

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

In the Matter of the Application of Aquila, )  
Inc. for a 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

**STAFF'S RESPONSE TO CASS COUNTY'S AND  
STOPAQUILA.ORG'S MOTIONS TO DISMISS**

COMES NOW the Staff of the Missouri Public Service Commission and, in Response to the Motions to Dismiss filed by both Cass County and StopAquila.org, Staff states:

**PROCEDURAL HISTORY**

On January 28, 2005, Aquila, Inc. filed its application for confirmation that it has authority under its current Certificate of Convenience and Necessity (CCN) to construct electric generation facilities or, in the alternative, for a site-specific CCN to construct a combustion-turbine-electric-generating power station, the South Harper facility, with associated electric transmission substations in Cass County, Missouri. On February 1, 2005, Aquila filed a Motion for Expedited Treatment and, in a separate pleading, a request for Protective Order, both of which the Commission granted on February 2, 2005. On February 1, 2005, StopAquila.org filed for intervention. On February 3, 2005, Cass County, Missouri, filed its application for intervention. On February 3, 2005, Cass County, Missouri, filed a Motion to Dismiss Aquila

Inc.'s Application. On February 4, 2005, Aquila filed its Motion to Establish Procedural Schedule. On February 10, 2005, the Commission granted Cass County's and StopAquila.org's applications to intervene.

On February 15, 2005, the Parties to the case submitted a Joint Response to Commission Order suggesting two procedural schedules. One contemplates that the Commission would issue its order clarifying that Aquila has the authority under its current CCN to build electric power plants in its currently certificated area. (Aquila Application at 2.)("Aquila App.") The alternative procedural schedule is based on Aquila's alternative request for a site specific or overlapping CCN. (Aquila App. p. 3.)

In the on-the-record presentation held on Friday, February 25, 2005, Staff suggested that the Applicant in the case, Aquila, has requested specific relief. As long as the parties to the case receive the process that is due, Staff recommends that the Commission adopt the procedural schedule designed to grant or deny the specific relief the Applicant has requested. In its application, Aquila had also requested alternative forms of relief. In the on-the record presentation, however, Aquila expressed a preference that the Commission utilize the process that would result in a Commission order that clarifies whether Aquila has the authority to proceed with the South Harper power station and the associated electric transmission stations.

Cass County and StopAquila.org have both filed Motions to dismiss on several grounds, among them that a Commission order would violate or contravene Judge Dandurand's Order,<sup>1</sup> that a Commission order would be a declaratory order, and that Aquila requires and lacks zoning authority from Cass County.

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<sup>1</sup> All references to Judge Dandurand's Order are to the Judge's January 25, 2005 Final Judgment issued by the Cass County Circuit Court.

## DISCUSSION

Aquila has made alternative requests in its Application. The first request for relief is that the Commission confirm that under its current CCN Aquila is authorized to build and operate a natural gas fired electric generating station and the associated substation. (Aquila App. p. 2) The second request for relief asks the Commission to issue a site-specific CCN authorizing Aquila to build the South Harper plant. (Aquila App. p. 3.)

Cass County suggests that the Commission is powerless to issue an order confirming that Aquila has authorization under its currently existing CCN. (Cass County Motion to Dismiss p. 1.) Staff disagrees for a number of reasons, including that: 1) a Commission has authority to interpret its own past order; 2) the Commission has primary jurisdiction in matters involving utility companies; 3) the controlling authority in this matter is not Judge Dandurand's Order because he specifically interpreted §64.235 RSMo (2000) but instead *Harline* is the controlling law in this Commission case; and 4) a Commission order would not conflict with Judge Dandurand's Order. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App.1960).

Cass County argues that any Commission order would be a declaratory judgment and the Commission is powerless to issue such an order. (Cass County Motion to Dismiss, p. 1.) In fact, Aquila is asking the Commission to make the kind of determination that is within its jurisdiction to issue. The Commission regularly interprets past orders. In its Response to Proposed Order filed in this case on Friday, March 4, Staff listed a number of cases in support of this fact. An order interpreting what the Commission has done in past cases is within the jurisdiction of the Commission.

Further, in addition to interpreting past orders, by issuing an order in this case interpreting authority granted under the Public Service Commission Law, the Commission would be acting within its primary jurisdiction under Chapter 386, RSMo 2000. Contrary to Cass County's assertion that if the Commission were to issue an order in this case it would be declaring principles of law or equity, the Commission would instead be interpreting its own orders under the Commission's enabling statute, something entirely within its jurisdiction. In fact, the Commission's interpretation of its enabling statute and the statutes it is charged with administering is entitled to great weight. *Foremost-McKesson, Inc. et al., v. Davis, et al.* 488 S.W.2d 193, 197 (Mo. 1966).

