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

APPLICATION FOR REHEARING

Comes now Cass County, Missouri, (Cass County) by and through its attorneys, and pursuant to Section 386.500 RSMo and 4 CSR 240-2.160, moves and applies for rehearing of the Commission's Report and Order entered in this case on May 23, 2006 (hereinafter "the Order"). In support thereof, Cass County submits the following to the Commission:

1. On May 23, 2006, the Commission entered the Order authorizing and permitting Aquila, Inc. (Aquila) to construct, install, own, operate, maintain and otherwise control the South Harper generating plant and the Peculiar Substation (sometimes abbreviated herein as the "Plant and Substation"). The Order bears an effective date of May 31, 2006. This application is therefore timely under Section 386.500 and 4 CSR 240-2.160.

2. The Order is unlawful, unjust and unreasonable and just grounds exist for the Commission to rehear the matter and enter a new modified report and order.

THE COMMISSION LACKS JURISDICTION, AND THERFORE EXCEEDED ITS JURISDICTION IN HEARING AQUILA'S APPLICATION AND APPROVING THE RELIEF REQUESTED THEREIN

3. At page 40 of the Order, the Commission takes up the issue of its jurisdiction and Cass County's contention, which is directly derived from the opinion of the Missouri Court of Appeals in *Cass County v. Aquila*, 180 S.W.3d 24 (Mo. App. W.D. 2005) (the Opinion), that Aquila's application for authority in this matter cannot be heard because it is too late. Per the Opinion, the hearing contemplated under §393.170.1, RSMo. 2000 is required to be held before construction of the facilities involved. The Commission acknowledges this yet adds:

> That same opinion, however, stated that even though it affirmed the trial court's injunction against Aquila, ". . . we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate." The Court of Appeals understood that the plant was already built, and discussed at great length the portion of Section 393.170 which requires pre-construction approval. Aquila cannot get pre-construction approval for the plant and substation. The Court of Appeals knew this, yet expressly stated that Aquila could still seek authority to operate the already built facilities. The Commission concludes, based upon the Court of Appeals final sentence of its Aquila opinion, that Aquila is not too late.

Order at 41.

4. The Commission thus renders the Opinion prospective to Aquila and does so in contravention of the Missouri Court of Appeals' very specific restriction that "unless other litigants have preserved the precise issue addressed in this opinion we see no need to apply our interpretation to existing facilities." Opinion at 39. The Court of Appeals' reference to the prospective effect of the Opinion was clearly intended to prevent attacks on the legality of construction of existing electric generation facilities *other* than the Plant and Substation. To suggest otherwise is to render meaningless the Court of Appeals' subsequent affirmation of the

trial court's judgment permanently enjoining the construction of the Plant and Substation. Opinion at 41. Moreover, the last sentence from the Opinion on which the Commission relies as the source of its "authority" to consider Aquila's request makes ***no*** reference to any ability to secure *post facto* authority to *construct* the Plant and Substation, but speaks only of the prospect of seeking authority to continue *operating* the illegally constructed facilities. The Commission is afforded no power to issue a Certificate of Convenience and Necessity under Section 393.170 to permit the continued operation of illegally constructed energy generation facilities.

5. The closing sentences of the Opinion cannot lawfully be interpreted to expand the Commission's authority under §393.170 or to in any way immunize Aquila from its illegal conduct, which the Court of Appeals recognized by affirming the injunction entered by the trial court below.

6. Pre-Opinion cases decided by this Commission cannot give Aquila safe harbor. On page 35 of the Order, the Commission discusses its Report and Order in *In re Missouri Power & Light Company,* 18 MoPSC (NS) 116, Case No. 17,737, and without examination of the evidentiary record in that case, implies from a finding that no complaints about noise had been raised that the combustion turbine involved in that case was already constructed and operating at the time the decision was rendered. First, there is no basis in fact for the implication, and the implication is dispelled by a complete examination of the evidentiary record in that case. Further even if the Commission approved the application in that case post-construction of the facilities to be certificated, the Commission did so unlawfully as ruled in the Opinion.

