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 substations in unincorporated areas of Cass County, near the town of Peculiar	**Case Number EA-2005-0248**

MOTION OF STOPAQUILA.ORG ET AL. FOR AN ORDER OF DISMISSAL OF THE APPLICATION FILED BY AQUILA, INC., AND SUGGESTIONS IN SUPPORT

I. INTRODUCTION

The application should be dismissed. What Aquila needs, it cannot get from the PSC. What Aquila needs it can only get from the county.

According to the PSC in Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116, the PSC requires that a utility comply with local zoning and further that the utility must meet all local requirements **before** it begins building a power plant. In Missouri Power the PSC said:

> In short, **we emphasize we should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning.**
>
> ***
>
> We also find that the Applicant **has met our Public Service Commission requirement that it has complied with municipal**

requirements <u>before</u> construction of the facility. (Emphasis added.)

Aquila has not done that. To the contrary, injunction has been issued against Aquila for its violation of county ordinances. See Appendix 2 to Aquila's Application.

To build a power plant, the utility has to have three things: a local franchise that allows it, a certificate from the PSC, and it has to comply with all local ordinances, including zoning. See Parts II, III and IV below.

In the present case, the only franchise Aquila has for Cass County says it is permitted "to build transmission lines, including the setting of poles…" See Appendix 6 to Aquila's Application. This franchise was issued in 1917. That franchise cannot be interpreted as authorizing a power plant. In 1917 when they talked about building "transmissions lines and setting poles," they certainly were not contemplating that a power plant would be included in that language. Nothing in the franchise can be construed as authorizing Aquila to build a power plant. Certainly also nothing in the franchise can be read as allowing Aquila to ignore County zoning.

There is absolutely no doubt that Aquila cannot rely on its Cass County franchise and its PSC certificate to build this power plant, as court decisions involving Aquila or its predecessors **have already ruled that**:

1.) the 1938 certificate of Aquila (gained through its predecessors) that it proposes to act on in this case **does not** say that it can build a power plant [according to the Court of Appeals for the Western District in

State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960)],

2.) the Cass County franchise (gained through Aquila's predecessors) **does not** give it the authority to build a power plant [specifically found in the decision of Judge Dandurand in Cass County v. Aquila, case number CV104-1443CC, at page 3, decided in January 2005]. and

3.) Aquila must comply with county zoning (decision of Judge Dandurand, ibid.)

The only way that Aquila can receive from this Commission a certificate that would authorize it to build a power plant in Cass is if Aquila first shows that it has a franchise from Cass County that authorizes it to build a power plant (and due to the court ruling the PSC must conclude that it does **not** have this), and Aquila must also show that it has complied with local zoning (and of course due to the court ruling the PSC must conclude that it does **not** have this).

According to Missouri Power & Light Company, Aquila must demonstrate this **before** it begins construction, and of course it cannot. It is important to not allow electric utilities to begin building power plants **before** applying for the requisite approvals.

The local authorities (in this case, the county) have by law a considerable amount of authority over the question of whether a utility can build a power plant and where a utility can build a power plant. An electric utility has to get a franchise from a county before building a power plant in the unincorporated county, and the county also

has zoning authority over it, so the county can also control the location of a power plant. The PSC does not have any zoning authority.

In fact, as Appendix 1 to Aquila's Application shows, the PSC has recently stated to a member of StopAquila.org that it does **not** tell electric utilities where to **not** build their plants. Since the PSC does not tell utilities where to not build a power plant, if the PSC could tell the county that it has no control over the location of building of a power plant, that would mean that no one could tell a utility where to build or not build a power plant.

Contrary to what Aquila has told the PSC, Aquila to date has neither applied for a special use permit for this new site, nor has it received a special use permit or rezoning from Cass County for any zoning for the plant.[1]

Numerous residences are located within a two mile radius of the site where Aquila proposes to build the plant. Over 350 people who live close by signed a petition to oppose the building and operation of the power plant.

The issues are now on appeal to the Missouri Court of Appeals, Western District. Instead of waiting for a ruling from this Court, Aquila seeks to force the PSC to issue a ruling. It would do no good to rush to a PSC ruling. The injunction orders all improvements that are in violation of county zoning to be removed. The PSC cannot save Aquila from this injunction. This application should be dismissed for the reasons set out in more detail to follow.

PART II. THE POWER OF THE COUNTY OVER THE ELECTRIC COMPANY (DISCUSSION OF CHAPTER 64 ON FIRST CLASS NONCHARTER COUNTIES, CHAPTER 393 AND THE CASE LAW)

[1] In its application, Aquila claimed that it had met all local requirements. Of course this is false.

1. According to Article IV, Section 1 of the Missouri Constitution, counties are recognized as legal subdivisions of the state.

2. Chapter 64 of the revised Statutes of Missouri was enacted in 1959. **RSMO 64.170 authorizes the county to control the construction of any building**.

3. RSMO 64.231[2] provides that a county may adopt a master plan to coordinate physical development in accordance with present and future needs and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants, and that the plan may include a land use plan, studies and recommendations relative to the locations of buildings and projects. Cass County has.

4. RSMO 64.235 provides that **no improvement shall be constructed** without first submitting the proposed plans to the county zoning authority and receiving a written approval. The entire section is as follows:

> **64.235 Improvements to conform to plan, approval required (noncharter first class counties). —**
>
> **From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefor to the planning board, nor shall**

[2] RSMO sections 64.231, .235, .255 and .285 discussed herein all apply specifically to first class noncharter counties, which is the classification that Cass is in.

