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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
TRANSCRIPT OF PROCEEDINGS  
Hearing  
April 5, 2006  
Jefferson City, Missouri  
Volume 2

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, ) Case No. EA-2006-0309  
Maintain, and Otherwise Control )  
and Manage Electrical Production )  
and Related Facilities in )  
Unincorporated Areas of Cass )  
County, Missouri, Near the Town )  
of Peculiar )

RONALD D. PRIDGIN, Presiding,  
REGULATORY LAW JUDGE.

STEVE GAW,  
LINWARD "LIN" APPLING,  
COMMISSIONERS.

REPORTED BY:  
KELLENE K. FEDDERSEN, CSR, RPR, CCR  
MIDWEST LITIGATION SERVICES

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23  
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1 P R O C E E D I N G S

2 JUDGE PRIDGIN: Good morning. We are on  
3 the record. This is the motion to dismiss nearing in Case  
4 No. EA-2006-0309, in the matter of the application of  
5 Aquila, Incorporated regarding its South Harper peaking  
6 plant.

7 I would like to get entries of appearance  
8 from counsel, if I may, and I'm going to begin with Staff,  
9 please.

10 MR. WILLIAMS: Nathan Williams and Lera  
11 Shemwell.

12 JUDGE PRIDGIN: Could you speak into the  
13 microphone, please, just so the folks can hear you? We're  
14 broadcasting this on the web.

15 MR. WILLIAMS: Nathan Williams and Lera  
16 Shemwell.

17 JUDGE PRIDGIN: Mr. Williams, thank you.  
18 On behalf of Aquila, Incorporated, please?

19 MR. SWEARENGEN: Yes. Thank you, Judge.  
20 James C. Swearngen, Brydon, Swearngen & England,  
21 Jefferson City, and Dale Youngs, Blackwell Sanders,  
22 Kansas City, appearing on behalf of Aquila, Inc. Thank  
23 you.

24 JUDGE PRIDGIN: Mr. Swearngen, thank you.  
25 On behalf of StopAquila.org, please?

1 MR. EFTINK: Gerard Eftink, Raymore,  
2 Missouri, for StopAquila.org.

3 JUDGE PRIDGIN: Mr. Eftink, do you have a  
4 microphone available there for you? See if it's on. I  
5 can't pick you up.

6 MR. EFTINK: Yes. Gerald Eftink, Raymore,  
7 Missouri. I pushed the push button.

8 JUDGE PRIDGIN: There we are. Thank you.  
9 Mr. Eftink, thank you. On behalf of Cass County, please?

10 MR. COMLEY: Appearing on behalf of Cass  
11 County, your Honor, are Mark W. Comley, 601 Monroe,  
12 Suite 301, Jefferson City, Missouri; Debra L. Moore, Cass  
13 County Counselor, 102 East Wall, Harrisonville, Missouri  
14 64701; and also Cindy Reams Martin, 408 S.E. Douglas  
15 Street, Lee's Summit, Missouri 64063.

16 JUDGE PRIDGIN: Mr. Comley, thank you. On  
17 behalf of intervenors Dillon, Miller and Doll, please?

18 MR. COFFMAN: John B. Coffman on behalf of  
19 Frank Miller -- or Frank Dillon, Kimberly Miller and  
20 James E. Doll, 871 Tuxedo Boulevard, St. Louis, Missouri  
21 63119. Also appearing on behalf of these clients is  
22 Matthew Uhrig. I'll let him give you his address.

23 MR. UHRIG: Yes. Matt Uhrig with the Lake  
24 Law Firm, 3401 West Truman Boulevard, Jefferson City,  
25 Missouri.

1                   JUDGE PRIDGIN: Gentlemen, thank you. On  
2 behalf of Sedalia Industrial Energy Users Association,  
3 please?

4                   MR. CONRAD: I'll come over here since the  
5 Hancock Amendment prevented me from having a microphone.  
6 Judge, let me enter the appearance of Stuart W. Conrad and  
7 David Woodsmall on behalf of that group of industrial  
8 intervenors in Sedalia. We're with the law firm of  
9 Finnegan, Conrad & Peterson in Kansas City, 3100 Broadway,  
10 Suite 1209, KC, Missouri as I mentioned, 64111.

11                  JUDGE PRIDGIN: Mr. Conrad, thank you. On  
12 behalf of the Office of the Public Counsel, please?

13                  MR. POSTON: Marc Poston appearing for the  
14 Office of the Public Counsel.

15                  JUDGE PRIDGIN: Mr. Poston, thank you. Did  
16 I miss any counsel?

17                  All right. Here's how I'd like to proceed.  
18 I do want to give, of course, all the parties the chance  
19 to speak, but because, if I'm not mistaken, I have motions  
20 from StopAquila.org and from Cass County and I have  
21 written responses only from the Staff and from Aquila,  
22 what I plan to do is give them the opportunity to speak  
23 first, make their opening statements, and then be  
24 available for Commission questions. Then, of course,  
25 we'll certainly be glad to hear from other counsel, but

1 because those are the parties who filed written responses,  
2 I want to concentrate on their responses and Commission  
3 concerns with those, beginning with Ms. Shemwell.

4 Ms. Shemwell handed me a very recent  
5 response, yesterday. Mr. Coffman, did you file yesterday?

6 MR. COFFMAN: That is correct.

7 JUDGE PRIDGIN: And I checked EFIS this  
8 morning and I didn't recall seeing that.

9 MR. COFFMAN: I got a notice. Generally in  
10 support of the Cass County motion.

11 JUDGE PRIDGIN: Okay. All right. What I  
12 would like to do is get some opening remarks and then have  
13 these counsel be available for questions, and I do want to  
14 start with the movant since we're here on their motion.  
15 So, Mr. Eftink, do you have any type of statement that you  
16 would like to make before we have any questions from the  
17 Bench? And you may do so either from the podium or from  
18 where you stand.

19 MR. EFTINK: Thank you. I don't know if  
20 there's a time limit on how long we should talk, but I  
21 think this is such a case that it may be beneficial to the  
22 Commissioners and to the Regulatory Law Judge if we just  
23 talk until you tell us to stop, and I'm sure you will tell  
24 us to stop at some point.

25 I represent StopAquila.org, and before I





1 address is what power does the Public Service Commission  
2 have? Where does that power come from? In an application  
3 to build a power plant, the power of the Public Service  
4 Commission comes from Revised Statutes of Missouri at  
5 393.170. The power of the Commission does not come from  
6 the chapter, Chapter 64 that deals with the county's  
7 power. The power of the Commission must be found in the  
8 chapters of Missouri law that give power to this  
9 Commission.

10                   When that chapter, that section that deals  
11 with the county planning board was enacted, that section  
12 is 64.235, RSMo 393.170, which we're dealing with today,  
13 was already on the books. It provided that before an  
14 applicant could get permission from the Public Service  
15 Commission to build a power plant, it had to show that it  
16 had the consent of the county.

17                   Now, the statute originally said  
18 municipality, but starting in 1941 that was interpreted to  
19 also refer to the county. That first decision that I  
20 found was a decision of the Public Service Commission, and  
21 later the Missouri Supreme Court agreed that when 393.170  
22 refers to a municipal consent, that refers to either the  
23 city or the county.

24                   So in trying to determine what power the  
25 Public Service Commission has, we look at 393.170, and

1 it's a logical statute. It's got three sections, and  
2 Sections 1, 2 and 3 logically apply to an applicant that  
3 wants to build a power plant. Logically Sections 2 and 3  
4 apply if you are an applicant for something other than  
5 building a power plant. I'm just talking about  
6 electricity. I'm not talking about gas or water, of  
7 course.

8                   So if an applicant comes before the Public  
9 Service Commission under this statute and says it wants to  
10 build a power plant, the Public Service Commission must  
11 ask and must require that it show it's got the consent  
12 from the county.

13                   Now, this Section 64.235 is the section  
14 that the Court of Appeals primarily was dealing with, and  
15 that deals with the planning board, which is under the  
16 authority of the county commission. Now, it says that the  
17 planning board is limited in what it can do. It doesn't  
18 limit the county commission, though.

19                   When 64.235 was enacted, the Legislature  
20 obviously had on the books 393.170, which provided that in  
21 order to get permission from the Public Service Commission  
22 to build your power plant, you had to show that you had  
23 the consent of the county. So it would have been  
24 redundant to require that the planning board give  
25 permission if the county Commission has already given

1 permission to the applicant to build a power plant.

2 So that's why we have 64.235 written the way it is.

3                   Now, let's briefly consider the power of  
4 the county. 64.255 was only briefly referred to by the  
5 court in Footnote 8 in that Court of Appeals decision,  
6 but, of course, the court said in that footnote that  
7 there's no exemption for 64.255 for public utilities.  
8 64.255 says that the county commission is empowered to  
9 regulate the location of buildings. Also, 64.285 says  
10 that the county's power to regulate land use supersedes  
11 other statutes.

12                   The Court of Appeals wrote at some length  
13 about the interest of the county and how it has power when  
14 it deals with location, and that's the big issue in this  
15 case is location. It's not whether -- as far as The  
16 county's concerned, I think -- I can't speak for the  
17 County, but I can speak for my people.

18                   The way we read this, the interest of the  
19 County should be on the location, and when it comes to  
20 whether there's a need for power, that is the job of the  
21 Public Service Commission. So this -- these areas of  
22 responsibility should logically be divided with the Public  
23 Service Commission only looking at the question of need,  
24 need for power, and the County should be looking at the  
25 question of whether this is the proper location.

1                   In our view, Aquila had to misstate some of  
2 the important statements of the Court of Appeals in order  
3 to construct an argument. Aquila claims that the Court of  
4 Appeals said that 393.170.2 does not apply to it, but  
5 that's not what the Court of Appeals said. The Court of  
6 Appeals did not say that at all. In fact, the Court of  
7 Appeals said Aquila has no exemption from that statute.

8                   Aquila claims that the Court of Appeals  
9 said that Aquila already has been given a franchise from  
10 Cass County that authorizes a power plant, but the  
11 opposite is true. For example, if you look at page 41 of  
12 the Court of Appeals decision, by that I mean 180 SW 3d,  
13 page 41, the Court of Appeals said that the Cass franchise  
14 does not give Aquila the authority to build this plant.

15                   Aquila claims that the Court of Appeals  
16 said that it does not have to show that it has the consent  
17 of the County. The Court of Appeals never said this. The  
18 Court of Appeals said that the Public Service Commission  
19 has no zoning power, that zoning certainly should be  
20 considered before the first spade full of dirt is  
21 disturbed, that the Public Service Commission itself has  
22 said that it, the PSC, should not change zoning, that  
23 64.255 empowers the county commission and does not have  
24 any exemption for utilities, and that absent a statute, a  
25 county may regulate the location of utility installations.

1                   Your Honors, there's no statute anywhere  
2 that says that the county commission as opposed to the  
3 planning board doesn't have the power to regulate  
4 location. I think if you want to research this yourself,  
5 you start out by reading the following sections of RSMo:  
6 64.255, 64.285 and then 393.170.

7                   I think after you do your research and --  
8 I've read this Court of Appeals decision many times, and  
9 every time -- at least the first three or four times,  
10 every time I read it, something new occurred to me. It's  
11 quite a decision. It's quite entertaining. It tells us a  
12 lot. It's like a road map. It doesn't give us all the  
13 streets, but it sure lays it out.

14                   So I'm certainly glad to take questions  
15 from the Commission now or later on this morning. What  
16 we're asking for is first that the case be dismissed  
17 because, No. 1, at this late date, an application cannot  
18 be made, because the application should have been made  
19 before construction began. We don't think the Commission  
20 has got the power and we don't think the County has the  
21 power either to issue a retroactive permit.

22                   And No. 2, that if the Commission does  
23 entertain the application, if we get past the question of  
24 whether it can be retroactive, that the Commission, the  
25 Public Service Commission must require that the applicant

1 under the 393.170 get the consent of the County.

2 As I said, I'd be glad to take any  
3 questions. Mr. Pridgin, should I stay up here or sit down  
4 and wait for questions?

5 JUDGE PRIDGIN: Let's see if we have any  
6 questions from the Bench for now, and obviously we may  
7 have some later.

8 Commissioner Gaw, do you have any questions  
9 for counsel at this time?

10 COMMISSIONER GAW: Not right at this  
11 moment. I'll wait.

12 JUDGE PRIDGIN: All right. Thank you.  
13 Commissioner Appling?

14 COMMISSIONER APPLING: I think I'm going to  
15 have to write mine out for you. Thank you.

16 MR. EFTINK: That would be fine,  
17 Commissioner.

18 JUDGE PRIDGIN: And I might have a few,  
19 Mr. Eftink, if I may, while I'm thinking of it.

20 Didn't the Court of Appeals decision -- and  
21 I don't have the opinion out of the Reporter. I just have  
22 it to off of the Internet, so I may not have the page cite  
23 correct, but didn't the Court of Appeals say that Aquila  
24 qualifies for an exemption under 64.235?

25 MR. EFTINK: It did say that.

1                   JUDGE PRIDGIN:  Then what is that  
2 exemption?

3                   MR. EFTINK:  Well, the Court of Appeals did  
4 not describe the exemption, so we don't know the extent of  
5 the exemption, we don't know exactly what it covers.  We  
6 do know that it refers --

7                   JUDGE PRIDGIN:  What do you think it  
8 covers?

9                   MR. EFTINK:  Well, the Court of Appeals  
10 referred to the planning board.  They made a distinction  
11 between the county commission and the planning board.

12                   JUDGE PRIDGIN:  Where in the opinion did  
13 they do that?

14                   MR. EFTINK:  It may be hard for me to come  
15 up with in the next minute or so, but I'm flipping through  
16 my Brief right now.

17                   JUDGE PRIDGIN:  I understand.

18                   MR. EFTINK:  While I'm flipping, I was  
19 going to also say that if Aquila had the exemption, then  
20 the injunction would have been dissolved.  So what the  
21 Court of Appeals really was saying, that if they had  
22 applied, like they were supposed to, they might have  
23 qualified for the exemption.

24                   On 180 SW 3d, 31 and 32, and in Footnote 8,  
25 which is --

1 JUDGE PRIDGIN: Yes.

2 MR. EFTINK: -- I think on page 32, the  
3 Court of Appeals notes the distinction between the  
4 planning board and the county commission. At the bottom  
5 of page 31, I'm not going to read that entire sentence  
6 because it goes on for quite some length, but it says that  
7 a certain section is similar to the extent that they  
8 address -- or it addresses the planning board approval for  
9 improvements.

10 Then on page 32 it notes that these other  
11 sections place limits on county commission zoning powers.  
12 And then in Footnote 8, which should be on page 32, but  
13 I've got an Internet copy so I can't be sure, but it is  
14 Footnote 8, it says that the nonchartered first class  
15 county statutory provisions that parallel 64.090 and  
16 64.620 in placing limitations on county commission zoning  
17 authority is section 64.255, and it does not include a  
18 public utility exemption that is applied across the full  
19 range of noncharter first class county zoning provisions.

20 JUDGE PRIDGIN: When the parties went  
21 before the Circuit Court of Cass County after this opinion  
22 was issued and they went before the court concerning the  
23 injunction, whether or not enforcement of the injunction  
24 should be stayed, didn't Judge Dandurand give Aquila until  
25 May 31st to get permission from either this Commission or



1 from Cass County?

2 MR. EFTINK: I was not a party. I was  
3 present in the courtroom listening, but it might be better  
4 to ask counsel for Cass County about that because I don't  
5 want to misquote. They were probably paying more  
6 attention to what the judge said than I was. They have  
7 the transcript, which I don't have that. So I'd prefer  
8 you ask them about that.

9 JUDGE PRIDGIN: And I can ask them here in  
10 a few minutes.

11 If you agree that the Court of Appeals gave  
12 Aquila either an exemption or a potential exemption from  
13 64.235, then how could Aquila try to get that exemption?  
14 How can they use statute -- that Section 64.235?

15 MR. EFTINK: To get the exemption?

16 JUDGE PRIDGIN: Yes.

17 MR. EFTINK: Well, you have to go back to  
18 the power of the Public Service Commission, which is found  
19 in 393.170. They've got to operate under that, and that  
20 requires that they get the consent of the County. So what  
21 they've got to do -- first of all, as I said, I don't  
22 think you can make an application after the plant has been  
23 constructed.

24 JUDGE PRIDGIN: Then why didn't the Court  
25 of Appeals just say this is game, set and match? Why

1 didn't they say there's nothing from this that prevents  
2 Aquila at this late date asking permission for this plant  
3 toward the end of the opinion? Didn't you make that  
4 argument? Didn't you argue that in front of the Court of  
5 Appeals, that Aquila's too late?

6 MR. EFTINK: Well, I wasn't involved in  
7 that. You'll have to ask the attorneys for the County and  
8 for Aquila. I did file an amicus brief, but I was not  
9 permitted to argue in front of the court.

10 JUDGE PRIDGIN: Okay. In your amicus  
11 brief, did you make the argument that Aquila is too late?

12 MR. EFTINK: I argued that they did not  
13 qualify for an exemption, and that they had to get consent  
14 from the County, and they had to get zoning approval.  
15 That's what I was arguing, which is the same thing.

16 JUDGE PRIDGIN: But did you argue they had  
17 to get zoning approval before they built?

18 MR. EFTINK: Oh, sure. Yeah. We said  
19 before construction begins, they have to jump through all  
20 those hoops.

21 JUDGE PRIDGIN: Okay.

22 MR. EFTINK: What the Court of Appeals said  
23 in that last sentence was after it affirmed the trial  
24 court's injunction, which basically says tear the plant  
25 down, the Court of Appeals added the sentence at the end

1 which says, in so ruling, however, we do not intend to  
2 suggest that Aquila is precluded from attempting at this  
3 late date to secure the necessary authority that would  
4 allow the plant and substation which have already been  
5 built to continue operating, albeit with whatever  
6 conditions are deemed appropriate.

7                   So I'm sure everybody's read that over and  
8 over and scratched their heads. If you want my opinion --

9                   JUDGE PRIDGIN: I do.

10                   MR. EFTINK: After the Court of Appeals  
11 said you have to make your application before the first  
12 spade full of dirt is disturbed, and that you have to  
13 follow the law and that the County has a role, what the  
14 Court of Appeals was saying is, hey, we understand  
15 Aquila's in a box here, but we're not going to say you  
16 can't all get together, the County, the Public Service  
17 Commission, Aquila, maybe the City, maybe the people, and  
18 try to work something out, because you've got a  
19 \$140 million facility that's been built here. Yeah, it  
20 was built illegally, but, you know, if you guys could all  
21 get together and all of you decide, think about it.

22                   JUDGE PRIDGIN: Don't parties always have  
23 the opportunity to settle disputes? The Court of Appeals  
24 doesn't need to remind the parties that, hey, you can  
25 always work this out on your own. Why would the Court of

1 Appeals at the end of that opinion implicitly encourage  
2 Aquila to apply at this late date if it were physically  
3 impossible for Aquila to comply with the law?

4 MR. EFTINK: But the Court of Appeals did  
5 not say that they only have to go to the PSC and that they  
6 can ignore the County. I think after you read everything  
7 that the Court of Appeals wrote, you have to conclude that  
8 it was saying, why don't you guys all get together and try  
9 to work something out. That is, the county's got a role  
10 the PSC's got a role. Maybe these other parties have a  
11 role.

12 But in my experience, courts often will  
13 suggest that the parties settle, particularly when the  
14 courts feel like they're busy.

15 JUDGE PRIDGIN: I don't think I have any  
16 further questions. Let me see if we have any further  
17 questions from the Bench. And Mr. Eftink, we may have  
18 questions for you later as well.

19 MR. EFTINK: I'd be glad to take them then.

20 JUDGE PRIDGIN: Thank you very much.

21 MR. EFTINK: Thank you.

22 JUDGE PRIDGIN: Let me see if we can hear  
23 from Cass County, and Mr. Comley will you be addressing --

24 MR. COMLEY: Yes.

25 JUDGE PRIDGIN: -- the Commission? Thank

1 you.

2 MR. COMLEY: May it please the Commission?

3 First, I want to acknowledge that I know that oral  
4 arguments of this nature on motions of this kind are not  
5 necessarily heard by this body, and I'm grateful that  
6 you've set aside time on your calendar for this purpose.

7 There's been much written about this  
8 matter, and it seems to me like the printed page is  
9 sometimes sterile and putting words behind it in front you  
10 have is a great way of directly communicating our  
11 positions.

12 Cass County filed a motion to dismiss, and  
13 it also had an alternative request for relief. There are  
14 two important points in that motion, and Cass County has  
15 allegiance to both even though there is an expression in  
16 the alternative.

17 The first point of argument is one that  
18 Mr. Eftink has introduced to us, for us today, and one  
19 that you have quizzed him on, Judge Pridgin. But the  
20 contention we rely on is that the Commission lacks the  
21 statutory authority at this time to certify a generating  
22 plant after it has been constructed.

23 The argument is based upon the Court of  
24 Appeals decision in Cass County vs. Aquila. Now, some  
25 parties have referred to that this case as StopAquila.org

1 vs. Aquila. I think Mr. Eftink mentioned that. But we  
2 have referred to it as Cass County vs. Aquila because I  
3 think that the record will reflect that StopAquila was  
4 dropped as a party fairly early on in the proceeding, and  
5 the appeal was prosecuted strictly by Cass County. So  
6 we're waiting on West Publications to catch up with us.  
7 I'm going to refer to the case as Cass County vs. Aquila.