7. Also at page 35 of the Order, the Commission appears to rely heavily on its broad supervisory powers under §393.140 in reasoning that it may avoid the sharper, plain and

unambiguous requirements of §393.170. Even under the elastic concepts of "public convenience and necessity," "public interest" or "general supervision of public utilities" the Commission lacks power to disregard the laws with which it disagrees. Even though the Public Service Commission Law and its provisions are essentially remedial in nature,

> **. . . and should be liberally construed in order to effectuate the purpose for which they were enacted, "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the commission is authorized by the statute**, *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (banc 1923). [Emphasis Added]

State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. 1979).

8. The Court of Appeals placed restrictions on the Commission's authority under §393.170.1:

> In light of the distinction acknowledged by the court in *Harline*, and examining the language of section 393.170 in its entirety, we believe that the legislature, which *clearly and unambiguously addresses electric plants* in subsection 1, *did not give the Commission the authority to grant a certificate* of convenience and necessity for the construction of an electric plant *without conducting a public hearing that is more or less contemporaneous with* ***the request*** *to construct such a facility.* [Emphasis Added]

Opinion at 34. The Western District reasoned that,

> By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan. [footnote omitted] *This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months before construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.* [Emphasis Added]

Id. at 37 -38.

Further, the Court of Appeals specifically indicates that §393.170.l *required* (emphasis added) a hearing be conducted in the months *before* (emphasis original) the Plant and Substation were constructed. Opinion at 35, f.n. 12.

9. Because Aquila failed to acquire Commission certification before it constructed the South Harper Plant and Peculiar Substation, the Commission lacks legislative authority and thus jurisdiction, to award Aquila a §393.170.1 Certificate of Convenience and Necessity authorizing construction of the South Harper Plant and the Peculiar Substation. Further, the Commission lacks legislative authority and thus jurisdiction to award Aquila a §393.170.1 Certificate of Convenience and Necessity authorizing continued operation of the South Harper Plant and the Peculiar Substation given their illegal construction.

WITHOUT PREJUDICE TO THE FOREGOING, THE COMMISSION HAS FAILED TO CONDUCT AN ANALYSIS OF LOCAL LAND USE ISSUES THAT IS INDEPENDENT OF CONSIDERATIONS OF NEED. FURTHERMORE, THE COMMISSION'S CONSIDERATION OF LOCAL LAND USE ISSUES WAS NOT CONDUCTED IN A MANNER THAT IS QUALITATIVELY SIMILAR AND FUNCTIONALLY EQUIVALENT TO A HEARING BEFORE THE CASS COUNTY PLANNING BOARD OR CASS COUNTY COMMISSION.

10. On page 29 of the Order, the Commission in error states:

> The Missouri Court of Appeals recently stated that the Commission may also consider "current conditions, concerns and issues, including zoning," matters that fall under the item "whether the involved facilities and related service promotes the public interest." Although the Court of Appeals held that this Commission had been misinterpreting *Harline*, the decision in the Aquila appellate opinion does not require the Commission to promulgate new rules or establish new procedures to consider an application pursuant to Section 393.170.3.
>
> Land use and other current conditions, concerns, and issues, including zoning, may be encompassed within the Commission's consideration of whether the facilities and related service "promote the public interest." There is no need or requirement that such issues be taken up separately from a consideration of this and the other factors to be examined by the Commission in connection with

> Aquila's application, nor is there any requirement that the evaluation of land use or zoning concerns, in particular, be the "functional equivalent" of a hearing on a special use permit or rezoning application. Even if there were such a requirement, the Commission concludes that it has been satisfied here.

11. Consideration of zoning issues, if the Commission elects to engage them, is not permissive under the Opinion. Section 393.170 sets up assurance that zoning issues, whether at the County level or at the Commission, will be considered. As the Court of Appeals stressed,

> By requiring public utilities to seek Commission approval each time they begin to construct a power plant, **the legislature ensures that a broad range of issues, including county zoning**, can be considered in public hearings before the first spadeful of soil is disturbed.

Opinion at 37.

