

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

In The Matter of the Application of Aquila,)
Inc. for Specific Confirmation or, in the)
Alternative, Issuance of a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own, Operate,)
Control, Manage, and Maintain a)
Combustion Turbine Electric Generating)
Station and Associated Electric)
Transmission Substations in)
Unincorporated Areas of Cass County,)
Missouri Near the Town of Peculiar.)

Case No. EA-2005-0248

BRIEF OF AQUILA, INC.

I. FACTS

A. Aquila, Inc.: Its Corporate and Regulatory History Relating to Cass County, Missouri

Aquila, Inc. (“Aquila”) is a public utility subject to the jurisdiction of the Missouri Public Service Commission (“Commission”). Aquila and its predecessors in interest have been doing business in Missouri since 1916 when Lemuel K. Green, doing business as L.K. Green & Sons, purchased the assets of the former Pleasant Hill Electric Light & Power Company. (J.S., ¶16)¹. This small utility had begun operations in the City of Pleasant Hill in Cass County after receiving a franchise from the city in 1905. (J.S., ¶12). It had no certificate of convenience and necessity (“CCN”) from the Commission because the Public Service Commission Law (the “Act”) was not enacted until 1913. Therefore, its electric plant and those of other utilities that have been

¹ All references to the March 10, 2005, Joint Stipulation of Facts will be abbreviated as “J.S.”

operating before the passage of the Act were viewed by the Commission as exempt from any requirement to obtain a CCN for the construction of electric plant.²

When L.K. Green & Sons took title of the utility in 1916, it continued the operations of the utility pursuant to a franchise granted by the City of Pleasant Hill and pursuant to an order issued by the Commission in Case No. 1100 approving the sale, as well as the transfer of the CCN rights previously granted to the seller. (J.S., ¶17).

As L.K. Green & Sons began to expand its business, it sought the permission of Cass County to build electric transmission lines, poles and other infrastructure over the roads and highways of the County. The Cass County Court (now, the Cass County Commission) granted the company's petition "as prayed for," in 1917. (J.S., ¶18). The permission or consent sometimes referred to as a franchise, granted by Cass County, was perpetual in nature. The Cass County franchise was granted in accordance with the provisions of what is now codified at §229.100 RSMo.³

In 1917 L.K. Green & Sons, a "co-partnership," incorporated as Green Light and Power Company and in 1918 received the permission of the Commission to transfer its assets, "together with all franchises, permits, rights, easements and contracts," to the new corporation in Case No. 1409. (J.S., ¶20).

² *Missouri Valley Realty Company v. Cupples Station Light, Heat and Power Company*, 2 Mo.P.S.C. 1, 6 (1914).

³ Section 229.100 RSMo states as follows: "No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission." This is discussed in *Re Union Electric Company*, 3 Mo.P.S.C. (N.S.) 157, 160 (1951).

The utility continued to grow, and in 1921 sought Commission permission to reorganize as West Missouri Power Company and to increase its capitalization. (J.S.,

¶21). The Commission issued this order in December 1921, specifically ordering:

. . . that the present and future public convenience and necessity require the exercise by the said new company [West Missouri Power Company] of all the rights, privileges and franchises to construct, operate and maintain electric plants and systems in the State of Missouri and respective counties and municipalities thereof, now acquired or controlled by Applicant, Green Light and Power Company. (emphasis added)

Case No. 3171, Preliminary Order at pp. 4-5 (Dec. 6, 1921).

In that same proceeding the Commission issued a subsequent order in March 1922, setting forth how West Missouri Power Company was required to use the capital that the Commission permitted it to raise. The Commission specifically directed how those funds must be used:

That the said West Missouri Power Company shall sell the said stock hereby authorized . . . and that the proceeds thereof shall be applied to the following purpose:

For extensions and additions to distributions systems and street lighting systems now or hereafter owned by said company in Jackson, Cass [and other] counties and for the reimbursement of monies heretofore or hereafter actually expended from the income of the company for the acquisition of property, the construction, completion, extension or improvement of the plants or distribution systems of said Company . . . (emphasis added)

Case No. 3171, Order at pp. 2-3 (March 21, 1922).

The chronology of Aquila's corporate history is detailed in the Joint Stipulation of Facts, but can be summarized as follows:

- 1927 – Missouri Public Service Co., a Missouri corporation, succeeds West Missouri Power Co.

- 1936 – Missouri Public Service Corp., a Delaware corporation, succeeds Missouri Public Service Co.
- 1950 – Missouri Public Service Co., a Missouri corporation, merges with and succeeds the Missouri Public Service Corp.
- 1985 – UtiliCorp United Inc. becomes the new name of Missouri Public Service Co.
- 1987 – UtiliCorp United Inc., a Delaware corporation, merges with and succeeds UtiliCorp United Inc., a Missouri corporation.
- 2002 – Aquila, Inc. becomes the new name of UtiliCorp United Inc.

During these years, Aquila’s predecessors returned to the Commission to expand their service territory and confirm their rights and obligations. In 1937, the company applied for an expansion of its service territory in eighteen Missouri counties, including most of Cass County. The major purpose of the application was to construct, operate and maintain extensions to its electric transmission and distribution lines in those counties. However, the utility noted that it expected “there will be sufficient requests for service requiring extension to its facilities” and “that such future extensions will be made in accordance with the rules and regulations” of the Commission. The application was assigned the docket number 9470 by the Commission.