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, or by permit of the county commission after public hearing in the manner provided by section 64.231.

(L. 1959 S.B. 309 § 5, A.L. 1994 H.B. 1175)

There are no exceptions to 64.235 that would apply to Aquila.

5. RSMO 64.255 states that the county shall control the **location** and use of buildings. There are no exceptions to 64.255. Section 64.255 states:

> For the **purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties**, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county commission in all counties of the first class not having a charter form of government and not operating a planning or zoning program under the provisions of § 64.800 to 64.905, is hereby empowered to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, **the location and use of buildings,** signs, structures and land for trade, industry, residence, parks or other purposes, including areas for agriculture, forestry and recreation. (Emphasis added.) ***

6. **RSMO 64.285 states that zoning regulations are to supersede other laws. It says that whenever the county zoning regulations require a more restrictive use of land or impose higher standards than are required by any other statute, the provisions of the zoning requirements shall govern**. This full section reads as follows:

> **64.285. Zoning regulations to supersede other laws or restrictions, when (noncharter first class counties). —**
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> **Whenever the county zoning regulations made under the authority of sections 64.211 to 64.295 require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require greater percentage of lot to be left unoccupied, or require a lower density of population, or require a more restricted use of land, or impose other higher standards than are required in any other statute, local order or regulation, private deed restrictions or private covenants, the provisions of the regulations made under authority of sections 64.211 to 64.295 shall govern.**
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> **(L. 1959 S.B. 309 § 15)**

There are no exceptions stated in 64.285.

7. In St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo.banc 1962), the Supreme Court had to rule on a dispute between a city and a county, and ruled in favor of the county, declaring that the county had zoning authority over the question of where a sewage disposal plant would be **located** in the county. The dispute involved a sewage disposal plant. The Supreme Court said:

> We conclude that the zoning ordinances of **St. Louis County** are a lawful restriction upon the **location** of the sewage disposal plant and related facilities which the City of Manchester proposes to construct. (Emphasis added.)

8. In L.C. Development Co. v. Lincoln County, 26 S.W.3d 336 (Mo. App. 2000), the county was operating under a different statute, dealing with landfills, but where the statute did not specify that the county could dictate the **location** of the landfill, the Court inferred that the county had such authority. From a review of the statutes, the Court concluded that the legislature must have intended that the county have the authority to dictate the location of the landfill. Lincoln was a third class county.

9. While the application of RSMO 64.235 seems clear, and the strength of the zoning laws is emphasized in RSMO 64.285 (which says zoning laws supersede any other laws), Aquila has argued recently that under 64.235 it can avoid the county zoning laws by getting a specific siting permit from the PSC. This argument is apparently based on the language in 64.235 that provides an exception from control of the Planning and Zoning Board of a first class noncharter county in certain circumstances. However, that "exception" is **only available to governmental entities**. Aquila seemed to recognize this itself in its first brief in the Cass County litigation when Aquila wrote that 64.235 did not apply to it because it only applied to governmental entities. See Appendix 1 to this brief. Aquila was only partly right. The first part of 64.235 applies to Aquila. The exception (found in the second part of 64.235) only applies to governmental entities. This means only governmental bodies are excepted from having to follow the zoning requirements of first class noncharter counties found in 64.235, and then only in certain circumstances.

To understand this, we look at the language in 64.235. The pertinent language says:

> **…no improvement … shall be constructed … without first … receiving the written approval … of the board…. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefor to the planning board, 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, or by permit of the county commission after public hearing in the manner provided by section 64.231. (All emphasis added.)**

For Aquila, the above section means that "**…no improvement … shall be constructed … without first … receiving the written approval … of the board….**" which it does not have.

The only exception to the above statute is for a **"development or public improvement" of a** "**municipality, county, public board or commission."**

That sentence then goes on, after the comma, to say: "**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, or by permit of the county commission . . .** (All emphasis added.) This refers again to developments or public improvements of a governmental entity.

This is all in one sentence, so it is all one thought. The part of the sentence after the comma applies to "such development or public improvement." This clearly ties back to the first part of the sentence. The first part of the sentence applies only to projects of governmental bodies.

Even if the word "such" were not used to clearly tie this clause back to the first part of the sentence, we need to note that the words "**public improvement**" are words of art that refer to projects by governmental entities. These words are used in our statutes to refer to projects of **government**. For example, in RSMO 64.050, it says:

> If a **development or public improvement** is proposed to be located in the unincorporated territory of the county **by any municipality, county, public board or commission**, the disapproval or recommendations of the county planning commission may be overruled by the county commission, which shall certify its reason therefore to the planning commission. (Enacted in 1941.) (Emphasis added.)

The above language from 64.050 (1941) was likely the model for the words in 64.235, which was enacted in 1959.

In addition to the two sections above (64.050 and 64.235), the words "public improvement" are used in the following statutes to refer to improvements of **government**, and not to improvements of private companies: 64.570, 64.820, 64.665, and 70.220.