8                   To remind the Commission, in the Cass  
9 County case, the Court of Appeals explained the statutory  
10 authority the Commission has under Section 393.170.1. I'm  
11 not going to repeat the statute.

12                   Like Mr. Eftink said, you can see on  
13 pages 37 through 38, the public hearings on an application  
14 for construction of a generating plant must occur before  
15 the spade full of soil is disturbed. The court did not  
16 expand the statutory authority of the Commission.

17                   The Court of Appeals interpreted the  
18 statute, and it is unquestionable that the Commission's  
19 lawful power to approve applications for generating plants  
20 filed under Section 393.170 is conditioned on the holding  
21 of public hearings before construction commences, at which  
22 hearing a broad list of issues is considered.

23                   The Commission itself cannot expand its own  
24 statutory authority. Judge Dandurand cannot expand the  
25 Commission's statutory authority. The Court of Appeals

1 announced the extent of the Commission's authority, and  
2 unmistakably a public hearing relating to the construction  
3 of electric plant -- of the electric plan must take place  
4 in the months before construction begins so that current  
5 conditions, concerns and issues, including zoning, can be  
6 considered. And I'll stress the words can be considered.  
7 We'll bring this up again, but there has to be an ability  
8 to bring these issues to a public forum.

9                   Basically, Aquila and the Staff have argued  
10 that Aquila is exempt from this requirement, and I think  
11 Judge Pridgin has referred to the last two sentences of  
12 the opinion as well. And both -- and both parties, Aquila  
13 and the Staff, have argued that the plain wording of the  
14 opinion allows the Commission to consider this  
15 application.

16                   It needs to be pointed out, those last two  
17 sentences don't tell Aquila or any party what to do. It  
18 does not tell Aquila that it needs to file an application.  
19 It does not tell Aquila where to go. It does say that at  
20 this late hour appropriate conditions can be put on, and  
21 that's another topic I'm going to get into.

22                   The Court of Appeals restricted the reach  
23 of its opinion to South Harper and the Peculiar substation  
24 and to any other facilities to which objecting litigants  
25 reserve the precise issue addressed in its opinion. To

1 that extent, the opinion is prospective, but it's no  
2 further. That's on page 39 of the opinion.

3                   What Aquila and Staff want the Commission  
4 to believe is that despite what the Court of Appeals has  
5 said, that the Commission can ignore that. There is no  
6 expressed provision in the opinion that makes the opinion  
7 prospective as it applies to Aquila. If the opinion were  
8 prospective to Aquila, the Court of Appeals would have  
9 issued an opinion or issued a mandate that specified it.  
10 Neither the opinion nor the mandate contain that  
11 specification.

12                   Basically, the mandate affirmed the trial  
13 court. The trial court said, the plant's been unlawfully  
14 constructed. It has to be torn down. Under the  
15 injunction, even as it's been extended by Judge Dandurand,  
16 Aquila is under a present obligation to tear down the  
17 plant by a date certain.

18                   This is not a prospective opinion as it  
19 applies to Aquila. The interpretation of the statute that  
20 the Court of Appeals supplied is the one that controls in  
21 this case. There is no way to waive it. It says what it  
22 says. The Commission is bound by the interpretation.

23                   As I mentioned, the last two sentences of  
24 the opinion contain no directions to you to ignore the  
25 statutory interpretation the court declared and applied in



1 the opinion.

2                   The Court of Appeals was presented debate  
3 over Section 393.170, but that wasn't how the case got  
4 there. There wasn't any argument about whether or not the  
5 plant had been constructed too late under 393.170. There  
6 were no arguments like that.

7                   On rehearing, the court had to analyze  
8 Harline and come up with conclusions about 393.170, but I  
9 don't think you'll find it in any of the Briefs of the  
10 parties, that there are any issues raised about whether or  
11 not the plant was constructed late with respect to the  
12 provisions of 393.170.

13                   The Court of Appeals did its best to  
14 reconcile Section 64.235 and 393.170.1 to figure out how  
15 that exemption that's in 64.235 can be exercised by not  
16 only public utilities but other qualified entities,  
17 because there's others mentioned in that statute.

18                   Somewhat like Mr. Eftink, I think the only  
19 way the Commission can read the Court of Appeals' opinion  
20 at this stage is that if Aquila can at this late date find  
21 authority to operate the plant, it must do so by some  
22 other means other than Section 393.170.

23                   Again, there is nothing in the opinion that  
24 says to Aquila or the Commission, you may ignore what we  
25 say about 393.170 for purposes of any retroactively filed

1 application for Aquila. The last two sentences -- the  
2 last two sentences, well, I think one term would be  
3 applied is somewhat inscrutable.

4                   But our contention is it would be an error  
5 for the Commission to consider a retroactive -- an  
6 application for certification of the South Harper plant  
7 and Peculiar substation prospective. Whatever Judge  
8 Dandurand may have remarked during the January 27th  
9 hearing, it does not change the nature of the statutory  
10 interpretation placed by the Court of Appeals.

11                   We think that there's adequate  
12 justification based upon the law, as announced by the  
13 Court of Appeals, to reject the application as it is.

14                   The County has also proposed an  
15 alternative. It is couched in the power of the County  
16 already mentioned, to regulate the location of buildings  
17 within its unincorporated area. I think it would be well  
18 to discuss what the opinion in Cass County stands for as  
19 you look at it from a global perspective. It means that  
20 regulated utilities lack the unfettered power to construct  
21 generation plants anywhere they please.

22                   And a second theme is, before public  
23 utilities may be authorized to construct a generating  
24 plant, the matter must be heard by a governmental  
25 adjudicative body or public input on land, local land

1 issues and current concerns is received and impartially  
2 considered. by virtue of the opinion in Cass County,  
3 there are now two qualified adjudicative bodies where that  
4 input can be considered, the planning board for Cass  
5 County, for instance, and any other related entity there.  
6 It can also be considered by the county commission under  
7 the explanation of the exemption in 64.235. The other  
8 body is this Commission.

9                   Of course, the Cass County planning board  
10 hears evidence in connection with zoning applications all  
11 the time. The Commission has been given some authority,  
12 some authority.

13                   Another important factor of the Court of  
14 Appeals opinion is that in the hearing at which a  
15 generating plant is up for approval, whether that hearing  
16 may be before this Commission, the county commission, or  
17 the county planning board, land use controls and the  
18 impact on adjacent property uses must be reviewed and  
19 evaluated by the fact finder.

20                   Our contention is that if the Public  
21 Service Commission elects to consider zoning, it is going  
22 to have to consider that as seriously and as in detail as  
23 it would be sitting as a zoning board. You will operate  
24 as, as we mentioned earlier in one of our pleadings, the  
25 functional equivalent of a zoning board. Failure to do so

1 would be an error under the terms and conditions of the  
2 Court of Appeals opinion.

3                   For purposes of this pending application  
4 and for applications for such certificates that are filed  
5 in the future, it should be determined as a matter of  
6 public policy, perhaps as a matter of public interest,  
7 that the county planning boards should be deferred to as  
8 the more suitable source for location assistance on a  
9 generating plant.

10                   What is the condition we've asked in this  
11 case? If the Commission is inclined to grant a  
12 certificate based on need for the South Harper plant and  
13 Peculiar substation, we're asking that it be conditioned  
14 on acquisition of local zoning approval from Cass County.

15                   Adding that condition to the certificate is  
16 appropriate. It is lawful. You have the power to add  
17 conditions to the certificate, and the Court of Appeals  
18 itself contemplated that appropriate conditions would be  
19 applied to the operation of this plant at this late hour.

20                   That condition is consistent with past  
21 practices of the Commission. In our Brief you will see an  
22 extensive analysis of the dual oversight of utility  
23 companies by local government and by this Commission. And  
24 it is the County's contention that local zoning approval  
25 has been and should continue to be a part of what is

1 considered local consent, irrespective of what may be  
2 considered local consent under the second section of  
3 390.170.

4                   Local zoning approval has been part of the  
5 application process for generation plants in this  
6 Commission, and it should continue to be so.

7                   That condition allows us to have a  
8 practical and efficient use of public resources. The  
9 county planning board and the other planning entities  
10 there have broader experience in land use control than the  
11 Commission, and I say that without apology. I think it  
12 would be very difficult to seriously argue that the  
13 Commission Staff, although they are highly qualified  
14 people, would have the qualifications for a detailed and  
15 very expensive analysis of the land use planning concerns  
16 in Cass County.

17                   Also, the condition prevents public  
18 utilities from indirectly condemning rights in property  
19 that they otherwise could not do. We've argued that it is  
20 conceivable that by the exemption in 64.235, if they  
21 qualify for it, public utilities can condemn the zoning  
22 powers of counties. That is unlawful. The Court of  
23 Appeals has held that. There is every reason to impose  
24 this condition.

25                   Staff has argued that if you condition the

1 certificate on acquisition of county zoning, then you  
2 render meaningless the exemption in Section 64.235. There  
3 is nothing in that section that restricts PSC authority in  
4 arriving at rules and regulations and procedures with  
5 respect to siting of generating plants.

6                   The Commission has the authority to allow  
7 county planners to do the job notwithstanding the  
8 provisions of section 64.235. Nothing limits your  
9 authority to choose the way in which you want siting  
10 decisions to be made.

11                   Nothing in Section 64.235 should be read to  
12 render meaningless any of the powers and authority that  
13 you have to promulgate rules and regulations. And you  
14 will remember, the Court of Appeals seems to encourage  
15 that for this kind of proceeding.

16                   Furthermore, there's another way to  
17 interpret 64.235. Mr. Eftink mentioned it to you. I'm  
18 going to repeat it. This section was enacted  
19 substantially in its form in 1959, and at that time and  
20 until the Commission's decision be in In Re Union Electric  
21 Company in approximately 1980, the Commission required  
22 applicants asking for authority to construct an electric  
23 plant pursuant to Section 393.170 to prove compliance with  
24 local zoning.

25                   One of the rules of statutory construction

1 is that courts presume that the Legislature when enacting  
2 new legislation acts with knowledge of the subject matter,  
3 the surrounding circumstances, the existing law, and the  
4 purpose and the object to be accomplished by that law.  
5 Therefore, in enacting Section 64.235, the Legislature is  
6 presumed to have understood the Commission's practice of  
7 demanding proof of local zoning as part of the certificate  
8 approval for new plants.

9                   Now, since the Commission was already  
10 examining plans and proposals and comparing them to local  
11 zoning as part of the application process for new plants,  
12 the Legislature determined that it was not necessary for  
13 public utilities to engage that exercise twice. Insisting  
14 that Aquila acquire local zoning approval in this case is  
15 arguably consistent with the spirit of this section. It  
16 is consistent with its terms.

17                   There is a contention that Cass County has  
18 misled you on a particular overriding policy addressed by  
19 the Court of Appeals. On page 41 of this opinion, you  
20 will find a quote. The overriding public policy from the  
21 County's perspective is that it should have some authority  
22 over the placement of these facilities so that it can  
23 impose conditions on permits, franchises or rezoning for  
24 the construction, such as requiring a bond for the repair  
25 of roads damaged by heavy construction equipment or

1 landscaping to preserve neighborhood aesthetics and  
2 provide a sound barrier.

3           As the Circuit Court stated so eloquently,  
4 to rule otherwise would give privately owned public  
5 utilities the unfettered power to be held unaccountable to  
6 anyone other than the Department of Natural Resources, the  
7 almighty dollar or supply and demand regarding the  
8 location of power plants.

9           The court simply does not believe that such  
10 unfettered power was intended by the Legislature to be  
11 granted to public utilities. For these reasons, we affirm  
12 the Circuit Court's judgment.

13           The Court of Appeals elected to end its  
14 opinion by quoting what the County considered one of the  
15 overriding policies of the case. I contend with you that  
16 we're not misleading you about a very important and  
17 perhaps overriding policy that should influence your  
18 decision in this matter.

19           The Staff has argued that consideration of  
20 zoning issues for you is permissive. Both Staff and  
21 Aquila have argued to reduce issues that the Court of  
22 Appeals regards with utmost importance, two stepchildren  
23 for this body. The Court of Appeals opinion refutes that  
24 contention. Again, the opinion stands for the proposition  
25 that there must be a meaningful opportunity for public



1 discourse on the effects the power plant will have on  
2 local land use and issues related thereto.

3                   There must be a public body involved where  
4 these issues can be considered. Keep in mind, up until  
5 the point of this opinion, it was doubtful whether there  
6 was an ability for public, discourse, public review,  
7 participation by affected residents, to make any statement  
8 in opposition or in favor of a generating plant the  
9 dimension of the one we're talking about in this case.

10                   Again, if the issues with local zoning are  
11 not considered by that public body, it is error. The  
12 Court of Appeals could not be more plain. Zoning issues  
13 must be considered, whether it is at the planning board or  
14 at this Commission. But in either body the same degree of  
15 seriousness and attention will be expected by the court.

16                   Aquila what openly claimed that Cass County  
17 will not be fair and impartial in evaluating the zoning  
18 application filed by Aquila. Aquila has asked  
19 rhetorically, can there be any question as to the outcome  
20 of the zoning application filed with Cass County?

21                   There is some language in the motion to  
22 dismiss that I think Cass County justifiably included.  
23 This is a very colossal unplanned use of property at the  
24 County. But a decision by the Cass County planning board  
25 rejecting a special use permit application filed by Aquila

1 is no more than a foregone conclusion than a decision by  
2 this body denying Aquila's certification for South Harper.

3           As I explained in our Briefs, the same  
4 safeguards and processes, judicial review of both the  
5 planning board and Cass County Commission and the Missouri  
6 Public Service Commission.

7           It is conjecture and nothing more to  
8 predict what the planning board may do or what the Cass  
9 County Commission may do sitting as a board of zoning  
10 adjustment. The matter has never been properly asked.  
11 The matter has never been properly put in front of the  
12 board. They have never been asked to weigh in on the  
13 subject.

14           Aquila has cited on page 10 of its comments  
15 Cass County's 2005 Comprehensive Plan Update. The  
16 argument appears to be that the 2005 update would be what  
17 would govern your review of the zoning issues related to  
18 the South Harper location.

19           The South Harper plant and its Peculiar  
20 substation were both constructed starting in 2004 and  
21 throughout the spring of 2005. The zoning and permitting  
22 applicable to South Harper would be governed by the 2003  
23 Cass County update to its 1997 comprehensive plan. I  
24 think it would be wise to refer, to say right now that  
25 reference to the 2005 plan of Cass County will be

1 irrelevant and not aid Aquila.

2                   It's on this basis that we first move to  
3 dismiss. And second, in the event that relief is not  
4 granted, that we very strongly encourage the Commission to  
5 condition its certificate on the acquisition of local  
6 zoning approval from Cass County.

7                   JUDGE PRIDGIN: Mr. Comley, thank you. Let  
8 me see if we have any questions from the Bench.  
9 Commissioner Gaw?

10                   COMMISSIONER GAW: It will be after  
11 everyone's done probably for me.

12                   JUDGE PRIDGIN: All right. Thank you.  
13 Commissioner Appling?

14                   COMMISSIONER APPLING: Mr. Comley, good  
15 morning.

16                   MR. COMLEY: Good morning.

17                   COMMISSIONER APPLING: I have one nagging  
18 question. This keeps coming back to me. Sometimes I  
19 can't sleep over this question. You spoke very well this  
20 morning about the planning board and the county  
21 commission's responsibility for siting of a plant and that  
22 companies must go through them to do that.

23                   Are you attorney for Cass County and the  
24 commissioners and the planning board? Do you represent  
25 them?

1                   MR. COMLEY: I represent Cass County, and  
2 in that connection would have to be, I think, representing  
3 all the interests of Cass County that come to the  
4 forefront here. So yes, I would say that I represent  
5 those interests.

6                   COMMISSIONER APPLING: How long have you  
7 been the attorney for those -- for Cass County? Before  
8 this plant started?

9                   MR. COMLEY: I think we started our  
10 engagement in 2004.

11                  COMMISSIONER APPLING: After this plant?

12                  MR. COMLEY: I think it was probably just  
13 before the case was filed in Judge Dandurand's court in  
14 2004, I think.

15                  COMMISSIONER APPLING: I've been reading  
16 the records, and I understand exactly what you're saying  
17 about the responsibility of the planning board and the  
18 commission. And I've read every piece of paper I think  
19 that we have on Aquila and what we have in this  
20 proceeding.

21                  Is there a place -- and I will ask Staff to  
22 answer this question, too. Is there a place somewhere  
23 when Aquila has got a bulldozer out there or bobcat or  
24 whatever the case is, they move the shovel of dirt, was  
25 there someplace that the County or the planning board

1 could have went and got a court injunction to stop Aquila  
2 until they proceeded in the right place, before you went  
3 down the road and spent this amount of money and this  
4 amount of time of the citizens of Cass County and all of  
5 our time?

6                   It seem to me that somebody should have  
7 stood up and said at that time, well, you can't do this  
8 until you-all come see us.

9                   MR. COMLEY: I think that's what happened.  
10 In December --

11                   COMMISSIONER APPLING: Before any dirt was  
12 turned?

13                   MR. COMLEY: I think the indication was  
14 that they started turning dirt, and at the time that they  
15 started turning dirt they were advised that they were  
16 unlawful, and then the injunction request was filed with  
17 Judge Dandurand and granted within a month.

18                   COMMISSIONER APPLING: Is that in the  
19 record?

20                   MS. MOORE: Yes, sir.

21                   MR. COMLEY: Yes, that's in the record.  
22 The reason that it was continued was that Aquila did file  
23 a bond, and the court permitted the filing of a bond.  
24 It's called a supersedeas device, and pending the appeal,  
25 it was permitted to continue construction of the plant.

1                   Our position has always been that Aquila  
2 had done that at its peril. It had received a circuit  
3 court judgment indicating that it was proceeding  
4 unlawfully. And it ignored it I think hoping on chance  
5 that it would prevail on appeal. That did not happen.  
6 The appellate Court concluded that, no, the plant was  
7 constructed and being constructed. It was constructed  
8 unlawfully.

9                   So that's what happened. I think that the  
10 record will reflect that Cass County authorities did act  
11 diligently. They did not delay. There was no contention  
12 at the hearing with Judge Dandurand that the County was  
13 engaging in -- or there was no defense of laches, meaning  
14 that they had sat too long on their hands.

15                   No, I think the court was satisfied that a  
16 timely response to Aquila's unlawful activity had been  
17 presented to it for decision.

18                   COMMISSIONER APPLING: Judge, thank you.

19                   JUDGE PRIDGIN: Thank you, Mr. Comley. I  
20 think I have a few questions for you.

21                   Does Aquila have a valid franchise to  
22 distribute electricity in Cass County or at least in  
23 portions of Cass County?

24                   MR. COMLEY: I think the franchise goes  
25 that far. I think we have a -- the 1917 franchise, that's

1 referred to in the Court of Appeals opinion, I'd have to  
2 look again, but I'm thinking as far as distribution  
3 requirements, that's true, and transmission. I think  
4 transmission's there.

5 JUDGE PRIDGIN: Towards the end of what  
6 you're referring to as the Cass County Western District  
7 decision, didn't the Western District say that nothing at  
8 this late date prevents Aquila from getting approval from  
9 the county commission or the Public Service Commission?

10 MR. COMLEY: It's not there, Judge. It's  
11 not there. The last two sentences, in so ruling, we do  
12 not intend to suggest that Aquila is precluded from  
13 attempting at this late date to secure the necessary  
14 authority that would allow the plant and substation which  
15 had already been built to continue operating, albeit with  
16 whatever conditions are deemed appropriate.

17 JUDGE PRIDGIN: But doesn't the sentence  
18 immediately before that say, we affirm the circuit court's  
19 judgement -- I don't want to read the entire sentence.

20 MR. COMLEY: Right. They are enjoined.

21 JUDGE PRIDGIN: Without first obtaining  
22 approval from the county commission or the Public Service  
23 Commission. Isn't that what the Western District said?

24 MR. COMLEY: That's true.

25 MR. COMLEY: And didn't Judge Dandurand

1 give Aquila until May 31st before it has -- before it's  
2 under court order to start dismantling the plant?

3 MR. COMLEY: That's true. It has an  
4 extension. Our position is that, even so, the Commission  
5 is left with the interpretation of Section 393.170 that  
6 the Court of Appeals has placed on it. In order for you  
7 to approve a generating plant, the hearings for that  
8 generating plant approval have to come before it's built.

9 JUDGE PRIDGIN: And I think this is the  
10 same question that I asked Mr. Eftink. Why would the  
11 Western District towards the end of its opinion all but  
12 expressly tell Aquila that it was okay to apply even at  
13 this late date for permission for the plant if it were  
14 physically impossible for Aquila to comply with 393.170?

15 MR. COMLEY: I'll explain that this way.  
16 The only statute it had in front of it was 393.170.1. It  
17 was analyzing just what was in front of it. I don't think  
18 the court knew or had any reason to believe that that was  
19 the only way it could be done. It didn't know whether  
20 there were other avenues that Aquila could go through at  
21 the Commission or otherwise to get approval.

22 And it may be that there are no other  
23 vehicles except through some sort of agreement with the  
24 Commission, the County and the other parties affected by  
25 which to allow this plant to continue operating. That's



1 my explanation for it.

2 JUDGE PRIDGIN: But again, don't parties  
3 always have the ability, no matter what a court says, a  
4 Court of Appeals, Supreme Court, don't parties always have  
5 the chance to settle their disputes?

