

**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

**AQUILA'S PREHEARING BRIEF**

COMES NOW Aquila, Inc. (hereinafter "Aquila" or the "Company"), by counsel, and for its Prehearing Brief in support of its request for a certificate of convenience and necessity, respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

**I. Procedural Background and Introduction**

On January 25, 2006, Aquila applied to the Commission for a certificate of convenience and necessity 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. By the Commission's order of March 2, 2006, Sedalia Industrial Energy Users' Association ("Sedalia"), StopAquila.org ("StopAquila"), Cass County, Missouri ("Cass County"), the City of Peculiar ("Peculiar"), Frank Dillon, Kimberly Miller, and James E. Doll ("Certain Residents of Cass County"), and the Southwest Power Pool, Inc. ("SPP") were allowed to intervene. Two public hearings were held on March 20, and one local public hearing

was held on March 30, all in Harrisonville, Cass County, Missouri, at which time over 50 witnesses appeared and testified.

Intervenors StopAquila and Cass County each filed a motion to dismiss Aquila's application. These motions were denied by the Commission's order issued April 20, 2006.

## **II. Executive Summary**

The electrical production and related facilities which are the subject of this case include a peaking power production plant consisting of three natural gas-fired combustion turbines and an associated electric transmission substation situated on approximately 38 acres of a 74 acre tract of land, with actual land usage of 9.3 acres. The turbines and substation are sometimes referred to as the "South Harper Facility." In addition, there is a related electrical transmission substation (the "Peculiar Substation") which occupies approximately 7.5 acres of a separate 55 acre tract of land. (The South Harper Facility and Peculiar Substation are sometimes collectively referred to as the "Facilities"). Construction was completed during the summer of 2005, and the Facilities were placed into commercial operation and began serving Aquila's customers during late June and early July, 2005.

The evidence in this proceeding will clearly demonstrate that there is a need for the Facilities and related service and that Aquila is fully qualified, from both a financial and operational standpoint, to own, operate, control and manage the Facilities. The evidence will also demonstrate the economic feasibility of the project and that Aquila's ownership and operation of the Facilities and provision of the related service will promote the public interest.

Aquila is an experienced operator of power production facilities as the Company has, for many years, provided electrical service in those areas of the state certificated to it by the Commission. The Facilities have been constructed and have operated successfully. The project has been fully funded and Aquila has suffered no impairment to its credit as a result.

This Commission has previously established, in Case Nos. 3,171, 9,470 and 11,892 and others, that the public convenience and necessity is served by Aquila's extension of its electrical facilities and services throughout those areas of Missouri, including Cass County, currently served by the Company. In furtherance of this, the South Harper Facility and Peculiar Substation were constructed to partially replace the Company's power purchase agreement ("PPA") that expired May 31, 2005. The PPA provided for 500 megawatts ("MW") of capacity from a combined cycle facility interconnected with the Aquila Networks-MPS transmission system during the summer months and 200 MW from said facility in the winter months. With increasing demand in Aquila's Missouri service area, including Cass County, and the need for peaking capability, the South Harper Facility's three 105 MW simple cycle CTs provide flexibility to meet the needs of the Company's customers.

Aquila's Western Missouri service area includes the majority of Cass County, a first class non-charter county, which is one of the fastest growing areas served by the Company. Aquila is adding approximately 5,000 new customers per year in this area, and the Company's total system demand for electricity at peak times hit an all-time high of approximately 1,861 MW in 2003. Electrical load in this area is up approximately 7.5% since 2002. The electrical power to be generated by the South Harper Facility will

be regulated capacity available to serve the increasing demand for electrical power caused by Aquila's Missouri customers, including those located in Cass County.

The Commission has stated the importance of company-owned generation instead of heavy reliance on power purchase agreements to meet Missouri load requirements and to protect Missouri customers. Likewise, the Commission Staff ("Staff") has encouraged Aquila to reduce its reliance on power purchase agreements in favor of power plant ownership when justified. Since as early as May of 2003, Aquila has presented to representatives of Staff and the Office of the Public Counsel ("Public Counsel") information demonstrating the need for peaking capacity of 300 MW during regular reviews of its Integrated Resources Plan ("IRP").

