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BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

HEARING

May 3, 2006

Jefferson City, Missouri

Volume 10

In the Matter of the Application)
of Aquila, Inc., for Permission and)
Approval and a Certificate of Public)
Convenience and Necessity Authorizing)
It to Acquire, Construct, Install, Own,)
Operate, 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

RONALD D. PRIDGIN,
REGULATORY LAW JUDGE.

JEFF DAVIS, Chairman
STEVE GAW
ROBERT M. CLAYTON, III,
LINWARD "LIN" APPLING,
COMMISSIONERS.

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1 P R O C E E D I N G S
2 (Exhibit Nos. 102 through 115 were marked for identification.)

3 JUDGE PRIDGIN: Good morning. We're back on
4 the record. We have resumed a hearing in Case
5 No. EA-2006-0309.

6 As I understand it, our next witness will be
7 Cass County witness Gary Mallory. Is that correct, counsel?

8 MS. MARTIN: That is correct.

9 JUDGE PRIDGIN: Is there anything else before
10 we proceed to cross-examination?

11 MR. COMLEY: Your Honor, in connection with
12 our presentation today, Cass County has several documents that
13 have been pre-marked and we need to identify them and admit
14 them into the record.

15 Starting first, the first piece of
16 documentation we have marked today has been pre-marked as
17 Exhibit 102. It is a certified copy of the Cass County zoning
18 map, which was effective in 1999.

19 I think as testimony will unfold today, you
20 will notice that there will be updates that have not been
21 reflected on this map, but those updates will not have any
22 bearing on the location and the zoning for South Harper or the
23 Peculiar substation.

24 Anyway, this is the official Cass County
25 zoning map. It's been certified by the county clerk. I move

1 admission of Exhibit 102.

2 JUDGE PRIDGIN: Any objections?

3 CHAIRMAN DAVIS: I'd like to examine the map.

4 JUDGE PRIDGIN: Ms. Martin, if you could bring
5 that forward for the Chairman.

6 MR. WILLIAMS: I think I have a question
7 before I voice an objection. Are you representing that that's
8 the current Cass County zoning map or a map that was in effect
9 at some point in the past?

10 MR. COMLEY: That map is current subject to
11 updating. It represents the base map for all their updates.

12 MR. WILLIAMS: Well, the reason I'm asking is
13 because according to Schedule WW-11, there's a different
14 classification code than the legend I see on that map and I
15 don't see anything updating that. So my question is whether
16 you're representing that this is the current Cass County
17 zoning map or the zoning map that was in effect before the
18 February 1, 2005 update.

19 MR. COMLEY: That zoning map was in effect for
20 purposes of the 2005 zoning update.

21 MS. MARTIN: To further clarify that issue,
22 zoning was first adopted in Cass County in 1959. The original
23 Cass County zoning ordinance included a larger number of
24 descriptor categories for zoning classifications than exists
25 since, say, 1977 when the zoning ordinance would have been

1 significantly updated by Cass County.

2 The legends that are reflected on this
3 particular zoning map, which would have been -- this one was
4 copied by Darrell Wilson, who was the head of the Planning and
5 Zoning Department in 2004, but would have been prepared
6 basically in this form by 1999.

7 Those legends from the original zoning
8 ordinance have carried forward to the extent applicable
9 because land that might originally have been zoned in 1959
10 may not ever have changed from that zoning classification, but
11 the classifications basically date back to 1959 and to the
12 extent still applicable because a tract has not changed zoning
13 under a new zoning ordinance, thus, the additional
14 classifications.

15 MR. WILLIAMS: And my issue is that if I go
16 look for a zone that's classified with a symbol A as being an
17 agricultural district, if I go to that legend and look at that
18 map, I believe I don't find that on there.

19 MR. COMLEY: I think you do.

20 CHAIRMAN DAVIS: Can I just point out that I
21 don't see anything about multi-tier use on this map?

22 MR. COMLEY: Those would be in the
23 comprehensive plans.

24 MS. MARTIN: Commissioner Davis, the zoning
25 classifications are distinguished from comprehensive plan

1 characterizations. They are completely different animals.

2 MR. WILLIAMS: I see a reference to something
3 as AG that says it's agricultural district and it says no
4 color code.

5 MS. MARTIN: Anything that's the base yellow
6 color is the background agricultural. You start from that
7 premise and you color based on the scale from there any
8 particular tract that has been zoned some other use.

9 MR. UHRIG: Judge, Matt Uhrig for the nearby
10 residents. Is it okay for the rest of us to approach and view
11 the map?

12 JUDGE PRIDGIN: Sure. I'm sorry. I thought
13 that counsel had been doing that before we went on the record,
14 but obviously you're free to look at it.

15 MR. COMLEY: I note because it is such a large
16 piece, we've only brought one.

17 MS. MARTIN: And just for the record, there
18 are two little flags that have been placed on the map by me to
19 reflect the location of the plant and the substation that are
20 at issue in this case.

21 In section 32, which would be west of
22 Highway 71 at the appropriate section 32 in that area -- in
23 the proper township, I should say, and range, there is a flag.
24 The orange portion of that flag would be roughly the location
25 of the power plant.

1 And similarly, in section 5 in the proper
2 township and range, the little flag with the orange portion
3 would be roughly where the substation is located.

4 CHAIRMAN DAVIS: Your Honor, I'd like to ask
5 Mr. Pridgin a couple of questions whenever you have the
6 opportunity.

7 JUDGE PRIDGIN: You'd like to ask me some
8 questions?

9 CHAIRMAN DAVIS: No. Counsel for Staff,
10 Mr. Williams.

11 MR. WILLIAMS: Yes.

12 CHAIRMAN DAVIS: Is this the first time you've
13 seen this map here today?

14 MR. WILLIAMS: Yes, it is.

15 CHAIRMAN DAVIS: Has Staff requested maps from
16 Cass County in the past?

17 MR. WILLIAMS: Yes.

18 MR. COMLEY: There's been no data request for
19 the maps.

20 MR. WILLIAMS: There was no formal data
21 request for the maps, but when we were present, as any citizen
22 could walk in and do, we requested to view the maps on
23 numerous occasions.

24 CHAIRMAN DAVIS: So is somebody going to make
25 an objection here or am I just going to sit here?

1 MR. WILLIAMS: Well, I think they've got a
2 certified copy of the map so I'm not going to object.

3 CHAIRMAN DAVIS: Since you didn't make a data
4 request, then you didn't make a data request. Okay.

5 JUDGE PRIDGIN: I'm hearing no objections to
6 Exhibit 102; is that correct?

7 Exhibit 102 is admitted.

8 (Exhibit No. 102 was received into evidence.)

9 MR. COMLEY: We've also previously marked a
10 certified copy of the Cass County Comprehensive Plan, Zoning
11 Ordinance, Subdivision Regulations and Procedure Manual dated
12 February 1991. It is in notebook form. And as I mentioned
13 earlier in the proceeding, that because of its volume, we
14 would be preparing only one and make it available to the
15 parties.

16 I'm going to hand out the certificate that's
17 been issued by the county clerk inspecting that so there will
18 be some record in your file about the exhibit. And I think
19 the notebooks are by the court reporter.

20 I would move for the admission of Exhibit 103.

21 JUDGE PRIDGIN: Okay. Any objections?

22 MR. YOUNGS: Judge, just for the record, on
23 behalf of Aquila -- and I don't think it will come as any
24 surprise given the issues in the case and the dispute about
25 which zoning regulations and which comprehensive plan apply --

1 it's Aquila's position that this procedural manual dated
2 February 1991 has been subsumed by the zoning regulations that
3 have been enacted since that time and that it's irrelevant to
4 the issues in this case. I just make that objection for the
5 record, please.

6 MR. WILLIAMS: Staff joins in that objection.

7 JUDGE PRIDGIN: Mr. Comley?

8 MR. COMLEY: Mr. Peshoff has talked about the
9 history of the zoning ordinances in Cass County and this
10 particular comprehensive plan was mentioned in his testimony,
11 his foundation for his opinions and we offer it as part of the
12 chronicle of the history. We think it's relevant on that
13 score.

14 It also provides the Commission the stages
15 through which zoning has traveled in Cass County. We think
16 it's highly relevant to the issues.

17 JUDGE PRIDGIN: All right. I will overrule.
18 Exhibit 103 is admitted.

19 (Exhibit No. 103 was received into evidence.)

20 JUDGE PRIDGIN: I will need a copy of that at
21 some time.

22 MR. COMLEY: Would you like the notebook or
23 would you prefer -- is there an extra copy somewhere of the
24 certificate? I thought we had enough.

25 MS. MARTIN: Did you not hand the Commission

1 any?

2 MR. COMLEY: I haven't handed them any.

3 JUDGE PRIDGIN: Mr. Comley.

4 MR. COMLEY: The next exhibit we have
5 pre-marked is the Cass County Comprehensive Plan, Zoning
6 Ordinance Subdivision Regulations and Procedural Manual dated
7 June 1997. It's been marked as Exhibit 104. It's a certified
8 copy. And I'd offer the certified copy of the Cass County
9 Comprehensive Plan of June 1997 into evidence.

10 JUDGE PRIDGIN: Any objections?

11 MR. YOUNGS: Your Honor, on behalf of Aquila,
12 same objections as to 103 again. And specifically with regard
13 to the zoning ordinance, the most recent zoning ordinance
14 and -- or zoning order in Cass County indicates that this
15 version of the zoning ordinance has actually been repealed by
16 the enactment of subsequent ones.

17 And again, for the other reasons we've talked
18 about that I think have been made of record previously in this
19 case. We don't believe there's any relevance to any
20 comprehensive plan or zoning order other than the 2005 update
21 and the 2005 version of the zoning order. So we object to it
22 on relevance grounds.

23 MR. WILLIAMS: Judge, Staff also objects on
24 relevance except to the extent that it shows changes in the
25 plan that have occurred overtime. For that limited purpose,

1 Staff would not object to its admission.

2 JUDGE PRIDGIN: Mr. Comley.

3 MR. COMLEY: Again, Mr. Peshoff refers to the
4 plan in his testimony as part of the history that he supplies
5 to the Commission for Cass County zoning. And in terms of the
6 history, it's quite relevant to this proceeding.

7 JUDGE PRIDGIN: All right. I will overrule.
8 Exhibit No. 104 is admitted.

9 (Exhibit No. 104 was received into evidence.)

10 MR. COMLEY: And I haven't mentioned this, but
11 as far as -- in the notebooks you will also find the original
12 resolution of the adoption. Respecting Exhibit 103, you'll
13 find the Cass County original -- a resolution of adoption in
14 there as well as in 104 there's an enabling document included
15 in Order No. 97-07 for the 1997 comprehensive plan.

16 The next exhibit that was marked Exhibit 105
17 is the Cass County Comprehensive Plan dated July 2003 under
18 certificate of the county clerk. And Cass County offers
19 Exhibit 105 into the record.

20 JUDGE PRIDGIN: Any objections?

21 MR. YOUNGS: On behalf of Aquila, the same
22 objection as previously stated to the previous exhibits, your
23 Honor.

24 MR. WILLIAMS: And Staff has the same
25 objection, that it's irrelevant except to the extent it shows

1 history.

2 JUDGE PRIDGIN: Objections are overruled.

3 Number 105 is admitted.

4 (Exhibit No. 105 was received into evidence.)

5 JUDGE PRIDGIN: And I'll eventually need a
6 copy of that, please.

7 Mr. Comley.

8 MR. COMLEY: I'm sorry. Is there a ruling on
9 the objections?

10 JUDGE PRIDGIN: I overruled and admitted the
11 evidence.

12 MR. COMLEY: The next document marked is
13 Exhibit 106. It is a certified copy of Ordinance No. 03-13
14 dated October 16th, 2003. And this is the ordinance which
15 adopts the comprehensive plan update of 2003. And I would
16 offer Exhibit 106 into evidence.

17 JUDGE PRIDGIN: Any objections?

18 MR. YOUNGS: Your Honor, on behalf of Aquila,
19 same objection. Aquila's position, as the Commission knows,
20 is that anything other than the 2005 comprehensive plan and
21 2005 zoning ordinance are the only ones relevant because the
22 Commission is determining the current state of the properties
23 in Cass County relative to these facilities and the current
24 impact of those facilities on the community and, therefore,
25 the only current document relating to those are the 2005 ones.

1 We object to relevance.

2 MR. WILLIAMS: Staff also objects on the basis
3 of relevance except to the extent these documents show the
4 history of how zoning and planning have evolved in Cass
5 County.

6 MR. COMLEY: Your Honor, the 2003 plan, we
7 take very vigorous opposition with the positions taken by the
8 Staff and Aquila. It's the county's position that the 2003
9 comprehensive plan and the existing ordinances at that time do
10 control the situation and because of that, they are highly
11 relevant.

12 Furthermore, in addition to what I said about
13 the 1997 documents that we've already admitted, the 1997 plan
14 is part and parcel to 2003 comprehensive plan updates. So in
15 that respect, they are highly relevant documents.

16 JUDGE PRIDGIN: And I will overrule. Exhibit
17 No. 106 is admitted.

18 (Exhibit No. 106 was received into evidence.)

19 MR. COMLEY: The next document is a certified
20 copy of Ordinance No. 03-15 dated December 15th, 2003. This
21 ordinance converted the planning and zoning procedures in Cass
22 County to a first-class non-charter county. It had originally
23 been a second-class county. I'd offer Exhibit 107 into the
24 record.

25 JUDGE PRIDGIN: Objections?

1 Hearing none, Exhibit 107 is admitted.

2 (Exhibit No. 107 was received into evidence.)

3 MR. COMLEY: Exhibit 108 is the Cass County
4 Comprehensive Plan, Zoning Ordinance, Subdivision Regulations
5 and Procedural Manual dated February 1, 2005. As the other
6 comprehensive plans have been entered, this is a single
7 notebook. There are no other copies, but we do have copies of
8 the certificate. I would move for the admission of
9 Exhibit 108.

10 JUDGE PRIDGIN: Any objections?

11 Hearing none, Exhibit No. 108 is admitted.

12 (Exhibit No. 108 was received into evidence.)

13 MR. COMLEY: Exhibit 109 is a certified copy
14 of Resolution No. 05-01 effective February 1, 2005 of Cass
15 County. This is a resolution that amends the zoning ordinance
16 and subdivision regulations of the county effective
17 February 1, 2005. It is a companion document to the
18 comprehensive plan, as I understand it. I would move for the
19 admission of Exhibit 109.

20 JUDGE PRIDGIN: Any objections?

21 Hearing none, Exhibit 109 is admitted.

22 (Exhibit No. 109 was received into evidence.)

23 MR. COMLEY: Exhibit 110 is a certified copy
24 of Resolution No. 05-02 the Cass County Commission adopted
25 February 1, 2005. By this resolution, the Cass County

1 Commission adopted the comprehensive plan updates for 2005. I
2 would move the adoption -- excuse me, move the admission of
3 Exhibit 110.

4 JUDGE PRIDGIN: Any objections?

5 Hearing none, Exhibit 110 is admitted.

6 (Exhibit No. 110 was received into evidence.)

7 MR. COMLEY: Exhibit 111 is a certified copy
8 of an Order No. 05-02 dated February 1, 2005. The order
9 establishes impact fees that were referred to in the
10 subdivision regulations adopted in the comprehensive plan
11 updates for 2005. I would offer Exhibit 111 into evidence.

12 JUDGE PRIDGIN: Any objections to 111?

13 MR. YOUNGS: Your Honor, may I just -- this is
14 the first I've seen of this.

15 JUDGE PRIDGIN: Yes, sir.

16 MR. YOUNGS: So I don't want to hold us up,
17 but -- thank you. No objection on behalf of Aquila.

18 JUDGE PRIDGIN: Hearing no objection,

19 Exhibit 111 is admitted.

20 (Exhibit No. 111 was received into evidence.)

21 JUDGE PRIDGIN: Mr. Comley.

22 MR. COMLEY: Exhibit 112 is a certified copy
23 of an Ordinance No. 05-08 adopted by the Cass County
24 Commission on August 31, 2005. This is an ordinance enacting
25 the provisions of the Cass County resolution 05-01 and 05-02,

1 which have already been admitted into evidence, and adopting
2 the comprehensive plan entitled Comprehensive Plan of 2005. I
3 would offer Exhibit 112 into evidence.

4 JUDGE PRIDGIN: Any objections?

5 Exhibit 112 is admitted.

6 (Exhibit No. 112 was received into evidence.)

7 MR. COMLEY: Exhibit 113 is a larger scale
8 illustration based upon maps available at Cass County showing
9 the zoning districts and the zoning applicability for the area
10 around the South Harper plant.

11 I'll represent to the Commission this was
12 prepared by Darrell Wilson. We had this prepared so that it
13 may be easier for the Commission and the parties to understand
14 the significance of Exhibit 102, the Cass County zoning map
15 and its applicability to South Harper. I'll wait a minute
16 until everybody gets a copy of it.

17 Because it will be helpful in explaining --
18 perhaps explaining the testimony of some of the witnesses
19 today, I would move for the admission of Exhibit 113.

20 JUDGE PRIDGIN: Any objections?

21 MR. EFTINK: Your Honor, could I just ask a
22 question to see if we can understand? On Exhibit 113, is the
23 yellow zoned residential?

24 MR. COMLEY: What I gather, it's kind of a
25 yellowish green and, yes, that's single-family residential.

1 MR. EFTINK: And the white is zoned
2 agricultural?

3 MR. COMLEY: Yes.

4 MR. EFTINK: Okay. Thank you for the
5 clarification.

6 MR. WILLIAMS: Judge, I'm going to object on
7 the basis of lack of foundation. If he's offering it simply
8 for illustrative purposes, then I don't have an objection to
9 it. If he's offering it as substantive evidence, then I do.

10 JUDGE PRIDGIN: Mr. Comley?

11 MR. COMLEY: I think we'll firm that up with
12 some other foundation testimony, Judge. We'll withhold
13 offering 113 for the moment.

14 Finally, the court reporter has pre-marked a
15 series of affidavits and I think that was Exhibit 114. On
16 April 19th, I caused to be served on the parties a business
17 records affidavit concerning three custodians of records. The
18 affidavits that are noted in 114 are under the cover like this
19 (indicating) and the affidavits concern the business records
20 held by Cass County.

21 Under the affidavits you will find
22 construction permits, a driveway permit and Health Department
23 permit that were issued through Cass County departments to
24 Aquila in connection with the South Harper facility. And I
25 would offer Exhibit 114 into evidence.

1 JUDGE PRIDGIN: All right. Any objections?

2 Hearing none, Exhibit 114 is admitted.

3 (Exhibit No. 114 was received into evidence.)

4 MR. WILLIAMS: Judge, while we're on the topic
5 of exhibits, Commissioner Gaw had requested of Warren Wood his
6 backup materials for the factors he came up with. And I have
7 brought in here an exhibit that Mr. Wood prepared with that
8 information and I've distributed it. I believe all the
9 counsel have received a copy. That's been marked for
10 identification as Exhibit 115 and I'd like to offer that at
11 this time.

12 JUDGE PRIDGIN: All right. Any objections?

13 Hearing none, Exhibit No. 115 is admitted.

14 (Exhibit No. 115 was received into evidence.)

15 JUDGE PRIDGIN: Mr. Williams, thank you.

16 Any further exhibits or anything else from
17 counsel before Mr. Mallory takes the stand?

18 MS. MARTIN: No, your Honor.

19 JUDGE PRIDGIN: All right. At this time if I
20 could ask Mr. Mallory to come forward to be sworn.

21 (Witness sworn.)

22 JUDGE PRIDGIN: Thank you very much, sir. If
23 you would, please have a seat. Ms. Martin, when you're ready,
24 ma'am.

25 MS. MARTIN: Thank you very much, your Honor.

1 GARY MALLORY testified as follows:

2 DIRECT EXAMINATION BY MS. MARTIN:

3 Q. Good morning, Mr. Mallory. If you could,
4 please, would you state your name and address?

5 A. Gary L. Mallory, 519 London Way, Belton,
6 Missouri.

7 Q. Are you the same Gary Mallory that has caused
8 to be filed in this case rebuttal testimony, which has been
9 marked as Exhibit 21, and surrebuttal testimony, which has
10 been marked as Exhibit 22?

11 A. Yes.

12 Q. And you've had an opportunity to review your
13 testimony?

14 A. Yes.

15 Q. And if I were to ask you, sir, the questions
16 in both your Rebuttal and your Surrebuttal today, would your
17 answers be the substantial similar answers as are already
18 indicated in Exhibits 21 and 22?

19 A. Yes.

20 Q. Do you have any corrections or additions to
21 your testimony that you would like to note today?

22 A. No.

23 Q. And are the answers that have been provided in
24 your rebuttal and surrebuttal testimony truthful and complete,
25 to the best of your knowledge?

1 A. Yes.

2 MS. MARTIN: I move admission of Exhibits 21
3 and 22.

4 MR. WILLIAMS: Judge, Staff --

5 JUDGE PRIDGIN: Mr. Williams.

6 MR. WILLIAMS: Judge, Staff has objections to
7 Exhibit 22.

8 JUDGE PRIDGIN: Okay. Your objections,
9 please.

10 MR. WILLIAMS: First of all, Staff objects to
11 Schedule GM-2, which is a stipulation of facts that was
12 entered into in another proceeding. It has no relevance to
13 this case. And, further, being a settlement document, it
14 should not be admitted since it would show the policy of
15 encouraging settlement amongst the parties.

16 It's a settlement document from another
17 proceeding in front of this Commission, EA-2005-0248. And I
18 would point out that in the document itself on the first page
19 in the "come now" sentence at the last clause it says, And
20 hereby stipulate to the following facts for the purposes of
21 this proceeding.

22 JUDGE PRIDGIN: All right. Mr. Williams,
23 thank you.

24 Ms. Martin?

25 MS. MARTIN: Your Honor, it's a joint

1 stipulation of facts. It is not a settlement document. It is
2 a document that was arrived at amongst discussion of all the
3 parties in the 0248 case, which this Commission might recall
4 was an earlier attempt by Aquila to secure a certificate of
5 convenience and necessity with respect to the South Harper
6 plant.

7 The reference to the fact that it is for the
8 purposes of this proceeding, nonetheless, does not effect that
9 a stipulation was made and, thus, an admission against
10 interest was made at that time by these parties with respect
11 to the status of zoning of the tracts in question. It is
12 highly relevant and it needs to be admitted into evidence.

13 JUDGE PRIDGIN: All right. I'll overrule that
14 objection. Any other objections to 21 or 22?

15 Hearing none, Exhibits 21 and 22 are admitted.

16 (Exhibit Nos. 21 and 22 were received into
17 evidence.)

18 MS. MARTIN: Thank you, your Honor. I tender
19 for the witness for cross-examination.

20 JUDGE PRIDGIN: Ms. Martin, thank you.

21 Mr. Eftink, any cross from StopAquila?

22 MR. EFTINK: Yes.

23 CROSS-EXAMINATION BY MR. EFTINK:

24 Q. Good morning, Mr. Mallory. I'm Jerry Eftink
25 for StopAquila.org. I'd like to draw your attention to

1 Exhibit 112. I don't know if you have one in front of you
2 there.

3 MR. EFTINK: Your Honor, may I approach and
4 hand my copy to him?

5 JUDGE PRIDGIN: You may.

6 And before Mr. Eftink gets started, I did get
7 an e-mail from somebody in PSC. I guess some pretty serious
8 weather is on the way. If any Commission employees have their
9 cars up on top, they've been offered to move their cars down
10 below, if you wanted to take care of that. And say a prayer
11 for mine.

12 Mr. Eftink.

13 BY MR. EFTINK:

14 Q. Exhibit 112 is the resolution that adopts,
15 among other things, the 2005 comprehensive plan of Cass
16 County; is that correct?

17 A. Yes.

18 Q. And that's dated in August 2005?

19 A. Yes.

20 Q. What's the date in August 2005?

21 A. August 31st.

22 Q. Okay. Now, Mr. Mallory, there's been
23 testimony about a meeting that occurred on I think November 5,
24 2004 that you were involved in with representatives of Aquila.
25 Do you recall anything about that meeting?

1 meeting with them. I tried to get somebody to tell me
2 something about the meeting to jog my memory and it did not
3 happen.

4 BY MR. EFTINK:

5 Q. All right. Let me move on then.

6 Now, there's been testimony about a proposed
7 annexation of South Harper Road. And it's correct that you
8 received a letter from Mike Fischer --

9 A. Yes.

10 Q. -- saying the City of Peculiar wanted to annex
11 a portion of South Harper Road?

12 A. Yes.

13 Q. Can you think of any reason why the county
14 would have any objection to a city annexing a portion of a
15 road?

16 A. None whatsoever. I'd be happy if they'd take
17 them all.

18 Q. I thought you might say that.

19 In September 2004, Mr. Fischer mentioned this
20 proposed annexation to you, but did he tell you the size or
21 the dimensions of the proposed annexation?