12. On page 33 of the Order, the Commission questions the validity of Cass County's zoning ordinances. The Commission takes issue with the maintenance of the Cass County zoning map, the regularity of the various amendments to the Cass County zoning ordinance and purportedly without making any conclusions of law with respect to the enforceability of the ordinances, concludes for benefit of its decision that "the foregoing issues weigh against deferring to Cass County for siting the facilities at issue in this case." Page 4 of Staff's post hearing brief appears to be the origin of the Commission's conclusions.

13. The Commission has no zoning authority. It cannot consider legal challenges to city or county ordinances. It has no staff on which to rely in construing zoning ordinances or their effect in Cass County. "Zoning ordinances are presumed valid and 'any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor.' [citation omitted]." *Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71, 77 (Mo.App. W.D.2001). Staff did not submit data requests or a request under the public records laws to Cass County with respect to inspection and production of Cass County's zoning maps or updates

thereto. Staff did not move to compel production of those materials. Staff's failures to follow discovery procedures, and the consequences of not following those procedures (one of which is seeing documents for the first time at trial) does not rebut the presumption of validity due Cass County's enactment of zoning ordinances by lawfully elected officers.

14. Moreover, the Opinion directs the Commission, if it elects to consider zoning issues, to conduct a hearing that is the type of public hearing necessary to secure a §64.231 permit as a means of earning §64.235 exemption. Opinion at 37-38, f.n. 14. It is also plain that the Court of Appeals intended that the public hearings, and the determination made as a result, afford land use issues, including zoning, qualitatively similar treatment, to avoid "giving electric companies in the state carte blanche to build wherever and whenever they wish, subject only to the limits of their service territories and the control of environmental regulations . . . ." *Id.* Accordingly in this case, the Commission was under a **duty to uphold, not question or impeach, the zoning ordinances at stake**. The Commission had no authority to cast any suspicion on Cass County's elections, officers or ordinances in connection with its analysis.

15. On page 34 of the Order, the Commission first concludes that it is no less capable than Cass County to consider land use concerns. It later concludes that its own processes have been more than the functional equivalent of the process involving special use permits or rezoning applications before the County. The Commission's conclusions are without basis and are erroneous.

16. The entity capable by law to consider zoning issues is Cass County. §64.255. The Commission's enabling legislation gives it no authority to zone property in areas where its certificated utilities operate or have facilities. The County has been in the zoning business since 1959. The Commission's first venture into the field was by virtue of the awkward situation

Aquila presented in this application. On page 11 of its Order, the Commission records correctly that if Aquila were to file (for rezoning or) a special use permit application for the South Harper Plant and Peculiar Substation, the County would need to hire an outside consultant because the issues associated with the facility are simply more than its two person planning and zoning staff can handle. If the County needs outside expert assistance in reviewing rezoning or special use permit applications, then likewise this Commission, in providing equivalent substantive review, would need to do the same thing. The Commission staff lacks a land use planner, certified or not.

17. The Commission's process in examining land use issues in this case is fundamentally dysfunctional when compared to the processes the County would employ because at the County level, land use issues pertaining to the Plant and Substation would be fully independent from considerations of public need and convenience for the services. The Commission has done nothing in this case to separate the concepts. In fact, the Commission has allowed land use to be absorbed, and then discarded, within its evaluation of need for the facilities. By so doing, the Commission ignores the Opinion and has reached its conclusion unlawfully. Furthermore, had Aquila sought exemption via §64.231, the County Planning Board would not only have been evaluating the location of the Plant and Substation independent of any determination of "need" for the Plant and Substation, but it would have required Aquila to secure proper zoning for the Plant and Substation sites from the County Commission pursuant to its §64.255 authority as a condition of reviewing consistency with the Comprehensive Plan. The Commission has misunderstood the significance of §64.255 in its analysis, as explained below.