6 MR. COMLEY: Oh, absolutely.

7 JUDGE PRIDGIN: Then this language there  
8 towards the end of the opinion seems to be more than just  
9 encouragement for the parties to settle. That looks to  
10 be, I wouldn't say a directive, but some sort of  
11 acknowledgement from the Court of Appeals that Aquila  
12 still has the chance to ask for permission and get legal  
13 authority even after the plant was built?

14 MR. COMLEY: My position would be that if  
15 there was a manner for Aquila to acquire operating  
16 authority through any device besides Section 393.170.1,  
17 that's what the court was willing to allow it to do. It  
18 didn't want to discourage that.

19 But there's nothing in this opinion that  
20 says we -- we are not going to use this interpretation for  
21 purposes of Aquila. It just said, you constructed the  
22 plant unlawfully. Why did it do that? Well, there wasn't  
23 a hearing before construction commenced, and you don't  
24 have a certificate.

25 So I think to make logical sense of how the

1 Court of Appeals decided to dispose of the appeal, you  
2 can't expand your own statutory control. Your authority  
3 is as they said it is, and there's permission in the  
4 opinion for you to do otherwise. That leaves the devices  
5 to the parties in a very restricted way.

6 JUDGE PRIDGIN: Okay. Mr. Comley, thank  
7 you. I don't think I have any further questions. Again,  
8 the Commission may have questions either of you or from  
9 other counsel later.

10 All right. Ms. Shemwell, I was going to  
11 call on you, but I think you informed me you wanted Aquila  
12 to proceed next.

13 MS. SHEMWELL: Actually, Aquila had  
14 requested to go next, and Staff has no objection to that.

15 JUDGE PRIDGIN: Mr. Swearngen, will you be  
16 addressing the Commission?

17 MR. SWEARENGEN: Mr. Youngs will.

18 JUDGE PRIDGIN: Mr. Youngs, when you're  
19 ready, sir.

20 MR. YOUNGS: Your Honor, thank you. May it  
21 please the Commission? My name is Dale Youngs, and it's  
22 my pleasure to speak with you today.

23 My intention is to take both of the motions  
24 that have been filed by StopAquila and Cass County in  
25 turn, starting with the Cass County motion. Obviously

1 I'll talk about anything you want to talk about, and I'll  
2 talk about it in any order you want to talk about it, but  
3 that's my road map.

4                   Judge Pridgin has talked about in -- on a  
5 couple of occasions during both of the arguments, the  
6 language of the Court of Appeals decision, and I think  
7 it's important to look at it. And I agree with Judge  
8 Pridgin. It's not a directive, but you can't disregard  
9 it. The County has alleged in its filings that what  
10 Aquila has done is disregarded all the discussion about  
11 393.170 and its interrelationship with 64.235 by relying  
12 on this last sentence.

13                   Aquila's position is the County is ignoring  
14 this last section of the Court of Appeals' opinion in  
15 favor of all the other things that were said, which we  
16 have no dispute about. We operate as though that is the  
17 law that governs this proceeding, but this is the  
18 directive of the Court of Appeals. This is the last  
19 sentence of the Court of Appeals opinion that indicates  
20 their disposition of the issues that were before them.

21                   And they say, for these reasons we affirm  
22 the Circuit Court's judgment permanently enjoining Aquila  
23 from building the South Harper plant and Peculiar  
24 substation in violation of Cass County zoning law without  
25 first obtaining from the county commission or the Public

1 Service Commission.

2 In so ruling, however, we do not intend to  
3 suggest that Aquila is precluded from attempting at this  
4 late date to secure the necessary authority that would  
5 allow the plant and substation, which have already been  
6 built, to continue operating, albeit whatever conditions  
7 are deemed appropriate. That's the language from the  
8 Court of Appeals. That's the disposition of the appeal,  
9 and that is why we're here in this case.

10 The County's motion invites the Commission  
11 to do two things; No. 1, to ignore the breadth of its  
12 authority under Chapters 386 and 393 by focusing  
13 exclusively on the language of 393.170, which in most  
14 respects imposes obligations on public utilities, not the  
15 Commission.

16 And No. 2, the County asks this Commission  
17 to cede to the County its obligations, as have been set  
18 forth by the Court of Appeals, to consider the land use  
19 issues associated with this application because, according  
20 to the County, they will do a better job, and that's it.

21 The County argues that the Commission  
22 cannot consider this application because the facilities  
23 are already constructed. The Court of Appeals has said  
24 this doesn't matter. The Court of Appeals does not intend  
25 to preclude Aquila from pursuing this application. And

1 more important, or not more importantly, but equally as  
2 importantly, Judge Dandurand agreed.

3 He indicated that it was not too late, and  
4 the way he agreed with Aquila and the Court of Appeals  
5 that it was not too late for Aquila to seek the authority  
6 that they're seeking in this application was by staying  
7 the injunction, staying the effect of the injunction until  
8 May 31.

9 And as somebody pointed out, it would make  
10 absolutely no sense for the Court of Appeals to issue this  
11 opinion that ended in this language and for Judge  
12 Dandurand to give us until May 31 if the intention of all  
13 of those parties was not that it was not too late for  
14 Aquila to find the authority that it needed from this  
15 Commission.

16 Section 393.170 does not support the  
17 County's claim. That section does not impose any  
18 obligations on the part of the Commission consistent with  
19 what the County has alleged, and I'll put it up on the  
20 screen. The primary section at issue is subsection 1,  
21 which there should be no dispute, although there  
22 apparently seems to be, that 393.170.1 is the subsection  
23 of Section 393 that governs this application, because this  
24 is an application for a power plant and a related  
25 substation.

1                   The Court of Appeals has held that this  
2 application is governed by subsection 1. Prior courts  
3 have held that these types of applications are governed by  
4 subsection 1. There is absolutely nothing in subsection 1  
5 that prohibits the Commission from considering the  
6 application that's before it. Subsection 1 talks about  
7 obligations of the public utilities. Subsection 1 does  
8 not limit the jurisdiction or the authority of this  
9 Commission to consider this application, notwithstanding  
10 the fact that these facilities have already been  
11 constructed.

12                   On the contrary, there is absolutely no  
13 section of either Chapter 386 or Chapter 393 discussing  
14 the Commission's broad powers that in any way limits their  
15 ability to consider the application that is now before  
16 them. On the contrary, as the Commission is no doubt  
17 aware, your powers are broad, your powers are sweeping.  
18 At least one court has held that your powers over public  
19 utilities include practically everything except actually  
20 running the utility yourself. It is under that framework  
21 that --

22                   COMMISSIONER GAW: Excuse me for  
23 interrupting.

24                   MR. YOUNGS: Sure.

25                   COMMISSIONER GAW: I just want to make sure

1 that I have a copy of that last group of statements,  
2 Judge, if you could include that as Aquila's statement of  
3 the Commission's authority for all matters.

4 MR. YOUNGS: Mr. Swearngen may need to  
5 speak to the thing that I may have just screwed up. Just  
6 in case, I'll let Mr. Swearngen speak to that. But  
7 that's it. Whatever the case that I may have screwed up,  
8 the fact of the matter is your authority is broad. And in  
9 fact, in a dissent, Commissioner Gaw, you've recognized  
10 the breadth of the Commission's authority to take up  
11 certain matters.

12 And it's no less broad in this situation.  
13 And importantly, there is nothing that the County has  
14 pointed to except this section that purports to limit your  
15 ability in any way to consider this application and all  
16 the issues associated with it. Further, and I think it's  
17 important not to forget about the fact that this is not  
18 the first time Aquila has been before this Commission  
19 seeking specific authority for these facilities.

20 As the Commission recalls, in January of  
21 2005, after the court -- the trial court rendered its  
22 decision, after construction had begun, Aquila came to the  
23 Commission and requested either specific authority for the  
24 facilities or confirmation that we had all the authority  
25 that we needed.

1                   The Commission considered that application.  
2     We had an abbreviated hearing, although prior to that the  
3     issues were fully briefed, vigorously contested. At no  
4     time did anybody, anybody, including members of the  
5     Commission, who are always free to contest or question  
6     their jurisdiction to proceed, at no time did anybody  
7     raise the issue of whether or not it was proper for the  
8     Commission to undertake a review of the application  
9     because the facilities were already in the process of  
10    being constructed. Nobody said anything about that at any  
11    time.

12                   COMMISSIONER GAW: Just for purposes of  
13    making sure the record is clear, I'm not sure that's  
14    totally correct.

15                   MR. YOUNGS: Well, here's the --

16                   COMMISSIONER GAW: You may not have been  
17    present in all of the agendas.

18                   MR. YOUNGS: I'll yield to the record.

19                   COMMISSIONER GAW: The record will not  
20    reflect one way or the other if it was in agenda because  
21    there would not have been a court reporter there.

22                   MR. YOUNGS: If there were agenda  
23    discussions about it, the one point I would make that is,  
24    I think, indisputable is there is no portion of the Report  
25    and Order that was issued by the Commission and no portion



1 of any dissent from that Report and Order that questioned  
2 in any way the Commission's authority to proceed with the  
3 application review.

4                   The County has conceded that either the  
5 Commission or the County can consider land use issues  
6 raised by Aquila's application. They not only concede  
7 that in the proceedings here, they have conceded that  
8 before. In the proceedings before Judge Dandurand in the  
9 Circuit Court case in Cass County, counsel for the County  
10 said the Legislature is looking at the County's interest  
11 in protecting land use regulations, and so when they pull  
12 back on the County's authority, they are pulling back on  
13 their authority because the assumption by the Legislature  
14 is that somebody else is looking at those same issues.

15                   And we are not going to give the County the  
16 ability to interfere when the same interest, protection of  
17 public interest, safety, health and welfare of the  
18 citizens, et cetera, is being protected through some other  
19 process.

20                   Later on in the argument, counsel for the  
21 County stated, now, I'm going to be honest with you, the  
22 County would much prefer that that process occur with the  
23 County, but we are going to follow the law. And the law  
24 as the Court of Appeals has stated it is that it is not  
25 too late for Aquila to file this application and obtain

1 the authority that it needs for these facilities, and that  
2 those issues, land use issues may be taken up by the  
3 Commission. And there is nothing in the Court of Appeals'  
4 opinion that suggests the result that the court -- the  
5 County now seeks, and that is that the Commission  
6 disregard its broad authority, disregard its obligation to  
7 consider all the issues associated with this application,  
8 and somehow cede to the County its consideration to  
9 whatever extent the Commission deems it appropriate to  
10 consider land use issues associated with this application  
11 to the County, simply because the County says that they  
12 can do a better job.

13                 There's no overriding public policy stated  
14 by the Court of Appeals that supports the extraordinary,  
15 and in this case, I will say, pointless result that the  
16 County seeks, and that is having the Commission  
17 essentially admit that it's not capable of addressing all  
18 the issues associated with Aquila's application and  
19 relinquishing that authority to the County.

20                 In fact, the Legislature contemplated just  
21 the opposite when it enacted Section 64.235, 64.620 and  
22 64.090, which are the zoning enabling statutes that deal  
23 with counties of the first class that are non-charter,  
24 counties of the second and third class, and first class  
25 charter counties. There's no evidence other than the

1 County say-so that the County possesses such overriding  
2 expertise in determining whether these locations are in  
3 the public interest that would justify such an  
4 unprecedented action.

5                   On the contrary, the Staff has indicated in  
6 its filings that it stands ready and able to consider all  
7 these issues, and the Court of Appeals all but said it's  
8 the Commission's obligation to do so. And, in fact, the  
9 purpose behind the Court of Appeals stating that I think  
10 is well stated by the Supreme Court in the Crestwood  
11 decision.

12                   And there's a reason why 64.235 exists.  
13 The legislative intent between 64.235 is exactly as  
14 counsel for the County said, that there are times when the  
15 County's police power to enforce zoning yields to the  
16 statewide public interest in the safe and efficient  
17 generation and distribution of electricity, among other  
18 utilities that are governed by this Commission's  
19 jurisdiction.

20                   And the reason why that exemption exists,  
21 the legislative intention behind that exemption is, as  
22 stated in the Crestwood case, the statutes relative to the  
23 Public Service Commission constitute a legislative  
24 recognition that the public interest in proper regulation  
25 of public utilities transcends municipal and county lines,

1 and that a centralized control must be entrusted to an  
2 agency whose continually developing expertise will assure  
3 uniformly safe, proper and adequate service by utilities  
4 throughout the state. Without such a system, chaos would  
5 result.

6                   That's the Supreme Court talking about what  
7 the County says dictates the transfer of part of your  
8 authority in this application to the County, and that is  
9 that you don't have the expertise, you don't have the  
10 horses to deal with the land use issues, whatever they may  
11 be, zoning, whether or not this property or some good  
12 portion of it falls within what's called a multi-use tier,  
13 and so whether or not it is, in fact, a colossal unplanned  
14 use of this property. We think the evidence before the  
15 Commission will be the contrary.

16                   But you have the authority and the ability  
17 to take up those issues. Notwithstanding the fact that,  
18 as the County has said, you don't have the expertise, the  
19 Legislature has recognized that you have continually  
20 developing expertise, and the authority that's given this  
21 Commission that's recognized in 64.235 is a reflection of  
22 the desire of the Legislature that these issues not fall  
23 to county zoning and planning boards, unless it's  
24 appropriate for them to do that.

25                   In other words, there's an exemption in the

1 statute that requires zoning compliance, and that  
2 exemption exists for a reason. The Commission has the  
3 power to consider this application and should do so,  
4 including all issues associated it.

5 That's what I have to say about the  
6 County's motion. I'll take any questions at any time, but  
7 I was going to address some of the points that Mr. Eftink  
8 raised.

9 JUDGE PRIDGIN: Mr. Youngs, thank you, and  
10 we'll see if we have any questions from the Bench.  
11 Commissioner Gaw?

12 COMMISSIONER GAW: I want to wait.

13 JUDGE PRIDGIN: Thank you. Commissioner  
14 Appling?

15 COMMISSIONER APPLING: I'll wait, Judge.

16 JUDGE PRIDGIN: Thank you. I think I'll  
17 also reserve my questions we may have, Mr. Youngs.  
18 Ms. Shemwell, will you or Mr. Williams be --

19 MS. SHEMWELL: I think Mr. Youngs is not  
20 finished.

21 JUDGE PRIDGIN: Oh, I'm sorry.

22 MR. YOUNGS: I'll do what you want, but  
23 would like to address some --

24 JUDGE PRIDGIN; Certainly. I'm sorry. I  
25 thought you were finished. I'm sorry.

1                   MR. YOUNGS: This is the section of opinion  
2 that I believe the Judge was referring Mr. Eftink to in  
3 his questions, and it can't be any more clear. Aquila is  
4 seeking to build an electric power plant, a matter that is  
5 governed by Section 393.170.1. 393.170.1, you know,  
6 Mr. Eftink asks you to look at the opinion, he asks you to  
7 look at 393.170, he asks you to look at 64.235, and then  
8 he asks you to ignore each and every one of those sections  
9 and what they say in favor of little bits and pieces of  
10 other statutes and other cases.

11                   You have to start, as the Court of Appeals  
12 has said, with the plain language of the statute itself.  
13 And Section 393.170.1 clearly does not contemplate an  
14 obligation to seek or provide the Commission with evidence  
15 of proper municipal -- consent of the proper municipal  
16 authorities. That is a line certificate section. It's  
17 undisputed that that's what we're talking about today and  
18 that it's governed by that subsection.

19                   Area certificates, as the Court of Appeals  
20 has said both on this occasion and back in I think 1989,  
21 when Judge Guitan, writing for the Western District, wrote  
22 about it in the Union Electric case, area certificates are  
23 covered by subsection 2. Those are the certificates by  
24 which Aquila has the authority to serve a territory. And  
25 under those circumstances, Aquila is obligated to provide

1 evidence that it has received the required consent of the  
2 proper municipal authorities.

3                   And it's done that. It's had that  
4 authority, as Mr. Comley has conceded, since 1917 when it  
5 was issued a franchise in Cass County, which is the area  
6 most of which is covered by the 1938 certificate that I  
7 know the Commission is well aware of. There is absolutely  
8 no other section of Chapter 393 -- or Section 393.170 that  
9 requires the kind of proof that Mr. Eftink is indicating  
10 is necessary.

11                   In fact, even if there was some evidence  
12 required of local consent, we've got it. As I've talked  
13 about, the Union Electric court clearly set out what type  
14 of local consent is contemplated under that section, and  
15 it is exactly what we have. Utility franchises are no  
16 more than local permission to use the public roads and  
17 right of ways in a manner not available to or exercised by  
18 the ordinary citizen. There is no other type of county  
19 consent required. Nor is there any other type of county  
20 consent statutorily permitted for Cass County under these  
21 circumstances.

22                   Under any circumstance, StopAquila's  
23 argument that that local consent must be in the form of  
24 local zoning approval, it just doesn't make any sense.  
25 It's circular reasoning at its best. The Court of Appeals

1 made it clear that either county zoning approval or  
2 Commission authority is needed by Aquila, not both. The  
3 Court of Appeals further said that if we obtain that  
4 specific approval, we are exempt from county zoning laws.

5                   Judge Dandurand agreed. In fact, when I --  
6 at the hearing in January when I went down the path of  
7 saying there's been some argument that we need both, we  
8 need county zoning approval and we need Commission  
9 approval, Judge Dandurand cut me off and said, I don't  
10 think the Court of Appeals said that, and I said, neither  
11 do I. And that's -- he's right, and so is Aquila.

12                   The bottom line is 64.235's exemption would  
13 be meaningless if the Commission accepted StopAquila's  
14 arguments. That's all I have to say. I think both  
15 motions should be denied. I'll be happy either now or at  
16 any point to answer any questions by the Court or the  
17 Commissioners.

18                   JUDGE PRIDGIN: Again, thank you. Let me  
19 see if we have questions from the Bench for right now.  
20 Commissioner Gaw?

21                   COMMISSIONER GAW: No, thank you.

22                   JUDGE PRIDGIN: Commissioner Appling?

23                   COMMISSIONER APPLING: Mr. Youngs, good  
24 morning. How are you doing?

25                   MR. YOUNGS: Good morning, sir.



1                   COMMISSIONER APPLING: I'm looking at the  
2 1917 franchise. Is it your belief that Aquila had the  
3 authority to turn directly to Cass County based on this  
4 franchise and this right of those?

5                   MR. YOUNGS: I missed the verb in your  
6 sentence. Did we have the authority to do what?

7                   COMMISSIONER APPLING: Did they have the  
8 authority initially to build that plant there under the  
9 1917 law?

10                  MR. YOUNGS: The Court of Appeals has  
11 indicated, and we agree, that the franchise itself does  
12 not speak to authorizing power plants.

13                  COMMISSIONER APPLING: Right.

14                  MR. YOUNGS: The law is, as the Court of  
15 Appeals confirmed, and I think it's important to note that  
16 the Court of Appeals initially issued an opinion back in  
17 June of 2005 that said, since your franchise doesn't say  
18 power plant, you can't build a power plant, case over. We  
19 sought rehearing, and that opinion was disposed of in  
20 favor of the opinion was issued in December of 2005.

21                  And we believe the Court said and agreed  
22 with us that under 229.100, which is the statutory  
23 authority for the county issuance of a franchise like the  
24 one we had from 1917, the County is not empowered to give  
25 a franchise that authorizes the construction of a power

1 plant.

2                   So I guess my answer to your question would  
3 be the 1917 franchise does not authorize the construction  
4 of the facilities that are at issue here. It allows us  
5 under subsection 2 to serve that territory, and as the  
6 Court of Appeals has said, in order to build those  
7 facilities, we need to obtain specific approval for them  
8 from you. And that's why we're here.

9                   COMMISSIONER APPLING: Thank you.

10                  JUDGE PRIDGIN: Mr. Youngs, I don't have  
11 any questions for you. We may have questions for you or  
12 another counsel may have.

13                  MR. YOUNGS: Thank you.

14                  JUDGE PRIDGIN: Thank you. Ms. Shemwell or  
15 Mr. Williams?

16                  MR. WILLIAMS: May it please the  
17 Commission? Nathan Williams appearing on behalf of the  
18 Staff. Like Aquila, it's the Staff's position that the  
19 Commission should construe its jurisdiction broadly. What  
20 you really have in front of you here today are questions  
21 of law that have been raised by parties concerning the  
22 Commission's jurisdiction to address matters in the  
23 application that Aquila's filed here.

24                  Staff's perception that most if not all of  
25 these issues have been raised by Cass County and



1 provision that says that if you've gone ahead and built  
2 the plant without having gotten Commission authorization,  
3 you're going to have to tear it down.

4                   As to the other matters, the Staff believes  
5 that it's argued well in its pleadings and that the other  
6 parties have touched upon them. So unless there are  
7 questions, I don't have anything further here to say  
8 today, at this point in time.

9                   JUDGE PRIDGIN: All right. Mr. Williams,  
10 thank you, and let me see first if we have any questions  
11 from the Bench.

12                   COMMISSIONER GAW: I will, but not now.

13                   JUDGE PRIDGIN: Thank you. Commissioner  
14 Appling?

15                   COMMISSIONER APPLING: I will wait,  
16 Mr. Williams. Thank you.

17                   JUDGE PRIDGIN: Commissioner Appling, thank  
18 you.

19                   I think I have a quick question or two,  
20 while I'm thinking of it. And I hope I'm -- I hope I'm  
21 recalling the statement correctly. How do you respond to  
22 StopAquila.org's argument that 64.235 is an exemption for  
23 a utility to have to go the county planning board but not  
24 to the county commission?