22 A. I don't recall specifically other than the
23 fact that it was some agriculture land down on Harper Road.
24 And he may have told me how much it was, but I don't recall
25 him saying.

1 Q. If the City of Peculiar proposes annexing
2 ground, can you think of think reason why the county would
3 object to any annexation by the city?

4 A. No. We would encourage cities to annex all
5 they can.

6 Q. In your rebuttal affidavit, Page 13, Line 15,
7 you say that, The county's regulations require applications
8 processed through the Planning Board for special use permit
9 applications and through the County Commission for rezoning.

10 Is that a correct statement of --

11 A. Read it again, please.

12 Q. On Page 13, Line 15 of your rebuttal affidavit
13 you say that, The county's regulations require applications
14 are processed through the Planning Board for special use
15 permit applications and through the County Commission for
16 rezoning; is that correct?

17 A. Any application for rezoning or special use
18 permit goes to the Planning Board first.

19 Q. And on a special use permit application, after
20 it goes to the Planning Board, where does it go?

21 A. Planning Board, it goes to the Board of Zoning
22 Adjustment.

23 Q. For a rezoning application, is there a
24 different procedure?

25 A. Yes. The only difference is in name only. In

1 first-class county zoning, the County Commission approves or
2 disproves zoning applications that have been sent from the
3 Planning Board. The County Commission also acts as the Board
4 of Zoning Adjustment in a first-class county. So essentially
5 it's the same group of people.

6 Q. Now, George Lewis testified regarding the
7 power plant that he didn't care what people living around the
8 South Harper facility site said about it. Referring back to
9 2004, did you have any conversations with Mayor George Lewis
10 about his attitude about the people out there?

11 A. I don't recall any other than maybe a social
12 setting at a dinner or something like that. George may have
13 mentioned the project itself, but I don't recall any detailed
14 conversation with him regarding what the impact would be on
15 the folks living there or anything of that nature.

16 Q. Now, I want to make it clear that on behalf of
17 StopAquila.org, we oppose any retroactive approval by anybody
18 of this facility, but setting that aside for the moment, if
19 the application to allow this facility to be there were to
20 come in front of the County Commission or the Board of Zoning
21 Adjustment and you're on that board, would you be able to be
22 fair to my clients in that situation?

23 A. Absolutely.

24 Q. If the matter came before the county, would
25 the county be able to hire engineers to assess all the factors

1 that engineers assess?

2 A. Yes.

3 Q. Would the county be able to hire land use
4 planners to advise it?

5 A. Yes.

6 Q. Has Cass County had other situations where
7 people have constructed something without getting prior
8 approval from the zoning authorities?

9 A. I can recall one instance that an individual
10 built a boat storage barn in a residential area.

11 Q. That was built without first getting approval
12 from the zoning authority of Cass County?

13 A. Yes.

14 Q. And what did Cass County do?

15 MR. YOUNGS: Excuse me. Just for the record,
16 there's no similar exemption, to my knowledge, that applies to
17 boat house construction as applies to electric generating
18 facilities pursuant to 64.235, so I just need to object for
19 the record.

20 MR. EFTINK: Well, you know, 64.235 doesn't
21 have the word "exemption" in it either.

22 JUDGE PRIDGIN: I'll overrule, let him answer
23 the question.

24 BY MR. EFTINK:

25 Q. Please go ahead.

1 A. Ask it again, please.

2 Q. What happened in that situation where these
3 people built that facility without first getting some kind of
4 permit from the zoning authority of Cass County?

5 A. We initiated legal action, they tore it down.

6 MR. EFTINK: May I approach the witness to
7 retrieve that exhibit?

8 JUDGE PRIDGIN: You may.

9 MR. EFTINK: I pass the witness.

10 JUDGE PRIDGIN: Mr. Eftink, thank you.

11 Mr. Uhrig?

12 MR. UHRIG: No questions, Judge.

13 JUDGE PRIDGIN: All right. Thank you.

14 Mr. Williams?

15 MR. WILLIAMS: Thank you, Judge.

16 CROSS-EXAMINATION BY MR. WILLIAMS:

17 Q. Good morning, Mr. Mallory. Is Cass County's
18 only issue in this case that Aquila must obtain some kind of
19 zoning permission from Cass County before it can build a plant
20 such as the South Harper plant in unincorporated Cass County,
21 Missouri?

22 A. That is our only issue and has been that way
23 from day one.

24 Q. And as I recall, on Page 10 of your
25 surrebuttal testimony, you make the statement that various

1 county constituents have complained of odors, noise levels and
2 diminished property values?

3 A. That's correct.

4 Q. Does Cass County have any ordinances that
5 govern acceptable noise levels?

6 A. Yes.

7 Q. Has anyone made a formal complaint to Cass
8 County about the noise levels at the South Harper plant?

9 A. No.

10 Q. Has Cass County made any investigation of the
11 noise levels at the South Harper plant?

12 A. No.

13 Q. Did Cass County hire a firm called Bucher,
14 Willis and Ratliff, B-u-c-h-e-r, W-i-l-l-i-s, R-a-t-l-i-f-f,
15 Corporation as a consultant?

16 A. Yes.

17 Q. And for what purpose did Cass County hire that
18 firm as a consultant?

19 A. We hired them to provide consultant services
20 because some of the issues and developments that were coming
21 to Cass County, since we're growing so rapidly, was more than
22 our staff could handle and we wanted some expert opinion and
23 advice on some of the plans.

24 Q. Did Bucher, Willis and Ratliff assist Cass
25 County in updating its comprehensive plan and zoning

1 ordinances in its subdivision regulations?

2 A. Yes.

3 Q. And was that in the 2004 to 2005 time frame?

4 A. It started back when I first became presiding
5 commissioner in 2003. And the exact time we started, I don't
6 really know. Our objective was to get our zoning regulations
7 in line with what first-class county zoning regulations are
8 according to state statute.

9 Q. Would it be fair to say that Bucher, Willis
10 and Ratliff Corporation have an in depth knowledge of Cass
11 County's Comprehensive Plan, Zoning Ordinance and Subdivision
12 Restrictions?

13 A. I think it would be.

14 Q. When did Cass County hire Bruce G. Peshoff?

15 A. I don't recall the exact date.

16 Q. What approximate date?

17 A. Maybe six weeks, a month, two months ago. I'm
18 not sure.

19 Q. Had Cass County ever hired Mr. Peshoff before?

20 A. No.

21 Q. How did Cass County select Mr. Peshoff?

22 A. We selected him through a search of people
23 that we felt were expert land use planners.

24 Q. How much has Cass County paid to Mr. Peshoff
25 to date for his services?

1 A. \$13,250. That may be off by \$50, but
2 something like that.

3 Q. Is he being paid at an hourly rate?

4 A. Yes.

5 Q. Do you know what his hourly rate is?

6 A. No, I do not.

7 Q. Were you the presiding commissioner when the
8 February 1, 2005 comprehensive plan and zoning ordinance
9 update were passed?

10 A. Yes.

11 Q. So you voted on the ordinance to -- on the
12 zoning ordinance?

13 A. Yes.

14 Q. And does that zoning ordinance include an
15 Article 4 that pertains to zoning districts?

16 A. I'd have to look at it.

17 MR. WILLIAMS: May I approach?

18 JUDGE PRIDGIN: You may.

19 BY MR. WILLIAMS:

20 Q. I'm handing you what's been marked as
21 Schedule WW-2 to the surrebuttal testimony of Warren Wood,
22 which is I believe Exhibit No. 20. Would you take a look at
23 that?

24 A. Which item were you asking me about?

25 Q. Just if that's part of the zoning ordinance

1 that was passed by Cass County on February 1, 2005.

2 A. It appears to be, yes.

3 Q. And does that document include a legend on it
4 that identifies zoning districts?

5 A. Yes.

6 Q. And does that document also indicate that
7 there's a zoning map that's incorporated by reference?

8 A. Yes.

9 Q. And what map was incorporated by reference?

10 A. The map that you were shown earlier today.

11 MR. WILLIAMS: May I approach?

12 JUDGE PRIDGIN: Yes, you may.

13 BY MR. WILLIAMS:

14 Q. I have here what's been marked for
15 identification as Exhibit No. 102. Would you take a look at
16 that? Have you had an opportunity to review that?

17 A. Yes.

18 Q. And does a legend appear on that map?

19 A. Yes.

20 Q. I want to take you back to the schedule I
21 handed you earlier.

22 A. Yes.

23 Q. Is there identified on that schedule something
24 that says Classification of Zones?

25 A. Yes.

1 Q. Can you identify for me -- well, I see a list
2 that shows a symbol and then a name for the zone; is that
3 correct?

4 A. Yes.

5 Q. Can you identify for me on the map where I
6 would find the symbol A that identifies the agricultural
7 district?

8 A. I don't really see an A on the map. I see
9 agriculture is identified by the absence of any of the other
10 symbols.

11 Q. And what symbols are shown on the legend on
12 the map for agricultural district, for example?

13 A. It's blank.

14 Q. On the legend?

15 A. That's what it has here. AG, agriculture
16 district.

17 Q. Can you tie each of the districts that are
18 shown in Article 4 under Classification of Zones with the map?
19 And presumably you'll need to do that through the legend on
20 the map.

21 A. I would have to take a look at it a minute.

22 Q. That's fine. And maybe it will work best if I
23 just ask you each one separately, but go ahead and take a
24 look.

25 A. However you want to do it.

1 Q. Okay. From what I see on Schedule WW-11,
2 symbol A indicates agricultural district. And how would I
3 find agricultural district as shown on Schedule WW-11 on the
4 map? How would I translate that?

5 A. Well, I would go to where the map says
6 agriculture district and the absence of color, that's the
7 background color of the entire map, that would be agriculture.

8 Q. And the second one I see shows the symbol RR
9 for residential rural district?

10 A. Yes.

11 Q. Where would I find that on the map?

12 A. Green.

13 Q. And what does the legend show for green on
14 that map?

15 A. Rural residential district.

16 Q. And for the symbol R-S, residential suburban
17 district, where would I find that on the map?

18 A. That's not in the legend on the map.

19 Q. So you can't identify that on the map?

20 A. No. The map itself has four or five different
21 residential districts identified.

22 Q. And then I see a symbol R-1, single-family
23 residential district. Can you identify that on the map?

24 A. Not without knowing -- on the map itself it
25 has residential R-40, R-25, R-15, R-10 and R-7. And I would

1 assume that those would identify with residential
2 single-family, two-family and so forth.

3 Q. Well, is that the map that you approved as
4 part of approving the zoning ordinances?

5 A. Yes. That's our official map. It doesn't
6 include the updates that have been made, you know, since then.
7 If someone comes in and goes through the zoning process in
8 building a subdivision, it may not be on this map yet.

9 I think, as I told you when I gave my
10 deposition, that we're in the process of putting all this
11 information in the GIS system to get it updated.

12 MR. WILLIAMS: I'd ask that the latter part of
13 his response be stricken as non-responsive. There wasn't even
14 a question.

15 JUDGE PRIDGIN: I'll sustain.

16 And, Mr. Mallory, do appreciate the
17 information, but I'd ask that you just simply try to answer
18 the questions that you are asked.

19 THE WITNESS: Yes.

20 MR. WILLIAMS: If I may approach the witness
21 and retrieve my document, I'm done.

22 JUDGE PRIDGIN: Mr. Williams, thank you.

23 Mr. Youngs, any cross?

24 MR. YOUNGS: Thank you. Yes.

25 THE WITNESS: Does Mr. Williams want the map

1 back?

2 MR. WILLIAMS: No. It's the court reporter's
3 exhibit.

4 MR. YOUNGS: If I might just have two seconds,
5 Judge.

6 JUDGE PRIDGIN: Yes, sir.

7 MR. YOUNGS: Thank you.

8 CROSS-EXAMINATION BY MR. YOUNGS:

9 Q. Mr. Mallory, good morning.

10 A. Good morning.

11 Q. I need to ask it because I'll forget it if I
12 don't, but --

13 MR. YOUNGS: Your Honor, may I approach the
14 witness?

15 JUDGE PRIDGIN: You may.

16 BY MR. YOUNGS:

17 Q. Mr. Mallory, I've handed you what's been
18 admitted into evidence as Exhibit No. 107. Do you recognize
19 that?

20 A. Yes.

21 Q. And just again for the record, that is --
22 correct me if I'm screwing this up, but that's a copy of the
23 ordinance by which Cass County elected to conduct its planning
24 and zoning activities as though it is a first-class
25 non-charter county?

1 A. That's correct.

2 Q. Okay. And what's the date of that
3 ordinance -- the effective date of the ordinance again?

4 A. The ordinance shall become effective
5 January 1st, 2004.

6 Q. So prior to that date, Cass County was
7 conducting its planning and zoning as though it were a second-
8 and -- second- or third-class county; is that correct?

9 A. That's correct.

10 Q. All right. And just so we're clear, the 2003
11 comprehensive plan that was in effect prior to January 1st of
12 2004 would have been the plan under which the county was
13 operating as, for purposes of planning and zoning, a second-
14 and third-class county. Correct?

15 A. Yes.

16 Q. As opposed to what it was from January 1st
17 forward in terms of planning and zoning, which was a
18 first-class non-charter county. Correct?

19 A. Yes.

20 Q. Okay. You've been presiding commissioner in
21 Cass County since 2003; is that correct?

22 A. Yes.

23 Q. And prior to that, you were the Cass County
24 clerk?

25 A. Yes.

1 Q. And you held that position for 12 years?

2 A. Yes.

3 Q. And both of those positions are elected
4 positions; is that correct?

5 A. Yes.

6 Q. So for approximately the last 15 1/2 years,
7 you have been an elected official in Cass County, Missouri.
8 Is that fair to say?

9 A. Yes.

10 Q. As the presiding commissioner, just to make
11 sure there's no dispute, you supervise the Planning and Zoning
12 Department, do you not?

13 A. Yes.

14 Q. And its supervisor, which I believe the record
15 reflects, is named Darrell Wilson?

16 A. Yes.

17 Q. How long has Mr. Wilson been in Cass County in
18 that capacity?

19 A. I don't know for sure. I know that he's been
20 there probably 12, 13 years.

21 Q. The reason that I want to talk to you a little
22 bit about this -- and just so the record's clear, you've got
23 your rebuttal and your surrebuttal testimony in front of you,
24 do you not?

25 A. Yes.

1 Q. On Page 13, I think, of your rebuttal
2 testimony, one of the things that you say beginning at Line 10
3 is that the county possesses unique knowledge and experience
4 with respect to its zoning ordinance and development plan and
5 is in a superior position to evaluate the propriety of a
6 proposed use for property within the county, including
7 proposed power plants.

8 Have I read that correctly?

9 A. Yes.

10 Q. And that's your testimony and that's your
11 position?

12 A. Yes.

13 Q. I want to talk about that just a little bit.
14 In 2004, the Planning and Zoning Department of Cass County,
15 Missouri had one employee. Correct?

16 A. Yes.

17 Q. And that was Darrell Wilson?

18 A. Yes.

19 Q. And, to your knowledge, Mr. Wilson's not a
20 certified land use planner, is he?

21 A. No.

22 Q. Can you tell me how many people are employed
23 by the Planning and Zoning Department in Cass County, Missouri
24 as we sit here today?

25 A. We have three -- four. We have a

1 secretary/clerk and Mr. Wilson and Mr. Morris. They are the
2 planners and zoning officer people -- officers. And we have a
3 zoning officer that verifies that people are following the
4 right procedure in zoning, so four.

5 Q. All right. You have a copy of your
6 deposition -- first of all, just so the record is clear, this
7 isn't the first time you and I have talked today, is it?

8 A. No.

9 Q. You presented yourself for a deposition in
10 this case on April 17th of 2006 at your offices; is that
11 correct?

12 A. Yes.

13 Q. And you have a copy of that deposition in
14 front of you?

15 A. Yes.

16 Q. Would you please turn to Page 69 of that
17 deposition? Tell me when you're there, please.

18 A. Okay.

19 Q. Beginning at, say, Line 8 -- and we're
20 discussing the concept of how many people you had in planning
21 and zoning in 2004. And I asked you: Okay, how many people
22 did you have in planning and zoning at that time?

23 And your answer was, One.

24 Question: And that was Mr. Wilson primarily?

25 And your answer was, Yes.

1 Question: How has that situation changed
2 between then and now?

3 Answer: They have hired another person down
4 there.

5 Question: So they have got two people?

6 Answer: Yes, two people.

7 Did I read that correctly?

8 A. Yes.

9 Q. All right. Did planning and zoning hire a
10 couple of additional folks between April 16th and today?

11 A. No. I was referring to the people that do the
12 planning work, not the support staff when I said two.

13 Q. So to make sure we're really clear then, in
14 terms of the people who would be doing what you've referred to
15 as the planning for the Planning and Zoning Department, as we
16 sit here today, your answer was correct, that's two people?

17 A. Yes.

18 Q. All right. And I think one of the things that
19 we also talked about in your deposition and I'll talk to you a
20 little bit about today, but with regard to the Camp Branch
21 application that was processed --

22 A. Yes.

23 Q. -- back in 2004, the county hired a
24 consultant, Bucher, Willis. Correct?

25 A. Yes.

1 Q. And Bucher, Willis became that consultant in
2 2004 because the Planning and Zoning Department, in your view,
3 wasn't capable of handling everything associated with the
4 magnitude of the various developments that were going on in
5 Cass County at that time, including the Camp Branch facility.
6 Is that fair to say?

7 A. Yes.

8 Q. And, in fact, assuming that Aquila or some
9 other entity filed an application for either special use
10 permit or rezoning for a power plant or some other type of
11 electric generating or transmission facility, you would hire
12 Bucher, Willis or some consultant today, would you not?

13 A. Yes, I would.

14 Q. Okay. You absolutely would, would you not?

15 A. Absolutely would.

16 Q. Okay. Because, frankly, the issues that we're
17 talking about here today and the issues associated with that
18 are just, frankly, more than a one- or two-man shop can
19 handle --

20 A. I agree.

21 Q. -- is that fair to say?

22 A. I agree. And that's why we hired them.

23 Q. Understood.

24 A. Okay.

25 Q. I want to talk to you just a little bit about

1 your role in the planning and zoning process generally.
2 Mr. Eftink asked you a few of these questions, but with regard
3 to planning and zoning in Cass County -- and let's just take
4 special use permits for an example. Those applications first
5 go to the Planning Board; is that correct?

6 A. That's correct.

7 Q. And can you just tell me what generally the
8 process is for the consideration of such an application by the
9 Planning Board?

10 A. Yeah. The Planning Board -- if someone comes
11 in for a project, they first talk to our people in the zoning
12 office and they'd have to identify the surrounding landowners,
13 identify them. And then the Planning Board would have a
14 public hearing to address the application. And from that
15 point they would either accept or deny the application.

16 Either way, if it's a zoning issue, it would
17 come before the County Commission with the recommendation of
18 the Planning Board. Special use permit would come before the
19 County Commission, which is acting as the Board of Zoning
20 Adjustments.

21 Q. That was one question, and I appreciate you
22 making that clarification. The difference between the Board
23 of Zoning Adjustment and the County Commission is simply the
24 name by which those two entities go by; is that correct?

25 A. That's correct.

1 Q. All right. The three commissioners of Cass
2 County are also, by law, the members of the Board of Zoning
3 Adjustment; is that correct?

4 A. That's correct.

5 Q. You talked about a public hearing. How long
6 does a typical public hearing last with regard to, say, for
7 example, a special use permit application, or can you even
8 say?

9 A. Well, that depends on what it is. If someone
10 comes in for a special use permit to put up a microwave tower
11 or cell tower, may not last 15 minutes. We had a subdivision
12 that came in for a rezoning, Paulty Homes was going to build a
13 subdivision on the north part of the county, that lasted two
14 or three hours.

15 Q. Okay.

16 A. It just depends on the number of people that
17 are affected by the application itself.

18 Q. All right. And I wasn't present at the
19 July 13th, 2004 Planning Board meeting with regard to the Camp
20 Branch site, but it's my understanding that that hearing took
21 about two or three hours. Is that your recollection?

22 A. That's my recollection. I wasn't in
23 attendance either.

24 Q. And that procedure that is undertaken as a
25 part of that Planning Board public hearing, is it like what

1 we're doing today? In other words, what's the format?

2 A. It's somewhat like you're doing today. The
3 Planning Board sits up there and the applicant presents their
4 case, the staff presents information they have applicable to
5 it, the Planning Board discusses it and then they vote or else
6 table it, continue.

7 Q. At the Planning Board meetings there's
8 typically no lawyer standing up here cross-examining a witness
9 like you at that hearing. Is that fair to say?

10 A. Yes.

11 Q. In other words, both sides -- people for the
12 project possibly, the staff and then maybe people who want to
13 speak out against the project, have an opportunity to do that
14 sort of like the public hearings we've had in this case. Is
15 that a fair summary?

16 A. Yes, uh-huh. The people pro and con, yes.

17 Q. All right. Other than the application itself
18 and the supporting materials, are there any briefs or legal
19 documents filed by any party to that proceeding?

20 A. Not that I'm aware of. You know, sometimes on
21 a zoning application the applicant will hire an attorney to
22 present it for them, so --

23 Q. Okay. And then when the Planning Board makes
24 its recommendation, it makes that recommendation to either the
25 County Commission or the BZA; is that correct?

1 A. Yes.

2 Q. Okay. Just so we're clear -- and the process
3 can go quicker or it can go longer, I assume, but as a matter
4 of law, the Planning Board has 60 days in which to consider
5 the application before making its recommendation; is that
6 true?

7 A. That's true.

8 Q. You've been involved in some litigation with
9 regard to Martin Marietta and a rock quarry actually near the
10 plant site in which this issue has come up. Is that fair to
11 say?

12 A. Yes.

13 Q. Okay. So after the Planning Board makes its
14 recommendation to the BZA -- talk to me about the BZA just a
15 little bit. Would it be accurate to characterize the BZA, as
16 the comprehensive plan does, and I think the 2003 and 2005
17 comprehensive plans both refer to it in the same way, as a
18 quasi-judicial body?

19 A. Yes.

20 Q. And as presiding commissioner, you're a member
21 of the BZA?

22 A. Yes.

23 Q. And in 2004, you were a member of the BZA?

24 A. Yes.

25 Q. And do you preside over the BZA since you're

1 the presiding commissioner?

2 A. Yes.

3 Q. And the BZA reviews the recommendation of the
4 Planning Board?

5 A. Yes.

6 Q. Okay. And they have a hearing as well, do
7 they not?

8 A. Yes.

9 Q. And tell me how that hearing typically works.
10 Is it the same?

11 A. Same scenario as the Planning Board. I would
12 set up and give each party a certain amount of time to present
13 their case. And I normally will start out by saying something
14 like, If a rock quarry -- I don't need to be told by
15 100 people that a rock quarry is dusty. I know that. Just
16 one of you tell me that. I don't need everyone to tell me
17 that.

18 Q. And, in fact, one of the other statements that
19 you make in your capacity as the chair of the BZA is that
20 essentially somebody's got to tell you why this isn't a good
21 idea; otherwise, you're going to be for it?

22 A. Yeah. Any time there's a contentious issue
23 that comes before the BZA or us -- let's look at a zoning
24 application. If the Planning Board's approved it and our
25 staff has looked at it and don't have any problem with it, I

1 make a general comment to the effect that the county has rules
2 and regulations regarding zoning and the Planning Board's
3 looked at it and they have found that it meets those
4 requirements, the staff has no problem with it so I'm going to
5 vote for it unless you tell me -- convince me why I shouldn't.

6 Q. I mean, just as a matter of policy, do you
7 have any difficulty with the Commission taking that same
8 approach in the case that we're in front of them on today?

9 A. No. I would think that's how they should do
10 it.

11 MS. MARTIN: Your Honor, for the record could
12 we clarify what Commission Mr. Youngs is referring to in his
13 question and re-ask the question? Because I think that's
14 vague and ambiguous. He's just been speaking about the County
15 Commission.

16 BY MR. YOUNGS:

17 Q. Did you understand my question to refer to the
18 Missouri Public Service Commission, sir?

19 A. Yes.

20 Q. And, again, it can go faster, but after the
21 Planning Board makes its recommendation to the Board of Zoning
22 Adjustment, the Board of Zoning Adjustment has another 60 days
23 to make its finding?

24 A. That's correct.

25 Q. All right. And then what happens from there?

1 Is there further review of that decision by somebody?

2 A. There could be. Depends on what the issues
3 are. Normally when you get to the position where the Board of
4 Zoning Adjustment is referring an issue, there's an attorney
5 involved with the applicant.

6 Q. All right. And that's an additional amount of
7 time that it takes to finally resolve the issues?

8 A. Yes. Unless it can be resolved right at the
9 meeting.

10 Q. And that additional amount of time can take a
11 long time, as you found out with Martin Marietta. Is that a
12 fair to say?

13 A. It can take the 60 days, yes.

14 Q. And then some?

15 A. And more, yes. And, again, we can make a
16 decision at the BZA and if it's not to the liking of the
17 applicant, they have the option to go to the circuit court
18 and -- to demonstrate that we were arbitrary and capricious in
19 our decision making.