When it granted the application in early 1938, the Commission broadly ordered:

That the Missouri Public Service Corporation be and is hereby authorized to construct, maintain and operate electric transmission lines and distribution systems over, along and across the highways of the county of . . . Cass . . . with authority to furnish electric service to all persons in the area for which the certificate is granted. (emphasis added)

See, *Report and Order*, Case No. 9470 (the “1938 CCN Order”); J.S., ¶¶ 26-27.

In 1950 the Commission confirmed that Aquila’s predecessor had authority to operate power plants in Cass County when the Commission approved the merger of

Missouri Public Service Corp. into Missouri Public Service Co. The Commission specifically granted the utility a CCN to:

. . . own, maintain and operate all properties and assets, and to acquire, hold and exercise all contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; including, without limitation, all rights to construct, own and maintain electric utility facilities in the areas of the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938. (emphasis added)

Report and Order, Case No. 11,892 at 4; J.S., ¶¶ 35-36.

B. The South Harper Peaking Station

In October of 2004, Aquila began land clearance and site preparation on a parcel of property in an unincorporated area in Cass County, Missouri near the City of Peculiar at East 243rd Street and South Harper Road⁴ for the installation of a peaking power production facility comprising three (3) 105 MW natural gas-fired combustion turbines (“CTs”) and an associated electric transmission substation (collectively, the “South Harper Facility”). (J.S., ¶56) Also, Aquila began land clearance activities in preparation for the construction of a related electric transmission substation on approximately ten (10) acres of a fifty-five (55) acre parcel of property at a location one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road, approximately two (2) miles northwest of Peculiar at a location adjacent to the intersection of an existing 345 kv electric transmission line and an existing 69 kv electric transmission line, each of which is owned by Aquila (the “Peculiar Substation”)⁵. (J.S., ¶54). Both parcels of property are located in Aquila’s certificated area as identified in

⁴ Identified as Tract A in the Joint Stipulation of Facts, ¶ 43.

⁵ Identified as Tract B in the Joint Stipulation of Facts, ¶ 43.

the Commission's 1938 CCN Order (Case No. 9470). (J.S., ¶44; Verified Application, ¶8.)

The Peculiar Substation is designed to support the South Harper Facility on Tract A by allowing the power output of the plant to flow to an adjacent, higher voltage transmission line. From there, power will flow through Aquila's transmission grid to where it is needed. The Peculiar Substation will also serve load growth in the area. (J.S., ¶55.)

Immediately adjacent to the South Harper Facility on Tract A is a gas compressor facility operated by Southern Star Gas Pipeline since about 1951. This gas compressor facility will provide natural gas for the operation of the South Harper Facility. (J.S., ¶57.)

The South Harper Facility is being constructed to replace part of the capacity represented by a Power Purchase Agreement dated February 22, 1999, (the "PPA") that expires on May 31, 2005. The PPA is for 500 megawatts ("MW") of capacity during the summer months and 200 MW in the winter. (J.S., ¶58.) With increasing demand in Aquila's Missouri service area and the need for year round peaking capability, the South Harper Facility CTs will provide the flexibility to meet the needs of Aquila's customers.

Aquila's Western Missouri service area includes most of Cass County, a first class non-charter county, which is one of the fastest growing areas served by Aquila. A news release issued by the Office of Administration identifies Cass County as one of the top ten fastest growing counties in the state showing a population increase of 8.2% over the three (3) years between April 1, 2000 and July 1, 2003. (See, **Attachment A** hereto). Aquila is adding approximately 5,000 new customers per year in this area, and the total system demand for electricity at peak times hit an all time high of approximately

1,816 MW in 2003. Electrical load in this area is up approximately 7.5% since 2002. Aquila's additional capacity needs of approximately 200 – 250 MW will be met with power purchase agreements that resemble base load power supply. (Verified Application, ¶10).

C. Cass County Litigation and Final Judgment

Shortly after the initiation of site preparation activities at the South Harper Facility and the Peculiar Substation, separate petitions for injunctive relief were filed by Cass County, and an unincorporated association of individuals. Said lawsuits challenged the right of Aquila to construct the South Harper Facility and the Peculiar Substation claiming, among other things, that the provisions of §64.235 RSMo 2000 providing for the conformance of improvements to the county's master plan, superceded the authority of Aquila's CCNs or imposed additional requirements on Aquila to seek more specific authority from the Commission to construct and operate the South Harper Facility and the Peculiar Substation or, more specific authority from the Cass County Commission.

On January 6, 2005, the Cass County Circuit Court issued a permanent injunction enjoining Aquila from constructing and operating the South Harper Facility and the Peculiar Substation, and ordering that Aquila remove all improvements and equipment inconsistent with the properties agricultural zoning classification by Cass County. A true and correct copy of the Circuit Court's Final Judgment is marked Appendix 2 and attached to Aquila's Verified Application. (J.S., ¶79). Aquila posted an appeal bond on January 11, 2005, that was approved by the Circuit Judge and that stayed the injunction portion of the Final Judgment. (J.S., ¶80). A Notice of Appeal was filed by Aquila on January 12, 2005 in the Circuit Court of Cass County regarding the

Final Judgment. (J.S., ¶81). Aquila's appeal of the Final Judgment in Case No. CV104-1443CC has been assigned Case No. WD64985 in the Missouri Court of Appeals, Western District, which has scheduled oral argument for April 14, 2005. (J.S., ¶82).

