

REBUTTAL 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. WHAT IS YOUR OFFICIAL POSITION AND WHAT ARE YOUR DUTIES?**

6 A. I am the Presiding Commissioner for Cass County, Missouri. In this elected office I am
7 responsible for presiding over all matters relating to Cass County government, its various
8 departments and other elected officials.

9

10 **Q. HOW LONG HAVE YOU BEEN IN THIS POSITION?**

11 A. I began serving my office on January 1, 2003.

12

13 **Q. HAVE YOU HELD ANY OTHER POSITIONS WITH CASS COUNTY, MISSOURI?**

14 A. Yes, prior to being elected to the position of Presiding Commissioner, I held the elected office of
15 County Clerk of Cass, County for twelve (12) years, from January 1, 1991 until December 31,
16 2002.

17

18 **Q. FOR WHOM DO YOU APPEAR IN THIS PROCEEDING?**

19 A. I am speaking on behalf of Cass County, Missouri, an intervener in this case.

20

21 **Q. DID YOU ALSO TESTIFY ON BEHALF OF THE COUNTY AT THE LOCAL PUBLIC**

HEARING HELD IN HARRISONVILLE, MISSOURI, ON MARCH 20, 2006?

A. Yes, I did.

Q. PLEASE STATE YOUR EDUCATIONAL BACKGROUND AND HISTORY OF EMPLOYMENT AND PROFESSIONAL EXPERIENCE.

A. I have attached GM Schedule 1 which sets out my education and experience.

Q. IN GENERAL, WHAT ARE YOUR PRESENT DUTIES?

A. I have direct responsibility for managing the affairs, both financial and administrative, of all Cass County governmental departments and functions under the County's purview.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. To provide testimony relative to Cass County land use development concerns and Zoning Regulations as the same relate to issues concerning the construction and operation of the South Harper electric power plant site and Peculiar Substation site by Aquila, Inc. in Cass County, Missouri. I desire to describe the importance of planning and zoning and its importance to Cass County. I will address the Cass County planning and zoning review process that would have occurred if Aquila had appropriately filed timely development review applications (for a rezoning and/or special use permit(s)) pertaining to the South Harper Generating Station and the Peculiar Substation.

1 **Q. MR. MALLORY, ARE YOU FAMILIAR WITH THE HISTORY OF ZONING IN CASS**
2 **COUNTY?**

3 A. Yes, during my years of employment and service with Cass County, I have become familiar with
4 and have knowledge of Cass County zoning laws and regulations.

5

6 **Q. WHAT IS THE BASIS FOR YOUR KNOWLEDGE OF THAT HISTORY?**

7 A. In my duties as County Clerk, I attended County Commission meetings and Board of Zoning
8 Adjustment meetings in order to assure that a formal record was made of the proceedings. In the
9 normal course of business during these meetings, County zoning policies, rules, regulations and
10 state laws have been discussed. As the Presiding Commissioner, I preside over all County
11 Commission meetings, review documents relating to issues coming before the Commission,
12 observe and listen to public hearing testimony, and vote on all decisions coming before the
13 County Commission, including zoning applications and site plan approval. In accordance with
14 Missouri law, I am also a member of the Cass County Board of Zoning Adjustment (BZA). In
15 my capacity as a member of the BZA, I review documents relating to issues coming before the
16 BZA, observe and listen to public hearing testimony, and vote on all decisions coming before the
17 BZA.

18

19 **Q. WOULD YOU GIVE US A BRIEF ACCOUNT HOW ZONING WAS IMPLEMENTED**
20 **IN CASS COUNTY?**

1 A. The zoning process began in Cass County in 1958. Subsequent to the issue being presented to
2 Cass County voters, zoning was established/adopted on August 3, 1959. The first Planning
3 Board was appointed on October 13, 1959. The Zoning Order has since been amended on
4 October 14, 1959, and again in the years 1967, 1969, 1973, 1991, 1997 and 2003, which
5 remained in effect with amendments until February 1, 2005.