20 Q. And you're not a lawyer?

21 A. No.

22 Q. But you do understand the fact that the Board
23 of Zoning Adjustment's review and determination of the
24 application is subject to an arbitrary and capricious
25 standard. Correct?

1 A. Yes.

2 Q. On Page 10 of your surrebuttal, I think it's
3 in front of you as well --

4 A. Yes.

5 Q. -- you testified beginning at Line 4, I
6 believe it is very important for anyone serving on the
7 Planning Board or on the County Commission or on the Board of
8 Zoning Adjustment to maintain a fair and impartial view on any
9 proposed development.

10 Have I read that correctly?

11 A. Yes.

12 Q. And that's your position today as we sit here.
13 Is that fair to say?

14 A. Yes.

15 Q. On July 13th of 2004, you understand that the
16 Planning Board -- the Cass County Planning Board recommended
17 denial of a special use permit application for what's been
18 referred to in these proceedings as the Camp Branch facility?

19 A. Yes.

20 Q. Okay. You had determined at that point based
21 on what you had heard as presiding commissioner -- I think
22 you've talked about everybody's always willing to give you
23 advice and I know you appreciate that. Correct?

24 A. Yes.

25 Q. All right. But you had heard as a result of

1 your position as presiding commissioner and maybe from some
2 other sources that there was significant opposition to that
3 facility; is that correct?

4 A. Yes.

5 Q. And as a member of the Board of Zoning
6 Adjustment and, in fact, as the presiding commissioner, you
7 would have presided over the hearing that was eventually set
8 for August 26th of 2004 to review that Planning Board
9 recommendation; is that correct?

10 A. Yes.

11 Q. And I'll take you to about 10 days after that
12 Planning Board recommendation of July 13th of '04. By that
13 time you hadn't -- in your capacity as presiding commissioner
14 of the Board of Zoning Adjustment, you had not yet looked at
15 anything with regard to that?

16 A. No.

17 Q. You hadn't reviewed the Bucher, Willis report?

18 A. No.

19 Q. In fact, you've never reviewed that. Is that
20 fair to say?

21 A. I don't recall looking at it, no.

22 Q. 10 days after that Planning Board vote and
23 before the BZA hearing of August 26th over which you would
24 preside, at Aquila's request you met with Dave Kreimer and
25 Glenn Keefe at your office; is that right?

1 A. That's correct.

2 Q. And I think that meeting took place on or
3 about July 23rd of 2004; is that correct?

4 A. That could be. I don't recall.

5 Q. Any reason to doubt me on that?

6 A. No.

7 Q. Okay. And in that meeting, Mr. Kreimer asked
8 you what you thought the chances were of the Camp Branch site
9 getting approved. And you recall that?

10 A. Yes.

11 Q. And in that meeting you told them that you
12 thought Aquila had about a snowball's chance in hell. Is that
13 a fair representation of your comment?

14 A. That's correct.

15 Q. And that was because of the public opposition
16 that you had heard about; is that correct?

17 A. Yes. And I was, you know, giving my thoughts
18 on it because Aquila had approached this project diametrically
19 opposite what they did on the Aries plant where they went and
20 talked to people, did a lot of public relations work ahead of
21 time. And on this particular issue, people's conception was,
22 well, we're going to put this there whether the hell you like
23 it or not and that was -- yes.

24 Q. So the answer to my question is that you had
25 heard that there was significant public opposition to the

1 site?

2 A. Yes.

3 Q. All right. And as a result of that public
4 opposition, it was your personal opinion that Aquila had about
5 a snowball's chance in hell of getting it approved?

6 A. That's correct.

7 Q. And when you say "getting it approved," you
8 understood at the time you made that comment that getting it
9 approved, the entity who would either approve it or disapprove
10 it was the Board of Zoning Adjustment, didn't you?

11 A. That's correct.

12 Q. That quasi-judicial body over which you
13 presided as the presiding commissioner. Is that fair to say?

14 A. That's correct.

15 Q. On Page 10 again of your surrebuttal --

16 A. Well, could I make a comment about that?

17 Q. Well --

18 A. Or that's --

19 Q. -- Ms. Martin may ask you some questions, but
20 we'll get through mine and then you'll have a chance.

21 A. Okay. Page 10?

22 Q. Page 10. How do you reconcile -- and this may
23 give you the opportunity to make the comment that you want,
24 but how do you reconcile what you said and the position that
25 you took on July 23rd of '04 with your statement on Page 10 at

1 Line 4 that you believe it's very important for anyone serving
2 on the Planning Board or on the County Commission or on the
3 Board of Zoning Adjustment to maintain a fair and impartial
4 view on any proposed development?

5 MS. MARTIN: Objection, argumentative.

6 MR. YOUNGS: I'm just asking the witness to
7 reconcile those two statements.

8 JUDGE PRIDGIN: Objection's overruled.

9 THE WITNESS: I think it's pretty easy really.
10 I mean, I could give my opinion on what I think's going to
11 happen, but when I sit in this, as you call it, quasi-judicial
12 board, I have to be fair and impartial. And the fact that I
13 told him that did not mean that the other two commissioners
14 were going to vote yes and I was going to vote no.

15 And to illustrate that, in the Kansas Business
16 Journal, May the 1st, the general counsel for Aquila,
17 Christopher Reitz, said the Public Service Commission was
18 already on board regarding this issue.

19 Well, I don't believe that they've already
20 made their mind up. I believe they're going to listen to it
21 and be fair and impartial. And I think it's the same thing I
22 was saying.

23 Q. Okay. Well, we can argue all day about what
24 Mr. Reef said in that article --

25 A. Yes. I understand that. It's the same thing.

1 Q. -- and may yet do that.

2 My only question to you, sir, is, that you
3 understood in that conversation that you were like the judge
4 who was going to preside over the review of the planning and
5 zoning -- Planning Board recommendations?

6 A. Yes, sir, I do.

7 Q. All right. Let's talk a little bit about your
8 knowledge of the planned use of the South Harper site for a
9 power plant and when that came about. Be fair to say that you
10 knew at least by mid-August of 2004 that Aquila intended to
11 construct a power plant on what's now referred to as the South
12 Harper site. Correct?

13 A. Yes. The exact date I wouldn't know, but yes.

14 Q. And you believe, I think, that you heard about
15 that from your conversations with either Darrell Wilson or
16 Mike Fischer, the city administrator of Peculiar, or some
17 combination of the two of them. Is that fair to say?

18 A. Yes.

19 Q. And you knew that because, among other things,
20 the City of Peculiar -- let me strike that and start again.

21 One of the things you also knew at that time
22 was that the City of Peculiar had expressed interest in
23 annexing that site. Correct?

24 A. Yes.

25 Q. I think this already may be in evidence. You

1 may have it in front of you.

2 MR. YOUNGS: Your Honor, may I approach?

3 JUDGE PRIDGIN: You may.

4 BY MR. YOUNGS:

5 Q. Mr. Mallory, you have before you what's been
6 marked and offered and admitted in evidence as Exhibit 97,
7 which is an August 20th, 2004 letter to you from Mike Fischer
8 on behalf of the City of Peculiar; is that correct?

9 A. Yes.

10 Q. And it relates that the City of Peculiar is
11 anticipating annexing certain properties. And the letter
12 requests the county's approval for annexation of a section of
13 South Harper Road; is that correct?

14 A. Yes.

15 (Exhibit No. 116 was marked for
16 identification.)

17 BY MR. YOUNGS:

18 Q. Mr. Mallory, the court reporter has handed you
19 an exhibit that's marked Exhibit No. 116. Do you see that?

20 A. Yes.

21 Q. And this is just -- again, for the record's
22 sake, this is Deposition Exhibit 7 from your April 16th
23 deposition; is that correct?

24 A. Yes.

25 Q. Okay. And this is a resolution basically

1 signed by you and the other two members of the County
2 Commission dated September 16th approving the annexation of
3 that portion of South Harper Road that's referenced in
4 Exhibit 97; is that correct?

5 A. Yes

6 MR. YOUNGS: Your Honor, I offer Exhibit 116.

7 JUDGE PRIDGIN: Any objections?

8 Hearing none, Exhibit 116 is admitted.

9 (Exhibit No. 116 was received into evidence.)

10 MS. MARTIN: Mr. Youngs, if you have a chance,
11 could we get some additional copies of that? Thank you.

12 MR. YOUNGS: You can have mine.

13 BY MR. YOUNGS:

14 Q. There were also discussions at or around this
15 time, and it's been the subject of some testimony, about a
16 grading permit; is that correct?

17 A. Yes.

18 Q. Okay.

19 (Exhibit No. 117 was marked for
20 identification.)

21 BY MR. YOUNGS:

22 Q. Do you have Exhibit No. 117 in front of you?

23 A. Yes.

24 Q. Okay. And this is again Deposition Exhibit
25 No. 8 and this is a series of e-mails going back and forth

1 between you and Mike Blake of SEGA, which you understood to be
2 an engineering firm working with Aquila; is that correct?

3 A. Yes.

4 Q. Beginning on September 22nd and going through
5 September 29th regarding whether or not the county would
6 require a grading permit; is that correct?

7 A. Yes, that's correct.

8 Q. And that's with regard to a grading permit for
9 the property located there at 241st Street and South Harper
10 Road?

11 A. Yes.

12 Q. Okay. And you understood that at the time
13 these conversations were going on, that the purpose for the
14 grading that was to be done there was in anticipation of
15 constructing a power generating facility on that site?

16 A. Yes.

17 MR. YOUNGS: Okay. Your Honor, I offer
18 Exhibit 117.

19 JUDGE PRIDGIN: All right. Any objections?
20 Hearing none, 117 is admitted.

21 (Exhibit No. 117 was received into evidence.)

22 BY MR. YOUNGS:

23 Q. So it's fair to say that going back as early
24 as at least August of 2004 and continuing through the fall of
25 2004, you, as presiding commissioner of Cass County,

1 understood that Aquila was going -- or at least intended to
2 construct a power plant on that site?

3 A. That's correct.

4 Q. Okay. And you also understood that Peculiar
5 was in the process of annexing that site; is that correct?

6 A. Yes.

7 Q. Which you supported?

8 A. Yes. Didn't have any objection to it.

9 Q. All right. With regard to both the road.
10 Yes?

11 A. Yes.

12 Q. And the power plant site itself?

13 A. The property itself, yes.

14 Q. And you understood that that annexation -- I
15 think actually we've referred to the shape of the annexation
16 as a lollipop or a flag or something like that, but in any
17 event, you understood there was going to be a portion of South
18 Harper Road annexed and then the parcel on which you knew
19 Aquila was intending to build a power plant?

20 A. Yes.

21 MR. YOUNGS: Okay. May I approach, your
22 Honor?

23 JUDGE PRIDGIN: You may.

24 BY MR. YOUNGS:

25 Q. Just so we're clear here, this is a photograph

1 that's in evidence, an exhibit, a schedule to I think Terry
2 Hedrick's testimony. And you recognize this as the South
3 Harper facility; is that correct?

4 A. Well, because you say it is. I've never seen
5 it.

6 Q. Okay. Well, it's in evidence so we'll talk
7 about it as much as we can. But just for reference purposes,
8 South Harper Road runs right -- or left to right along the
9 middle of this picture; is that correct?

10 A. Yes.

11 Q. Okay. And then on the bottom side of South
12 Harper Road, you see what I'm telling you is the power plant?

13 A. Yes.

14 Q. And then to the right of that -- to the left
15 of that you see the gas compressor station?

16 A. Yes.

17 Q. All right. And you understood that the
18 purpose of the annexation was to annex this portion of South
19 Harper Road (indicating) to the southernmost border of the
20 property and this parcel for purposes of the power plant?

21 A. Yes.

22 Q. Okay. And, again, with regard to the
23 annexation, you had no objection to it?

24 A. No.

25 Q. And when I say "objection," you understand I

1 don't mean whatever legal objection the county might have, but
2 just personally, as the presiding Commissioner of Cass County,
3 you had no objection to it?

4 MS. MARTIN: I'm going to object to the
5 question. It assumes a legal obligation, it lacks foundation
6 and calls for speculation. The question presumes that as the
7 presiding commissioner, it would be his duty or role to
8 express objection to proposed use of land versus complying
9 with land use regulations.

10 MR. YOUNGS: I'll re-ask the question. That
11 wasn't what I was asking.

12 BY MR. YOUNGS:

13 Q. There's been some evidence and statements and
14 argument during the course of this proceeding about what, if
15 any, legal ability Cass County could have had to stop the
16 annexation of that site. All I'm asking you is, irrespective
17 of whatever legal obligations or rights might exist, you
18 personally had no objection to the annexation of that site.
19 True or not?

20 A. That's true. We encourage cities to annex
21 property.

22 Q. And you had no idea at that time, during the
23 early fall of 2004, how Peculiar would deal with any land use
24 issues associated with what would eventually be City of
25 Peculiar zoned property. Correct?

1 A. No. I assume they would utilize their own
2 planning and zoning rules.

3 Q. Okay. And you had no -- and maybe you don't
4 have any idea as you sit here today what specific rules and
5 statutes apply to the city in terms of its ability to regulate
6 through zoning power plants or any other facilities. Fair to
7 say?

8 A. No, I do not.

9 Q. And just so we're clear, you understood that
10 the only portion of this area that's depicted on this
11 photograph that would be annexed are the ones that we talked
12 about just a minute ago. Correct?

13 A. Yes. Harper Road and the property to the west
14 of it and --

15 Q. All right. So the prop-- excuse me. I didn't
16 mean to interrupt.

17 A. And the property that borders it on the west
18 down at the corner.

19 Q. And so we're clear, the property to the east
20 of South Harper Road would not be annexed?

21 A. Right.

22 Q. The property to the north of 241st Street
23 would not be annexed?

24 A. No.

25 Q. And the property to the west of the

1 westernmost boundary of what's now the South Harper site would
2 also not be annexed?

3 A. That's correct.

4 Q. All right. All of those properties would
5 remain in unincorporated Cass County assuming the annexation
6 went through?

7 A. Yes.

8 Q. So, in other words, if -- I think the evidence
9 has been Frank Dillon lives across from the Southern Star
10 compressor station and near the power plant. Frank Dillon
11 would continue to live in unincorporated Cass County --

12 A. Yes.

13 Q. -- after the annexation?

14 A. Yes.

15 Q. Okay. As would, to your knowledge, all the
16 residents who have expressed complaint about the facility as
17 it now exists?

18 A. As far as I know, yes.

19 Q. During that period of time -- well, you
20 understood and I think the record will show it's undisputed
21 that on October 23rd, 2004, the City of Peculiar Board of
22 Aldermen voted against annexing the South Harper site. You
23 recall that?

24 A. Yes.

25 Q. So from that period of time, say, mid-August

1 of 2004 through, say, October 23rd of 2004, you didn't have
2 any conversations with Mike Fischer or Mayor, at the time,
3 George Lewis about any concerns you had with regard to the
4 possible erection of a power plant on that site?

5 A. Not to --

6 MS. MARTIN: Objection. Excuse me,
7 Mr. Mallory, for interrupting, but I want to interpose my
8 objection before you respond that question.

9 That question is improper. It assumes a legal
10 duty or obligation by Mr. Mallory in his role as the presiding
11 commissioner to express opposition or support one way or the
12 other for a particular proposed use on land that is not going
13 to be subject to the county's land use regulatory scheme.

14 JUDGE PRIDGIN: Well, I'll overrule. That's
15 something you can bring up in redirect. He can answer the
16 question.

17 MR. YOUNGS: I'll re-ask the question, if it
18 pleases the judge.

19 BY MR. YOUNGS:

20 Q. With regard to -- and just so we're clear,
21 setting aside whatever legal obligation or right Cass County
22 might have had to object to or take action to stop the
23 Peculiar annexation, set that aside. I'm asking you as the
24 presiding commissioner of Cass County, did you ever express
25 any objection to Mike Fischer or Mayor Lewis about the fact

1 that they were getting ready to build -- that Aquila was
2 getting ready to build a power plant on that site?

3 MS. MARTIN: Then I object to relevance.
4 Setting aside those matters Mr. Youngs has determined should
5 be set aside, the question is irrelevant with respect to his
6 personal expression or view one way or the other.

7 MR. YOUNGS: Excuse me. This question has a
8 lot of relevance because there's been ample testimony about
9 why Aquila didn't do certain things with the county during
10 various points in time, including this one, and what Aquila
11 knew with regard to the county's position vis-a-vis this South
12 Harper facility and the use of it. And this is exactly
13 designed to deal with those allegations.

14 JUDGE PRIDGIN: All right. I'll overrule.

15 BY MR. YOUNGS:

16 Q. You didn't say anything to Mike Fischer from
17 mid-August through October 23rd of 2004 expressing any
18 objection about the proposed use of that site for a power
19 plant, did you?

20 A. I don't recall anything.

21 Q. And you don't recall any discussions with Mike
22 Fischer with regard to expressing any concerns about the
23 plant, the effect of the plant on the community. Correct?

24 A. That's correct.

25 MS. MARTIN: Same objections, your Honor, for

1 the record.

2 JUDGE PRIDGIN: All right. I'll show a
3 standing objection.

4 Overruled.

5 BY MR. YOUNGS:

6 Q. And what was your answer?

7 A. That's correct.

8 Q. Or what the effect of the plant might be on
9 the neighbors. Correct?

10 A. Correct.

11 Q. And that would include those neighbors who
12 would continue to remain in unincorporated Cass County after
13 the annexation. Correct?

14 A. That's correct.

15 Q. Okay. And the reason that you didn't do that
16 was because, in your view, once the property was annexed,
17 whatever happened on that site would be Peculiar's concern,
18 not Cass County's. Correct?

19 A. That's correct.

20 Q. And just so we're clear, I think you may have
21 clarified this, but you have no idea the difference between
22 city and county zoning?

23 A. No, I do not.

24 Q. Or what exemptions might lie from city zoning
25 versus county zoning?

1 A. No. I'm not familiar with it at all.

2 Q. Okay. Or the different rights that the city
3 might have under the situations that govern them?

4 A. No.

5 Q. I want to talk to you a little bit about the
6 2005 update to the Cass County plan, the comprehensive plan.
7 Okay?

8 A. Yes.

9 Q. Most recent update began in early 2004.
10 Correct?

11 A. That's correct.

12 Q. All right. Similar to Exhibit 107 in which in
13 early 2004, Cass County decided to begin conducting planning
14 and zoning under the provisions applicable to non-charter
15 first-class counties. Correct?

16 A. Correct.

17 MR. YOUNG: Your Honor, I, frankly, wasn't
18 anticipating that Cass County would mark and offer the
19 comprehensive plan and zoning order for 2005 and so although
20 it's already in evidence, I would like to mark and use my
21 copy, if that's all right with you.

22 JUDGE PRIDGIN: That's fine.

23 And normally I hate to interrupt in the middle
24 of cross-examination. Do you know how much longer?

25 MR. YOUNGS: If it's your intention to see

1 about taking a break, I think this would be a good time to do
2 that.

3 MR. PRIDGIN: With that in mind, we'll go off
4 the record. I show 10:15 being the time at the back -- the
5 clock in the back of the room and we'll resume about 10:30 and
6 resume with your beginning to cross-examine Mr. Mallory on
7 Exhibit No. 118. We are off the record.

8 (Exhibit Nos. 118 through 124 were marked for
9 identification.)

10 (A recess was taken.)

11 JUDGE PRIDGIN: We're back on the record.

12 Mr. Youngs, you were still cross-examining
13 Mr. Mallory. Mr. Mallory, you still are under oath, sir. And
14 I think, Mr. Youngs, you were beginning to talk about
15 Exhibit 118.

16 MR. YOUNGS: Correct.

17 BY MR. YOUNGS:

18 Q. Mr. Mallory, during the break I took the
19 opportunity to dump some more paper on your table. One of
20 those is Exhibit No. 118, which you recognize as the copy of
21 the comprehensive plan update dated 2005 that was marked in
22 your deposition as Exhibit No. 1. Do you recall that?

23 A. I have Exhibit No. 119 here.

24 Q. Here's 118.

25 A. Yes.

1 Q. And you recognize that as the 2005 update to
2 the Cass County, Missouri comprehensive plan?

3 A. It appears to be.

4 MR. YOUNGS: All right. Your Honor, I offer
5 Exhibit 118.

6 JUDGE PRIDGIN: Objections?

7 MS. MARTIN: No objections. I'll just note
8 for the record that as Mr. Youngs has indicated, it's a
9 duplicate at least in part of Exhibit 108. This is just the
10 comprehensive plan portion, however, of Exhibit 108.

11 MR. YOUNGS: And I agree with that.

12 MR. PRIDGIN: All right. So noted. And,
13 Ms. Martin, thank you.

14 Hearing no objections, No. 118 is admitted.

15 (Exhibit No. 118 was received into evidence.)

16 BY MR. YOUNGS:

17 Q. And just so we're on the same page, the
18 revisions to what ultimately became the comprehensive plan
19 update effective February 1st, 2005, in fact, began in the
20 early stages of 2004. Correct?

21 A. That's approximate, yes.

22 Q. And there's a process by which those updates
23 were discussed?

24 A. Yes.

25 Q. And ultimately implemented. Correct?

1 A. Yes.

2 Q. And, in fact, if you could turn to Page 2 of
3 the 2005 update, numeric 2, not small ii --

4 A. Yes.

5 JUDGE PRIDGIN: And I'm sorry to interrupt.
6 At your convenience, if I could get a copy of 118 up at the
7 bench.

8 BY MR. YOUNGS:

9 Q. On Page 2, the 2004 -- excuse me.

10 In the first paragraph on Page 2, it actually
11 refers to it as the 2004 plan update. Does it not?

12 A. Yes.

13 Q. And in the heading right below that first
14 paragraph it refers to the 2004 master plan. Correct?

15 A. Yes.

16 Q. And then in the second paragraph in that
17 section it again refers to this as the 2004 master plan; is
18 that correct?

19 A. Yes.

20 Q. All right. And do you believe that that's
21 indicative of the fact that the process was ongoing during
22 2004?

23 A. Yes.

24 Q. All right. And that process involved the
25 combination of the Cass County Planning Board. Correct?

1 A. Yes.

2 Q. The public?

3 A. Yes.

4 Q. And the Cass County Commission?

5 A. Yes.

6 Q. On which at that time you were the presiding
7 commissioner?

8 A. Yes.

9 Q. As you are today?

10 A. Yes.

11 Q. And that process was continuing through 2004;
12 is that correct?

13 A. Yes.

14 Q. And the idea behind that process was that if
15 anybody had any objections or thoughts or concerns about the
16 comprehensive plan, those could be expressed and dealt with
17 and the plan could be revised if it was appropriate. Is that
18 fair to say?

19 A. Yes. Suggestions or objections, either one.

20 Q. Okay. You have before you, I think,
21 Exhibit No. 119?

22 A. Yes.

23 Q. I do have copies of that one. And 119, again,
24 it's a duplicate, in part, of an exhibit that the county has
25 put in evidence. And it is actually the zoning order and

1 subdivision regulations that were also adopted effective
2 February 1st, 2005. Correct?

3 A. Yes.

4 Q. And it's an exhibit in your deposition. Could
5 you just tell me what that exhibit number is?

6 A. 119?

7 Q. Yeah. There should be a deposition sticker on
8 there from your deposition, another exhibit sticker.

9 A. Oh, yes. 3.

10 Q. Just so we're clear, that's Exhibit No. 3 --

11 A. Yes.

12 Q. -- that we talked about during your April 16th
13 deposition; is that correct?

14 A. Yes.

15 MR. YOUNGS: All right. Your Honor, I offer
16 Exhibit 119 and I'll provide copies for the bench.

17 MS. MARTIN: If I could take a look at
18 Exhibit 119.

19 MR. YOUNGS: Oh, I'm sorry. Certainly.

20 MS. MARTIN: I don't think that was marked as
21 a deposition exhibit.

22 BY MR. YOUNGS:

23 Q. It's too much paper, Mr. Mallory. Exhibit 119
24 was, in fact, not marked in your deposition; is that correct?

25 A. Right.

1 Q. You're just going to have to trust me on that
2 one.

3 A. I've got to trust you? Okay.

4 Q. Exhibit --

5 MS. MARTIN: Mr. Mallory, you can trust me.

6 BY MR. YOUNGS:

7 Q. Yeah, you don't have to trust me. Trust your
8 lawyer --

9 A. All right.

10 Q. -- just so the record doesn't get all
11 befuddled here.

12 Exhibit 119 though, whatever it was marked at
13 or not marked at at your deposition, is the zoning order and
14 subdivision regulations effective February 1st, 2005; is that
15 correct?

16 A. That's correct.

17 MR. YOUNGS: I offer 119.

18 MS. MARTIN: And I don't have an objection,
19 but I would -- I'd be fine with its admission subject to
20 making sure it compares to those portions of Exhibit 108 which
21 are also the zoning ordinance and subdivision regulations for
22 2005. If there are discrepancies, we would stand by
23 Exhibit 108.

