

1 **REBUTTAL TESTIMONY OF BRUCE G. PESHOFF**

2

3 **Q: PLEASE STATE YOUR NAME AND BUSINESS ADDRESS**

4

5 **A:** My name is Bruce Gregory Peshoff, I am a Principal at Planning Works, LLC, and my
6 business address is 8014 State Line Road, Suite 208, Leawood, Kansas 66208.

7

8 **Q: FOR WHOM ARE YOU APPEARING IN THIS PROCEEDING**

9

10 **A:** Cass County, Missouri.

11

12 **Q: PLEASE EXPLAIN YOUR RELATIONSHIP TO CASS COUNTY.**

13

14 **A:** Planning Works has been retained by Cass County to review its planning and zoning
15 procedures and practices and to provide the expert testimony and opinions set forth
16 herein all as part of Cass County's participation in this case.

17

18 **Q: PLEASE STATE YOUR EDUCATIONAL BACKGROUND AND HISTORY OF**
19 **EMPLOYMENT AND PROFESSIONAL EXPERIENCE.**

20

21 **A:** I have attached Schedule BGP-1 which sets out my education and experience. Briefly, I
22 am a professional planner with approximately 15 years of planning experience in the
23 public, non-profit and private sectors, and have advanced degrees in both planning and
24 law. My specialization is growth management – specifically, helping communities
25 understand, respond to and prepare for the implications of new development. Most of my
26 work experience has been as a consulting planner for cities, counties and private
27 development interests, including working for Professor Robert Freilich's planning group,
28 from which Planning Works was formed. My professional experiences include a wide
29 variety of projects and clients from coast to coast. I maintain memberships in both the
30 American Planning Association and American Bar Association, have served on and
31 chaired committees and regularly participate in professional training courses.

32

33 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

34

35 **A:** In my testimony I will describe for the Public Service Commission (hereinafter
36 "Commission") the importance of planning and zoning and its importance to areas of
37 rapid population growth, like Cass County, particularly when planning for intensive uses

1 of property and for uses which potentially have regional implications. I will provide an
2 overview of the system of planning and zoning in place in Cass County, including the
3 adoption and amendments to the Zoning Ordinance and Comprehensive Plan. I will
4 discuss how industrial uses of property, like the South Harper Generating station, are
5 treated and have been treated by Cass County pursuant to its planning and zoning
6 regulations. In addition, my testimony will address the Cass County planning and zoning
7 review process that would have occurred if Aquila had filed timely development review
8 applications such as a rezoning and/or special use permit(s) pertaining to the South
9 Harper Generating Station and the Peculiar Substation. There is also a portion of my
10 testimony in which I discuss boards and commissions, including public utility
11 commissions, of other jurisdictions that have authority to approve the site for proposed
12 power plants.
13

14 THE IMPORTANCE OF PLANNING AND ZONING

15

16 **Q: YOU HAVE MENTIONED ALREADY THE TERM “COMPREHENSIVE**
17 **PLAN.” WHAT IS A COMPREHENSIVE PLAN AND WHAT IS ITS PURPOSE?**
18

19 **A:** Within a system of planning and zoning, the Comprehensive Plan establishes the “vision”
20 for the community, establishes policy guidelines and provides the basis for zoning and
21 land use decisions. Comprehensive Plans constitute more than the general form and
22 shape of projected development for a community. The Plan is a document consisting of
23 principles, guidelines and standards that goes to the core of how a community “does
24 business.” It provides for an orderly and balanced future, promoting economic (jobs),
25 social (quality of life), environmental (natural resources, open space) and fiscal
26 (budgeting, capital improvement plans) attributes of an area. It sits atop the hierarchy of
27 local government law regulating land use and has been analogized to a constitution for all
28 future development. A Plan should be future-oriented (establishing goals and objectives
29 for future land use and development), continuous (flexible and able to adjust to changing
30 conditions), based on an assessment of present (actual) and future (reasonable) conditions
31 and comprehensive (coordinated, not haphazard or incremental).
32

33 **Q: WHAT ARE DEVELOPMENT REGULATIONS?**
34

35 **A:** The term “development regulations,” in its broadest sense, loosely characterizes the
36 regulatory structure applicable to existing and new development. Development

1 regulations include subdivision regulations, zoning regulations, building codes, and
2 administrative procedures.

3
4 **Q: HOW DO DEVELOPMENT REGULATIONS APPLY TO A COMPREHENSIVE**
5 **PLAN?**

6
7 **A:** While the Comprehensive Plan is an advisory document that directs the future mix,
8 intensity and distribution of land use, it also is the foundation of the development
9 regulations. Though development regulations are the primary legal tool for implementing
10 the Plan, they must be consistent with the Plan.

11
12 **Q: ARE THERE KINDS OR TYPES OF DEVELOPMENT REGULATIONS?**

13
14 **A:** Yes, development regulations can be divided generally into two types or parts:
15 Subdivision Regulations and Zoning Regulations. With regard to Subdivision
16 Regulations:

17
18 \$ Subdivision Regulations control the division of land into distinct parcels. They
19 contain rules and standards that are applied to the conversion of farm or vacant
20 land into lots and parcels for urban development.

21
22 \$ Subdivision Regulations aid in the development of public facilities. While zoning
23 generally treats of location factors - where and how a particular private structure
24 or use may be established - subdivision regulations concern themselves with the
25 provision for and design of public facilities such as streets and sewers, and the
26 layout and division of the site into lots so as to protect against hazards and to
27 ensure consistency with the development of adjacent land with respect to public
28 facilities.

29
30 \$ Subdivision Regulations provide an opportunity to protect future residents of an
31 area. Design standards give the community an opportunity to protect the desired
32 community character and assure that new developments do not create blight or
33 burdens for other existing and future property owners. The future residents of the
34 development are not on the scene to speak for themselves, so it becomes
35 imperative that the reviewing agency and staff members attempt to execute that
36 function on their behalf.
37

1 \$ Subdivision Regulations ensure that when developers construct public facilities
2 (such as streets) that these facilities are built to public standards. Design standards
3 provide an opportunity to assure safe and convenient circulation for automobiles,
4 pedestrians and bicycles; to minimize conflicts between transportation facilities
5 and abutting land uses; and to ensure adequate park and recreation, water and
6 sewer, and storm drainage facilities.

7
8 With respect to Zoning Regulations:
9

10 \$ Zoning Regulations control where land uses may be located. In general, zoning
11 ordinances divide a county into zones for various classes of land uses (such as
12 residential, commercial, and industrial) and prescribe regulations as to how land
13 or buildings may be used. Moreover, the zoning ordinance specifies spatial
14 relationships between land and the placement of buildings on the land - for
15 example, the size and type of bufferyards and open space to protect incompatible
16 uses.

17
18 \$ Zoning Regulations provide for the implementation of the Comprehensive Plan.
19 In one oft-cited case, the Oregon Supreme Court observed truisms applicable to
20 all jurisdictions:

21 Although we are aware of the analytical distinction
22 between zoning and planning, it is clear that under our
23 statutes the Plan adopted by the planning commission and
24 the zoning ordinances enacted by the county governing
25 body are closely related; both are intended to be parts of a
26 single integrated procedure for land use control. The plan
27 embodies policy determinations and guiding principles; the
28 zoning ordinances provide the detailed means of giving
29 effect to those principles.¹
30

31 \$ Zoning Regulations protect residential land uses from the negative impacts of
32 industrial and commercial land uses and vice versa. Preventing industrial
33 development in a residential district provides protection to the residents from
34 noxious odors, noise, vibrations, heavy traffic, and other negative impacts.
35 Similarly, preventing residential development in a commercial area protects the

¹ Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973).

commercial developers' ability to assemble property, provide for parking and loading areas, and conduct business without enduring complaints from residents. Zoning ordinances generally include provisions that encourage compatibility between uses and seek to minimize conflicts between different types of land uses.

\$ Zoning Regulations provide an opportunity to improve the aesthetics of an area, particularly architectural or historic character.

Q: WHY ARE PLANNING AND ZONING IMPORTANT?

A: Planning and zoning are critical to successful community growth. Planning can be defined as the process of applying forethought to solve or avoid potential problems. The key to successful community growth is the consistency between planning, regulatory and fiscal tools. Consistency not only refers to the relationship between the Plan and development regulations, but broadly refers to the relationships between planning, zoning, building permits, annual budgets, short- and long-range capital improvement plans and intergovernmental relationships. Good planning is critical to growth management, helps reduce conflict, benefits developers and the public, and promotes fairness.

Q: PLEASE EXPLAIN.

