BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
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 Transmission Substation and Related Facilities in St. Clair County, Missouri (Near the City of Osceola).	))))))))))	Case No. EA-2006-0500

MEMORANDUM OF AQUILA, INC. CONCERNING NECESSITY FOR ISSUANCE OF CERTIFICATE OF CONVENIENCE AND NECESSITY

COMES NOW Applicant Aquila, Inc., ("Aquila" or the "Company"), and submits the following memorandum concerning the necessity for the issuance of a certificate of convenience and necessity authorizing it to construct, install, own, operate, maintain and otherwise control and manage an electrical transmission substation in an unincorporated area of St. Clair County near the City of Osceola, Missouri.

CONTEXT OF FILING

On June 23, 2006, Aquila filed its Application for a certificate of convenience and necessity to construct, own, operate, and manage an electrical transmission substation ("Certificate") in an unincorporated area of St. Clair County near the City of Osceola, Missouri (the "Osceola Substation"). In paragraph 5 of that Application, Aquila noted that the Missouri Public Service Commission ("Commission") previously has authorized the Company to render electric service throughout portions of St. Clair County (including the site of the

proposed Osceola Substation) in Case Nos. 9470 (1938) and 11,892 (1950). In its June 28, 2006 Order and Notice in this case, the Commission directed Aquila to file "a memorandum addressing the issue of whether it is necessary for Aquila, Inc., in light of the Commission's prior grant of authority, to presently seek from the Commission the requested relief."[1]

Prior to the Missouri Court of Appeals, Western District's December 20, 2005, decision in Case No. WD64985 (the "South Harper Opinion"), Aquila likely would not have filed an Application with the Commission for a Certificate to construct and operate the Osceola Substation. Following the Commission's guidance provided in *Re Union Electric Company*, 24 Mo. P.S.C. (N.S.) 72 (1980) [which interpreted the scope and application of *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960)], Aquila's long-standing practice was to rely on its area service certificate as sufficient authority to construct those electrical service facilities necessary to carry out its legal obligation to provide safe and adequate electrical service to its patrons.

Consistent with the Commission's stated policy that it was unnecessary for an electric utility to secure a site-specific certificate to build a peaking power station within the existing boundaries of an area service certificate[2], Aquila undertook, in October of 2004, to construct an electric generation peaking station and an associated remote electric transmission substation, both in unincorporated Cass County and near the City of Peculiar, Missouri. Shortly after commencement of site preparation and improvement for these two facilities,

[1] *See*, ¶ Ordered:3.
[2] *Re Union Electric Company, supra.*

separate petitions for injunctive relief were filed by Cass County, Missouri and an unincorporated association of individuals challenging the right of Aquila to construct the South Harper power station and the associated remote electrical transmission substation. Ultimately, on January 11, 2005, the Cass County Circuit Court issued a permanent injunction enjoining Aquila from constructing and operating both the power plant and the associated electric transmission substation and ordering that Aquila remove all improvements and equipment inconsistent with an agricultural zoning classification.[3]

Following an appeal, the Court of Appeals, Western District, affirmed the Circuit Court's judgment "permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County's zoning law without first obtaining approval from the county commission or the Public Service Commission."[4] (emphasis added). In short, the Court of Appeals appears to have upheld the validity of its *Harline* decision but limited its application to the extension of transmission power lines within an electric utility's certificated service area.[5] Specifically, the Court of Appeals concluded that the Commission's *Union Electric* decision, which interpreted the application of *Harline*, was erroneous because the Commission "reached its conclusion by overlooking the distinction made in *Harline* between transmission lines and an electric plant."[6] The Court concluded that the term "electric plant" appearing in

[3] The injunction was suspended during the pendancy of Aquila's appeal thereof.
[4] *Slip Op.* at 26.
[5] *Slip Op.* at 16
[6] *Slip Op.* at 17