24 MR. YOUNGS: As would I.

25 JUDGE PRIDGIN: All right. Hearing no

1 objection, 119 is admitted.

2 (Exhibit No. 119 was received into evidence.)

3 BY MR. YOUNGS:

4 Q. And, again, these subdivision regulations and
5 zoning order were part of what was also being discussed during
6 2004. Correct?

7 A. Yes.

8 Q. And amendments to those that were eventually
9 adopted effective February 1st, 2005?

10 A. Yes.

11 Q. And, again, the same concept. Discussion,
12 evaluation, expression of concerns, objections and resolving
13 those to ultimately come up with this document?

14 A. Yes.

15 Q. Okay.

16 JUDGE PRIDGIN: Will this be 120, Mr. Youngs?

17 MR. YOUNGS: Yes, sir.

18 BY MR. YOUNGS:

19 Q. Mr. Mallory, you have in front of you what's
20 been marked as deposition -- or excuse me, Exhibit No. 120.
21 And that is a fax from you dated I believe October 13th of
22 2004; is that correct?

23 A. Yes.

24 Q. Along with an attached meeting notice
25 indicating that there is going to be a meeting on October 28th

1 of 2004 at the Pearl Street Grill in Harrisonville to discuss
2 changes to the comprehensive plan. Correct?

3 A. Yes.

4 Q. And you sent that notice to -- at least
5 according to the top of the page, which is the fax cover
6 sheet, mayors and city administrators presumably around or
7 within Cass County; is that correct?

8 A. Yes.

9 Q. Okay. So it was important for you, as the
10 Cass County commissioner, the presiding commissioner, to make
11 sure that mayors and city administrators of municipalities
12 within Cass County could see what was being done and
13 considered with regard to Cass County's comprehensive plan and
14 zoning regulations. Correct?

15 A. That's correct. We were seeking their input.

16 MR. YOUNGS: I offer 120.

17 JUDGE PRIDGIN: Any objections?

18 Hearing none, 120 is admitted.

19 (Exhibit No. 120 was received into evidence.).

20 BY MR. YOUNGS:

21 Q. And you were asking that they -- in the
22 meeting notice the Commission asked that interested parties
23 review the information regarding the comprehensive plan, the
24 zoning order, the subdivision regulations, the procedures
25 manual and the impact fee ordinance and advise the Commission

1 of any concerns those folks have no later than December 1st of
2 2004. Correct?

3 A. Yes.

4 MS. MARTIN: Excuse me for interrupting.

5 Mr. Youngs, do we have a copy of that exhibit? If that's your
6 only -- have you passed them? Oh, sorry.

7 BY MR. YOUNGS:

8 Q. And, again, at this point, October 13th of
9 2004, you knew that Aquila was proposing to put a power plant
10 at what is 241st and South Harper Road. Correct?

11 A. Yes.

12 Q. And the luncheon took place on October 28th of
13 2004. Correct?

14 A. Yes.

15 Q. Were you present for that luncheon?

16 A. Yes.

17 Q. And at that luncheon I assume there was
18 discussion about the comprehensive plan, the zoning
19 regulations, the subdivision order and the changes that were
20 being proposed to those. Correct?

21 A. Yes. Uh-huh.

22 Q. Were there members of the public or was this
23 just a city administrator, mayor luncheon?

24 A. City officials.

25 Q. Okay. By then, October 28th of 2004, you knew

1 that Peculiar, the Board of Aldermen, had voted against
2 annexing the South Harper Road and South Harper facility site.
3 Correct?

4 A. Yeah. As I recall the dates, that would be
5 correct.

6 Q. You have in front of you, I think, Exhibit
7 No. 121; is that correct?

8 A. Yes.

9 Q. And Exhibit No. 121 are minutes of a
10 November 30th, 2004 meeting; is that correct?

11 A. Yes.

12 Q. At which you were present; is that correct?

13 A. Yes.

14 Q. And the meeting's purpose was listed, at
15 least, on the front page as discussion of comprehensive plan;
16 is that right?

17 A. Yes.

18 Q. And there are minutes to the meeting that are
19 attached as this second page. And they talk about, again,
20 similar to what we've been discussing, people expressing
21 concerns, asking questions, raising issues and discussing
22 those issues. Correct?

23 A. Yes.

24 MR. YOUNGS: I offer 121.

25 JUDGE PRIDGIN: Any objections?

1 Hearing none, 121 is admitted.

2 (Exhibit No. 121 was received into evidence.)

3 BY MR. YOUNGS:

4 Q. And at this time, as presiding commissioner of
5 Cass County, you knew -- still knew that Aquila was proposing
6 to put a power plant on the South Harper site. Correct?

7 A. Correct.

8 Q. And you also knew that Peculiar was not going
9 to annex that site. Correct?

10 A. Correct.

11 Q. You knew that there was a dispute between
12 Aquila and Cass County regarding Aquila's obligation or lack
13 of obligation, depending on whose side of the coin you flipped
14 on, to comply with Cass County zoning. Correct?

15 A. That's correct.

16 Q. And, in fact, by that time you had directed
17 the county to file suit against Aquila. Correct?

18 A. Yes. If I recall, yes.

19 Q. Which they did on December 1st --

20 A. Uh-huh.

21 Q. -- is that accurate?

22 A. Correct.

23 Q. There's no discussion in the minutes of this
24 November 30th, 2004 meeting regarding the comprehensive plan
25 whether or not -- regarding whether or not the extension of

1 multi-use tiers to include the property on which Aquila was
2 planning on building the South Harper site was a good idea or
3 a bad idea. Correct?

4 A. Yeah. Correct.

5 Q. In fact, there's no discussion of it at all?

6 A. Correct.

7 Q. If you'll look at Exhibit No. 122, these are
8 the --

9 A. I don't have 122, counsel. 123?

10 Q. I'm sorry. Exhibit 123.

11 A. Yes, I have that.

12 JUDGE PRIDGIN: And I think I'm only on 122.
13 I want to be sure that we're --

14 MR. YOUNGS: Yeah. I've skipped a
15 chronological exhibit, but I will get to 122.

16 JUDGE PRIDGIN: Thank you. Is what you've
17 handed me 122?

18 MR. YOUNGS: That's 123. I've referred to it
19 as 122, but in fact, it's 123. It got marked out of order. I
20 apologize.

21 JUDGE PRIDGIN: Okay. Thank you.

22 MR. EFTINK: Your Honor, to clarify, is
23 Exhibit 123 the document marked January 18th, 2005?

24 JUDGE PRIDGIN: Yes, that's correct.

25 MR. EFTINK: So we don't have a 122 at this

1 time?

2 MR. YOUNGS: You're about to.

3 JUDGE PRIDGIN: That's correct. And we're
4 about to, Mr. Youngs says.

5 BY MR. YOUNGS:

6 Q. Do you also have in front of you Exhibit 122,
7 Mr. Mallory?

8 A. No. You're holding out on me. I still have
9 123 and 124.

10 Q. There's no trusting me.

11 A. That's what you told me.

12 Q. All right. Mr. Mallory, do you now have
13 Exhibits 122 and 123 in front of you?

14 A. Yes.

15 Q. Okay. I apologize.

16 Looking first at Exhibit No. 122, just tell us
17 what that is.

18 A. It's a record of a meeting of January 27th
19 when the county adopted 2005 County Comprehensive Master Plan,
20 Zoning Ordinances and Subdivision Regulations.

21 Q. And that was the meeting at which the
22 comprehensive plan and the zoning ordinance updated to 2005
23 were finally approved by the County Commission; is that
24 correct?

25 A. Yes.

1 Q. And Exhibit 123, since we're a little out of
2 order, is the January 18th meeting of the Cass County Planning
3 Board, again, minutes of the discussion and the vote of the
4 Planning Board on the comprehensive plan on that date,
5 January 18th of '05; is that correct?

6 A. Yes.

7 MR. YOUNGS: Okay. I offer 122 and 123.

8 JUDGE PRIDGIN: Any objections?

9 Hearing none, 122 and 123 are admitted.

10 (Exhibit Nos. 122 and 123 were received into
11 evidence.)

12 BY MR. YOUNGS:

13 Q. And without going through them, again, bottom
14 line is these meetings were for the purpose of discussing and
15 finally making a determination on the 2005 update to the
16 comprehensive plan and the zoning ordinances; is that correct?

17 A. Yes.

18 Q. At any point during this process prior to
19 January 27th, 2005, anybody could have taken issue with the
20 extension of the multi-use tier concept to include the South
21 Harper facility. Correct?

22 A. Anyone could have used the opportunity to do
23 that, yes.

24 Q. Okay. In fact, that was the purpose of all
25 the meetings we've been going through here. Correct?

1 A. Yes.

2 Q. And no one did that, did they?

3 A. No.

4 Q. And you did not raise that issue, did you?

5 A. No.

6 Q. And, in fact, in response to those concerns or
7 objections, the Commission -- first the Planning Board and
8 then the Commission could have made changes to the
9 comprehensive plan to accommodate those concerns, could they
10 not?

11 A. Yes.

12 Q. And it's true, is it not, that construction on
13 the South Harper facility did not begin until sometime after
14 January 11th, 2005?

15 MS. MARTIN: Objection. Lacks foundation,
16 calls for speculation.

17 JUDGE PRIDGIN: I'll overrule. He can answer
18 if he knows. If he doesn't know, he can say so.

19 THE WITNESS: Yeah, I don't recall the exact
20 date.

21 BY MR. YOUNGS:

22 Q. I'm just looking at your surrebuttal testimony
23 on Page 8, sir, in which you said, Actual construction
24 commenced on the plant in January 2005 immediately after the
25 trial court stayed its injunction.

1 Do you see that?

2 A. Yes. Line 5.

3 Q. And I'll represent to you that the judgment in
4 that case was entered on January 11th, 2005, which also
5 contained a stay of that injunction pending appeal. You
6 recall that?

7 A. Yes.

8 Q. All right.

9 A. Not the exact date, but I do recall that
10 happening.

11 Q. Okay. Well, talking about the comprehensive
12 plan, you'd agree with me that anything involved in zoning in
13 Cass County or anywhere else -- well, let me just ask you
14 about Cass County. It's not a static thing, is it?

15 A. No.

16 Q. It grows and changes as the community changes,
17 does it not?

18 A. Yes.

19 Q. You'd agree with me that the county's
20 comprehensive plan generally sets out the county's vision?

21 A. Yes.

22 Q. And provides the basis for zoning and land use
23 decisions?

24 A. Yes.

25 Q. And, again, as we've talked about, that's a

1 vision that's got to be updated, retooled as the county grows
2 and changes, does it not?

3 A. Yes.

4 Q. And aside from the legal argument that we
5 lawyers will have about which one of these plans is applicable
6 in this particular case, you'd agree with me that to determine
7 the current vision of the community, one should look to the
8 current version of the plan?

9 A. Yes.

10 Q. The comprehensive plan update of 2005 carried
11 forward this tier system that was adopted as part of the 2003
12 update; is that right?

13 A. Yes.

14 Q. And one of those tiers that we've been talking
15 about is the multi-use tier; is that correct?

16 A. Yes.

17 Q. And if you have your copy of Exhibit 118 in
18 front of you --

19 A. Yes, I do.

20 Q. -- if you'd turn to Page 25 --

21 A. Yes.

22 Q. -- where it talks about Chapter 3, future land
23 use and policy. Multi-use tiers at the bottom of the page are
24 areas near towns and cities and along paved highways and
25 thoroughfare roads where non-agricultural development, such as

1 commercial and industrial uses, and residential development
2 that is denser than 20-acre lots is encouraged. Large scale
3 development is allowed, including commercial and industrial
4 zoning, provided there are provisions for direct access to
5 paved roads.

6 Have I read that correctly?

7 A. Yes.

8 Q. And on Page 28, again, discussing multi-use
9 tiers, the multi-use tier is representative of development
10 areas within Cass County that exhibit the following
11 characteristics: First, positioned as transition areas from
12 urban to rural densities; two, located along rural highways,
13 major arterials and intersections or close enough to such
14 major roads to provide access for more intense levels of
15 non-agricultural traffic; and three, predominantly developed
16 for a mix of land uses, residential, industrial and commercial
17 purposes.

18 Have I read that correctly?

19 A. Yes.

20 Q. If you want to look behind you on the screen,
21 I have on the screen Schedule BGP-3, which is the schedule to
22 Bruce Peshoff's testimony in this case. And this was also
23 marked as an exhibit in your deposition. Correct?

24 A. Yes.

25 Q. Okay. And the area in yellow depicts the

1 multi-use tier according to the 2005 comprehensive plan, the
2 current vision of the community. Is that fair to say?

3 A. Yes.

4 Q. All right. And at the bottom -- towards the
5 bottom you can see a little horseshoe-shaped rectangle --

6 A. Yes.

7 Q. -- do you see that?

8 And at the top you see -- it looks like the
9 state of Idaho --

10 A. Yes.

11 Q. -- do you see that?

12 A. Yes.

13 Q. Okay. And actually, I think we've determined
14 that the state of Idaho listing, which is the substation,
15 needs to be on the other side of that street, is that correct,
16 in order for this map to be accurate?

17 A. Yes.

18 Q. But in all other respects it accurately
19 depicts not only the current tier system, but also the
20 location of these facilities at issue within that tier system.
21 Correct?

22 A. Yes.

23 Q. And there's no dispute, as we sit here today,
24 that currently the South Harper site sits in a multi-use tier?

25 A. Yes.

1 Q. As does more than half of the Peculiar
2 substation site at least?

3 A. Yes.

4 Q. And to the north of that, that area is an
5 urban service tier; isn't that correct?

6 A. Yes.

7 Q. All right. And the area just north and
8 east -- I'm going to walk up here.

9 This area listed here (indicating), I think
10 it's gray on the exhibit, those are the city limits of the
11 City of Peculiar, are they not?

12 A. Yes.

13 Q. All right.

14 A. They appear to be, yes.

15 Q. All right. And so as we sit here today,
16 there's no dispute between you and me that the facilities sit
17 in multi-use tiers under the 2005 comprehensive plan?

18 A. Yes, I agree.

19 Q. All right.

20 A. Except the piece of Idaho sticking out.

21 Q. With the exception of that little piece of
22 Idaho?

23 A. Yeah.

24 Q. This is a photograph that's Schedule WW-14,
25 which I'll represent to you is the view of the gas compressor

1 station from Frank Dillon's property on the east side of South
2 Harper Road. You see that?

3 A. Yes.

4 Q. The gas compressor station that sits north of
5 the actual plant is also located in the 2005 multi-use tier.
6 Correct?

7 A. Yes.

8 Q. I just want to also be clear. As we sit here
9 today, you've never seen this site. Correct?

10 A. I've -- not the power plant. I've not went by
11 where the power plant is.

12 Q. Prior to the power plant's erection, you had
13 been by --

14 A. Oh, I'd been by, I'm sure.

15 Q. To see the gas compressor station?

16 A. Yeah.

17 Q. But as we sit here today, at no time have you
18 ever seen in person the South Harper peaking facility?

19 A. No, I have not.

20 Q. Nor have you ever seen the Peculiar substation
21 at 239th --

22 A. No, I have not.

23 Q. And just so we're clear, the state of Idaho,
24 the substation, that has always been in a multi-use tier.
25 Correct?

1 A. I believe so.

2 Q. Ever since the multi-use tier system has been
3 in effect?

4 A. Yes.

5 Q. So, in other words, vis-a-vis the 2003 and the
6 2005 plans, we don't have any dispute that that substation was
7 in that multi-use tier under both of those plans. Correct?

8 A. Yes.

9 Q. And as a part of the work that was done by the
10 Commission during 2004, we also have a zoning order and
11 subdivision regulations dated effective February 1st, 2005; is
12 that correct?

13 A. Yes.

14 Q. And those are Exhibit 119?

15 A. Yes.

16 Q. In fact, that new zoning order repeals the old
17 zoning order, does it not?

18 A. Yes.

19 Q. And there's been some discussion about
20 agricultural districts. Correct?

21 A. Yes.

22 Q. If you'd turn to Page 29 of Exhibit 119 for
23 me. Are you there?

24 A. Yes.

25 Q. And read with me. The intent of an

1 agricultural district is to preserve and protect land valuable
2 for agriculture and as open space from urban-type activities.
3 This district is not intended for the development of
4 low-density residential areas.

5 Have I read that correctly?

6 A. Yes.

7 Q. With regard to the regulations that deal with
8 zoning, if you'd turn to page 82, this is the portion of the
9 zoning order that talks about supplementary regulations. It's
10 Article 7, isn't it? Or it's a portion of Article 7?

11 A. Yes.

12 Q. And it deals with something we talked about a
13 little while ago in this proceeding, concentrated animal
14 feeding operations. Correct?

15 A. Yes.

16 Q. And it provides for additional requirements
17 for those operations, does it not?

18 A. Yes.

19 Q. Later on, starting on Page 86, which is the
20 section of the zoning order Article 8 dealing with special use
21 permits, it also provides for additional conditions for
22 particular special uses. Correct?

23 A. Yes.

24 Q. Such as residential or outpatient facilities
25 for the treatment of alcohol or other drug abuse. Correct?

1 A. Yes.

2 Q. Special manufactured homes?

3 A. Yes.

4 Q. Any uses involving the storage, processing or
5 manufacturing of large quantities of toxic chemicals.
6 Correct?

7 A. Yes.

8 Q. On Page 87, communications towers?

9 A. Yes.

10 Q. You don't have to trust me, but 89 adult
11 entertainment establishments?

12 A. Yes.

13 Q. Three pages of additional conditions for
14 those. Correct?

15 A. Yes.

16 Q. Composting sites, page 92?

17 A. Yes.

18 Q. Sanitary landfills, page 93?

19 A. Yes.

20 Q. There's no provision in these supplementary
21 regulations or additional conditions regarding special use
22 permits that deal with or address electrical generation for
23 transmission facilities, are there?

24 A. No.

25 Q. You talked in your surrebuttal testimony,

1 Mr. Mallory, on Page 10 --

2 A. Yes.

3 Q. -- about -- or excuse me, Line 10 is as Aquila
4 entitled to a fair and full hearing on its application as the
5 citizens affected by the plant are entitled to a full and fair
6 hearing on their grievances with the plant and substation.

7 Have I read that correctly?

8 A. Yes.

9 Q. And that's a recitation -- first of all, you
10 still agree with that statement?

11 A. Yes.

12 Q. Okay. And that's a recitation of your concern
13 that everybody who's affected by this facility have an
14 opportunity to be heard regarding the facilities. Correct?

15 A. Yes.

16 Q. You're aware of the fact that there have been,
17 with regard to this application, three public hearings?

18 A. Yes.

19 Q. All of which occurred in Cass County.
20 Correct?

21 A. Yes.

22 Q. You're painfully aware of the fact that there
23 have been depositions taken in this case. Correct?

24 A. Yes.

25 Q. Including the deposition of Harold Stanley,

1 which was taken down in New Mexico. Correct?

2 A. I wasn't aware of that.

3 Q. Okay.

4 A. I'll believe you on that one.

5 Q. We're here at a full evidentiary hearing on
6 Aquila's application, are we not?

7 A. Yes.

8 Q. And you understand that the Commission has set
9 aside 8 days for consideration of Aquila's application.
10 Correct?

11 A. I didn't know that until now, but --

12 Q. That hearing has included testimony by two
13 land use -- yeah, two sets of filed testimonies by two land
14 use planners. Correct?

15 A. I know of one. I don't know about the other
16 one.

17 Q. Okay. We have a guy too.

18 A. All right. Figured you did.

19 Q. You understanding there's been extensive
20 briefing in this case?

21 A. Yes.

22 Q. Briefs that you have reviewed sometimes before
23 the fact and at all times after the fact. Correct?

24 A. Yes. As far as I'm aware.

25 Q. And that, of course, is in addition to public

1 hearings related to these facilities that were conducted in
2 what's been referred to as the 0248 case. You know that?

3 A. Yes.

4 Q. There was a public hearing in Harrisonville
5 regarding that application as well?

6 A. Yes.

7 Q. Same facilities, different application --

8 A. Yes.

9 Q. -- correct?

10 A. Yes.

11 Q. And, again, briefs and evidentiary hearings.
12 You recall all that?

13 A. Yes.

14 Q. Other than the fact that this hearing is not
15 taking place in Cass County in conjunction with some kind of a
16 zoning application, is there anything about this proceeding
17 that you don't believe offers a full and fair hearing for
18 people to be heard about their concerns about these
19 facilities?

20 A. Taking into account the public hearings you
21 had in Cass County?

22 Q. Sure.

23 A. Yes. I think everybody should have had a
24 chance to be heard.

25 Q. Let's talk a little bit about the discussions

1 that you had with Aquila that were the subject of some
2 questioning of Norma Dunn the other day after the Court of
3 Appeals issued its ruling on December 20th of 2005. Are you
4 with me?

5 A. Yes.

6 Q. Okay. You knew that prior to October -- or
7 excuse me, December 20th of 2005, that there had been
8 discussions between counsel regarding Aquila's possibility of
9 being willing to submit these facilities to zoning review
10 through Cass County. Correct?

11 A. Yes.

12 Q. And in addition to the conversations that were
13 going on between Chris Reitz, myself, your outside counsel,
14 Cindy Reams Martin, your Cass County attorney, Debra Moore,
15 you were working with Norma Dunn, weren't you?

16 A. I don't know how -- if you'd characterize it
17 working with. I'd met with her twice. She and I are both on
18 the Economic Development Committee.

19 Q. And I think the evidence has been that you
20 asked her to serve in that capacity; is that correct?

21 A. Absolutely, yes.

22 Q. You like Norma Dunn?

23 A. I think she's very professional.

24 Q. And you understood -- and I won't burden the
25 record with all the letters, but you understood there was some

1 concern expressed early on by the county through your outside
2 counsel of the ability of the county to process a zoning
3 application while the litigation was ongoing. You recall
4 that?

5 A. Yes.

6 Q. And that litigation included not only the
7 appeal from Judge Dandurand's order in January of 2005, but it
8 also involved a writ proceeding involving this Commission's
9 April 2005 order. You understood that?

10 A. Yes.

11 Q. And those were the two proceedings that you
12 understood from your lawyers were the issues?

13 A. Yes.

14 Q. You had conversations with Ms. Dunn in late
15 2005 regarding what she referred to as stopping the litigation
16 and going through the process of zoning in Cass County. You
17 recall that generally?

18 A. Yes. Uh-huh. I sure do.

19 Q. After the December 20th, 2005 opinion of the
20 Court of Appeals affirming Judge Dandurand's January judgment,
21 you understand that Aquila did not seek any further review of
22 that judgment?

23 A. Yes.

24 Q. And, in fact, Ms. Dunn told you that Aquila
25 would not seek further review?

1 A. Yes.

2 Q. And that she committed to you that as an
3 attempt to resolve the issues between the county fully and
4 finally, Aquila would prepare and file special use permit
5 applications for these facilities. Correct?

6 A. Yes.

7 Q. And when she said that, you believed her?

8 A. Yes.

9 Q. And that was consistent with the good working
10 relationship that you had had with her up to that time?

11 A. Yes.

12 MR. YOUNGS: May I approach, your Honor?

13 JUDGE PRIDGIN: You may.

14 BY MR. YOUNGS:

15 Q. Mr. Mallory, this is Schedule NFD-2, which is
16 a series of letters with a fax cover sheet, the first letter
17 of which is dated January 5th, 2006 over your signature to
18 Norma Dunn; is that correct?

19 A. Yes.

20 Q. Okay. And it attaches an August 16th, 2005
21 letter from Ms. Martin to Chris Reitz, general counsel of
22 Aquila; is that correct?

23 A. Yes.

24 Q. Okay. And just so we're clear, that 2005 --
25 January 5th, 2005 letter from you --

1 A. January 5th, 2006.

2 Q. -- excuse me, January 5th, 2006 letter from
3 you --

4 A. Yes.

5 Q. -- you did not write that, did you?

6 A. No.

7 Q. That was prepared for you by counsel?

8 A. Yes.

9 Q. And signed by you?

10 A. Yes.

11 Q. And at the end of that letter -- excuse me,
12 I've given you my only copy, I'm going to come back. In fact,
13 maybe I'll just put it up.

14 The last paragraph of that letter,
15 Mr. Mallory, you see where it says, I ask that further
16 communications with respect to this matter, particularly as
17 relate to the legal proceedings, be directed through your
18 counsel to the county's counsel; is that correct?

19 A. Yes.

20 Q. And then the letter sets out all the various
21 lawyers that the county has working for it regarding this
22 dispute?

23 A. Yes.

24 Q. All right. On the first page of the letter --
25 or excuse me, of the exhibit, which is the fax cover sheet,

1 you did write this, didn't you?

2 A. Yes.

3 Q. And it says, Norma, info regarding discussions
4 were recently had. Any questions, please call. Gary.

5 A. Yes.

6 Q. You intended that if she had any questions
7 about these two letters that she was getting from you, that
8 she should feel free to call you. Correct?