II. NATURE OF RELIEF REQUESTED

A. The Final Judgment and the Verified Application

In its Application, Aquila submits alternative requests for relief. The reason for doing so can be found in the express language contained in the Final Judgment. The Final Judgment of the Circuit Court of Cass County contains the following findings:

The Court finds that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, in that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of §64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not. (emphasis added)

Final Judgment, page 3. This language explicitly provides that Aquila may apply to the Commission to confirm it has or obtain "specific authorization" in its CCN or in an order in accordance with the provisions of §64.235 RSMo 2000, as a means of addressing the concerns of the Circuit Court of Cass County. The phrase "must obtain" used by Judge Dandurand clearly allows Aquila to request relief from the Commission consistent with the powers delegated to the Commission by the Missouri General Assembly.

The language employed by Judge Dandurand in the Final Judgment includes the phrase "pursuant to the provisions of §64.235 of the Revised Statutes of Missouri." The Final Judgment's specific reference to that portion of §64.235 RSMo refers to that statute's acknowledgment that specific authorization

or permission may be obtained “by a certificate of public convenience and necessity, or order issued by the public service commission.” (Emphasis added.) The Final Judgment, therefore, authorized Aquila to confirm it has or obtain specific authorization or permission by virtue of an order of interpretation and clarification by the Commission or, alternatively, an overlapping CCN from the Commission. This is precisely what Aquila has requested by virtue of its verified Application. Aquila has filed an Application for a confirmation or grant of specific authorization to construct power plants and substations in its certificated service area in the form of an order of clarification and confirmation under Aquila’s existing CCNs or a new overlapping, site-specific CCN.

The language used in the Final Judgment is enabling, not limiting. There is no language in the Final Judgment enjoining Aquila from filing the Application with the Commission. Similarly, the Commission has not been enjoined or bound by the terms of the Final Judgment from holding proceedings or ruling on the request for relief contained in the Application.

At the time of the February 25, 2005, on-the-record presentation to the Commission, Aquila stated its preference for an order interpreting its CCNs and clarifying that the language of those CCNs includes the specific authority for Aquila to construct all manner of electric plant throughout the area certificated to it including the construction of power plants and electric transmission substations. (Tr. 45-46). By virtue of its March 3, 2005, Order Setting Procedural Schedule, the Commission adopted a procedural schedule consistent with Aquila’s stated preference.

B. The Commission has the Power to Interpret its Own Prior Orders

The right of the Commission to interpret its own orders has been expressly upheld on several occasions.

It will not do to say that the commission can not interpret its own orders. Denial of the power of the commission to ascribe a proper meaning to its orders would result in confusion and deprive it of the power to function. In interpreting its orders it does not act judicially, but as a fact finding agency.

State ex rel. Missouri Pacific Freight Transport Company v. Public Service Commission, 312 S.W. 2d 363, 365 (Mo. App. 1958), citing *State ex rel. Orscheln Brothers Truck Lines, Inc. v. Public Service Commission*, 232 Mo. App. 605, 110 S.W. 2d 364, 366 (1937). The Missouri Supreme Court has said that an order of the Commission interpreting one of its own prior orders “was basically one of fact and findings of the Commission in such an event would, on review, accorded the same effect as other facts found by the Commission.” *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W. 2d 593, 598 (Mo. banc. 1964). The Supreme Court went on to conclude that the Commission also could interpret questions of law but its conclusions in that regard are not “controlling on the courts.” *Id.* The Commission’s construction of its enabling legislation is, however, entitled to judicial deference. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W. 2d 20, 22 (Mo. banc. 1975).

In practice, the Commission often has examined, interpreted and clarified its prior orders, policies and practices, including in the context of interpreting and terms of CCNs. In the *Orscheln* case, the Kansas City Court of Appeals was reviewing an order of the Commission interpreting a common carrier hauling authority. In the *Pacific Freight* case, the Kansas City Court of Appeals was reviewing a Commission decision

that had included an examination of a railroad company's CCN. In the *Public Water Supply District* case, the Missouri Supreme Court was reviewing a Commission order that had interpreted a CCN of Raytown Water Company. There are numerous other examples.

In its Application, Aquila has directed the Commission's attention to three (3) similar decisions. In 1973, in *Re Missouri Power & Light Company*, 18 Mo.P.S.C. (N.S.) 116, Commissioner Clark concurred in the result of the majority opinion to give the utility a site-specific CCN to construct, install and operate a combustion turbine within its certificated service area in Jefferson City, Cole County, Missouri. Commissioner Clark was firm in his view that Missouri Power & Light Company did not need any additional authority from the Commission. He could not have ventured this view without examining and taking into account the terms of the Commission's prior orders and decisions. See, Verified Application, ¶¶ 17, 19.

Aquila also directed the Commission's attention to Case No. EA-77-38⁶ wherein the Commission granted The Empire District Electric Company ("Empire") a site-specific CCN associated with the construction and operation of the LaRussell Energy Center located in Jasper County, Missouri. In doing so, the Commission expressed reservations about the need for such action in light of its prior order in Case NO. 9,420. Again, the Commission was looking to its prior decision in 1937 to decide what it should do regarding Empire's Application in 1977. (See, Verified Application, ¶20.)

Not long thereafter in 1980, in Case No. EA-79-119⁷, the Commission dismissed an application of Union Electric Company for a CCN to install two (2) combustion

⁶ Reported at 21 Mo.P.S.C. (N.S.) at 352.

⁷ Reported at 24 Mo.P.S.C. (N.S.) at 725.

turbine generating units at locations within its existing certificated service area. The Commission could not have done so without being cognizant of, interpreting and applying the authority it had granted Union Electric Company in its prior orders. (See, Verified Application, ¶18.)