Aquila issued several requests for proposals and conducted multiple independent solicitations seeking the required power supply beginning in 2005 to replace the PPA from a combined cycle facility interconnected with the Aquila Networks-MPS transmission system and to acquire approximately 25 MW to 100 MW necessitated by system load growth. Aquila determined to replace a portion of the 500 MW from the PPA through the construction of three (3) CTs at the South Harper Facility, with a combined nominal rating of 318 MW. If the South Harper Facility is not available, Aquila will need to immediately add capacity to meet its load and reserve requirements. Adding capacity could come in the form of importing capacity or building at another site within Aquila's system. These other options had been evaluated previously and were significantly more costly than the South Harper Facility.

The construction of the South Harper Facility is consistent with the Company's IRP. Actual experience has borne out Aquila's need for the capacity produced by the

plant. In fact, during the months of July through December of 2005, the South Harper Facility was operated for a total of 429 hours on 57 days, representing nearly 74,000 MWh of power generation for Aquila Networks-MPS system customers.

The location of the South Harper Facility is desirable because of its relative proximity to the load center of the Western side of the Aquila Networks-MPS service area, existing electrical transmission facilities and the availability of fuel from natural gas pipelines.

For reliability purposes, the most appropriate self-build option is a facility near the center of the load growth of Aquila's system, i.e. Cass County, Missouri. If generation and transmission are located far from load centers, there is increased opportunity to experience service interruptions, outages, and voltage issues. Aquila has conducted extensive site evaluation studies in Cass County and has not identified any site that is more suitable in terms of infrastructure than the site of the South Harper Facility. Moreover, Aquila has been unable to identify any suitable site that would not be subject to similar objections from nearby residents as have been raised regarding the South Harper Facility. The remaining alternatives of constructing generation outside the load center or purchasing capacity from outside Aquila's system would result in higher costs, less reliability, and greater impact on land use through miles of additional transmission structures and facilities.

### **III. Factual Background**

The Facilities are located within the geographic service area previously certificated to the Company's predecessors-in-interest, pursuant to the Commission's prior decisions and orders in various cases. (Empson Direct, p. 2) As indicated, the

Facilities include a peaking power production plant consisting of three natural gas-fired combustion turbines and an associated electric transmission substation situated on a small portion of a 74 acre tract of land. (Id., p. 3) In addition, there is a related electrical transmission substation (the "Peculiar Substation") which utilizes approximately 7.5 acres of a separate 55 acre tract of land (Id.; Empson Surrebuttal, schedule 9). Construction was completed during the summer of 2005, and the Facilities were placed into commercial operation and began serving Aquila's customers during late June and early July, 2005. (Empson Direct, p. 3)

Aquila was a party to a Power Sales Agreement dated February 22, 1999, ("PPA") that expired on May 31, 2005. The PPA was for 500 MW of capacity during the summer months and 200 MW in the winter. The Facilities were constructed to partially replace this PPA and to meet customer demand. (Boehm Direct, p. 3)

At the time it began construction of the Facilities, based on past case law and relevant orders of the Commission, the Company believed that it held all requisite Commission authority consistent with the Commission's long-standing policy which was summarized in a letter from the Executive Director of the Commission dated November 5, 2004. (Empson Direct, p. 4)<sup>1</sup> This policy is also set forth in many Commission cases, including the Commission's Report and Order in 24 Mo.PSC (NS) 72 (1980), *In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate and Maintain Two Combustion Turbine Generating Units in the State of Missouri*.

More recently, this policy was expressed in the Commission's report and order in Missouri-American Water Company's Case No. WA-97-49 ("The Commission will limit

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<sup>1</sup> For the Commission's reference, a copy of the letter is attached hereto as Attachment B.

its issuance of a certificate of convenience and necessity to that portion of the proposed project located outside the certificate area of MAWA"). Aquila's position of not seeking additional authority was later confirmed by the Commission when, in response to Aquila's application in Case No. EA-2005-0248 filed on January 28, 2005, the Commission, in a 4-1 vote, issued its Order Clarifying Prior Certificates of Convenience and Necessity and confirmed that the Company's existing certificates authorized Aquila to build the South Harper Facility and Peculiar Substation.

