

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

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

Case No. EA-2005-0248

**REPLY TO CASS COUNTY’S RESPONSE TO AQUILA’S PROPOSED
CLARIFICATION ORDER**

COMES NOW Aquila, Inc., (“Aquila” or the “Company”), and for its reply to Cass County’s Response to Aquila’s Proposed Clarification Order dated March 2, 2005 (the “Response”), states as follows:

1. At the time of the February 25, 2005, on-the-record presentation in this case, Aquila offered into the record a document containing suggested language of clarification and specificity for the Commission’s consideration.¹ The language was offered to illustrate the nature of the relief being requested by Aquila should the Commission employ the Company’s preferred option of providing clarification and confirmation concerning Aquila’s existing certificates of convenience and necessity. The language was offered for the solitary purpose of illustrating the Company’s request and not to preclude any other party from objecting to the language or proposing alternative language. In that regard, the procedural schedule established by the

¹ The document was marked for identification as Exhibit 1.

Commission on March 3, 2005, provides for the filing by all parties of briefs, proposed findings of fact and conclusions of law on March 21, 2005.

2. On March 2, 2005, Cass County filed its Response to the language contained in Exhibit 1. Cass County claims that the language contained in Exhibit 1 invites the Commission to “enter an order in direct opposition” to the Final Judgment issued by Judge Dandurand in Cass County Circuit Court Case No. CV104-1443CC.² The Commission, Cass County asserts, “is powerless to render declarations of law.” The language contained in Exhibit 1, the County claims, “is a declaratory judgment.” *Response* at pps. 2 and 3.

3. Cass County’s argument, which is made without benefit of statutory or judicial authority, is contrary to the expository case law as enunciated by the Missouri Supreme Court and the Courts of Appeals. The right of the Commission to interpret its own orders has been expressly upheld on several occasions.

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

State ex rel. Missouri Pacific Freight Transport Company v. Public Service Commission, 312 S.W.2d 363, 365 (Mo. App. 1958), citing *State ex rel. Orscheln Brothers Truck Lines, Inc. v. Public Service Commission*, 232 Mo. App. 605, 110 S.W.2d 364, 366 (1937). That the Commission is not acting “judicially” when it interprets its prior orders negates the County’s claim that the Commission is being asked to render a declaratory judgment. The Missouri Supreme Court also has said that an order of the Commission

² Aquila previously has rebutted this contention in its March 2, 2005, Supplemental Suggestions of Aquila, Inc. in Opposition to Motions to Dismiss. As pointed out in that filing, Aquila’s Application conforms in all respects to the terms of the Final Judgment.

interpreting one of its prior orders “was basically one of fact and findings of the Commission in such an event would, on review, be accorded the same effect as other facts found by the Commission.” *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 598 (Mo. banc 1964). The Supreme Court went on to conclude that the Commission also could interpret questions of law but its conclusions in that regard are not “controlling on the courts.” *Id.* An agency’s construction of its enabling legislation is, however, entitled to judicial deference. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 22 (Mo. banc 1975).

4. Each Court opinion referenced in the preceding paragraph has arisen in the context of the Commission interpreting a prior order granting operational authority of some nature. In the *Orscheln* case, the Commission interpreted a common carrier hauling authority. In the *Pacific Freight* case, the Commission examined a railroad company’s certificate of convenience and necessity. In the *Public Water Supply District* case, the Commission interpreted the certificate of convenience and necessity of Raytown Water Company.

5. At page 4 of its Response, Cass County asserts that “Aquila’s proposed clarification order is unmistakably a declaration of law which the Commission is powerless to enter.” The statement is lacking in legal support and, moreover, is contrary to the decisions of the Missouri Supreme Court and the Courts of Appeal which have verified the authority of the Commission to interpret its own prior authority or certificate orders as to matters of both fact and law. Contrary to the assertions of Cass

County, the Courts have recognized that as to matters of fact, the Commission is fulfilling its lawful role as a fact finding agency.

WHEREFORE, Aquila offers the foregoing reply to Cass County's Response.

Respectfully submitted,

/s/ Paul A. Boudreau
Paul A. Boudreau MO #33155
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166 Phone
(573) 635-0427 Fax
paulb@brydonlaw.com

Attorneys for Applicant, Aquila, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 9th day of March, 2005 to the following:

General Counsel's Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Mark W. Comley
Newman, Comley & Ruth
P.O. Box 537
Jefferson City, MO 65102-0537

Mr. Gerard D. Eftink
Van Hooser, Olsen & Eftink, P.C.
704 W. Foxwood Drive
P.O. Box 1280
Raymore, MO 64083-1280

Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230

Debra L. Moore
Cass County Counselor
Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701

/s/ Paul A. Boudreau