There are other examples of the Commission interpreting its prior CCN orders. In its August 31, 2000 Report and Order in Case No. WR-2000-281⁸ in the context of a rate case, the Commission construed the language and effect of a CCN issued to Missouri-American Water Company nearly three years earlier in Case No. WA-97-46.⁹ More recently in Case No. GM-2001-585¹⁰, the Commission looked to the language of its prior orders in Case Nos. GA-89-126, GA-90-280 and GM-94-252 to interpret and apply an operational restriction it imposed on Missouri Pipeline Company (“MPC”) when it first granted MPC its CCN. This occurred in the context of a subsequent stock sale. 10 Mo.P.S.C 3d at 535 – 536.¹¹ In that case, the Commission looked to the terms of the orders issued in 1989 and 1994 to interpret the purpose of the connection restriction language to determine what it should do in 2001.

These cases demonstrate that the Commission routinely examines and interprets its prior CCN orders in dealing with current or changed circumstances as they may be presented in entirely different proceedings. These cases also show that there is no valid legal or policy reason that the Commission should not review its prior orders and decisions. In fact, were it not able to do so, its prior orders and decisions would have no practical meaning, purpose or effect. As noted by the Court of Appeals in the *Orscheln*

⁸ *Re Missouri-American Water Company*, 9 Mo.P.S.C. 3d 254.

⁹ *Id* at 264.

¹⁰ *Re Gateway Pipeline Company*, 10 Mo.P.S.C. 3d at 520.

¹¹ Report and Order at pages 28-29.

case, the inability of the Commission to interpret its own prior orders would result in confusion and “deprive it of the power to function.” In the absence of such power, cases before the Commission would become needlessly complex and unmanageable because each case would presumably be occurring in a regulatory and historical vacuum.

Aquila is not requesting the Commission to weigh in on the question of whether it believes the Final Judgment was rightly or wrongly decided. The legal issues of the interplay between the provisions of §393.170 RSMo 2000 and §64.235 RSMo 2000 are pending before the Missouri Court of Appeals and those issues should be left to be resolved in that forum. To the contrary, the Application conforms fully with the express language of the Final Judgment as noted above.

III. AQUILA’S CCNs SPECIFICALLY AUTHORIZE THE CONSTRUCTION AND OPERATION OF THE SOUTH HARPER FACILITY AND THE PECULIAR SUBSTATION

A. The Commission has the Power to Confirm the Specific Authorization of Aquila to Construct and Operate Electric Plant, Including the South Harper Facility and the Peculiar Substation

The Act provides in §386.040 RSMo that the “Commission shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carryout fully and effectually all of the purposes of this chapter.”¹² Pursuant to §386.250, “[t]he jurisdiction, supervision, powers and duties of the public service commission . . . shall extend . . . (1) to the manufacture, sale or distribution of . . . electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to . . . electric

¹² §386.040 (emphasis added). The word “chapter” is taken from the 1939 codification of the Revised Statutes of Missouri, and includes all of chapters 386, sections 387.010-.340, 389.360, 389.780, 390.020-.170, 391.070, 392.190-.360, and 393.110-.290. See, Section 386.010.

plants, and to persons or corporations owning, leasing, operating or controlling the same;. . .”

Section 393.140 sets forth in twelve (12) lengthy subsections, covering four (4) pages, the “general powers” of the Commission relating to electricity, as well as other utility services. It provides:

The Commission shall: (1) have general supervision of all . . . electrical corporations . . . having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purposes of . . . transmitting electricity for light, heat or power, . . . and all . . . electric plants . . . operated by any . . . electrical corporation. . .

(2) examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying . . . electricity for light, heat or power and in transmitting the same, and . . . have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those from using such . . . electricity . . . system, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of . . . electrical corporations. . .

(3) have power, by order, . . . to prescribe from time to time the efficiency of the electric supply system, the current supplied and of the lamps furnished by the person or corporations generating and selling electric current . . . for the purpose of determining . . . whether the efficiency of the electric supply system, of the current supplied and of the lamps furnished . . . conforms to the orders issued by the commission, the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying . . . electricity . . . and shall have access, through its members or persons employed or authorized by it, to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission or distribution of . . . electricity. . . (emphasis added)

See, §393.140 (1) – (3)

Subsection 4 of §393.140 grants the Commission power to prescribe uniform methods of accounts, books and records of electrical corporations. Subsection (5) permits the Commission to examine “the methods, practices, regulations and property” employed by such corporations, as well as to file complaints against any company where “the property, equipment or appliances . . . are unsafe, insufficient or inadequate . . . “ In such an event, the Commission is empowered to “determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.” See, §393.140(5).

Subsection (7) of 393.140 specifically grants the Commission power “to inspect the property, buildings, plants, factories, powerhouses, ducts, conduits and offices of any corporations,” just as subsection (8) empowers the Commission to “examine the accounts, books, contracts, records, documents and papers of any such corporation.” The Commission may require sworn copies of any such books, records or other documents to be filed with it. See, §393.140(9). The Commission is also granted the power “to subpoena witnesses, take testimony and administer oaths in any proceeding brought before it relating to public utilities.” See, §393.140(10). Finally, the Commission is given broad power over the financial regulation of a number of the state’s electrical corporations, including the power to set rates and charges, as well as to “prescribe the apportionment of” capitalization, earnings, debts and expenses of electrical and other corporations. See, §393.140(11) – (12).

As is particularly pertinent to this case, §393.170 grants the Commission the power to approve the construction of electric plant before a new company commences operations or when an existing electric utility proposes to enter a new service area, in both cases through the issuance of CCNs.

