

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

In the Matter of the Application of Aquila,)
Inc. for Permission and Approval and a)
Certificate of Convenience and Necessity)
Authorizing it to Acquire, Construct,)
Install, Own, Operate, Control, Manage)
and Maintain and otherwise Control and)
Manage Electrical Production and Related)
Facilities in Unincorporated Areas of Cass)
County, Missouri Near the Town of)
Peculiar.)

Case No. EA-2006-0309

**STAFF’S RESPONSE IN OPPOSITION TO STOPAQUILA.ORG’S
MOTION TO DISMISS OR DENY APPLICATION OF AQUILA**

COMES NOW the Staff of the Missouri Public Service Commission and for its
Response in Opposition to StopAquila.org’s Motion to Dismiss or Deny Application of Aquila
states:

1. On March 10, 2006, StopAquila.org filed its Motion to Dismiss or Deny Application of Aquila asserting the Commission lacks jurisdiction to grant Aquila the relief it requests—a Certificate of Convenience and Necessity that specifically approves the construction of the existing three natural gas-fired combustion turbine unit electricity generating South Harper Facility, which has an output rating totaling 315 MW, and the associated Peculiar Substation.

2. In its motion StopAquila.org focuses on the statutory phrase “required consent of the proper municipal authorities” found in §393.170.2¹ and argues “required consent of the proper municipal authorities” includes compliance with their zoning ordinances. Simply put, StopAquila.org’s position is that Aquila must comply with Cass County’s zoning ordinances before the Public Service Commission can specifically authorize Aquila to construct the South Harper Facility and Peculiar Substation. The Staff disagrees.

3. Section 393.170.2, in full, provides:

No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

4. While StopAquila.org has cited a number of cases in an effort to support its position “required consent of the proper municipal authorities” includes compliance with their zoning ordinances, none squarely do so. Instead, they support that the “required consent of the proper municipal authorities” is a franchise—“local permission to use the public roads and rights-of-way in a manner not available to or exercised by the ordinary citizen.”² Unlike a franchise, where a governmental entity **grants consent** to use of a public right in land in a manner otherwise unavailable to the public, zoning ordinances are where a governmental entity **imposes restrictions** on the use of land, including privately-owned land.³

5. The South Harper Facility and Peculiar Substation are in an unincorporated part of Cass County near Peculiar, Missouri zoned agricultural and do not conform to uses permitted by that zoning designation.⁴ In *StopAquila.org. v. Aquila, Inc.* the Western District Court of Appeals held the statutory exemption from Cass County’s zoning ordinances found in §64.235 is available to Aquila.⁵ The exemption would allow Aquila to construct the South Harper Facility

¹ All statutory cites are to RSMo 2000 or RSMo Supp 2004, unless otherwise indicated.

² *State ex rel. Union Electric Co., v. Public Serv. Comm’n*, 770 S.W.2d 283, 285 (Mo App. 1989).

³ See §64.040, and e.g., *Strandberg v. Kansas City*, 415 S.W.2d 737 (Mo banc 1967).

⁴ *StopAquila.org. v. Aquila, Inc.*, 180 S.W.3d 24, 28 (Mo. App. 2005).

⁵ *Id.* at 32.

and Peculiar Substation if either the Cass County Commission or the Public Service Commission specifically so authorize Aquila.⁶

6. StopAquila.org's position renders the exemption based on specific authorization by the Public Service Commission meaningless. If Aquila must comply with Cass County's zoning ordinances before the Public Service Commission can specifically authorize Aquila to construct the South Harper Facility or Peculiar Substation, then Aquila cannot avail itself of the exemption based on Public Service Commission authorization found in §64.235, since compliance with the zoning ordinances would be required to obtain the specific authorization from the Public Service Commission that would permit non-compliance with the zoning ordinances.

