

**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

**PROPOSED
REPORT AND ORDER**

Procedural History

On January 28, 2005, Aquila, Inc. ("Aquila") filed an Application 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. The Application verified by Aquila's Senior Vice President and Chief Operating Officer, Keith G. Stamm, concerns the construction and eventual operation of a peaking power production facility comprising three (3) natural gas-fired combustion turbines ("CTs") and associated electric transmission substation to be located at East 243rd Street and South Harper Road (the "South Harper Facility"). The Application also concerns construction of a related electric transmission substation being installed 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 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").

On February 1, 2005, Aquila filed a Motion for Protective Order and Motion for Expedited Treatment.

On February 1, 2005 and February 3rd, 2005, respectively, an unincorporated association of individuals known as Stopaquila.org and Cass County filed Applications to Intervene, respectively.

On February 3, 2005 Cass County filed a Motion to Dismiss Aquila's Application.

On February 4, 2005, Aquila filed a Motion to Establish Procedural Schedule. Shortly thereafter, on February 8, 2005, Staff filed a Motion for Commission Order Directing an Early Prehearing Conference.

Intervention was granted to Stopaquila.org and Cass County on February 10, 2005. On that same date, the Commission issued its Order Setting Intervention Period and Scheduling Prehearing Conference.

A prehearing conference was held at the offices of the Commission in Jefferson City on February 16, 2005. The following day, February 17, 2005, the Commission issued an Order Setting An On-The-Record Presentation for February 25, 2005.

On February 18, 2005, the parties filed a Joint Response to Commission Order wherein alternative procedural schedules were proposed for the Commission's consideration depending on the manner in which the Commission may decide how to process the Application.

On February 23, 2005, Stopaquila.org filed its Motion for Order of Dismissal and Suggestions in Support of Said Motion.

On February 23, 2005, the Commission issued an Order Setting Local Public Hearing to take place in Harrisonville, Missouri on March 15, 2005. Thereafter, on March 3, 2005, the Commission issued an Order Setting Procedural Schedule. That order adopted the procedural schedule providing for the filing of the Stipulation of Facts on March 8, 2005, a local public hearing on March 15, 2005 and simultaneous Briefs, and Proposed Findings of Fact and Conclusions of Law to be filed on March 21, 2005.

On February 25, 2005, the Commission held an On-the-Record hearing to provide an opportunity for argument from the parties on how best to proceed with the case.

On March 10, 2005, the parties filed a Joint Stipulation of Facts and a Motion for Leave to Late-File Joint Stipulation of Facts.

The local public hearing was held in Harrisonville on March 15, 2005 at which time extensive public comment both in favor of and opposed to the South Harper Facility was heard and transcribed.

On March 18, 2005, the Commission issued its Order Granting Motion for Leave to Late-File Joint Stipulation of Facts.

On March 21, 2005, the parties filed Briefs and Proposed Findings of Fact and Conclusions of Law for the Commission's consideration.

On March 28, 2005, the Commission held an evidentiary hearing to allow the parties to address the testimony offered and the local hearing in Harrisonville.

Issue

The issue in this case is whether the certificates of convenience and necessity and other orders issued by the Commission with regard to Aquila and its predecessors specifically authorize or permit Aquila to construct a power plant, electric substations and other electric utility infrastructure within its service territory, including in unincorporated Cass County, in order to fulfill its legal obligation to provide adequate property, equipment and service to the general public.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to “make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises.”¹ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090,

¹ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

which applies to “every decision and order in a contested case,” to fill in the gaps of Section 386.420.² Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.³ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁴

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁵ Findings of fact are also inadequate that “provide no insight into if and how controlling issues were resolved” or that are “completely conclusory.”⁶

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

1. Aquila, Inc. is a publicly-traded, Delaware corporation, headquartered in Kansas City, Missouri. Aquila is regulated by the Missouri Public Service Commission,

² *State ex rel. Laclede Gas Co. v. Public Service Commission of Missouri*, 103 S.W. 3d 813, 816 (Mo. App., W.D. 2003); *State ex rel. Noranda Aluminum, Inc. v. Public Service Commission*, 24 S.W. 3d 243, 245 (Mo. App., W.D. 2000).

³ *Glasnapp v. State Banking Board*, 545 S.W. 2d 382, 387 (Mo. App. 1976).