In addition to these powers, the Commission has explicit inspection authority (§393.160), approval of authority for sales of property, including mergers (§393.190), authority over the issuing of stock, bonds and other forms of indebtedness by companies chartered in the State of Missouri (§393.200), and explicit valuation and depreciation authority (§§393.230 -.240).

The scope and powers granted by the General Assembly to the Commission is sweeping. This broad authority granted to the Commission demonstrates a legislative intent that the police power of the state as it relates to public utility shall be exercised by the Commission. As the Missouri Supreme Court recognized, “the statutes relative to the Public Service Commission constitute ‘a legislative recognition that the public interests and proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the state.’” *Union Electric Company v. City of Crestwood*, 499 S.W. 2d 480, 482-483 (Mo. 1973) (“Crestwood I”), quoting *In Re Public Service Electric and Gas Company*, 173 A. 2d 233, 239 (NJ 1961). Without such a system, “chaos would result.” *Id.* at 483.

Therefore, the Commission has the power to confirm the specific authorization of Aquila to construct and operate electric plant within the area certificated to it by the Commission, including the South Harper Facility and the Peculiar Substation.

B. Aquila's CCNs and Related Orders Issued by the Commission are Legally Sufficient to Authorize Aquila to Construct All Manner of Electric Plant, Including Power Plants, Electric Substations and Other Infrastructure Within its Service Territory in Furtherance of Aquila's Legal Obligation to Serve All Customers Within its Service Territory

In 1938 the Commission granted Aquila the right to greatly expand its service territory in western Missouri, including most of unincorporated Cass County. In earlier orders, the Commission granted Aquila the right to construct power plants. The locations of the South Harper Facility (Tract A) and the Peculiar Substation (Tract B) are within this territory. (J.S., ¶44).

As the Commission is aware, Missouri's Appellate Courts have been unanimous in their opinions that §393.170 RSMo. requires the "permission and approval" of the Commission through a CCN in only two instances: (1) when a new company wants to commence business in the state as a utility, or (2) when an existing utility wants to enter a new service area. See, *State ex rel. City of Sikeston v. Public Service Commission*, 82 S.W. 2d 105, 110 (Mo. 1935); *State ex rel. Harline v. Public Service Commission*, 343 S.W. 2d 171, 182-83 (Mo. App. 1960). The only circumstance under which Aquila or any other established utility company is required to apply for a CCN is when it seeks to expand its existing service territory. *Harline*, 343 S.W. 2d at 183. Accord, *The Empire District Electric Company v. Cox*, 588 S.W. 2d 263, 267 (Mo. App. 1979); *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W. 2d 469, 474 (Mo. App. 1964).

Harline is the leading case on the subject. In that case, the Kansas City Court of Appeals (now the Western District Court of Appeals) held that Aquila's predecessor, Missouri Public Service Company, was not required to obtain any additional authority to build a transmission line within its Commission-approved service territory. The *Harline* plaintiffs first argued that the utility was required to obtain a CCN under §393.170.1 prior to construction. The Court held that this provision was irrelevant because the utility's electric plant predated its 1938 CCN. See, 343 S.W. 2d at 183. The *Harline* Court observed that such a view is consistent with early Commission decisions, decided shortly after the passage of the Act in 1913. The *Harline* Court analyzed *Missouri Valley Realty Company v. Cupples Light, Heat & Power Company*, 2 Mo.P.S.C. 1, 6 (1914), which held that when a utility is legally serving the public under a CCN, the law does not require a CCN for every extension of its line to render additional service. See, 343 S.W. 2d at 183. The Court of Appeals made it clear that this proposition was not limited just to transmission lines, but "for additions, extensions or construction within the area" granted by the Commission. *Id.*

The *Harline* plaintiffs also invoked §393.170.2, arguing that it required utilities to return to the Commission to receive additional approval for any new construction. *Id.* The Court of Appeals flatly rejected that contention, noting that if Commission approval were required for every individual act pursuant to its franchises, "we envisage its ridiculous application to every conceivable detail incident to business operation." *Id.*

In arriving at its conclusions, the *Harline* court paid particular attention to Commission decisions, noting that its "interpretation of §393.170 is entitled to great weight" which it found "strongly persuasive on the present issue." *Id.* at 182 -83.

The Commission reiterated this long-standing policy in 1980 that a CCN “is only needed when an electric corporation starts in business or if it attempts to expand its authority in an entirely new area.” *Re Union Electric Company*, 24 Mo.P.S.C. (N.S.) 72, 80 (1980). In analyzing *Harline*, as well as the decisions of the Courts of Appeals in *Doniphan* and *Cox*, the Commission stated:

An argument could be made that the above cases are not applicable to the instant situation as they concern transmission lines as opposed to plant. The Commission believes that such an argument would be without merit as electric transmission lines are a part of the definition of plant as contained in §386.020.

Re Union Electric Company, 24 Mo.P.S.C. (N.S.) at 78.

The Commission’s decision in this regard is consistent with its earlier decisions, where, for example, the Commission held that a public utility serving a rural area pursuant to a CCN had the right “to continue to serve in all portions of such rural area which thereafter may be annexed to a municipality, notwithstanding another utility may hold a previously granted CCN to serve that city.” *Re Union Electric Company*, 3 Mo.P.S.C. (N.S.) 157, 162 (1951). The Commission reached a similar decision in *Re Joplin Water Company*, 21 Mo.P.S.C. 222, 229-30 (1934), where it held that a utility had the right to expand service within its certificated area if it had the capacity to do so, and which the Kansas City Court of Appeals cited in *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W. 2d 283, 286 (Mo. App. 1989). The Commission’s interpretation and application of §393.170 RSMo “is entitled to great weight.” *Harline*, 343 S.W. 2d at 183. It is well-recognized that the Commission’s construction of its enabling legislation is entitled to judicial deference. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W. 2d 20, 22 (Mo. banc. 1975). In this regard, the

Courts are not permitted to substitute their judgment for that of the Commission if the Commission's decision is based on substantial and competent evidence on the record as a whole. *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W. 2d 283, 284 (Mo. App. 1989).

