

**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 SUGGESTIONS IN SUPPORT
OF THE PROPOSED PROCEDURAL SCHEDULE SUBMITTED ON BEHALF OF
AQUILA, THE CITY OF PECULIAR, THE SOUTHWEST POWER POOL, AND STAFF**

COMES NOW Aquila, Inc. (hereinafter "Aquila" or the "Company"), by counsel, and in support of the proposed procedural schedule submitted on March 7, 2006 by Aquila, the City of Peculiar, the Southwest Power Pool, and the Staff of the Commission and in opposition to the proposed procedural schedule filed on March 7, 2006 by Cass County, Missouri ("Cass County"), StopAquila.org, and certain Cass County residents, respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

1. On January 25, 2006, Aquila filed an application with the Commission seeking permission and approval and a certificate of public convenience and necessity with regard to the South Harper Facility and Peculiar Substation. On January 26, 2006, the Commission issued its Order and Notice in this docket and set an intervention deadline of February 27, 2006. Aquila subsequently requested that the Commission establish a procedural schedule in this case which would allow the Commission to issue an order approving Aquila's application in the early part of May, 2006, and this request

was opposed by Cass County in its filing of February 22, 2006. Thereafter, on March 7, 2006, Staff, Aquila, the Southwest Power Pool, and the City of Peculiar proposed a procedural schedule for the processing of this case, and Cass County, StopAquila.org, and certain Cass County residents proposed an alternative procedural schedule.

2. The timing of the subject application and the procedural schedule proposed by Staff, Aquila, the City of Peculiar, and the Southwest Power Pool, in Staff's filing of March 7, 2006, are, in part, a result of the fact that the Honorable Joseph P. Dandurand extended, only until May 31, 2006, the stay of the terms of the injunction he issued against Aquila on January 11, 2005.¹ As will be discussed later in these Suggestions in Support, Judge Dandurand's comments indicate that he set the May 31st deadline based, at least in part, on his perception that the Commission should be able to address the required issues by that date.

3. If Aquila does not obtain specific authority to operate the subject facilities from the Commission prior to May 31, Judge Dandurand's order of January 27, 2006 states that Aquila begin dismantling and removing the South Harper Facility and Peculiar Substation. Alternatively, should the Commission approve the application at some point beyond May 31, the Company might be faced with a set of circumstances in which it is authorized to construct and operate a plant which it has dismantled or started to dismantle. The Cass County proposal, with hearings ending in July, could very well lead to such a result. Such a situation would be wasteful and certainly would not be in the public interest. Further, if a ruling is not made by the Commission prior to May 31,

¹ This was done on January 27, 2006, in the case styled Cass County, Missouri vs. Aquila, Inc., Cass County Case No. CV104-1443CC.

Cass County will likely come before the Commission and argue that the facilities must be torn down pursuant to Judge Dandurand's order and the application is thus moot.

4. The procedural schedule proposed in Staff's filing is reasonable, will afford all parties with due process and a fair opportunity to be heard, and will allow the Commission to be in a position to render a decision prior to May 31. Aquila filed its direct testimony with its application, and Aquila has agreed to make the discovery from three prior cases dealing with this matter² available to all parties to this case upon request. Aquila has also agreed to expedite new discovery requests. Furthermore, certain parties, including Aquila, Cass County, and StopAquila.org, stipulated and agreed to a comprehensive set of facts involving South Harper and the Peculiar Substation in Commission Case No. EA-2005-0248, and these facts continue to be relevant in this proceeding. Additionally, the proposed procedural schedule provides for the filing of testimony by other parties; for two local, public hearings; and for an evidentiary hearing where all parties may be heard on all matters relevant to the application, including zoning and land use concerns. In its pleading of March 7, Cass County asserts that a local public hearing should be scheduled in a manner to maximize citizen input. The proposal of Aquila, Staff, the City of Peculiar, and the Southwest Power Pool satisfies the concerns expressed by Cass County in this regard.

5. This is a case that should not be that difficult to process. The Commission and the parties are familiar with the facts and circumstances surrounding the South Harper Facility and Peculiar Substation, as these matters have been addressed in Commission Case No. EA-2005-0248 (the "Clarification Order" case), Commission

² Commission Case Nos. EA-2005-0248 (the "Clarification Order" case), EO-2005-0156 (the "Sale and Lease Back" or "Chapter 100 Financing" case), and ER-2005-0436 (the "Electric Rate Case").

Case No. EO-2005-0156 (the “Sale and Lease Back” or “Chapter 100 Financing” case), and Commission Case No. ER-2005-0436 (the “Electric Rate Case”), as well as the Cass County Circuit Court proceedings. This point was noted by Judge Dandurand in the context of a recent discussion about further proceedings before the Commission:

Has anybody had any discussion with [the Commission] about what expectations we might have with regard to obtaining some sort of a ruling from them? Because the facts aren't difficult. They have been hashed over and hashed over. The PSC is either going to vote for you, or they are going to vote against you.³

Judge Dandurand continued by stating that this Commission proceeding should be handled expeditiously.⁴

6. Further, contrary to the assertions of Cass County, the Commission is not establishing new law or new procedures with this case. The Commission has a history of processing applications under RSMo. 393.170 in which it applies the “necessary or convenient for the public service” standard.⁵ Land use issues have, in the past, been considered as part of the “public interest” component of the “necessary or convenient for the public service” standard. In other words, the Commission need not expand its prior practice in order to take land use issues into account.