#### **IV. Argument and Authorities**

##### **A. Does the Commission have the jurisdiction to consider Aquila's application?**

Aquila's application is simply a request for a certificate of convenience and necessity pursuant to Section 393.170.1, wherein the Commission is to apply the "public convenience and necessity" standard in determining whether to authorize Aquila to acquire, construct, install, own, operate, maintain, and otherwise control and manage the Facilities. The Commission has jurisdiction over Aquila's application, and, in its April 20, 2006 Order Denying Motions to Dismiss, the Commission held that it "is unwilling to conclude as a matter of law that it cannot consider Aquila's application." These legal issues have been briefed in Aquila's previously filings in this matter and are summarized in Attachment A hereto.

##### **B. Is the authority requested by Aquila under Section 393.170.1 necessary or convenient for the public service, the standard prescribed by Section 393.170.3?**

As the Commission has determined by its April 20, 2006, Order Denying Motions to Dismiss that it has jurisdiction over Aquila's application, the overriding issue left for

determination in this case is whether or not the grant of the requested authority is necessary or convenient for the public service.

The Commission and the Appellate Courts have both defined the “public convenience and necessity” standard. “Necessity” does not mean essential or absolutely indispensable. Rather, it means that an additional service would be an improvement justifying the cost and that the inconvenience occasioned by the lack of a utility is so sufficiently great as to amount to a necessity. *In the Matter of the Application of Timber Creek Sewer Co.*, EA-99-202, 8 Mo. P.S.C. 3d 312, 314.

In the Commission proceeding of *In Re Tartan Energy*, GA-94-127, 3 Mo. P.S.C. 3d 173, 177, the Commission articulated the legal standard to be met by applicants for a certificate of convenience and necessity. As applied to Aquila in this case, the standards may be summarized as follows:

- Whether there is a need for the involved Facilities and related service;
- Whether Aquila is qualified to own, operate, control and manage the involved Facilities and provide the related service;
- Whether Aquila has the financial ability for this undertaking;
- Whether Aquila’s proposal is economically feasible; and
- Whether the involved Facilities and related service promotes the public interest.

Positive findings with regard to factors 1-4, will, in most instances, support a finding that an application for a certificate of convenience and necessity will promote the public interest. *In Re Tartan Energy* at 189. The Courts of Appeals have articulated the standard and policy similarly to the Commission. See *State ex rel. Intercon Gas, Inc. v.*



*Public Service Commission of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. W.D. 1993), and *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission of Missouri*, 600 S.W.2d 147, 154, 156 (Mo. App. W.D. 1980).

In addition, the Missouri Court of Appeals recently stated that the Commission may also consider "current conditions, concerns and issues, including zoning,"<sup>2</sup> matters which fall under the item "whether the involved facilities and related service promotes the public interest." Although the Court of Appeals held that the Commission had been misinterpreting *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960), the Court's decision in 180 S.W.3d 24 does not require the Commission to promulgate new rules or establish new procedures to consider a Section 393.170.1 application pursuant to Section 393.170.3.

Although the Commission has not been faced with this identical situation, prior Commission proceedings may be used as guidance. Certificate cases involving power plants and substations are not unique. Up until the 1980 Union Electric case wherein the Commission held that "it is not necessary for electric utilities to come before us to obtain permission to build plant within their certificated areas,"<sup>3</sup> the Commission had the occasion to consider applications for authority to build within a utility's certificated territory. For example, the Commission considered two applications for power plant authority under Section 393.170.1 in the mid-1970s and two more in the late 1970s. The Commission also considered an application for a substation in the early 1980s. More recently, the Commission considered and approved the application of Missouri-

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<sup>2</sup> 180 S.W.3d 24, 35.

<sup>3</sup> *In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate and Maintain Two Combustion Turbine Generating Units in the State of Missouri*, 24 Mo.PSC (NS) 72, 78 (1980).