The General Assembly knew what it was doing when it limited the words "public improvement" to meaning a project of a government. The words used in 64.235 by their common usage and by the context indicate that the exception to the general rule is only available for governmental projects. Private entities are not excepted from zoning in first class noncharter counties under 64.235.[3]

[3] Our statutes have at times indicated that municipally owned projects are subject to the PSC. For example, current RSMO section 386.800 gives jurisdiction to the PSC over municipally owned utilities, at least to some extent. Both RSMO 64.050 and 64.235 specifically refer to developments or public improvements proposed to be located in the unincorporated territory of the county **by any municipality, county, public board or commission.**

Even if someone thinks that it would be better if this exception also apply to private utilities, that does not allow the PSC or the courts to somehow rewrite the law to expand the exception.

In Missouri, we use the rule of Ejustem Generis, which is the rule that in interpreting a statute, where general words follow a specific enumeration of persons or things, the general words that follow are not given their widest extent, but are to be held as applying only to the class that was specifically mentioned. In 64.235, the exception clause begins by talking only about governmental entities, then after the comma it talks about "**such** developments and public improvements." The rule of Ejustem Generis would say that the words "such developments and public improvements" cannot expand on the enumeration earlier specified in the statute. For a number of reasons, the exception found in the second part of 64.235 does not apply to Aquila, despite what Aquila might say.

10. Aquila in the various briefs filed in litigation over the last few months has found no case that says that a **first class noncharter county** has no zoning authority over a public utility in its efforts to build a power plant. The fact is that no case has ever limited the zoning power of a first class noncharter county when it comes to the location of power plants. (Statutes on second and third class counties are different from statutes on first class noncharter counties.)

11. Aquila wants to have the PSC rule that Aquila can build a power plant anywhere it wants. Aquila wants the PSC to say that it can ignore the county zoning. The PSC cannot rule on the power of the county.

12. Even if the PSC were to grant a certificate to Aquila that were to say it can to build a power plant in Cass County, and even if the PSC said it approved of the site chosen by Aquila, this would not in any way effect the authority of the county to stop the power plant from being built due to its zoning laws.

13. To be clear, the proper interpretation of RSMO 64.235 is that a first class noncharter county can refuse to grant zoning approval to a **privately owned** utility even if the PSC were to specifically say that the utility could build its plant at that site. Aquila is subject to both authorities.

III. THE UTILITY HAS TO SUBMIT TO REGULATION BY <u>BOTH</u> THE PSC AND THE COUNTY AND THE PSC HAS NO POWER TO INTERFERE WITH COUNTY DECISIONS.

1. RSMO 393.010 provides that any corporation supplying electricity shall need the consent of municipal authorities[4] "where located" for such things as laying conductors, under such reasonable regulations as such authorities may prescribe. RSMO 229.100 states that no person, company or corporation shall erect poles for the suspension of electric light, or power poles, or lay conductors or conduits for any purpose, through, on, under or across the public roads or highways of the county without first obtaining assent from the county, and no poles shall be erected or such conductors be laid or maintained except under such reasonable rules as may be prescribed by the county engineer, with the approval of the county commission.

[4] As shall be explained in the cases cited below beginning at page 18, the County is the "municipal authority."

2. RSMO 393.170 provides that consent of the appropriate municipal authorities is required for an electric plant to be constructed. The "consent" of the local municipal authorities[5] is usually referred to as the "franchise."

3. Cass County is the local governmental entity or municipal authority that has zoning authority in this case, as the land lies in the county, outside of any city.

4. In In the matter of the complaint of Missouri Valley Realty Company v. Cupples Station Light, Heat and Power Company et al., 2 Mo. P.S.C. 1 (1914), the Public Service Commission (hereafter "PSC" or "Commission") stated:

> **Consent of the municipality is always required as a condition precedent to the granting of permission and approval by this Commission** … (Ibid., at page 6)(emphasis added).

5. The case law early on made a distinction between the authority of the PSC and the authority of the city or county. In State ex rel Electric Co. of Missouri v. Atkinson, 204 S.W. 897 (Mo banc 1918), the Supreme Court indicated that the statute empowers the PSC to issue a **certificate** of convenience and necessity to an electric company or to refuse it, **but it does not empower the PSC to adjudicate the question of the validity of the franchise**.

6. In State ex rel. v. Cupples Station L.H. & P. Co., 283 Mo. 115, 223 S.W. 75 (Mo.banc 1920), the City of St. Louis had promulgated zoning ordinances that designated two different kinds of districts, with one being a district in which electric companies had to place transmission lines underground and the other being a district in

[5] As shall be explained in the cases cited below beginning at page 18, the County is the "municipal authority."

which electric companies had to place transmission lines above ground. The electric company did not challenge the authority of the local government to exercise this zoning power, even though the local government was actually telling the electric company whether it had to put its lines underground or overhead in certain areas. The Missouri Supreme Court seemed to have no problem with the idea that local government had such extensive authority over public utilities.

7. In Realty & Power Co. v. St. Louis, 282 Mo. 180 (1920), the Court was dealing with a dispute between a city and an electric company. The Plaintiff had installed lines on its **own** real estate and also on the real estate of others, about twelve years prior to the litigation. The Plaintiff had never received a permit from the City to install these electric transmission lines. The City demanded removal of the lines from its streets. The Supreme Court stated that the legislature did not grant directly to electric companies the right to use the streets. Instead, the legislature gave the authority to municipalities to regulate these electric companies in this regard. In other words, the Court was saying that the grant was from the legislature to the municipality, and the municipality would then decide what kind of grant to make to the utility. The legislature also gave to the municipalities the **authority to grant or refuse to grant** to utilities the right to use the streets **and the power to impose conditions**. The Court clearly held that the City had the power to refuse permission to the Plaintiff. The Court also stated that this right of the municipality cannot be lost by "acquiescence." The result was, the City could, and did, tell the power company to remove its transmission lines twelve years after they had been installed. If the Supreme Court says you can't even install

transmission lines without municipal consent, how can you build a power plant without municipal consent?