WITHOUT PREJUDICE TO THE FOREGOING, AQUILA HAS FAILED TO COMPLY WITH THE COUNTY'S ZONING AUTHORITY AS DESCRIBED IN SECTION 64.255,

AND WAS NOT RELIEVED OF THE OBLIGATION TO DO SO BY THE OPINION; THE COMMISSION SHOULD NOT HAVE ISSUED, OR SHOULD HAVE CONDITIONED, A CERTIFICATE OF CONVENIENCE AND NECESSITY, PENDING AQUILA'S COMPLIANCE WITH THE COUNTY'S ZONING AUTHORITY UNDER SECTION 64.255

18. On page 37 of its Order the Commission states that "[i]f Aquila has specific Commission approval for the Facilities, the Company is exempt from local zoning under Section 64.235. On page 41 of the Order, the Commission interprets the Opinion to rule that a utility may be exempt from county zoning either by a permit of the county commission after public hearing under §64.231 or by becoming specifically authorized or permitted by commission certificate. The Commission has erroneously interpreted the Opinion and the laws construed therein.

19. Under §64.235, Aquila is exempt from filing **proposed plans for its facilities and receiving written approval from the Cass County planning board,** if it is specifically authorized under a certificate of this Commission. The exemption is not carried over into §64.255 which is the source of Cass County's power to zone property in its unincorporated areas. Unlike the zoning statutes of other classes of counties that were reviewed in the Opinion, §64.255 lacks the exceptional phrase of "nor shall anything [in these sections] interfere with such public utility services as may have been or may hereafter be specifically authorized or permitted by certificate of public convenience and necessity, or order issued by the public service commission." The absence of this phrase from §64.255 was noteworthy to the Court of Appeals. In footnote 8, page 32 of the Opinion, the Court wrote:

> The non-charter first class county statutory provision that parallels 64.090 and 64.620 in placing limitations on *county commission* zoning authority is section 64.255, and it does *not* include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions. [emphasis original]

20. Aquila is not exempt from the Cass County Commission's exercise of its authority under §64.255, which authority is manifested and embodied in the County zoning ordinance. Aquila admits it has not complied with the county zoning ordinance in constructing the South Harper Plant and Peculiar Substation. Tr. Vol. 3, p. 229. Though Aquila might have been able to secure exemption from §64.235's obligation to secure the Cass County Planning Board's review of its proposed developments for consistency with the County Comprehensive Plan had it secured, before construction, an appropriate §393.170.1 certificate for the facilities, Aquila is not, under any reading of the Opinion, exempt from the obligation to comply with the County's zoning ordinance. The Commission's statements and determinations to the contrary in the Order are therefore erroneous and unlawful.

21. A Certificate of Convenience and Necessity to Aquila under §393.170.1 authorizing construction and operation of the Plant and Substation is not, therefore, the "necessary authority" Aquila requires to continue operating the facilities. Aquila is not relieved of the County's Zoning Ordinance, enacted in accordance with the County's authority under §64.255. The Commission should not have issued the Certificate of Convenience and Necessity to Aquila due to its failure to demonstrate compliance with the County's land use regulatory authority under this statute, or, at a minimum, the Commission has erroneously failed to condition the Certificate on Aquila's compliance with that authority.

THE COMMISSION LACKS RULES AND REGULATIONS PERTAINING TO LAND USE ISSUES IN CONNECTION WITH CERTIFICATION REQUESTS UNDER SECTION 393.170. FURTHERMORE, THE COMMISSION HAS NO LEGISLATIVE AUTHORITY TO SITE POWER PLANTS AND THEREFORE HAS NO JURISDICTION TO APPROVE THE LOCATIONS OF POWER PLANTS. THE COMMISSION'S EXERCISE OF JURISDICTION IN THIS MATTER, THE ABSENCE OF APPROPRIATE RULES AND REGULATIONS AND THE MANNER IN WHICH THE COMMISSION HEARD AND DECIDED THE LAND USE ISSUES IN THIS CASE

HAVE DEPRIVED CASS COUNTY AND AFFECTED CITIZENS OF DUE PROCESS OF LAW AS GUARANTEED BY THE 14TH AMENDMENT TO THE US CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION (AS AMENDED 1945)

22. Quoting once more from page 29 of the Commission's Order,

> Although the Court of Appeals held that this Commission had been misinterpreting *Harline*, the decision in the Aquila appellate opinion does not require the Commission to promulgate new rules or establish new procedures to consider an application pursuant to Section 393.170.3.[1]

23. On page 30 of the Order, the Commission excuses itself from the need for specific rules for this type of proceeding by noting that there are no rules defining the factors the Commission considers in determining whether requested authority is "necessary or convenient for the public service." In response, the County would question why no such rules exist, and even if the Commission is content to be without rules on that important topic, it is not a legitimate reason to be without rules on consideration of land use issues in §393.170 certification cases.