The Commission's own interpretation of §64.235, RSMo 2000, however, is not entitled to any deference from the Courts. But Aquila is not asking the Commission to interpret §64.235. Aquila is, instead, asking the Commission to determine the breadth of Aquila's authority to construct facilities under its CCN. (Aquila App. p. 3). In this area of the law, under the Public Service Commission Act, the Commission has primary jurisdiction. In fact, the Commission has exclusive jurisdiction in the first instance. *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (1940).

The Commission's jurisdiction is found in Chapter 386, and the Commission has broad powers of supervision and regulation over electric, gas, water and sewer utilities. The legislature has placed within the Commission's jurisdiction "generally all matters relating to rights, facilities, service, and other correlated matters of a public service company." *Id.* at 1014. The Public Service Commission Act states that the jurisdiction of the Commission extends:

- (5) To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined...

Section 386.250 RSMo (2000).

Accordingly, Missouri's Courts have regularly applied the doctrine of primary jurisdiction when addressing issues involving public utilities. In *State ex rel. Cirese v. Ridge*, for example, Kansas City Power & Light Company (KCPL) requested the Circuit Court issue an injunction against an electrical corporation, Cirese Power and Light (Cirese) that allegedly was operating without a city franchise and without a certificate of public convenience and necessity from the Commission. Cirese challenged the Circuit Court's authority to issue an injunction and sought an original writ of prohibition on the basis that the Circuit Court was without subject matter jurisdiction to consider the issues raised in the injunction. The Missouri Supreme Court agreed with Cirese and stated:

[T]he Kansas City Light and Power Co. contends that the circuit court has concurrent jurisdiction over said subject matter. We do not think so. Generally the courts, including this court, favor the regulation of public utilities by Public Service Commissions. *In State ex inf. Kansas City Gas Co.*, 163 S.W. 854, 860 we state that "he who reads it [Public Service Commission Law], and does not see that the yearning of the lawmaker was to have the courts trust the commission in the first instance to solve such business problems as those presented in this case, reads it to still less purpose." In substance, we have so stated in many opinions.

138 S.W.2d at 1014.

The Court went on to explore the rationale behind the doctrine of primary jurisdiction and explained:

It is exclusively within the legislative power to determine what the policy of the commonwealth shall be, or it may designate an agency of the government to determine that policy. . . . [T]he Legislature has the power to determine who shall promulgate and enforce its declared public policy, and, when an agency of the government is selected or created for that purpose, no other body, judicial, executive, or municipal, can step in, and by decree, order, ordinance, or otherwise, actively enforce the policy, or do other acts in relation thereto, except possibly to sustain the legislatively created or designated body . . . . There has been placed under the regulation, supervision, and control of the commission generally all matters relating to rights, facilities, service, and other correlated matters of a public service company. . . . Courts were not intended to be the administrative tribunal for this purpose.

138 S.W.2d at 1014.

The policy of primary jurisdiction particularly applies where administrative knowledge and expertise are necessary to determine technical, intricate fact questions, and where uniformity is important to the regulatory scheme. *Main Line Hauling Co. v. Public Serv. Comm'n*, 577 S.W.2d 50, 51 (Mo.App. 1978)(holding that the doctrine did not apply because the substantive issue presently for consideration can be resolved as a pure question of law).

Judge Dandurand's Order makes no determination concerning Aquila's authority under its current CCN, nor does it in any way prohibit the Commission from exercising its jurisdiction to regulate Aquila as a public utility. Instead, the Order specifically leaves open the option for Aquila to obtain such a Commission order concerning the authority that it does have under its CCN. (Order at 3.)

Staff holds a different view than Cass County about the Commission's jurisdiction and Cass County's argument that the Commission has no authority to issue an order as requested by Aquila in its first request for relief. Staff also differs with Cass County's assertion that the Cass County Order is the "prevailing standard" in this case. Staff considers the *Harline* case to be the prevailing authority on interpreting Aquila's 19338 CCN, issued in case No. 9470. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App.1960).

The *Harline* Court specifically addressed the issue of Aquila's authority under its current CCN, the issue that Aquila is asking this Commission to resolve and that Judge Dandurand's Order does not resolve. In *Harline* the Court posed the "basic issue for decision" as "[m]ust a public utility obtain an additional certificate of convenience and necessity from the Commission to construct each extension and addition to its existing transmission lines and facilities within a

territory already allocated to it under a determination of public convenience and necessity?” 343 SW2d at 183.