⁴ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

⁵ *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W. 2d 680, 684 (Mo. App., W.D. 1991) (quoting *State ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W. 2d 745, 754 (Mo. App., W.D. 1985)).

⁶ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W. 2d 791, 795 (Mo. banc 1986) (relying on *State ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W. 2d 61 (1949)).

which has authorized Aquila to conduct its business in its certificated areas in Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions. As such, Aquila is engaged in providing electrical, natural gas and industrial steam service in those area of the state certificated to it by the Commission. Aquila provides retail electric service most of Cass County, Missouri.

2. Aquila and its predecessors have been operating electric transmission and distribution systems in unincorporated Cass County for nearly 90 years.

3. The earliest known franchise issued by City of Pleasant Hill, Cass County, Missouri ("Pleasant Hill") for the operation of an electric plant in Pleasant Hill was issued on or about September 5, 1905, to the Pleasant Hill Electric Light Company and its successors and assigns to operate the electric light plant at Pleasant Hill. See, Application of J.E. Rawls, et al., Case No. 1073 (August 22, 1916). This franchise was subsequently assigned to William Reader, William A. Reader, and Charles E. Reader, who were doing business as a partnership known as Reader Light, Ice & Fuel Co.

4. The Reader Light, Ice & Fuel Co. operated the electric plant at Pleasant Hill until it declared bankruptcy, as a result of which J.E. Rawls purchased all assets, including the franchise related to the electric plant, from the bankruptcy trustee in March 1915.

5. On or about August 15, 1915, City of Pleasant Hill issued another franchise to J.E. Rawls, his successors, assigns, and grantees for the purpose of "generating electricity and for the sale thereof." (Ordinance No. 407, in PSC Case No. 1074).

6. On or about September 12, 1916, the Commission issued an order authorizing and approving J.F. Johnston's purchase from J.E. Rawls, and J.E. Rawls' sale to J.F. Johnston, of the electric plant at Pleasant Hill (Case No. 1073). A companion order on the same date by the Commission (Case No. 1074) authorized and approved J.F. Johnston's exercise of the franchise granted by the City of Pleasant Hill to Rawls.

7. On or about October 5, 1916, Pleasant Hill issued a franchise to Aquila's predecessor, L.K. Green & Sons, their successors and assigns, to purchase, erect, establish, maintain and operate a plant or plants for the generation or transformation of electrical energy, among other things (Ordinance No. 421) (confirmed by vote on October 25, 1916).

8. On or about October 12, 1916, J.F. Johnston applied to the Commission (PSC Case No. 1100) for permission to transfer all the property, franchises, and contracts of Pleasant Hill Electric Light & Power Company to L.K. Green & Sons.

9. On or about January 1, 1917, the Cass County Court issued a County franchise to L.K. Green & Sons ("Cass County Franchise") to set Electric Light Poles for the transmission of light for commercial purposes, a true and correct copy of which is attached to the Application filed by Aquila on January 28, 2005, and marked as Appendix 6 thereto.

10. On or about November 23, 1917, the Articles of Association forming Green Light & Power Corporation are filed with the Cass County Recorder of Deeds.

11. On or about December 17, 1917, L.K Green & Sons applied to the Commission (PSC Case No. 1409) for permission to transfer all real estate, personal

property, franchises, and contracts of every kind to Green Light and Power Company, which permission was granted by the Commission on January 15, 1918 (Case No. 1409).

12. Green Light and Power Co. requested on November 21, 1921, that the Commission approve a Plan of Reorganization, whereby all of its property and franchises be transferred to a “New Company” to be known as West Missouri Power Company. See, Application for Authorization of the Reorganization of Green Light and Power Co., Case No. 3171. In its Preliminary Order of December 6, 1921, the Commission granted the request and authorized the formation of the West Missouri Power Company from the assets of Green Light and Power Co. See Preliminary Order, Case No. 3171 at 3. The Commission issued further orders concerning the finances and powers of the West Missouri Power Company in January and March, 1922. See Supplemental Order, Case No. 3171 (Jan. 4, 1922); Order, Case No. 3171 (Mar. 21, 1922).

