

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

In the Matter of the Application of Aquila,       )  
Inc., for Authority to Acquire, Sell and       )  
Lease Back Three Natural Gas-Fired       )  
Combustion Turbine Power Generation       )  
Units and Related Improvements to be       )  
Installed and Operated in the City of       )  
Peculiar, Missouri.       )

**Case No. EO-2005-0156**

**REPLY TO THE RESPONSE OF CASS COUNTY TO AQUILA'S SUGGESTIONS IN  
OPPOSITION TO APPLICATION OF CASS COUNTY, MISSOURI TO INTERVENE**

COMES NOW Aquila, Inc., (hereinafter "Aquila"), by and through counsel, and offers the following reply to Cass County's Response to Aquila's Suggestions Opposing Intervention:

1. On January 13, 2005, the County of Cass, Missouri (hereinafter the "County") filed its Response to Aquila's Suggestions in Opposition to the County's proposed intervention in the captioned case (hereinafter, the "Response"). The County's Response does not contain any additional allegations which state an interest sufficient under the standards of Commission rule 4 CSR 240-2.075 to justify granting its Application to Intervene in this case. To the contrary, the Response further illustrates why the County's intervention would not serve the public interest.

2. It bears repeating that there are only two principal (2) topics presented in this case. The first is a request under the Commission's affiliate transaction rule 4 CSR 240-20.015 for a determination that the transfer of the CT's from an unregulated affiliate to the Aquila Networks-MPS operating division at a specified transfer value does not provide a financial advantage to the unregulated affiliate. The second consideration is

whether Aquila will be permitted to enter into a number of transactions the collective purpose of which is to fund the construction of the South Harper station with low cost revenue bonds. The problem with the County's proposed intervention is that it is not calculated to address any of the matters actually being presented to the Commission in this case.

3. The proposed intervention by the County appears to be for the purpose of contending that the County's local land use regulation trumps statewide regulation of investor-owned electric utilities vested in the Commission by the General Assembly. In essence, the County argues that the Public Service Commission Law's comprehensive scheme for regulation of utilities is subordinate to the requirements of the County's planning and zoning code, an argument that would fundamentally undermine the authority vested in the Commission and result in a chaotic regulatory scheme. See, Response ¶7. As a matter of fact, in those cases where local governments have attempted to use the power of zoning to regulate the construction of electric infrastructure under the authority of the Commission, the Missouri Supreme Court has expressly concluded that such efforts are unlawful.<sup>1</sup> In any event, this is not a question that is properly before the Commission in this case.

4. The County essentially concedes that its interests are both tangential and speculative in paragraph four (4) of its Response wherein it sets forth its concerns about what Aquila *might do* and what its position *would be if* Aquila were to ask for something

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<sup>1</sup> See, *Union Electric Company v. Saale*, 377 S.W.2d 427, 430 (Mo. 1964); *Union Electric Company v. City of Crestwood*, 562 S.W.2d 344, 346 (Mo. banc 1978); *Union Electric Company v. City of Crestwood*, 377 S.W.2d 480, 482-84 (Mo. 1973).

other than what it is actually asking for in this case. Conjecture of this nature does not justify the County's intervention.

5. As a final observation, the County also suggests in paragraph five (5) of its Response that a Judgment entered by the Circuit Court of Cass County has already resolved a number of legal issues associated with the scope of Aquila's certificate of convenience and necessity ("Certificate"). This is not so. The Court has stayed the effect of its Judgment pending an appeal by Aquila. In the interim, construction of South Harper will continue. Furthermore, the Judgment to which the County refers is not a judgment against the Commission nor has it by its terms modified, invalidated or restricted the nature or scope of Aquila's Certificate. To the contrary, the Commission retains its exclusive jurisdiction to determine the scope and effect of Aquila's Certificate<sup>2</sup>; a decision well within the specialized expertise reserved to the Commission by law. *State ex. rel. MCI Metro Access Transmission Services v. City of St. Louis*, 941 S.W.2d 634, 644 (Mo. App. 1997); *Killian v. J&J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. banc 1991). The Judgment of the Circuit Court of Cass County has not taken from the Commission its primary jurisdiction to deal with the scope and effect of Aquila's Certificate. Again, these issues, as important as they may be, presently are not before the Commission as a consequence of the Application filed by Aquila in this case.

WHEREFORE, Aquila restates its objections to the County's intervention in this proceeding for the reasons aforesaid and as previously set forth in its Suggestions in Opposition to Application of Cass County, Missouri to Intervene.

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<sup>2</sup> See, *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943); *Inter-City Beverage Co. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 878 (Mo. App. 1994).

Respectfully submitted,

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### **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 24<sup>th</sup> day of January 2005 to the following:

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