6
7 **Q. WHAT PROCEDURES ARE FOLLOWED IN CASS COUNTY FOR A REZONING**
8 **APPLICATION?**

9 A. All documents are submitted by an applicant, along with the necessary fees to the Planning and
10 Zoning Department. The procedures require an applicant to inform the County of nearby
11 landowners who may be impacted by a proposed application so that public notice can be
12 accomplished. An appropriate date is set for a planning board hearing, notice to nearby
13 landowners is sent and a hearing is advertised. At the conclusion of the public hearing the
14 Planning Board votes to either recommend approval or denial of the application and sends its
15 recommendation to the County Commission. Approximately ten (10) days later, the County
16 Commission convenes to hear the Planning Board recommendations and may vote to accept the
17 Planning Board's recommendations or may vote to deny the Planning Board's recommendations

18
19 **Q. WHAT PROCEDURES ARE FOLLOWED IN CASS COUNTY FOR AN APPLICANT**
20 **TO OBTAIN A SPECIAL USE PERMIT?**

1 A. All documents are submitted by an applicant, along with the necessary fees, to the Planning and
2 Zoning Department. The procedures require an applicant to inform the County of nearby
3 landowners who may be impacted by a proposed application so that public notice can be
4 accomplished. An appropriate date is set for a Planning Board hearing, notice to nearby
5 landowners is sent and a hearing is advertised. At the conclusion of the public hearing the
6 Planning Board votes to either recommend approval or denial of the application and sends its
7 recommendation to the County Board of Zoning Adjustment. Approximately ten (10) days later,
8 the County Board of Zoning Adjustment convenes to hear the Planning Board recommendations
9 and may vote to accept the Planning Board's recommendations or may vote to deny the Planning
10 Board's recommendations.

11
12 **Q. HAS CASS COUNTY SEEN A RAPID INCREASE IN ITS POPULATION?**

13 A. Yes, Cass County has seen a rapid increase in population growth.
14

15 **Q. CAN YOU QUANTIFY THE INCREASE IN POPULATION FOR THE COMMISSION?**

16 A. Yes, Cass County has seen an approximate 11% increase in growth the last 5 years from 2000
17 census to 2005 update issued by the census bureau.
18

19 **Q. HAS THE POPULATION INCREASE HAD AN EFFECT ON THE ZONING**
20 **REGULATIONS OF THE COUNTY? PLEASE EXPLAIN.**

1 A. The Planning Board, staff and the County Commission are constantly looking forward, as any
2 necessary changes and updates to the County's planning processes need to reflect the county's
3 growth and future projected growth.

4
5 **Q. AS THE PRESIDING COMMISSIONER FOR THE COUNTY, WHAT IS YOUR**
6 **PERSPECTIVE ON THE IMPORTANCE OF ZONING FOR THE COUNTY?**

7 A. As the County grows and develops, it is imperative that the County enforce its Zoning
8 Ordinance, and that the County routinely review and amend, as necessary, its Zoning Ordinance
9 and Development Plan. The Zoning Ordinance and Development Plan serve several goals. Both
10 provide for consistency in how land can be developed in certain areas of the County. Both
11 provide standards to be followed by developers. Good land use planning actually enhances
12 growth and property values in the County. People are more willing to invest in developing
13 property in the County when they have some reasonable certainty about the plan for growth and
14 development in the County. The County's Zoning Ordinance and Development Plan is designed
15 to foster both residential and commercial/industrial growth in the County. The Zoning Ordinance
16 and Development Plan describe the areas in the County where certain types of uses will be
17 deemed acceptable. These uses, which vary in intensity, are planned in a tiered or phased
18 fashion, as to minimize the impact of higher intensity uses on areas intended to be developed or
19 used for lower intensity purposes. It is my desire to assure that the growth of Cass County is
20 realized in a manner that is consistent and in accordance with the Comprehensive Plan.