Aquila’s requests for relief pose this same issue for decision. Aquila asks the Commission to determine that its current CCN is sufficient, that it contains adequate authorization for Aquila to construct South Harper, and that Aquila need not obtain an additional certificate. Aquila’s alternative request for relief is for the Commission to issue a site-specific CCN for Aquila to construct the power plant in its current certificated territory. The *Harline* case provides guidance in what authority Aquila has under its current CCN.

The *Harline* Court concluded that the Company had a legal duty to serve the public in its certificated area and that the Company could perform its duty to render electric service by extending lines and building new facilities as required with no further grant of authority from the Commission, citing the Company’s corporate charter and Section 393.130. *Id.* at 181. Further, the Court concluded that the Company could fulfill its duty to provide electric service to its customers in its certificated area only if it continued to build facilities. *Id.* at 177.

In *UE* the Commission determined “that a certificate is only needed when an electric corporation starts in business or if it attempts to expand its authority in an entirely new area. . . . Accordingly, the Commission is of the opinion that it is not necessary for electric utilities to come before us to obtain permission to build plant within their certificated areas.” Case No. EA-79-119, *In the Matter of Union Electric Company for permission and authority to construct, operate and maintain two combustion turbine generating units in the State of Missouri*, 24 Mo. P.S.C. (N.S.) 72 (1980). But, in *UE* the Commission also stated that, under the proper circumstance, even though the Company did not need additional authorization, the Commission would, in the right circumstances, grant a site specific CCN. 24 Mo.P.S.C. at 79.

In addition to the issues raised above, Cass County and StopAquila.org suggest that a Commission order would contradict Judge Dandurand's Order. In making that suggestion, Cass County and StopAquila.org overlook the "or" in Judge Dandurand's Order. Cass County argues that the Court's Order "declared as a matter of law" that "1) Aquila's 1917 franchise with Cass County does not give Aquila the specific authority to build a power plant within Aquila's certificated area; and 2) Aquila lacks a 'specific authorization' in its current certificate of public convenience and necessity from this Commission to build a power plant in Cass county." (Cass County Motion to Dismiss p. 2.)

Staff reads the Order differently. The Court in the Cass County Order finds that the 1917 franchise is inadequate, but there is no statement of fact or finding that Aquila lacks specific authorization under its current CCN to build the South Harper plant. The Court stated that:

THE COURT FINDS that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 franchise does not; **or** that Aquila **must obtain** a 'specific authorization' **in** its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not.

A careful reading of the Order does not reveal any finding concerning the breadth of Aquila's current CCN. Rather the Order indicates that Aquila "must obtain" such authorization. That seems to be exactly what Aquila seeks in its Application. Staff's reads the Court's Order to indicate that there are two ways to satisfy the requirements of §64.235, and one way is for Aquila to "obtain" a specific authorization from this Commission that Aquila has specific authority in its current CCN to build this power plant in its certificated area. (Order p. 3.)

StopAquila.org argues that Aquila requires additional local authorization, beyond the current franchise, before this Commission may act. This does not comport with either Judge



Dandurand's Order or the law. The question is, when can local zoning be imposed on a utility company that holds a CCN from this Commission to provide service to that area.

The grant of a CCN which requires proof of a utility franchise from the local authorities gave Aquila the right to construct power plants. A utility franchise is "local permission to use the public roads and rights-of-way in a manner not available to or exercised by the ordinary citizen." *State ex rel. Union Electric Co. v. Public Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo App. 1989). In the 1938 Commission order granting Aquila a certificate of convenience and necessity to serve most areas of Cass County among other areas, the Commission carefully reviewed the communities and areas for which Aquila had obtained a local franchise. (a copy of this order was submitted by Aquila on February 25). The Commission stated that Aquila had obtained a franchise for service in Cass County. (Report and Order p. 2)

Franchises that are not of limited duration are perpetual in nature. "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). In addition to the law noted above, the *Harline* decision indicates that Aquila requires no further local authorization to construct facilities in Cass County. 343 S.W.2d at 183.

Staff does not agree with Cass County or StopAquila.org that Aquila's Application should be dismissed. The Commission acts within its jurisdiction when it interprets the statutes under which it operates, *State ex rel. Johnson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 28 (Mo. banc), cert. denied, 429 U.S. 822, 97 S.Ct. 73 (1976) and its own past orders. *In the Matter of General Telephone Company of the Midwest Grinnell, Iowa for the authority to file*

*tariffs increasing rates for telephone service provided to customers in the Missouri service area,*  
21 Mo. P.S.C. (NS) 257 (1973). A Commission order in this case will not contravene Judge Dandurand's Order and is within the scope of the Commission's jurisdiction.

WHEREFORE Staff recommends that the Commission not grant the Motions to Dismiss filed in this case.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

**/s/ Lera L. Shemwell**

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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 7th day of March 2005.

**/s/ Lera L. Shemwell**

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