

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

In The Matter of the Application of Aquila,)
Inc. for Permission and Approval and a)
Certificate of Public Convenience and)
Necessity Authorizing it to Acquire,)
Construct, Install, Own, Operate,)
Maintain, and otherwise Control and)
Manage Electrical Production and)
Related Facilities in Unincorporated)
Areas of Cass County, Missouri Near the)
Town of Peculiar.)

Case No. EA-2006-0309

**MOTION TO SET EARLY PREHEARING CONFERENCE,
TO ESTABLISH PROCEDURAL SCHEDULE
AND FOR ISSUANCE OF PROTECTIVE ORDER**

COMES NOW Aquila, Inc., (hereinafter "Aquila" or "Company"), by counsel, and for its Motion to Set Early Prehearing Conference, to Establish Procedural Schedule and for the Issuance of Protective Order in the captioned-case, respectfully states as follows to the Missouri Public Service Commission ("Commission"):

1. On January 25, 2006, Aquila filed an application with the Commission seeking permission and approval and a certificate of public convenience and necessity authorizing the Company to acquire, construct, install, own, operate, maintain, and otherwise control and manage electrical production and related facilities (the "South Harper Facility" and "Peculiar Substation") in unincorporated areas of Cass County, Missouri near the town of Peculiar¹. The application is a result of the opinion of the Missouri Court of Appeals, Western District, in its Case No. WD64985 dated December 20, 2005 that rejected the Commission's long-standing regulatory policy, followed by the

¹ The subject electrical production and related facilities have been constructed.

electric utility industry, that "area" or "territorial" certificates are sufficient authority for a utility to construct any and all facilities within that area including power plants and substations. The opinion of the Court of Appeals also held that with a grant of specific "plant" authority from the Commission pursuant to §393.170.1 RSMo., the South Harper Facility and Peculiar Substation, would qualify for the regulatory preemption from Cass County zoning requirements as contemplated by §64.235 RSMo.

2. The timing of the application and the relief requested by this motion is also a result of the fact that the Honorable Joseph P. Dandurand, on January 27, 2006, in Cass County, Missouri vs. Aquila, Inc., Cass County Case No. 17V010401443, extended, until May 31, 2006, the stay of the terms of the injunction he previously entered in said case to allow Aquila an opportunity to obtain specific authority from the Commission for the South Harper Facility and Peculiar Substation².

3. Aquila has made repeated offers to Cass County to file a zoning application for the South Harper Facility and Substation. Each of these offers was met with a refusal. Most recently, on January 20, 2006, Aquila Senior Vice President of Communications, Norma Dunn, hand-delivered an application to Cass County, but was

² A written order has not yet been signed. See Transcript, Cass County Case No. 170V10401443, January 27, 2006.

THE COURT: The Order I am going to enter I believe to be fair. I wouldn't enter it if I didn't think it was fair, but it's not what Aquila wants, and its is certainly not what the County wants because they would like for me to order you tomorrow under penalty of contempt to begin to tear that thing down and get it done quickly.

This will be the Order of the Court that I would request counsel for the County to fashion and circulate for approval as to content - - excuse me - - as to form, not as to content, and you can probably work on my language a little better, but the Order of the Court is:

That Aquila is directed to dismantle the plant in its entirety commencing May 31st of 2006 under penalty of contempt of court, that they are to immediately cease operations of the plant in its entirety regardless of emergencies; that the substations will be allowed to continue to operate; that they will post a \$20 million bond with the Court as security for compliance with this Court's Order.

Tr. pp. 79-80.

met at the steps of the Courthouse and turned away by the County attorney. Cass County attorneys followed up with a letter threatening to seek an order holding Aquila in contempt of court for attempting to file the application. **Appendix 1**

4. Also recently, Cass County strongly opposed Aquila's motion requesting that Judge Dandurand stay his prior removal order while Aquila sought the approval from the Commission for the facilities that the Court of Appeals determined was lacking. Cass County also insisted that the Judge immediately order the facilities dismantled.³ As part of that proceeding, Cass County delivered to Judge Dandurand a legal memorandum suggesting it would be illegal for the County to ever consider a zoning application for these facilities. **Appendix 2** Other stated reasons for refusing a zoning application included (1) that there was (and still is) a court order in affect requiring the facilities be removed; (2) the suit filed by Cass County against the Commission over the Commission's April 2005 Order Clarifying Prior Certificates of Convenience and Necessity (Case No. EA-2005-0248) has not been resolved in the County's favor; and (3) the County has a duty to see that the facilities are first removed before a zoning application can fairly be considered. **Appendix 3a and 3b** Notwithstanding a recent "invitation" by Cass County for Aquila to file an application for a special use permit, it is clear that the position of Cass County is that any retroactive approval of zoning for the site is illegal and that the County's objective is to have the facilities removed. **Appendix 4**