A: *Planning is essential for proper management.* Planning is an integral element of good management. Management needs to anticipate events; it is weak if it merely responds to them. ... The evolution of planning methods has stressed the validity and pertinence of information, the logic of analysis, the worth of evaluating the consequences of alternative decisions, and the effectiveness of standards and policies in achieving goals. We see land use planning as serving four functions in the community's management of change - intelligence, advance planning, problem solving, and operating the community's development management system. Those four services should be provided to both public and private decision-makers to improve community discourse and land use decisions and to achieve a more desirable future in which social use, market values, and environmental values are in balance. The application process, whether it involves a rezoning or special permitting, is an essential element in planning. Informed decision-making consists of gathering, organizing, analyzing, and disseminating information applicable to the use and development of land. This alerts decision-makers to conditions,

1 trends, and projections as well as the social, economic, and environmental impacts
2 of those projections and proposed alternative decisions (i.e., impact assessments),
3 and aims to serve public officials and agencies primarily but also provides
4 information to private firms, organizations, and individuals. The presumption is
5 that better information will lead to improved public discourse, more equitable and
6 effective policy, and better land use decisions.

7
8 \$ *Growth management reduces conflict.* Growth management describes how
9 people and their governments deal with change. The purpose of growth
10 management is to provide greater certainty and predictability about where, when,
11 and how much development will occur in a community, region, or entire state;
12 how it will be serviced, and the type and style of development. Lack of
13 predictability about the future growth and development of a community leads to
14 costly struggles that may pit government, developers, and concerned citizens
15 against each other. This case is certainly an example of that.

16
17 \$ *Planning provides benefits to developers and the public.* Benefits flow both ways
18 - to the public and to the developer, but with so much money at stake clear
19 precautions must be established, to keep public and private interests from blurring
20 the public detriment and lessen the opportunities for bad decision-making (for
21 either side). Precautions, to improve good planning, include the adoption of
22 standards and guidelines that provide predictability (to establish community
23 objectives and preferences and identify development expectations). Active
24 community development does need the partnership of both public and private
25 sectors; some public investments and incentives to private development are
26 justified, and a public concern for the marketability of that development is
27 needed. The balance will be better struck if all the computations of costs and
28 benefits and markets are explicitly and publicly examined, case by case. As more
29 citizens and communities begin to question the type of growth that is occurring in
30 their area, how much it is costing, who is paying for it, and how it is affecting the
31 community, the need to coordinate the community's planning and control devices
32 is becoming evident to all.

33
34 \$ *Planning and zoning promote fairness.* The heart of zoning is how local decisions
35 are made: how fair is the process by which permission to develop is granted or
36 denied? The hallmark of zoning is the opportunity for individuals to petition for
37 relief - to seek a change - from the general comprehensive zoning plan. Cass

County's regulations provide for two basic types of relief: rezonings (a legislative act that gives broad discretion to elected officials to determine the use, intensity and timing of development) and/or special use permits, variances, exceptions or administrative appeals (to address use- or site-specific issues).

Q: WHAT IS THE RELATIONSHIP BETWEEN ADEQUATE DEVELOPMENT REVIEW AND PLANNING AND ZONING?

A: Plan implementation and consistency are critical for adequate development review. The development review process provides an outline of how the community, especially including stakeholders (neighbors that have invested in the community) who may be impacted, considers development proposals. Development review requirements are established to protect and enhance the public realm, to mitigate impacts of development proposals on their surroundings and preserve public resources. The Missouri planning statutes, not unlike statutes in other states, give cities or counties the power to review applications for proposed land developments. With respect to the case at hand, and from a planner's perspective, it would be Cass County's responsibility and duty, as the jurisdiction delegated the responsibility by the State to review development proposals, to make a determination of whether a proposed use(s) of land would be appropriate for the proposed location.²

Q: WERE THE LOCATIONS FOR THE SOUTH HARPER GENERATING PLANT AND THE PECULIAR SUBSTATION GIVEN ADEQUATE DEVELOPMENT REVIEW?

A: No. Development review is intended to be an anticipatory function; it is intended to occur prior to development occurring so that a community can ensure compliance with its goals, objectives, policies and standards. The plant and substation were constructed prior to any governmental body review, by the County Planning Board, County Commission or even this Public Service Commission, leaving the review strictly at the discretion of the entity with the vested interest in developing the facility (Aquila) rather than with an unbiased entity with an interest of representing and protecting the jurisdiction's interests (Cass County).

² "No improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans (*emphasis added*) thereof to the county planning board and receiving the written approval and recommendations of the board." (RSMO 64.235)

1 Furthermore, the plant and substation were erected without any participation by the
2 public. The Missouri planning statutes, as they apply to Cass County, provide that the
3 development review process should be a public process.³
4

5 Also, in accordance with generally accepted planning principles, coordinated
6 development must be based on needs that are reasonably foreseeable and not what is
7 beyond visionary – there must be a reasonable, rational basis for projecting and
8 protecting future development patterns. Coordinated development includes coordinating
9 with the transportation network and roadway improvements, compatible land uses,
10 adequate open space and buffering and capital improvements planning. None of this
11 accompanied the location and erection of the South Harper plant and Peculiar substation
12

13 **Q: IS THERE A RELATIONSHIP BETWEEN PLANNING, ZONING AND OTHER**
14 **GOVERNMENTAL OR COMMUNITY USES?**
15

16 **A:** Yes. All land uses are controlled by some form of planning and zoning, including those
17 that generate some “public benefit,” such as schools, utilities, airports and hospitals.
18

19 **Q: ARE SOME LAND USES EXEMPT FROM LOCAL ZONING CONTROL?**
20

21 **A:** Yes, there are some land uses, including on occasion the public benefit uses mentioned
22 earlier for example, that have obtained exemptions from local zoning approval. Even so,
23 when uses are expressly preempted from local zoning control, there are a myriad of other
24 regulatory controls established to ensure that appropriate land use factors are considered,
25 especially in states with strong home rule practices such as Missouri.
26

27 **Q: IN THIS CASE, AQUILA MAY QUALIFY FOR AN EXEMPTION FROM**
28 **LOCAL ZONING APPROVAL. IF THIS IS THE CASE, SHOULD IT ALSO BE**
29 **EXEMPT FROM AN ADEQUATE DEVELOPMENT REVIEW?**
30

31 **A:** Assuming that Aquila is exempt from local zoning control since it has filed this case for
32 certification of the South Harper Plant and Peculiar Substation before the Commission, it
33 is my opinion that adequate review is nonetheless a planning requirement. An
34 appropriate land use assessment should be conducted by an entity with the ability to

³“The county planning board shall have power to make, adopt and may publish an official master plan for the county for the purpose of bringing about coordinated physical development (*emphasis added*) in accordance with present and future needs (*emphasis added*)”... and ... that “the board shall hold at least one public hearing.” (RSMO 64.231.1)

adequately review the development proposal. Such an adequate review would include at a minimum:

- ? Expertise in land use planning and zoning;
- ? Familiarity with the jurisdiction's Plan and regulatory controls;
- ? A thorough understanding of the community goals, objectives, policies and strategies; and
- ? Familiarity with the history of development, particularly the treatment of similar development proposals, in the community.

Q: ARE THERE GENERALIZED STANDARDS OR PROCEDURES THAT PLANNERS CONSIDER REGARDING POWER PLANTS?

A: Yes. In the Energy Policy Guide of the American Planning Association (see Schedule (BGP-2) the importance of land use planning in the siting of power generating facilities is emphasized. Recognizing that energy facilities are not always subject to the same comprehensive planning process and environmental evaluation that is required for other land-use decisions, Initiative 11 provides:

Develop procedures and standards to ensure that siting decisions for energy generation, transmission, and distribution facilities will be evaluated to ensure consistency with community and regional development objectives, and the overall protection of public health, safety, and the environment.⁴

Regarding environmental justice and the siting of energy generation facilities, the Energy Policy Guide of the American Planning Association recommends:

A clearly defined process is needed to establish priorities and requirements and identify participants/stakeholders in siting of new energy facilities. The process should ensure compliance with all applicable local, state, and federal regulations governing such

⁴ Energy Policy Guide, American Planning Association, Ratified by the Board of Directors, April 25, 2004, p. 8.