American Water Company for a certificate of convenience and necessity to lease, operate, control, manage and maintain a new source of water supply in Andrew County (Commission Case No. WA-97-49, Report and Order, October 9, 1997). Although the parties to that case agreed that a certificate was only necessary for the portion of the project located outside Missouri-American's current service area, and the Commission limited its issuance of a certificate to that portion of the proposed project, the Commission applied the same "necessary or convenient" standard of Section 393.170 in that case as is to be applied to Aquila's application.

Perhaps most relevant to the case at hand is the 1973 Commission proceeding wherein Kansas City Power & Light Company ("KCPL") and St. Joseph Light & Power Company ("SJLP") filed their joint application pursuant to 393.170 requesting certificates of public convenience and necessity to construct and operate Iatan Station in Platte County, Missouri. The proposed facilities were within SJL&P's service territory, but outside KCP&L's service territory. After hearings, in November of 1973, the Commission issued its Report and Order in Case No. 17,895 granting the requested certificates. Although land use issues were addressed by the applicants and the Commission, county zoning apparently was not viewed by the Commission as a prerequisite to granting the requested authority.

The Report and Order granting the certificates of public convenience and necessity was issued by the Commission on November 14, 1973. Of importance is the fact that, at that time, the subject property was still zoned "agricultural." KCP&L and SJL&P did not seek a change in zoning until March of 1974, and Platte County did not approve the change until April of 1974.

In reviewing a condemnation issue related to Iatan Station, the Court of Appeals stated that "the joint application of KCP&L and SJL&P for rezoning of the property was neither a prerequisite to the project, nor necessary to it." *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 561 (Mo.App. W.D. 1983). The Court continued by stating:

. . . although rezoning was unnecessary for construction of the generating plant, KCP&L and SJL&P sought the rezoning. The evidence shows that from the inception of the Iatan project KCP&L's power sales staff promoted sales to firms which would locate at or near the project site. . . . A fair conclusion from this and similar evidence is that KCP&L sought rezoning not to construct the plant itself, but to enable it to surround itself with satellite customer industries. **The rezoning, then, was necessary not to generate electricity, but to generate business.**

*Id.* (emphasis added)<sup>4</sup>

The record in this proceeding will demonstrate that it will promote the public interest for Aquila to continue operating the Facilities, and the evidence will show that Aquila satisfies the five factors set forth in *In Re Tartan Energy* and *State ex rel. Intercon Gas*.

**Factor 1 - There is a need for the Facilities and related service.**

Jerry Boehm, Aquila's resource planning manager, explains Aquila's justification for adding generation capacity, explains the analysis methods used in resource

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<sup>4</sup> Additionally, Union Electric Company filed its application for a certificate of convenience and necessity in 1974 to construct and operate the Callaway Nuclear Plant. After hearings, the Commission granted the requested authority to Union Electric. (The Commission's Report and Order granting the certificate in Case No. 18,117 was issued March 14, 1975 and became effective on April 1, 1975.)

The Empire District Electric Company sought and obtained specific authority to build and operate two units within its certificated area of Jasper County in Commission Case No. EA-77-38 and Commission Case No. EM-78-277 involving the Empire Energy Center near LaRussell. When approving the application of Empire in Case No. EA-77-38, the Commission noted that the location was chosen by Empire after study with its consultants and that a report on power plant site selection was admitted into evidence.

On May 8, 1981, Union Electric Company filed its application with the Commission seeking a certificate of convenience and necessity to construct and operate a substation in St. Charles County. The Commission's Report and Order of August 13, 1981 in Case No. EA-81-323, addressed three general categories: the company, the need for the proposed substation, and the proposed construction.

planning, and discusses the reasons for not adopting a new Calpine contract in lieu of constructing the Facilities. (Boehm Direct, pp. 1-2)

Aquila needed the Facilities to replace 500 MW of an expiring Calpine purchase power contract and to accommodate approximately 50 MW of native load growth. (Id., p. 3) Using MIDAS Gold and Realtime models, Aquila thoroughly evaluated potential resources. The results of the model demonstrated that two purchase-power offers supplemented with a plant like South Harper would provide the best solution for Aquila's customers. (Id., p. 6) The lowest cost scenario under base conditions was with a plant with 5 CTs, but the 3-CT plan of South Harper was deemed the "preferred plan." (Id.)