9 A. Yes.

10 Q. And, in fact, she did call you. Correct?

11 A. Yes.

12 Q. She reaffirmed her original commitment to you,
13 did she not?

14 A. Yes.

15 Q. And you have in front of you Exhibit No. 87,
16 which has been received in evidence in this case. You recall
17 that letter, don't you?

18 A. Yes. I saw this before.

19 Q. And just so the record is clear, this is a
20 January 12, 2006 letter from Chris Reitz to Cindy Reams Martin
21 and Debra Moore; is that correct?

22 A. Yes.

23 Q. And it attached a motion requesting Judge
24 Dandurand to stay the effect of his injunction; is that
25 correct?

1 A. I don't have that.

2 Q. But the letter references it, does it not?

3 A. Yes, yes.

4 Q. And, again, it confirms that the company's
5 intention, consistent with your conversations with Norma Dunn,
6 was to file special use permit applications for these
7 facilities?

8 A. Yes.

9 Q. As a means to possibly resolve the dispute
10 between Aquila and Cass County. Correct?

11 A. Yes.

12 Q. And, in fact, the letter asks in the first
13 paragraph if Ms. Moore and Ms. Martin will agree to support a
14 stay of the trial court's injunction while this process goes
15 forward. Correct?

16 A. Yes.

17 Q. And that's consistent with the conversations
18 that you had had and that you understood had been had
19 regarding the fact that so long as there was an injunction in
20 place, the county did not feel it was appropriate to accept a
21 special use permit application. Correct?

22 A. The injunction and the writ.

23 Q. And the writ proceeding?

24 A. Yes.

25 Q. The county could have agreed to a stay of the

1 injunction while this process went forward, couldn't it have?

2 A. I suppose so.

3 Q. Could have agreed to a stay while Aquila went
4 through the process that you believed was important and to
5 this day believe was important with the county. Correct?

6 A. Yes.

7 Q. But instead, the county didn't do that, did
8 it?

9 A. No.

10 Q. In fact, it filed suggestions in opposition to
11 that motion for a stay somewhere between 25 and 30 pages. You
12 recall that?

13 A. Yes.

14 Q. Accused Aquila of being arrogant. You recall
15 that allegation?

16 A. Yes.

17 Q. Requested an order directing the immediate
18 dismantling of the facilities?

19 A. Yes.

20 Q. And, in fact, in that suggestions in
21 opposition, even suggested whether the county had the legal
22 ability to process an application for a special use permit for
23 facilities that were already constructed. You recall that?

24 A. Yes.

25 Q. And, in fact, as we sit here today, that's a

1 concern that you still have as presiding commissioner of Cass
2 County?

3 A. Yes.

4 Q. And on January 20th, 2006, Aquila did attempt
5 to file special use permit applications for the plant and the
6 substation; is that correct?

7 A. Yes.

8 Q. Those were rejected?

9 A. Yes.

10 Q. And followed up with a letter from counsel
11 accusing Aquila of a publicity stunt, brinksmanship and
12 threatening to ask that we be held in contempt --

13 A. Yes.

14 Q. -- you recall that?

15 A. Yes.

16 Q. Do you have in front of you Exhibit No. 88?
17 If you don't, I'll get it.

18 A. You better get it.

19 Q. I'll just borrow somebody's copy.

20 MR. YOUNGS: May I approach, Judge?

21 JUDGE PRIDGIN: You may.

22 BY MR. YOUNGS:

23 Q. Mr. Mallory, I've handed you what has been
24 marked and received in evidence as Exhibit No. 88. You recall
25 that?

1 A. Yes.

2 Q. And this, just so the record is clear, is a
3 letter dated February 1st, 2006 from Cindy Reams Martin to me
4 and to Mr. Reitz on behalf of Aquila. Correct?

5 A. Yes.

6 Q. And just so we're clear in terms of the status
7 of all these proceedings, the writ case was still pending at
8 that time?

9 A. That's my understanding, yes.

10 Q. And, in fact, as Ms. Martin says in her
11 February 1st letter, the first paragraph, the order that Judge
12 Dandurand entered giving Aquila a stay until May 31st still
13 needs to be finalized and presented to the court. Until the
14 order is entered and until Aquila files its required bond,
15 Aquila has not been relieved of the obligation to comply with
16 the January 11th, 2005 judgment and, thus, with the original
17 terms of the permanent injunction.

18 Do you see that?

19 A. Yes.

20 Q. And those original terms of the permanent
21 injunction included an order to dismantle the plant. Correct?

22 A. Yes.

23 Q. So the position that the county had been
24 taking prior to this time that so long as the writ case was
25 not resolved and there was not a final order giving us some

1 relief from the injunction in the case before Judge Dandurand,
2 the county would not accept a special use permit application,
3 those conditions still consisted as of February 1st, 2006, did
4 they not?

5 A. Yes. Because in my mind, still litigation was
6 ongoing.

7 Q. All right. However, in the third paragraph --
8 notwithstanding that, the third paragraph says --
9 notwithstanding the fact that those proceedings are still
10 pending and the litigation is ongoing, Ms. Martin says, We
11 assume Aquila will be filing an application for either
12 rezoning or for a special use permit for the South Harper
13 plant and the Peculiar substation as evidence of local consent
14 is required before the PSC can issue a certificate of
15 convenience and necessity for the plant and substation.

16 Have I read that correctly?

17 A. Yes.

18 Q. You understood at that time that Aquila did
19 not agree that that was the state of the world?

20 A. Yes.

21 Q. When you read that paragraph -- and I assume
22 you did; is that correct?

23 A. Yes.

24 Q. Did you think that that was kind of a trap?

25 A. No.

1 Q. In any event, you certainly weren't surprised
2 when Aquila subsequently refused to file an application for
3 special use permit for the site and the substation?

4 A. No, I was not.

5 Q. And as we sit here today, you have no opinion
6 whether these facilities are appropriately located where they
7 sit from a land use perspective?

8 A. I've formed no opinion whatsoever.

9 MR. YOUNGS: Those are all the questions I
10 have of this witness at this time, your Honor.

11 JUDGE PRIDGIN: Mr. Youngs, thank you.

12 Let me see if we have any questions from the
13 Bench. Chairman Davis?

14 CHAIRMAN DAVIS: Pass.

15 JUDGE PRIDGIN: Mr. Chairman, thank you.

16 Commissioner Gaw?

17 COMMISSIONER GAW: Thank you.

18 QUESTIONS BY COMMISSIONER GAW:

19 Q. Commissioner, thank you for coming.

20 Let me ask you just in general terms a little
21 bit about the process that occurs in regard to the
22 applications for land use in Cass County. I want to focus on,
23 at least for the moment, the current plan that you have in
24 effect.

25 A. Yes.

1 Q. If today we had an application filed for a
2 facility that is not yet constructed that was a generation
3 plant located in the area similar to the area where the South
4 Harper facility is located and if we presume that they come to
5 ask -- first of all, let me ask you this.

6 Would they be required to come in and ask for
7 any special permission before they could construct that plant
8 in Cass County, in your opinion?

9 A. Yes.

10 Q. Okay. Tell me what kind of permission and
11 applications would be necessary, in your opinion.

12 A. Well, for example, a multi-use tier just
13 describes things that can be placed there.

14 Q. Okay.

15 A. But if you're going to come in and put a CFO
16 there, a hog farming operation, you know, we'd want to make
17 sure that people understood that was coming in. And that's a
18 big difference than a power plant. In my mind it is. In some
19 people's mind, it might not be. But that would be a thing
20 they'd have to come in for, go through the Planning Board and
21 public hearings and go through the BZA just like anybody else.

22 Q. And if it were a power plant facility, would
23 your answer be the same in regard to the necessity for them to
24 come in?

25 A. Yes.

1 Q. Okay. When would an entity or individual not
2 have to come in in that region?

3 A. If there was -- like in a residential area if
4 somebody's going to build a house on 10 acres, they're not
5 going to have to get zoning changed for that. It's already
6 zoned residential and it wouldn't be a use not consistent with
7 what was there.

8 Q. All right. Who makes that determination in
9 regard to the application, the decision to apply? How do they
10 know whether they should or should not apply in those
11 multi-use areas?

12 A. They would talk first with the zoning
13 director, look at the map and look at the comp plan and
14 subdivision regulations.

15 Q. And you're familiar with that process, aren't
16 you?

17 A. Somewhat.

18 Q. If there were some other kind of industrial
19 development in that area proposed, would you expect them to
20 come in and make an application?

21 A. I don't understand the question, Commissioner.

22 Q. In just any kind of a manufacturing facility
23 or an industrial facility.

24 A. Yes, I would.

25 Q. Okay. So is the fact that currently this area

1 is zoned with multi-use then, in your opinion, decisional in
2 regard to whether or not there is a need to apply for
3 particular permission from the county if it's industrial in
4 nature?

5 A. Yes.

6 Q. All right. And you believe that they do need
7 to come in and apply?

8 A. Yes.

9 Q. As far as the decision-making process of the
10 county is concerned on land use, once that designation was
11 changed in the plan from agricultural to multi-use, does that
12 change in your perspective, your analysis of what's
13 appropriate?

14 A. To some degree, yes.

15 Q. Explain that to me, if you would.

16 A. If someone comes in to look at the zoning map
17 where the multi-use tiers are, for example, that would be one
18 of the first indications that there's a probability you could
19 locate that facility there. If it's in residential, then that
20 would be a tough road there.

21 Q. Okay. And this particular area that we're
22 discussing around the South Harper facility, does it have a
23 general nature to it, in your opinion?

24 A. It's agriculture and residential.

25 Q. Okay. And that's based upon the uses that are

1 being made of the property currently?

2 A. Yes. And there is the gas plant there.

3 Q. Okay.

4 A. That's been there for years.

5 Q. So would you take -- all of those things would
6 be taken into account?

7 A. Yes.

8 Q. Okay. So your analysis would involve -- what
9 kind of an analysis generally would you make if you were
10 looking at this in a hypothetical sense to determine whether
11 or not some application was appropriate for the use in a
12 multi-tiered area?

13 A. I would look at it to see if it -- make sure
14 it didn't deter from what was already there.

15 Q. Okay.

16 A. I use the hypothetical example sometimes that
17 a power plant -- if the Commission has the right to site a
18 power plant, then can you put one on a square in
19 Harrisonville? I mean, that's ludicrous, but that's what it
20 says if that's what it is.

21 Q. Is it your opinion that a multi-tier use
22 designation is different than no zoning at all?

23 A. Yes.

24 Q. Okay. Can you give me a little bit generally
25 about how it differs in an area where there is no zoning, in a

1 county where there's no zoning and an area that's designated
2 multi-tier?

3 A. In a county that has no zoning like Johnson
4 County right next to us, you can put up a junkyard next to the
5 church if you want to.

6 Q. Can you do that in --

7 A. In a multi-use tier --

8 Q. Can you do that in Cass County?

9 A. No.

10 Q. And why not?

11 A. Because we have zoning regulations --

12 Q. All right.

13 A. -- that don't let you do that.

14 Q. Even in a multi-tier designated area?

15 A. Yes.

16 COMMISSIONER GAW: Okay. That's all I have.

17 Thank you, sir.

18 JUDGE PRIDGIN: Commissioner Gaw, thank you.

19 Commissioner Clayton?

20 QUESTIONS BY COMMISSIONER CLAYTON:

21 Q. Just I want to -- Commissioner Gaw referred to
22 you as commissioner. I always refer to presiding
23 commissioners as the presiding judge in a county and I always
24 call them judge. Do you go by judge?

25 A. No.

1 Q. Nobody calls you judge?

2 A. I don't want to be a judge or lawyer, neither
3 one.

4 Q. That's going to get you really far with me.

5 A. I know.

6 Q. Talking about just along the same line that
7 Commissioner Gaw was just talking about, on multi-tier -- or
8 multi-use tier designation, are there subcategories within
9 that -- the use of the land or is it just any use?

10 A. Not --

11 Q. I'm confused. You made reference to
12 residential and agricultural, but does multi-use mean any use
13 or just those two or could you explain that to me?

14 A. No. It could be any use that's highlighted --
15 that's outlined in our regulation is what a multi-use tier
16 could be used for.

17 And the reason we did that is because of the
18 growth of the cities in the county and we expect that growth
19 to continue outward. And to support rooftops, you've got to
20 have commercial and light industrial and so forth, which we
21 advocate bringing into the county.

22 Q. So the multi-use tier could mean any number of
23 uses?

24 A. Yes. In my opinion.

25 Q. It could mean agricultural, it could mean

1 residential, it could mean industrial?

2 A. Yes.

3 Q. All right. Do you have several categories of
4 industrial use?

5 A. I think light industrial is what we primarily
6 have.

7 Q. What is the difference between light
8 industrial and I guess heavy industrial?

9 A. Oh, I don't know. I would say heavy
10 industrial to me would be a railroad yard and a foundry as
11 opposed to a tool shop, machine shop.

12 Q. Okay. What do you consider this power plant
13 to be? Light industrial, heavy industrial?

14 A. I would think it would be light industrial.

15 Q. Light industrial?

16 A. And I base that on the knowledge I have with
17 the Calpine plant in Pleasant Hill we worked on.

18 Q. So with this multi-use designation, there
19 would not be a specific prohibition of placing a power plant
20 according to the 2005 comprehensive plan. Would they have to
21 request a special use permit? Let me rephrase the question
22 this way.

23 What type of application -- what type of
24 permission do they have to ask of either the county planning
25 and zoning or the County Commission? What is the description

1 of the request for permission?

2 A. They would ask for a zoning change or a
3 special use permit.

4 Q. Even in this multi-use tier?

5 A. They wouldn't have to do that there because
6 that's already allowed in that area.

7 Q. That's what I'm getting at. So under the old
8 law, it was zoned I believe agricultural?

9 A. Yes.

10 Q. So under the old, the only way that you could
11 place the power plant there according to zoning law would be
12 either to have a change in zoning?

13 A. Correct.

14 Q. And you'd have to change it from agriculture
15 to industrial or light industrial?

16 A. Whatever, yes.

17 Q. And the second alternative would be to request
18 a special use permit, which would basically be a variant to
19 the use of the land; is that correct?

20 A. Yeah. It's regulations -- different
21 stipulations than just an ordinary zoning application would.

22 Q. Okay. Now, when you have a multi-use
23 designation, what type of request for permission do they have
24 to ask of the county?

25 A. Well, they would just come in and talk to the

1 zoning officer and see if it fit in that area or not.

2 Q. Okay. Well, with a multi-use designation,
3 what do you mean "fit"? Because it's -- since you've got
4 multiple uses there, you don't have the specific zoning
5 designation. What do you mean -- how is it supposed to fit
6 within that area?

7 A. If someone comes in for a multi-tiered area
8 and say that the -- has developed along the lines of
9 80 percent residential, then it would be some concern if
10 somebody would come in there and put a foundry in the middle
11 of that.

12 Q. Even if it's designated multi-use?

13 A. Yes.

14 Q. So they come in and talk to the planning and
15 zoning officer?

16 A. Uh-huh. Uh-huh. Yes.

17 Q. And then would they -- would they need his or
18 her blessing to get started?

19 A. No. He would just tell them what the rules
20 are and what needs to be done and the procedure to follow.

21 Q. Then what would be the procedure?

22 A. I think it would go before the Planning Board
23 and probably be looking for a special use permit because if it
24 was different --

25 Q. So even if -- I'm sorry. Go ahead and finish.

1 Even with the multi-use designation, they
2 still have to file an application or a petition for a special
3 use permit?

4 A. If it does not fit within that area.

5 Q. Okay. And when you say fit within the area,
6 you look at how the land is being used now even though it may
7 be designated as a multi-use area?

8 A. Yes.

9 Q. So in this area where the South Harper
10 facility is, how would you describe its use right now as --
11 it's multi-use designation through zoning, but how would you
12 see -- how would you describe the actual use of the land right
13 now?

14 A. Residential and agriculture.

15 Q. Do you break that into percentages or do you
16 just --

17 A. Not really. I wouldn't know without looking
18 at the maps and trying to make a determination.

19 Q. Okay.

20 A. Just in general, that's the two
21 characteristics of that area right now.

22 Q. So based on that actual use of the property,
23 the company would have to file an application or petition of
24 some sort requesting a special use permit to place this light
25 industrial --

1 A. In my opinion, yes.

2 Q. Okay. And then would that request go to the
3 planning commission or would it go to the County Commission
4 acting as the Board of Zoning --

5 A. Adjustment.

6 Q. -- Adjustment, the BZA, which is a snappy
7 title?

8 A. It would go to Planning Board first and then
9 the BZA.

10 Q. Okay. The County Commission or BZA would have
11 the ultimate authority?

12 A. Yes.

13 Q. Does the standard that that decision-making
14 body uses, does the standard change in this type of request on
15 a multi-use zoned area versus under the old plan where it's
16 designated agriculture and they have to come in and ask for a
17 change in the use of the property? Is the standard different,
18 standard of -- or burden of proof by the parties? Is it any
19 different --

20 A. Not necessarily.

21 Q. -- in your mind?

22 Okay. Is it more difficult or easier to
23 change actual use where you have multi-use zoning than under
24 the old way where you had something zoned specifically as
25 agricultural? Is it harder or easier to get that special use

1 permit?

2 A. I think it would be easier to get a special
3 use permit if it's in a multi-tiered area because through the
4 planning process, comprehensive plan, subdivision regulations
5 we've recognized that that area could be used for multi-use
6 and we would expect those kind of applications come in;
7 whereas, if it's in a general or agricultural or residential
8 area, then that would be a little bit more difficult to
9 approve, but not impossible.

10 Q. Well, you've been an elected official in Cass
11 County for a few years?

12 A. Yes.

13 Q. Going back as an elected official under the
14 old zoning plan as well as the new zoning plan. Is that a
15 fair statement?

16 A. Yes.

17 Q. Okay. As a member of -- or as the presiding
18 commissioner of Cass County, I guess what I want to ask is,
19 what uses do you see this area being used for as area becomes
20 more developed? Do you see it remaining residential,
21 remaining agriculture? Do you see other services cropping up,
22 whether it be food service, whether it be other personal
23 service uses?

24 A. I see commercial, retail development in those
25 areas in the main roads leading from the cities. Not just

1 Peculiar, but all of them.

2 Q. So you don't see this area as being at this
3 time being an industrial area or light industrial area or
4 machine shop, as you said earlier?

5 A. Yeah. And that's a difficult question to
6 answer because a tool shop or machine shop can fit right in
7 without being obtrusive or anything and doesn't generate a lot
8 of traffic. That is something that might fit in there a lot
9 easier than -- I'll go back to a foundry.

10 Q. And you see this power plant as being more
11 obtrusive and creating more traffic and being different than a
12 tool shop?

13 A. I don't see the power plant generating much
14 traffic --

15 Q. Okay.

16 A. -- from what I understand.

17 Q. Do you see it being obtrusive?

18 A. If it's like the one in Pleasant Hill, there's
19 very few people actually there.

20 Q. Do you see it as being obtrusive? And I use
21 that word just because you used that word to describe the
22 machine shop.

23 A. I don't really have an opinion on that right
24 now, because this thing could end up that I have to make a
25 decision regarding that. And I'm not going to go on record

1 saying I think it's obtrusive or not.

2 Q. You mentioned that you saw, looking into the
3 future, this area as growing up as commercial retail possibly
4 rather than being light industrial. Is that a fair
5 representation of what you said?

6 A. Yes.

7 Q. Is that a factor that you look at in -- or is
8 that a potential factor that a Planning and Zoning Commission
9 would look at?

10 A. No. I think the Planning and Zoning
11 Commission and the BZA can do the proper job after looking at
12 everything that come in. I don't think you can just say we're
13 just going to want retail stores around here. We've developed
14 and made it multi-use tier because while it may not fit in
15 this location, it may fit in a location in another city under
16 different circumstances and we don't want to preclude that
17 from being addressed or being considered.

18 Q. Okay. As the leading -- well, I'm sure this
19 is debatable, but as the leader of Cass County or at least as
20 the witness appearing in this case, are you here to testify
21 one way or another whether Cass County wants this power plant
22 at this location or not?

23 A. No, I'm not one way or another.

24 Q. Your position is simply that Aquila has to
25 follow the procedures that are set forth in the comprehensive

1 plan and the zoning regulations of Cass County?

2 A. Yes. That's been my position all along.
3 That's the only thing we've asked for, that they come through
4 our zoning and planning process like everybody else does. No
5 more, no less.

6 COMMISSIONER GAW: Okay. Thank you.

7 THE WITNESS: Yes, sir.

8 CHAIRMAN DAVIS: Judge.

9 JUDGE PRIDGIN: Mr. Chairman?

10 QUESTIONS BY CHAIRMAN DAVIS:

11 Q. Good morning, Mr. Mallory --

12 A. Good morning.

13 Q. -- what's left of it.

14 Now, Aquila did attempt to go through planning
15 and zoning with the Camp Branch site. Correct?

16 A. Yes, sir.

17 Q. And can you refresh, for my recollections, did
18 they attempt to go through planning and zoning? Are you
19 familiar with the Aries plant, what's called the Aries plant?

20 A. I'm very familiar with the plant. I worked
21 with Aquila to get it there.

22 Q. Now, so they went through planning and zoning
23 to get the Aries plant there. Correct?

24 A. Yes.

25 Q. And then was there a proposed addition to the

1 Aries plant at any time?

2 A. Yes.

3 Q. And they attempted to go through planning and
4 zoning to add, what was it, three --

5 A. I believe it was three more stations, uh-huh.

6 Q. All right. And that application was
7 subsequently rejected; is that correct?

8 A. No. The county had no objection to them doing
9 that since it was already zoned that way at the Aries plant.
10 Again, we tried to work with Aquila.

11 Q. Okay. Let's see.

12 CHAIRMAN DAVIS: No further questions, Judge.

13 JUDGE PRIDGIN: Mr. Chairman, thank you.

14 I don't believe I have any questions. Any
15 recross? Mr. Williams.

16 RE-CROSS-EXAMINATION BY MR. WILLIAMS:

17 Q. Hello again, Mr. Mallory.

18 A. Hi.

19 Q. I could be wrong, but I think maybe there's a
20 little confusion on a part of some of the Commissioners.

21 Commissioner Gaw asked you about whether or
22 not a power plant such as the South Harper plant could be
23 located -- and I'm going to limit it to unincorporated Cass
24 County, Missouri, without going through some kind of a zoning
25 process with the county. Do you recall that?

1 A. Yes.

2 Q. And would someone -- and your response was
3 that, no, someone would have to go through a process.
4 Correct?

5 A. Yes.

6 Q. And would that --

7 A. If it was an agricultural area? Is that what
8 you're asking?

9 Q. I'm not saying anything about what the zoning
10 designation is.

11 A. All right. Then I say yes.

12 Q. And would that process require either rezoning
13 of the site to permit the use or a special use permit from the
14 county to allow that nonconforming use to exist at that
15 location?

16 A. Yes.

17 Q. And you'll probably recall this from your
18 deposition, but do you understand the difference between
19 planning and zoning?

20 A. Yes.

21 Q. And is planning what sets out the concept of
22 what the county wants land use to be?

23 A. Planning is the vision.

24 Q. And is zoning implementation of that vision?

25 A. Yes.

1 Q. And when we've been talking about multi-use
2 tiers, has that been planning or zoning?

3 A. I think it's zoning. Planning and zoning
4 really. I think zoning has to follow planning, but planning
5 doesn't follow zoning.

6 Q. My recollection is that the multi-use tiers
7 are found in the comprehensive plan --

8 A. Yes.

9 Q. -- not in the zoning.

10 A. Absolutely.

11 Q. And if I understand your planning and zoning
12 correctly, if someone comes in and asks for a special use
13 permit, that use will be measured against the plan --

14 A. Yes.

15 Q. -- to make a determination whether or not that
16 use should be allowed even if the zoning does not permit it?

17 A. Where it fits, yes.

18 MR. WILLIAMS: No further questions.

19 JUDGE PRIDGIN: Mr. Williams, thank you.

20 Any further recross? Mr. Eftink, yes, sir.

21 COMMISSIONER CLAYTON: Can I clarify that?

22 Please come on up because I think Mr. Williams has highlighted
23 my confusion and I want to thank him for highlighting that for
24 everyone.

25 MR. WILLIAMS: I don't think you're alone,

1 Commissioner.

2 FURTHER QUESTIONS BY COMMISSIONER CLAYTON:

3 Q. I was confused on that. The land in question
4 is still zoned residential and agriculture. It's the
5 multi-use designation within the comprehensive plan --

6 A. Comprehensive plan.

7 Q. -- of 2005?

8 A. Yes.

9 Q. Okay. So that's why you still have to request
10 permission to use --

11 A. Yes.

12 Q. -- you still have to request the special use
13 permit?

14 A. Yes.

15 COMMISSIONER CLAYTON: Thank you,

16 Mr. Williams. Appreciate that.

17 JUDGE PRIDGIN: Mr. Eftink.

18 RECROSS-EXAMINATION BY MR. EFTINK:

19 Q. Mr. Mallory, there were questions about public
20 hearings. Since there has never been an application to the
21 county for any kind of special use permit or zoning for the
22 South Harper facility, isn't it correct that there were never
23 any public hearings in that venue?