24. This Commission has statutory origins for its mission to regulate utilities in the public interest and to grant applications of many varieties based upon a determination that the relief sought is "necessary or convenient for the public service." By comparison, the Commission has **no** statutory authority to site or locate power plants; has no zoning authority, Opinion at 30; and presently has no rules or regulations on which to approach its post-Opinion duties-- which are optional-- respecting treatment of land use issues that arise with respect to the proposed construction of power plants.

[1] Although the Opinion may be silent on any requirement to publish rules, consideration of due process demands identifiable and discernable standards under which the Commission will hear and decide §393.170 certification requests consistent with the ruling announced in the Opinion. Cass County will also observe that nothing in the Opinion mandates, directs or requires the Commission to consider local land use issues in connection with §393.170 applications.

25. As Cass County pointed out in its Post Hearing Brief, the Commission has consistently understood-- and correctly understood--- that its legislative authority did not extend to the siting of power plants. The absence of legislative siting authority is fatal to the Commission's jurisdiction and jurisdiction cannot be conferred by the Opinion. In apparent recognition of its limited authority and of the absence of any rules by which to evaluate and determine land use issues, the Commission simply added land use in the mix as one of many factors to be considered under the heading of "public convenience and necessity." In this process, the Commission dilutes the intent of the Opinion that land use issues must be separately and independently addressed (as Cass County has already discussed) and it also does nothing more than attempt to mask the Commission's unauthorized expansion of its authority into siting.

26. The Opinion, and Aquila's application in this case, abruptly threw the Commission into subjects involving land use principles, an area that the Commission was authorized to nonetheless avoid. Its decision to play into the field was hurried and the parties have been detrimentally affected.

27. Under the Court of Appeals Opinion, it is evident that the Commission, if it elects to decide land use issues itself rather than deferring to the local authority, must consider those issues even if the local zoning authority is not a party. Absence of the County for instance as a party in this case would not have permitted the Commission to ignore relevant land use issues. Had Cass County not intervened in this case, the Commission would have been duty bound to either seek to make the County a party, which may be subject to objection, or arguably have the Staff retain a Cass County zoning employee as an expert on zoning concerns. The Opinion contemplates that the Commission and the local zoning authority will act in partnership in considering the application of a public utility. A partnership was far from what occurred in this

proceeding. As the Order reflects, and as questions posed by Commissioners to staff witnesses and counsel during hearing reflect, the Commission has treated the County as its adversary and instead of respecting the County's system of land regulation has, without authority, decided to deride it. This is itself a major breakdown in the process due in this proceeding. It is inconceivable that an administrative agency that has no zoning authority can, under the guise of determining local land use issues, challenge and dismiss as "inexplicable" the ordinances, maps, and comprehensive plans of one that does. The Commission has no oversight authority with respect to Cass County zoning. Absent judicial decrees or orders that determine the validity or not of the Cass County zoning system, its ordinances are entitled to the weight and construction given other laws of the state. That was not done in this case.

28. It is clear beyond doubt that the Commission utterly lacks any rules or regulations by which to analyze the land use issues that have been raised in this case. The absence of those rules or regulations means that the Commission has no boundary on its discretion and in turn the parties, particularly the County in this case, were justifiably at a loss on appropriate evidence to adduce and offer, on the standards to apply, and as is shown by Mr. Wood's creation of a 10-step process, were left to their own devices to hastily "engineer" something that would work "just for this case." Mr. Wood's 10-step analysis is no substitute for rules. His creation was invented for this case only and Cass County surmises it will have no other life beyond this case. Cases following this one, as Mr. Wood told the Commission, will have different rules and procedures apply.

