

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

CASS COUNTY, MISSOURI

Case No. EA-2006-0309

SURREBUTTAL TESTIMONY

OF

GARY MALLORY

Harrisonville, Missouri
April 18, 2006

SURREBUTTAL TESTIMONY OF GARY MALLORY

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS?

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

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

A. Yes, I am.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

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

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

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

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

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

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

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.

1

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

3 A. Yes, it does.