

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

**RESPONSE OF STOPAQUILA.ORG**  
**TO AQUILA'S MOTION TO SET EARLY PREHEARING CONFERENCE,**  
**TO ESTABLISH PROCEDURAL SCHEDULE**  
**AND FOR ISSUANCE OF PROTECTIVE ORDER**

STOPAQUILA.ORG and individual members are filing a motion to intervene.

The deadline is February 27, 2006.

The motion to expedite filed by Aquila incorrectly suggests that the PSC has the power to decide zoning issues. This is wrong. It is important to note that the recent Court of Appeals decision plainly said that the PSC has **no** zoning authority, as the following quote from the decision shows:

While it is true that the Commission has extensive regulatory powers over public utilities, **the legislature has given it no zoning authority**, nor does Aquila cite any specific statutory provision giving the Commission this authority. See Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973) (regarding the location of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states, "In short, we emphasize we should take cognizance of--and

respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning."). It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, a municipality may regulate the location of public utility installations." 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986). (Emphasis added.)

The proposed expedited schedule suggested by Aquila assumes that the PSC will decide zoning issues, and assumes that this can be handled in a short amount of time. Intervenors submit that the statutes and the Court of Appeals decision only give zoning authority to the local governmental bodies, which in this case is Cass County, and that hearings will take numerous days.

The statute under which the PSC operates states that in order for Aquila to apply to the PSC for a certificate to build its power plant, it must first demonstrate that it has the permission of the municipality. "Municipality" has been defined by the Supreme Court to mean the county or the city, whichever has jurisdiction of the real estate. State v. Burton, 379 S.W.2d 593 (Mo. 1964) and RSMO 393.170. RSMO 393.170 specifically deals with construction of power plants and it specifically requires proof of permission from the county before the applicant can apply to the PSC.

Aquila has not presented evidence that it has the permission of the County to build this plant,<sup>1</sup> let alone permission gained before it began construction of the plant.

Judicial and commission resources and the time and expenses for all interested parties would be best served by taking up issues in a logical order and allowing enough

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<sup>1</sup> It is the understanding of the undersigned from news reports that Aquila applied for a special use permit, and now the County has said that it will give it a hearing before the Planning and Zoning Board, but Aquila is backing away, meaning that apparently Aquila does not want to have a zoning hearing. Kansas City Business Journal, February 17-23, 2006, page 6.

time for all to be heard. Some of the issues that must be addressed by someone are as follows:

- 1.) Does the PSC have the authority to retroactively approve the building of a power plant?
- 2.) Does the county have the authority to retroactively approve zoning for a power plant?
- 3.) What kind of precedent is set if the authorities allow a regulated utility to build a power plant before it gets approval?
- 4.) Since the Court stated that the PSC has no zoning power, what issues will be addressed at any PSC hearing?
- 5.) Since Aquila must get the permission of the local government before it applies for a certificate to permit the building of the power plant, what purpose if any is served by proceeding before the PSC if Aquila does not have permission from the local government (in this case, the county)?
- 6.) If the PSC proceeds, what are the rules under which the parties will operate?
- 7.) If we have two hearings, one before the County Planning Board and one before the PSC, what issues are presented at one or the other or at both?
- 8.) How much time is required, and how much time should be allowed for all interested parties for discovery and to prepare?

It is important to sort out these issues at as early a stage as is possible. A conference with the PSC and all interested parties should be held before any schedule is set.

Respectfully submitted,

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I hereby certify that a true and correct copy of the above and foregoing document was delivered by electronic mail or mailed, on this 22nd of February, 2006 to the following:

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