It is equally well-established that the Commission has exclusive jurisdiction to make decisions within the specialized expertise reserved to it by the law. In this regard, the Missouri Supreme Court and other appellate courts have recognized that the Commission has primary jurisdiction to interpret its enabling legislation and its prior rules, decisions, and orders. *State ex rel. MCI Metro Access Transmission Services v. City of St. Louis*, 941 S.W. 2d 634, 644 (Mo. App. 1997); *Crestwood I*, 499 S.W. 2d at 482-84; *Union Electric Company v. City of Crestwood*, 562 S.W. 2d 344, 346 (Mo. banc. 1978); *State ex rel. Kansas City Power & Light Company v. Buzard*, 168 S.W. 2d 1044, 1046 (Mo. 1943).

C. The Commission Should Interpret Aquila's CCNs and Related Orders and in Furtherance of its Statutory Fact Finding Authority, Clarify That Aquila is Specifically Authorized to Construct Electric Power Production Plants, Electric Substations and Other Electric Infrastructure, Including the South Harper Facility and Peculiar Substation, Within its Certificated Service Area.

In its Case No. CV104-1443CC, the Circuit Court of Cass County interpreted the terms of §393.170 RSMo in light of the provisions of §64.235 RSMo and concluded, among other things:

That Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of §64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission . . .

The Circuit Court's conclusion that the provisions of §64.235 RSMo, as they apply to the authority of first class non-charter counties to require conformance of improvements with the counties' master plan supercede or impose additional requirements, limitations or restrictions on CCNs held by investor-owned utilities subject to the Commission's jurisdiction, is not consistent with Aquila's understanding of the expository case law as set forth above. Aquila is confident that its appeal of the Final Judgment is meritorious and that it ultimately will prevail on the legal issues raised by Cass County. The express terms of the Final Judgment, however, provide for the means by which Aquila may confirm that it has or obtain "specific authorization" from the Commission and, thus, address the concerns of the Circuit Court of Cass County. The Commission can and should resolve the uncertainty created by the terms of the Final Judgment by examining its prior CCNs and orders and clarifying that Aquila has the specific right and obligation to construct all manner of electric plant throughout its certificated service area, including power production stations, electric substations and other electric infrastructure including, the South Harper Facility and the Peculiar Substation on Tracts A and B, respectively.

There is an important public service principle at stake. As the *Harline* court noted, Aquila has the "legal duty to serve the public" in the areas certificated to it. 343 S.W. 2d at 181.

Section 393.130 specifically requires that "every electrical corporation . . . shall furnish and provide such service instrumentalities . . . as shall be . . . adequate . . .

The certificate of convenience and necessity is a mandate to serve the area covered by it because it is the utility's duty, within reasonable

imitations to serve all persons in an area it has undertaken to serve.¹³
(emphasis added)

This is a solemn public service obligation to the general public that outweighs any countervailing local or parochial interests.

It seems clear that the company could perform its duty to render electric service to all inhabitants of the rural area concerned only by a process of extending and building new lines and facilities as required, which the evidence shows has been done almost daily since 1938.

Harline, 343 S.W. 2d at 180 (emphasis added). If the authority embodied by CCNs is allowed to be eroded or subordinated to local land use regulation, the provision of reliable and affordable electric service to those who rely on it could be impaired. Economic development in this state could be seriously stunted.¹⁴

This right and obligation is no less important today than it was in 1960 when the court decided the *Harline* case. To the contrary, the stakes are even greater today. Cass County has been identified as one of the top ten fastest growing counties in the state showing a population increase of 8.2% over the three (3) years between April 1, 2000 and June 1, 2003.¹⁵ (See **Attachment A.**) The Kansas City Star recently published a map of population “winners and losers” in the Kansas City Area during the period 2000-2003. Using U.S. Census Bureau information, it noted substantial gains in the towns of Peculiar, Raymore and Belton; all communities located in Cass County. (See **Attachment B** hereto.) Cass is a substantial component of Aquila’s western

¹³ Citing *State ex rel. Ozark Power & Water Company v. Public Service Commission*, 287 Mo. 522, 229 S.W. 782 (Mo. 1921).

¹⁴ The prominent status conferred on public utilities by the General Assembly is reflected in their power under §523.010 RSMo. to exercise the power to “appropriate” private property by condemnation in furtherance of their public service obligations. The power to condemn property for public use will prevail over a local zoning ordinance. *City of Washington v. Warren County*, 899 S.W. 2d 863 (Mo. 1995); *City of Kirkwood v. City of Sunset Hills*, 589 S.W. 2d 131 (Mo. App. 1979). This special status distinguishes public utilities from any other type of commercial enterprise.

¹⁵ News Release of the Missouri Office of Administration.