1 issues as air quality, water/wetlands, land use, noise, cultural and
2 natural resources, public health and safety, and other
3 environmental issues in addition to ensuring that environmental
4 justice issues are addressed. The location of energy facilities
5 should be part of a comprehensive planning process, which
6 includes the opportunity for meaningful public participation and
7 public consensus, in advance of the "public hearing to announce
8 the new plant" scenario [emphasis added].⁵
9

10 **Q: WHAT ARE THE CONSEQUENCES OR IMPLICATIONS IF DEVELOPMENT**
11 **IS NOT CONSISTENT WITH THE COMPREHENSIVE PLAN?**
12

13 **A:** Many detrimental effects can result from ignoring a community's Comprehensive Plan
14 when making land use decisions. When purchasing homes, businesses and land for
15 investment, individuals make decisions based on their best appraisal of the future of a
16 community and how their investment will be influenced by future activities in an area.
17 One of the ways an individual can do this is by consulting a community's Comprehensive
18 Plan to compare how their plans fit in with the community's plan. If an individual feels
19 that the Plan is a document that will not be followed to balance the interests of the
20 community and individual land owners, a rational person will make decisions to promote
21 their own best interests with disregard for how those decisions will impact adjacent
22 properties and the overall best interests of their neighborhood and town.
23

24 Through the Comprehensive Plan, a community expresses its vision for the future and the
25 principles that guide land use decisions. A Plan provides some degree of certainty as to a
26 community's goals, objectives and land use policies. Setting a precedent that the Plan
27 will not be followed is dangerous in that it eliminates that certainty for individual land
28 owners. Without some assurance that their property will be protected from incompatible
29 uses and that its value will be retained, there is no reason for individuals to maintain or
30 improve their property investment. This can lead to blight, including general
31 disinvestment, property code violations, high vacancy rates and abandoned properties,
32 reduced property values and the associated decline in the tax base and overall decrease in
33 the community's quality of life.
34

⁵ Energy Policy Guide, American Planning Association, Ratified by the Board of Directors, April 25, 2004, pp. 12-13.

1 Land use incompatibilities that reduce property values and quality of life
2 disproportionately burden those with lower or fixed incomes who cannot afford to move
3 or to accept a lower price for their property. The purchase of a home is typically a
4 family's largest expenditure, and families choose to live in communities where they think
5 that investment will be protected. If residents of Cass County believe that land use
6 decisions can be made without regard for the County's Plan, they will cease to believe
7 that Cass County is a good location for their investment.

8
9 The Comprehensive Plan provides the legal basis for a community's land use decisions.
10 If the Plan no longer serves that purpose, there is no legal basis for land use decisions and
11 therefore no route or recourse for a community to plan for the provision of municipal
12 facilities and services or the fiscal stability of the municipal government and service
13 providers.

14 15 **CASS COUNTY PLANNING AND ZONING**

16
17 **Q: HAS CASS COUNTY ADOPTED A COMPREHENSIVE PLAN AND ZONING**
18 **ORDINANCE?**

19
20 **A:** Yes, it has.

21
22 **Q: BRIEFLY, WHAT IS THE RECENT HISTORY OF THE COUNTY'S**
23 **ADOPTION AND AMENDMENTS OF ITS COMPREHENSIVE PLAN AND**
24 **ZONING ORDINANCE AND WHAT WAS THE BASIS AND EXTENT OF**
25 **THOSE AMENDMENTS?**

26
27 **A:** The County has established and maintained a planning and zoning program for land use
28 regulation, defined and implemented through the County's Comprehensive Development
29 Plan, Zoning and Subdivision Regulations since 1959. During the 1990s, growth was
30 guided by the Cass County 1991 Comprehensive Plan, the primary intent of which was to
31 "encourage urban development to locate near incorporated areas and other urban land
32 uses."

33
34 The 1991 Comprehensive Plan was adopted by the Cass County Planning Board on
35 November 27, 1990 and adopted by the County Commission in February 1991. This Plan
36 is the basis for other planning documents I describe in my testimony.

1 The 1991 Plan was reviewed and updated, with minimal changes to the existing goals,
2 objectives and policies adopted, and recommended amendments to the Cass County
3 zoning and subdivision regulations drafted. The 1997 Plan includes the 1991 Plan and
4 the subsequent updates. The updates to the Comprehensive Plan were adopted on June
5 10, 1997, and the changes to the Zoning Ordinance were adopted on June 16, 1997.
6

7 In 2002, the County and various stakeholders met to identify key issues within the
8 County, and in 2003 updates to the Plan were drafted to address those issues. The issues
9 identified were generally in response to the growth and increasing urbanization occurring
10 within the County. As a result of this planning effort, a 2003 Comprehensive Plan was
11 adopted that incorporated the 1991 and 1997 Plans. The Plan was adopted in July 2003
12 by the Board of County Commissioners and the County Planning Board. No changes
13 were made to the zoning ordinance at that time.
14

15 There are few substantive differences between the 1997 and 2003 Comprehensive Plans
16 of Cass County regarding overall land use policy. On the whole, the County maintains its
17 position in both documents that urban and rural uses should occur in appropriate
18 locations, with urban uses concentrated in and around existing incorporated areas, in
19 order to reduce land use incompatibilities and provide for the efficient extension of
20 municipal facilities and services.
21

22 Overall, the 2003 Plan responds to the increasing urbanization of the County. For
23 example, the Plan supported the adoption of impact fees to mitigate the costs of serving
24 new development. Additionally, as the "Urban Reserve Area" system promoted in the
25 1997 Plan had little desired effect on development in the County, a Tier system was
26 implemented through the 2003 Plan to ensure that development would occur in
27 appropriate locations with adequate levels of service.
28

29 In addition to changes in the Plan between 1997 and 2003, the County went from being
30 designated as a Second Class County to a First Class County, allowing it to reduce the
31 number of members on the Planning Board.
32

33 Further updates were made to the Plan in 2004, and a new Plan was adopted on February
34 1, 2005 by the Board of County Commissioners and the County Planning Board. The
35 2005 Plan is a self-contained document, in contrast to the 2003 Plan, which was a
36 compendium of the 1991, 1997 and 2003 planning efforts. A new Zoning Ordinance was
37 also adopted at that time.

1
2 **Q: IN PREPARING YOUR TESTIMONY, DID YOU HAVE THE OPPORTUNITY**
3 **TO REVIEW RECORDS OF THE CASS COUNTY PLANNING BOARD AND**
4 **THE MANNER IN WHICH IT CONDUCTED HEARINGS AND RENDERED**
5 **RECOMMENDATIONS?**

6
7 **A:** Yes, I did.

8
9 **Q: CAN YOU SUMMARIZE THE AVERAGE NUMBER OF APPLICATIONS**
10 **PROCESSED BY THE PLANNING BOARD ANNUALLY AND DESCRIBE THE**
11 **TYPES OF MATTERS HEARD?**

12
13 **A:** From January of 1960, to April of 2006, there have been 2,701 applications processed by
14 the Planning and Zoning Commission. This is an average of approximately 58
15 applications per year. The Commission hears matters including special use permits,
16 rezonings, lots splits, preliminary and final plats and ordinance amendments and special
17 use permits. Over the course of the past five years, the Planning Board has heard from 80
18 to 100 applications per year. Compared to other similarly-situated rural county planning
19 boards, Cass County responds to a very active agenda that includes a wide range of
20 planning issues, most dealing with growing urbanization demands.

21
22 **Q: HAS CASS COUNTY APPROVED APPLICATIONS RELATED TO**
23 **INDUSTRIAL USES OF PROPERTY? IF SO, PROVIDE THE COMMISSION**
24 **EXAMPLES THAT IDENTIFY THE APPLICANT, DESCRIBE THE PROCESS**
25 **AND INDICATE WHETHER THE APPLICATION WAS APPROVED OR**
26 **DENIED.**

27
28 **A:** Yes. Cass County has a strong record of supporting industrial and other intensive
29 commercial uses. Some recent examples include:
30

Application Number	Date Heard	Owner/Applicant	Location	Matter	Comments
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Application Number	Date Heard	Owner/Applicant	Location	Matter	Comments
2420	1/28/03	Harrelson Properties, LLC	Near 195th & 71 HWY	Rezoning, preliminary & final plat	? Approved ? A to PD to include C-2 and I-1 Classification for use as a Business Center
2536	8/26/03	Ron & Rachel Rushly	Near Faumuliner & 275th	Special Use Permit	? Approved ? MSTP Sanctioned Tractor & Truck Pull ? Two times per year ? Traffic
2542	4/27/04	Mike Vogt, Summit Lifts	Near 167th & MO 291 HWY	Final Plat	? Approved ? Industrial Park ? Next to fire station
2573	2/24/04	Ron G. Schrock	Near Kauffman & 275th	Special Use Permit	? Approved ? Light manufacturing, small parts assembly & upholstering on farm
2595	8/24/04	Town & Country Disposal of Western Missouri, Inc.	Near 231st & MO 291 HWY	Rezoning	? Approved ? Ag to I-1 for light industrial use as a transfer station ? Opposed by Harrisonville
2614	4/26/05	Foster Bros. Wood Products	Near Tieman & MO 7 HWY	Rezoning & Lot Split	? Approved ? Mulch ? Expansion of Use ? Ag to I-1

Application Number	Date Heard	Owner/Applicant	Location	Matter	Comments
2640	7/26/05	Crabtree Transportation LLC	Near 195th & Mullen	Special Use Permit	? Approved against staff recommendation ? For a bus lot ? Across from subdivision
2656	9/27/05	Craig A. & Wanda M. Cox	Near 203rd & State Hwy D	Rezoning	? Approved ? RR to C-2 to store ? RVs and trailers ? No sale or repair ? Concern about increasing industrial uses ? Area “center” for industrial/commercial uses (antique/auction, concrete plant, bar, landscaping, body shop, storage)
2670	12/27/05	Curtis Holland/Terry & Patricia Suddoff	Near 227th & MO 2 HWY	Special Use Permit for a cell tower, lot split and rezoning	? Approved ? For a cell tower ? Rezone from RR to C-2 ? Greenhouse on residential lot

Q: HAS AQUILA ALWAYS TAKEN THE POSITION THAT IT IS EXEMPT FROM COMPLYING WITH CASS COUNTY DEVELOPMENT APPLICATION REQUIREMENTS?