8. In State ex. inf. Shartel v. Missouri Utilities Company, 331 Mo. 337, 53 S.W.2d 394 (Mo. banc 1932), the Supreme Court said:

> Of the nature and scope of the certificate of convenience and necessity referred to in the above section, Judge McQuillin, himself **a distinguished former member of the Public Service Commission of Missouri, says in his work on Municipal Corporations (2 Ed.) section 1768, vol. 4. page 703**:
>
> "Before action on the application for such a certificate, provision is made for a hearing thereon, and the commission after such hearing may issue the certificate or refuse to issue the same or may grant the application in whole or in part, and usually may attach to the exercise of the rights granted by the certificate, such terms and conditions as in its judgment the public convenience and necessity may require.
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> "**It is not intended by this requirement to substitute a commission for the local or municipal authorities**, when by the constitution and laws of the particular jurisdiction **the consent of such local authorities is necessary before the grant of a franchise could be complete, because the constitution and laws contemplated that such local or municipal authorities shall have power to impose such reasonable conditions as the convenience and necessity of the locality may require, and with such conditions for the exercise of the franchise a commission has no concern.**

> **Therefore, it (the PSC) cannot demand that the local authorities add to or take from the conditions upon which they were willing to consent.** The State, however by its commission, has power to say that no franchise shall be acquired or exercised unless it is necessary or convenient for the public service; and hence by virtue of such statutory grant of authority it may impose upon a corporation or individual before such a franchise can be exercised the obligation of satisfying the commission that the construction of the proposed plant for public service, or the exercise of the franchise or privilege thereunder is necessary or convenient for the public service. This is the single question presented to such commission. ***

9. In State ex rel. City of Sikeston v. Public Service Commission, 336 Mo. 985, 82 S.W.2d 105 (Mo. 1935), the Supreme Court said:

> Furthermore, this court in the ouster case specifically and definitely held that **municipal consent is still required**, in addition to whatever requirements may be imposed by the commission … In other words, a certificate of the commission is only, where required, an **additional** condition imposed by the State to the exercise of a privilege **which a municipality may give or refuse** …
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> *** The commission held that . . . the grant of such certificate (by the commission) to an electric corporation is only required an (sic) authorized in case of, "First, the beginning of **construction** of an electric plant; second, the commencing to exercise any right or privilege under any franchise . . . (Emphasis added.)

10. In State ex rel. inf. McKittrick v. Ark.-Mo. Power Co., 339 Mo. 15, 93 S.W.2d 887 (Mo.banc 1936), the Supreme Court showed the extent of the power that local government has over electric companies. The Courts ousted the electric company from the City of Campbell, and the Supreme Court upheld this, saying that the utility had six months to vacate.

11. In State ex inf. McKittrick v. Mo. Utilities Co., 339 Mo. 385, 96 S.W.2d 607 (Mo. 1936), the City of California sought to oust the electric utility. A franchise had been given by the City to the utility. That franchise expired in 1929. The utility requested an extension, but the City refused. The utility argued that the PSC had authority over this matter, that the PSC had given it a certificate, that the PSC certificate gave it additional rights, and that under the PSC certificate it could continue to supply power in the City. The Supreme Court rejected these points. The Court said:

> [W]hen the City limits the life of the franchise granted to twenty years, as it must, and that period expires, the privilege of so using the City's public places comes to an end. The continued use is illegal.

In other words, the grant of a franchise by the local municipality does not end the power of the municipality. The municipality continues to have authority.

The Court said that the franchise was a **contract** between the utility and the State. The Court declared that as originally made, that contract was to expire in twenty years. As the City did not renew it, that contract expired and the utility then had no rights. The Court held that the certificate issued by the PSC did not lengthen the life of

the franchise. The City could oust the utility. The Court gave the utility one month to remove its equipment from the City.

12. In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941), the water **company failed to show that it had received consent from Jackson County** to place its water lines along and across the roads of the particular area in which it sought to operate. Jackson County refused to give its consent. The water company argued that the county was not a "municipal authority" and therefore it did not have to get the consent of Jackson County. The PSC found that the **County was in fact the "proper municipal authority." Jackson County could refuse to grant that franchise.**

13. In In the matter of Ozark Utilities Company, Mo. P S. C. 635 (1944), the electric utility received a franchise from the city and a certificate from the PSC. The franchise had a term of ten years. When the franchise expired in 1944, it was renewed between the utility and the city. The PSC stated that the statutes did not give the PSC the power to approve or disapprove the municipal franchise, and **did not give the PSC the power "to entertain any issue respecting the municipal franchise**."

The PSC made it clear that it **could not interfere** with the relationship between the municipality and the utility. The PSC noted the difference between the authority of the PSC and the authority of the municipality. If the municipality did not renew the franchise, of course the certificate issued by the PSC would not authorize the utility to continue in the municipality, according to the PSC. The PSC said:

>]W]e do hold that, absent a revocation by this Commission, it (the certificate issued by the Commission) is **good so long as the municipality permits the**

operation whether by renewal of the basic franchise supporting the certificate, a new franchise, or permissively allowing the operation after the expiration of the franchise. (Ibid. at pages 643 - 641.)(Emphasis added.)

