

**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

**PROVISIONAL RESPONSE OF AQUILA, INC. TO BRIEF OF STOPAQUILA.ORG  
AND MOTION OF CASS COUNTY TO DISMISS APPLICATION**

COMES NOW Aquila, Inc. (hereinafter, "Aquila" or "Applicant") and files its response to a Brief of STOPAQUILA.ORG (hereinafter, the "Residents") opposing the Application in this case and, also, a Motion to Dismiss Application filed by the County of Cass, Missouri. In that regard, Aquila states as follows:

1. On or about February 2, 2005, the proposed intervenor, STOPAQUILA.ORG, filed a Brief of STOPAQUILA.ORG et al. Opposing Application Filed by Aquila, Inc. and Requesting Denial, or, in the Alternative, Suspension, Consolidation, Scheduling and a Public Hearing (the "Brief"). Thereafter, on February 3, 2005, the County of Cass, Missouri, (hereinafter the "County") filed a Motion to Dismiss Aquila Inc.'s Application (hereinafter the "Motion"). Aquila submits the following response to the Brief and the Motion and offers its suggestions in opposition to certain of the items of relief requested in both filings.

2. It should be noted at the outset that the Residents and the County are proposed intervenors and have not yet been authorized to participate as parties to the

captioned proceeding. Consequently, neither the Residents nor the County are yet entitled to request or to be granted any affirmative relief. As such, the Commission should reserve any ruling with respect to the Brief or the Motion until after such time as it has ruled on the Applications to Intervene because both pleadings are prematurely filed.

3. Much of the argument set forth in the Brief addresses the interplay of §393.170 RSMo with that of Chapter 64 RSMo and, particularly, §64.235 RSMo. Aquila will not burden the record in this case with a responsive brief on that legal issue. As noted in paragraphs 13-16 of the Application, the issues identified in the Brief are the subject of a pending appeal before the Western District Court of Appeals in Case No. WD64985 and those matters would be best left to play out in that forum. To re-litigate them in this case would be unnecessary, wasteful and duplicative. Aquila has not requested the Commission to address the legal issues currently on appeal nor does it believe the Commission needs to (or should) address these issues in order to move forward with a decision concerning the Application in this case. Consequently, no purpose would be served in responding the arguments contained in the Brief at this time. Expounding on those topics would only serve to distract from the narrow issue in this case, that is, whether Aquila needs the 318 MW of capacity the combustion turbines will provide.

4. The Brief and the Motion both contain a request that the Commission either suspend or dismiss this proceeding. Neither party has given any legitimate legal reason why the Commission should feel compelled to suspend proceedings in this case.

As noted in Aquila's Motion for Expedited Consideration,<sup>1</sup> time is of the essence and delay would only exacerbate the problem by tabling the important public service considerations associated with meeting customer demand for electric power for the approaching Summer cooling season. Dismissal of the Application, too, is inappropriate. Aquila has properly invoked the jurisdiction of the Commission under §393.170 RSMo and filed its Application in accordance with the Commission's filing requirements rules. The County argues that the Commission "is powerless to overturn" a Judgment of a circuit court<sup>2</sup> but this is a red-herring argument. The Commission has not been asked to do any such thing. The County's suggestions that proceeding with this case would conflict with the terms of the Circuit Court's permanent injunction or the appeal now before the Western District Court of Appeals also is without merit. Aquila would not have filed its Application with the Commission had it thought by doing so it would be in violation of the Court's injunction. To the contrary, as noted in paragraph 15 of the Application, express language in the Judgment sets out the manner in which the issue identified by Judge Dandurand may be cured by the Commission granting Aquila "specific authorization" to build a power plant within the Applicant's certificated territory. Aquila has not been prohibited from making petition to the Commission and, conversely, the Commission is in no way barred from acting on the Application. The injunction does not contain any language that prohibits the Commission from granting Aquila specific authorization to construct the South Harper Facility and the Peculiar Substation. In fact, the Commission is not even a named defendant in the Judgment. There is no conflict between the filing of the Application in this case, the relief requested therein, the terms

---

<sup>1</sup> See, document #4 on the Commission's docket sheet.