A: No. Applying for land use approval is not a foreign concept to Aquila, who previously submitted applications for special use permits and/or rezoning to construct and operate

1 the “Aries” plant, the “Camp Branch” plant, and a number of substations. In addition,
2 there are numerous other provisions of the County’s development regulations with which
3 Aquila has complied, such as for building permits, driveway permits and a health
4 department permit.
5

6 **Q: HAS AQUILA ALWAYS TAKEN THE POSITION THAT IT IS EXEMPT FROM**
7 **ZONING REQUIREMENTS?**
8

9 **A:** No. Aquila conducted a “site selection” analysis found in the Project Manager binder for
10 the South Harper Facility, which includes a table labeled as the “Comprehensive Site
11 Evaluation Summary Table.” The “fatal flaw” column [in that table] is particularly
12 revealing, not so much for its cursory assessment of the risks associated with each
13 potential alternative site as for its identification of key recurring variables - land use
14 compatibility and ZONING. Aquila was clearly considering the viability and risk of the
15 alternative sites based, in part, on the availability of appropriate zoning, as noted by the
16 following comments:
17

18 ? “County zoning issue negated by planned Peculiar annexation” (South Harper
19 site);
20

21 ? “County zoning issue negated by location inside of Raymore” (Good Ranch site);
22

23 ? “Due to zoning denial and expected litigation from Cass County and opposed
24 surrounding landowners” (Camp Branch site);
25

26 ? “Adjacent to .. and within full view of Shafer Estates” (North 235th site); and
27

28 ? “Scenic parkway may hinder development as needed” (Turner Road site).
29

30 These analyses cannot help but bring forward the question: If Aquila was operating under
31 the premise that County zoning did not matter, then why were two development
32 proposals dependent upon, at least in part, potential municipal annexations (Camp Branch
33 with Harrisonville and South Harper with Peculiar)?
34

35 **Q: HAS CASS COUNTY PREVIOUSLY APPROVED APPLICATIONS FOR THE**
36 **CONSTRUCTION OF POWER PLANTS AND/OR SUBSTATIONS? IF SO,**
37 **PROVIDE THE COMMISSION EXAMPLES THAT IDENTIFY THE**
38 **APPLICANT, DESCRIBE THE PROCESS AND INDICATE WHETHER THE**
39 **APPLICATION WAS APPROVED OR DENIED.**
40

1 **A:** Yes, construction of power plants and substations has been approved through the Cass
2 County planning process. There are two key examples relating to the County's treatment
3 of power plants and, ironically, both examples concern applications filed by Aquila – the
4 first plant application was approved, the second was withdrawn by Aquila before the
5 County's review process was complete.

6
7 **Q: TELL THE COMMISSION ABOUT THE AQUILA APPLICATION THAT WAS**
8 **APPROVED.**

9
10 **A:** The Aquila application that was approved concerned the erection of the "Aries" facility,
11 located near Pleasant Hill, Missouri. When Aquila approached Cass County regarding
12 rezoning for the Aries facility, Aquila, with the aid of a local attorney, arranged meetings
13 with the County representatives regarding various aspects of the project well in advance
14 of the filing of its application. Those attending the meetings included: the County Clerk,
15 County Commissioners, County Planning Department staff and the Cass County
16 Economic Development Council. Aquila spear-headed an inclusive, cooperative process
17 that virtually assured approval of their development proposal (the rezoning) because they
18 sought to address local concerns. Aquila successfully followed the process, to its benefit,
19 the County's and adjacent property owners. Based upon my review of the County
20 records, it appears that no complaints have ever been filed with the County about the
21 Aries site.

22
23 The Aries application was filed with the Cass County Planning Board on April 12, 1999.
24 The result of Aquila's submittal and good faith cooperation with Cass County in advance
25 of that submittal was a successful review process that resulted in the issuance of the
26 rezoning with no protests by neighboring property owners and no legal conflicts between
27 Aquila and the County.

28
29 **Q: YOU MENTIONED ANOTHER AQUILA APPLICATION FILED WITH CASS**
30 **COUNTY THAT WAS WITHDRAWN. TELL THE COMMISSION ABOUT**
31 **THAT APPLICATION.**

32
33 **A:** The application that was withdrawn concerned a facility proposed at or near "Camp
34 Branch" in Cass County. In comparison to the Aries process, the process followed by
35 Aquila respecting the Camp Branch site and eventually the South Harper site was
36 fundamentally different. Prior to choosing the South Harper location for the peaking
37 facility, Aquila examined several potential sites in Cass County, and initially selected the

1 Camp Branch location near to Harrisonville, Missouri for its peaking facility. The Camp
2 Branch site was located in unincorporated Cass County but was also an area the city of
3 Harrisonville intended to annex for residential purposes according to its Plan of Intent.
4 The Cass County Planning Board recommended that the special use permit for the Camp
5 Branch location be denied for reasons including land use compatibility, traffic, noise,
6 visual impacts and water/sewer availability.

7
8 The pre-application procedures used by Aquila for Aries were not utilized during the
9 application for the Camp Branch location. For Camp Branch, Aquila contacted with the
10 County Planning Department only a week prior to submittal of its application for a
11 rezoning of the area. At that time, Aquila was informed that the Camp Branch location
12 was an inappropriate location for rezoning as an Industrial district, and that applying for a
13 Special Use Permit for the site would be the most appropriate route if it chose to pursue
14 that location. Ultimately the permit was recommended for denial by the Cass County
15 Planning Board because the Camp Branch location was incompatible due to the reasons
16 listed above and the objection of neighbors, the application was tabled by the Zoning
17 Board, and Aquila eventually withdrew their application to the Board of Zoning
18 Adjustment.

19
20 On July 13, 2004, the Cass County Planning Board considered Aquila's application at a
21 public hearing and voted unanimously to recommend denial of the permit, whereupon the
22 Planning Board recommendation was forwarded to the Board of Zoning Adjustment. I
23 have reviewed the transcript of the proceedings before the Cass County Planning Board
24 in providing this testimony, and I incorporate that transcript by reference.

25
26 At the hearing, representatives of Aquila stated that it had been Aquila's original
27 intention to apply for a rezoning of the property from an Agricultural to an Industrial
28 classification, but based upon the recommendation of County Planning Director Darrell
29 Wilson, the company chose to pursue a Special Use Permit instead.

30
31 Aquila's testimony at the hearing addressed the six criteria set forth in the zoning
32 ordinance for acquiring a special use permit. Those criteria were:

- 33
34 ? The location and size of the proposed use in relation to the site, to adjacent
35 sites and the use of the property and nature and intensity of operations on
36 the property;
37

- 1 ? Accessibility to emergency services and traffic flow;
2
3 ? Availability of utilities and services;
4
5 ? Height and siting of structures on the site;
6
7 ? Yard and open space requirements; and
8
9 ? General compatibility with adjacent properties in the district, general
10 health, safety and welfare of the community.
11

12 Witnesses against approving the application included both the Mayor and Director of
13 Community Development for the City of Harrisonville, who addressed the City of
14 Harrisonville and Cass County Comprehensive Plans and explained why the Camp
15 Branch site would not be appropriate for a power plant in terms of land use compatibility
16 and future land use plans for the area. Additionally, the attorney representing Cass
17 County Residents Opposing the Power Plant (CCROPP), a group of approximately 280
18 residents, spoke against the project for a variety of land use compatibility and planning
19 issues, such as the need to buffer more intense uses with less intense uses on a
20 continuum.
21

22 Overall, while Aquila stated that they met the criteria for a Special Use Permit, they did
23 not fully or adequately address how the SUP would meet the objectives of the
24 Comprehensive Plan, or how the criteria would be specifically achieved. Ultimately the
25 Planning Board voted to deny the permit, as mentioned previously, and that
26 recommendation was forwarded to the Board of Zoning Adjustment. Later, Aquila
27 withdrew the application and the Board of Zoning Adjustment held no hearing on the
28 matter.
29