At page 639, the Commission said it would be intolerable for the Commission to be involved in trying to suggest the terms that should be in the franchise between the municipality and the utility.

At page 642, the PSC stated:

[I]t will be found that all the legal rights and remedies between the utility corporations and the municipalities, in any controversies between them respecting the franchise and its operations, and apart from our own regulatory powers, must generally be pursued in the courts which have jurisdiction.

14. In State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934 (Mo. 1951), Union Electric acquired 375 acres of ground in St. Louis County with plans to build a power plant. The County **rezoned** the land for this purpose, so Union Electric could build the power plant there. This was challenged by citizens, and the Court upheld the action of the County in zoning the land so it could be used for a power plant.

15. In In the matter of the application of Union Electric Company, 3 Mo.P.S.C. (N. S.) 157 (1951), the **PSC indicated that the county court (which is now the county commission) had authority over the public utilities**. At page 160 the PSC said that **the county court constituted the "proper municipal authority"** as that term is used in the statute when we are dealing with operations in an unincorporated area. The

PSC spoke of the franchise between the utility and the county as being in the nature of a contract between the two.

The PSC stated that the police power of the proper municipal authority is **"transcendent"** (in matters regarding the franchise). Ibid. at page 161. Speaking about the police power of the county and the city, and the notion that the utility had a contract right, the Court said:

> While contracts are impervious to impairment by statutes and municipal ordinances, at the same time the police power is **transcendent** over the contract to the extent that the municipality, if it so desires, may provide for the reasonable exercise, in the municipality, of the holder's rights under the pre-existing county franchise or one of its own. (Emphasis added.)

In other words, the PSC said the power of the county is transcendent over the utility.

The PSC said it was not its province to approve or disapprove a franchise issued by the county. The PSC stated that "**its conclusions will not impair or in any manner restrict the right of local municipalities under the law to deal fully with the subject of granting or withholding of local franchises to the utility**."

In 1959, after the above cases established the authority of the county and the city over utilities, Chapter 64 of the Revised Statutes of Missouri was enacted, codifying the zoning authority of counties. As far as first class noncharter counties are concerned, this legislation certainly did not in any way disagree with the case law that gave authority to the county over the utilities, but rather strengthened control of the counties.

16. In State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960), the Court of Appeals dealt with a dispute over the extension of power lines proposed by Missouri Public Service Company. This case did not deal with the building of a power plant. The Court noted the important **distinction** between the running of **power lines**, which an electric utility can do in its certificated area without getting a further permit from the PSC, and the **building of a power plant**, which is something entirely different. The Court said:

> We have no concern here with Sub-section 1 "authority". **The 1938 certificate permitted the grantee to serve a territory — not to build a plant. Sub-section 2 "authority" governs our determination**. (Emphasis added.)

17. The last in the line of Missouri Supreme Court cases on point for power plants is State v. Burton, 379 S.W.2d 593 (Mo. 1964). In this case the Supreme Court said:

> The **necessity and effect of county court consent** to the utilization by a public utility of county roads and highways in an unincorporated area of a county has regularly been recognized by the Commission itself. In Re Southwest Water Co., 25 Mo. P.S.C. 637, 41 P.U.R. (NS) 127, the Missouri Public Service Commission refused a certificate to a water company which sought to operate in Jackson County. Refusal was based upon the failure of the appellant to show that consent of the Jackson County Court to the use of the county roads and highways had been

obtained. In answer to the contention that Section **393.170** does not apply in instances where a utility proposed to operate in unincorporated areas of a county, the Commission's report stated:

"An examination of the findings of this Commission for many years back will show that the Commission has consistently required a showing that the applicant has secured the consent of what is considered proper municipal authority before granting authority to own, lease, construct, maintain, and operate any water, gas, electric, or telephone system as a public utility. Consent of the city, town, village, the **county court** or the State Highway Commission, depending upon whether the line or system was to be placed within the incorporated city, within the unincorporated area of the county, or along a state highway, **has always been made a condition precedent to the granting of such certificate by this Commission**." In Re Union Electric Co., 3 Mo. P.S.C. (NS) 157, 160, 88 P.U.R.(NS) 33, the Commission recognized that the permission granted by a county court, pursuant to Section **229.100**, RSMo 1959, V.A.M.S., to a public utility to use the county roads is a "county franchise," supplying the consent required by Section **393.170**. If, as stated in Southwest Water Co., supra, the county "franchise" is a condition precedent to the issuance of a certificate by the Commission for an operation involving use of county roads in unincorporated areas of the county, it must follow that **the authority which the Commission confers must be in accord with the "franchise" which the county grants**. Otherwise, the requirements of Section **393.170**, insofar as

municipal consent is concerned, would be practically meaningless. **The courts have recognized that the corporate charter and the local franchise provide the fundamental bases for a public utility's operation and that the certificate of the Commission cannot enlarge the authority thereby conferred**. In State ex rel. Harline v. Public Service Comm., Mo.App., **343 S.W.2d 177**, 181(3), the court stated:

"The certificate of convenience and necessity **granted no new powers.** It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and **municipal consent**. State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, **53 S.W.2d 394**, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges." Therefore, although the application of Raytown Water Company did request that the Commission grant it authority to lay its water mains generally throughout Jackson County, the **Commission's authority to grant that prayer was necessarily limited by the requirement that the consent of Jackson County be obtained** for the use of the county roads for such purpose. (Emphasis added.)