13. On or about November 12, 1926, West Missouri Power Company executed a contract with National Public Service Corporation (“NPSC”), a Virginia corporation, to sell and transfer the assets of West Missouri Power Company to a new corporation named Missouri Public Service Company, which NPSC had organized. See Case No. 5109.

14. On or about April 1, 1927, the Commission authorized and approved application of Missouri Public Service Company to acquire the public utility properties of West Missouri Power Company, and issued the Missouri Public Service Company a

certificate of convenience and necessity (“CCN”) (effective 4/11/27) to “own, maintain and operate all the properties, works and systems acquired” See Case No. 5109.

15. On or about November 20, 1936, Missouri Public Service Corporation, a Delaware corporation, was incorporated out of the bankruptcy and court-ordered reorganization of the Missouri Public Service Company and its parent, Middle West Utilities Company. See Case No. 9070 (Mo. P.S.C., December 1, 1936).

16. On or about December 1, 1936, the Commission authorized and approved the transfer of all properties, rights, and franchises from the Missouri Public Service Company, a Missouri corporation, to the Missouri Public Service Corporation, a Delaware corporation. See Case No. 9070.

17. On or about January 18, 1938, the Missouri Public Service Corporation received a CCN from the Commission to serve an area (“1938 CCN Order”). Case No. 9470.

18. The Commission’s Report and Order (Case No. 9470) granting that 1938 CCN noted on page one that the company’s application, filed November 23, 1937 (“CCN Petition”), sought a CCN “to construct, maintain and operate, as a public utility, electric transmission and distribution lines for the purposes of furnishing electric service to the public” in its certificated area, including most of Cass County (Case No. 9470).

19. Aquila’s certificated area includes Western Missouri and North Central Missouri, including, but not limited to, most of Cass County.

20. In its CCN Petition in Case 9470 to the Commission, Aquila’s predecessor attached maps and legal descriptions of the areas of each county to which the certificate applies. The PSC’s 1938 CCN Order stated that the maps had been marked

as Exhibits A-1 to A-19. 1938 CCN Order at 3. A copy of the legal description for the area of Cass County was submitted to the PSC as Exhibit A-6.

21. Aquila's service territory in Missouri is also set forth in its tariff, which is on file with and maintained by the Commission.

22. Exhibit B-5 to the CCN Petition in Case 9470 is the Cass County Franchise.

23. In its 1938 CCN Order, the Commission stated that the Cass County Court, as well as the courts of the other counties covered by the CCN, had authorized the construction and maintenance of electric distribution lines across "public streets, roads and alleys, and other public places and grounds." 1938 CCN Order at 2, 5.

24. On or about April 5, 1938, Pleasant Hill issued a franchise (Ordinance No. 608) to Missouri Public Service Corporation to operate an electric light, heat and power system (subject to a vote on April 26, 1938) within the City of Pleasant Hill.

25. On or about April 7, 1950, Missouri Public Service Company was incorporated in Missouri.

26. On or about April 28, 1950, the Commission issued a CCN to Missouri Public Service Company, a Missouri corporation, authorizing and approving the merger of the Missouri Public Service Corporation, a Delaware corporation, with and into the Missouri Public Service Company. Case No. 11,892.

27. In Case No. 11,892, the Commission granted Missouri Public Service Company 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 in the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.

Case No. 11,892 at 4.

28. On or about May 31, 1950, the Missouri Public Service Corporation merged fully with and into Missouri Public Service Company.

29. On or about May 2, 1985, Missouri Public Service Company changed its name to UtiliCorp United Inc., a Missouri corporation.

30. On or about March 20, 1987, the Commission issued an order (effective April 1, 1987) authorizing and approving the merger of UtiliCorp United Inc., a Missouri corporation, with and into UtiliCorp United Inc., a Delaware corporation. Case No. EM-87-26.

31. On or about April 1, 1987, UtiliCorp United Inc., a Missouri corporation, merged fully with and into UtiliCorp United Inc., a Delaware corporation.

32. On or about February 21, 2002, the Commission issued an order (effective March 3, 2002) authorizing the merger and name change between UtiliCorp United Inc. and Aquila, Inc. Case No. EM-2002-297.

33. On or about March 15, 2002, UtiliCorp United Inc. changed its legal name to Aquila, Inc.

34. Intervenor Stopaquila.org is an unincorporated association of individuals each of whom are landowners within Cass, some of whom reside in Peculiar, Missouri.

