, 2006 when the Court of Appeals issued its Mandate affirming the Judgment, without equivocation.

The Last Paragraph of the Opinion

It is the effect of the last two sentences of the Opinion that have proven to be the source of vigorous debate during the course of this proceeding. Aquila has argued that the sentences render the Opinion prospective as to Aquila and provide the authority for the filing of this

application and its request for relief although the facilities involved have already been constructed and admittedly operated. Cass County has argued that the Court of Appeals unequivocally affirmed the Judgment, added no remand with instructions, and restricted the prospective range of its Opinion to only those existing facilities the construction of which had not been objected to on the grounds affirmed in the Judgment. Cass County goes on to contend that an application seeking retroactive approval of the construction of these facilities or their continued operation is barred.

The last two sentences of the Opinion provide:

“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.

It is the conclusion of the Commission that neither of these sentences grants new authority to the Commission nor relieves it from the determinations the Court rendered in the Opinion, particularly that § 393.170 requires the Commission to hold public hearings before the first spadeful of soil is disturbed in connection with construction of new power plants.

Staff, like Aquila, relies on the second sentence in the last paragraph in suggesting that the Commission has the power and authority to grant post facto approval for the facilities. 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 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). Whether or not the South Harper Plant and Peculiar Substation are necessary or convenient for the public service, since both were constructed before the filing of the instant application, the Commission utterly lacks authority to consider the application.

With respect to any suggestion that the Commission has authority to enter an order permitting the plant and substation to continue operating, we are likewise not persuaded that the Commission has such authority. Again, the final sentences of the Opinion do not direct us to any such authority under § 393.170 or elsewhere.

It is therefore the conclusion of the Commission that we have no authority to consider Aquila's application since it has been filed after the facilities involved were constructed. We further conclude that we have no authority to issue an order permitting those facilities to operate.

CONCLUSIONS OF LAW
(ALTERNATIVE ONE)

IT IS THEREFORE ORDERED:

1. That Aquila's Application in the captioned case is denied.
2. That any pending motions the Commission has not specifically ruled upon are denied.
3. That this report and order shall become effective on _____, 2006.

DISCUSSION⁴ (ALTERNATIVE TWO)

Determinations of the Opinion

Cass incorporates herein by reference its discussion of the Opinion as set forth in the portion of this Proposed Report and Order designated "Discussion (Alternative One)."

The Last Paragraph of the Opinion

It is the effect of the last two sentences of the Opinion that have proven to be the source of vigorous debate during the course of this proceeding. Aquila has argued that the sentences render the Opinion prospective as to Aquila and provide the authority for the filing of this application and its request for relief although the facilities involved have already been constructed and admittedly operated. Cass County has argued that the Court of Appeals unequivocally affirmed the Judgment, added no remand with instructions, and restricted the prospective range of its Opinion to only those existing facilities the construction of which had not been objected to on the grounds affirmed in the Judgment. Cass County goes on to contend that an application seeking retroactive approval of the construction of these facilities or their continued operation is barred.

⁴ See footnote number 3.

The last two sentences of the Opinion provide:

“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. [emphasis our own]

It is the conclusion of the Commission that the Court of Appeals intended that at this late time, Aquila may still qualify for a certificate of convenience and necessity from this Commission to construct, operate and maintain the South Harper Plant and the Peculiar Substation. As we did earlier in an order denying the Motions to Dismiss filed by Cass County and other parties, we reject the arguments questioning our jurisdiction and proceed to the merits of Aquila’s application, ever mindful that we have the authority to impose conditions upon any certificate that may be issued under our authority in §393.170.3 which authority has been confirmed if not buttressed by the emphasized quote above from the Opinion.

Public Convenience and Necessity

Under the provisions of §393.170.1 and 3:

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.

* * *

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 our own].

The question before the Commission is whether Aquila, consistent with the directives of the Opinion, has presented sufficient evidence from which we may conclude that the construction, operation and maintenance of the South Harper Plant and the Peculiar Substation are necessary or convenient for the public service. After consideration of the evidence, the Commission concludes that the public interest would be served by granting Aquila its sought after certificate for both facilities. The Commission has reached this decision on the basis of the following:

[Cass County will not for purposes of its proposed report and order detail Aquila's and Staff's alleged proof of need and convenience but rather directs the Commission to those proposals for this part of the discussion]

Cass County Zoning and Land Use Issues Relating to the Plant and Substation

In connection with the review of applications for approval of construction of new generation facilities, the Opinion of the Court of Appeals makes clear for the Commission that its duties and responsibilities may include, in the absence of a local zoning authority approving the issues in advance, the review and consideration of local land uses and zoning of the geographical area affected by the public utility's proposal. After considering the widely divergent arguments of the parties on the extent of the Commission's power and qualifications to review land use issues, the Commission has concluded that if it were to take on the task of reviewing and evaluating land use impacts attending the construction of new power facilities proposed by utilities under its regulation, the Opinion requires that the Commission's treatment of those issues be qualitatively the same as that afforded by the local land use authority, which in this case is the Cass County Planning Board and the Cass County Commission. Contrary to the

arguments of Aquila, Staff and those aligned with them, we are not authorized to fold land use issues of this nature into a consideration of public convenience and necessity. Otherwise, we believe we would give “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.