7. According to the Court of Appeals, if Aquila's application is approved by the Commission and Aquila is thus granted the specific authority to operate the South Harper Facility and Peculiar Substation the facilities will be exempt from county zoning, as the Court of Appeals held the Company qualifies for the county zoning exemption

³ Transcript of January 27, 2006 proceedings before Judge Dandurand, pages 19-20.

⁴ *Id.* at page 20.

⁵ In addition to more traditional cases, the Commission considered two applications under Section 393.170 in the late 1970s. Empire 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.

under RSMo. 64.235.⁶ Although land use concerns may be considered by the Commission as part of the “public interest” review, the instant case is not a zoning or special use permit proceeding which would require Aquila to prove all elements necessary to support a change in zoning or a special use certificate.

8. In any event, previous zoning requests regarding electric utility facilities in Cass County have been disposed of quickly by the County. For example, zoning applications for the Aries facility were filed on April 19, 1999. Less than 30 days later, the Planning Board had approved the application, a decision that was affirmed by the County Commission 17 days after that. In addition, regarding the proposed Camp Branch location for these facilities, Aquila filed a special use permit application with Cass County on June 14, 2004, and by July 13, 2004, the County Planning Board had denied Aquila’s application after an evening hearing. The proponent and opponent to that proceeding were each allowed only one hour to present witnesses, with an additional fifteen minutes for rebuttal. At the hearing from 7:00 pm to 9:45 pm on July 13, the chairman stated the following: “Your redundancies are not appreciated. If it does appear that we are rehashing and hashing again positions and opinions, I’ll ask you to step down . . . We want to run this meeting efficiently.”⁷ These facts belie the County’s assertion that land use issues are so complex as to justify the extended schedule the County has proposed.

⁶ *Stopaquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 32 (Mo.App. W.D. 2005). Additionally, RSMo. 64.620, the parallel statute for second and third class counties, has been considered by both the Western District Court of Appeals and the Missouri Supreme Court. In *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555 (Mo.App. W.D. 1983), the Court held that the Commission is specifically empowered in §393.170 to grant permission and approval for construction of an electric plant and that a county cannot interfere with construction by means of its zoning regulations. In *Union Elec. Co. v. Saale*, 377 S.W.2d 427, 430 (Mo. 1964), the Court held that a county cannot by zoning restrictions limit the use of land by a public utility to construct a power plant to generate electric energy for public use.

⁷ Transcript of Cass County hearing, July 13, 2004, page 7, lines 1-9.

9. Contrary to the assertions of Cass County, Aquila does not contend that the Commission has the power to rezone the subject area or otherwise “superimpose a zoning districting” that differs from the one established by the County. It is true, however, that a county may not interfere with authorized construction by a Missouri utility by means of county zoning regulations. As the Appellate Court noted, a broad range of issues, including county zoning, may be considered in public hearings before the Commission. *Stopaquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 37 (Mo.App. W.D. 2005). To deal with this, the Commission need not expand its prior practice, but may consider land use issues as part of its public interest review.

10. Cass County contends that its presentation in this case will include a comprehensive record regarding the processes under which its local zoning was adopted, its Master Plan approved, and its ordinances enforced. Assuming the Commission finds these matters to be relevant to the instant application, Cass County will be able to file prepared testimony on these issues, and Aquila would be willing to stipulate to facts regarding the circumstances under which Cass County’s zoning ordinances were established and are currently enforced.

11. Cass County also contends that additional time is needed in the procedural schedule to allow for dispositive motions. Cass County has known since the Court of Appeals decision was handed down in December of 2005 that Aquila would be returning to the Commission with a new application, and Cass County has certainly known about the application since it was filed on January 25, 2006. In fact, the theories for Cass County’s intended dispositive motion have been in existence since this matter began, and, after requesting until March 24 to file dispositive motions, StopAquila.org

filed its motion to dismiss on March 10, 2006. Why then is extra time needed for Cass County to prepare and file a dispositive motion in this case? Additionally, the Commission may take up and consider dispositive motions along with the application, following pre-hearing briefing and the evidentiary hearing. The possibility of an additional dispositive motion being filed simply is not a reason to extend the schedule and prohibit a decision on the application prior to May 31.

12. Finally, due process does not guarantee any particular form or method of state procedure. *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 46 S. Ct. 384 (1926). “Its requirements are satisfied if [a citizen] has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.” A hearing, after reasonable notice, before a tribunal such as the Commission, satisfies the constitutional requirements of due process. *State ex rel. Anderson Motor Service Co. v. Public Service Com.*, 339 Mo. 469 (Mo. banc 1936). The presentation of a contested case even to an administrative agency which is itself interested in the outcome does not vitiate the proceedings. *Tonnar v. Missouri State Highway & Transp. Com.*, 640 S.W.2d 527 (Mo.App. W.D. 1982). “The requirement of due process is satisfied where judicial review is provided.” *Id.*, citing *Rose v. State Board of Registration for Healing Arts*, 397 S.W.2d 570, 574 (Mo. 1965).

13. As noted in paragraph 8, Cass County apparently felt due process was served in less than one month on previous occasions involving zoning and special use permits with respect to Camp Branch and Aries. The County even believed that “rehashing and hashing again” could take place in a two hour and forty-five minute

hearing. It is disingenuous for Cass County to now argue that the procedural schedule proposed by Staff, Aquila, the Southwest Power Pool, and the City of Peculiar is not providing the opportunity for due process.

WHEREFORE, Aquila respectfully requests that the Commission issue an order adopting the procedural schedule proposed in Staff's filing of March 7, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, mailed by U.S. mail, or electronically transmitted on this 13th day of March, 2006, to all parties of record.