35. Intervenor Cass County is a county of the State of Missouri and is a first-class non-charter county.

36. Cass has adopted, pursuant to the authority of Chapter 64 RSMo, various planning and zoning ordinances and regulations, including, without limitation, a Comprehensive Plan (adopted in 1991 and from time to time thereafter amended), Zoning Ordinance, and a Procedural Manual.

37. The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to “represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]”⁷

38. The Staff of the Commission traditionally appears as a party in Commission proceedings and is represented by the Commission’s General Counsel, an employee of the Commission authorized by statute to “represent and appear for the commission in all actions and proceedings involving any question under this or any other law [involving the commission.]”⁸

The South Harper Facility and Peculiar Substation:

39. Aquila is the owner of two tracts of real estate identified as follows:

- a. An approximate 74 acre tract of real estate at or near 243rd Street and Harper Road, and generally located in parts of Sections 29 and 32, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter “Tract A”).
- b. An approximate 55 acre tract of real estate at or near 203rd Street and Knight Road, and generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter “Tract B”).

40. Tracts A and B are located in Aquila’s certificated area as identified in the PSC’s 1938 CCN Order (Case No. 9470).

⁷ Sections 386.700 and 386.710.

⁸ Section 386.071.

41. Tract A is located in unincorporated Cass and is currently zoned as an agricultural district.

42. Tract B is located in unincorporated Cass and is currently zoned as an agricultural district.

43. Aquila has commenced construction on Tract B of an electric utility substation (“Peculiar Substation”) on an approximate 10-acre parcel situated within the property boundaries of the larger 55-acre tract.

44. The Peculiar Substation is designed to support the electric utility power plant on Tract A (“South Harper Facility”) by allowing the power output of the plant to flow to an adjacent, higher voltage transmission line. From there, power would then flow through Aquila’s transmission grid to where it is needed. The Peculiar Substation would also serve load growth in the area.

45. Aquila has commenced construction of the South Harper Facility within the property boundaries on Tract A. The proposed South Harper Facility is a 315-megawatt peaking power plant that will generate electric power by use of three 105 MW gas-fired combustion turbine generating units, fueled by natural gas.

46. Immediately adjacent to Tract A is a gas compressor facility operated by Southern Star Gas Pipeline since about 1951 when the facility began operation. Cass did not have a zoning ordinance at the time the gas compressor facility was constructed. When Cass first adopted a zoning ordinance in June, 1972, the gas compressor facility property was zoned I1 (light industrial) based on its pre-existing use. This gas compressor facility will provide the natural gas for the operation of the South Harper Facility.

47. Aquila has expressed its desire to complete construction of the South Harper Facility and the Peculiar Substation by June 2005.

48. On or about March 26, 2004, Aquila applied to the Missouri Department of Natural Resources ("MDNR") for a Prevention of Significant Deterioration construction permit ("PSD Permit") for the proposed Camp Branch Energy Center near Harrisonville, Missouri. A revised PSD Permit application was submitted to MDNR on or about September 13, 2004, reflecting a change in location of the proposed peaking facility to the South Harper location (Tract A).

49. MDNR conducted a public hearing on the draft PSD Permit on November 22, 2004.

50. MDNR issued a final PSD Permit to Aquila for the South Harper Facility at Tract A on December 29, 2004 a true and correct copy of which has been attached to the Application filed by Aquila on January 28, 2005, and marked as Appendix 7 thereto.

51. Aquila has commenced construction of the South Harper Facility now that it has received a final PSD Permit from MDNR.

52. Aquila could not have commenced construction of the South Harper Facility until it had a final PSD Permit from MDNR.

Purpose of South Harper Facility:

53. The South Harper Facility is being constructed to replace a purchase power agreement dated February 22, 1999 that expires May 1, 2005. The current PPA is for 500 MW of capacity during the summer months and 200 MW in the winter. Aquila's Western Missouri service area includes most of Cass County, which is one of the fastest growing areas served by Aquila. 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. With increasing demand in Aquila's Missouri service area and the need for year around peaking capability, the South Harper Facility will provide flexibility to meet the needs of Aquila's customers.