25                   MR. WILLIAMS: I think if you read 64.235,

1 if you give me a minute...

2 JUDGE PRIDGIN: Certainly.

3 MR. WILLIAMS: I think if you read the  
4 section in its entirety, what it indicates is that the  
5 county commission can overrule the county planning board,  
6 and that nothing within that section addresses that, nor  
7 shall anything herein interfere with such development of  
8 public improvement as may have been or may hereafter be  
9 specifically authorized or permitted by a certificate of  
10 public convenience and necessity.

11 I don't think it applies. I don't think  
12 it's limited to the county planning board. It looks to me  
13 like that exemption applies to zoning in general.

14 JUDGE PRIDGIN: And I think -- and I don't  
15 believe it was your brief, Mr. Williams, but General  
16 Counsel's Office I think replied to StopAquila.org's  
17 motions and stated that you believed StopAquila.org was  
18 mischaracterizing Staff's position, and I think that was  
19 Ms. Shemwell's brief and maybe she's better to address  
20 that.

21 What she said, she was only touching on  
22 what she thought were the most egregious misstatements,  
23 and I wonder if either of you have any other misstatements  
24 that you wanted to bring to the Commission's attention.

25 MR. WILLIAMS: I don't have any I want to

1 raise here today, aside from what we've already indicated  
2 in our pleadings.

3 JUDGE PRIDGIN: Ms. Shemwell, is there  
4 anything else that you didn't add in your pleadings that  
5 you wanted to call to the Commission's attention?

6 MS. SHEMWELL: No, not during this hearing,  
7 thank you.

8 JUDGE PRIDGIN: Thank you. All right.  
9 Mr. Williams, I don't think I have any further questions  
10 for you, but the Commission may have questions for you or  
11 for Ms. Shemwell later.

12 MR. WILLIAMS: Certainly.

13 JUDGE PRIDGIN: Thank you. And I think  
14 Mr. Coffman, if I'm not mistaken, is the only other party  
15 who has filed responsive pleadings to the motion; is that  
16 correct?

17 Mr. Coffman, did you have anything for the  
18 Commission?

19 MR. COFFMAN: Yes, briefly. Thanks. May  
20 it please the Commission? I appreciate the opportunity  
21 for you to hear my comments on behalf of those people who  
22 do live directly across the street from the power plant or  
23 so close that I hope no one would be arguing that they are  
24 not significantly affected by this decision and by what is  
25 going on.

1                   And I tell you, I have to admit that I  
2 don't know if there's a case that I have seen that has  
3 caused me to lose more sleep than this one. It just  
4 boggles my mind that we are even here having this utility  
5 suggest to you that you would even consider a zoning  
6 decision, that that somehow falls in the lap of the  
7 Missouri Public Service Commission. And I don't think  
8 you've heard or seen anywhere the claim that the  
9 Commission has zoning authority. The law's very clear the  
10 Commission does not have zoning authority.

11                   The Commission does not have -- has not  
12 promulgated any rules that would permit it to consider the  
13 type of evidence and decisions that a local zoning  
14 authority would consider. And I think that the  
15 implication is outrageous that if you are to in some way  
16 preempt the zoning authority of the local community, that  
17 that's not in and of itself a zoning decision.

18                   The only way that you can reconcile these  
19 statutes is to understand that the Legislature understood  
20 or expected that there would not be a certificate, even a  
21 construction certificate ordered by this Commission unless  
22 there had been the required consent by the community.

23                   And I know with a -- an area certificate  
24 that required consent of the municipality has been  
25 considered the franchise, and we have not typically in my

1 experience done power plant certificates. It's been more  
2 or less merged over the last few years. We've had power  
3 plants.

4 I know the Callaway plant, the water plant,  
5 Missouri-American near st. Joe, essentially those were  
6 power plant approvals. They were certifi-- they were  
7 described as area certificates, but they covered  
8 essentially just the area that the power plant was on.  
9 And in those cases, all the ducks were in a row. All of  
10 the local zoning authorities had been secured.

11 In this case, one of the things that is so  
12 outrageous to me is that Aquila had these turbines. They  
13 were looking for places to place them. They didn't know  
14 what to do with them exactly, and they had proposed other  
15 locations, and in those cases they had at least begun the  
16 process of trying to get local zoning authority.

17 We can only assume that they figured that  
18 that was too difficult for whatever timetable they had,  
19 and they got advice from somewhere that said, well, maybe  
20 we can just go ahead and do whatever we want and try to  
21 figure out how to get approval later, or maybe we won't  
22 even have to. Maybe our lawyers will come up with some  
23 creative arguments.

24 And Cass County, I have to say I'm  
25 impressed with them. I mean, they were vigilant, and when



1 they saw this going on without their authority, they went  
2 as quickly as apparently I would think anyone could have  
3 and they went to the court and they got an injunction  
4 saying, you cannot do this.

5                   Aquila went ahead anyway. They posted a  
6 bond. They said, well, we'll take our chances at court.  
7 And they went to the Court of Appeals and they lost. The  
8 Court of Appeals said, you did not at that time have the  
9 proper authority to do that. That's what -- I mean,  
10 underlying some other arguments and other behavior, that  
11 to me is one of the most amazing things.

12                   And now, to come back and say, well, gee,  
13 you know, well, maybe we can get approval now, and then to  
14 argue that because it's already there, you really should  
15 consider our motions more favorably when, in fact, that  
16 was done, essentially almost all the construction done  
17 after they were told they did not have the authority to do  
18 that. Just imagine how that must feel to the people who  
19 are most affected.

20                   The decision, if you look at the Court of  
21 Appeals decision, it's fairly logical, makes a lot of  
22 sense, talks about the dual authority of zoning and the  
23 Commission certificate authority, until you get to that  
24 last sentence, which was added on. And I think that what  
25 you have to do is understand that -- I disagree with

1 Aquila, that was not a directive as much as a statement of  
2 what the decision was not about.

3                   Courts make decisions only as far as they  
4 have to make them. They issue holds, and sometimes it  
5 doesn't make everyone happy because it doesn't resolve all  
6 of the issues. They only resolve what is in dispute and  
7 what is clearly before them. And I think when they said  
8 that this decision does not mean that after this fact  
9 Aquila might secure the necessary approvals, I think what  
10 they were saying is that we're not addressing those  
11 issues. We're not saying, even though issues may seem  
12 apparent here about whether you have to get approval  
13 before the first spade of earth is turned, they're saying,  
14 we're not to say -- this decision isn't addressing those  
15 issues. So unfortunately, we may have to address those  
16 decisions at a future time. I'm hoping not.

17                   I filed a motion yesterday. I think it is  
18 essentially consistent with the arguments you had heard  
19 from Cass County, although I think that it does suggest  
20 maybe a different way -- I mean, Cass County suggested  
21 maybe you could go ahead, issue a certificate conditioned  
22 on there being approval from the local zoning authority  
23 before that certificate would be effective.

24                   And I think that at this time it would make  
25 sense for the Commission to at least state how it's

1 viewing this state and state that this proceeding is not  
2 going to be about zoning, that we're going to limit the  
3 scope of this proceeding, if in fact -- you know, I agree  
4 with Cass County. I think that required municipal  
5 authority is required before any certificate is -- I don't  
6 think that sentence refers only to subsection 2.

7 I think it applies to subsections 1 and 2,  
8 but if you wanted to proceed, I don't think that it would  
9 be unlawful, provided that the Commission says we have a  
10 role, we have the ability to consider whether power is  
11 needed in this region, whether it makes sense in this area  
12 to have a power plant, with the understanding that we are  
13 not attempting to usurp that local control, that that  
14 zoning authority is still intact, and frankly, I think  
15 that's the law.

16 But if you proceed in that way, I don't  
17 think there would be any question that the Commission  
18 could proceed as long as it's respecting the zoning rights  
19 that are there. You know, and I think that's what 393.170  
20 assumed. And, you know, when you look at -- you read  
21 Chapter 386.393 all the way through, it does not say  
22 anywhere in there that the Commission has zoning  
23 authority.

24 I'm pretty sure the Commission cannot act  
25 in an area that it does not have authority, and it clearly

1 does not say that the Commission has the power of eminent  
2 domain. It does not have the power to bless a utility's  
3 exercise of condemnation.

4                   And so I think that that has to -- that  
5 clarification is really needed at this point. If we  
6 proceed to hearing with all these issues in such a mottled  
7 state, it will just be -- we'll be here for weeks, I'm  
8 afraid. So I think that it's really to everyone's benefit  
9 for the Commission to draw the line around what exactly  
10 this case is about. And I submit to you it cannot be  
11 under the law about zoning or taking away zoning  
12 authority.

13                   And in addition, another thing the Court of  
14 Appeals did not address, and that is 64.285, which was a  
15 statute that was apparently adopted at the same time as  
16 the statute that they claim is the reason they would get  
17 some sort of exemption preempting local zoning. And that  
18 statute, enacted at the very same time says, well, if you  
19 have a conflict between a statute and zoning regulation,  
20 the zoning regulations trump the statute, the zoning  
21 supersedes it. And I don't see how you get around that.

22                   I assume that you will hear from Staff and  
23 Aquila that they're going to say, well, you can issue a  
24 certificate, it's not a zoning decision, it's not eminent  
25 domain, but when you look at what they're saying, in the

1 end it has that same effect. They're still arguing that  
2 if they get this approval, they don't have to go and get  
3 county zoning and that it doesn't matter what the folks  
4 down there think -- thought were their rights and what the  
5 zoning master plan said about their property.

6 I'll take questions.

7 JUDGE PRIDGIN: Mr. Coffman, thank you.

8 I'll see if we have any Bench questions first.

9 COMMISSIONER GAW: Are we done?

10 JUDGE PRIDGIN: We'll see if we have any  
11 more questions. First of all, I do have a couple other  
12 counsel who did not file pleadings. Did either SIEUA or  
13 OPC have a statement for the Commission? Mr. Conrad is  
14 saying no. Mr. Poston, no?

15 All right. So no further counsel.

16 Commissioner Gaw, did you have --

17 COMMISSIONER GAW: Whenever we're ready.

18 JUDGE PRIDGIN: All right. And  
19 Commissioner Appling, any questions for Mr. Coffman?

20 COMMISSIONER APPLING: He seemed to be  
21 running this morning, so maybe I should let him hurry back  
22 to his seat. Thank you.

23 JUDGE PRIDGIN: I believe before we -- I  
24 think Commissioner Gaw's going to have some questions for  
25 counsel. This looks to be a convenient breaking point.

1 So let's go off the record and take a break and try to  
2 reconvene in 15 minutes.

3 (A BREAK WAS TAKEN.)

4 JUDGE PRIDGIN: We are back on the record.  
5 I wanted to give the Bench the chance to ask questions of  
6 counsel. We may not go necessarily in any order, so ask  
7 counsel to be prepared to answer questions from the Bench.  
8 And, Commissioner Gaw, did you have any questions?

9 COMMISSIONER GAW: Just a few, thank you,  
10 Judge, with recognition that the word few may be  
11 interpreted broadly.

12 First question, can anyone tell me whether  
13 or not Section 64.235 was discussed by the Court of  
14 Appeals in the Cass County case?

15 MR. YOUNGS: It was not.

16 MR. EFTINK: It was not discussed in the  
17 Court of Appeals.

18 MR. YOUNGS: Although it was -- I shouldn't  
19 say that it was not referenced. As the Commission is  
20 aware, at the end of the opinion there is an appendix, and  
21 in that appendix are all the zoning enabling acts set  
22 forth for first class charter, first class non-charter and  
23 second and third class counties, and they are all in  
24 there.

25 And the Court's point in the appeal was

1 that all of -- No. 1, all of them were enacted at the same  
2 time. They were all enacted in 1959. So there's a  
3 presumption that the Legislature knew what it was doing  
4 when it enacted all these various provisions, and I think  
5 the point that I would like to make with regard to those  
6 sections is that you cannot assume that the Legislature  
7 did not intend for the exemption in 64.235 to be trumped  
8 by other statutes that are in that same group of statutes  
9 that address the same area, and that is planning and  
10 zoning in these various counties.

11 But the short answer to your question,  
12 Commissioner, is that the Court did not specifically deal  
13 with that issue.

14 COMMISSIONER GAW: Okay. Thank you.

15 MS. MARTIN: And an even shorter answer to  
16 the question is, the appendix that is attached to the  
17 opinion makes absolutely no reference to 64.285 at all.  
18 It's not mentioned at all as one of the six statutes that  
19 are articulated there.

20 COMMISSIONER GAW: Okay.

21 MR. EFTINK: Commissioner?

22 COMMISSIONER GAW: Yes?

23 MR. EFTINK: Further, if you look at the  
24 last page --

25 JUDGE PRIDGIN: Mr. Eftink, can I get you

1 to flip your microphone on, please?

2 MR. EFTINK: If you look at the last page  
3 of the appendix of that Court of Appeals decision, it  
4 shows the years of enactment of those selected statutes  
5 that the Court of Appeals puts in the appendix. One group  
6 was enacted in 1941, one group was enacted in 1951, and  
7 one group was enacted in 1959, and the Court did not take  
8 all of the statutes that deals with zoning and put it in  
9 the appendix, just a few. Thank you.

10 COMMISSIONER GAW: When was 285 enacted?

11 MS. MARTIN: I believe it was 1959, which  
12 was the same year 64.235 was enacted, Commissioner.

13 COMMISSIONER GAW: All right. What's  
14 Aquila's argument in regard to how the Commission is to  
15 skirt or get around 285?

16 MR. YOUNGS: Section 64.235, again, is part  
17 of the same statutory framework of zoning regulations  
18 dealing with first class non-charter counties. In 64.235  
19 there is an exemption from county zoning, and in fact, in  
20 Section 64.285, if I can find it here, the last section  
21 whenever the county zoning regulations made under the  
22 authority of Sections 64.211 to 64.295, which clearly  
23 includes 64.235, and then it goes on. At the end it says,  
24 the provisions of the regulations made under authority of  
25 Section 64.211 to 64.295 shall govern.



1                   And it would be Aquila's position that  
2 since 64.235 is included in that range, you can't ignore  
3 the exemption, the clear just unequivocal exemption from  
4 county zoning that's contained in 64.235.

5                   MS. MARTIN: Commissioner, if I could  
6 respond to that.

7                   COMMISSIONER GAW: Please.

8                   MS. MARTIN: I disagree with counsel's  
9 characterization of 64.235 as articulating exemptions to  
10 county zoning. 64.235 discusses planning board authority  
11 with respect to approval of developments consistent with  
12 master plans. That is something different.

13                   And, in fact, the Court of Appeals'  
14 opinion -- and again, I have the print off from WestLaw --  
15 goes to great lengths to describe that 64.235 is in that  
16 series of statutes relating to different sizes of counties  
17 that address planning board approval for improvements of a  
18 type embraced within the recommendations of a county's  
19 master zoning plan.

20                   It distinguishes three other types of  
21 statutes that address county commission zoning powers.  
22 And in particular, with respect to first class non-charter  
23 counties, which Cass County would be, the statute that  
24 relates to county commission zoning powers is the one  
25 identified by the Court of Appeals in Footnote No. 8 as

1 64.255, and the Court of Appeals made the express finding  
2 that that particular zoning statute, which articulates the  
3 county commission's zoning power, does not include an  
4 exemption relating to public utility use.

5 JUDGE PRIDGIN: Ms. Martin, to make sure I  
6 understood your cite, is that 64.255?

7 MS. MARTIN: The second statute I referred  
8 to is 64.255.

9 JUDGE PRIDGIN: Thank you.

10 COMMISSIONER GAW: Response from Aquila?

11 MR. YOUNGS: There is no question but that  
12 the Court of Appeals held that we have an exemption from  
13 county zoning pursuant to 64.235 if we have the specific  
14 authority for the facilities issued by this Commission.  
15 That question -- this is the first time that I've heard  
16 anybody in such detail say that the Court of Appeals  
17 didn't hold that.

18 COMMISSIONER GAW: Show me where that is.  
19 I'm not disputing what you're saying. I just want to  
20 know.

21 MR. YOUNGS: I believe that that is -- as  
22 Mr. Comley is whispering in my ear, and I'm assuming that  
23 he's being genuine. I have it on page 32, because we  
24 find that Aquila qualifies for an exemption under  
25 Section 64.235 and because Aquila did not seek a permit

1 from the county commission before commencing construction,  
2 we must determine whether it has been authorized by the  
3 Commission to build these facilities and is thus exempt.

4           That section, 64.235 again is in the same  
5 series of statutes as the others that are cited by the  
6 com-- or by the County, and it would make absolutely no  
7 sense and the County does not advance a theory for why the  
8 exemption would apply under 64.235 but somehow not in  
9 Section 255.

10           MS. MARTIN: Commissioner Gaw, that  
11 provision of the opinion does not address the question  
12 that you raised of counsel. It does not say that Aquila  
13 is exempt from county zoning. What that paragraph read by  
14 counsel is designed to do is to summarize the discussion  
15 of the Court of Appeals on the preceding pages relating to  
16 statutory interpretations of 64.235.

17           As a matter of context for the Commission,  
18 the County had advanced an argument that 64.235, read  
19 literally, would only allow certain developments that have  
20 been proposed by municipalities, county commissions or  
21 public boards to ever be entitled to the potential  
22 exemption further articulated in that statute.

23           The Court of Appeals addressed that  
24 argument first in its opinion and came to the conclusion  
25 that some of the language in 64.235 created enough of an

1 ambiguity that it was going to take the position that any  
2 development by whomever proposed, including a public  
3 utility, could qualify for the exemptions articulated in  
4 64.235.

5                   Thus when the Court of Appeals says in its  
6 opinion, quote, because we find that Aquila qualifies for  
7 an exemption under Section 64.235, closed quote, it is  
8 referring to its determination that Aquila, like any  
9 developer, not just municipalities, public boards or  
10 county commissions, could be eligible for that exemption.

11                   The sentence I just quoted from goes on to  
12 say, and because Aquila did not seek a permit from the  
13 county commission, and let me stop with that phrase. That  
14 sentence refers back to one of the ways that one could  
15 secure an exemption from 64.235. That sentence or phrase  
16 is not a reference to an exemption from county zoning.

17                   MR. YOUNGS: I'm just --

18                   COMMISSIONER GAW: Go ahead. This is an  
19 interesting argument.

20                   MR. YOUNGS: I don't mean for it to be a  
21 free for all, but I do want to respond.

22                   Why in the world, then, would the Court of  
23 Appeals not have relied on 64.255 to say that no matter  
24 what Aquila got from the Public Service Commission, it did  
25 not have zoning authority for these and there was no

1 exemption found in 64.255; therefore, the case is over?

2                   They did not do that. In fact, they took  
3 great pains to do the exact opposite, which was to say  
4 that 64.235 applied, there's an exemption in it, and in  
5 order to fall within the exemption, we need specific  
6 authority for the facilities and it's not too late for us  
7 to get them. That's what they said.

8                   COMMISSIONER GAW: So how do you get around  
9 the language in 235 that seems to imply that it's  
10 referring not to the county commission, it outright states  
11 it's not referring to the county commission, but to the  
12 planning board?

13                   MR. YOUNGS: I think my response to you is  
14 the same, Commissioner, and that is that those are all  
15 in pari materia, and they are all to be read together, and  
16 there's no exemption required under that section.

17                   COMMISSIONER GAW: And was the argument  
18 raised in front of the Court of Appeals in regards to 255?

19                   MR. YOUNGS: Well, the Court of Appeals  
20 clearly referenced Section 255.

21                   COMMISSIONER GAW: But was it raised? Was  
22 it argued in front of the Court of Appeals?

23                   MR. YOUNGS: Aquila did not, and I can't  
24 speak for the other parties. I cannot recall.

25                   COMMISSIONER GAW: Can anyone else shed

1 light?

2 MS. MARTIN: 64.235 was the focus of the  
3 argument before the Court of Appeals, and that was because  
4 it was the source of Aquila's claimed exemption from any  
5 authority that the County might have over it. The focus,  
6 therefore, was whether there was some exemption from  
7 county land use regulatory control, and thus the focus of  
8 argument was 64.235.

9 It didn't even have to get to 64.255, and  
10 clearly Aquila does not advance to this Commission, did  
11 not advance to the Court of Appeals and in Footnote 8, the  
12 Court of Appeals found that 64.255 would provide no solace  
13 to Aquila because it does not contain any type of an  
14 exemption for public utilities from zoning.

15 I think it's a foregone conclusion that  
16 there's no exemption from zoning. The only issue before  
17 the trial court and thus the Court of Appeals was whether  
18 there was some exemption that allowed Aquila to abandon  
19 any compliance with land use regulatory authority of the  
20 County because of the passage in 64.235.

21 COMMISSIONER GAW: And same question on  
22 285, was it raised and argued?

23 MS. MARTIN: No, sir.

24 MR. COFFMAN: If I might add, I think --

25 COMMISSIONER GAW: Yes, Mr. Coffman.

1                   MR. COFFMAN: -- that in a sense, the Court  
2 was making sure at the end of its order on rehearing that  
3 everyone understood the limitations of its holdings in  
4 that case, and that it was not addressing what required  
5 consent means under 393.170. It was not addressing the  
6 issues relating to whether Aquila could come in after the  
7 fact and exactly -- saying this decision does not preclude  
8 those -- that attempt from being made, and if the issues  
9 that we're talking here today clash, then we'll consider  
10 that in a future appeal.