24 A. That's correct.

25 Q. Okay. And there were hearings before the

1 Public Service Commission, but that was after the project was
2 underway and partially constructed?

3 A. Yes.

4 Q. There were questions about how many employees
5 the county has that are working on planning and zoning. Now,
6 in addition to the employees -- I think you said there were
7 about four at this time?

8 A. In the department.

9 Q. In the department. Are there also people who
10 are on planning -- on the Planning Board who are not counted
11 within that number of four?

12 A. That's correct.

13 Q. Those are people not employed by the county?

14 A. That's correct.

15 Q. How many on the Planning Board?

16 A. Six.

17 Q. And in addition to those six and those four,
18 you've got the three commissioners?

19 A. Yes.

20 Q. And those are all different people?

21 A. Yes.

22 Q. So that's a total of 13 people right there?

23 A. Yes.

24 Q. Okay. And then, of course, the county engages
25 outside people like attorneys --

1 A. Yes.

2 Q. -- and engineers when it needs to?

3 A. That's correct.

4 MR. EFTINK: Okay. Thank you, your Honor.

5 JUDGE PRIDGIN: Mr. Eftink, thank you.

6 Mr. Youngs.

7 RE-CROSS-EXAMINATION BY MR. YOUNGS:

8 Q. Mr. Mallory, in response to some of the
9 questions that Mister -- excuse me, Commissioner Gaw asked
10 you, there is a difference between the comprehensive plan and
11 the zoning regulations. Correct?

12 A. Yes.

13 Q. There are two separate sets of documents?

14 A. Yes.

15 Q. The comprehensive plan establishes the vision?

16 A. Yes.

17 Q. And the zoning ordinance is the method by
18 which that vision is achieved; is that correct?

19 A. Yes.

20 Q. And regulated?

21 A. Yes.

22 Q. All right. One of the things that you would
23 do with regard to the zoning regulation side of things in
24 determining whether or not the facility was appropriate at
25 South Harper would be to compare that facility with the

1 surrounding uses, would it not?

2 A. Yes.

3 Q. And determine the compatibility of that
4 facility with the existing uses that are adjacent to it?

5 A. Yes.

6 Q. And one of those adjacent uses, you'd agree,
7 is the gas compressor station that's located just north of the
8 plant site on South Harper Road. Correct?

9 A. Yes.

10 Q. And it's depicted on the overhead, as I'm
11 showing it to you?

12 A. Yes. It's been there for several years.

13 Q. There were some questions from Commissioner
14 Clayton, I believe, about what the county is saying in this
15 proceeding in terms of Aquila's obligation to, in any event,
16 come to the county and go through your land use regulatory
17 process. You recall that question?

18 A. Yes. That's my feeling, yes.

19 Q. And I think we've been around about this with
20 regard to the Court of Appeals' decision. You've read it and
21 maybe on different occasions when you read it, you come to
22 different conclusions about what the court was saying. Is
23 that fair to say?

24 A. Yes. Very fair.

25 Q. And you understand that Aquila's position in

1 this proceeding is that the Court of Appeals said that Aquila
2 is obligated to either go to the county or to the Public
3 Service Commission for approval for the facilities. You
4 understand that?

5 A. I understand that's your position.

6 MS. MARTIN: Objection, your Honor. Asks for
7 a legal opinion, calls for speculation about what Aquila's
8 position may or may not be in this case.

9 MR. YOUNGS: Excuse me. Mr. Mallory has
10 spoken to what his opinion is regarding the obligation of
11 Aquila and I think it's appropriate for him to just briefly
12 explain.

13 JUDGE PRIDGIN: I would normally sustain, but
14 because he has gone into his opinion on what he believes
15 Aquila needs to do, I will let counsel cross on that.

16 BY MR. YOUNGS:

17 Q. Do you recall my question?

18 A. Say it again.

19 Q. You recall that Aquila's position is that the
20 Court of Appeals' decision says we go either through county
21 zoning or we come to the PSC?

22 A. That's Aquila's position.

23 (Exhibit No. 124 was marked for
24 identification.)

25 BY MR. YOUNGS:

1 Q. And, Mr. Mallory, I wasn't expecting to use
2 this, so I don't have extra copies, but I will put it up on
3 the overhead so everyone can see it and provide copies at some
4 point here.

5 I'm showing on the overhead projector what's
6 been marked as Exhibit 124, was also Deposition Exhibit No. 10
7 in your deposition of April 16th. Correct?

8 A. Yes.

9 Q. And this is the news release that you issued
10 on December 1st, 2004 announcing that the county had sued
11 Aquila; is that correct?

12 A. Yes.

13 Q. About halfway through the first paragraph,
14 I've underlined a phrase where it says, As such, Cass County
15 is left with no alternative but to file a lawsuit against
16 Aquila to prevent them from building power plants wherever it
17 pleases -- and the underlined portion is -- Without having
18 first secured specific authority or permission to construct
19 the power plant from the county or from the Public Service
20 Commission as required by Missouri law.

21 Those were your words, were they not?

22 A. Yes.

23 Q. Commissioner Davis asked you some questions
24 about the Aries facility, and I want to be real clear. The
25 county did approve zoning for the Aries facility. Correct?

1 A. Yes.

2 Q. Okay. The facility that the Planning Board
3 voted not to recommend for special use permit in July of 2004
4 was the facility located at Camp Branch -- or proposed to be
5 located at Camp Branch?

6 A. That's correct.

7 Q. Just so we're clear, the Aries plant at the
8 time zoning was applied for and ultimately approved was what's
9 referred to as a merchant plant; is that correct?

10 A. That's correct.

11 Q. And you understood that it was not owned by
12 the regulated entity that is here before the Commission,
13 Aquila, Inc.?

14 A. Yes.

15 Q. In fact, it was owned by or the interest was
16 held by an unregulated subsidiary of Aquila. Correct?

17 A. Yes.

18 Q. And as a merchant plant, you understood that
19 it was not regulated by the PSC?

20 A. Yes.

21 MR. YOUNGS: Those are all the questions I
22 have. Thank you, Judge.

23 JUDGE PRIDGIN: Mr. Youngs, thank you.

24 Mr. Uhrig?

25 MR. UHRIG: I just have a few questions.

1 RE-CROSS-EXAMINATION BY MR. UHRIG:

2 Q. Commissioner Mallory, good morning, good
3 afternoon, whatever we're at.

4 A. Whatever it is, yes.

5 Q. My name's Matt Uhrig. I represent Frank
6 Dillon and some of the other neighbors that live by this
7 plant.

8 A. Yes.

9 Q. Mr. Youngs was asking you some questions about
10 the similarities between this Commission and the Planning and
11 Zoning Commission in Cass County. One question I had for you
12 is, any hearing that the Planning and Zoning Commission of
13 Cass County -- any hearing that you would have, where would
14 that hearing be held?

15 A. At the county courthouse.

16 Q. And that's in Harrisonville?

17 A. Harrisonville, yes.

18 Q. I also want to talk to you about the gas
19 pumping facility. I believe that's owned by Southern Star; is
20 that correct?

21 A. I think that's correct.

22 Q. And we've heard it referred to as a facility,
23 we've heard it referred to as a plant. But it's not a plant
24 at all, is it?

25 A. Not to my knowledge, no. I've referred to it

1 more as a pumping station.

2 Q. It's a pumping station?

3 A. Yeah.

4 Q. And you've driven by it before?

5 A. Yes.

6 Q. Before Aquila built the South Harper plant, I
7 believe you said?

8 A. Yes.

9 Q. And so you're familiar with it?

10 A. Yes.

11 Q. And it's currently zoned industrial. Correct?

12 A. No.

13 Q. What is it currently zoned as?

14 A. Agriculture.

15 Q. It's within an agriculture area?

16 A. Yes. Uh-huh.

17 Q. And it was grandfathered into that area; is
18 that correct?

19 A. Yes. Long before my time.

20 Q. Before your time?

21 A. Yes, sir.

22 Q. And that's because it was there before Cass
23 County instituted any sort of zoning ordinances or
24 regulations; isn't that correct?

25 A. That's my understanding.

1 Q. And as I said before, it is, in fact, not a
2 plant at all. Correct?

3 A. That's correct. In my opinion, it's not.

4 Q. They're not refining anything there. Correct?

5 A. Right.

6 Q. And it's true that they're not extracting
7 natural gas from that area?

8 A. That's correct.

9 Q. And it's simply there to pressurize Southern
10 Star's pipeline?

11 A. That's my understanding.

12 Q. If Southern Star wanted to install a similar
13 facility under the 2003 plan, would they be required to obtain
14 rezoning?

15 A. Yes.

16 Q. And if Southern Star wanted to install a
17 similar facility under the 2005 plan in a multi-use tier or
18 district, would they be required to obtain a special use
19 permit?

20 A. Yes. In my opinion.

21 MR. UHRIG: I have no further questions.

22 JUDGE PRIDGIN: Mr. Uhrig, thank you.

23 Any further recross?

24 MR. YOUNGS: Judge, in the continuing saga of
25 my mishandling of exhibits, counsel's reminded me that I have

1 not offered Exhibit No. 124, which I will do at this time.

2 JUDGE PRIDGIN: Thank you. Any objections to
3 Exhibit 124?

4 Hearing none, 124's admitted.

5 (Exhibit No. 124 was received into evidence.)

6 JUDGE PRIDGIN: Any further recross?
7 Redirect?

8 Ms. Martin, do you know how long your redirect
9 will be?

10 MS. MARTIN: I won't be done in 5 minutes, but
11 I would hope to be done by 20 to 25 after maybe.

12 JUDGE PRIDGIN: Since it is virtually noon,
13 this might be a convenient time -- I hate to bind Mr. Mallory
14 over, but this might be a convenient time to break. I show
15 the clock on the wall to be about five after 12:00. Let's try
16 to resume roughly 1:15. Is there anything else from counsel
17 before we go off the record?

18 All right. Thank you. We will adjourn for
19 lunch. We'll resume at 1:15.

20 (A recess was taken.)

21 JUDGE PRIDGIN: All right. We're back on the
22 record. If I understand correctly, we left off with Cass
23 County's redirect of Mr. Mallory; is that correct? All right.
24 Ms. Martin, will you be examining?

25 MS. MARTIN: Yes, your Honor.

1 JUDGE PRIDGIN: All right. Mr. Mallory, I'll
2 just remind you you're still under oath, sir.

3 THE WITNESS: Yes, your Honor.

4 JUDGE PRIDGIN: Ms. Martin, when you're ready.

5 REDIRECT EXAMINATION BY MS. MARTIN:

6 Q. First of all, Mr. Mallory, I think Judge
7 Pridgin would agree with me that you probably get the gold
8 star of all the witnesses in nearly five days of hearings who
9 actually followed the instructions of the Court by answering
10 yes or no to questions. And as a result, I do have some
11 redirect for you to allow you to explain some of your
12 responses. Would that be okay?

13 A. Yes.

14 Q. With respect to the comprehensive plan and
15 zoning ordinance in Cass County, could you describe please, to
16 the best of your ability, the difference between the
17 comprehensive plan and a zoning ordinance?

18 A. In my opinion, the comprehensive plan is, like
19 I said before, the vision that's been laid out by the county
20 Planning Board with the input from citizens of the county,
21 leadership in the city community. And that indicates a way
22 that we see that the county should grow.

23 Q. And, in fact, the document that has been
24 previously introduced as Exhibit 108, which is the
25 comprehensive plan update for 2005, I don't believe you have

1 this in front of you Mr. Mallory. I'm showing you. Is this
2 the 3-ring binder -- and I'm demonstrating -- the volume of
3 material that comprises the 2005 Comprehensive Plan, Zoning
4 Ordinance and Subdivision Regulations? Is that your
5 understanding?

6 A. That's correct.

7 Q. Behind each of the tabs in this 3-ring binder
8 are the separate component parts of either the comprehensive
9 plan, the zoning regulations, the subdivision regulations and
10 a procedural manual; is that correct?

11 A. That's correct.

12 Q. Now, Mr. Youngs introduced an exhibit, I
13 believe it was Exhibit 118, and that was a copy of the portion
14 of this 3-ring binder, which is the comprehensive plan. And
15 I'm going to refer your attention to Page 3 of Exhibit 118.
16 I'm also going to put it up on the overhead so everyone has a
17 chance to take a look at that.

18 And do you see, sir, on Page 3 the portion of
19 the document that begins, How the master plan is used?

20 A. Yes.

21 Q. If you have questions with respect to the
22 integration of the comprehensive plan and the zoning ordinance
23 where, Mr. Mallory, would you go to get those questions
24 answered?

25 A. The comprehensive plan.

1 Q. To the documents themselves. Is that --

2 A. Yes.

3 Q. -- your understanding?

4 A. Yes.

5 Q. And with respect to how the master plan is
6 used, on this particular page of the comprehensive plan in the
7 second full paragraph, it provides, does it not, The master
8 plan is the legal framework on which the zoning and
9 subdivision regulations are enacted and amended by the County
10 Commission on recommendations from the Planning Board. These
11 two land use regulatory ordinances shape the locations, type,
12 quality and comprehensiveness of the physical development of
13 Cass County.

14 While the plan outlines recommended
15 modifications to current unified development code regulations
16 in order to implement its recommendations, it should not be
17 viewed as a zoning document.

18 Have I read that correctly?

19 A. Yes.

20 Q. And does that, Mr. Mallory, in your mind,
21 capture the distinction or difference between the
22 comprehensive plan and the zoning document?

23 A. Yes, it does.

24 Q. Now, if I'm going to make an application in
25 Cass County to develop a project and I want to know where the

1 procedures are with respect to how I go about applying to
2 develop that project, do I look for those procedures in the
3 comprehensive plan or do I look in the zoning ordinance?

4 A. Zoning ordinance.

5 Q. And the zoning ordinance is where the actual
6 process is described by which an applicant would apply either
7 to rezone property or for a special use permit application; is
8 that correct?

9 A. That's true.

10 Q. Now, you've described in response to questions
11 that the comprehensive plan is the vision of the county, but
12 the zoning ordinance is the actual designation of permitted
13 uses for land within the county; is that correct?

14 A. Yes.

15 Q. And as this document, Page 3 of the
16 comprehensive plan, notes, the comprehensive plan is not the
17 zoning document; is that correct?

18 A. That's correct.

19 Q. And so with respect, for example, to the South
20 Harper tract and the Peculiar substation tract, how are those
21 tracts zoned today --

22 A. Agriculture.

23 Q. -- in Cass County?

24 A. Agriculture.

25 Q. How were those tracts zoned in 2004?

1 A. Agriculture.

2 Q. How were those tracts zoned in 1997?

3 A. Agriculture.

4 Q. How were those tracts zoned in 1959, the first
5 year when Cass County enacted a zoning ordinance?

6 A. Agriculture.

7 Q. Are you aware, Mr. Mallory, of any application
8 whatsoever, whether for rezoning or for a special use permit,
9 that has been filed at any time since 1959 with respect to
10 either the Bremer tract, which is the South Harper plant, or
11 the Peculiar substation site, to change permitted uses on
12 those sites --

13 A. No.

14 Q. -- from agricultural to something else?

15 A. No. I'm not aware of any.

16 Q. The notion of permitted uses -- well, hold on
17 just one moment. I'm going to refer you to another page, if
18 we can, in the comprehensive plan.

19 Turn, if you could, to Page 5 -- actually
20 Page 4, Mr. Mallory. I think I need better contacts, but I'm
21 going to do my best here. The zoning order is described in
22 the comprehensive plan as the legislative tool used for
23 implementing the comprehensive plan; is that correct?

24 A. Yes.

25 Q. And by distinction from the comprehensive

1 plan, the zoning order is described as delineating the
2 boundaries for land use districts to regulate use, density of
3 population, lot coverage and bulk of structures; is that
4 correct?

5 A. Yes.

6 Q. On the next page of the comprehensive plan,
7 Page 5, there is discussion, is there not, of the role of the
8 Planning Board; is that correct?

9 A. Yes.

10 Q. And in the first full paragraph is there
11 discussion --

12 MR. WILLIAMS: Judge --

13 JUDGE PRIDGIN: I'm sorry. Did we have
14 something from counsel?

15 MR. WILLIAMS: I'll wait until she finishes.

16 JUDGE PRIDGIN: All right. Thank you.

17 BY MS. MARTIN:

18 Q. In the first full paragraph is there
19 discussion with respect to the role of the Planning Board in
20 connection both with the comprehensive plan and the zoning
21 ordinance?

22 MR. WILLIAMS: Judge, if I might object at
23 this point. She's just asking the witness to verify what's in
24 the exhibits already and she's asking leading questions on
25 redirect.

1 JUDGE PRIDGIN: I will sustain at least on the
2 leading. If you can try not to lead the witness, ask more
3 open-ended questions.

4 MS. MARTIN: I'll do my level best. Thank you
5 very much, your Honor.

6 BY MS. MARTIN:

7 Q. What discussion, if any, is contained in this
8 section on the role of the Planning Board about the Planning
9 Board's role in connection with the comprehensive plan and
10 zoning?

11 MR. WILLIAMS: Judge, I'm going to object to
12 that question. She's just asking to read the exhibit. It's
13 already in evidence.

14 MS. MARTIN: Your Honor, I think the line of
15 questioning on cross-examination and from the Commissioners
16 has demonstrated some confusion in the record, and I think
17 it's appropriate for me on redirect examination to make it
18 clear the integration between the comprehensive plan and the
19 zoning ordinance. I'm simply trying to make sure the record
20 is clear with respect to the distinction between those two and
21 the relative role of the Planning Board and the Commission or
22 the BZA.

23 JUDGE PRIDGIN: All right. I'll overrule and
24 let Mr. Mallory answer the question.

25 THE WITNESS: Ask the question again, please.

1 BY MS. MARTIN:

2 Q. What, if any, information is provided with
3 respect to the role of the Planning Board in the approved
4 comprehensive plan for Cass County both as to zoning and as to
5 the master plan?

6 A. Well, the primary responsibility is to accept
7 public input with regard to what changes are going to be made
8 to the plan and how it's going to interact with the zoning
9 regulations.

10 Q. And do you understand then, Mr. Mallory -- or
11 let me ask the question this way. If I want to develop
12 property in Cass County, regardless the manner in which the
13 comprehensive plan suggests the vision of the county on that
14 property, what is my fundamental obligation with respect to
15 zoning before I can develop that property?

16 A. Those requirements are stipulated and spelled
17 out in the zoning regulations.

18 Q. And you mean by that what with respect to uses
19 permitted on a particular tract?

20 A. Any use permitted, yes.

21 Q. And by permitted use, Mr. Mallory, is there
22 any discussion in the zoning ordinance itself, which is
23 Exhibit 108, about what are or are not permitted uses
24 depending upon a zoning classification?

25 A. Yes.

1 Q. Is there a chart of any kind contained in the
2 back portion of the zoning ordinance that lists uses and then
3 describes whether they would or would not be permitted on
4 various classifications of land?

5 A. Yes.

6 Q. Mr. Mallory, much has been discussed with
7 respect to the comprehensive plan adopted in 2005. I do want
8 to show you the land use tier map that would have been a part
9 of the comprehensive plan of 2003. Can I do that?

10 And do you recognize -- and I realize this
11 isn't the totality of the document, but rather the lower part
12 of the document. And this is a document which is Schedule
13 BGP-4, Mr. Peshoff's Schedule 4. But do you note the location
14 of the South Harper plant on this document on the screen?

15 A. Yes.

16 Q. And in the 2003 comprehensive plan, that plant
17 would not have been located in a multi-use tier; is that
18 correct?

19 A. That's correct.

20 Q. Now, Mr. Mallory, by way of contrast, we're
21 now looking at the same document that Mr. Youngs showed you
22 during your cross-examination, which is BGP-3; is that
23 correct?

24 A. Yes.

25 Q. Is this the tier map from the 2005

1 comprehensive plan?

2 A. It appears to be.

3 Q. And although we don't have them side by side,
4 there is, in fact, an expanded area of multi-tier use
5 reflected in the 2005 plan; is that correct?

6 A. That's correct.

7 Q. Mr. Mallory, can you tell me what, if any,
8 influence it would have on a Commission's -- and by this I
9 mean the County Commission's -- evaluation of a rezoning or
10 special use application for land in a multi-use tier that the
11 proposed development is immediately on the edge of that tier?
12 Do you understand my question?

13 A. No. Would you restate that?

14 Q. Is it influential at all to the county when it
15 evaluates an application for rezoning or special use permit,
16 where within a multi-use tier that proposed development might
17 be located?

18 MR. YOUNGS: Excuse me. Let me just pose an
19 objection. Indirectly I think the question poses a question
20 to the witness that's specific to the case of Aquila and the
21 South Harper plant, because it's obviously on the edge of the
22 multi-use tier.

23 I think the witness's prior testimony is that
24 he's not formulated an opinion one way or the other about
25 anything with regard to zoning. And I think it would be

1 improper for him to do so now when I don't have a chance to
2 ask him any more questions about it. So I think the question
3 lacks foundation based on his prior testimony.

4 MS. MARTIN: Well, your Honor, I'm not asking
5 his opinion about any particular development. I'm asking only
6 whether it's a factor in evaluating the application, which is
7 say fair line of redirect examination given the cross that has
8 occurred to this point where within a multi-use tier a
9 proposed development might be located.

10 JUDGE PRIDGIN: All right. I'll overrule and
11 let him answer.

12 BY MS. MARTIN:

13 Q. Mr. Mallory, do you understand the question?

14 A. Yes.

15 Q. Can you provide a response?

16 A. Yes.

17 Q. What is your response?

18 A. I think where it's located could be a factor.

19 I think where it's located could be a factor.

20 Q. And explain, if you could, why you say that.

21 A. Because I think in any kind of development
22 where you go from one zone to another, it should be a
23 graduated change, not an abrupt change.

24 Q. And whether or not that would be the case with
25 respect to a particular application, can you explain to the

1 Commission what the role of the multi-use tier designation is
2 meant to be with respect to implementation of zoning
3 applications in Cass County?

4 A. Well, in my opinion, the multi-tier system is
5 to give flexibility for the planning and development of the
6 county. And without the multi-use -- multi-tier district, I
7 think that's somewhat hampered.

8 Q. And so the multi-use tier is meant to give the
9 county flexibility. Is the multi-use tier in any manner meant
10 to obligate the Commission one way or the other with respect
11 to the approval of a zoning application?

12 A. Not in my opinion.

13 Q. Now, Mr. Mallory, while we have this
14 particular document up here, if we can, I'm going to jump to
15 something else you were asked about because this is a natural
16 time to ask the question.

17 You were asked by Mr. Youngs on recross about
18 the Southern Star gas compressor facility. Do you recall
19 that?

20 A. Yes.

21 Q. And when you look at the map behind you, can
22 you locate where that facility is?

23 A. Yeah, pretty well. I think here somewhere
24 (indicating).

25 Q. Do you recognize where the South Harper plant

1 site is, the road?

2 A. Yes.

3 Q. And do you understand the Southern Star
4 compressor facility to be the little notch in that tract?

5 A. Yes.

6 Q. And can you point to that?

7 A. The little cutout, the U (indicating).

8 Q. Is that area, the Southern Star gas
9 compressor, the only use within the area around the plant that
10 is an industrial use, to your knowledge?

11 A. To my knowledge, it is.

12 Q. How would you describe all of the other use
13 around this South Harper plant as reflected -- or based on
14 your knowledge, Mr. Mallory?

15 A. As residential and agriculture.

16 Q. You talked a bit about the fact that Cass
17 County is experiencing change with respect to its having
18 adopted an ordinance in January of 2004 to conduct its
19 business as a first-class non-charter county; is that correct?

20 A. Yes. Yes.

21 Q. Can you describe what you meant by that
22 testimony, Mr. Mallory?

23 A. Well, prior to that, we operated under
24 second-class county zoning rules and we had a -- the Planning
25 Board consisted of I think 17 or 18 members. And there was

1 supposed to be one of the County Commissioners a member. And
2 I felt that that in itself was inefficient. It didn't really
3 do the job the way it should be.

4 And so we worked and introduced -- got
5 legislation introduced and changed to where we, as Cass
6 County, could go to first-class county -- non-chartered
7 first-class county. And that reduced the number of Planning
8 Board members to six. And we felt like it's a better way to
9 handle zoning in Cass County.

10 Q. Is Cass County growing?

11 A. Cass County is the fastest growing county in
12 the state of Missouri, the last report I had.

13 Q. What, if anything, impact has that had on your
14 Staff and its ability, frankly, to keep up with respect to
15 updates of official zoning maps?

16 A. We can't keep up.

17 Q. Is there any doubt, Mr. Mallory, in your mind
18 that the tract where the South Harper plant is located and the
19 substation tract is located are, in fact, zoned agriculture?