With regard to Calpine, Aquila decided not to enter into another contract with that organization because the contract which was offered proposed higher prices and provided for significant operating constraints. (Id., p. 8) Once Aquila had decided to move forward with the South Harper Facility, Calpine did attempt to provide an unsolicited offer that was competitive, but it was just too late. The offers from Calpine did not excel over the decision to build, and, by the time the offers were received, Aquila had incurred sunk costs in pursuit of the self-build plan. (Id., p. 9)

In January of 2005, Aquila informed the Staff and the Public Counsel that it would pursue a self-build option. Before and after this announcement, the Staff had been receiving resource planning updates from Aquila every six months, and Aquila used some of Staff's suggestions as guidance for its self-build plan. (Id., pp. 10-11) If the Facilities were not in service, Aquila would need to add capacity to meet load and reserve requirements, and the cost of other options were significantly higher than building South Harper. (Id., p. 12)

Aquila's transmission system planning department completes a 10-year transmission planning study every three years. The 2002 study analyzed the Grandview, Belton, Harrisonville, and Pleasant Hill area. (Huslig Direct, p. 4) A critical issue was identified regarding the amount of load on the 69 kV system and the ability to adequately serve it. A number of options were analyzed, all of which were viewed as costly. (Id.) By upgrading the local transmission system in conjunction with construction of the Facilities, Aquila was able to improve the transmission system reliability to the growing western area of the service territory of Aquila-MPS. (Id., pp. 4-5)

Pursuant to the policies set forth in Cass County's 2005 Comprehensive Plan, electrical services are needed to accommodate the demands of future growth, and public improvements must be completed within a prescribed time period. (White Surrebuttal, pp. 7-8) Aquila also refers the Commission to the position of the City of Peculiar, as stated in its Prehearing Brief: "...the growth of the County, and particularly the portion around and north of Peculiar warrants improved capacity to meet residential and commercial development that is occurring in northwest Cass County, and has occurred particularly in the last five years."

SPP also provides testimony regarding the Facilities promoting the public interest by facilitating a reliable transmission grid. The Facilities have been incorporated into SPP's expansion plan and will provide the local loads with greater access to generation resources in the region, improve the reliability of the bulk transmission system, improve the overall efficiency and economics of transmission operations, and provide reactive support to the local loads and the overall system. (Caspary Rebuttal, pp. 10-11)

**Factors 2, 3, and 4 - Aquila is qualified to own, operate, control and manage the Facilities and provide the related service, Aquila has the financial ability for this undertaking, and Aquila's proposal is economically feasible.**

Based on the prefiled testimony in this matter, Aquila does not believe that these factors are at issue. Aquila is a Delaware corporation with its principal office and place of business in Kansas City, Missouri. The Company is authorized to conduct business in Missouri through its MPS and L&P operating divisions, and Aquila now provides electrical, natural gas, and industrial steam utility service in those areas of the state certificated to it by the Commission. (Empson Direct, p. 2)

At the time of construction, Aquila did not possess the "specific authority" from the Commission for the Facilities which the Court of Appeals deemed necessary in *Cass County v. Aquila*, 180 S.W.3d 24 (Mo. App. 2005). In constructing the Facilities without such "specific authority," however, the Company acted in conformity with the Commission's long-standing policy which was summarized in a letter from the Executive Director of the Commission dated November 5, 2004,<sup>5</sup> and which is set forth in the Commission's Report and Order in 24 Mo. PSC (NS) 72 (1980), *In the Matter of the Application of Union Electric Company*. Aquila also returned to the Commission with its application on January 28, 2005, Commission Case No. EA-2005-0248, seeking specific confirmation or, in the alternative, the issuance of a certificate of convenience and necessity authorizing it to construct, install, own, operate, control, manage, and maintain the Facilities. The syllabus of the Commission's ruling in that case (which has since been vacated) is that the Commission's order "clarifies prior certificates of convenience and necessity of Aquila, Inc., and confirms that, in order to serve its

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<sup>5</sup> Empson Direct, p. 4; Attachment B hereto.

customers, Aquila has already been granted specific authorization to build its South Harper Facility and Peculiar Substation.”

