

**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

PREHEARING BRIEF OF THE NEARBY RESIDENTS

COMES NOW Frank Dillon, Kimberly Miller, and James E. Doll
(hereinafter collectively as "Nearby Residents"), and submits its prehearing brief
to the Missouri Public Service Commission (Commission) in this matter:

To the extent that this prehearing brief does not address a particular issue,
the Nearby Residents hereby adopt each of the legal positions and conditional
legal positions stated in the Prehearing Brief of the Cass County Commission.
The Nearby Residents also reserve the right to adopt revised positions based
upon the positions taken by other parties or upon evidence presented at the
hearing commencing Wednesday, April 26, 2006.

Preliminarily, the Nearby Residents state that the expedited procedural
schedule that has been imposed upon the Nearby Residents has violated due
process and has hindered preparation for this case. Moreover, the confusion
regarding what evidence that should be placed before the Commission in this
matter, absent any duly promulgated rules to govern this type of certificate
request, along with the apparent attempt to collapse all of the Nearby Residents'

property rights concerns into an overarching collection of public interest considerations, also violates due process and has hindered the ability of the Nearby Residents to properly prepare its positions in this matter.

Some testimony and comments have been submitted into the record of this case on behalf of the Nearby Residents. Frank Dillon testified at the hearing held on March 30, 2006. His son, Tyler Dillon, testified at the hearing held on March 20, 2006. Carolyn Doll, the wife of James E. Doll, also testified at the hearing held on March 20, 2006. Kimberly Miller has submitted her written comments into the case file, using the form supplied by the Commission for that purpose. The testimony attests to the detrimental impact that the unlawful South Harper power plant has had on property values and on the quality of life (i.e., noise, pollution, emotional distress) of those individuals who live adjacent or very near the plant.

The Commission should recognize that, when compared to everything that the Nearby Residents own and hold dear, it is they who have the most at stake in this case. These individuals have not yet had the opportunity to make their case to a governing body that has jurisdiction over their property interests and are merely fighting for that opportunity. If Aquila and the Staff have their way, the Commission will issue an order in this case that actually attempts to extinguish that opportunity.

It should be noted that the City of Peculiar, who conspired with Aquila to attract the power plant to its current location, has received financial benefits for doing so. However, the proposed location for the South Harper power plant is far

outside the city limits of Peculiar, and *its* residents do not face the possibility of suffering its negative impacts. The Nearby Residents do not live in Peculiar and have no influence over its Mayor and City Council. The Nearby Residents also do not have the opportunity to vote for Public Service Commissioners.

Pursuant to Section 393.170, RSMo 2000, does the Commission have jurisdiction to grant a certificate of public convenience and necessity for a generating plant that has already been constructed. It bears recalling again that, even **after** the injunction was obtained against Aquila building the South Harper power plant in an agriculturally zoned area, Aquila chose to take its chances and to proceed despite the injunction, and that the Court of Appeals ultimately found that the power plant was indeed constructed illegally.

Furthermore, despite some confusing dicta at the end of its decision, the actual holding of that same Court of Appeals decision clearly states that the Missouri Legislature has given the Public Service Commission no zoning authority whatsoever:

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) . . .

Cass County v. Aquila, 180 S.W.3d 24 (W.D. 2005).

Thus the Commission's legal authority is limited to those powers that it has been granted by statute. None of the Commission's powers listed in Chapter 386 or in Chapter 393 grant the power to issue a **zoning** decision. Although the Commission has the power to verify whether zoning approvals have been

granted by the proper local authorities, the Commission's jurisdiction does not extend into making a zoning determination itself. Logic dictates that a decision exempting a utility from a particular zoning determination is itself an act of zoning.

There is truly no need for the Commission to feel that it must be thrust into the difficult position that Aquila wants to place the Commission. Section 64.285 RSMo. states that a county's power to regulate the use of land shall supersede *any* other statute that would otherwise interfere with such power. This statute can easily be reconciled with Section 64.235 RSMo. (which was adopted at the same time as Section 64.285) in that it must be presumed that the Missouri Legislature knew that a certificate of convenience and necessity can only be granted by the Commission provided local "consent of the proper municipal authorities" had previously been granted. To the extent that a certificate may exempt local zoning, it can only be understood to mean that a *second* round of approval by the proper local zoning authority is unnecessary, since consent is already a legal requirement of a certificate application.

Nonetheless, and regardless of the legal interpretation of these statutes, the Commission has the power to avoid another round of costly appeals by conditioning any certificate issued in this matter upon consent by the local zoning authorities. In this manner, the Commission would be doing that which is the only fair, just, and equitable thing—that is to give the residents of Cass County, at long last, the opportunity that any other property owner or resident has to have its "day in court" with regard to land use concerns under the proper auspices of

local control. It has not been a burden for any other utility in Missouri history to go before local zoning boards and commissions to obtain proper consent in order to build a power plant. No special forgiveness should be granted to Aquila, *especially* in light of the circumstances of this case.

The Nearby Residents have been forced to spend a significant amount of resources, simply asserting their right to have their concerns addressed by *its* duly elected governmental body, the Cass County Commission. Any attempt to usurp this function would be unjust and unreasonable. Any such action would be no different in character than the exercise of **eminent domain** by an *unelected* governmental agency. Furthermore, it would be an unconstitutional act of condemnation without just compensation.

Respectfully submitted,

/s/ John B. Coffman

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been to the following on this 21st day of April, 2006:

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