7. Staff raised this same point in its March 13, 2006 pleading, *Staff's Opposition to the Proposed Procedural Schedule of Cass County Missouri, StopAquila.org and Nearby Residents*, as follows:

Staff believes compliance with Cass County's zoning ordinances is not a requisite to Commission consideration of the pending certificate of convenience and necessity (CCN) application for the South Harper Generating Station and the Peculiar Substation. If "proof of compliance with local zoning" were a requisite to this Commission's authorization to build plant, then the exemption in § 64.235⁷ based on a utility company obtaining authorization from the Commission⁸ would be meaningless. This is because a utility would have to comply with the zoning requirements to obtain the exemption from the zoning requirements. In its *StopAquila.org* Opinion, the Western District Court of Appeals refused to interpret § 64.235 in a way that rendered it meaningless. Neither should this Commission. The Western District Court of Appeals' decision accords with rules of statutory construction and should be followed by this Commission.⁹

⁶ *Id.*

⁷ All references are to RSMo 2000 or Supp 2004 unless otherwise noted. (footnote 5 in original).

⁸ The exemption in § 64.235 reads: "nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission. . . ." (footnote 6 in original).

⁹ *Murray v. Missouri Highway & Transportation Commission*, 37 S.W.3d 228, 233 (Mo.banc 2001): "Construction of statutes should avoid unreasonable or absurd results." (footnote 7 in original).

In interpreting § 64.235, which it found ambiguous, the Western District Court of Appeals looked to other zoning statutes, specifically §§ 64.090.3 and 64.620.3(3), and determined that “first class counties with a charter form of government and counties of the second and third class, respectively, lack the authority to interfere via zoning authority with public utility services authorized by the public service commission”¹⁰

The Court further noted that these statutory sections “place limits on county commission zoning powers” and that the counties governed by these statutory sections “lack the authority to interfere via zoning authority with public utility services authorized by the public service commission.” If utility companies were required to get zoning authority before Commission authorization, **all** of these statutory sections would be meaningless. (Emphasis added.)

8. In addition to holding Aquila qualifies for the exemption under §64.235, in *StopAquila.org*, the Western District analyzed §393.170.1 and §393.170.2, found them to apply to different utility property, and determined § 393.170.1 is the subsection that applies to the South Harper Facility and the associated Peculiar Substation.¹¹

9. Section 393.170.1 requires only Commission authorization: “No . . . , electric corporation, . . . shall begin construction of . . . , electric plant, . . . without first having obtained the permission and approval of the commission.”

10. As the Staff explained in its March 13, 2006 pleading, *Staff’s Opposition to the Proposed Procedural Schedule of Cass County Missouri, StopAquila.org and Nearby Residents*, Aquila already has the local consent required by §393.170.2. In its 1938 Report and Order, as supplemented, in which it granted Aquila’s predecessor Missouri Public Service Corporation a certificate of convenience and necessity to serve portions of Cass County, and other areas, the Commission scrutinized the communities and areas for which Missouri Public Service

¹⁰ 180 S.W.3d at 31. (footnote 8 in original).

¹¹ *Id.* at 35-39.

Corporation had obtained local franchises before issuing the certificate of convenience and necessity.¹²

11. “In absence of any general law limiting duration of franchises for operation of an electrical system on the roads and highways of a county, the grant of a franchise for that purpose, without specifying a period of duration, is a grant in perpetuity.” *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc.*, 407 S.W.2d 883, 888 (Mo. 1966).

12. StopAquila.org attempts to make much of the Commission’s decision in *In re Missouri Power & Light Co.*, 18 Mo.P.S.C. (NS) 116 (1973) (StopAquila.org Motion, pages 22 and 28). In that case the Commission indicated it would respect local zoning. There the interveners had requested the Commission to reject the site for a power plant in an industrial use zone that Missouri Power & Light Co. proposed and, instead, authorize a site located in an area zoned for residential use. In addition to being of no binding precedential effect, this case does not stand for the proposition zoning authority is a prerequisite for a Commission certificate of convenience and necessity. Instead, it stands for the proposition that zoning is one of the many factors the Commission is to consider when granting a certificate of convenience and necessity. A proposition echoed by the Western District Court of Appeals when construing §393.170.1 in *StopAquila.org* as follows: “By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed.”¹³

WHEREFORE the Staff, in response to StopAquila.org’s Motion to Dismiss or Deny Application of Aquila, opposes the motion and recommends the Commission deny the motion.

¹² *In re the Application of the Missouri Public Service Corporation*, 23 MO.P.S.C. 740 (1938).

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 20th day of March 2006.

/s/ Nathan Williams

¹³ *StopAquila*, 180 S.W.3d at 37.