1 **Q. ARE THERE CERTAIN COUNTY POLICIES OR GOALS SATISFIED WITH THE**
2 **ENFORCEMENT OF THE ZONING ORDINANCES?**

3 A. Yes, as I have indicated, good land use planning advances the County's goals of growth.
4 Increased residential and commercial development projects add to the County's tax base. At the
5 same time, good land use planning enhances existing property values by promoting a reasonable
6 and systematic development scheme. Enhanced residential and commercial property values also
7 add to the County's tax base. The County's tax base is a critically important source of the
8 revenue the County needs to provide necessary services to its citizens.

9
10 **Q. WHAT ARE THE EFFECTS UPON THE COUNTY AS A WHOLE IF STRUCTURES**
11 **ARE ERECTED WITHOUT COMPLYING WITH THE REQUIREMENTS OF THE**
12 **ZONING ORDINANCES OF THE COUNTY?**

13 A. If development is allowed to take place haphazardly, with no regard for zoning or the County's
14 Development Plan, we can anticipate an immediate "chill" on development in Cass County.
15 Developers, and by that I mean businesses and individuals, will be naturally reluctant to invest
16 money developing or improving property in Cass County in the absence of reasonable certainty
17 about the likely future uses of adjacent properties. As a result, the County's growth will be
18 stunted, property values in the County can be expected to fall, and the County will lose property
19 tax revenues. It is, in effect, a vicious cycle. Though some may view land use regulations as
20 intrusive or obstructionist, in reality, the proper adoption and enforcement of land use regulations
21 is the best way to insure steady, managed growth and increased property values.

1

2 **Q. HAS THE PLANNING BOARD FOR THE COUNTY OR THE COUNTY**
3 **COMMISSION ITSELF SHOWN ANY TENDENCIES AGAINST GROWTH OR**
4 **AGAINST INDUSTRIAL DEVELOPMENT IN THE COUNTY?**

5 A. No, in fact, the County has a history of attempting to be proactive in providing for systematic,
6 planned growth and industrial development.

7

8 **Q. AQUILA, INC. ATTEMPTED TO FILE AN APPLICATION FOR A SPECIAL USE**
9 **PERMIT RELATED TO THE SOUTH HARPER PLANT AND THE PECULIAR**
10 **SUBSTATION ON JANUARY 20, 2006, WITH THE COUNTY, IS THIS CORRECT?**
11 **CAN YOU TELL THE COMMISSION WHY THE COUNTY REJECTED THESE**
12 **APPLICATIONS FROM AQUILA?**

13 A. The County rejected the proposed Special Use Permit applications which Aquila attempted to file
14 on January 20, 2006, because at that time the judgment entered by Judge Dandurand and which
15 the Western District Court of Appeals affirmed directed that the plant and substation were to be
16 immediately dismantled and the real property returned to its agricultural state.

17

18 **Q. HAS AQUILA ATTEMPTED TO FILE ANY ZONING APPLICATIONS WITH CASS**
19 **COUNTY SINCE JANUARY 20, 2006?**

20 A. To the best of my knowledge and information, Aquila has not attempted to file any zoning
21 applications with Cass County since January 20, 2006, although Aquila was advised after Judge

Dandurand granted additional time before the plant had to be dismantled that the county would process such an application.

Q. ARE THERE ANY REASONS AT THIS TIME WHY SUCH APPLICATIONS COULD NOT BE RECEIVED, FILED AND PROCESSED BY THE COUNTY?

A. No.

Q. HAS AQUILA ACQUIRED ZONING APPROVAL FOR CONSTRUCTION AND OPERATION OF THE SOUTH HARPER PLANT AND THE PECULIAR SUBSTATION?