18. In the 1971 case of State ex rel. Union Electric v. Scott, 470 S.W.2d 1 (Mo. App. 1971), we see that Union Electric applied for **zoning** from the county.

19. In Union Electric v. Public Service Commission, 770 S.W.2d 283 (Mo. App. W.D. 1989), the county had given a franchise to one electric utility and the

city had given a franchise to another electric utility. Later, the city expanded its limits. **The court discussed the fact that there was a difference between a certificate issued by the PSC for authority to construct an electrical plant and a certificate issued by the PSC for a utility to serve an area**. This is the same distinction made by the Court of Appeals in State ex rel. Harline v. Public Service Comm., Mo.App., 343 S.W.2d 177, and appears to be consistent with the statements of the Supreme Court in State ex rel. City of Sikeston v. Public Service Comm., 82 S.W.2 105 (Mo 1935), discussed above. The 1989 Union Electric Court discussed the type of "franchises" that had been given, to one utility by the city and to the other utility by the county. The Court commented as to how the utilities had to deal with **both** the PSC and the local government:

> The statutory scheme at Section 393.170.2, RSMO 1986 establishes **two layers of oversight** by providing that the rights and privileges granted by a franchise may not be exercised without first having obtained Commission approval. A Commission certificate becomes an **additional** condition imposed by the State on the exercise of a privilege **which a municipality or county may give or refuse under its delegated police power**. (Emphasis added.)

Aquila contends that a 1980 PSC decision involving Union Electric (24 Mo. P.S.C. 72) stands for the proposition that the utility can construct a plant without any kind of permission from the county and without any regard for what the county says. However, as shown in the various cases involving Union Electric, set out above, **Union Electric in fact did get zoning approval from the county and did get a county franchise for its operations**. See paragraphs 14, 18 and 19.

20. In what appears to be the most recent pronouncement from our Legislature related to this topic, in a 1998 enactment, found at RSMO 393.297, the General Assembly stated:

> 3. **Missouri has historically . . . allowed political subdivisions to require franchises for these services** (electric and gas service) . . . (Emphasis added.)

21. In the regulations of the Public Service Commission, there is a recognition that the consent of the county may be needed in order for a plant to be built, because the regulations state in pertinent part:

> **4 CSR 240-3.105. Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity**
>
> ***
>
> 1. When consent or franchise by a city or **county** is required, approval shall be shown by a **certified copy of the document granting the consent or franchise,** or an affidavit of the applicant that consent has been acquired; and ...
>
> (Emphasis added.)

(If Aquila were correct in its argument that the local authorities have no power over it, then there would be no need for such language in the regulation.)

22. Therefore, the requirement that the utility get both permission from the county and from the PSC is expressed in the statutes, the case law, the PSC decisions, and the regulations of the PSC.

23. In our case, Aquila is operating under the same 1938 PSC certificate that was reviewed and interpreted by the Court in State ex rel. Harline v. Public Service Comm., above.

24. Therefore, the certificate that is involved in this case has already been adjudicated. According to the Court of Appeals for the Western District in the Harline case, this very same certificate does **not say that Aquila has the authority to build a power plant**. This is res judicata as to the certificate issued by the PSC.

25. In this litigation, Aquila has not pointed to any case in which the electric utility took the position that it did not have to comply with county zoning rules and building requirements of a first class noncharter county and litigated that question in Court with the local government being involved in the litigation. In all cases that we have reviewed in which there was an issue litigated between the electric company and a local government as to the power of the local government, the local government has prevailed in Court.

26. In State v. Bonacker, 906 S.W.2d 896 (Mo.App. 1995), the Court said that the Public Service Commission is purely a creature of statute and its powers are limited to those conferred by statute. Protection of the rights of, the health and safety, and the convenience of it citizens, and land use planning, are within the authority of the county. See RSMO Chapter 64 and the cases cited above. The county and the PSC have different responsibilities. As indicated by the statements of the several Supreme Court

cases, and other cases, cited above, we have two layers of oversight; that is, one layer of oversight involving the PSC when it comes to matters within its jurisdiction (i.e., rates), and the other layer of oversight involving the local authorities, which, in this case, concerns the proper use of land, area planning, the location of buildings, and the protection of the welfare of its citizens. Requiring compliance with both the agency and the local government is a sort of "checks and balances" This dual authority system has been a staple of our state law for about ninety years. We must not allow Aquila to cause serious damage this long standing, dual authority system simply because it failed to ask for approval from anyone before it started to build a power plant.

IV. THE PSC REQUIRES THAT AN APPLICANT COMPLY WITH ALL ZONING REQUIREMENTS AND ALL LOCAL GOVERNMENT REQUIREMENTS BEFORE IT BEGINS BUILDING ITS POWER PLANT.

In Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116, the PSC said:

> In short, **we emphasize we should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning.**
>
> ***
>
> We also find that the Applicant **has met our Public Service Commission requirement that it has complied with municipal requirements before construction of the facility**. (Emphasis added.)