Missouri service area. Aquila is adding approximately 5,000 new customers per year in this area, and the total system demand for electricity at peak times hit an all time high of approximately 1861 MW in 2003. Electrical load in this area is up approximately 7.5% since 2002. The principal purpose of a peaking facility like the South Harper Facility is to meet summer peak demand during the cooling season. The ability of Aquila to bring the South Harper Facility on-line on schedule is in furtherance of its statutory obligation to provide adequate service to its customers. The power will be used to light, heat and cool homes and businesses. Consumer electronic appliances all run on electricity. We live in an electricity-driven society. The Commission's responsibility is to the larger public service considerations at stake; not the purported impact on a small group of affected individuals or the desire of local political subdivisions to substitute their judgment for that of the Commission. Ultimately, it is the Commission that is charged with ensuring safe, adequate and affordable electric service and facilities to the public, not Cass County.

The alternative is for electric utilities in this state to request a facility-specific CCN within their existing certificated service areas for every conceivable additional item of newly constructed plant if there is any questions whatsoever about insufficient "specificity" in a CCN or alleged conflict with local land use controls. This most certainly has not been the preferred policy of the Commission, as was made clear in its 1980 decision in the *Union Electric* case. The business of the Commission could easily grind to a halt under the weight of such a case load. This would frustrate the Commission's policy of reserving the judgments about what and where to build to the informed

discretion of the company's management. *Re Union Electric Company*, 24 Mo.P.S.C. (N.S.) at 78.

The Commission has previously established in Case Nos. 3171, 9470, and 11,892 and others that the public convenience and necessity is served by Aquila's extension of new electric plant, including power plants and transmission substations, throughout those areas of Cass County currently served by it, including at the locations of Tracts A and B. See, *infra*, Section III D. The Commission's findings in this regard are final and conclusive and are not subject to collateral challenge. §386.550 RSMo., 2000.¹⁶

In any event, a specific confirmation of Aquila's specific authority to construct electric power production plants, electric substations and other electric infrastructure, including the South Harper Facility and the Peculiar Substation on Tracts A and B, respectively, will be in the public interest because the electric power to be generated by the South Harper Facility will be rate-based capacity that will be available to serve increasing demand for electric power by Aquila's customers in Missouri, including those located in Cass County. There are operational and cost advantages inherent in a utility's ownership of generating facilities. In recognition of these advantages, the Commission just recently stated is preference for company-owned generation instead of heavy reliance on power purchase agreements to meet Missouri load requirements and to protect Missouri customers.¹⁷ This statement has been consistent with Aquila's recent experience in which the Commission's staff has encouraged the company to reduce its reliance on purchased power in favor of power plant ownership when

¹⁶ Section 386.550 RSMo states that "[i]n all collateral actions or proceedings the orders and decisions of the Commission which have become final shall be conclusive."

¹⁷ See, FERC Docket EC03-53-000 and 001, Opinion 473, pp. 7 and 10.

justified. Since as early as May of 2003, Aquila has presented to representatives of Staff and the Office of the Public Counsel information demonstrating the need for peaking capacity of 300 MW during regular reviews of its Integrated Resource Plan (“IRP”). The construction of the South Harper Facility is consistent with the IRP.

The location of the project is highly desirable because of its relative proximity to the load center of the Western side of Aquila Networks-MPS’ service area, existing electrical transmission lines and the availability of fuel from natural gas pipelines near Tract A. A significant consideration was the availability of tax-advantaged Chapter 100 financing that will help keep the cost of electric power lower to Aquila’s customers. The advantages of the Tract A location for the South Harper Facility are set forth in greater detail in paragraph 34 of Aquila’s Verified Application.

D. Aquila’s Prior CCN and Related Orders Specifically Authorize it to Construct the South Harper Facility on Tract A and Peculiar Substation on Tract B

Aquila operates in Cass County, as well as other western Missouri counties pursuant to a number of CCNs and other orders issued to it and its predecessors. Prominent among these orders is the 1938 CCN Order to serve an area which included large portions of Western and North Central Missouri, including, but not limited to most of Cass County. In the 1938 CCN Order which issued the certificate, the Commission ordered:

That the Missouri Public Service Corporation be and is hereby authorized to construct, maintain and operate electric transmission lines and distribution systems over, along and across the highways of the counties . . . Cass . . . with the authority to furnish electric service to all persons in the area for which the certificate is granted.

In the decade previous to this Report and Order, the Commission granted permission to the predecessor of Aquila to increase its capitalization in a proceeding known as *In Re Green Light and Power Company*, Case No. 3171. The Commission's Preliminary Order of December 6, 1921, authorized the reorganization of Green Light and Power Company as West Missouri Power Company, and specifically ordered:

. . . that the present and future public convenience and necessity require the exercise by said company [West Missouri Power Company] of all the rights, privileges and franchises to construct, operate and maintain electric plants and systems in the State of Missouri and respective counties and municipalities thereof, now acquired or controlled by the applicant Green Light and Power Company.

See, Preliminary Order at 4-5, Case No. 3171 (1921).

In that same proceeding the Commission issued a subsequent order on March 21, 1922, setting forth how West Missouri Power Company was required to use the capital that the Commission permitted it to raise. The Commission specifically directed how those funds must be used:

That the said Western Missouri Power Company shall sell the set stock hereby authorized . . . and that the proceeds thereof shall be applied to the following purpose: for extensions and additions to distribution systems and street lighting systems now or hereafter used by the said company in Jackson, Cass [and other] counties and for the reimbursement of monies heretofore or hereafter actually expended from the income of the company for the acquisition of property, the construction, completion, extension or improvement of the plants or distribution systems of said company; . . .

See, Order at 2-3, Case No. 3171 (1922).

These three orders taken together, specifically authorized Aquila's predecessors to construct plants, substations and other "electric plant," as defined in §386.020 (14), within the service territory granted by the Commission.