11                   To me, the only thing that makes sense in  
12 interpreting these statutes in Chapter 64 in pari materia  
13 is to understand that the Legislature understood that the  
14 Commission has always required zoning to be in place  
15 before it issued a certificate, that it understood that  
16 that was the practice and, you know, in 393.170, the law.  
17 And that -- you know, that if that required consent had  
18 been given for proper zoning or whatever was required for  
19 what was being requested, it didn't make sense that the  
20 utility would have to go back a second time.

21                   MR. YOUNGS: What -- excuse me. I'm sorry.

22                   COMMISSIONER GAW: Go ahead.

23                   MR. YOUNGS: What doesn't make sense is  
24 that the Legislature would say that there is no exemption  
25 from county planning board zoning authority, but at the

1 next level of zoning authority, at the county level, the  
2 county commission, there is.

3                   There's no -- there's absolutely no reason  
4 to read those, and in order to read those in that way, you  
5 have to assume that 64.235's exemption was intended to be  
6 meaningless, and there's no authority for that kind of an  
7 interpretation of that provision. You don't assume that  
8 the Legislature put that exemption in 64.235 for it to be  
9 ignored because of a consideration of another section.

10                   COMMISSIONER GAW: Well, would it -- help  
11 me to understand why you say that would be ignoring those  
12 provisions if it creates an alternative from going through  
13 the planning board.

14                   MR. YOUNGS: Are we talking about 255 or  
15 235?

16                   COMMISSIONER GAW: 235.

17                   MR. YOUNGS: Section 235, again, since it  
18 applies to improvements to conform to plan approval  
19 required, I mean, that is the heading of the statute, and  
20 it goes by and says how you do that, and it creates one  
21 way to do it, which is to go through the county commission  
22 to get zoning approval, or it says you come to the Public  
23 Service Commission. That's the exemption, and it says  
24 nothing, nor shall anything herein interfere with such  
25 development or public improvement as may have been or may



1 hereafter be specifically authorized or permitted by the  
2 Public Service Commission.

3                   And so it absolutely makes no sense for  
4 that specific of an exemption from -- and I know what the  
5 County says, it's not county zoning, it's county  
6 commission zoning, but that's not the question. It's  
7 county zoning. Why would there be an exemption in that  
8 section that would then be taken away by another section  
9 in the same series of statutes that were all enacted at  
10 the same time? It just doesn't make any sense.

11                   COMMISSIONER GAW: Well, is it not possible  
12 that a utility could site or request to site a plant in a  
13 portion of the county that was already ap-- where the  
14 placement was already in compliance with the zoning?

15                   MR. YOUNGS: Yes, it is.

16                   COMMISSIONER GAW: And if that were not the  
17 case, could you not look at this as a direction in regard  
18 to the need not just to get -- secure the appropriate  
19 authority, if necessary, from the County because if you're  
20 not -- if you're not going to need additional authority,  
21 since you're putting it in an area -- if you were putting  
22 it in an area that was where the placement was appropriate  
23 according to the zoning rules, and then you would also  
24 have to acquire the appropriate authority from the Public  
25 Service Commission.

1                   MR. YOUNGS: That's correct. In fact, we  
2 believe that's the law.

3                   COMMISSIONER GAW: Okay. So how is that  
4 not consistent, then, in the use of the word "or" rather  
5 than "and"?

6                   MR. YOUNGS: We believe that the Court of  
7 Appeals decision said --

8                   COMMISSIONER GAW: Go ahead.

9                   MR. YOUNGS: -- either that we have zoning  
10 authority or we have specific approval for the facilities  
11 by the Public Service Commission. Under either scenario,  
12 we believe it's pretty clear that the Court of Appeals  
13 said, you have to -- under any circumstances you've got to  
14 get the Commission's approval.

15                   COMMISSIONER GAW: I agree. I think I  
16 agree with that. You have to get the Commission's  
17 approval, but you do not always have to secure the  
18 County's approval if you're placing this -- a plant within  
19 a portion of the county that's appropriately zoned for  
20 that plant. So why would you -- you would not need  
21 authority from the County if the placement were within an  
22 area that was appropriate under the zoning law.

23                   MR. YOUNGS: I think the statutes clearly  
24 contemplate that there might be a circumstance under which  
25 you would go to a site that's already zoned consistently.

1                   COMMISSIONER GAW: Yes.

2                   MR. YOUNGS: But I don't think there's  
3 anything inconsistent with that factual consent and  
4 Aquila's reading of the statute.

5                   COMMISSIONER GAW: Yes. Okay.

6                   MS. MARTIN: The difficulty with  
7 Mr. Young's argument, your Honor, is that to take the last  
8 paragraph of this opinion and the passage that talks in  
9 terms of approval from the county commission or the Public  
10 Service Commission as being a literal summarization of the  
11 Court of Appeals' opinion in its totality as to direct  
12 that one can choose one way or the other, depending on the  
13 winds of the day and whichever place it feels it may get  
14 more favorable treatment, is to ignore the totality of  
15 this opinion that speaks very clearly in terms of the dual  
16 jurisdiction of the Commission with respect to approval of  
17 need for a plant and the dual jurisdiction of a local  
18 authority, such as Cass County, with respect to the  
19 location of a plant.

20                   MR. YOUNGS: That's the kind of phrase --  
21 and I don't mean -- it's going to sound pejorative, but  
22 that's misleading. There's no such thing as dual  
23 jurisdiction. What the Court of Appeals decision said is  
24 that there are interests, there are local interests that  
25 under some circumstances yield to the statewide interest.

1                   And under the Court of Appeals opinion, the  
2 only time that that occurs, and the only time that a  
3 utility like Aquila can get the benefit of that is if we  
4 have sites that are specifically approved by the Public  
5 Service Commission.

6                   Under that circumstance, the Court of  
7 Appeals has held that 64.235 mandates those local  
8 interests, zoning, land use or otherwise, so long as those  
9 land use issues have been considered by the Public Service  
10 Commission in its certificating process, those yield to  
11 the authority of the Commission.

12                   COMMISSIONER GAW: And your argument on  
13 that is based upon the last provisions of this Order, the  
14 last couple of sentences?

15                   MR. YOUNGS: No. I mean, I think that the  
16 Court of Appeals clearly held that we fall within the  
17 exemption of Section 64.235. Our opinion is that, reading  
18 the last paragraph of the Court of Appeals opinion in  
19 which it announces the disposition of the case, the Court  
20 of Appeals simply said that it -- it is not too late for  
21 Aquila to obtain the necessary requirement in order to  
22 fall within the exemption.

23                   COMMISSIONER GAW: Okay.

24                   MS. MARTIN: I think your question can be  
25 answered from the opinion itself, in the section of the

1 opinion that addresses legal analysis and in particular  
2 Aquila's preemption argument, which is effectively what it  
3 is making when it suggests to this Commission that it has  
4 the right to go either/or at its choice, it is suggesting  
5 preemption, that this Commission has the right to preempt  
6 county zoning. And yet, when you look at the opinion, the  
7 opinion clearly says this Commission does not preempt  
8 local zoning.

9                   If you look at the opinion, it specifically  
10 says, because facility location has particularly local  
11 implications, it is arguable that in the absence of any  
12 law to the contrary, local governing bodies should have  
13 the authority to regulate where a public utility builds a  
14 power plant, citing to the city of -- or St. Louis County  
15 vs. City of Manchester case.

16                   That's why I suggest to the Commission that  
17 the dual jurisdiction -- and I use that phrase somewhat  
18 pejoratively, but I mean that one group looks at need and  
19 another group looks at where. That has been the history  
20 in the state of Missouri. That has been the practice of  
21 this Commission before 1980.

22                   When Mr. Youngs talks in terms of ceding  
23 regulatory authority to this Commission, he's again  
24 referencing the Crestwood decision, which he talked about  
25 during his argument before this Commission, completely

1 ignoring that the Court of Appeals opinion addresses both  
2 Crestwood 1 and Crestwood 2 and found neither applicable  
3 to the circumstances of this case.

4           The Court of Appeals expressly held  
5 Crestwood 1 was not about a County's zoning authority, and  
6 I'm quoting from the opinion, and that in Crestwood 2,  
7 again quoting, the Court did not rule that the application  
8 of a zoning ordinance to the siting of a power plant  
9 invaded the Commission's area of regulation and control.

10           All the County asks is for recognition of  
11 what the Court of Appeals clearly understood. It's not an  
12 either/or proposition based upon the utility's whim. It  
13 depends upon the circumstances, and if zoning has not been  
14 secured and is necessary, then this Commission should cede  
15 that decision to the County.

16           MR. YOUNGS: No. 1, that's not the  
17 proposition for which we cited the Crestwood case for.  
18 The proposition for which we cited the Crestwood case for,  
19 recognizing the distinction that the Court of Appeals made  
20 in it, No. 1, it was a transmission line case, there's no  
21 question about that, although in that case it is true that  
22 the Court held that local municipalities, local  
23 governments cannot use their zoning laws to get into an  
24 area that's more properly designated by the Public Service  
25 Commission as one it's supposed to regulate.

1                   The only point to the Crestwood decision's  
2 citation in this procedure is to look at what the County  
3 is asking this Commission to do from a public policy  
4 standpoint, and that is to give up its authority to local  
5 governments, local interests, whether they're political or  
6 otherwise. And the fact of the matter is that is against  
7 the grain of the Public Service Commission Act.

8                   The purpose for the Public Service  
9 Commission Act's enactment in the first place was to take  
10 those decisions out of the types of local interests that  
11 are not -- I'm not saying they're not appropriate, and the  
12 Commission obviously heard the opinions of people on both  
13 sides of the aisle three times over the last couple of  
14 weeks. Those interests are not inappropriate to take into  
15 account, but Section 64.235 indicates a legislative  
16 intention that those interests under some circumstances  
17 yield to the Public Service Commission's statewide  
18 authority and the statewide public interest that this  
19 Commission is obligated to protect.

20                   COMMISSIONER GAW: Mr. Coffman?

21                   MR. COFFMAN: I think that it may be more  
22 accurate to describe the roles of Cass County and the  
23 Commission here as separate and concurrent jurisdictions.  
24 I mean, dual jurisdiction is -- actually sounds more like  
25 what Aquila's arguing, that both Cass County and the

1 Commission both have the ability to do zoning and that  
2 it's the utility that can forum shop and decide where  
3 they're going to get a better decision, and that somehow  
4 both have the same authorities.

5                   And everything in the law and in this  
6 decision points out the difference, that each has its role  
7 to play, and that is why I think it is so important for  
8 the Commission to clarify what it's doing in this case, so  
9 that Aquila would have the opportunity to go seek zoning,  
10 which it has never attempted to do, from Cass County and  
11 that they might have the time to get a proper hearing, you  
12 know, before another attempt to extend the stay on the  
13 injunction goes forward. And that's all.

14                   MR. YOUNGS: That we've not --

15                   COMMISSIONER GAW: One more time, then I'm  
16 going to move on to something else.

17                   MR. YOUNGS: I understand. I disagree with  
18 Mr. Coffman's statement that we've never sought zoning  
19 approval from Cass County, but we don't -- the more  
20 pertinent point that I wanted to address was this issue  
21 that if the Commission does not -- and I'm -- it's not  
22 inaccurate to say, cede its authority over this  
23 application and to consider all the issues associated with  
24 it, Cass County's zoning interests and the land use  
25 interests that they say would be contemplated and



1 processed through a zoning application will not be heard,  
2 that those issues will go unheard by anybody, and it's  
3 just not true.

4                   The fact of the matter is, they filed  
5 testimony yesterday, 40 pages or so of which are from a  
6 land use expert dealing with the very issues that they  
7 want this Commission to consider as part of this  
8 application process. So I don't want the Commission to be  
9 laboring under the misconception that if it considers and  
10 denies the County's motion to dismiss or in the  
11 alternative to send a portion of this hearing to the  
12 County for zoning application, that those issues are not  
13 going to be heard. You have the power to hear them all.

14                   COMMISSIONER GAW: I think what it's -- at  
15 this stage, Mr. Coffman's point is well taken in regard to  
16 what happens if this case moves forward as to defining  
17 what it is this Commission is deciding, because I don't  
18 think that has been clarified, and I don't think that it's  
19 fair to the parties to labor under speculation about that,  
20 no matter which side of this argument you are on.

21                   MS. MARTIN: And we appreciate that,  
22 Commissioner, which is why we were forced to file certain  
23 rebuttal testimony by the deadline yesterday that frankly  
24 would get into issues that we feel would be more  
25 appropriately determined by the County.

1 MR. COFFMAN: In fact --

2 COMMISSIONER GAW: I understand that. I  
3 think all of the parties are in a position here where it's  
4 difficult to evaluate what evidence is appropriate for any  
5 hearing that may be held on this matter.

6 MR. COFFMAN: In fact, Commissioner, I  
7 believe that if the Commission begins to consider this  
8 zoning testimony that has been prepared, I think at that  
9 point it's overstepping its bounds, acting outside its  
10 statutory authority. And that's why this is such a  
11 crucial point in this case.

12 MR. YOUNGS: If the Legislature didn't  
13 believe you had the authority to consider land use issues  
14 such as the ones that we're talking about here, they would  
15 not have passed 64.235 in the first place.

16 COMMISSIONER GAW: I'm not trying to  
17 belabor this argument one way or the other. I'm just  
18 trying to state that I think at least in one  
19 Commissioner's opinion here, it would be helpful for the  
20 parties to know what it is the Commission believes is  
21 relevant if we have a hearing on this matter.

22 MS. MARTIN: I don't think anybody could  
23 disagree with that statement.

24 COMMISSIONER GAW: Mr. Eftink, you've  
25 wanted to say something a while ago. If you still want

1 to, I'll go to you, then I do have some other questions.

2 MR. EFTINK: Well, my good friend  
3 Mr. Youngs speaks as if the Public Service Commission has  
4 zoning authority, and he's concerned about the PSC giving  
5 up its zoning authority and turning it over to the County.

6 But actually, the Court of Appeals on page  
7 30 of its decision said that the Legislature has given no  
8 zoning authority to the PSC. Nor does Aquila cite any  
9 specific statutory provision giving the PSC such  
10 authority. So it's not its authority to cede. The  
11 authority on zoning strictly is that of the County.

12 MR. YOUNGS: I just want the record to  
13 reflect that's not what I'm saying.

14 COMMISSIONER GAW: Okay. Fine. Let me go  
15 to Section 393.170 for just a little bit. And I want to  
16 ask Staff in regard to their earlier statements about what  
17 subsection 1 means, as I understand, you're making the  
18 argument that because there is an absence of language that  
19 suggests that the attempt to build a plant is void, that  
20 somehow that means that the Commission is -- can I assume  
21 you're saying retroactively approve some sort of a  
22 construction under that plant? But I need some  
23 clarification on what your position is there.

24 MR. WILLIAMS: What we're saying is that  
25 where the Legislature has clearly intended that there --

1 that the action without prior Commission approval is  
2 impermissible, it stated that the action is -- resulted in  
3 something that was void.

4 COMMISSIONER GAW: Well, help me out here,  
5 because if that's the case, and I understand that in  
6 regard to a sale, to a transaction involving a note, a  
7 mortgage, I understand that. But how can you ever say  
8 that once you have built something, that it is somehow  
9 void? It doesn't translate to me the same way. How could  
10 you suggest that if someone has already started building a  
11 plant, that the fact that they have built it, the  
12 building, the construction is void?

13 It is -- it doesn't seem logical to me. I  
14 can see setting aside a transaction, but not something  
15 that's been constructed. Do you see something that ties  
16 those two together, some statement that could have been  
17 there that would make sense in regard to the construction  
18 of a plant?

19 MR. WILLIAMS: Sure. There could have been  
20 something that said that any plant so constructed shall be  
21 removed. There's no associated penalty or action that  
22 results for failure to get preapproval.

23 COMMISSIONER GAW: There is no penalty for  
24 violating subsection 1, in Staff's opinion?

25 MR. WILLIAMS: There is not -- I won't say

1 there's no penalty because there is a penalty provision in  
2 the statute.

3 COMMISSIONER GAW: There is, isn't there?  
4 What is that?

5 MR. WILLIAMS: For failure to comply with  
6 statute or law, there can be penalties.

7 COMMISSIONER GAW: And what kind of range  
8 of penalties are there for failing to comply with the law?

9 MR. WILLIAMS: I don't recall off the top  
10 of my head. It's something like up to \$2,000 per day.

11 COMMISSIONER GAW: Does Staff believe that  
12 Aquila has violated subsection 1 in regard to constructing  
13 a plant without getting appropriate permission from this  
14 Commission?

15 MR. WILLIAMS: Staff has not done an  
16 analysis on that.

17 COMMISSIONER GAW: How long does Staff need  
18 to conduct an analysis of that?

19 MS. SHEMWELL: May I respond to that?

20 COMMISSIONER GAW: Absolutely.

21 MS. SHEMWELL: Thank you.

22 COMMISSIONER GAW: I see Mr. Williams has  
23 sat back in his chair.

24 MS. SHEMWELL: Mr. Comley?

25 MR. COMLEY: Yes.

1 MS. SHEMWELL: Staff argued under prior law  
2 before the StopAquila decision that Aquila had authority  
3 from this Commission to go ahead and build. The  
4 Commission had operated that way for many years. After  
5 the StopAquila decision has made clear its position, I  
6 would say that if Aquila came in now to do that, that  
7 certainly they're going to have to comply with  
8 Section 1.

9 However, I'd also like to point out that  
10 Section 1 does not require local zoning consent or local  
11 consent. The Staff's position has been all along that  
12 that local consent is the franchise that they obtain when  
13 they come in, before they come in to the Commission for  
14 their certificate of convenience and necessity to operate  
15 under 393.170, sub 2. That gives them the authority and  
16 also the obligation to serve a specific area.

17 The purpose of a utility franchise is to  
18 give a utility the ability to use the city's streets and  
19 roadways in a way not available to the public in general.

20 COMMISSIONER GAW: Ms. Shemwell, I'm  
21 not referring to subsection 2 right now. I'm in  
22 subsection 1, and in subsection 1, I want to know whether  
23 or not Staff feels like the last portion of that  
24 subsection is at all relevant to anything when it says,  
25 without first having obtained the permission and approval

1 of the Commission? Does Staff believe that those words  
2 are basically erased from the statute books?

3 MS. SHEMWELL: Absolutely not.

4 COMMISSIONER GAW: All right. Then help me  
5 to understand whether or not there is any meaning to be  
6 given to that portion of that subsection.

7 MS. SHEMWELL: The Court has given that  
8 meaning in StopAquila. Staff's position prior to that  
9 case was --

10 COMMISSIONER GAW: Well, obviously Staff's  
11 position was wrong. Isn't that true?

12 MS. SHEMWELL: Staff's position --

13 COMMISSIONER GAW: At least according to  
14 the Court of Appeals?

15 MS. SHEMWELL: Well, Staff's position was  
16 based on the law at the time.

17 COMMISSIONER GAW: Staff's position was  
18 based on what law at the time? Show me where the Court of  
19 Appeals in Cass County vs. Aquila overturned a precedent  
20 that they stated in their opinion that they were  
21 overturning past precedent.

22 MS. SHEMWELL: They overturned Harline.

23 MS. MOORE: They did not.

24 COMMISSIONER GAW: Where did they say that?  
25 Ms. Shemwell, I will give you five minutes if you would

1 like to show me where in that opinion -- and I will go to  
2 someone else. Show me where in that opinion the Court of  
3 Appeals said that they overturned their previous decision  
4 in Harline.

5 MS. SHEMWELL: Well, they say --

6 COMMISSIONER GAW: Would you like five  
7 minutes?

8 MS. SHEMWELL: I may want it, but let me  
9 say this first. What they noted was that for a long time  
10 the Commission had not felt that it was necessary to grant  
11 specific approval, and that the Commission had operated  
12 that way since the 1980s, and that the Commission had not  
13 been granting site-specific approval.

14 COMMISSIONER GAW: When was Harline  
15 decided, Ms. Shemwell?

16 MS. SHEMWELL: '68.

17 MS. MARTIN: 1960.

18 MS. SHEMWELL: Sorry, 1960.

19 COMMISSIONER GAW: 1960.

20 MS. SHEMWELL: But what we argued to the  
21 Commission, Commissioner Gaw --

22 COMMISSIONER GAW: So do you need another  
23 three minutes?

24 MS. SHEMWELL: I'd better take that, it  
25 sounds like.



1                   COMMISSIONER GAW: Yes. I would like to --

2                   MR. YOUNGS: Commissioner, you asked that  
3 question of Staff, but I would like to be heard on it, if  
4 you'll let me.

5                   COMMISSIONER GAW: I'll come over to you in  
6 just a minute.

7                   MR. YOUNGS: That's fine.

8                   COMMISSIONER GAW: In regard -- I'd like to  
9 hear from -- from the County as to whether or not they  
10 believe Harline was overturned by the decision in the  
11 Court of Appeals case.

12                   MS. MARTIN: Harline was not overturned by  
13 the Court of Appeals. Harline was absolutely affirmed and  
14 restated. What the Court of Appeals said very clearly is  
15 that the Commission's apparent unilateral change in  
16 direction in 1980, with no apparent foundation to do so --  
17 I think that's almost an exact quote from the opinion --  
18 to decide all of a sudden that it would not require plants  
19 to be preapproved before their construction was a  
20 misapplication of the Harline decision by the Commission.