Regardless of its past activities and the litigation surrounding this matter, the Facilities have now been constructed, the project has been funded, and Aquila has suffered no impairment to its credit as a result. (Armstrong Direct, pp. 1-2) Beth Armstrong, Aquila’s controller and a certified public accountant, explains that Aquila has had the financial wherewithal to fund the construction and operation of the Facilities. (Id., p. 1) Construction of the Facilities began in 2004, when the Company’s consolidated equity ratio was approximately 32 percent. As of September of 2005, Aquila’s consolidated equity ratio had grown to roughly 42 percent. Despite the significant capital commitment necessary to fund the construction of the Facilities, the Company’s financial condition has actually improved. (Id., p. 2)

Since 2002, the Company has undergone financial restructuring, and the process continues to this day. Aquila has sold most of its non-regulated businesses, is in the process of selling those that remain, and is in the process of selling select domestic utility properties, with proceeds earmarked to reduce debt and further strengthen the Company’s balance sheet. (Id.) Aquila has been able to strengthen its financial profile while simultaneously constructing the Facilities.

**Factor 5 - Operation of the Facilities and the provision of the related service by Aquila promotes the public interest.**

Positive findings with regard to factors 1-4, will, in most instances, support a finding that an application for a certificate of convenience and necessity will promote the

public interest,<sup>6</sup> but the Missouri Court of Appeals recently stated that the Commission may also consider “current conditions, concerns and issues, including zoning.”<sup>7</sup> The evidence presented in this matter will show that Aquila satisfies this fifth prong of the review standard and that operation of the Facilities by Aquila will serve the public interest.

Terry Hedrick, Aquila’s Generation Services Manager, explains Aquila’s approach to selecting the site for the Facilities. As part of Aquila’s integrated resource plan and in response to a request for proposals (“RFP”) for capacity and energy for Aquila, a site selection study was prepared by Segra Inc. (Hedrick Direct, pp. 1-2) The RFP provided constraints such as delivery points and availability which were factors in the site study. (Id., p. 2) The basic components for site selection criteria are: electric transmission access, natural gas supply, air permit considerations, delivery infrastructure, and potable water supply. (Id., p. 4)

The testimony from Cass County and StopAquila may give the impression that the Facilities should have been located in an area with no residents nearby, but this simply was not possible. Weighing all factors, the South Harper site ranked number one in the final comprehensive site evaluation summary sheet. (Id., p. 7)

Chris Rogers, vice president and project manager with Segra Inc., has worked in the power industry for over 30 years and holds professional engineering registration in ten states. (Rogers Direct, p. 1) Mr. Rogers explains that Segra’s preliminary study performed at the direction of Aquila for siting of the Facilities generally evaluated five different tracts of land in Cass County. This initial effort identified one fatally flawed site

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<sup>6</sup> *In Re Tartan Energy* at 189.

<sup>7</sup> 180 S.W.3d 24, 35.



and recommended a site north of Harrisonville which became known as the "Camp Branch" site. The study was later expanded to include three more sites. The expanded study ranked each site and recommended the Camp Branch site as the best location. (Id., p. 2) However, after the Cass County Planning and Zoning Board recommended denial of a special use permit for the site,<sup>8</sup> Sega's investigation was expanded further to include a total of twelve sites which were then evaluated and ranked according to specific criteria. (Id., p. 3)

Nine engineering criteria were applied by Sega, and each site was visited, photographed, and observed by Sega staff. The physical attributes of each site were cataloged and evaluated. (Id., pp. 3-4) Each site was examined for adequacy of size and configuration for an overall plant layout template, the location of each site was examined relative to Aquila's existing electric transmission grid, each site was examined for proximity to adequate natural gas supply lines, the location and adequacy of water supply lines was examined for each site, each site was examined for proximity to existing sanitary sewer services, each site was examined and evaluated for access. (Id., pp. 4-7)