30 **Q: HAS AQUILA TRIED TO FILE AN APPLICATION FOR A SPECIAL USE**
31 **PERMIT OR PERMITS WITH THE CASS COUNTY PLANNING BOARD**
32 **RESPECTING THE SOUTH HARPER PEAKING FACILITY AND THE**
33 **PECULIAR SUBSTATION?**
34

35 **A:** Yes, it presented for filing such applications with the Planning Board on January 20,
36 2006 but its filing was rejected at that time by Cass County for reasons related to the
37 litigation pending between the parties. As explained to me, Cass County rejected the

1 applications on Jan 20, 2006, because at that time the only Order in place was the trial
2 court's Judgment directing that the plant and substation be immediately dismantled. I am
3 further advised that subsequent to the trial court's January 27, 2006 decision to provide
4 Aquila to May 31, 2006 before dismantling the plant and substation, Cass County invited
5 Aquila to resubmit its applications.
6

7 **Q: HAVE YOU REVIEWED AQUILA'S REJECTED APPLICATIONS FOR THE**
8 **SPECIAL USE PERMIT(S) RELATED TO THE SOUTH HARPER PLANT FOR**
9 **THE AQUILA PLANT AND SUBSTATION THAT AQUILA ATTEMPTED TO**
10 **FILE WITH THE COUNTY ON OR ABOUT JANUARY 20, 2006?**
11

12 **A:** Yes, I have.
13

14 **Q: WERE THE APPLICATIONS IN PROPER FORM FOR REVIEW BY THE**
15 **PLANNING BOARD?**
16

17 **A:** Yes, the Special Use Permit applications submitted by Aquila for South Harper were
18 adequate *to begin* review by the Planning Board to determine if these uses meet the
19 criteria set forth in the 1997 Zoning Ordinance for the approval of the permit under
20 Article 8, Section C - Standards for Issuances of Special Use Permits. It is also
21 reasonable and likely that, due to a project of this scope and complexity, additional
22 information or clarification of submitted information would have been requested.
23

24 THE AQUILA SPECIAL USE PERMIT APPLICATIONS 25

26 **Q: MR. PESHOFF, FOR MY NEXT SERIES OF QUESTIONS I WANT YOU TO**
27 **ASSUME THAT AQUILA FILED TIMELY AND COMPLETE**
28 **APPLICATION(S) WITH THE PLANNING BOARD OR ZONING OFFICER OF**
29 **THE COUNTY. PLEASE DESCRIBE FOR THE COMMISSION THE**
30 **PROCESSES THE PLANNING BOARD WOULD EMPLOY TO EVALUATE**
31 **AND ANALYZE THE APPLICATION(S)?**
32

33 **A:** According to Article 8 of the 1997 Cass County Zoning Ordinance, the Planning Board,
34 after receiving the formal application according to the proper procedures, would review
35 the application for the Standards for Issuance of Special Use Permits delineated in
36 Section C, relying on planning staff reports, conferral with other applicable County staff
37 and consultants and their own knowledge and research. Section C delineates six major

criteria for issuance of a SUP that the Planning Board considers, briefly described as follows:

- ? Location, size, nature and intensity of proposed use in relation to the site and to adjacent properties;
- ? Accessibility of property to emergency and municipal services, traffic impacts and parking availability;
- ? Location, availability, capacity and compatibility of utilities and services;
- ? Location, nature and height of all site improvements, their relation to adjacent property and uses, and the need for buffering or screening;
- ? Adequacy of required yard and open space requirements and sign provisions; and
- \$ General compatibility with adjacent properties, other properties in the district and the general safety, health, comfort and general welfare of the community.

There are further restrictions and standards for certain special uses that the Planning Board considers, as applicable, as described in Article 8. The Planning Board also takes into account the goals, objectives and land use policies of the Comprehensive Plan. Additionally, the Board considers the presentations, findings and comments presented at the public hearing.

Q: WHAT FACTORS WOULD THE PLANNING BOARD CONSIDER TO MAKE A RULING ON THE APPLICATION(S)?

A: The County would consider the following factors:

- \$ *The impacts of development on the community.* Land use changes inevitably involve impacts. Systematic and objective assessment of these impacts not only gives decision-makers important information for their deliberations, but also points out options for impact mitigation. The land use planner constructs and applies evaluation procedures and identifies and proposes mitigation alternatives.

1 Development proposal evaluation methods assess the impacts of proposed public
2 and private land use changes in light of plan objectives. They consider both local
3 and communitywide impacts.
4

5 \$ *Land use efficiency.* The spatial specificity of the land classification plan and land
6 use design serves several purposes. One is to promote efficiency by coordinating
7 the size and location of future public facilities with the location and intensity of
8 future residential, commercial, and industrial development. A second purpose of
9 the land use design is to specify the most suitable long-range pattern to counteract
10 the short-sighted misallocation of land through an unplanned market.
11

12 \$ *The public health, safety and welfare.* Zoning is the most widely applied land-use
13 control in the United States. The main purpose of zoning is to separate land uses
14 that might result in threats to public health, safety, or welfare or reduce a
15 landowner's enjoyment of his or her property.
16

17 \$ *Locational requirements and implications.* The following location principles
18 illustrate the considerations that the planner should address, adapting them to the
19 specific community's goals and concerns, the specific nature of the economy, and
20 the physical geography, including:

- 21 -- Topography, drainage and terrain
- 22 -- Alternative locations
- 23 -- Access to and capacity of transportation network
- 24 -- Visibility
- 25 -- Availability of infrastructure
- 26 -- Compatibility with surrounding uses (this criterion is especially applicable
27 for heavy industrial areas and industrial processes with off-site noise,
28 glare, odor, smoke, traffic, dangerous emissions, or waste storage areas)
- 29 -- Compatibility with the natural environment
30

31 \$ *Consistency with the Comprehensive Plan.* The idea that local land-use decisions
32 should be consistent with an independently adopted local Comprehensive Plan is
33 a fundamental concept of planning practice. An increasing number of states have
34 adopted legislation requiring consistency between certain land-use regulations,
35 such as zoning and subdivision ordinances, and a local Comprehensive Plan.
36 Many states also have adopted legislation that requires other decisions (including

sewer extensions, the creation of tax increment finance districts or redevelopment districts, etc.) to be consistent with a Comprehensive Plan.

\$ Additionally, in reviewing the application, the Planning Board would have the opportunity to request additional information of the applicant in response to data requests, as well as confirm that the proposed facilities are in compliance with other local, state and federal regulations.

Q: ARE THERE ANY OTHER FACTORS THAT THE COUNTY MAY CONSIDER PRIOR TO MAKING A RULING ON THE AQUILA APPLICATION(S)?

A: Yes. Communities generally are afforded considerable latitude when considering discretionary requests, such as for special use permits, rezonings and variances. Courts and communities across the country, supported by generally accepted planning principles, have consistently ruled against self-inflicted cases of hardship as a means to avoid compliance with Comprehensive Plans and development regulations. For example, the County's Zoning Ordinance identifies Board of Zoning Adjustment findings to approve a zoning variance, the first of which is that the requested variance requested is "not created by the action or actions of the property owner or applicant." (§13(D)(b))

The above-referenced provision is directly applicable to one of the key "nagging" questions that arise from Aquila's proposal for the South Harper peaking facility relates to need... is the facility actually needed to supply regional electrical needs or is it merely an alternative business choice to improve the return for Aquila shareholders? In two Aquila documents, the balance between preference and need come into focus: Aquila's Application to the Public Service Commission (dated January 25, 2006) refers to the Commission's *preference* (emphasis added) for company-owned generation instead of power purchase agreements. (at paragraph 20)

Aquila's Special Use Permit Application for Cass County (dated January 2006) indicates that "ownership of peaking generation is an essential component of its (Aquila's) least-cost plan). (at §1.2)

Without attempting to address electric demand, infrastructure needs or Aquila's business model (those topics can be more appropriately addressed to others with such expertise), this analysis can identify the *types* of questions that communities routinely and reasonably raise during the development review process. The following are not NIMBY

1 (not in my backyard) questions, but questions that focus on the applicant's actions and
2 alternatives, the role of Cass County to the region's needs, the roles of other counties in
3 the region and the viability of alternative sites in Cass County that could satisfy Aquila's
4 needs and minimize land use incompatibilities.

5
6 Ownership in Aries facility, until recently, included Aquila. Did Aquila create its own
7 problem by selling its interest in the Aries plant? Could Aquila's continued ownership of
8 Aries precluded the need for the South Harper plant? Is there anything that Aquila could
9 have done to lessen the need for another plant in the County?