21                   The Court of Appeals did not overturn  
22 Harline, did not change anything with respect to the  
23 findings or holdings of Harline, but clearly said that the  
24 Commission from 1980 on had not been following the law.

25                   MS. SHEMWELL: I agree with that. The

1 Court said the Commission has erroneously interpreted  
2 Harline by extending the Court's reasoning to a case -- in  
3 that case to a public utility's request for specific  
4 authority. But the Commission had been operating under  
5 what this Court now is saying was an erroneous  
6 interpretation of the Commission. The Commission had  
7 operated that way for a long time.

8 The Staff argued in support, I guess, of  
9 the Commission's misinterpretation because the Commission  
10 had been doing that for many years. Staff felt that that  
11 was the law as it was at the time. Now, StopAquila will,  
12 of course, change our opinion of what the law is now, but  
13 we certainly didn't argue anything --

14 COMMISSIONER GAW: Actually, this is the  
15 Cass County matter, I think, not StopAquila, just to be  
16 correct, if I'm not mistaken.

17 MS. SHEMWELL: Every opinion that I print  
18 out styles the case StopAquila.org.

19 MS. MARTIN: We can't control WestLaw, but  
20 StopAquila was not a party to these proceedings from the  
21 point of the final judgment of the trial court through the  
22 Court of Appeals.

23 MS. SHEMWELL: That may be easier, but the  
24 Reporter -- we're doing it the way the Reporter has it for  
25 clarity.

1                   COMMISSIONER GAW: That's all right. It's  
2 not that big of a deal.

3                   JUDGE PRIDGIN: We can call it the Aquila  
4 opinion.

5                   MS. SHEMWELL: Okay. That would work.

6                   COMMISSIONER GAW: Except there are more  
7 than one.

8                   So in regard to Staff's position on  
9 subsection 1, does Staff believe that there is meaning to  
10 be given to that portion of subsection 1 that a gas,  
11 electrical, water corporation or sewer corporation shall  
12 not begin the construction of a plant without having first  
13 the permission and approval of the Commission?

14                   Does Staff believe that that means that  
15 permission must first be granted before beginning  
16 construction?

17                   MR. WILLIAMS: The Staff agrees with the  
18 Court's interpretation that that's the intent of the  
19 Legislature. The point Staff was trying to make is that  
20 there's -- there's a statutory rule of construction that  
21 if no penalty's associated with an expression of intent,  
22 it's not necessarily mandatory, and consummate with that  
23 is the Court of Appeals indication that Aquila has the  
24 opportunity to come in and seek to obtain a certificate  
25 from this Commission or authorization from the county

1 commission for the South Harper plant, coupled with my  
2 understanding that Judge Dandurand has granted Aquila  
3 until May 31 to so obtain.

4 COMMISSIONER GAW: So what does that mean  
5 to you, that this is meaningless, this provision, or that  
6 it has some meaning? What does it mean to you?

7 MR. WILLIAMS: Certainly it's meaningful.  
8 I mean --

9 COMMISSIONER GAW: Okay. And if a -- if a  
10 utility does not seek permission pursuant to subsection 1,  
11 is it potentially subject to penalties under the Public  
12 Service Commission law?

13 MR. WILLIAMS: Prospectively, certainly,  
14 prospectively from the Cass County or StopAquila or --

15 COMMISSIONER GAW: I didn't ask whether  
16 it's prospective or not. I asked you whether or not it  
17 was subject -- potentially subject to penalties.

18 MR. WILLIAMS: Yes.

19 COMMISSIONER GAW: I am sorry. I apologize  
20 to Aquila. I cut you off a while ago. I want you to go  
21 ahead and weigh in, if you want to.

22 MR. YOUNGS: I appreciate the opportunity  
23 to be heard, Commissioner. The only point that I wanted  
24 to make in direct response to your question is, does that  
25 last phrase have any relevance? And I think the clear

1 answer is that, yes, it has relevance. It's in the  
2 statute, so we read it. The only point that I was going  
3 to make was that it has no relevance to the motion that's  
4 before the Commission right now.

5                   What the County is saying is, you read  
6 subsection 1 to not only impose an obligation on Aquila or  
7 any other public utility, but you also read subsection 1  
8 as a limitation on the authority of the Commission to  
9 approve this application. And the first of those  
10 interpretations Aquila agrees with. The second of those  
11 is clearly incorrect because the statute starts, no gas  
12 corporation, electrical corporation, water corporation or  
13 sewer corporation shall.

14                   It's clearly a section that's designed to  
15 impose obligations and duties on utilities, and it cannot  
16 be read in conjunction with these motions to prescribe the  
17 Commission's authority to act as Aquila has requested it.

18                   COMMISSIONER GAW: And would -- I don't --  
19 ignoring the question of this particular case and what may  
20 or may not be fair in regard to penalties, okay, but if we  
21 were dealing with a utility that did not seek prior  
22 approval under subsection 1 on the siting, construction of  
23 a generating unit from the Public Service Commission, do  
24 you believe they would be subject potentially subject to  
25 penalties under this Act?

1                   MR. YOUNGS: Obviously the statute exists  
2 and the statute says what it says, and the answer to your  
3 question is yes, although in that instance, just like in  
4 this particular instance, the Commission would be duty  
5 bound to consider all the facts that went into the  
6 construction of the facilities in the first place.

7                   And in this particular instance, we would  
8 want to make sure that the Commission was aware of the  
9 fact that I think is well known by now that Aquila was  
10 relying on Commission authority, and --

11                   COMMISSIONER GAW: I'm not trying to get  
12 you to argue that case.

13                   MR. YOUNGS: I know that, but I think it's  
14 important for you to know.

15                   COMMISSIONER GAW: It's important to me to  
16 see what the meaning of this section might be, to analyze  
17 whether or not there are any ramifications for not  
18 following it.

19                   MR. YOUNGS: Any time it's alleged not only  
20 by the Commission but by an interested party that Aquila  
21 has violated the law, there's a statutory provision that  
22 allows for an action to impose penalties for that, at  
23 which all those issues would have to be taken up.

24                   COMMISSIONER GAW: Mr. Coffman, did you  
25 have something?

1 MR. COFFMAN: Not at this time. Thanks.

2 COMMISSIONER GAW: Okay. I just want to  
3 make sure. You looked like you wanted to say something.  
4 I wasn't sure.

5 I want to move on to just this general  
6 question of if the Commission does not grant the motions  
7 that are pending before us, have the parties up to this  
8 point in time -- and I'll ask this of the Judge -- have  
9 the parties or has there been any submission of what it is  
10 that this Commission is supposed to consider in this case,  
11 what factors that go into any analysis in this matter?

12 JUDGE PRIDGIN: That was something I was  
13 going to bring up with the parties. In the Commission's  
14 order setting a procedural schedule, a list of issues is  
15 due April the 11th, and that would be the time when we  
16 would expect the parties to tell us what is it that you  
17 want the Commission to decide and why.

18 COMMISSIONER GAW: It makes it somewhat  
19 difficult, it seems to me, for the parties to tell us what  
20 it is that the Commission ought to consider in regard to  
21 the breadth of this case.

22 JUDGE PRIDGIN: And the Commission  
23 obviously can order otherwise. I mean, the Commission can  
24 always issue an Order stating, this is what we're going to  
25 address.

1                   COMMISSIONER GAW: Are the parties aware in  
2 regard to siting issues whether or not there is any past  
3 precedents, any rules, any case law that would give  
4 guidance in regard to the factors that should be examined  
5 in a case of this kind?

6                   MS. MARTIN: By the Public Service  
7 Commission?

8                   COMMISSIONER GAW: Yes.

9                   MS. MARTIN: The question, if I understand  
10 it, presupposes that the Public Service Commission has  
11 previously considered siting issues, and I don't believe  
12 it has. There's a 1973 decision out of the Commission  
13 that is cited in the Court of Appeals opinion that goes to  
14 great lengths to explain that the Commission should and  
15 does give great deference to zoning and local land use  
16 issues to local authorities.

17                   So I believe the answer to your question is  
18 that I'm not aware of any precedent from this Commission  
19 that articulates factors, matters to be considered,  
20 et cetera, with respect to siting.

21                   I will also note, and it's in the record of  
22 these proceedings, that as a part of the case below,  
23 before we ever went up to the Court of Appeals, there was  
24 a resident near the plant who requested some guidance from  
25 the Commission with respect to the Public Service



1 Commission's role in siting plants.

2                   And Wayne -- or Warren Wood, who's a  
3 representative of the Public Service Commission Staff, if  
4 I'm stating that correctly, provided a letter and he also  
5 testified at the trial in front of Judge Dandurand that  
6 the Public Service Commission does not concern itself with  
7 locating precisely plants, but leaves that to local  
8 authorities.

9                   COMMISSIONER GAW: Would someone mind  
10 providing a copy of that?

11                   MS. MARTIN: I will be happy to do that.

12                   COMMISSIONER GAW: Thank you. Mr. Coffman?

13                   MR. COFFMAN: Yes, Commissioner. In the  
14 years that I've been doing this, it has been generally  
15 understood, and I think by the Commission itself, that it  
16 did not have siting authority. It was usually listed as  
17 not being a state that does it, not like the few states  
18 that did. And perhaps it does have the authority.

19                   The question before you now that is the  
20 difficult decision is, does that siting authority somehow  
21 take away local zoning authority? That has never been --  
22 obviously never been considered and no court has ever sent  
23 back, the Cass County decision says the Commission has no  
24 zoning authority.

25                   As to your question about what the

1 Commission should consider, the only cases that I can  
2 think of in the last two years that the Commission has had  
3 this general understanding was the Callaway plant built by  
4 Union Electric. They came in for an area certificate  
5 that, essentially, it wasn't really a certificate to serve  
6 that area. It was just a certificate that would go out to  
7 cover the area which the nuclear plant now sits.

8                   There was in 1995, give or take,  
9 Missouri-American Water Company wanted to build a very  
10 large state-of-the-art water treatment plant outside of  
11 its service territory. Generally it has been the  
12 understanding that if someone wants to build a power  
13 plant, they can within their territory. So both of those  
14 cases they came to the Commission with an area certificate  
15 that just covered the footprint of those large production  
16 facilities, and the evidence presented to the Commission  
17 dealt with whether it was needed, whether they've drawn  
18 the plans correctly and whether they were following, as I  
19 remember, the proper zoning in that area.

20                   I think that the Commission can consider  
21 whether or not a utility is in compliance with zoning. I  
22 do not think the Commission can make a decision about what  
23 the zoning should be. And in every case that I have ever  
24 heard of, and maybe there is a case out there I've not  
25 seen, but I'm not aware of any case where a utility has

1 come and asked for a certificate where it did not have  
2 zoning or the proper authority to do what it was planning  
3 to do, and, you know, generally has been understood that  
4 you had to get all your ducks in a row with the local  
5 officials before you came to the Commission.

6 I don't know if one could be before the  
7 other, but frankly I think that's the meaning of that  
8 local required consent in that, and I think that that has  
9 to be read to be whatever consent is necessary to do what  
10 you do, whether that be zoning or a franchise or whatever.

11 But I don't think that anything that the  
12 Court of Appeals has done has changed that understanding,  
13 that you have to have your zoning in place.

14 And I don't know if I'm answering your  
15 question, but those two cases come to mind as being very  
16 similar to siting decisions where the Commission really  
17 looked at whether this was needed in this area and whether  
18 the plans for the plant met the needs of that facility.  
19 And there was lots of disagreement about that, but never  
20 was it ever contemplated that the Commission was making  
21 some sort of zoning decision. That had already taken  
22 place and was already in line as far as I know.

23 MR. EFTINK: Commissioner?

24 COMMISSIONER GAW: Yes, Mr. Eftink?

25 MR. EFTINK: Could I just quote from the

1 case that Ms. Martin was referring to, because I would  
2 like to give you the citation and give you the exact quote  
3 that we referred to in our briefs. It's the Missouri  
4 Power & Light Company case, 18 Missouri Public Service  
5 Commission, then it says NS, page 116, the Public Service  
6 Commission in 1973 said that, quote, we also find that the  
7 applicant has met our Public Service Commission  
8 requirement, that it has complied with municipal  
9 requirements before construction of the facility, end  
10 quote.

11 I just wanted to put that into the record.

12 MR. YOUNGS: Well, and the record --

13 COMMISSIONER GAW: Hold on. I'm coming to  
14 you.

15 MR. YOUNGS: All right.

16 COMMISSIONER GAW: Are you done,  
17 Mr. Eftink?

18 MR. EFTINK: Yes.

19 COMMISSIONER GAW: Okay. Go ahead. I'm  
20 sorry.

21 MR. YOUNGS: It's meaningless, because the  
22 fact of the matter is, what the Commission was referring  
23 to in that case was the fact that the utility had the  
24 required franchise it needed.

25 MR. EFTINK: That's not true. It had the

1 zoning. The case talked about zoning. Go back and read  
2 that --

3 COMMISSIONER GAW: We'll read it and see  
4 what we think, but -- Mr. Coffman, go ahead.

5 MR. COFFMAN: And the Court of Appeals  
6 cited that case right after the sentence where it said the  
7 Commission has no zoning authority.

8 MS. MARTIN: With approval.

9 COMMISSIONER GAW: Thank you all. I want  
10 to ask Aquila the same general question in regard to what  
11 the Commission ought to be looking at if this case moves  
12 forward.

13 MR. YOUNGS: Well, Aquila certainly  
14 believes it is more than the current zoning classification  
15 of the property, because obviously, if that were the only  
16 issue that the Commission was empowered to take up, then  
17 there wouldn't be much of an issue, because there's no  
18 dispute of the current zoning classification of the  
19 property.

20 I think it's important to note that Aquila  
21 is not requesting that the Commission -- and we don't have  
22 any quarrel with the concept that the Commission does not  
23 have zoning power in the way that it is set out for local  
24 municipalities like Cass County. There's just no dispute  
25 about that.

1                   What the Court of Appeals has said,  
2 however, is that the Commission has the obligation to  
3 consider all kinds of land use issues associated with  
4 siting of these facilities where Aquila has proposed they  
5 be sited. Those can include, like the Missouri -- the  
6 Missouri power case that Mr. Eftink was talking about, the  
7 current zoning classification for the properties at issue.  
8 We think it goes beyond that.

9                   We'll be prepared to provide in a list of  
10 issues and in our surrebuttal testimony additional  
11 materials to that have been provided by the land use  
12 expert that the County has hired, and those will include  
13 issues such as -- you know, there's been some discussion  
14 about the 2005 comprehensive plan versus the 2003  
15 comprehensive plan.

16                   Well, there's a good reason why the County  
17 doesn't want you to look at the most current comprehensive  
18 plan that discusses the land use planning issues related  
19 to these parcels, and that is because the County has  
20 designated significant portions of both of these parcels  
21 as multi-use tiers, in which development exactly like that  
22 which is contemplated by these facilities is approved, and  
23 is, per se, reasonable.

24                   So that's why they don't want you to look  
25 at that, but we will want you to look at and we'll put

1 those issues on. I expect that land use issues will also  
2 consist of discussion like occurred in the last hearing or  
3 was contemplated in the last hearing last year, which  
4 would be effect of the property -- or excuse me -- the  
5 effect of the facilities on surrounding landowners. We'll  
6 be prepared to deal with those.

7                   So there are a lot of issues that slough  
8 into the land use issue, in quotes, category that are, we  
9 believe, pretty well contemplated by the kind of analysis  
10 that the Commission would do in addition to that which is  
11 contemplated now pursuant to the Court of Appeals opinion,  
12 and we'll be prepared to enumerate what those issues are.

13                   MS. MARTIN: Commissioner Gaw, if --

14                   COMMISSIONER GAW: Yes?

15                   MS. MARTIN: I think you've hit the nail on  
16 the head with respect to the struggle of the parties in  
17 trying to embrace what it is that we are supposed to put  
18 into evidence before this Commission without some guidance  
19 from the Commission.

20                   In the absence of that guidance, we're left  
21 to guess at what, in fact, the scope of these proceedings  
22 should be, based on the Court of Appeals opinion, based on  
23 trying to read your mind, and despite our views of the law  
24 that may be inconsistent with some of the evidence we  
25 would be required to put on in order to preserve a record,

1 which is just a dreadful position to be in.

2                   But let me say this to you: Mr. Youngs  
3 does not quarrel with the fact that this Commission does  
4 not have zoning authority. He also cannot quarrel with  
5 the fact that the Court of Appeals opinion makes it  
6 crystal clear that there must be a functionally equivalent  
7 proceeding that occurs somewhere, and whether it's here or  
8 the County I suppose is still up for debate, but that  
9 functionally equivalent proceeding must look like, feel  
10 like, sound like, take into consideration all of the  
11 factors that the County would have been required to take  
12 into consideration were a rezoning application or a  
13 special use permit application filed with respect to this  
14 particular plant's location.

15                   And I will note to you this: I find it  
16 very interesting that Aquila goes to great lengths to  
17 point out the prior argument that has been advanced by  
18 counsel for the County, both in the trial court and today  
19 by Mr. Comley with respect to a recognition that somewhere  
20 this functionally equivalent proceeding must occur, and  
21 yet at the same time, Aquila attempts to soft sell what  
22 the nature of that proceeding would have to look like  
23 should it be that it occurs here, using phrases to the  
24 effect that the PSC could choose to look at regulatory  
25 land issues to the extent it deems appropriate.



1                   I will submit to the Commission that in the  
2 absence of extreme clarity, with respect to what it is  
3 that the Commission intends to do in serving as a zoning  
4 board with respect to the siting and location of this  
5 plant, we are simply creating a mess that will have to go  
6 back up again, with no disrespect at all to this  
7 Commission, but merely clarify once again what in the  
8 bleep the law is respect to the relative authorities of  
9 local governments and this Commission when power plants  
10 are built.

11                   COMMISSIONER GAW: I understand your point.

12                   MS. SHEMWELL: If I may, when you're ready.

13                   COMMISSIONER GAW: Go ahead, Ms. Shemwell.  
14 I'm sorry.

15                   MS. SHEMWELL: Mr. Wood has filed testimony  
16 with this Commission discussing siting. So Staff will be  
17 addressing siting.

18                   The Aquila case specifically says, by  
19 requiring public utilities to seek Commission approval  
20 each time they begin to construct a power plant, the  
21 Legislature ensures that a broad range of issues,  
22 including county zoning, can be considered in public  
23 hearings before the first spade full of soil is disturbed.

24                   Ideally, this would have been considered  
25 initially, but certainly the Commission may consider that,

1 along with a very broad range of issues, as it does in  
2 most hearings, because the Commission is to protect the  
3 public interest as a whole. The Commission's job is to  
4 look at what is the public interest as a whole, and that  
5 necessarily includes a very broad range of issues, only  
6 one of which is zoning.

7                   Staff will present a variety of testimony  
8 on what it believes is a reasonable site, and --

9                   COMMISSIONER GAW: Well, Ms. Shemwell, I  
10 understand and I appreciate your points, although I have  
11 to say that, from the beginning of this case, Staff has  
12 taken a position that this -- that this plant should be  
13 sited where it is. So I have a little difficulty seeing  
14 Staff as presenting any kind of an independent view in  
15 regard to the siting of this particular plant at the  
16 particular location it currently exists.

17                   I appreciate the fact that you're willing  
18 to participate, but from the standpoint of it being an  
19 independent view, I'm not going to see how I can view it  
20 that way.

21                   MS. SHEMWELL: In fact, Staff's point of  
22 view is certainly not pro-Aquila. Has Aquila made  
23 mistakes? You bet. Staff's point of view is what is in  
24 the public interest, and --

25                   COMMISSIONER GAW: I understand that's what

1 Staff's role is supposed to be, but I also understand the  
2 history of this case and where Staff has been all along in  
3 regard to its position on this location. So all of that I  
4 would take into account.

5 Let me ask you this: In regard to this  
6 siting question, is the question of public interest one of  
7 the factors or is it a guiding factor in regard to siting  
8 issues?

9 MS. SHEMWELL: Staff has testified --

10 COMMISSIONER GAW: You raised public  
11 interest.

12 MS. SHEMWELL: Right. I believe the duty  
13 of the Commission is to consider the public interest as a  
14 whole, and I believe that Staff's duty is also to look at  
15 the public interest as a whole. Mr. Wood --

16 COMMISSIONER GAW: Okay. In regard to  
17 that, is there guidance within prior cases in Missouri  
18 that will help us in understanding what the factors are  
19 that specifically would help us analyze the general  
20 concept of public interest? In other words, do we have  
21 some cases that say we should look at the environmental  
22 impact, we should look at other possible locations, we  
23 should look at whether or not there is -- there are other  
24 factors in regard to this particular site that make it a  
25 positive or negative site because of disruption or lack of

1 disruption in regard to that particular land use?

2                   Are there some guiding principles that we  
3 can look at in our rules or in previous cases that will  
4 give this Commission and the parties guidance in regard to  
5 what evidence is appropriate in deciding this case?

6                   MS. SHEMWELL: The Aquila case has said  
7 that the Commission is to consider a broad range of  
8 issues. In this case, the Commission will look at siting,  
9 and Mr. Voight is testifying on that. Mrs. Mantle is  
10 testifying concerning whether or not the company has need  
11 for the power. Mr. Wood is talking about what is an  
12 appropriate or reasonable location. Is there the perfect  
13 location? Probably not.