A. No, Aquila has not.

Q. HAS AQUILA ACQUIRED ANY PERMITS FROM CASS COUNTY IN REFERENCE TO ITS CONSTRUCTION AND OPERATION OF THE SOUTH HARPER PLANT AND THE PECULIAR SUBSTATION TO DATE? IF SO, WHAT PERMITS HAVE BEEN ACQUIRED AND WHEN WERE THEY ACQUIRED?

A. Yes. According to the records of the Cass County Building Codes Department and the Cass County Health Department, the following permits have been obtained by Aquila or on Aquila's behalf in reference to the South Harper Plant and Peculiar Substation:

a. Project Control No. 241206: This application was made on 12/2/04, by Mr. Terry

1 Hedrick from Aquila. This application was for the following: To install foundations only for the
2 turbines and service building at the Aquila Peaking power (plant) as per submitted plans and
3 applicable building codes and county ordinances. Permit #25047 was issued on 2-24-05.

4 b. Project Control No. 241219: This application was made on 12/17/04, by Doug
5 Lukenbill for Aquila. This application was for a control enclosure structure at the SouthHarper
6 Substation. Permit #25020 issued on 2/1/05.

7 c. Project Control No. 241220: This application was made on 12/17/04, by Doug
8 Lukenbill for a control enclosure building located at the Peculiar Substation, 8901 E 203rd St.
9 Permit #25021 issued on 2/1/05.

10 d. Project Control No. 250108: This application was made by AZCO on 1/7/05 for
11 temporary power at the South Harper job site. Permit #25015 issued on 1/24/05.

12 e. Project Control No. 250109: This application was made by Kissick Const. on 1/14/05
13 for temporary power at the South Harper job site. Permit #25012 issued on 1/19/05.

14 f. Project Control No. 250110: This application was made by Kissick Const. on 1/14/05
15 for a temporary work enclosure at the South Harper job site. Permit #25013 issued 1/19/05. No
16 inspections have been performed by Cass County as of 3/23/05.

17 g. Project Control No. 250206: This application was made by Aquila on 2/7/05 for the
18 main construction permit for the South Harper plant. Permit #25072 issued on 3/21/05.

19 h. Project Control No. 250416: This application was made by Panhandle Eastern
20 PipeLine on 4/19/05 to install foundations only for a 8' x 12' prefabricated skid mounted metal
21 building at the Aquila Peaking power (plant) for the natural gas pipeline as per submitted plans

1 and applicable building codes and county ordinances. Permit # 25101 issued 4/25/05.

2 I would like to note here that a Special Use Permit is required by the County for the
3 construction of a natural gas pipeline extension within the County, however, no
4 application was made by any entity for such extension.

5 i. Project Control No.250425: This application was made by Panhandle Eastern Pipe
6 Line on 4/25/05 for installation of a prefabricated 8 x 12 skid mounted metal building for natural
7 gas pipeline. Permit #25123 issued 5/5/05.

8 j. Project Control No. 250537: This application was made by Aquila, Inc. on 5/19/05 to
9 install a foundation only for an “h” occupancy building. Permit #25196 issued on 7/16/05.

10 k. Project Control No. 250639- This application was made by Aquila, Inc. on 7/6/05 to
11 install a flammable material storage building size 22’ x 25’ w/12’ sidewalls at the Aquila Peaking
12 power (plant). Permit #25267 issued on 9/6/05.

13 l. Project Control No. 251034: This application was made by Aquila, Inc. on 10/28/05
14 for installation of footings and foundation for sound proofing walls at 24400 S. Harper. Permit
15 #25339 issued on 10/31/05.

16 m. Driveway Permit: Aquila received a Road and Bridge Driveway Permit for the South
17 Harper Peaking Facility on December 2, 2004.

18 n. Health Department Permit: On February 24, 2005, Aquila received Permit # 05-018
19 from the Cass County Health Department for construction of an on site wastewater system.
20

21 **Q. WERE THE ABOVE PERMITS ISSUED BY CASS COUNTY WITH ANY SPECIAL**

CONDITIONS?