10
11 Cass County already includes one approved electric plant – the Aries facility. A review
12 of Missouri Department of Natural Resources data (for 2000, the most recent year
13 information is provided) indicates that there are 22 counties in the State with large, fossil-
14 fired plants, but only three (3) have more than one plant (and each of those three counties
15 contains at least one major city). Further, the DNR data shows that 53 counties had an
16 electrical plant (of any type or size) that produced electricity, but only 16 counties had
17 more than one plant. Cass County is a largely rural county on the fringe of a metro area.
18 Should Cass County really bear more of a burden than any other County in Missouri?

19
20 What reasonable siting alternatives exist? Are there other Counties in the region/service
21 area with no plants that could be responsible for their fair share of the metro area's
22 electrical needs? Are there other locations in the County that would minimize the
23 incompatibilities from this intensive land use and provide existing or planned
24 improvements consistent with Aquila's needs? Could both plants be co-located or
25 adjacent to one another, effectively creating a utility district?

26
27 Are the same factors that Aquila claimed supported the selection of the South Harper site
28 still valid, such as the existence of Southern Star gas lines and overhead power lines, or,
29 as anecdotal information suggests, did Aquila remove and upgrade overhead lines and
30 extend gas lines to another provider? Were the transmission line improvements
31 consistent with the existing lines at the Aries plant?

32
33 Cass County has not attempted to exclude any and all power plants from within its
34 borders, only to ensure that its citizens are adequately protected, a cornerstone of the
35 development review process. Unfortunately, Aquila's actions might lead one to
36 paraphrase a statement by the then-President of General Motors, at his Secretary of

1 Defense confirmation hearings in 1953, that “what’s good for Aquila is good for Cass
2 County.”
3

4 **Q: HAVE YOU CONDUCTED A DEVELOPMENT REVIEW ANALYSIS OF**
5 **AQUILA’S SOUTH HARPER PLANT AND PECULIAR SUBSTATION?**
6

7 **A:** Yes.
8

9 **Q: WHAT PLAN(S) AND/OR ORDINANCES DID YOU REVIEW FOR THAT**
10 **ANALYSIS?**
11

12 **A:** I reviewed and applied the 2003 Cass County Comprehensive Plan to determine Aquila
13 plant and substation Plan consistency and the 1997 Cass County Zoning Ordinance to
14 determine Aquila plant and substation compliance with the County’s zoning and
15 development requirements.
16

17 **Q: WHY ARE YOU USING THE 2003 COMPREHENSIVE PLAN AND THE 1997**
18 **ZONING ORDINANCE WHEN THE COUNTY ADOPTED A SUCCESSOR**
19 **PLAN AND ORDINANCE IN FEBRUARY 2005?**
20

21 **A:** The Aquila plant and substation development projects should have been brought to the
22 County for review and consideration prior to their construction. According to the Permit
23 Book for the South Harper Facility (prepared by Burns MacDonnell, for Aquila, dated
24 March 2005), Aquila and its contractors/agents were conducting a flurry of permit
25 applications for a variety of jurisdictional bodies and agencies as early as May 2004.
26 That application process continued through the fall and winter of 2004. Had the projects
27 been submitted for development review in a timely manner, Aquila also would have
28 submitted applications to Cass County at that same time. Based on the timing of the
29 Aquila application and permitting process in 2004 the only controlling documents [that
30 were adopted by Cass County] were the 2003 Comprehensive Plan and the 1997 Zoning
31 Ordinance.
32

33 **Q: BASED UPON YOUR REVIEW OF THE CASS COUNTY PLANNING AND**
34 **ZONING REQUIREMENTS AND BASED FURTHER UPON YOUR**
35 **EXPERIENCE IN THE LAND USE PLANNING FIELD, DO YOU HAVE AN**
36 **OPINION RESPECTING WHETHER THE AQUILA SOUTH HARPER**
37 **FACILITY IS CONSISTENT AND IN COMPLIANCE WITH THE COUNTY’S**
38 **2003 COMPREHENSIVE PLAN AND 1997 ZONING ORDINANCE? PLEASE**
39 **EXPLAIN THE REASONS FOR YOUR OPINION.**
40

41 **A:** No, it is my opinion that the South Harper Facility is not consistent with the 2003
42 Comprehensive Plan, which emphasizes minimizing conflicts between rural and urban
43 uses and other negative land use externalities. The South Harper Facility is not an
44 appropriate use for its rural location.

- 1
2 ? The facility is an urban use in a rural location that is incompatible with the
3 surrounding rural residential uses, and should have been located nearer to or
4 within an Urban Area Reserve or incorporated area.
5
6 ? The facility is inappropriately located in an Agricultural district and does not
7 minimize land uses externalities for nearby rural residential uses, due to its
8 industrial character, noise and height.
9
10 ? The location of the facility is outside of designated Urban Area Reserves, where
11 urban-oriented land uses are encouraged to be located. As an industrial use with
12 urban character, the facility should be located within an Urban Area Reserve.
13
14 ? The facility is not in accordance with Policy G1.1, as it is not contiguous to urban
15 development, and is therefore inefficient "leap-frog" development that should be
16 located closer to a city.
17
18 ? The facility is not in accordance with Policy G1.2, which limits development
19 within the unincorporated portions of the County, and prevents the inefficient use
20 and distribution of public facilities and services. The Policy is intended to prevent
21 the County's rural development from becoming urban in nature and creating urban
22 demands on the County. The power plant should be located in an urban area
23 instead of a rural area in order to change the rural character of unincorporated
24 Cass County.
25
26 ? The facility is not in accordance with Policy G2.1, which encourages new urban
27 development to be located within urban area reserves as identified on the Future
28 Land Use map. The facility is an urban development that is located outside of the
29 designated urban area reserves and within an Agricultural District.
30
31 ? The facility is not in accordance with Objective G3, which is to minimize
32 conflicts between rural and urban land uses. As a major industrial use, the facility
33 is in conflict with the surrounding rural residential and agricultural uses.
34
35 ? The facility is not in accordance with Objective A1, which discourages the
36 premature subdivision and development of agricultural land for urban purposes.
37 As the power plant is an industrial use, it should not be located in an Agricultural
38 District, as it currently is.
39
40 ? The facility is not in accordance with Policy A1.1, which encourages growth
41 around existing incorporated areas and which encourages the separation of urban
42 and rural land uses. The facility should be located in a setting with more intensive
43 development, closer to or within an incorporated area.
44

1 ? The facility is not in accordance with the Industrial Goal, Objective or Policies,
2 which include location, land use separation and buffering and access standards.
3 The facility is an intensive use that should not be located near to the less intensive
4 rural residential areas that are currently adjacent to the facility, as indicated in
5 Policy I1.3.

6
7 ? In accordance with Policy I1.4, the facility, as an industrial use, should be
8 separated or buffered from existing or projected residential growth areas. Instead,
9 the facility is currently adjacent to residential areas on the north and east sides.

10
11 ? Policy I1.8 states that industrial uses, in the absence of special conditions
12 requiring remote locations, should be encouraged to locate within existing cities.
13 The facility is currently located in an unincorporated portion of the County, and
14 should instead be located within a City.

15
16 ? The facility is not in accordance with Policy T1.6, as its impact on the
17 surrounding road system should have been evaluated.

18
19 And, no, the South Harper Facility does not meet the criteria of the 1997 Zoning
20 Ordinance. The facility is located in an area zoned as an Agricultural District, and as an
21 "Electrical Services & Power Generation" facility, a special use permit is required to
22 support this use in an Agricultural District, which has not been obtained.

23
24 ? The land the facility is located on is identified as an Agricultural District, intended
25 to protect land from urban-type activities. Such as facility is allowed in an
26 Agricultural District only with a Special Use Permit.

27
28 ? Electric Services & Power Generation" is a use permitted by right in I-1 and I-2
29 districts. It is not a use permitted in any other district. The facility should be
30 located in an appropriately zoned Industrial District.