20 A. They are zoned agriculture.

21 Q. Now, Mr. Mallory, you had discussion with
22 Mr. Youngs about the process you utilized by the county from
23 time to time to hire experts to assist it in evaluating
24 applications. Do you recall that testimony?

25 A. Yes.

1 Q. And that testimony was in connection with your
2 rebuttal testimony at Page 13, Line 10, if you have that in
3 front of you, sir.

4 A. Yes.

5 Q. In particular, Line 10 through the first part
6 of Line 13, do you recall Mr. Youngs directing your attention
7 to that testimony?

8 A. Yes.

9 Q. And you were talking about the fact that, at
10 least in your opinion, the county possesses unique knowledge
11 and experience with respect to its zoning ordinance and
12 development plan and is in a superior position to evaluate the
13 propriety of a proposed use.

14 Do you recall that testimony?

15 A. Yes.

16 Q. What do you mean by that, Mr. Mallory?

17 A. I mean that the people that we have in the
18 zoning office down there know more about Cass County zoning
19 than anyone else, and that's what they're hired to do. I
20 certainly am not an expert on zoning issues and hope I haven't
21 tried to convey that to anybody today because I'm not.

22 They work for me and they do the job that I
23 ask them to do. And there are times when we're just
24 overwhelmed with new work coming in and we do from time to
25 time utilize consultants for that.

1 Q. And your response to -- or excuse me, your
2 discussion about unique knowledge and being in a superior
3 position was actually in response to a propounded question
4 with respect to the relative role the Cass County facility
5 should play in siting power plants as compared to the
6 Commission; is that correct?

7 A. That's correct. And I -- I guess I refer to
8 Mr. Wilson who's been there for many years and the history
9 that he has of the changes that's gone on. And it would
10 make -- it seems to me it would make sense that that's where
11 efforts should be expended with regard to trying to determine
12 where a power plant should be located.

13 Q. Are you aware of any other times when the
14 Public Service Commission has been asked to interpret whether,
15 for example, the 2003 comprehensive plan or the 2005
16 comprehensive plan in Cass County ought to apply to a proposed
17 development?

18 A. Not to my knowledge.

19 Q. Are you aware of any other times where the
20 Public Service Commission has been asked to interpret or apply
21 what the county's vision might be with respect to the
22 implementation of its comprehensive plan?

23 A. Not to my knowledge.

24 Q. Are you aware of any other times where the
25 Public Service Commission has been asked to interpret or apply

1 whether rezoning or a special use permit application should be
2 granted in Cass County in keeping with its vision?

3 A. Not to my knowledge.

4 Q. And, Mr. Mallory, the folks who make those
5 decisions in Cass County, do they do that on a regular basis?

6 A. Yes, they do.

7 Q. Are you aware of any opportunities or
8 circumstances that the Public Service Commission might have
9 had to spend any significant amount of time evaluating land
10 use issues in Cass County?

11 A. Not to my knowledge.

12 Q. Who, as between Cass County, and with due
13 respect, the Public Service Commission do you feel stands in a
14 better position to anticipate growth and change and the needs
15 of the citizens of Cass County?

16 MR. YOUNGS: I'll object to that question,
17 your Honor. That calls for an opinion of a lay witness. I
18 don't think it's proper redirect.

19 MS. MARTIN: I think it's appropriate given
20 the scope of his testimony and the things that he's been asked
21 today. That's precisely the scope and purpose of his
22 testimony.

23 JUDGE PRIDGIN: I'll overrule.

24 BY MS. MARTIN:

25 Q. Mr. Mallory?

1 A. Ask again.

2 Q. Who, as between Cass County and, due respect,
3 this Commission do you believe stands in a better position to
4 evaluate the growth and the needs of the citizens of Cass
5 County and the vision of Cass County with respect to its land
6 use needs?

7 A. There's no question about that at all. The
8 local people should be the ones to make that decision --

9 Q. Now --

10 A. -- or should be able to evaluate.

11 Q. And I didn't mean to interrupt you,
12 Mr. Mallory.

13 By contrast, is Cass County seeking any right
14 to play a role in the determination of whether power plants
15 are needed in the sense of energy needs?

16 A. No. I'm -- we are not. That's the Public
17 Service Commission's job, not ours.

18 Q. And by the way, re--

19 A. As I understand it. I guess I should say it
20 that way.

21 Q. As I recall, Mr. Youngs asked you on
22 recross-examination about a press release that had been issued
23 by Cass County. Do you recall that testimony?

24 A. Yes.

25 Q. And do you recall that you also talked with

1 Mr. Youngs about that very same press release in your
2 deposition?

3 A. Yes.

4 Q. And do you recall that Mr. Youngs, in your
5 deposition, pointed out to you the phrasing of Aquila not
6 having sought either the approval of this Commission or of the
7 county in connection with that plant?

8 A. Yes. I recall that.

9 Q. Did Mr. Youngs ask you what you meant by that?

10 A. Yes.

11 Q. What did you tell Mr. Youngs in your
12 deposition?

13 A. That both of them had to apply.

14 Q. You did not look at the word "or" as
15 exclusive; is that correct?

16 A. Absolutely not.

17 Q. Now, Mr. Mallory, there was some discussion
18 about the procedure in Cass County and how long it may take.
19 And you recall discussing 60 days potentially for a Planning
20 Board and 60 days in addition for the BZA or the Commission?

21 A. Yes, I do.

22 Q. Let's take an example from real life. Can we?

23 A. Yes.

24 Q. There is evidence in this record that the Camp
25 Branch application was filed on June 9th. Do you have a

1 recollection that an application was filed?

2 A. That seems fairly well right.

3 Q. And there is evidence in this record that the
4 public hearing before the Planning Board was on July 13th. Do
5 you have an independent recollection of that?

6 A. Yes.

7 Q. And there is evidence in this record that
8 there was scheduled a meeting before the Board of Zoning
9 Adjustments on August the 27th of 2004 that was continued at
10 the request of Aquila. Do you have a recollection of that?

11 A. That's correct.

12 Q. The time frame between the filing of the
13 application on June 9th and the potential disposition of that
14 application on August the 27th is less than 120 days by a
15 considerable amount, is it not?

16 A. Yes.

17 Q. You testified in response to questions that
18 were asked of you by Commissioner Davis about the Aries plant.
19 You had direct involvement in that plant, didn't you?

20 A. Yes.

21 Q. And you were a participant in what manner?

22 A. I worked with representatives from Aquila with
23 the people in that area to promote the plant and essentially
24 PR information, helped them with that.

25 Q. Do you have a recollection, as you sit here

1 today, the time frame that it took from the point of
2 application for rezoning and other land use approvals for that
3 plant and the ultimate decision?

4 A. I don't remember the exact time, but I know it
5 wasn't 120 days when -- four months, no.

6 Q. I want to talk with you, if we can, about that
7 Camp Branch application. In particular, I want to talk to you
8 about the conversation that you had with Dave Kreimer and
9 Glenn Keefe after the Planning Board hearing. Do you recall
10 that conversation?

11 A. Yes.

12 Q. Mr. Mallory, how long had you known Dave
13 Kreimer?

14 A. Since 1999, I think is when the Aries plant
15 went in.

16 Q. And so had you had a working relationship with
17 Mr. Kreimer in connection with the successful application for
18 rezoning for the Aries plant?

19 A. Yes.

20 Q. And you had what you considered -- or did you
21 have what you considered to be a good working relationship
22 with Mr. Kreimer?

23 A. I felt it was excellent.

24 Q. When Mr. Kreimer and Mr. Keefe came to you,
25 Mr. Mallory, after the Planning Board hearing, how would you

1 describe the tenor of that meeting or discussion?

2 A. There was no acrimony at all. It was very
3 congenial. And I felt that Dave was just asking me my opinion
4 on what the -- Camp Branch, what they would do.

5 Q. And did you feel some obligation to be honest
6 with him at that time?

7 A. Well, sure.

8 Q. And is that why you relayed to them that you
9 were concerned there was not a snowball's chance in hell?

10 A. Yes, ma'am.

11 Q. Now, Mr. Mallory, did you discuss with
12 Mr. Kreimer at that time any differences between the manner in
13 which Aquila had approached the Camp Branch application
14 versus, say, the Aries application?

15 A. Well, the difference --

16 MR. YOUNGS: Excuse me. I need to interpose
17 an objection. There's this constant referral to the Aries
18 facility as an Aquila facility and that's just not the truth
19 and I'm getting tired of hearing it. I object to it. It
20 misstates the record in this case. It was not an Aquila
21 facility and I need that objection noted for the record.

22 MS. MARTIN: In fairness, Mr. Youngs, I have
23 no intent by asking these questions to assume in any manner
24 that the Aries facility was a part of the regulated side, but
25 the same personnel for Aquila were working on the promotion of

1 that application, Mr. Kreimer namely being one of them. I
2 think the approach taken to garner public support is relevant
3 for the record by way of comparison.

4 MR. YOUNGS: My objection is to the
5 characterization of the Aries facility as an Aquila facility.

6 JUDGE PRIDGIN: Well, and I'll overrule. If
7 she wants to use the word "Aquila," that's fine. I think the
8 record is abundantly clear that Aries is an unregulated
9 utility on the merchant side. I think the Commission's well
10 aware of that.

11 MS. MARTIN: As am I. Thank you.

12 BY MS. MARTIN:

13 Q. Mr. Mallory, do you recall the question?

14 A. Have to do it again.

15 Q. Is there a comparison, in your mind, having
16 been involved in the Aries' application, with the process
17 undertaken by Aquila or some entity it controlled in garnering
18 support for that application versus the manner in which the
19 application process proceeded on Camp Branch?

20 A. Yes. I'll just say it this way. The
21 individuals that were involved with the power plant in
22 Pleasant Hill did a lot of work ahead of time talking with
23 people in the area, with school officials, city officials,
24 county officials, went to great lengths to make sure they
25 understood what was going on and how it was going to happen.

1 And as opposed to the Camp Branch facility,
2 that one was just like, you know, somebody put a hand grenade
3 in your shorts and said, Run.

4 Q. Not a pretty picture, Mr. Mallory.

5 A. Well, I'm just telling you that's the
6 perception people had of it.

7 Q. And I appreciate that. Because I think that
8 helps to explain the context of your statement, There's not a
9 snowball's chance in hell.

10 A. Absolutely.

11 MR. YOUNGS: Now I object -- I know we're
12 trying to get Mr. Mallory on his way and I appreciate that,
13 but I do have to object to leading questions like that one, as
14 funny as it is.

15 JUDGE PRIDGIN: I'll overrule just being at a
16 loss for words, I'm sorry. It distracted me.

17 MS. MARTIN: It was terribly distracting, but
18 I will rephrase, in fairness.

19 BY MS. MARTIN:

20 Q. Mr. Mallory, your statement, Not a snowball's
21 chance in hell, what, if any, relation did that statement have
22 to the county's view generally about power plants within
23 unincorporated Cass County?

24 A. Well, it's a matter of record the county is
25 not opposed to power plants in Cass County. We have one.

1 Another one was scheduled to become before the BZA and it was
2 continued. And we have another one that's in the county now
3 that the county's never had the opportunity to even act on.

4 So if you want to look at the record of Cass
5 County and power plants, we are supportive of power plants.
6 We're not against power plants. And -- now, I would go on and
7 say there's probably three or four cities in Cass County right
8 now that would take a power plant.

9 Q. After the Camp Branch application, did the
10 county receive any notoriety or a plaque in recognition or
11 appreciation for its work from any source?

12 A. On which one?

13 Q. After the Camp Branch application -- or the
14 Aries' application.

15 A. No.

16 Q. After the Aries' application?

17 A. Oh, the Aries, yes. We worked very well with
18 them on that.

19 Q. Who was that plaque from or notoriety from?

20 A. MEP, Aries. I think it is MEP.

21 Q. Now, you made a comment a couple of times --
22 and I just want to follow up on this because I think it's
23 important to explain why, but you made a comment a couple of
24 times during cross-examination that you have not, yourself,
25 ever gone by to look at the South Harper plant; is that

1 correct?

2 A. Not since construction began, no.

3 Q. Why?

4 A. I don't want to prejudge it. I've said that a
5 hundred times through this thing.

6 Q. And related to that, you also talked in your
7 testimony about the fact that you have received numerous
8 comments from constituents about noise or other issues they
9 may have personally about this plant. What, if any,
10 independent investigation have you done with respect to those
11 complaints?

12 A. None.

13 Q. Why?

14 A. I don't feel it's my place to do that at this
15 point in time. I'd be going in trying to determine something
16 about the plant and I've never had a chance to look at the
17 plant and I'm not going to until they come through the county
18 for zoning on it.

19 Q. There was a lot of discussion with you on
20 cross-examination, particularly by Mr. Youngs, with respect to
21 the Peculiar annexation process. Do you recall that line of
22 testimony?

23 A. Yes.

24 Q. You were asked several questions about whether
25 you ever had or had not expressed any objection to the

1 annexation or even to the proposed plant itself. Do you
2 recall those questions?

3 A. Yes, I do.

4 Q. And, in particular, Mr. Youngs referred you to
5 Page 10 of your surrebuttal, if you could turn to that,
6 please, Line 12.

7 A. Yes.

8 Q. There are two sentences there. The county has
9 never expressed or held a view or opinion opposing a plant or
10 substation is the first sentence; is that correct?

11 A. Yes.

12 Q. And you've already testified that, of course,
13 that is your testimony here today as it was at the time you
14 filed the surrebuttal testimony; is that correct?

15 A. Yes.

16 Q. Was that the position of the county in 199--
17 or excuse me, in 2004 when Aquila started building this plant
18 without zoning?

19 A. Well, ask that again.

20 Q. Has the county ever held a view or opinion
21 opposing the plant or substation at any time?

22 A. We've never had the opportunity to do that.

23 Q. And would the county's view, with respect to
24 not having an opinion one way or the other about the plant or
25 substation, have been the same during the time when Peculiar

1 was planning to annex the land for the plant?

2 A. Yes.

3 Q. Now, by contrast, Mr. Mallory, during the time
4 frame that Peculiar was talking about annexing the South
5 Harper plant site, were you aware whether Aquila had to buy a
6 separate tract for a substation?

7 A. I was aware that they were getting land for a
8 substation, yes.

9 Q. And Mr. Fischer has testified that he had a
10 conversation with you in late September of 2004 about the
11 proposed substation site. Did you report to Mr. Fischer or to
12 Aquila what the county's requirements would be with respect to
13 the substation site?

14 A. I don't recall that conversation. Not well
15 enough that I could say yes or no.

16 Q. Did the county have an expectation in
17 September of 2004 with respect to what would have to be done
18 with the substation site since it was going to be in
19 unincorporated Cass County?

20 A. Yes. It would have had to go through zoning.

21 Q. And you're aware that Aquila did, in fact,
22 file an application for rezoning of that site that it
23 subsequently withdrew; is that correct?

24 A. Yes.

25 Q. Is the position of the county that the

1 substation site, which was zoned agriculture, would need to be
2 rezoned any different from the position of the county with
3 respect to the plant site that is now in unincorporated Cass
4 County?

5 A. Be the same circumstances.

6 Q. You've discussed with Mr. Youngs public
7 hearings that have occurred in connection with this Commission
8 proceeding. Do you recall that testimony?

9 A. Yes.

10 Q. And you discussed the fact that folks have
11 been able to come here and to provide testimony during several
12 days of proceedings before this Commission. Do you recall
13 that testimony?

14 A. Yes.

15 Q. And Mr. Youngs asked you to provide a view
16 whether at least procedurally there were some comparisons
17 between the Commission -- the Public Service Commission's
18 processes and those before the County Commission. Do you
19 recall that testimony?

20 A. Yes.

21 Q. Mr. Mallory, are you aware of any rules that
22 have been promulgated by the Public Service Commission with
23 respect to the factors or issues that are to be determined in
24 locating a power plant?

25 A. I'm not aware of any.

1 Q. Are you aware of any rules or regulations that
2 have been promulgated by the Commission that set forth a
3 procedure or process that must be followed before a power
4 plant can be cited or located?

5 A. I'm -- I'm not aware of any.

6 Q. Are you aware of any rules or processes that
7 describe for folks who might have an interest in a power
8 plant's location what standards or guidelines are to be
9 utilized by the Commission in making a decision about a power
10 plant's location?

11 A. You're still referring to the Public Service
12 Commission?

13 Q. Yes, sir.

14 A. No, I'm not aware of any.

15 Q. And are you aware of any rules or regulations
16 or guidelines or standards with respect to review of any such
17 decision by the Public Service Commission?

18 A. I'm not aware of any.

19 Q. And by contrast, Mr. Mallory, we've already
20 talked about the stacks of documents and maps and the like
21 that have been introduced into evidence with respect to the
22 rules and regulations and standards and guidelines for the
23 county; is that correct?

24 A. That's correct.

25 Q. I want to talk with you, if I can, about your

1 discussions with Norma Dunn. And Mr. Youngs has already
2 elicited from you an acknowledgment that you talked with Norma
3 Dunn about the importance of ending all the litigation; is
4 that correct?

5 A. That's correct.

6 Q. Ms. Dunn has also testified that you reported
7 to her that the county would do what the judge told the county
8 to do; is that correct?

9 A. Absolutely. That's why we gave permits all
10 along because the judge said that they could continue
11 construction during the appeal process. And we interpreted
12 that to be that you would treat them like anyone else. We
13 gave them permits, but with the little, I guess, caveat that
14 we understood that it was under litigation.

15 Q. Now, when you were having these discussions
16 with Ms. Dunn in late December 2005 and early January 2006,
17 what, to your knowledge, had the judge directed the parties to
18 do with respect to this plant?

19 A. Well, the judge -- the ruling has always been,
20 my opinion, to dismantle the plant if the appeal process
21 failed.

22 Q. And, Mr. Mallory, did you ever say anything to
23 Ms. Dunn one way or the other to suggest that the county would
24 relieve Aquila of the obligation of the trial court's
25 judgment?

1 A. No.

2 Q. When you were speaking with Ms. Dunn about the
3 need to do the right thing and to file an SUP or rezoning
4 application, was there ever any connection between that
5 discussion and the trial court's judgment?

6 A. No. The only thing that I -- you know, the
7 way I remember all of that was that I felt they should submit
8 an application for an SUP and I didn't feel like that we could
9 legally accept it as long as there was any kind of litigation
10 going on.

11 And to me, when -- I guess once the appeals
12 court the second time had gave their ruling and then Aquila
13 went to the judge to get a stay of execution -- is that the
14 right word -- and at that point in time I felt like we
15 couldn't do anything until a judge had made a final ruling,
16 and he had not done that.

17 Because his ruling had been to tear it down if
18 the appeals process failed. And it appeared the appeal
19 process failed and they've had a meeting with the judge to
20 determine are you going to tear it down or what are you going
21 to do with it. And the Judge gave them time until May 31st or
22 whatever it was.

23 Q. And once the judge gave them time, did you
24 direct counsel to advise Aquila that the county could then
25 accept a special use permit or rezoning application?

1 MR. WILLIAMS: Judge, I'm going to object
2 again to the leading form of the question.

3 MS. MARTIN: I'll rephrase the question.

4 BY MS. MARTIN:

5 Q. Once the court granted time to dismantle the
6 plant, what was the county's view with respect to its ability
7 then to accept a special use application permit or rezoning
8 application?

9 A. We felt like we could process it then once the
10 judge said that. Because we gave them another 40 days,
11 45 days, whatever it was.

12 Q. Mr. Mallory, when Cass County had to file a
13 suit on December 1st of 2004 to attempt to secure an
14 injunction against this plant, for whose benefit was that
15 action filed?

16 A. The injunction we filed?

17 Q. Yes, sir.

18 A. For the benefit of the people that live in
19 Cass County. Not just the ones near that plant, but
20 everywhere.

21 Q. And in December of 2005 when the Court of
22 Appeals affirmed Judge Dandurand's trial court judgment
23 directing that the plant had been illegally built and should
24 be dismantled, what was the county's view with respect to its
25 ability to voluntarily relieve Aquila of that obligation?

1 A. Well, I didn't feel like we could because I
2 was not going against what I thought the judge was saying --
3 well, I know what the judge said. He said, if you fail to
4 appeal, you have to tear it down.

5 Q. So when Mr. Youngs asked you whether Aquila
6 should have been able to expect Cass County to just say, Sure,
7 go ahead, get more time before having to dismantle the plant,
8 why wasn't the county willing to do that or able to do that,
9 Mr. Mallory?

10 MR. YOUNGS: I'm going to object as
11 mischaracterizing my question. I asked Mr. Mallory whether or
12 not he was capable of agreeing to a stay and indicating that
13 support for a stay to the judge. I think that's a little
14 different than what counsel is intimating in her question and
15 I object to it.

16 MS. MARTIN: I think my question captured the
17 essence of the question. It's designed basically to have
18 Mr. Mallory explain why the county didn't provide that consent
19 at that time.

20 JUDGE PRIDGIN: All right. I'll overrule and
21 let him answer.

22 BY MS. MARTIN:

23 Q. Mr. Mallory?

24 A. I felt like the judge had issued his judgment
25 and that's what he should go by. I wasn't going to interfere

1 with that.

2 Q. Again, Mr. Mallory, when that injunction had
3 been secured, for whose benefit had that been secured?

4 A. The people of Cass County.

5 Q. With respect to Mr. Youngs' question of you
6 about what had been filed by the county in opposition to
7 Aquila's motion to extend the stay, do you remember that
8 discussion?

9 A. Yes.

10 Q. And Mr. Youngs talked with you about the fact
11 that the county raised a concern in its pleading that it may
12 not have the right to consider an application to remedy an
13 illegal use. Do you remember that discussion?

14 A. Yes, I do. And I'm still not sure we have
15 that right though.

16 Q. And that's something that would have to be
17 evaluated?

18 A. Yes.

19 Q. And that's just a concern that you have, just
20 as it's a concern that you have with this Commission?

21 A. Absolutely.

22 Q. And, in fact, Mr. Mallory, the statement of
23 the county that it had that concern was raised previously. Is
24 that your recollection?

25 A. Yes.

1 Q. I'm going to show you what Mr. Youngs showed
2 you, which is Schedule NFD-2.

3 MS. MARTIN: If I could approach.

4 JUDGE PRIDGIN: You may.

5 BY MS. MARTIN:

6 Q. And, Mr. Mallory, you recognize in NFD-2 to be
7 the facsimile letter that you sent to Ms. Dunn and attached a
8 letter I had written to Christopher Reitz on August 16th,
9 2005; is that correct?

10 A. Yes.

11 Q. And if you turn to Page 2 of that letter, the
12 third complete paragraph, you see discussion with respect to
13 Aquila's ability to file a permit application?

14 A. Yes.

15 Q. Is there discussion with respect to the
16 county's concern about whether it would be permitted to see
17 that application as remediating an illegal use?

18 A. No. However Aquila will remain obligated to
19 comply with the court's judgment --

20 Q. Read it slower and out loud.

21 A. I'm sorry. It says, However, Aquila will
22 remain obligated to comply with the court's judgment, which
23 requires remediation of the existing zoning violations by
24 removal of the illegal improvements. The county is not
25 permitted to ignore the judgment or to unilaterally modify its

1 terms by permitting remediation of existing zoning violations
2 in a manner other than as directed by the court.

3 Q. So, Mr. Mallory, as of August the 16th, 2005,
4 in your view, had the county expressed its concern to Aquila
5 that the county could not use an SUP or rezoning to perhaps
6 remediate an illegal use unless directed by the court to do
7 so?

8 A. I think it's very clear.

9 Q. And yet despite that, did Aquila attempt to
10 file an SUP application on January 20th of 2006?

11 A. Yes.

12 MS. MARTIN: That's all I have, Mr. Mallory.
13 Thank you.

14 JUDGE PRIDGIN: Ms. Martin, thank you.

15 Any follow up from the Bench?

16 Assuming there's nothing further from counsel,
17 may this witness be excused?

18 Mr. Mallory, thank you very much, sir, for
19 your time and your testimony. The Commission appreciates it.

20 THE WITNESS: Thank you.

21 JUDGE PRIDGIN: Thank you very much. I
22 understand the next witness will be Mr. Peshoff and that will
23 be Cass County's final witness.

24 MS. MARTIN: That's correct.

25 JUDGE PRIDGIN: All right. If Mr. Peshoff is

1 ready. Come forward to be sworn please, sir.

2 (Witness sworn.)

3 JUDGE PRIDGIN: Thank you very much, sir. If
4 you would, please, have a seat.

5 Mr. Comley, when you're ready, sir.

6 MR. COMLEY: Just a moment, Judge.

7 JUDGE PRIDGIN: Certainly.

8 BRUCE PESHOFF testified as follows:

9 DIRECT EXAMINATION BY MR. COMLEY:

10 Q. Mr. Peshoff, would you state your full name
11 for the recorder, please?

12 A. Bruce Gregory Peshoff.

13 Q. And are you the same Bruce Gregory Peshoff
14 that caused to be filed in this proceeding two pieces of
15 written testimony styled rebuttal and surrebuttal?