Each site was also examined for the ability to obtain permits in a timely fashion, and each site was evaluated for the likely schedule required for acquisition, permitting, and construction of the plant. (Id., p. 7) Acquisition costs for the South Harper site were considered reasonable, a willing seller was ready to move forward, the City of Peculiar

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<sup>8</sup> After the Planning Board recommended this denial, Aquila representatives met with the Cass County Presiding Commissioner, who also sat as a member of the Board of Zoning Adjustment, which would ultimately review the recommendation. The Presiding Commissioner – who had recommended that Aquila file an SUP application – told those representatives he thought Aquila had about a "snowball's chance in Hell" of ever having the application approved. He reached this conclusion without reading Aquila's SUP application or the report of Cass County's own consultant which indicated that the SUP application was generally consistent with SUP requirements. Aquila ultimately withdrew the application.

was favorable to annexation and tax exempt financing, and there appeared to be local support for the project. (Id., pp. 7-8) The geographic and geologic features of the site appeared appropriate, there were major gas pipeline lines located on the property, an existing compression station was located adjacent to the proposed site, a competing gas transmission pipeline was located only about two miles to the south, and water capacity appeared to be adequate. (Id., pp. 8-9) Ultimately, the South Harper site was deemed the best site for the project by Sega, Inc.

Mark White, a certified planner and land use attorney, filed surrebuttal testimony in this matter and will testify that the location and design of the Facilities are consistent with sound planning principles, were sited using defensible planning practices, are compatible with the surrounding development, and are consistent with the Cass County Comprehensive Plan and Zoning Order. Although witnesses for other parties may focus on out-dated versions of the Comprehensive Plan and Zoning Order, because the Commission's focus will be on the current land use planning "vision" of the community, Mr. White has evaluated the Facilities in light of Cass County's 2005 Comprehensive Plan and Zoning Order. (White Surrebuttal, p. 5) The 2005 Plan is designed to balance local land use policy with the type and nature of growth that Cass County is experiencing, and the 2005 Plan acknowledges that limits on development must be balanced with private economic interests. (Id., p. 6)

The Plan also provides for a multi-use tier which encourages non-agricultural uses "such as commercial and industrial uses." (Id.) The Facilities are located in such a multi-use tier and are consistent with the pattern of land use envisioned by the 2005 Comprehensive Plan. (Id., p. 7) The Facilities are also compatible with neighboring

uses, including a 6.5-acre gas compressor station site which sits just north of the South Harper Peaking Unit, and which has occupied that site for more than 50 years. Additionally, residents in suburban areas often complain about the noise and odors generated by agricultural uses. (Id.) The Facilities are proximate to urban development without abutting higher density, residential neighborhoods. "This strikes an appropriate balance between compatibility with urban residential development, accommodating orderly development, and avoiding urban sprawl." (Id., p. 8) It is important to recognize that Cass County's agricultural zoning classification is not intended for the development of low-density residential areas, but construction and manufacturing businesses may be located in the area, and, by special use permit, even commercial feedlots and correctional institutions may be located within the area (Id., pp. 9-10).

Block Andrews, Aquila's director of environmental services, is responsible for Aquila's compliance with environmental rules and regulations. (Block Direct, p. 1) He explains Aquila's record of and commitment to environmental compliance, addresses testing at the Facilities, and describes actions taken by Aquila in response to concerns raised regarding noise and air quality. Aquila operates in many states, with its service territory being comprised of hundreds of facilities. Aquila had no notice of violations of environmental rules or regulations in 2005. (Id., p. 2) With regard to the specific Facilities, Aquila has met all environmental requirements, and Aquila continues to respond to concerns raised by nearby residents. (Id., pp. 5-9)

Aquila is building sound walls to further reduce transformer noise and is taking an additional series of measures to further reduce the level of noise emanating from the Facilities. (Block Direct, p. 6) There are no anticipated health effects from air emissions,

and an air permit was issued because the emissions will not significantly cause or contribute to a degradation of air quality in the area. (Id., pp. 6-7) That being said, Aquila has paved roads to reduce emissions. (Id., p. 7)