31
32 ? ARTICLE VIII - SPECIAL USE PERMITS describes the Board of Zoning
33 Adjustment's right to grant or deny special use permits, and delineates procedures
34 for application, hearing, findings and action by governing body. As the facility is
35 located in an Agricultural District, a special use permit should have been obtained

36
37 **Q: EVEN IF A PRELIMINARY REVIEW INDICATED THE SOUTH HARPER**
38 **PLANT AND SUBSTATION ARE LOCATED IN AREAS THAT ARE NOT**
39 **CONSISTENT WITH THE COMPREHENSIVE PLANS AND DOES NOT**
40 **CONFORM TO THE ZONING ORDINANCES, DOES THIS MEAN THAT THE**
41 **COUNTY PLANNING BOARD WOULD BE PRECLUDED FROM APPROVING**
42 **SPECIAL USE PERMITS FOR THESE FACILITIES?**

1
2 **A.** No. The County Planning Board would be expected to evaluate all of the factors I have
3 described including conformity with the comprehensive plans and zoning ordinances in
4 consideration of its recommendation, along with the contributions of any members of the
5 public who participate in the hearing. Even if the County Planning Board recommended
6 a denial of the special use permit requested, the recommendation must come before the
7 County Board of Zoning Adjustment, which can accept or reject the recommendation of
8 the Planning Board. Before these boards, the applicant and other stakeholders can, and
9 generally do, formulate conditions by which to accommodate conflicting interests and if
10 all are satisfied, the application can be approved with those conditions.
11

12 **Q: BASED UPON YOUR REVIEW OF THE AQUILA APPLICATION(S) FOR**
13 **SPECIAL USE PERMIT(S) FOR THE PLANT AND SUBSTATION, DATED**
14 **JANUARY, 2006, DID AQUILA ADEQUATELY ADDRESS EACH OF THE**
15 **COUNTY'S DEVELOPMENT REGULATIONS?**
16

17 **A:** The special use permit applications submitted by Aquila, dated January 2006 were one-
18 sided and driven from the company's point of view. The information entered in the
19 applications was not conducive to an unbiased review pursuant to generally accepted
20 planning principles. In Aquila's process to select a site for South Harper and the Peculiar
21 Substation, due diligence and site analysis activities were completed by the company to
22 determine if the locations were suitable to meet the needs of Aquila. However, these
23 analyses did not extend beyond the site needs in terms of the facilities in question to
24 measure any meaningful type of impact on the surrounding neighborhoods and
25 communities within Cass County. In the submitted Special Use Permit Applications for
26 these facilities, the review that was completed was Aquila-oriented and superficial with
27 respect to conducting a real analysis on the extent of impacts on the greater community.
28 The land use and development / site plan considerations that Aquila addresses in the
29 Special Use Permit applications were limited to:

- 30 ? Landscape / visual screening;
- 31 ? Stormwater drainage;
- 32 ? Environmental and natural resource impacts;
- 33 ? Wastewater disposal;
- 34 ? Facility lighting;
- 35 ? Facility security;
- 36 ? Fire protection;
- 37 ? Facility signage;

- ? Traffic;
- ? Road Maintenance and repair;
- ? Local tax impact; and
- ? Impact on property values.

While these subjects must be addressed, these considerations should be secondary to discussions regarding appropriateness of the proposed land uses on the sites in question. If a site is inappropriate for a particular land use due to considerations of the greater community, the facility's landscape and lighting plan, for instance, are not relevant and should not be addressed until an appropriate location is identified.

Regarding land use, the very brief description of the Peaking Facility's land use compatibility section found in the application is limited to identifying the existing electric transmission line and natural gas pipelines, the existing natural gas compressor station and a communications tower to the north of the compressor station. While the Application notes that adjacent properties have agricultural and residential zoning classifications, it makes no mention of the facility's impact on those surrounding properties in the sections within the application dealing with land use compatibility. The Application correctly identifies the area for the Peaking Facility as being located in a Multi-Use Tier, but does not identify why a power plant is an appropriate use within such a Tier.

While Aquila has completed its analysis of the sites and found them suitable for the purposes of a peaking facility and substation, the development review process is intended to give the County the opportunity to complete its own due diligence and to review the plans of the applicant for consistency with County regulations, goals, objectives and policies. While an applicant looks at a site in terms of its own needs, the governing body looks at the use and design of a site in terms of the greater community, and how a particular use on a particular site will impact the surrounding property owners and County operations from a broader perspective. As the applicant did not follow the prescribed routes for approval of the facility in terms of appropriate zoning or permitting, the County did not have this opportunity to become involved in the land use, site planning and development review processes intended to balance the rights of property owners and users throughout the County.

Although Aquila has been working with neighboring property owners to improve the screening of the Peaking Facility and reduce the noise impacts of the facility, the property

1 owners were not given the opportunity to participate in the process in a formal, County-
2 led review of the proposal, which would have provided the opportunity for community
3 members to make formal responses to Aquila's proposal. Many of the issues regarding
4 on-going site improvements at the Peaking Facility could have been addressed prior to
5 construction through a cooperative process among Aquila, the County and stakeholders
6 and neighbors, as opposed to post-construction improvements and buy-outs of
7 neighboring properties. Aquila has paid for improvements to local streets, water and fire
8 systems and other community-improvement projects, however these improvements were
9 either required in order to service the facility or to appease neighbors of the project, and
10 have no affect on the underlying issue. The County was unable to review the
11 appropriateness of the proposed uses on the sites that were chosen, and was by-passed as
12 the authority on local land-use decisions.

13
14 In short, the County should have been able to review and evaluate Aquila's findings
15 regarding the suitability of the sites for the peaking facility and substation, and to review
16 the zoning and land use compatibility of the facilities on a community-wide basis prior to
17 site planning or construction of the facilities. After finding a suitable location for these
18 activities, site planning issues, mitigation efforts and community improvement projects
19 should have been addressed, with formal community participation at all stages of the
20 process. It appears clear that had Aquila given the process the opportunity to work, a
21 process which has proven to work in favor of utilities in Cass County in the past, a less
22 combative and costly and, possibly, a consensus-driven result could have occurred.

23
24
25 **Q: ARE THERE LOCATIONS IN UNINCORPORATED CASS COUNTY WHERE**
26 **AN INDUSTRIAL USE, SUCH AS A POWER PLANT, WOULD BE**
27 **PERMITTED? PLEASE IDENTIFY THOSE LOCATIONS.**

28
29 **A.** Yes. The attached maps (see Schedule BGP-3) of Potential Industrial Sites identify the
30 numerous areas within the County where industrial zoning and uses might be appropriate.
31 As this map illustrates, the County is open to industrial type uses, supports the location of
32 these uses within the County, and set standards for identifying appropriate locations for
33 industrial uses. An effective Comprehensive Plan gives options for the location of
34 different types and intensity of uses and includes flexibility within its Plan to meet the
35 changing needs of the County. The number and variety of potential industrial sites
36 shown on the map illustrates the choice and the flexibility that the County supports.

1 ? The map is not intended to be an exhaustive portrayal of every possible
2 industrial site within the County, but simply includes examples of areas that
3 appear to accommodate heavy and industrial uses.
4

5 These sites were identified due to their zoning as industrial districts, proximity to other
6 industrially zoned sites, and recommendation by County staff that these sites might be
7 appropriate for industrial zoning in accordance with the goals, objectives and land use
8 policies defined in the Comprehensive Plan.
9
10

11 BOARD AND COMMISSIONS IN OTHER JURISDICTIONS

12
13

14 **Q: ARE YOU AWARE OF ANY GOVERNMENT COMMISSIONS OR BOARDS,**
15 **INCLUDING PUBLIC UTILITY COMMISSIONS, IN OTHER JURISDICTIONS**
16 **THAT HAVE THE AUTHORITY TO SPECIFICALLY APPROVE THE SITE OF**
17 **PROPOSED POWER PLANTS?**
18

19 **A:** Yes, I am.
20

21 **Q: DESCRIBE HOW THOSE GOVERNMENT COMMISSIONS OR BOARDS**
22 **EXAMINE LAND USE ISSUES IN THE CONTEXT OF POWER PLANT**
23 **APPROVAL OR CERTIFICATION.**
24

25 **A:** Numerous states expressly and explicitly manage the siting of energy generation and
26 transmission facilities through state siting boards, which oversee the siting process and
27 control permitting for such facilities. I understand that Counsel will be providing an
28 exhibit with my source information on this topic at the hearing. The following discussion
29 is not a comprehensive overview of state siting procedures, nor an exhaustive list of state
30 siting boards. However, the following examples do illustrate how state siting boards
31 address land use regulations, local authority and zoning classification in their review of
32 facility siting:
33

34 \$ *Oregon Energy Facilities Siting Council.*⁶ In Oregon, the state regulates the siting
35 of energy facilities, including a land use review, through the Energy Facility

⁶ “Energy Facility Siting Standards,” State of Oregon Department of Energy, 30 March 2006,

1 Siting Council, established in 1975. The applicant must choose to 1) seek land
2 use approval from the local jurisdiction, or 2) to have the Council make the land
3 use determination. If the applicant chooses to seek land use approval at the local
4 level, then the applicant must follow the local procedures and comply with all
5 local land use ordinances. The Council will issue a site certificate for the project
6 only if the local jurisdiction has approved the proposed land use. If the applicant
7 chooses instead to have the Council make the land use determination, the Council
8 must make findings on compliance with the local land use ordinances. Local
9 officials are asked to identify the "substantive criteria" from local land use
10 ordinances and comprehensive plan that the Council should apply to the proposed
11 facility. The land use standard ensures that the proposed facility will comply with
12 Oregon's land use planning goals, which are 19 goals adopted by the Land
13 Conservation and Development Commission (LCDC).
14