In In the matter of the complaint of Missouri Valley Realty Company v. Cupples Station Light, Heat and Power Company et al., 2 Mo. P.S.C. 1, 6 (1914), the PSC stated:

> **Consent of the municipality is always required as a condition precedent to the granting of permission and approval by this Commission** … (emphasis added).

It is established by decisions of the courts that:

1.) the 1938 certificate of Aquila (gained through its predecessors) that it proposes to act on in this case **does not state that it can build a power plant** [see State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960)],

2.) the Cass County franchise (gained through its predecessors) that Aquila proposes to operate under in this case **does not** give it the authority to build a plant [decision of Judge Dandurand in Cass County v. Aquila, case number CV104-1443CC, Appendix 2 to Aquila's application, decided in January 2005], and

3.) Aquila is ordered to comply with county zoning (Dandurand decision, ibid).

It is important that the Courts and the PSC make the proper decision for precedent. Aquila knew when it began building its power plant that it did not have a franchise that would allow it,[6] it knew that it did not have zoning,[7] and it presumably

[6] By about mid-December, 2004, before the building began, counsel for all parties in the Cass litigation had reviewed the franchise and saw it only allowed transmission lines and poles.

knew what the Harline case said about its certificate, yet Aquila did not ask for a new franchise, did not ask for zoning for this site, and of course did not ask the PSC for a certificate for this situation before beginning to build.

Aquila would therefore violate the PSC policy that it demonstrate that it complied with all local requirements **before** it began building.

This is not some kind of flexible policy that can be cast aside. This requirement comes from the statutes, the regulations and the decisions.

The PSC should not violate the statutes, the case law, the PSC regulations, and the PSC decisions, in order to save Aquila from its own misguided actions.

V. ESTOPPEL SHOULD RUN AGAINST AQUILA.

1. Aquila applied for zoning permits from Cass County for other site(s). It applied for a special use permit for this plant when it proposed building it closer to Harrisonville.[8] That power plant zoning request was turned down by the Zoning Board in July 2004. Aquila did not appeal. Aquila applied for the zoning permit for the substation in October 2004, after the aforementioned denial. After that, Aquila decided to take the stance that it did not need any zoning permits. Aquila never applied for a zoning permit for the location outside of Peculiar for the power plant. Aquila withdrew its application for the zoning permit for the substation. Suit was then filed before December 1, 2004 on the failure to apply for zoning.

[7] The suit against Aquila to enforce zoning was filed before December 1, 2004.
[8] Aquila, or its partner, got county zoning approval for the Calpine plant and complied with all requirements of the county.

2. These facts should act as an estoppel or should be considered as an admission by Aquila. Aquila wants to change the rules of the game during the middle of the game, after getting a denial.

3. Our system cannot allow big corporations to apply for zoning, then after the initial decision does not go well, for the big corporation to then be able to decide that it doesn't need to follow the rules.

4. If Aquila prevails, then this opens the gates for any and all companies to come out from the Kansas City metropolitan to build their plants in Cass with the county having no power to regulate them. Cass will end up being the dumping ground for the Kansas City area, if the courts and the government agencies do not enforce the laws in this case to protect it.

5. Aquila wants to live in a world where the county does not tell it where to build, the PSC does not tell it where to build, and, in fact, no one can tell it where to build. The scheme of Aquila appears to be to get a ruling that says only the PSC has authority over the location of power plants, and to also get the PSC to say it will not tell an electric utility where to build or not build. In other words, it wants the PSC to say, you can build anywhere, we don't care, and we will protect you by not letting anyone else stop you.

6. This is all being pursued by Aquila because it refused to follow the law. It refused to seek approvals before it began building its power plant at the present location, despite the suits and the protests. The PSC cannot go along with this. The PSC cannot violate or twist the law to save Aquila from its own acts.

VI. WHAT THE INJUNCTION SAYS.

1. Aquila cites only a portion of the injunction judgment in its application.

2. The PSC was a party to this action, for limited purposes. Appendix 2 to Application, at page 2. The injunction states that it applies to all who are acting in concert with Aquila or in collaboration with Aquila. Appendix 2 to Application, at page 3.

3. The Court made general statements about 64.235, but stated clearly that the Court was not making an interpretation of language in that statute that dealt with the question of whether the second half of 64.235 applied to Aquila. Appendix 2 to Application, at page 3. This obviously means that regardless how the Courts interpret 64.235, the Circuit Court believed an injunction was appropriate. The Court went on to state that Aquila's proposed actions would violate county **ordinances**. Appendix 2 to Application, at page 3. In fact, the Judge indicated that irreparable harm flowed from Aquila's failure to comply with county ordinances. A mandatory injunction was issued against Aquila and all acting in concert with it to remove all improvements that are inconsistent with county zoning.

4. The PSC cannot issue an order that would say that Aquila does not have to comply with county ordinances. See discussion above, Parts II, III and IV.

5. Apparently Aquila will argue that if the PSC were to give it a certificate that says it can build the plant at the site Aquila has chosen, then the Circuit Court would have to dissolve the injunction. One insurmountable problem with this theory is that in order to get a certificate from the PSC for a power plant, the applicant

must first show compliance with local ordinances, including zoning. See cases cited above in Parts II, III and IV. The applicant also has to show that it has a proper franchise, and Aquila does not. See Parts II and III above. The requirements of obeying local authority are built into the requirements needed to get a certificate, and this requirement is irrefutable, with our Courts repeatedly saying that the utility has to comply with **both** the local government and with the PSC. It is not going to make any difference what kind of certificate the PSC issues, because if the county does not grant the right to Aquila, it cannot build or operate a power plant. The PSC also cannot eliminate the finding of the Court that there is irreparable harm caused by failure to comply with county **ordinances** and the PSC cannot remove the injunction's requirement that all improvements not in compliance with county **zoning** be removed. This application is a waste of time and resources.