Aquila has taken a number of measures to mitigate impacts on its neighbors. Norma Dunn, senior vice president of communications and stakeholder outreach with Aquila, is responsible for interacting with community members impacted by the Facilities. Ms. Dunn explains that Aquila has increased its involvement with local residents. (Dunn Surrebuttal, p. 2) She met with families and small groups of residents, scheduled tours of the Facilities, and invited neighbors to meet with experts conducting emissions and sound testing. (Id.) The Facilities were designed to meet the County's residential noise emissions standards, and Aquila has embarked on projects to reduce the sound levels even further. (Id., pp. 2-3; Dunn Direct, p. 3) Approximately 1,200 trees and shrubs were planted on the grounds and neighboring properties, and Aquila consulted with neighbors regarding landscaping. (Dunn Surrebuttal, p. 3) Additionally, Aquila offered to purchase the property of residents who were not satisfied with Aquila's efforts. (Id.) Aquila purchased four homes and one vacant lot adjacent to the property. Two of the homes have sold near appraised values, and the other two homes and the lot are available for sale. (Id., pp. 4-6) The testimony in this matter will show that the Facilities have not negatively impacted real estate values.

The Peculiar Substation site is 55 acres, of which only 7.5 acres is being used for operations. (Empson Surrebuttal, schedule 9) The South Harper Facility site has a total of 73.6 acres, and the footprint for the plant and substation is only 9.3 acres. (Rogers Surrebuttal, pp. 3-4) Aquila is using approximately 13 percent of the land area for the

Facilities. The remainder of the property consists of "buffer zones." For example, Aquila's original land purchase for the Facilities included 35 acres north of the plant in excess of what was need for the Facilities. Aquila has committed to leaving this land as an additional "buffer zone" between the Facilities and the residential neighbors, and Aquila is taking many other steps to be a good corporate citizen to the people of Cass County. (Dunn Direct, pp. 4, 7-8)

In summary, Aquila has worked with area residents to address their concerns regarding noise and aesthetics, and the Facilities are located in Cass County's multi-use tier and are consistent with the scheme of development envisioned by the County. They provide essential public services, and the need for the Facilities far outweighs any local land use impact. It is important to remember that the "public" does not consist solely of the residents surrounding the Facilities or solely of Cass County residents. The "ultimate interest is that interest of the public as a whole . . . not the potential hardship to individuals." The rights of an individual resident with respect to the issuance of a certificate are subservient to the rights of the public as a whole.<sup>9</sup> Regardless of the siting of the Facilities, some people will be unhappy. In this instance, the intrusion even for the neighboring residents is minimal, and Aquila will continue its community programs so that it may further accommodate the reasonable requests of its neighbors.

**C. May Aquila's certificate be conditioned and, if so, in what manner?**

Section 393.170.3 reads, "The commission may by its order impose such condition or conditions as it may deem reasonable and necessary." As is discussed in Attachment A hereto, the Commission should not force Aquila to engage in a futile effort

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<sup>9</sup> *State ex rel. Public Water Supply Dist. No. 8 v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo.App. W.D. 1980); see also *In the Matter of the Application of Union Electric Company*, Commission Case No. EO-2002-351, Report and Order dated August 21, 2003.

to obtain County zoning approval for the facilities, and such a condition would be contrary to law. Aquila acknowledges, however, that the Commission may impose reasonable conditions upon ANY grant of authority to the Company.

#### **V. Conclusion**

The Commission has the power under section 393.170 to grant Aquila the relief it has requested, and, upon exercising its statutory authority and obligation to consider Aquila's Application in its entirety, the Commission should grant to Aquila a certificate of public convenience and necessity to acquire, construct, install, own, operate, maintain, and otherwise control and manage the electrical production and related facilities located in Cass County, Missouri near the Town of Peculiar and known as the South Harper Facility and the Peculiar Substation.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, sent by U.S. mail, or electronically transmitted on this 21<sup>st</sup> day of April, 2006, to all parties of record.

A handwritten signature in cursive script, reading "Diana C. Carter", written over a horizontal line.