A. Yes. The Permits issued by the Cass County Codes Office all contain the following Special Conditions: “This permit is being issued despite the fact that this site has not been zoned in a manner consistent with the activities anticipated for the site. The County does not by issuing this permit, wave [sic] its right to enforce its requirement that building permits cannot be issued in the absence of proper zoning. However, in light of this Court’s judgment and the suspension of that judgment pending appeal in the case styled Cass County, Missouri, Plaintiff, v. Aquila, Inc., Defendant, Case No. CV104-1443CC, this building permit is being issued despite the absence of proper zoning.”

Q. HAS AQUILA REQUESTED TO RECEIVE ANY OTHER PERMITS FROM CASS COUNTY SINCE OBTAINING THE ABOVE-REFERENCED PERMITS?

A. Aquila, through its representatives, has requested to receive a permanent Certificate of Occupancy for the service building located at the South Harper power plant site from the Cass County Codes Department since its completion. The Codes Department has not issued a permanent Certificate of Occupancy for this structure as a result of the ongoing litigation. Cass County has not received any requests for any other permits nor has the County received any type of zoning application from Aquila since the attempted Special Use Permit submittal on January 20, 2006.

Q. AS THE COUNTY’S PRESIDING COMMISSIONER, DO YOU BELIEVE IT IS

**IMPORTANT FOR CASS COUNTY OFFICIALS TO PLAY A ROLE IN THE SITING
OF ELECTRIC ENERGY GENERATION AND TRANSMISSION FACILITIES? IF SO,
WHY?**

A. Power plants are no different than any other proposed development in Cass County, and for the reasons previously noted, compliance with the County's Zoning Ordinance and Development Plan is critical to the County's growth. A power plant is an industrial use of property. An industrial use of property is more intensive than residential or agricultural use. It is even more important that the location of a power plant or transmission facility be reviewed in partnership with the County, consistent with the County's Zoning Ordinance and Development Plan, to minimize the impact on existing property owners. The County possesses unique knowledge and experience with respect to its Zoning Ordinance and Development Plan, and is in a superior position to evaluate the propriety of a proposed use for property within the County, including proposed power plants. In fact, the County has previously worked in cooperation with Aquila in connection with construction of the Aries power plant in 1999 in unincorporated Cass County. The County can work with a utility to assist in locating proposed sites for a power plant most consistent with the County's existing land use regulatory scheme. The County also has the ability to require the utility, as a condition of approval of an application for rezoning or special use permit for a power plant site, to make certain adjustments or improvements to its planned development to address citizens' concerns. In this way, all affected have an opportunity to be heard, and all affected have an opportunity to work in partnership toward a solution that balances the desire of the County to promote growth with the desire of residents to minimize the impact

1 of growth on their property. No other entity or agency is positioned to serve in this role but the
2 County.

3
4 **Q. ARE YOU FAMILIAR WITH THE DUTIES AND RESPONSIBILITIES OF THE**
5 **MISSOURI PUBLIC SERVICE COMMISSION?**

6 A. Yes, the Missouri Public Service Commission is appointed for the purpose of determining the
7 need for public utilities and to approve rates which are passed on to the consumer.

8
9 **Q. DESCRIBE HOW THE DUTIES OF THE MISSOURI PUBLIC SERVICE**
10 **COMMISSION AND THE DUTIES OF CASS COUNTY GOVERNMENT COULD**
11 **WORK COOPERATIVELY IN THE SITING OF ELECTRIC ENERGY GENERATION**
12 **AND TRANSMISSION FACILITIES.**

13 A. The Public Service Commission should be responsible for determining the need for power and
14 Cass County government should oversee and assist the utility company in the site selection
15 process.

16
17 **Q. DOES THIS CONCLUDE YOUR TESTIMONY AT THIS TIME?**

18 A. Yes, it does.