14                   COMMISSIONER GAW: Will the Commission  
15 Staff be presenting evidence in regard to alternative  
16 locations?

17                   MS. SHEMWELL: I believe the Commission  
18 Staff has looked at what were the other locations reviewed  
19 by Aquila and will discuss the process that they would  
20 expect any utility to use when picking a site and then has  
21 stated its evaluation in testimony that's been filed  
22 concerning whether or not this is a reasonable location.

23                   COMMISSIONER GAW: Are there a set of  
24 standards and principles that the Commission Staff is  
25 following in presenting its testimony?

1 MS. SHEMWELL: Mr. Wood has set out what he  
2 believes to be a reasonable set of standards to look at.

3 COMMISSIONER GAW: What are those?

4 MS. SHEMWELL: Well, he's presented about  
5 12 of those, and I'll be happy to get his testimony and  
6 read them into the record if you'd like, but I don't have  
7 them memorized.

8 COMMISSIONER GAW: If you have them, could  
9 you present them? I don't need them read, but if you  
10 could give them to me.

11 I'll ask the parties whether or not they  
12 have looked at other states to help give this Commission  
13 guidance into what factors ought to be examined in a  
14 siting case of this nature.

15 MR. COMLEY: Commissioner, first, somewhat  
16 in response to your earlier question --

17 COMMISSIONER GAW: Sure.

18 MR. COMLEY: -- the Commission has no  
19 rulings regarding --

20 COMMISSIONER GAW: Yeah, that's right. I  
21 didn't get that question answered, did I?

22 MR. COMLEY: There are no rules, and I  
23 think the Court of Appeals acknowledged that in some  
24 opinion.

25 Cass County has filed testimony of a

1 certified land use planner, and in Mr. Pashoff's testimony  
2 you will find a discussion and discourse about other  
3 jurisdictions and commissions, other commissions and  
4 boards of other jurisdictions in which siting factors are  
5 exclusively and specifically given to those boards. That  
6 should give some direction.

7                   Also, he has provided a list of siting  
8 factors that have been approved by the American Planning  
9 Association with respect to generating power plants.

10                   COMMISSIONER GAW: Okay. Mr. Coffman?

11                   MR. COFFMAN: Yes. I think that -- I'm  
12 glad Mr. Comley made that point. You know, there are no  
13 rules, and that again underscores a reason why it will be  
14 important for the Commission early on, very soon, to tell  
15 us the scope of this proceeding.

16                   But I think the Commission needs to think  
17 about whether or not -- and this is the key legal question  
18 here. Is the Commission going to go down the path of  
19 acting as a local zoning board? Is the Commission going  
20 to invite utilities to bring controversial local disputes  
21 to it? Is that really what anyone has ever considered  
22 this Commission -- is this what the law has considered  
23 that this Commission do? And how many of these cases are  
24 you going to have to decide a year? How many certified  
25 land use planners should the Commission be hiring? Does

1 it have FTEs to open up a land use and planning  
2 department?

3                   This is -- this is not an elected body that  
4 has the resources to do that. I mean, do you want to be  
5 getting into the subtleties between the 2003 comprehensive  
6 plan and the 2005 comprehensive plan and all the multi-use  
7 tiers? Is that really -- is this the body that is best to  
8 interpret that or the body that actually enacted those  
9 comprehensive plans?

10                   I just think that it's important to this  
11 case and it is important to really what this Commission  
12 should be spending its time on. Now, that is not to say  
13 the Commission cannot obviously consider siting, the need  
14 for the power, whether this is an appropriate location  
15 from the Commission's expertise, which is utility  
16 planning, but not land use planning.

17                   I just cannot see why the Commission would  
18 take on to itself the ability to go out and take away  
19 those powers from these -- and what chaos that can create  
20 to people who have private property interests and  
21 expectations that their private property rights are  
22 controlled by a set of zoning rules and regulations.

23                   And if I were buying a piece of property, I  
24 would check out what the local zoning. I just would never  
25 think that I would have to also buy my property thinking

1 about what the Public Service Commission might do down the  
2 road.

3 COMMISSIONER APPLING: Mr. Coffman, have --  
4 I know I haven't, but have you heard either one of these  
5 Commissioners say we wanted to take on that  
6 responsibility?

7 MR. COFFMAN: No, sir.

8 COMMISSIONER APPLING: Then why do we keep  
9 talking about it?

10 MR. COFFMAN: Well, when this application  
11 was filed, I didn't think necessarily we would be going  
12 down that. I didn't necessarily think that, but Aquila  
13 and Staff in their pleadings have said that --

14 COMMISSIONER APPLING: If you buy a piece  
15 of property, I'll make sure I won't make a decision on  
16 whether --

17 MR. COFFMAN: Thank you.

18 MR. YOUNGS: Commissioner, may I respond to  
19 you as well?

20 COMMISSIONER APPLING: Yes.

21 MR. YOUNGS: The fact of the matter is, I  
22 think it's fair to say that in large degree the Court of  
23 Appeals decision issued in December of 2005 indicated a  
24 sharp change in the way these types of facilities are  
25 going to be approved on a going-forward basis. And so the



1 fact of the matter is, why are we talking about it, it's  
2 because the Court of Appeals has said we have to talk  
3 about it in this way.

4                   And to Commissioner Gaw's point, I agree,  
5 it is unchartered water in some degree. However, the  
6 Court of Appeals, as you've indicated, has given us  
7 examples of other states who have for years had siting  
8 authority similar to what the Court of Appeals has now  
9 said this Commission has to exercise with regard to  
10 certainly these facilities and we believe others. And  
11 we'll be prepared to address those issues for you.

12                   But that's why we're talking about it is  
13 because the Court of Appeals says we have to.

14                   COMMISSIONER APPLING: And, sir, I agree  
15 with you. I don't disagree with you. However, I do agree  
16 that this case is in this room this morning because  
17 somewhere down the road people in Cass County or some  
18 other place felt that it couldn't be settled over there.  
19 So somebody's going to have to take the responsibility  
20 here to make a decision. The plan is up. Now, we can  
21 talk about it and point fingers at whatever everybody  
22 done, but the fact is the decision before me as a  
23 Commissioner, I have to make a decision on whether we take  
24 this plant down or whether we leave it up.

25                   And some of the argument here this morning

1 really confuses me more than it helps me. So if we can  
2 get back and stick the point of whether we should take  
3 this plant down or whether we should leave it up, then  
4 that would be helpful for me in the decision which I'm  
5 going to make or I'll have to make here pretty soon. But  
6 guys, you are confusing me more than you're helping me to  
7 come to the right decision here.

8 MS. MARTIN: Well, if it's any consolation,  
9 Commission Appling, having lived and breathed this case  
10 since early December of 2004, I cannot tell you how many  
11 sleepless nights I've had with the thoughts and ideas that  
12 have gone through my head because it is a very confusing  
13 set of circumstances.

14 COMMISSIONER APPLING: But, ma'am, you are  
15 being paid to be here today.

16 MS. MARTIN: Well, I also have a passion  
17 for my client and for the --

18 COMMISSIONER APPLING: And I have a passion  
19 for what I do, too.

20 MS. MARTIN: And I understand that. My  
21 point was I agree with you, it is a confusing set of  
22 circumstances.

23 We're looking for some definition of the  
24 issues that the Commission should be looking at to reach  
25 the decision that you have so aptly noted needs to be

1 made, and I think what the County's motion has attempted  
2 to do is to lay out a framework that would provide a  
3 pretty clear road map consistent with the Commission's  
4 prior practice before 1980 that would allow that decision  
5 to be made and that would allow the Commission to focus on  
6 the things that it has always focused on with respect to  
7 need and would allow local authorities to focus on those  
8 things they're accustomed to focusing on with respect to  
9 where a plant is constructed.

10 We're actually trying to simplify this  
11 process and to make it more readily and easily understood  
12 in the context of the opinion by having filed this motion  
13 today.

14 COMMISSIONER APPLING: Thank you.

15 MR. COFFMAN: Commissioner, may I make a  
16 point? I think that the important thing here is that this  
17 is not the Commission's decision about whether to tear  
18 down a power plant or not. That decision is not a  
19 decision that the Commission has the authority to make.  
20 And in this particular case, an injunction was granted  
21 prior to the construction. As I understand it, the only  
22 reason it was allowed to go forward was that a bond was  
23 posted, a supersedeas bond, which as I understand cuts off  
24 the facts as to the court should consider at that point.

25 And so the fact that the plant has been



1 could make one further point. I think Judge Dandurand  
2 expressed in some ways the same concerns that you are, and  
3 he said in extending the date for the injunction to be  
4 effective, that one of his concerns was waste and that  
5 this is not a small matter in terms of waste.

6 So I suggest that the role of the  
7 Commission is to consider what is the public interest in  
8 this case, and that Judge Dandurand expressed the same  
9 interest you are about waste. Thank you.

10 MS. MARTIN: With all respect, he expressed  
11 that opinion pretty vehemently, in a very angry and  
12 frustrated manner because he felt he was in a position  
13 where he had to evaluate waste issues through  
14 circumstances that were not of his doing, and he wasn't  
15 very happy with the steps Aquila had taken up to that  
16 point.

17 Commissioner Appling, if I could digress  
18 just a minute, you raised a question earlier today that  
19 Mr. Comley responded to, but I really feel it's important  
20 to express to you how quickly the County took action and  
21 to give you a sense of the timing here, because I don't  
22 want you to operating under the misapprehension that  
23 somehow or the other the County let this plant be built  
24 and then decided, well, let's see if we can go pull a fast  
25 one because that's not the circumstance.

1                   Nothing had been done on this site. We  
2 were advised by Aquila in the summer of 2004 that they  
3 were going to pursue constructing a plant without zoning,  
4 and they proceeded along those paths in discussion with  
5 the County. And then come December, late November and  
6 December of 2004, they made application for a DNR permit  
7 for this site.

8                   Nothing had happened on the site with  
9 respect to construction activities, but Aquila made it  
10 clear, we are going to build this plant and we are going  
11 to start construction the moment we get a DNR air permit.  
12 And it was not clear to the County when that moment would  
13 occur. So without construction having even commenced, the  
14 County filed an injunction action on December the 1st of  
15 2004.

16                   And your Honor -- or Commissioner, I'm  
17 certain you can appreciate when I tell you this, that that  
18 case filed on December 1st of 2004 was tried to a final  
19 judgment on January the 11th of 2005-- January the 5th,  
20 with an Order issued on January 11th of 2005, a month and  
21 a few days later. That's how quickly the County moved.

22                   And I think the Commission can further  
23 appreciate that the County cooperated with Aquila in  
24 agreeing to an expedited appeal schedule, such that that  
25 case was argued before the Western District Court of

1 Appeals in April of 2005. I can tell you on, in my 22  
2 years of practicing law, I have never been involved in a  
3 matter as complex as this or, frankly, a simple matter  
4 that has been filed, tried and argued to the Court of  
5 Appeals in less than six months.

6                   And it was -- the injunction was issued on  
7 the 5th of January, formally entered on the 11th of  
8 January. At that moment in time, this plant had not been  
9 built, not even in part. All construction activities  
10 occurred after that date. The County did everything it  
11 could to put Aquila on notice, please don't go down this  
12 path.

13                   And when Aquila at the trial court wanted  
14 to go forward to build the plant even though the court had  
15 enjoined its construction, the court said, fine, but I'm  
16 going to make you post a bond, and the court then added  
17 language into the judgment that said, anything you build  
18 from this moment on will need to come down if you lose on  
19 appeal.

20                   Those are the facts. And so I just don't  
21 want there to be any misapprehension in mind, sir. And I  
22 have great respect for you, but I don't want you to feel  
23 that the County somehow sat on its rights or did nothing.  
24 In effect, it did everything it could more expeditiously  
25 than anyone could even imagine in an effort to protect the

1 rights of the citizens of Cass County.

2 COMMISSIONER APPLING: Thank you for that  
3 clarification, but believe it or not, I don't have time to  
4 sit on my hands either. But explain to me, and then I  
5 would like for Aquila to do it, and I will yield to my  
6 colleague -- I'm sorry that I butted in over here,  
7 Commissioner Gaw, but you looked like you needed a small  
8 break anyway.

9 But anyway, help me out, ma'am, on why  
10 Judge Dandurand, you think in your mind that he did not  
11 say -- and I know Mr. Comley addressed this this morning  
12 and Mr. Epstein (sic) addressed it, too. Why do you think  
13 he didn't say, Aquila, go out and get a bulldozer right  
14 now and start taking this building down, this plant down,  
15 and why is it a possibility in your legal mind that a  
16 judge could have probably thought there was a chance to  
17 work this out?

18 MS. MARTIN: To work this out?

19 COMMISSIONER APPLING: At the present  
20 location that it's at.

21 MS. MARTIN: Judge --

22 COMMISSIONER APPLING: How do you interpret  
23 that last couple of sentences in which the judge has been  
24 bringing up on several different occasions this morning?  
25 You know, it would have been easier for him to say in his



1 madness as you have described, angry feeling, which you  
2 can get to in one of these cases I'll admit, why didn't he  
3 say, Aquila, this is over, Get your bulldozer and start  
4 moving bricks?

5 MS. MARTIN: The question you asked me  
6 relates to two different Orders. The two sentences in the  
7 opinion are the Court of Appeals opinion, and Judge  
8 Dandurand's Order that you're talking about is the Order  
9 that he entered Jan-- excuse me -- February 1st of this  
10 year where he extended the dismantling date to May 31st.

11 Let me address Judge Dandurand's Order  
12 first. If you had been present at that hearing,  
13 Commissioner Appling, you would appreciate that Judge  
14 Dandurand made it very clear that he was frustrated with  
15 the fact that Aquila had proceeded with the construction  
16 of this plant despite the fact he had ordered that the  
17 plant would be constructed illegally, that it did so at  
18 its peril.

19 I will tell you with candor that I think  
20 Judge Dandurand was frustrated in part with the fact that  
21 the Commission had, at least from Judge Dandurand's  
22 perspective, attempted to pass the buck with respect to  
23 determinations about whether this plant should be built,  
24 whether there was Commission authority to build this  
25 plant, to him, and that frustrated him as well.

1                   He appreciated and acknowledged on the  
2 record that he felt the County had done everything right  
3 and had done everything that it could. At the end of the  
4 day, as angry as he was and as frustrated as he was, he is  
5 concerned about the issue of waste when the Commission has  
6 not been in, frankly, his view required and forced to do  
7 its job and to evaluate the issues the statute requires it  
8 to evaluate.

9                   If you look at the Order that Judge  
10 Dandurand issued after that extensive oral argument, all  
11 it says is, Aquila, I'm giving you time before you have to  
12 get the bulldozer out, and I'm giving you to May 31st.

13                   But Commissioner, Judge Dandurand didn't  
14 say on what condition. He didn't say, so that you can go  
15 to the Public Service Commission to get X, or so that you  
16 can go to the County to get Y. He basically just said,  
17 look, you've got time, you go see if you can figure it  
18 out, but it was very clear don't come back for more time.

19                   So I take from that that he simply was  
20 trying to be as fair as he possibly could to all parties  
21 despite his frustration, that he's not terribly persuaded  
22 by Aquila's argument that somehow it's a victim when it  
23 made a decision to proceed with the construction of the  
24 plant.

25                   With respect to the Court of Appeals

1 decision, I think Mr. Comley has already discussed the  
2 County's view about those last two sentences. The opinion  
3 goes on at great length to describe 393.170 means, what it  
4 says and what it allow this Commission the authority to do  
5 or not to do.

6                   When it says in very vague, somewhat  
7 confusing but vague language, we do not mean by this to  
8 suggest there aren't other options, in effect that's what  
9 that sentence says. That's merely a statement by the  
10 court, we're not going to get into other issues that  
11 haven't been presented to us for determination. If there  
12 are other options or means available for Aquila to go  
13 forth and to secure the authority it needs to leave this  
14 plant in operation, we're not suggesting that it can't.

15                   But it certainly didn't say what it could  
16 have said. It did not say, even though we find in this  
17 opinion that 393.170.1 requires construction to be  
18 approved in advance, we are going to relieve Aquila of  
19 that obligation. The Court of Appeals did not say that in  
20 this opinion. And if that had been what it meant, trust  
21 me, it could have said so. I think it was simply throwing  
22 out a bone to say, look, folks, if you can find a way to  
23 work through this mess, we encourage you to try to do it.

24                   But it didn't provide specific direction,  
25 it didn't mandate, it didn't provide specific guidance, it

1 didn't tell this Commission it had to hear this case, it  
2 didn't tell the County it had to hear a case. It just  
3 simply said, if Aquila can find a way to resolve this  
4 problem, try.

5 COMMISSIONER APPLING: Thank you.

6 MR. YOUNGS: Commissioner, may I respond to  
7 your question on behalf of Aquila?

8 COMMISSIONER APPLING: Absolutely.

9 MR. YOUNGS: I think with all due respect  
10 to my good friend Cindy Reams, I think the fact is that  
11 Judge Dandurand read the opinion of the Court of Appeals  
12 the same way we do, and that is that notwithstanding the  
13 injunction, the Court of Appeals opinion has set forth now  
14 clearly what this Commission's obligation is in situations  
15 like this, and he gave us four months to get what the  
16 statute requires us to have in order to be exempt from  
17 county zoning.

18 And I don't have any dispute with  
19 Ms. Martin that the fact is he was irritated and made that  
20 very clear at the conclusion of the hearing. But the fact  
21 of the matter is, regardless of that, he gave us time. He  
22 would not have given us time to get an Order from this  
23 Commission that he believed under the terms of the Court  
24 of Appeals decision in December was a pointless exercise.

25 He would have said, as you've suggested,

1 you know what, I don't think that's what the Court of  
2 Appeals decision said. I think you need county zoning  
3 authority. You don't have it. In fact, we tried to file  
4 an application recently and they rejected it. But in any  
5 event, unless you can get the County to sign off on this,  
6 you're done. Start tearing down the plant right now. In  
7 the meantime, if you can get the authority from the County  
8 that you need, go for it.

9                   But he didn't say that. He said, go back  
10 to the Commission. In fact, he said, I think you're stuck  
11 with whatever the Commission says to you. So that's why  
12 he granted the stay. And I do agree with Cindy that I do  
13 think that the court did express some frustration with a  
14 perception on his part that the Commission had not done  
15 its job.

16                   However, back to the motions that we're  
17 here about today, if you look at the County's motion, I  
18 think you're going to hear that again. If you cede to the  
19 County, if you say we're going to condition the approval  
20 of this plant and substation on your ability to get county  
21 zoning authority, No. 1, that's not going to happen. I  
22 don't care what they say, they're not going to approve the  
23 zoning application for Aquila, and I'll hear about that  
24 later.

25                   But the second thing is, it flies exactly

1 in the face of what the Commission's obligation is, as the  
2 Court of Appeals has said, and as Judge Dandurand  
3 expressed some frustration about. If you cede to the  
4 County the authority to hear those issues as a part of  
5 this proceeding, it's going to be the same argument again.  
6 You know what, here's the Commission passing the buck to  
7 the County when the law is clear that it's the  
8 Commission's obligation to take these issues up and  
9 resolve them.

10 COMMISSIONER APPLING: So is your point  
11 that the Judge told Aquila to come to this location and  
12 get permission to leave this plant in place?

13 MR. YOUNGS: I believe that the only  
14 reading of the court's granting of our request for a stay  
15 was to allow us to do that, and he did that because he  
16 believed that's what the Court of Appeals opinion says,  
17 and I agree with him.

18 MS. MARTIN: Commissioner Appling, Judge  
19 Dandurand feels like Aquila kept taking this case to him  
20 to make him do your job, and Judge Dandurand made no  
21 statement whatsoever on the record with respect to what  
22 this Commission should or should not do with this  
23 application.

24 In fact, he quizzed Aquila's  
25 representatives, both Mr. Youngs and General Counsel Chris

1 Reetz, with respect to what it thought this Commission  
2 might do with an application. But he expressed no view  
3 with respect to how this Commission should or would  
4 interpret its jurisdiction or its authority under 393.170.  
5 In fact, that statute has never been interpreted,  
6 discussed or argued before Judge Dandurand at any time.

7                   And I think what you can fairly read from  
8 the Order from the judge, which by the way makes no  
9 statement about the Commission, makes no reference to the  
10 Commission, gives no direction to Aquila to come file an  
11 application, it does nothing but say you must start  
12 dismantling on May 31st. That's it. Not conditioned on  
13 any conduct, activity or subsequent event.

14                   I think what you can fairly read from the  
15 opinion and the transcript of those proceedings is that  
16 Judge Dandurand is saying, I'm not going to evaluate and  
17 do the Commission's job, and it's up to the Commission to  
18 look at 393.170 and determine what its authority is and  
19 what its obligation is with respect to this application in  
20 light of the Court of Appeals opinion. That's it.

21                   COMMISSIONER APPLING: Judge, I'm finished.

22                   JUDGE PRIDGIN: Commission Appling, thank  
23 you. Commissioner Gaw, any more questions for counsel?

24                   COMMISSIONER GAW: Just a few. I guess  
25 just to follow up briefly on what I asked earlier, in

1 regard to siting guidance, will there -- will there be any  
2 discussion or provision of information in regard to what  
3 other states are doing on siting from any of the parties?

4 MS. SHEMWELL: We can certainly do that.  
5 Are you interested in Warren -- my reviewing Warren's  
6 testimony? That's where we'd left our prior discussion.