5. A result of Cass County's demand that Judge Dandurand order immediate removal of the facilities is that the Judge has provided Aquila with a very limited window of time in which to seek approval and for the Commission to act. Given that the

³ See footnote 2.

Commission's approval for these facilities is required even if the County were to also approve them⁴, at this late date, it is imperative that the resources of all concerned be focused on that process. Issues such as land use, current conditions and public input may be considered in the context of the case before the Commission as contemplated by the decision of the Court of Appeals and the County. In this regard, counsel for Cass County, stated the following at the January 5, 2005 hearing before Judge Dandurand: "Well, if an application is filed by Aquila tomorrow with the Public Service Commission, Cass has a right to go down there and be heard."⁵ She also said, "Aquila's interpretation, there is never an opportunity to be heard."⁶ Then she said, "Now, I am going to be honest with you. The county would much prefer that that process occur with the county, but we are going to follow the law."⁷ Counsel also stated to the Court that if Aquila's facilities are exempt "from compliance with the county's master plan," which both the Court of Appeals and Circuit Court have now concluded, then there are

three different ways an applicant would be able to impose upon the county - - or excuse me - - better stated, would be able to say to the county you do not have the police power authority to regulate zoning or land use for the land I'm going to develop, and those three ways are either a specific authorization and permit or permission from the Public Service Commission by way of a certificate of convenience and necessity for the development ... second would be an

⁴ MR. REITZ: The County wants it removed, and one of the reasons we think that they are so anxious to have that done is, because as the Court of Appeals said, the decision about whether this plant should be here or not, at the end of the day, it belongs to the Public Service Commission.

THE COURT: Or the County. Or the County.

MR. REITZ: Well, even if the County gives us approval, the Public Service Commission has been told it is your obligation to approve all projects. We still have to go to them for approval.

THE COURT. Yes. That's right. All right.

Tr. p. 28, Cass County Case No. 17V010401443, January 27, 2006.

⁵ Transcript, Cass County Case Nos. CV104-1380CC and CV104-1443CC, pg. 175, Ins. 14 – 18, January 5, 2005.

⁶ *Id.*, pg. 176, Ins. 2 – 3, January 5, 2005.

⁷ *Id.*, pg. 177, Ins. 1 – 4, January 5, 2005.

order from the Public Service Commission authorizing and permitting that particular development ... third would be via compliance with the county.^{8,9}

6. On January 26, 2006, the Commission issued its Order and Notice of Application in this docket and set an intervention deadline of February 27, 2006. For the reasons stated herein, Aquila, by this motion, requests that the Commission establish a procedural schedule in this case which will allow the Commission to issue an order approving Aquila's application sometime early in May 2006.

7. As indicated by his January 27, 2006, Order, Judge Dandurand extended the stay of his injunction until May 31, 2006. If the Commission does not issue its order approving Aquila's application effective by the end of May, Aquila will be required, under

⁸ Transcript, Cass County Case Nos. CV104-1380CC and CV104-1443CC, pg. 11, Ins. 22 – 25, pg. 12, Ins. 1 – 18, December 7, 2004.

⁹ Since the January 27, 2006 hearing before Judge Dandurand, Cass County has suggested that Aquila must obtain certain rezoning or a special use permit as evidence of local consent before the Commission can issue the requested authority. This position is incorrect. The Court of Appeals clearly held that the ultimate authority for determining whether or not the facilities are permitted is the Commission, to which Judge Dandurand has concurred.

MR. YOUNGS: ... There's been an argument by the County that no, no, we need zoning approval to deal with the land use issues from us and you need PSC approval. The only point I want to make is --

THE COURT: I don't think the Court of Appeals said that.

Tr. p. 17, Cass County Case No. 17V010401443, January 27, 2006.

That conclusion is also implicit in Judge Dandurand's January 27, 2006 order granting Aquila additional time to obtain Commission approval notwithstanding his recognition that the County would not provide Aquila any further authority.