More recently, in Case No. 11,892, the Commission granted to Missouri Public Service Company in 1950 a certificate to:

. . . own, maintain and operate all properties and assets, and to acquire, hold and exercise all contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; including, without limitation, all rights to construct, own and maintain electric utility facilities in the areas of the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.

Report and Order at 4, Case No. 11,892 (1950).

The words “electric utility facilities” were intended to encompass “electric plant” which is defined in §386.020 (14), and which “includes all real estate, fixtures and personal property operated, controlled, owned, used, or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power . . .” This definition also embraces plants, substations, wires, lines, poles and other fixtures or equipment used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power.

The Commission’s conclusion that the words “electric utility facilities” were intended to encompass the concept of “electric plant” as defined in §386.020(14) is supported by statutory law, case law and similar usage and application in federal law. §393.295 enacted in 1978 (and thereafter repealed) relating to joint municipal utility commissions (“JMUCs”) subjected JMUCs to the same type of regulation as that applicable to investor-owned utilities, like Aquila. In doing so, the General Assembly made the provisions of Chapter 386 and 393:

. . . fully applicable to any joint municipal utility commission which owns, operates, controls or manages all or any part of any gas or electric light

works, heat or power plants, electrical energy resources or gas or electrical production, distribution or transmission facilities in this state.
(emphasis added)

(See, **Attachment C** hereto.) The Commission concludes that the General Assembly was using the terms “power plants” and “electrical production . . . facilities” synonymously and interchangeably with the term “electric plant” as defined at §386.020(14).

Similarly, in *Harline*, the Court of Appeals recognized that Missouri Public Service Corporation:

Could perform its duty to render electric service to all inhabitants of the rural area concerned only by a process of extending and building new lines and facilities as required . . . (emphasis added)

343 S.W. 2d at 181. If the Court of Appeals had intended that its order only authorize the construction of additional transmission and distribution lines, the phrase “and facilities” would have been unnecessary and superfluous language. In the context in which the language is used, the Commission concludes that the Kansas City Court of Appeals was using the term “facilities” as a general catch-all and, that is, consistent with the statutory definition of “electric plant” as set forth in §386.020 (14). Otherwise, the Court’s discussion about Aquila’s statutory “mandate to serve” would be frustrated. *Id.*

Also persuasive is the opinion of the Missouri Supreme Court in *State inf. McKittrick ex rel. City of Trenton v. Missouri Public Service Corporation*, 174 S.W. 2d 871 (Mo. banc 1943), wherein an examination of the language of a municipal franchise, the Court determined that the franchise term “electric light works” should be read to mean “electric plant.” *Id.* at 879-880. This opinion suggests that common usage of the terms “works” or “facilities” generally are synonymous with the term “plant.”

Finally, the definition of “electric utility company” contained in the federal Public Utility Holding Company Act as including any company “which owns or operates facilities used for the generation, transmission or distribution of electric energy for sale . . .”¹⁸ It is clear from customary usage in both federal and state law concerning regulation of utilities that the term “facilities” is an expansive term applying to all manner of electric utility infrastructure including production as well as transmission and distribution equipment.

Based upon a review of its prior orders, relevant decisions of appellate courts as well as the facts that are not in dispute in this proceeding, the Commission should confirm that the prior CCNs and other orders issued by this Commission specifically authorize and permit Aquila, as they specifically authorized and permitted its predecessors, to build power plants, substations and other forms of electrical infrastructure, including the South Harper Facility and the Peculiar Substation in Cass County, within the service territory that has been granted to Aquila and its predecessors by this Commission. Such prior CCNs and other orders apply fully to Aquila’s current service territory, which includes Tracts A and B where Aquila proposes to construct the South Harper Facility and the Peculiar Substation, respectively, in Cass County.

WHEREFORE, for the reasons aforesaid, Aquila requests that the Commission:

(A) Confirm that Aquila by virtue of the 1938 CCN Order and subsequent orders of the Commission has the specific permission, approval and authority necessary, to install, acquire, build, construct, own, operate, control, manage and maintain an electric power generation station comprising three (3) 105 MW natural gas-fired combustion turbines and associated transmission substation, transformers and breakers together

¹⁸ 15 U.S.C. §79b(3)

with any and all other installations, facilities, structures, fixtures and equipment related thereto for the production and transmission of electric power and energy at the following described location in Cass County:

The Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-Nine (29), and the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32).

containing approximately 74 acres at or near the intersection of 243rd Street and Harper Road;

(B) Confirm that by virtue of the 1938 CCN Order and subsequent orders of the Commission Aquila has the specific permission, approval and authority necessary to install, acquire, build, construct, own, operate, control, manage and maintain an electric transmission substation together with any and all other associated installations, facilities, structures, fixtures and equipment related thereto for the transmission of electric power and energy at the following described location in Cass County:

Beginning at the Northwest corner of the Northwest Quarter (NW1/4) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW ¼ a distance of 2,508.18 feet more or less to the South line of said NW ¼; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning.

containing approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road;

(C) Find that the construction and operation of the South Harper Facility and the Peculiar Substation will be in furtherance to the public convenience and necessity heretofore determined in the 1938 CCN order;

(D) State that the confirmation hereinabove granted by the Commission is not binding for rate making purposes or financing purposes and that the Commission reserves the right to consider the treatment to be given the described plant additions in a subsequent proceeding or proceedings; and

(E) Grant such other orders and relief as are appropriate in the circumstances.

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, hand delivery or electronically, on this 21st day of March, 2005 to the following:

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