No party will deny that the Commission lacks a set of rules or regulations by which to measure and evaluate the land use issues that have been raised in this proceeding. Although the Commission is benefited by a highly qualified staff, no member of that body qualifies as a competent land use planner. The Commission is cognizant of Mr. Wood’s efforts to arrive at a “process” by which to judge the reasonableness of a utility’s power plant site selection. Mr. Wood’s factors however do not require zoning compliance, and given the Opinion, we are restrained to disapprove those factors. Mr. Wood’s factors would in our estimation 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. Mr. Wood agreed at hearing that land use issues can be consumed by the issue of need for a plant. If we were to adopt Mr. Wood’s 10-step process, we would relegate land use issues, including zoning, to the category of discardable factors under §393.170 which the Court of Appeals has forbidden. Such would not be the outcome the Court of Appeals envisioned or intended when it ruled that a public hearing to procure exemption from § 64.235 could be conducted before “either the county or the Commission.” Moreover, even if we were to adopt Mr. Wood’s 10-step process, we are cognizant that the Opinion in *Cass County* did not relive Aquila of the obligation to comply with § 64.255. Thus, no matter what process this Commission might employ to “review” the South Harper Tract and the Peculiar Tract, no

action taken by this Commission will suffice as all of the authority Aquila needs to continue operating the illegally constructed Plant and Substation.

The absence of discernable rules and regulations has also impaired affected parties in their presentations before the Commission on the issues relating to land use impacts. Cass County has argued that due process considerations weigh heavily in our determination. Although Aquila and Cass County supplied the testimony of land use planners in their presentations and Cass County has offered into evidence its governing zoning ordinances, Comprehensive Plan and amendments thereto, the parties, including Staff, 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 the 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 Commission believes that the issues of what process is due by law in this case are manifold and immense and foreshadow unnecessary judicial review of fundamental questions relating to our jurisdiction and due process. Our decision in this matter should therefore be tailored to minimize error on these grounds.

Conditioning the Site Specific Certificate

As provided in §393.170.3 and as unmistakably provided in the most heavily relied on last sentence of the Opinion, this Commission is authorized to certify the South Harper Plant and the Peculiar Substation and let them continue operating albeit with "whatever conditions are deemed appropriate." The Commission will exercise this authority in this case.

In conditioning the relief afforded by this order, the Commission finds that Aquila undertook, at its risk, to build the Plant and Substation despite the issuance of an 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 we impose herein take into consideration among other things that:

- a. 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 a self-imposed construction deadline
- b. Aquila has never secured proper zoning for the Plant and Substation sites and is not exempt from the obligation to do so.
- c. The impact of the Plant and Substation on neighboring residents, and the efforts taken by those neighbors to protect and preserve their property rights.

CONCLUSIONS OF LAW
(ALTERNATIVE TWO)

IT IS THEREFORE ORDERED:

1. Aquila is granted permission and approval and a certificate of convenience and necessity to construct, install, own., operate, maintain, and otherwise control and manage the South Harper Plant and Peculiar Substation subject to the conditions of certification set out below and to all applicable statutes and Commission rules:

- 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.

- 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.
- 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.
- 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.
- e. Aquila will not utilize the South Harper Plant to generate "off-system sales."
- 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, whichever first occurs, as the penalty for an illegal use envisioned by the County's Zoning Ordinance.
- 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.

- 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.**
- 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.**
- 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 than Aquila, the facilities will be immediately dismantled.**
 - 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.**
- 2. That any pending motions the Commission has not specifically ruled upon are denied.
 - 3. That this report and order shall become effective on _____, 2006.

BY THE COMMISSION

Secretary/Chief Regulatory Law Judge

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

OFFICE OF THE PUBLIC COUNSEL

By: /s/ Mark D. Wheatley

Mark D. Wheatley (#30163)

Senior Public Counsel

P O Box 2230

Jefferson City, MO 65102

(573) 751-1304

(573) 751-5562 FAX

mark.wheatley@ded.mo.gov

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 18th 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 ltrackers@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