29. Cass County addressed due process concerns in more detail in its Post Hearing Brief and will incorporate that section into this Application for Rehearing by reference as if fully set forth. The Commission had the authority to avoid the due process problems by directing

Aquila to secure, as a condition of the certificate issued in this case, local land use approval for the South Harper Plant and Peculiar Substation—a practice that is consistent with the Commission's previous practice, and with long standing cases that recognize the concurrent jurisdiction of the Commission and local governments. [2]

THE COMMISSION HAS ERRONEOUSLY RELIED UPON CASS COUNTY'S 2005 COMPREHENSIVE PLAN AND ZONING ORDINANCE. THE COMPREHENSIVE PLAN AND ZONING ORDINANCE IN FORCE AND EFFECT AT THE TIME AQUILA PROPOSED THE PLANT AND SUBSTATION WOULD GOVERN AND FURTHERMORE, THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT ANY COMMISSION FINDING THAT THE PLANT AND SUBSTATION ARE CONSISTENT WITH ANY CASS COUNTY COMPREHENSIVE PLAN AND ZONING ORDINANCE

30. In its findings the Commission has extensively relied upon the Cass County 2005 Comprehensive Plan and Zoning Ordinance, and the Commission has done so erroneously. The evidence confirms that the 2005 Plan had not been adopted until after the Plant and Substation had been proposed and therefore it would not be applicable to an evaluation of land uses relating to the Plant and Substation. The County comprehensive plan that would govern is the 1997 Comprehensive Plan and Zoning Ordinance as updated in 2003. (Exhibits 104 and 105). Moreover, there is no substantial evidence upon the whole record to support any finding or conclusion that the Plant and Substation were consistent with either the 2003 update or the 2005 Plan and Zoning Ordinance.

THE COMMISSION'S REPORT AND ORDER IS UNJUST AND UNREASONABLE IN THAT THE CERTIFICATE ISSUED THEREIN HAS BEEN APPROVED WITHOUT APPROPRIATE CONDITIONS.

[2] *See, eg., State ex inf. Shartel, ex rel. Sikeston v. Mo. Utilities Co.*, 53 S.W.2d 394, 398 (Mo. banc 1932); *In the Matter of the Application of Ozark Utilities Company*, 26 Mo. P.S.C. 635, 639 (1944)

31. The Commission has relied strongly on the final sentences of the Opinion in rendering its Order but has failed to exercise the opportunities the Court envisioned to condition the operation of the South Harper Plant and the Peculiar Substation to advance substantial justice.

32. Aquila constructed the South Harper Plant and Peculiar Substation illegally in disrespect of its neighbors, the County's elected officials and the opinion of the Circuit Court of Cass County. Its efforts to address objections to the Plant took place only after Cass County filed suit to stop construction of the Plant, and indeed, after the plant's construction and operation, and not before. The history of the Plant's construction casts suspicion on its need, its schedule and its location. Imposing conditions on Aquila that recognize the cost, expense and widespread inconvenience caused by Aquila's conduct is imminently reasonable.

33. In its Post Hearing Brief, Cass County supplied a series of conditions that should be added to the certificate in this case. Without these conditions, the Commission's Order is unreasonable. The conditions are repeated here without the supporting discussion that accompanied them in the brief:

a. Aquila must comply with the County Zoning Ordinance, adopted pursuant to the County Commission's § 64.255 authority, and must secure, pursuant to the Zoning Ordinance, approval for rezoning or a SUP for the Plant and Substation sites (subject to such conditions as the County might reasonably impose) within nine (9) months of the Commission's ruling, <u>and if it does not do so</u>, Aquila must dismantle the Plant and Substation within eighteen (18) months of the Commission's ruling.

b. Should aggrieved citizens initiate suit against the County relating to the County's processing of rezoning or SUP applications as a means to remediate the illegally constructed Plant and Substation, Aquila must reimburse the County the costs, expenses, expert witness fees and attorneys' fees it incurs.