7 COMMISSIONER GAW: Well, I'm just looking  
8 generally in regard to whether or not -- if we don't have  
9 any -- obviously we have very little to go on from our own  
10 past cases, and we have no rules, as I understand it,  
11 regarding how you evaluate siting matters. And I don't  
12 know where else to look except to other states, even  
13 though those statutes may not be the same.

14 MR. COMLEY: Judge Gaw, again, there will  
15 be some discussion of that in Mr. Pashoff's testimony.  
16 I'm trying to recall offhand which states are going to be  
17 discussed, but there's a sampling of several.

18 COMMISSIONER GAW: Certainly most other  
19 states, I think, at least a great number of other states  
20 deal with siting on a regular basis and have long  
21 histories of what should be examined in a siting case in  
22 front of -- in front of a siting authority.

23 MR. COMLEY: Ms. Moore reminded me that the  
24 sampling would be from Oregon, California and Kentucky, to  
25 name a few, and I think there -- Massachusetts she's



1 mentioned. Also, there are web sites that are -- he has  
2 referred to in there for conveniences. At some point I  
3 think we will provide an extra exhibit showing some of the  
4 factors that those states use.

5 MR. WILLIAMS: Commissioner Gaw, I know  
6 that this Commission has issued site-specific certificates  
7 in the past. I don't know offhand what factors were  
8 reviewed in those, but certainly we can look into that.

9 COMMISSIONER GAW: Okay. And I don't want  
10 to go -- to start an argument that takes another hour  
11 here, but I am somewhat unclear in regard to Aquila's  
12 position on making any application to the County regarding  
13 the zoning issue.

14 On one hand, I heard Aquila suggest that  
15 it's not necessary, and then I also heard you suggest to  
16 me that you had attempted to file something that had been  
17 rejected in regard to that, and those two things seem  
18 inconsistent. Not that parties don't need to take  
19 somewhat inconsistent positions in regard to this case  
20 because of the difficulty in evaluating where the  
21 decisions ought to be made. But can you shed some light  
22 on that for me? And then I want to hear from the County.

23 MR. YOUNGS: Sure. It goes back actually  
24 farther than just recently. As you probably are aware  
25 from the last proceeding, Aquila sought as a matter of

1 working with the County for the prior locations of these  
2 facilities filed zoning applications for them, which were  
3 presented to the county planning board and were rejected.  
4 In conjunction --

5 COMMISSIONER GAW: Was that appealed?

6 MR. YOUNGS: That was not appealed.

7 COMMISSIONER GAW: When was that?

8 MR. YOUNGS: My dates are going to be  
9 wrong, but I think it was probably in the summer of '04.

10 MS. MOORE: Be July '04.

11 MR. YOUNGS: July of '04. In the interim,  
12 in terms of determining what to do about that, whether to  
13 appeal them and go forward in that location, I don't think  
14 there's going to be much dispute that the evidence was  
15 that Aquila was approached by the city of Peculiar about  
16 the possibility of relocating to another site that would  
17 be amenable to a plant because of the confluence of gas  
18 and other transmission and that sort of thing, and  
19 discussions about annexing that site.

20 It's important to note that early on in  
21 that process Cass County, the county commission passed a  
22 resolution in September of 2004 that would consent to the  
23 annexation of a portion of South Harper Road with the  
24 express knowledge that that was for the purpose of  
25 ultimately servicing a plant, and later on in that fall

1 gave Cass County, signed by Gary Mallory, a letter saying  
2 that you don't need a grading permit for the Aquila South  
3 Harper peaking facility.

4                   So there were discussions that involved the  
5 County about the fact that these facilities might  
6 ultimately go there.

7                   COMMISSIONER GAW: Well, and we can get in  
8 all kinds of debate --

9                   MR. YOUNGS: Yeah, I know. I'm wrapping  
10 up.

11                   COMMISSIONER GAW: -- about what happened  
12 when and what -- whether the injunction was in place.

13                   MR. YOUNGS: The bottom line was that early  
14 on in that portion of the process when there were  
15 discussions about zoning approval for the South Harper  
16 site, it was made clear to Aquila representatives that  
17 there would not be support for a zoning application for  
18 that site, which is in large part at least a reason why  
19 we're ultimately here today, because Aquila was faced with  
20 decisions that you'll hear about if you want to ask about,  
21 about what to do in light of that and in light of this  
22 Commission's prior Orders and opinions in terms of what  
23 their requirements were.

24                   After the Court of Appeals decision in  
25 December, Aquila agreed to submit zoning -- actually

1 special use permit applications, agreed to submit itself  
2 to the zoning authority, and the County rejected those  
3 applications at the door. And the County's response will  
4 be because there was still a Cass County case that said  
5 you had to tear it down, it wasn't proper for us to do  
6 that.

7                   Judge Dandurand heard that. He said, well,  
8 I understand. You had to do what you had to do. You had  
9 to hear what their answer was, and I think you've got it.  
10 And I said, I think we do, too, in no uncertain terms.  
11 And he said, I think you do, too. Meaning go forward with  
12 zoning if you want, but are you really thinking that  
13 zoning applications are going to be received and processed  
14 favorably.

15                   And by that time, knowing that we had to  
16 come here in any event, Aquila made the decision to rely  
17 on the Court of Appeals decision exclusively, and what we  
18 believe the Court of Appeals said was that you can get  
19 that authority from either the county commission or the  
20 PSC, not both, and because of the timing of the  
21 circumstances, we opted to come here.

22                   So that's a shorthand way of saying that we  
23 have on occasion worked -- tried to work with the County  
24 through the zoning process. We've made it clear to them  
25 that we don't believe that's what the statute requires.

1 But the most recent go-round, that was rejected by the  
2 County, was just real honestly in the nature of an attempt  
3 to resolve this dispute, to submit ourselves to the county  
4 zoning authority. And they'll call it gamesmanship, but  
5 that wasn't the intent of it.

6 And when that was rejected, we felt like we  
7 had no other choice than to stop banging our head against  
8 that wall and come here and bang it against this one.  
9 Does that answer your question, Commissioner?

10 COMMISSIONER GAW: Well, it does up to a  
11 point. I want to ask the County to respond.

12 MS. MARTIN: Thank you, Commissioner. Let  
13 me address the same subject matters that Mr. Youngs has  
14 addressed, and I'm going to start with the first  
15 application, which I'll call the Camp Branch application,  
16 which was for a different location for this very same  
17 plant within the unincorporated portion of Cass County but  
18 a little bit closer to the city limits of Harrisonville  
19 instead of the city limits of Peculiar.

20 It is absolutely an incorrect statement  
21 that that application was rejected and thus subject to  
22 appellate relief. In fact, what occurred is that Aquila  
23 had filed its application. You'll hear testimony about  
24 what steps it hadn't taken to prepare the public for that,  
25 but that's neither here nor there at this point.

1                   But the County's review of an SUP  
2 application under its zoning ordinance is a two-step  
3 process. First there's a public hearing before the  
4 planning board. The planning board makes a recommendation  
5 either to approve or deny and submits that recommendation  
6 to the board of zoning adjustments, which is essentially  
7 the county commission in makeup.

8                   What happened is, at the public hearing  
9 before the planning board, after hearing extensive  
10 testimony, the planning board recommended denial of the  
11 application and sent that recommendation to the BZA in the  
12 county. Aquila put off that hearing, which is supposed to  
13 occur within about ten days of the recommendation. They  
14 asked for that hearing to be continued.

15                   At that time Aquila, quite frankly, at that  
16 time unbeknownst to the County, was being courted by the  
17 City of Peculiar about these other locations for the  
18 South Harper plant and the Peculiar substation, and it  
19 begin pursuing the acquisition of land close to Peculiar.  
20 Aquila then withdrew their Camp Branch application. There  
21 was never a determination, a final determination made by  
22 the County with respect to that application, and that's  
23 why there was no appeal, because there was never a final  
24 decision made.

25                   Aquila willingly and of its own accord

1     withdrew that application when it was in the process of  
2     talking to Peculiar about the South Harper plant site and  
3     the Peculiar substation, the Peculiar substation site was  
4     never going to be the subject of annexation by the City of  
5     Peculiar.

6                     So Aquila filed an application for SUP for  
7     the substation site with the County at a time when Aquila  
8     was expecting that the South Harper site would be annexed  
9     by Peculiar and, in accordance with the e-mail  
10    communications between Aquila and the City of Peculiar,  
11    was planning on submitting itself to the zoning  
12    jurisdiction of the City of Peculiar with respect to the  
13    South Harper site and to the zoning jurisdiction of the  
14    County with respect to the substation site.

15                    When the annexation blew up because of  
16    public discontent in the City of Peculiar, Aquila, because  
17    of its own time frame issues -- don't delude yourself --  
18    decided forget it, we're building this, to heck with all  
19    of you. And it at that point withdrew, again of its own  
20    accord, its SUP application with respect to the substation  
21    location, and it proceeded with construction of both the  
22    substation and the South Harper plant without any zoning  
23    authority or local approval.

24                    This lawsuit commenced, et cetera. We all  
25    know where that led us. December 20th, the Court of

1 Appeals issued its opinion. No appeal was taken. That  
2 opinion became final, and a mandate was handed down by the  
3 Court of Appeals to Judge Dandurand. At that moment, the  
4 only operative order in effect was Judge Dandurand's  
5 decision of January 11th, 2005 that said tear down the  
6 plant.

7                   Now, I've been accused of accusing Aquila  
8 of gamesmanship, and I don't really care. The fact is  
9 that Aquila came to Cass County's door unannounced through  
10 their vice president of public relations, not through the  
11 attorney that they had hired and placed us on notice about  
12 who would be handling zoning affairs, with multiple boxes  
13 of an alleged SUP application, and they did so on Friday,  
14 January the 20th.

15                   On Friday, January the 20th, no relief had  
16 been afforded to Aquila from the judgment which was at  
17 that moment final that said tear down the plant. The  
18 County had no right, no authority, nothing that it could  
19 do at that point with respect to that application other  
20 than to say, I'm sorry, we can't accept it. We're bound  
21 by the same court order you are that says tear down the  
22 plant.

23                   On the 27th of January, seven days later,  
24 Mr. Youngs and I argued Aquila's request for an extension  
25 of the stay, and Judge Dandurand verbally on the record on



1 that day indicated that he would extend the stay to  
2 May 31st.

3 We, the County, within the next week sent a  
4 letter to Aquila that said, in light of the fact that the  
5 court has granted you relief in the form of an additional  
6 stay from the effect of the final judgment, we will  
7 entertain your application for SUP or rezoning, and  
8 nothing has been filed.

9 COMMISSIONER GAW: Well -- go ahead.

10 MS. MOORE: Could I add something to that,  
11 please?

12 COMMISSIONER GAW: Go ahead.

13 MS. MOORE: I'd like to respond to  
14 something Mr. Youngs discussed in regard to a letter that  
15 deals with Cass County's stance in regard to grading, and  
16 Aquila sought authority from the County to start grading  
17 on its property.

18 Cass County doesn't care anything about a  
19 landowner going out and moving dirt on their own property.  
20 We don't require a grading permit for any landowner to  
21 grade. So that had nothing to do with zoning issues  
22 before the County. We don't require grading permits.  
23 They can go out and move dirt on their own property as  
24 much as they want. That's all.

25 COMMISSIONER GAW: Mr. Youngs, why hasn't

1 Aquila followed up with its earlier request to ask the  
2 County to approve the plan on this zoning requirements  
3 subsequent to receiving a letter from --

4 MR. YOUNGS: Because that letter was in the  
5 nature of an invitation to come, have your case heard,  
6 we'll impanel a very fair jury, we'll have a good judge,  
7 and it will be followed by a first class hanging.  
8 That's --

9 COMMISSIONER GAW: Really, it says that in  
10 this letter? Would you mind providing me a copy of this?

11 MR. YOUNGS: I'll doctor one up so it looks  
12 like that and get Cindy to sign it.

13 The fact of the matter is -- and she says  
14 don't delude yourself. Don't delude yourself over what  
15 will happen if this Commission cedes its authority to  
16 consider these land use issues and instead --

17 COMMISSIONER GAW: Mr. Youngs, the same  
18 thing could be said about this Commission. Now, help me  
19 to understand why this company has not followed up with  
20 what it did earlier in the year and refile its request to  
21 have the zoning issues heard by the appropriate  
22 authorities in Cass County.

23 MR. YOUNGS: No. 1, because the Court of  
24 Appeals says we don't have to.

25 COMMISSIONER GAW: But you earlier have

1 already -- already tried to file --

2 MR. YOUNGS: Yes, we did.

3 COMMISSIONER GAW: -- said, we want you to  
4 look at this.

5 MR. YOUNGS: Yes, we did.

6 COMMISSIONER GAW: And nothing has changed  
7 except that the court gave you more time to do something.

8 MR. YOUNGS: Yes. The court gave us until  
9 May 31st, and here we are on April 5th, and we have not  
10 had an evidentiary hearing on this application yet.

11 COMMISSIONER GAW: You certainly haven't  
12 had any hearing in front of Cass County because you  
13 haven't reapplied for that.

14 MR. YOUNGS: No. And the fact of the  
15 matter is, as I think everybody will accept, there was no  
16 way that we believed, No. 1, that the County would review,  
17 in light of their arguments to the court, in light of  
18 their arguments to Judge Dandurand that basically focused  
19 on, well, Judge, if you want to give them a stay, go  
20 ahead, but in the meantime you need to make them tear down  
21 the plant. In light of those arguments that counsel made  
22 in front of Judge Dandurand, we believed that, No. 1,  
23 there was not going to be a favorable consideration. I  
24 don't know. Maybe we're wrong.

25 But in any event, the fact of the matter

1 is, we've run out of time, and the Court of Appeals says  
2 we don't need both.

3 COMMISSIONER GAW: The problem that I have  
4 here is that your -- that Aquila is again gambling that  
5 it's right. Aquila has been gambling that it is correct  
6 in its interpretation all through this whole mirage --  
7 barrage of cases that we have seen, and if you're wrong,  
8 you are out of time.

9 If you're wrong and you need authority from  
10 Cass County, you are going to be out of time, because you  
11 have waited now until the point -- and I don't mean you  
12 personally, but Aquila has waited now, putting all its  
13 eggs again in one basket, and maybe this time you will be  
14 right. Maybe. But if you're wrong, I don't know who's  
15 going to save your eggs this time.

16 MR. YOUNGS: Well, and the fact of the  
17 matter is, Commissioner, I understand that that's your  
18 view. I think that the fact of the matter is we believe  
19 the Court of Appeals decision is clear that approval can  
20 come either from the County or --

21 COMMISSIONER GAW: I'm not saying whether  
22 you're correct or incorrect. I'm not saying that.

23 MR. YOUNGS: I understand that.

24 COMMISSIONER GAW: I'm just trying to  
25 understand. It appears that you were going down one path

1 earlier in the year of saying maybe we need to look at  
2 both of these -- both of these avenues, and then you  
3 change -- Aquila changed its mind, and there may be  
4 reasons for that. I understand your rationale.

5 MR. YOUNGS: There are.

6 COMMISSIONER GAW: But it does put Aquila  
7 again in this precarious position, and I -- I'm not sure  
8 how close these eggs are to the floor, but it may be  
9 getting kind of close.

10 MR. YOUNGS: Aquila understands that,  
11 believe me. And the fact of the matter was the offer to  
12 participate in county zoning earlier in the year was an  
13 accommodation to the County's view and belief that Aquila,  
14 now that the appeal was over with and that a final  
15 decision had been reached, there might be some room for  
16 working with the County.

17 The County took the position that we're not  
18 legally able to do that. Whether that's a true position,  
19 I trust my friend Cindy that it was. But the fact of the  
20 matter was, by the time we got in front of Judge Dandurand  
21 and got an Order from him, we had to pick a course. And I  
22 hope you're wrong, Commissioner. I hope that is not a  
23 situation where the eggs are on the floor.

24 COMMISSIONER GAW: Well, I'm not wrong in  
25 regard to the time you have left, and that's what I'm

1 referring to, and in regard to your choices of eliminating  
2 one of the -- one of the avenues that may be necessary.

3 And again, that's a matter of somebody's going to  
4 determine at some point in time as a matter of law, but --

5 MR. YOUNGS: All I can tell you,  
6 Commissioner, is --

7 COMMISSIONER GAW: I don't know whether  
8 the -- I don't know what the outcome is here. I'm just  
9 trying to understand a little bit better about where we  
10 are in regard to this case.

11 MR. YOUNGS: All I can tell you,  
12 Commissioner, is with regard to the most invitation to  
13 participate in the zoning process, Aquila believed that  
14 that invitation was disingenuous and that we would waste  
15 time going through that process when ultimately we needed  
16 to come here and get approval from you. In any event,  
17 Aquila decided to come here as the Court of Appeals has  
18 said they could.

19 MS. MARTIN: Commissioner, if I could?

20 COMMISSIONER GAW: Sure, and then I think  
21 I'm done.

22 MS. MARTIN: With respect to the timing  
23 issue, nothing changed from January the 20th until January  
24 the 27th. Nothing. And that's why -- the only thing that  
25 changed from the County's perspective is that the County,

1 along with Aquila, were relieved of an immediate  
2 obligation that that plant be removed.

3                   You have to consider from the County's  
4 perspective, we also have obligations to folks like Jerry  
5 Eftink's clients, the citizens we serve. If we as a  
6 county accept an application for an SUP that is subject to  
7 a final, nonappealable order that says tear down the  
8 plant, we violated our duties to a whole lot of other  
9 people at that point.

10                   We were extremely honest with Mr. Youngs  
11 and with Aquila. And, quite frankly, it causes me to  
12 question whether there was some purpose and intent in  
13 attempting to file the application on the 20th knowing  
14 that that would be the position the County would take  
15 because we had told them that in advance, when barely  
16 seven to ten days later when the relief was afforded to  
17 Aquila that it had requested with respect to time and we  
18 said, well, now we'll accept the application, one was not  
19 forthcoming.

20                   To suggest in a self-serving manner that  
21 the reason one was not filed is, well, everybody knows the  
22 outcome is frankly offensive, just as it would be  
23 offensive to this Commission for me to sit here and say  
24 the same thing about any of you. It's offensive.

25                   And the fact of the matter is, if the

1 County were to entertain an SUP application or a rezoning  
2 application, it has legal standards and factors it is  
3 required to evaluate and review, and believe me,  
4 retribution or revenge or frustration or anger isn't one  
5 of them. And we have expressed repeatedly to Aquila that  
6 this is not an emotional case to the County. It is a case  
7 about following the law. And we have an obligation to  
8 follow the law.

9                   And if the County reviewed an SUP  
10 application or a rezoning application and for whatever  
11 reason denied it, that decision would be appealable, and a  
12 court of law would evaluate did the County take into  
13 consideration factors it should not have, including some  
14 desire to stick it to these people, which, trust me, would  
15 not have been a factor.

16                   Aquila conveniently characterizes the  
17 county's position, which is consistent with what the law  
18 was at the time and the state of affairs with respect to  
19 the court's judgment, as one that they chose to ignore  
20 because they had a right to. Well, I agree with the  
21 Commissioner that that's a gamble that they've taken, and  
22 I think it's a gamble that may come back to haunt them.

23                   But I will also tell you this as a measure  
24 of the County's good faith. Let me tell you why we have  
25 filed this motion to dismiss now and why we, not Aquila,



1 asked for oral argument.

2                   If this Commission selects alternative B in  
3 our motion to dismiss, there is still time for Aquila to  
4 file an application. And Aquila in proceedings it filed  
5 with this Commission has acknowledged that the process  
6 before the County is speedy, quick and efficient, and  
7 oftentimes can be resolved within 45 days. It's only  
8 April the 5th. That's nearly two months from May the  
9 31st.

10                   We sought this opportunity to present an  
11 option to the Commission that's consistent with the law  
12 and consistent with the Court of Appeals opinion. Aquila  
13 didn't seek it. They seem to be fighting it. And I think  
14 that's a demonstration of our good faith and our desire to  
15 work cooperatively with a developer in our county to look  
16 at land use issues.

17                   COMMISSIONER GAW: Well, let me thank all  
18 the parties for your patience and your arguments. I  
19 Was -- I appreciate -- I appreciate it, and it was helpful  
20 to me, and I apologize for keeping you so long.

21                   Judge, thank you. I'm finished with my  
22 questions.

23                   JUDGE PRIDGIN: Commissioner Gaw, thank  
24 you. Commissioner Appling, anything further?

25                   COMMISSIONER APPLING: I concur with my

1 colleague. Thank you for coming here today, and it's been  
2 very interesting. Thank you.

3 JUDGE PRIDGIN: I'll remind the parties  
4 before we go off the record, as the Commission's order  
5 stands, a list of issues from the parties is due  
6 April 11th, and understandably the parties may not agree  
7 on those issues, in which case I would suggest the parties  
8 at least break off into those two camps they seem to be in  
9 and at least give me to alternative lists of issues to  
10 present to the Commission.

11 Of course, the Commission may order  
12 something to the contrary, and the parties are also always  
13 free to move, file a motion with the Commission saying why  
14 you want something different. But as the Commission's  
15 order stands, a list of issues or lists of issues are due  
16 April 11th.

17 Anything further from counsel before we go  
18 off the record?

19 All right. Hearing nothing, that concludes  
20 this hearing. Case No. EA-2006-0309. Thank you very  
21 much. We are off the record.

22 WHEREUPON, the hearing of this case was  
23 concluded.

24

25