Cass County Litigation:

54. After the initiation of site preparation activities at the South Harper facility, separate petitions for injunctive relief were filed by Cass County and Stopaquila.org in the Circuit Court of Cass County, Missouri. The 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 providing for the adoption by first-class charter counties of a planning and zoning code, prevented Aquila from constructing and operating the South Harper Facility and the Peculiar Substation on Tracts A and B.

55. On January 11, 2005, the Honorable Joseph P. Dandurand, Circuit Judge of Cass County issued in Case No. CV104-1443CC a permanent injunction enjoining Aquila from constructing and operating the South Harper plant and the Peculiar Substation, and ordering that Aquila remove all improvements and equipment inconsistent with the properties agricultural zoning classification by Cass County.

56. 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.

57. A Notice of Appeal was filed by Aquila on January 12, 2005, in the Circuit Court of Cass County regarding the Final Judgment.

58. 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.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The record shows that Aquila operates electric plants for the purpose of generating electricity for sale at retail. The Commission concludes that Aquila is thus an electrical corporation within the meaning of Section 386.020(15) and a public utility pursuant to Section 386.020(42), RSMo Supp. 2004. The Commission has jurisdiction and general authority over Aquila's services, activities, and rates pursuant to Sections 386.020(42), 386.250 and Chapter 393.

The Application in this case is for confirmation or permission that Aquila's CCNs and other orders specifically authorizing it to construct and operate an electric power generation station and electric transmission substations within its service territory, including the South Harper Facility and the Peculiar Substation. These CCNs were issued by the Commission by virtue of its authority set forth in §393.170. Its authority to rule on the capitalization of domestic electrical corporations is set forth in §393.200.

Section 393.140 in particular sets forth the "general powers" of the Commission relating to electricity as well as other utility services. Among other things, it gives the Commission general supervision of all electrical corporations and all electric plants operated by electrical corporations. It gives the Commission the authority to examine

and investigate the manufacture of electricity and to order reasonable improvements to electric plant that will best promote the public interest, preserve the public health and protect those using electricity. It gives the Commission the authority to establish service standards and to examine the plants and methods employed by electric corporations in manufacturing electricity. It gives the Commission the authority to file complaints against any electrical corporation where “the property, equipment or appliances . . . are unsafe, insufficient or inadequate . . .” Section 393.140(5). In that 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 their franchises and charters.” The authority of the Commission as it concerns the adequacy of electric facilities and service is comprehensive and all inclusive.

Exercise of Authority:

The Commission chooses to exercise its discretion to consider the merits of the Application and to render a decision interpreting its prior orders as requested by Aquila. Aquila has shown that special circumstances justify doing so. In this regard, the Commission is acting in its lawful capacity as finder of fact.⁹

Burden of Proof:

The burden of proof is on the moving party; in this case, Aquila.

⁹ *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W. 2d 593, 598 (Mo. banc 1964); *State ex rel. Missouri Pacific Freight Transport Company v. Public Service Commission*, 312 S.W. 2d 363, 365 (Mo. App. 1958); *State ex rel. Orscheln Brothers Truck Lines v. Public Service Commission*, 232 Mo. App. 605, 110 S.W. 2d 364, 366 (1937).

Authority and Obligation of Aquila to Provide Safe and Adequate Facilities and Service Within its Certificated Service Territory:

The fundamental question before the Commission in this case is not a matter of first impression. The Commission addressed a very similar set of circumstances in 1980 in *Re Union Electric Company*, in its Case No. EA-79-119.¹⁰ In that case, Union Electric Company filed an Application with the Commission seeking authority to construct, operate and maintain two (2) combustion turbine generating units within its certificated service area. The General Counsel of the Commission subsequently filed a Motion to Dismiss on the grounds that an additional certificate of convenience and necessity would be duplicative and unnecessary. Ultimately, the Commission granted the Motion of its General Counsel and dismissed the Application. The Report and Order in that case set forth the legal and practical rationale employed by the Commission.

The Commission's decision followed the findings of the Kansas City Court of Appeals in *State ex rel. Harline v. Public Service Commission*, 343 S.W. 2d 177 (Mo. App. 1960). That discussion, as is pertinent to the proceedings in this case is set out at length below.