<sup>2</sup> Motion, at page 4.

of the permanent injunction issued by the Circuit Court of Cass County, Missouri or the appeal of the injunction pending before the Court of Appeals.

5. In its Motion, the County contends that Aquila has asked the Commission to render summary relief in the form of a declaratory finding on a principle of law. This is not correct. The Application requests that the Commission specifically confirm Aquila's authority to construct the South Harper Facility and the Peculiar Substation in their present locations under the terms of its existing certificates of convenience and necessity or, in the alternative, to issue an overlapping site-specific certificate of convenience and necessity authorizing Aquila to build the described power peaking facility and associated substations. **In either event, Aquila has assumed the Commission will employ some form of on-the-record hearing to create a record concerning the relief requested in the Application.** That assumption is embodied in Aquila's Motion to Establish Procedural Schedule filed with the Commission on February 4, 2005.<sup>3</sup>

6. The Residents have requested an opportunity to brief the case prior to the Commission taking any action on the Application. The Residents' demand for an opportunity to brief the case seems odd in light of the fact that it already has submitted its brief prematurely. In any event, Aquila has no objection to giving proper parties an opportunity to brief the case; again as evidenced by its Motion to Establish Procedural Schedule<sup>4</sup> that contemplates, among other things, the filing of a post-hearing brief.

7. In the Brief, the Residents have requested that the Commission consolidate this case with Case No. EO-2005-0156. Although there is subject-matter

---

<sup>3</sup> See, document #10 on the Commission's docket sheet.

<sup>4</sup> See, footnote #3, *supra*.

overlap in that both cases address the construction of the South Harper Facility and the Peculiar Substation, the two cases present entirely different issues. In light of the urgent need for expedited relief in this case, consolidation would be counterproductive because it would make it much more difficult for the parties to develop and present their case on a number of different issues (i.e., need for capacity, affiliate transfer and tax-advantaged project financing) in the very short amount of time available instead of only whether Aquila needs the 318 MW of capacity the combustion turbines will produce. Aquila is concerned that expanding the scope of the issues that would need to be decided on an expedited basis will create unnecessary hardship for all parties, including Staff and the Office of Public Counsel. The issues addressed in Case No. EO-2005-0156 are important issues deserving the attention of the Commission, however, Aquila does not believe the accounting and financing issues presented in that case have the same degree of urgency as the issue of whether Applicant needs the 318 MW of capacity that will be produced by the South Harper Facility.

8. The Residents have requested that the Commission hold a public hearing with respect to the Application. Aquila has no objection to holding a public hearing. To the contrary, the procedural schedule it has proposed for the Commission's consideration contemplates a public hearing (for general public comment) and a formal hearing (for the taking of evidence). In light of the Residents' request for a "public hearing to . . . present evidence,"<sup>5</sup> however, the Commission may find it more expedient to collapse the two suggested hearings into one formal contested event because public hearings typically are not reasonably calculated for the taking of evidence in a formal

---

<sup>5</sup> Brief at p. 32.

sense but, rather, only as an opportunity for general comment by interested members of the public.

WHEREFORE, for the reasons aforesaid, Aquila requests that the Commission deny the request of the Residents and of the County to suspend or dismiss proceedings in this case and that this case be consolidated with Case No. EO-2005-0156. Generally, Aquila does not object to giving proper parties an opportunity for a public hearing or for an opportunity to brief the issue in this case.

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

Attorneys for 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 9<sup>th</sup> day of February 2005 to the following:

Mr. Nathan Williams  
Senior Counsel  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102-0360

Mr. John B. Coffman  
Public Counsel  
Office of the Public Counsel  
200 Madison Street, Suite 650  
P.O. Box 2230  
Jefferson City, MO 65102

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

Ms. Lera Shemwell  
Senior Counsel  
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

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

/s/ Paul A. Boudreau