c. Aquila may not expand the South Harper Plant under any circumstances beyond the existing 3 CT's located on the "south half" of the parcel, and may not expand the Substation.

d. Aquila must reimburse the County the costs, expenses, expert witness fees and attorneys' fees it incurs in this proceeding and in all of the related proceedings and litigation which have preceded this proceeding, whether before the Cass County Circuit Court, the Court of Appeals or this Commission.

e. Aquila will not utilize the South Harper Plant to generate "off-system sales."

f. Aquila must pay the County $1,000.00 a day from January 1, 2005 through the date the Plant site secures rezoning or a SUP, or is dismantled, which ever first occurs, as the penalty for an illegal use envisioned by the County's Zoning Ordinance.

g. Aquila must pay the County $1,000.00 a day from January 1, 2005 through the date the Substation site secures rezoning or a SUP, or is dismantled, which ever first occurs, as the penalty for an illegal use envisioned by the County's Zoning Ordinance.

h. Aquila must place in escrow cash in the amount of $5 Million which sum can be drawn upon by any aggrieved person or entity toward satisfaction of a

final non-appealable judgment against Aquila relating to personal or property damages occasioned by the Plant and/or Substation, with the proviso that the posting of said sum will not control or limit the civil rights of any person or entity, the amount of any judgment that may be secured, or the sources for seeking satisfaction of any judgment.

i. Aquila must agree to purchase at fair market value, arrived at following acceptable appraisals, the property of any interested resident living within one mile of the boundaries of the 74-acre South Harper Tract, and within one mile of the boundaries of the 55-acre Peculiar Substation Tract.

j. Aquila must agree to relinquish its presently posted $350,000 bond to the County for its future use for road repair and maintenance in the areas in and around the South Harper Plant.

k. The $20 Million bond posted by Aquila as a condition of securing additional time before being required to dismantle the Plant and Substation shall remain posted until Aquila either secures § 64.255 approval for the Plant and Substation or the Plant and Substation are dismantled, as required by these conditions.

l. Aquila must agree to stipulate that the Judgment entered by Judge Dandurand on January 11, 2005, shall remain in force and effect, subject to further appropriate enforcement proceedings, including without limitation, contempt proceedings, in the event these conditions are not performed.

m. In the event the Plant or Substation are transferred in any manner as to be owned or operated by any person, entity or municipality other that Aquila, the facilities will be immediately dismantled.

n. These conditions must be placed in recordable form, and executed by Aquila, and be duly recorded in the Cass County Recorder of Deeds office against the 74-acre South Harper Tract and the 55-acre Peculiar Substation Tract, and will constitute covenants and restrictions running with the land.

CONCLUSION

On the basis of the above and foregoing, Cass County respectfully requests that the Commission grant this application for rehearing.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: **/s/ Mark W. Comley**

Mark W. Comley #28847
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266
(573) 636-3306 (FAX)
comleym@ncrpc.com

/s/ Debra L. Moore by M.W.C.
Debra L. Moore #36200
Cass County Counselor
Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701
(816) 380-8206
(816) 380-8156 (FAX)
dmoore@casscounty.com

/s/ Cindy Reams Martin by M.W.C.
Cindy Reams Martin #32034
Attorney at Law
408 SE Douglas
Lees Summit, MO 64063
816-554-6444
816-554-6555 FAX
crmlaw@swbell.net

ATTORNEYS FOR CASS COUNTY, MISSOURI

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 30th day of May, 2006 to:

Office of General Counsel at gencounsel@psc.mo.gov;
Office of Public Counsel at opcservice@ded.mo.gov;
James C. Swearengen at lrackers@brydonlaw.com.
Stuart Conrad at stucon@fcplaw.com and
David Linton at djlinton@earthlink.net;
John B. Coffman at john@johncoffman.net;
Matthew B. Uhrig at muhrig_lakelaw@earthlink.net;
Gerard Eftink at geftink@kc.rr.com; and
E. Sid Douglas at SDouglas@gilmorebell.com.

/s/ Mark W. Comley
Mark W. Comley