Initially, it is relevant to discuss what function a certificate of convenience and necessity fulfills in the administrative process. A certificate of convenience and necessity does not grant a utility any powers it does not already possess. On the other hand, a certificate cannot take away any right or power then existing to the utility. The corporate powers of a utility are not found in a certificate of convenience and necessity. *State ex rel. City of Sikeston v. Missouri Utilities Company*, 53 S.W. 2d 394, 399 (Mo. banc 1932). A certificate only permits a utility to utilize those rights and privileges already conferred upon it. *State ex rel. Harline v. Public Service Commission*, 343 S.W. 2d 177 (Mo. App. KCD 1960).

In the *Harline* case, the court held that all corporate powers of a utility are derived from the state by virtue of its charter, which includes all enacted statutes. A utility derives from Section 351.385, RSMo 1978 all

¹⁰ Reported at 24 Mo.P.S.C. (N.S.) 72.

powers necessary or convenient to effect any or all of the purposes for which it was formed. Section 393.010, RSMo 1978 confers on the utility the full power to manufacture, sell and furnish electricity.

Having considered the above, then of what value is a certificate of convenience and necessity? The Commission is delegated the statutory authority to grant or deny an application for a certificate, after hearing, to protect the public interest. The statutory power gives the Commission a tool to regulate competition between utilities and to avoid the needless duplication of electric facilities. Thus, when a certificate is granted for a certain area, the Commission has determined through findings of fact and conclusions of law that the utility should operate within the certificated area. The certificate is the triggering mechanism that allows the utility to use the powers it already possesses.

Section 393.170, RSMo 1978 entitled "Approval of Incorporation and Franchises-Certificates," provides in part that no electric corporation shall begin construction of an electric plant without first having obtained the permission and approval of the Commission. Section 386.020.5, RSMo 1978 defines electric plant as "including 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; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or not be used for the transmission of electricity for light, heat or power." Section 393.120 RSMo 1978 provides that the definitions in Section 386.020 shall apply to and determine the meaning of all such words, phrases or terms used in Section 393.110 to 393.290.

The foregoing Section 393.170 has previously been considered by the courts of this State. The construction emerging from the appellate decisions involving this section is that the "permission and approval" of the Commission, as expressed in a certificate of convenience and necessity, is only required ". . . (1) for any new company or additional company to begin business anywhere in the state, or (2) for an established company to enter new territory." *State ex rel. Harline vs. Public Service Commission of Missouri*, 343, S.W. 2d 177, 182. In *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W. 2d 469, 474, the Court stated ". . . the Commission shall pass upon the question of public necessity and convenience for any new or additional company to begin business anywhere in the state or for an established company to enter new territory." The most recent case of similar import is *Empire District Electric Company vs. Cox*, 588 S.W. 2d, 263

The Commission therefore concludes that a certificate is only needed when an electric corporation starts in business or if it attempts to expand its authority in an entirely new area. Such conclusion is entirely consistent with the heading of Section 393.170 entitled "Approval of Incorporation and Franchises-Certificates."

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 such an argument would be without merit as electric transmission lines are a part of the definition of plant as contained in Section 386.020.

The Commission notes that while dicta, the St. Louis Court of Appeals summarily assumed that proposed plant to be constructed within a certificated area does not need the approval of this Commission by the following statement found in *State ex rel. Utility Consumers Council v. Public Service Commission*, 562 S.W. 2d 688, 690 (Mo. App. St. Louis 1978):

Since the plant was to be constructed beyond the regular service territory of the Company, it was necessary for the company to apply to the Commission for a certificate of convenience and necessity.

For a further discussion on this topic see: *Public Service Commission v. Kansas City Power and Light Company*, 31 S.W. 2d 67, 71 (Mo. banc 1930) and *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W. 2d 469, 474 (Mo. App. KCD 1964).

24 Mo.P.S.C. (N.S.) at 76 – 78.

The Commission has reviewed the legal and policy rationale that formed the basis for its decision in 1980 and concludes that they are still valid and consistent with the leading case law and sound regulatory policy. There is no reason to change its views at this time, therefore, the Commission restates and ratifies those findings for purposes of this case.