15 \$ *Florida Power Plant Siting Act (PPSA).*⁷ For the Power Plant Siting Act, the
16 Department of Environmental Protection (DEP) is the lead agency for
17 coordination of the siting process, and has jurisdiction for many of the activities
18 which the certification is in lieu of. The PPSA requires that a Land Use and
19 Zoning hearing by an Administrative Law Judge (ALJ) be conducted to verify
20 that the site is consistent with and in compliance with local government plans and
21 zoning ordinances. The Department of Community Affairs, at a different time,
22 includes an analysis of compliance with the State Comprehensive Plan. The
23 Siting Coordination Office, within DEP, coordinates with other Agencies to
24 develop proposed Conditions of Certification, including local land use experts and
25 authorities, such as Regional Planning Councils, local governments and other
26 state agencies.
27

28 \$ *Kentucky Electric Generation and Transmission Siting Process.*⁸ Consideration
29 of local land use issues includes naming the chairperson of the planning
30 commission with jurisdiction over the proposed site as an ad hoc member of the
31 Siting Board. Additionally, applications for siting approval must identify the
32 Local Planning and Zoning Authority and provide notice of any requested
33 deviations from state setback requirements. The application must contain certain

<http://www.oregon.gov/ENERGY/SITING/standards.shtml>.

⁷ "Power Plant Siting Overview," State of Florida Department of Environmental Protection, 30 March 2006,
http://www.dep.state.fl.us/siting/Programs/Power_Plant_Siting_Overview.htm.

⁸ "Guide for Kentucky's Electric Generation and Transmission Siting Process," Kentucky Public Service Commission, 30
March 2006, http://psc.ky.gov/agencies/psc/siting_board/merchant.htm.

1 information, including a report on public involvement activities conducted by the
2 applicant, a site assessment report containing a detailed description of the project
3 and thorough analysis of the impacts to be considered by the Siting Board (visual
4 impacts, traffic, property values, etc.), and a statement of compliance with any
5 local zoning regulations and noise control ordinances. In addition, a local public
6 hearing will be held by the Siting Board if requested by a local government entity
7 - city, county or planning and zoning authority - or by at least three residents of
8 the city or county in which the proposed facility would be located.
9

10 § *Massachusetts Energy Facilities Siting Board.*⁹ In order to be exempt from local
11 zoning, an applicant must file an application containing at a minimum, the
12 following information:

- 13 -- A demonstration that the petitioner is a public service corporation that
14 may seek a zoning exemption pursuant to G.L. c. 40A, § 3, with
15 supporting documentation as necessary.
- 16 -- A list of the sections of the zoning ordinance or bylaw from which the
17 petitioner seeks an exemption, together with a summary of each such
18 section and an explanation of why exemption from that section is needed,
19 with supporting documentation as necessary.
- 20 -- A description of the use of land or structures which are the subject of the
21 exemption request, and an explanation of the purpose of the proposed use.
- 22 -- An explanation of the public benefits to be provided by the proposed use
23 of land or structures, with a supporting analysis and a description of the
24 methods used to develop this analysis.
- 25 -- A description of alternatives to the proposed use of land or structures,
26 including the use of existing structures or facilities.
- 27 -- An analysis of the environmental or other impacts of the use of land or
28 structures, during both construction and operation. This analysis could
29 include, without limitation, impacts on land use at or near the site, on
30 wetlands or water resources at or near the site, visual and noise
31 considerations, traffic and access considerations, public safety
32 considerations, air pollutant emissions, or the use of hazardous substances.
- 33 -- A list of all permits required for the proposed use of land or structures
34 prior to construction, during construction and during operation.
35

⁹ "Energy Facilities Siting Boards," Commonwealth of Massachusetts Department of Telecommunications and Energy, 30 March 2006, http://www.mass.gov/dte/siting_board.htm.

1 In addition, during the review process, local agencies and officials such as the
2 building inspector, planning board, conservation commission, water department,
3 fire department, historical commission, board of health and department of public
4 works also may be involved.

5
6 § *California Power Plant Site Certification Regulations*.¹⁰ Regarding land use,
7 applicants for power generating facilities within California are instructed to
8 include the information in their application:

- 9 -- A discussion of existing land uses and current zoning at the site, land uses
10 and land use patterns within one mile of the proposed site and within one-
11 quarter mile of any project -related linear facilities.
- 12 -- An identification of residential, commercial, industrial, recreational,
13 scenic, agricultural, natural resource protection, natural resource
14 extraction, educational, religious, cultural and historic areas, and any other
15 area of unique land uses.
- 16 -- A discussion of any trends in recent zoning changes and potential future
17 land use development.
- 18 -- Identification of all discretionary reviews by public agencies initiated or
19 completed within 18 months prior to filing the application for those
20 changes or development.
- 21 -- Legible maps of the areas identified in subsection (g)(3)(A) potentially
22 affected by the project, on which existing land uses, jurisdictional
23 boundaries, general plan designations, specific plan designations, and
24 zoning have been clearly delineated.
- 25 -- A discussion of the compatibility of the proposed facilities with present
26 and expected land uses, and conformity with any long- range land use
27 plans adopted by any federal, state, regional , or local planning agency.
28 The discussion shall identify the need, if any, for variances or any
29 measures that would be necessary to make the proposal conform with
30 permitted land uses."

31
32 § *Washington State Energy Facility Site Evaluation Council (EFSEC)*.¹¹ As part of
33 the EFSEC siting process, projects are reviewed for consistency with all

¹⁰“Rules of Practice and Procedure & Power Plant Site Certification Regulations” Title20, California Codes and Regulations, California Energy Commission, August 2000, http://www.energy.ca.gov/reports/2000-08_800-00-007_TITLE20.PDF.

¹¹ “Energy Facility Site Evaluation Council; Certification,” Energy Facility Site Evaluation Council, Access Washington: Official State Government Website, 31 March 2006, <http://www.efsec.wa.gov/cert.html>.

1 applicable local land use laws and plans, and local governments may regulate the
2 location of energy facilities through comprehensive planning and zoning policies.
3 If a proposed facility is not in compliance with local land use provisions and the
4 conflict cannot be resolved, the state can preempt the local land use plans or
5 zoning ordinances through an adjudication process. However, the local
6 government has representation on the state Energy Facility Site Evaluation
7 Council when a facility is seeking location within a jurisdiction's boundaries, and
8 the affected local governmental also participates in the hearings process.
9

10
11 **Q: DOES THE STATE OF MISSOURI HAVE A BOARD OR COMMISSION LIKE**
12 **THE BOARDS OR COMMISSIONS YOU HAVE JUST DESCRIBED?**
13

14 **A:** I do not believe the state of Missouri has such a board or commission. Although I do not
15 purport to be an expert in utility regulation in Missouri, I do not believe that the Missouri
16 Public Service Commission itself is like the boards or commissions in other jurisdictions
17 I have mentioned in my testimony. The Commission has a very different structure and
18 purpose compared to the above-referenced boards and commissions because of the
19 absence of one key factor – land use planning. The Commission is primarily an
20 infrastructure and rate assessment entity. It is a competent, technical entity that has
21 successfully regulated the electrical supply industry. However, siting considerations
22 appear to be limited to the location of a facility in relation to its service area and the cost
23 of the facility relative to consumer rates and shareholder return. The Commission
24 appears to have no goals, objectives, strategies or prioritization for siting conditions that
25 identify, assess, preserve or protect local planning and zoning requirements or
26 development requirements and no directive to work with communities to ensure land use
27 compatibility or protect the community's fiscal resources.
28

29 I reviewed the MoPSC website and *2005 Annual Report*, including the Commission's
30 *Mission Statement, A Snapshot of What We Do, Division Descriptions, Organizational*
31 *Functions and Organizational Chart* and these confirm that local land use planning and
32 zoning has not been a concern of the Commission. From the Commission's *A Snapshot*
33 *of What We Do* (June 2005):
34

35 The Public Service Commission is the state government agency
36 charged with ensuring that you receive safe, adequate, and reliable
37 utility services at reasonable rates. The Commission must balance

1 the interests of the public — ratepayers as well as company
2 shareholders. In proceedings before the Commission, rates are set
3 to give the utility company an opportunity, but not a guarantee, to
4 earn a reasonable return on its investment after recovering its
5 prudently incurred expenses.
6

7 ? In comparison, state utility commissions or specialized state boards or
8 commissions with local siting control for proposed generation plants recognize
9 the responsibility to local communities that has been delegated to them by their
10 respective legislatures and typically expand and modify their organizational
11 structure to include a land use planning function.
12
13

14 **Q: DOES THIS CONCLUDE YOUR TESTIMONY AT THIS TIME?**

15
16 **A:** Yes.