VII. SUMMARY OF LEGAL ARGUMENT ON ZONING AND CONTROL OVER PUBLIC UTILITIES.

1. A utility has to have consent of the county to lay conductors or erect poles. RSMO 229.100. A utility has to comply with regulations of the county to **maintain** conductors. RSMO 229.100. A utility has to have consent of the local government to lay conductors, according to RSMO 393.010.

2. It would make no sense to say a utility has to have consent of the county for less controversial matters such as laying conductors, erecting poles and maintaining conductors, but is immune from regulation by the county for the more

serious matter of constructing a power plant. Of course we do not have to try to guess at the intent of the legislature, because RSMO 393.170 addresses the question of the building of an **electric power plant**. 393.170 requires that utilities must have the consent of the county to construct a **power plant**. The legislature covered poles, lines and power plants in these three sections. The legislature intended that the utility is under the control of the county for all of these matters.

3. The county also has the authority to exert control over the construction of **buildings.** RSMO 64.170. There is no exception to application of this statute.

4. The statutes say that no improvement shall be constructed without the approval of the county. RSMO 64.235. The only exception to this statute is for governmental projects.

5. RSMO 64.255 states that the county shall control the **location** and use of buildings. There is no exception to the application of this statute.

6 To top it off, RSMO 64.285 states that if the county zoning requires a more restrictive use of land than required any other statute, the county zoning controls. There is no exception to the application of this statute. The title to this section says the **zoning laws (for first class noncharter counties) supersede other laws**.

7. Case law indicates that a county may refuse to give consent to a utility.

8. Case law indicates that the local government may impose conditions on the utility.

9. The PSC itself used the word **"transcendent"** when describing the police power of the local government over the utility. In the matter of the application of Union Electric Company, 3 Mo.P.S.C. (N. S.) 157 (1951),

10. The PSC certificate is a separate matter from the county franchise and serves a separate purpose, and the county zoning is a separate matter from each of those. A county franchise permitting the building of a power plant is necessary for a utility to build a plant in that county. (Zoning is yet another requirement.)

11. Cass County never issued a franchise to Aquila or its predecessor that says anything about building a power plant. The only franchise issued by Cass County to Aquila or its predecessor says it can **install transmission lines**. The Circuit Court held in Cass County v. Aquila, in January 2005, said this does **not** authorize Aquila to build a power plant in Cass. Appendix 2 to the Application of Aquila. The PSC cannot disagree with the Court.

12. A PSC certificate alone cannot authorize a company to build a plant. The utility must get authority from both the local government and the PSC.

13. The Courts recognize a distinction between laying lines and building a power plant. State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960). The authority to put in lines does not equate with the authority to build a power plant. Harline, supra.

14. In fact, in Harline the Court of Appeals stated that the certificate granted to the predecessor of Aquila, which is the very same certificate involved in this case, did not say it had authority to build a power plant.

15. The PSC does not have the power to entertain any issues respecting the local franchise. Such issues are to be resolved by the Courts.

16. The PSC cannot expand the rights given to the utility by the franchise.

17. In Judge Dandurand's decision, he indicated he was not pegging his decision on any particular interpretation of 64.235. By this he obviously meant that regardless how that particular section is interpreted, Aquila still would not prevail and would still be subjected to an injunction that says it has to comply with the county ordinances. Regardless how the decision of Judge Dandurand is interpreted, the fact is that to get a certificate from the PSC to build a power plant, Aquila must first get a franchise that allows it to build a power plant in the county. Aquila did not meet the first requirement that Judge Dandurand indicated as being required. The law clearly requires other things, and Judge Dandurand obviously did not intend that other requirements be thrown out. Instead of going down a list of other requirements that Aquila has to follow, the Judge issued an injunction that indicates in broad language that Aquila has to comply with county ordinances.

18. The application of Aquila in the present PSC case is a waste of time and resources. The matter is in the Courts and we should let the Courts decide.

19. The utility must submit to **both** the local government and the PSC.

20. The PSC cannot give Aquila what it must have to build a power plant at that location. Only the county can give Aquila what it must have to build a power plant at that location.

VIII. RELIEF REQUESTED IN THIS MOTION.

The application of Aquila must be dismissed. Aquila has not shown that it has complied with the local requirements, including the zoning requirements. Aquila has not shown that it has acquired a local franchise that would permit it to build a power plant in Cass County. In fact, Aquila has decided to litigate rather than to apply for the consents it needs from the County. In fact, an injunction has been entered against Aquila to enjoin it from violating the local ordinances, including the zoning ordinances. Until Aquila can show compliance with all local requirements, this application must be denied. Dismissal is proper.

Submitted by:

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I certify on this 21st day of February, 2005, a true copy of the above was sent by e-mail to Paul Boudreau at paulb@brydonlaw.com ; Dan Joyce at D.Joyce@psc.mo.gov; Office of General Counsel at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; Debra Moore at dmoore@casscounty.com; Mark Comley at comleym@ncrpc.com.

By /s/ Gerard D. Eftink