THE COURT: There are two places for you to go --

MR. YOUNGS: Correct.

THE COURT: -- back to the County of Cass or back to the Public Service Commission --

MR. YOUNGS: Right.

THE COURT: -- as far as I'm concerned, and you pretty well know what the County of Cass's answer is, don't you?

MR. YOUNGS: Well, I think we do now.

THE COURT: Their knees aren't buckling. I mean, read the -- I mean --

MR. YOUNGS: Twenty-six pages.

THE COURT: It never stopped pulling punches.

MR. YOUNGS: That's right.

THE COURT: They continue to batter. So I think, you know, you probably better well assume that avenue is out and you are stuck with the Public Service Commission and what they are going to do for you, if anything.

Tr. pp. 14 – 15, Cass County Case No. 17V010401443, January 27, 2006.

the terms of Judge Dandurand's Injunction, to begin to dismantle and remove the South Harper Facility and Peculiar Substation.

8. In order to have the opportunity to accomplish the objective of obtaining a Commission order granting the requested authority sometime early in May 2006, Aquila proposes the following procedural schedule:

<u>EVENT</u>	<u>DATE</u>
Aquila direct testimony	January 25, 2006 (filed on that date)
Intervention Deadline	Monday, February 27, 2006 (as previously ordered)
Early Prehearing Conference To Establish Procedural Schedule	Wednesday, March 1, 2006
Public Hearing	Week of March 13, 2006
Rebuttal Testimony (Non-Aquila parties)	Monday, March 27, 2006
Prehearing Conference/List of Issues	Friday, March 31, 2006
Surrebuttal Testimony (Aquila) and Cross Surrebuttal Testimony (Non-Aquila parties)	Friday, April 7, 2006
Prehearing briefs (all parties)	Friday, April 14, 2006
Hearing and closing arguments	April 19-20, 2006

9. The proposed schedule is reasonable. To expedite the process, Aquila filed with its application prepared direct testimony in support of its request and copies of same have been or will be provided to those entities indicated on the attached service list. Furthermore, the Commission and likely potential intervenors are familiar with facts and circumstances surrounding the South Harper Facility and Peculiar Substation as these matters have been addressed in Commission Case No. EA-2005-0248 ("Order

Clarifying Prior Certificates of Convenience and Necessity”), Case No. EO-2005-0156 (“Chapter 100 Financing” case) and Case No. ER-2005-0436 (the “Electric Rate Case”).

10. To further facilitate the process, Aquila will immediately entertain discovery requests with respect to its application and will expedite its responses to the extent possible. In addition, Aquila agrees that its responses to discovery in the cases referred to in paragraph 9, *supra*, may be utilized in this proceeding, subject to the issuance of the customary protective order. Aquila would not object to the Commission taking administrative notice or otherwise including the record made in Case Nos. EA-2005-0248, EO-2005-0156, and relevant portions of Case No. ER-2005-0436.

11. The proposed schedule allows four (4) weeks from the intervention deadline for the filing of rebuttal testimony by interested parties. It also affords the County and its citizens the opportunity they seek to be heard through a public hearing.¹⁰ The County, as an intervenor, will have the opportunity to present its position on all issues. With the submission of prehearing briefs and with closing arguments to be held immediately upon the conclusion of the evidentiary hearing, the schedule will put the Commission in a position to be able to issue its order early in May and meet the deadline imposed by Judge Dandurand.

WHEREFORE, Aquila respectfully moves the Commission to issue its standard Protective Order in this case and to issue its order:

- (a) Scheduling an early prehearing conference on Wednesday, March 1, 2006 for the purpose of determining a procedural schedule.

¹⁰ See Paragraph 5. Cass County previously advised Judge Dandurand that it wanted Aquila to seek County or Commission approval so that there would be an opportunity for the County's position to be heard.

- (b) Directing the parties to file with the Commission an agreed-to procedural schedule for the processing of this case no later than 4:00 p.m., Wednesday, March 1, 2006.
- (c) In the absence of an agreed-to procedural schedule, adopting and ordering the procedural schedule set out in paragraph 8, *supra*.
- (d) Granting such other relief deemed by the Commission to be appropriate.

Respectfully submitted,



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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 this 15th day of February, 2006 to the following:

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As well as to parties on the Commission's service list in Case Numbers EA-2005-0248, EO-2005-0156 and ER-2005-0436 who are as follows:

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