§393.170.1 RSMo necessarily includes power generating facilities.[7] The Court did not, however, specifically analyze whether electric substations are also within the definition of "electric plant."[8] Significantly, the Court of Appeals stated:

> [W]e believe that the legislature, which clearly and unambiguously addresses electric plants in subsection 1 [of § 393.170, RSMo] did not give the Commission authority to grant a certificate of convenience and necessity for the construction of an electric plant without conducting a public hearing that is more or less contemporaneous with the request to construct such a facility.[9]

While the South Harper Opinion primarily focused on the construction of the South Harper power station, the express legal effect of the opinion was to enjoin the construction of both the South Harper power station and the associated remote electrical transmission substation (referred to therein as the "Peculiar Substation"). Thus, although not so succinctly stated, the Court's clear conclusion was that electric substations are "electric plant" for the purposes of §393.170.1 RSMo, which construction must be specifically authorized by the Commission. The Court expressly held that the Peculiar Substation was not a power line extension that "already comes within the franchise granted by a county" and, therefore, was not authorized by the Commission in 1938 in Case No. 9470.[10]

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[7] In doing so, the Court took note that the definition of "electric plant" at §386.020(14) includes "any conduits, ducts, or other devices, materials, apparatus or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat or power." (emphasis added) *Id.* The South Harper Opinion does not address the meaning of this phrase.
[8] *Id*.
[9] *Slip Op*. at 13
[10] *Slip Op*. at 18.

CERTIFICATION OF THE OSCEOLA SUBSTATION

The Osceola Substation, like the Peculiar Substation, will be an electric transmission substation. The apparent holding of the South Harper Opinion is that electric transmission substations are to be considered "electric plant" which construction must be pre-approved under § 393.170.1 RSMo, and not "transmission lines" whose continued construction and extension are permitted under the Court of Appeal's 1960 *Harline* decision. The practical effect of the South Harper Opinion was to conclude that Aquila's service area certificate granted in Commission Case Nos. 9470 and 11,892 is not the specific authorization required by § 393.170.1 RSMo to construct, own and operate new electrical transmission substations within the areas described in those cases. Significantly, the Court of Appeals understood that the Peculiar Substation not only was designed to support the South Harper power station but also to "serve area load growth" in Aquila's authorized service territory.[11] Clearly, the Court did not view the Peculiar Substation merely as an appendage of the new peaker unit but, rather, as a facility with broader, independent system functionality.[12] Further, the Court stated that it only intended for its opinion to have prospective effect,[13] evidencing its intent that, going forward, electric utilities should seek Commission

[11] *Slip Op*. at 4, ftnt. #4.
[12] Company witness Carl Huslig, Vice President Transmission, testified in Case No. EA-2006-0309 that the construction of the Peculiar Substation was a required transmission upgrade to accommodate the South Harper power station but that it also was necessary for greater system reliability to the Belton and Raymore areas served by Aquila Networks-MPS regardless of the construction of the new power station. It allowed a 69kV line to be upgraded such that the entire western side of the Aquila system is now serviced by a 161kV line. The transmission planning department had concluded that load growth in the area would have caused "unacceptable system performance" without the addition of the Peculiar Substation. (Direct Testimony, pp. 4 and 5; Exh. 6)
[13] *Slip Op*. at 22.

approval (under §393.170.1 RSMo) of the construction of electric plant. Consequently, Aquila has determined that it is required under Missouri law (as recently enunciated in the South Harper Opinion) to file an Application for the Certificate for the Osceola Substation.

CONCLUSION

For the above reasons, Aquila believes that the filing of its Application for the Certificate for the Osceola Substation is necessary, notwithstanding the Commission's prior issuance of an area service certificate in Case Nos. 9470 and 11,892. Accordingly, the Commission should not dismiss the Application as unnecessary, but instead, should consider the Application on its merits and grant Aquila the requested Certificate of Convenience and Necessity.

Respectfully submitted,

BRYDON, SWEARENGEN & ENGLAND

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 21st day of July, 2006, to the following:

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