The Previous CCN and Other Orders Issued to Aquila and its Predecessors Specifically Authorize or Permit Aquila to Construct a Power Plant, Electric Substation and Electric Infrastructure Within the Service Territory Granted by the Commission in Order to Fulfill Aquila's Legal Obligation to Serve All Customers Within its Territory:

Aquila, Inc. operates in Cass County, Missouri, 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 CCN which the Commission issued in Case No. 9470 to serve an area which included large portions of western and

north central Missouri, including, but not limited to most of Cass County. In its 1938 CCN Order which granted the service authority, 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 of ... Cass ... with the authority to furnish electric service to all persons in the area for which this certificate is granted.

In the decade previous to this Report and Order, the Commission granted permission to a predecessor of Aquila to increase its capitalization in a proceeding known as *In re Green Light and Power Co.*, 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 the said New Company [West Missouri Power Co.] 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 (Mo. P.S.C. Dec. 6, 1921).

In that same proceeding, the Commission issued a subsequent Order on March 21, 1922, setting forth how West Missouri Power Co. 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 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 (Mo. P.S.C. Mar. 21, 1922).

These three orders, taken together, specifically authorized Aquila's predecessors to construct plants, substations, and other "electric plant," as defined in Section 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 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.

See Report and Order at 4, Case No. 11,892 Mo. P.S.C., April 28, 1950. The Commission finds that the words "electric utility facilities" were intended to encompass "electric plant," which is defined in Section 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 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.

A question has arisen whether Aquila has or must obtain specific authorization in its CCN to build a power plant within its service territory from this Commission. Based upon a review of our prior orders, relevant decisions of Missouri appellate courts, as

well as the facts that are not in dispute in this proceeding, the Commission hereby clarifies and confirms that the prior CCNs and other orders issued by this Commission specifically authorize and permit Aquila, as they authorized and permitted its predecessors, to build power plants, substations and other forms of electrical infrastructure within the service territory that has been granted to Aquila and its predecessors by this Commission, including the South Harper Plant and the Peculiar Substation in Cass County at the locations described in the Application. Such prior CCNs and other orders apply fully to Aquila's current service territory, which includes the two tracts of land where Aquila proposes to construct the South Harper Facility and the Peculiar Substation in unincorporated Cass County.

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. The Commission notes that §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 water, gas or electric light works, heating or power plants, electrical energy resources or gas or electrical production, distribution or transmission facilities in this state.
(emphasis added)

The Commission concludes that the General Assembly was using the term "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 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” in its broadest possible sense, 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 and the adequacy of electric service to the general public endangered. *Id.*

The Commission also finds persuasive 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 Commission is persuaded by 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 . . .”¹¹ It is clear from customary usage in both federal and state law regulating electric 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.

No Reexamination of Public Convenience and Necessity:

The Commission determines that there is no purpose for it to re-determine the public convenience and necessity of electric service by Aquila throughout its certificated service area, including within Cass County. The determination of public convenience and necessity was initially made by this Commission in its 1938 CCN Order and that determination is not subject to reexamination or challenge in this case. For this proposition, we again look to the language of the Kansas City Court of Appeals in the *Harline* case:

The present proceeding is independent of and collateral to Case No. 9,470. It is provided by Section 386.550 V.A.M.S.: “in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” The statute is declaratory of the laws of solicitude for the repose of final judgments.

The quoted statute bars our review of the issues decided in Case No. 9,470 that were properly within the jurisdiction of the Commission. *State ex rel. State Highway Commission of Missouri v. Conrad*, Mo. Supp., 310 S.W. 2d 871.

Is this court permitted to review the evidence in Case No. 9,470 to determine whether it supports the Commission’s order? The record discloses no jurisdictional defect. The subject matter was peculiarly within the Commission’s province. All notice required by law was given. The Commission heard evidence covering 120 typewritten pages. The resulting order was within the Commission’s lawful powers and in terms of the statute authorizing its entry. The order is not void on the face of the record. (emphasis added)

¹¹ 15 U.S.C. §79b(3).

343 S.W. 2d at 184. The Commission's underlying 1938 CCN Order is final and conclusive in the determination of the public convenience and necessity made at the time issued and remains valid and effective. The Commission concludes that Aquila has met its burden of demonstrating that the construction of the South Harper Facility and the Peculiar Substation are in furtherance of the public convenience and necessity as determined by the Commission in the 1938 CCN Order.

Adequacy of Local Authority:

As noted in the prior section, the Commission will not reexamine the adequacy of the Application filed by Missouri Public Service Corporation in 1937. Aquila's Cass County franchise, now held by Aquila, was sufficient authority for the issuance of the CCN in the first instance. By its terms it is a perpetual franchise and appears to be consistent in all respects with the statutory requirements of §229.100 RSMo. The Commission will not undertake in this case to revisit the adequacy of the Cass County franchise.

The Commission previously has said "the permission granted by a county court pursuant to Section 229.100, . . . to a public utility to use the county roads is a 'county franchise'; supplying the consent required by Section 393.170." *Re Union Electric Company*, 3 Mo.P.S.C. (N.S.) 157, 160 (1951) (emphasis added). It is undisputed that Aquila has a Cass County Franchise. Consequently the Commission concludes Aquila has the local authority required under its 1938 CCN Order and for any further or additional authority to operate in Cass County.

It also is undisputed that Aquila has obtained a PSD Permit from MDNR to authorize the construction of the South Harper Facility. This is compelling proof of

compliance with all applicable clean air act emissions standards. The Commission will not endeavor to enter into an independent examination of compliance with air emissions standards or alleged public health implications. These questions are beyond the Commission's statutory authority and expertise.

As to local planning and zoning ordinances since adopted by Cass County since the issuance of the 1938 CCN Order, those circumstances have no bearing on the Commission's findings and conclusions in this case. The Commission need not reconcile the terms of §64.235 with those of §393.170 in order to examine and interpret orders issued prior to the enactment of Chapter 64 RSMo. This order clarifies and confirms that by virtue of the terms of its prior CCNs and other orders Aquila has specific authority to construct all manner of electric infrastructure, including power plants and substations, throughout its service area including the South Harper Facility and the Peculiar Substation on Tracts A and B, respectively, in order to carry out its public service obligations. The Commission need not determine whether proof of compliance with Cass County's zoning standards would be required if Aquila were to seek a CCN today. Under the circumstances, that question is unnecessary and speculative. The issue of the legal effect of the Report and Order in this case in light of the provisions of §64.235 is one for resolution in the pending appeal before the Western District Court of Appeals. The Commission offers no views on the topic.

Generally, however, the Commission does not believe the adoption of the planning and zoning ordinances by Cass County in 2004 invalidated Aquila's CCNs or imposed additional requirements on Aquila to renew or ratify its CCNs, franchise or other orders. To find otherwise would throw the validity of any public utility's operating

authority into question in the event of subsequent adoption of local land use regulation. This would create regulatory uncertainty and possibly threaten the continued provision of safe, adequate and affordable electric service to consumers throughout the state.

Motions to Dismiss are Denied:

In making the preceding findings of fact and conclusions of law, the Commission hereby denies the separate motions to dismiss filed by intervenors Cass County and Stopaquila.org.

IT IS THEREFORE ORDERED:

1. That the Commission confirms that Aquila has the specific permission, approval and authority necessary to install, acquire, build, construct, own, operate, control, manage and maintain an electric power generation station comprised of three (3) 105 MW natural gas-fired combustion turbines and associated transmission substation, transformers and breakers together with any and all other installations, facilities, structures, fixtures and equipment related thereto for the production and transmission of electric power and energy within the service territory the Commission previously has granted to Aquila and its predecessors, including 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;

2. That the Commission confirms that 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 within the service territory the Commission previously has granted to Aquila and its predecessors, including at the following described location in Cass County, Missouri:

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;

3. That the construction and operation of the South Harper Facility and the Peculiar Substation are in furtherance of the public convenience and necessary as determined by the Commission in 1938 in its Report and Order in Case No. 9470;

4. That the confirmation of Aquila's specific authority and permission set forth above is not binding for ratemaking purposes or financing purposes. The Commission reserves the right to consider the treatment to be given the plant additions in a subsequent proceeding or proceedings;

5. That all pending motions, not otherwise disposed of herein, are hereby denied;

6. That this Report and Order shall become effective on **[date]**; and
7. That this case may be closed on **[date]**.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Dated at Jefferson City, Missouri,
on this ____ day of _____, 2005.