16 A. Yes, I am.

17 Q. Have they also been pre-marked as Exhibit 23
18 and 24?

19 A. Yes, they have.

20 Q. Mr. Peshoff, do you have any changes or
21 corrections -- or additions or corrections to your testimony
22 today?

23 A. Yes, I do.

24 Q. Please tell us.

25 A. On Page 29.

1 Q. And that would be of your rebuttal testimony?

2 A. Of the rebuttal testimony.

3 JUDGE PRIDGIN: And, Mr. Peshoff, I'm sorry to
4 interrupt, if I can get you to just pull the microphone down
5 and be sure we're getting your voice good. I'm sorry to
6 interrupt.

7 THE WITNESS: That's fine. On Page 29
8 beginning on line 18, the sentence should read, The
9 application identifies the area for the peaking facility as
10 being located in multi-use tier and does not identify why a
11 power plant is an appropriate use within such a tier. The
12 site is actually designated within a rural density tier in the
13 2003 comprehensive plan.

14 BY MR. COMLEY:

15 Q. So as I understand your change on line 20, you
16 would change the word "but" to "and"; is that correct?

17 A. Yes.

18 Q. And then add the sentence, The site is
19 actually designated within a rural density tier in the 2003
20 comprehensive plan?

21 A. That's correct.

22 Q. One more time. On line 20, the word "but"
23 would be replaced with "and" and you would add a sentence
24 on line 21, The site is actually designated within a rural
25 density tier in the 2003 comprehensive plan.

1 Are there any other additions or changes?

2 A. Yes. On -- in that same document on Page 32
3 at Line 29 following the word "issues" and including now the
4 phrase "in the siting of non-regulated energy facilities."

5 Q. So as I understand the change between the word
6 "issues" and "includes" on line 29, you would add "in the
7 siting of non-regulated energy facilities"?

8 A. That's correct.

9 Q. Are there any other corrections to the text of
10 your testimony?

11 A. Yes. Working from different versions here.
12 On Page 26, Line 7 before the word "minimize" we should add
13 "adequately."

14 Q. So the sentence there would read, The sentence
15 is inappropriately located in agriculture district and does
16 not adequately minimize land uses, externalities for nearby
17 rural residential uses, etc.?

18 A. That's correct.

19 MR. EFTINK: What page and line was that?

20 MR. COMLEY: Page 26, Line 7.

21 MR. EFTINK: I'm sorry. Could you just read
22 the change one more time? I apologize, Mark.

23 MR. COMLEY: I'm starting with Line 6 and I'm
24 reading, The facility is inappropriately located in an
25 agriculture district and does not adequately minimize land

1 uses, externalities for nearby rural residential uses, etc.
2 It just adds the word "adequately" in front of the word
3 "minimize."

4 BY MR. COMLEY:

5 Q. Okay. Mr. Peshoff, is there any revision to
6 the schedules to your testimony?

7 A. Yes, there are two -- two of the schedules.
8 Actually, within Schedule BGP-3, Pages 4 and Pages 6 should be
9 replaced. The content of the maps do not change other than
10 the agricultural zoning is now identified on the replacement
11 maps in green.

12 Q. Okay. Let me pass these out. So we're going
13 to deal with particularly is it line -- is it map 3-B and 4-B
14 in your schedule using the different designations?

15 A. That's correct.

16 Q. I'm going to hand this out to everybody for
17 the time being.

18 MR. COMLEY: My apologies to the parties. I
19 think in preparing the revised schedules I mislabeled or
20 mis-numbered the pages. The one that you are receiving now
21 should be page -- that should be Page 4 of 7.

22 BY MR. COMLEY:

23 Q. And is there also a revision to Schedule
24 BGP-3, Page 6 of 7?

25 A. That -- that's correct.

1 Q. Can you explain the change there?

2 A. It's the exact same change. We've identified
3 the areas as having agricultural zoning and they're shown now
4 as a green color.

5 Q. So the only change is the addition of the
6 coloring?

7 A. That's the only change.

8 Q. Are there any other changes or corrections to
9 your testimony?

10 A. No, there are not.

11 Q. Mr. Peshoff, if I were to ask you the
12 questions that are contained in your rebuttal and surrebuttal
13 testimony, would your answers be the same today as corrected?

14 A. Yes, they would.

15 MR. COMLEY: Your Honor, I'd move the
16 admission of Exhibits 23 and 24.

17 JUDGE PRIDGIN: All right. Any objections?

18 Hearing none, Exhibits 23 and 24 are admitted.

19 (Exhibit Nos. 23 and 24 were received into
20 evidence.)

21 MR. COMLEY: I would tender Mr. Peshoff for
22 cross-examination.

23 JUDGE PRIDGIN: All right. Mr. Comley, thank
24 you. See if we have any cross-examination from StopAquila.
25 Mr. Eftink?

1 MR. EFTINK: Yes, your Honor.

2 JUDGE PRIDGIN: When you're ready, sir.

3 CROSS-EXAMINATION BY MR. EFTINK:

4 Q. Good afternoon, Mr. Peshoff.

5 A. Good afternoon.

6 Q. Now, we've never talked before, but my name is
7 Gerry Eftink and I represent StopAquila.org. And I'd like to
8 take the opportunity to ask you some questions this afternoon.

9 In your rebuttal affidavit, if you would turn
10 to Page 8, starting on line 25. Page 8, Line 25.

11 A. Yes.

12 Q. You say that Missouri has strong home-rule
13 practices. Why do you say that?

14 A. Because my experience has been that there is a
15 strong desire for communities to be able to exercise as much
16 power and control as they are authorized by statute. They
17 want to have that control, they want to be able to make the
18 decisions affecting their lives. Missouri historically has
19 been a leader in home-rule.

20 As we start to compare between home rule
21 versus the Dillon's rule, the line becomes blurred. But in my
22 opinion, I would categorize Missouri as having a strong
23 home-rule background.

24 Q. On Page 8 starting on line 31 you say,
25 Assuming that Aquila is exempt from local zoning control since

1 it has filed this case for certification of the South Harper
2 plant and Peculiar substation before the Commission, it is my
3 opinion that adequate review is, nonetheless, a planning
4 requirement and appropriate land use assessments should be
5 conducted by an entity with the ability to adequately review
6 the development process.

7 And I want to focus on that last part that
8 says, An entity with the ability to adequately review. My
9 question is this. In order to be able to have the ability to
10 adequately review, does the entity have to have some zoning
11 authority?

12 A. I think that there are two components to that
13 question. One is the ability to review, which would be --
14 include the expertise, the skill, the knowledge, the
15 understanding of what the goals and policies of the community
16 are as well as the regulations and the zoning and subdivision
17 regulations. And being able to act on those decisions goes to
18 the authority. But being able to conduct a review does
19 require a certain level of background, education, expertise.

20 Q. But in order to have the ability to conduct an
21 adequate review, does that entity have to have the authority
22 to tell the developer, You cannot build on that particular
23 site?

24 A. Yes.

25 MR. YOUNGS: Let me just object to the form of

1 the question. I tried to get my objection in before the
2 witness answered, but I believe that calls for a legal
3 conclusion of a witness who is although educated in the law,
4 is not a practicing attorney. And I just need to object on
5 behalf of my client to protect the record.

6 JUDGE PRIDGIN: That's all right. I'll
7 overrule.

8 BY MR. EFTINK:

9 Q. I don't know if you've read the Court of
10 Appeals' decision in this particular case or not, but rather
11 than argue back and forth with counsel for Aquila, let me just
12 ask you to assume that the Court of Appeals has said that
13 there's no zoning authority granted by statute to the Public
14 Service Commission and that prior to the time that Aquila
15 started developing this project, which is now the South Harper
16 peaking facility, the Public Service Commission declared that
17 it cannot tell a developer where to not build.

18 Is there a problem in having an adequate or --
19 and having the ability to properly review a project in that
20 situation?

21 MR. YOUNGS: Let me just object again on
22 behalf of Aquila to the legal conclusion that he's asking this
23 witness to make, and I believe that his hypothetical misstates
24 various elements of the Court of Appeals' decision.

25 JUDGE PRIDGIN: Mr. Eftink?

1 MR. EFTINK: Well, it's in writing. The Court
2 of Appeals said that the Public Service Commission has not
3 been given any zoning authority by statute, so he can't
4 dispute that. But that is in a hypothetical so it really
5 doesn't make any difference because we're asking the witness
6 to assume that for the purposes of this question.

7 JUDGE PRIDGIN: I'll overrule because he did
8 get into it in his written testimony.

9 THE WITNESS: Can I have the question again,
10 please?

11 BY MR. EFTINK:

12 Q. In this hypothetical, the Court of Appeals has
13 said that the Public Service Commission does not have
14 authority to conduct zoning by statute. And prior to the
15 applicant starting the construction, the Public Service
16 Commission has said that it does not have the power to tell
17 the developer where to not build.

18 In that situation, if the Public Service
19 Commission is looking at land use issues, is there a problem
20 if it doesn't have the ability to tell the developer where to
21 not build?

22 A. I think there is. And that goes to the heart
23 of the dispute that's before us.

24 Q. And why do you say it "goes to the heart of
25 the dispute"?

1 A. Ultimately, there are a couple of questions
2 that are being asked. Who has the authority to act on a
3 review of the plan in the development regulations? And then
4 the second question is, once that decision about authority is
5 resolved, what are the standards that are going to apply to
6 make determination whether this is the right use at the right
7 location.

8 Q. Well, is it correct to say that if you can't
9 tell somebody don't build there, you don't have much authority
10 and land use control?

11 A. That's correct.

12 Q. What good is land use control if you don't
13 have that authority?

14 A. Very good question. That's true.

15 Q. Is there any good to that decision-making
16 process if ultimately you can't tell that entity to not build
17 there?

18 A. No.

19 Q. If you'd turn to page 11, Line 5 of your
20 rebuttal testimony. You say, If residents of Cass County
21 believe that land use decisions can be made without regard for
22 the county's plan, they will cease to be -- they will cease to
23 believe that Cass County is a good location for their
24 investment.

25 What do you base that on?

1 A. In another portion of this -- of my testimony,
2 I've identified some factors that are indicative of good
3 planning. Two of those factors are certainty and
4 predictability. It's a -- these are concepts that apply on
5 both sides of an issue from the public's perspective, from the
6 public administration perspective, from the jurisdiction as
7 well as for developers.

8 People need to have certain predictability,
9 knowing that an investment that they're making is going to be
10 protected, that there aren't going to be any actions that the
11 reasonably -- any actions that the jurisdiction is going to
12 approve that are going to lessen the value of their
13 investment.

14 They also want predictability, knowing that if
15 I invest in this area or if I buy this property, at some point
16 in the future I have a certain expectation that I might be
17 able to develop. So certainty and predict are extremely
18 important to being able to preserve value. And the
19 comprehensive plan is a very good place for that type of
20 protection to occur.

21 Q. What's the difference between certainty and
22 predictability?

23 A. The certainty is certainty in the development
24 process. These are the rules that are going to apply, these
25 are the policies that are going to be in effect. The

1 predictability is based on the certainty of these rules, of
2 these policies, this is the reasonable outcome that will
3 occur. Not a haphazard uncoordinated approach would be
4 exactly contrary to a certain and predictable process.

5 Q. A few days ago Mr. S. Mark White testified
6 that a person should have no expectation that a nuclear power
7 plant will not be built across the street from their home. Do
8 you agree with that?

9 A. Well, there are no guarantees in a
10 comprehensive plan in a long-range process. What they are are
11 guidelines that a jurisdiction should be following.

12 One of the -- one of the statements I make
13 frequently in front of communities that I work for across the
14 country is that whenever a development application comes
15 forward for review, one of the first questions someone should
16 be asking at the planning commission level, at the City
17 Council, legislative level is, is this proposal consistent
18 with the comprehensive plan.

19 It doesn't mean that there can't be a
20 deviation from the plan, that it can't be amended. It's not
21 to infer that.

22 What it does means is that the comprehensive
23 plan is supposed to embody the vision, the goals, the
24 policies, the beliefs of a community in how that jurisdiction
25 should develop, what kind of community it's going to become.

1 So that type of an expectation if we're going in the same
2 direction, these are the reasonable outcomes and reasonable
3 expectations, but it also leaves room for flexibility. And
4 that would be another component of good planning is to be
5 flexible to changing conditions.

6 Q. I appreciate that. I'm not sure if I got an
7 answer to my particular question though, which was, should
8 you, as a citizen of Missouri, have a right -- or an
9 expectation rather that somebody's not going to be permitted
10 to build a nuclear power plant across the road from your
11 house?

12 A. I don't think they can expect that that could
13 never occur. I think they can expect that if there's going to
14 be a change from the plan, that there's going to be a public
15 review that will debate whether that change is a good change
16 or a bad change.

17 Q. And how in Missouri is that public review
18 supposed to occur?

19 A. It's -- it should be occurring at the planning
20 commission and at the legislative, which would be County
21 Commission, City Council, Board of Aldermen level. There
22 should be two reviews that are taking place.

23 Q. And what's the timing of that review?

24 A. It's a review that absolutely must happen
25 prior to any development, if that's the direction your

1 question is going. It's not supposed to be a rear -- a
2 hindsight review. It's supposed to be a prospective review of
3 is this use going to be consistent -- the proposed use going
4 to be consistent with existing uses and with projected future
5 land uses.

6 Q. Well, you said it absolutely must occur before
7 the development. And that's pretty strong terminology.

8 A. And --

9 Q. Why do you say that?

10 A. Because, I mean, once the development is
11 constructed, different types of improvements are going to have
12 different costs, different things that you try and remedy.
13 Expecting someone to take down their fence because it
14 encroaches onto a setback is a far simpler proposition than
15 what we're faced with here, what to do with a plant that has
16 been constructed without the benefit of any public review.

17 The reason it absolutely needs to be
18 prospective is because residents deserve to know and
19 communities have a right to regulate what is going to happen
20 in their communities, what type of development should occur,
21 not whether something that has already occurred is
22 appropriate. Because at that point, as the old saying goes,
23 the horse is already out of the barn.

24 Q. If it's already built, what -- let me back up.

25 If the development's already put in, does that

1 affect the choices that you have later on?

2 A. I think realistically, real word it does
3 affect the choices. Again, it's a lot easier to try and
4 negotiate a good site plan before anything has been
5 constructed, before any investment has been made. After the
6 fact, it's just going to be more costly.

7 Q. If somebody builds despite the fact that
8 there's an injunction in place and despite the fact that they
9 haven't got their permits required, what's the consequence of
10 just forgetting what they did and going on?

11 MR. YOUNGS: Once again, I object to the form
12 of the question to the extent it tries to imply that Aquila
13 built this plant in the face of an injunction that had not
14 been stayed as a result of posting a bond. This is the fourth
15 time I've heard this kind of a question from StopAquila, and I
16 object to it again.

17 MR. EFTINK: Well, your Honor, that's an
18 accurate recitation of the facts. There was an injunction in
19 place, they went ahead and built anyway. So they realized the
20 risk that they were taking.

21 JUDGE PRIDGIN: I'll overrule the objection.
22 The Commission's well aware that Aquila posted a bond, built
23 with that bond in place. The Commission knows that.

24 THE WITNESS: I think the precedents it sets
25 is alarming. That any large user with -- with power, with an

1 argument that may even appear to be a quasi-public use, making
2 decisions about development without going forward through
3 development review process is alarming for other cities and
4 counties in the state. Because who's to say what that next
5 user is going to be and what their decision -- what their
6 rationale is going to be?

7 BY MR. EFTINK:

8 Q. But can we, in Missouri, say that this is for
9 this case only and nobody else later on will be able to cite
10 this as precedent?

11 A. I can't imagine that happening. I can't
12 imagine one decision being made and it ending there. Someone
13 will inevitably point to what happens here as a rationale to
14 support why we don't need to go through the development review
15 process. And everyone, unless they're clearly exempted,
16 should be going through a development review process.

17 Q. On Page 11 starting on Line 9, you say, If the
18 plan no longer serves the purpose of being a legal basis for a
19 community's land use decisions, then there is no legal basis
20 for land use decisions.

21 Are you talking about precedent when you write
22 that?

23 A. Yeah, and actually the effect. If the plan is
24 effectively defeated by bypassing it, if a corporation is
25 entitled to bypass -- selectively bypass which regulations

1 they choose to follow, which processes they choose to apply
2 for, effectively we have no plan and we have no set of
3 regulations to control because they become purely optional.
4 It becomes a sliding scale, these I will follow, these I will
5 not.

6 They need to be in force for all of the users,
7 all of the property within a jurisdiction, again, unless there
8 is an explicit express exemption.

9 Q. On Page 12 you talk about the comprehensive
10 plan and about zoning. Try to shorten this up. Is it correct
11 that the comprehensive plan is more of a guide and the zoning
12 is specific and controlling?

13 A. Yes.

14 Q. And then on Page 16 at Line 1 you say, In the
15 past, Aquila has made a number of applications for special use
16 permit or rezoning for substations. Why do you say that?

17 A. What page and line was that? I've got a
18 different --

19 Q. In your rebuttal on Page 16, Line 1.

20 A. I -- I don't have that -- I have a sentence
21 that starts with, The Aries plant.

22 Q. If you'll look at the bottom of Page 15. The
23 sentence starts there on my copy anyway.

24 A. All right. Applying for land use approval is
25 not a foreign concept to Aquila, who previously submitted

1 applications for special use permits and/or rezoning to
2 construct and operate the Aries plant, the Camp Branch plant
3 and a number of substations. That sentence --

4 Q. Why do you say that they have applied for SUP
5 or rezoning for several substations? You didn't say several.
6 You say a number of substations.

7 A. That was based on some anecdotal information
8 as I was interviewing county staff. And the way we would
9 typically -- a planner would typically come to conclusions is
10 through interviews, interviews with stakeholders, interviews
11 with staff to try and get an understanding for what the -- the
12 background environment is.

13 Q. Okay. On page 22 at line 22 you talk about
14 what a planner should address. And one of the things you said
15 a planner should address is alternate locations. Now, are you
16 saying that the planner that -- in that situation is the
17 planner the developer or is it the governmental authority that
18 should address the alternate locations?

19 A. This was drafted from the perspective of a
20 planner working for a reviewing authority, a jurisdiction.

21 Q. Okay. In the present case, you've heard
22 testimony that there is a power plant around Pleasant Hill and
23 now Aquila has put in this peaking facility outside of
24 Peculiar. How would a developer look at the question of
25 alternative locations?

1 A. Well, I'm sure that -- and using this as a
2 specific example and I've seen a matrix of some land use
3 alternatives, some site alternatives that Aquila had worked
4 through. They would look to what sites are most suitable for
5 their needs, size, access, access to infrastructure, which
6 would include roadways, water, wastewater, gas lines. And
7 so -- there's a question of is the site suitable for the
8 proposed use.

9 Then the next level of questions would lead to
10 once we've identified some potentially suitable sites that can
11 accommodate physically the types of uses proposed, are those
12 areas appropriate for those types of uses.

13 Q. Are you familiar with the Iatan situation?

14 A. No, I'm not.

15 Q. Okay. Let me give you a hypothetical then.

16 Let's say we have a plant called Iatan and there's a proposal
17 to put in an adjunct called Iatan 2. Should a planner look at
18 the possibility of putting Iatan 2 close to Iatan 1 instead of
19 putting it 25 miles away in a residential area?

20 MR. YOUNGS: Your Honor, I object. I think
21 that it is a hypothetical. The relevance of the hypothetical
22 is non-existent. I mean, the fact of the matter is, we're not
23 talking about Iatan --

24 MR. EFTINK: We will be soon.

25 MR. YOUNGS: -- or Iatan 2.

1 MR. EFTINK: We'll be talking about --

2 MR. YOUNGS: Excuse me. May I finish my
3 objection, Mr. Eftink?

4 MR. EFTINK: I apologize.

5 MR. YOUNGS: We're talking about South Harper
6 facility. And Iatan is irrelevant to the issues before this
7 Commission.

8 JUDGE PRIDGIN: What is the relevance of the
9 question?

10 MR. EFTINK: We'll be facing this if we set a
11 precedent. This will happen over and over again. That's how
12 it's relevant.

13 JUDGE PRIDGIN: I'm sorry. I don't see the
14 relevance. I'm going to sustain the objection.

15 BY MR. EFTINK:

16 Q. Now, on Page 23, Line 15 you talk about the
17 argument of self-created hardships. You say that, Courts
18 across the country have ruled against self-inflicted cases of
19 hardships as a means to avoid compliance with comprehensive
20 plans and development regulations.

21 Why is it that a self-created hardship should
22 not be a means of avoiding compliance with zoning?

23 A. Well, the purpose of the -- of the zoning
24 regulations are because a community has established certain
25 guidelines, certain standards for development.

1 The types of examples that this typically
2 arise for are someone that has a 10-acre lot in an area that
3 requires minimum 10 acres lot developed. They try and sell
4 off 5 acres and then say, Well, I only have 5 acres now, if
5 you don't let me develop, I can't do anything with this
6 property.

7 That would be a self-inflicted situation. And
8 communities routinely say, no, you cannot create a situation
9 whereby you effectively bypass the standards and guidelines
10 that the community has adopted.

11 Q. If you allowed an entity to create a hardship
12 for itself and, therefore, avoid compliance with the zoning
13 regulations, is that something that would be easy to happen
14 over and over again?

15 A. Over and over again.

16 Q. I want to ask you about the difference from a
17 land planner's point of view between a special use permit and
18 rezoning. Is a special use permit usually for something that
19 is temporary in nature?

20 A. It can be. There are -- there are some
21 benefits to a special use permit. One benefit is that there
22 is often greater latitude and agreeing to and establishing
23 conditions on a -- on a proposed use. Another is that the use
24 can lose its ability to operate if it fails to meet those
25 conditions.

1 Q. So that's one thing you look at is whether
2 this particular use will terminate in a number of years?

3 A. That's -- whether it will terminate, whether
4 it's relatively short term and whether there's a need to try
5 and identify additional conditions that are reasonable and
6 appropriate for that type of use, but may not have been
7 anticipated at the time an ordinance was drafted and adopted.

8 Q. If you would look at your surrebuttal
9 testimony, I'd like to ask you a few questions about that. On
10 Page of your surrebuttal at Line 4, you cite to Mr. Wood's
11 testimony. And you say that Mr. Wood indicates that working
12 with the community and property owners would have delayed site
13 selection. Well, quite simply, that is part of the process.

14 Couldn't virtually all developers use the
15 argument that they can't go through the process because there
16 will be delay?

17 A. Absolutely. And quite often -- more often
18 than not, communities are already facing pressure from
19 developers to expedite the process. If there is a development
20 application that goes through for a large project and the
21 issue of timing doesn't enter, that's a rarity.

22 Developers are always under the gun, there's
23 always a time constraint. Often whether it's related to
24 financing or what have you, timing is always critical. And
25 one of the things that responsible communities do is they find

1 a way to streamline their planning and development review
2 process.

3 Q. So you afford everyone due process in an
4 orderly fashion?

5 A. Absolutely.

6 Q. And a developer should plan ahead?

7 A. Plan ahead.

8 Q. On Page 3, Line 16 of your surrebuttal, you
9 say, paraphrasing Mr. Wood's testimony, that this was a
10 process that had Aquila acting as its own tariff administrator
11 and its own zoning administrator. What do you mean by tariff
12 administrator?

13 A. What page? I recall the -- the sentence, I
14 just can't find it on the --

15 Q. Page 3, beginning around Line 19.

16 A. There was a -- some of the documents I've
17 reviewed included different pieces of testimony. And that was
18 actually a line that I had read that Aquila was acting as a --
19 its own tariff administrator.

20 I am not trying to even presume to know what
21 is going to be involved with setting their own tariffs, but
22 what I did find interesting was that this was -- this appeared
23 to be a similar process for zoning of making a determination
24 to establish their own zoning for the parcel rather than
25 working through the process because of their expectation or

1 belief that this was their right to do so.

2 Q. So, in other words, in this statement you were
3 focusing on Aquila acting as its own zoning administrator. Is
4 that a fair statement?

5 A. Yes. They've made a unilateral decision where
6 this use would be located, how it would be developed, when it
7 would be developed and the applicable plans and ordinances
8 were largely irrelevant.

9 Q. On Page 6, beginning on line 7, you're talking
10 about Mr. Wood's testimony again, and you say that Mr. Wood
11 does not cite to rules of the PSC regarding land use
12 evaluation.

13 I want you to assume -- just assume in this
14 case that the Public Service Commission involves itself in
15 land use planning. Is the lack of published rules a due
16 process problem?

17 A. I think it's a major problem. One of the
18 things I did do as we were -- as I was going through this
19 analysis, was reviewed the Public Service Commission website.
20 And I could not find any information that even hinted at the
21 concept that the Public Service Comm-- Commission conducts
22 site analysis, development review, any consideration of local
23 plans and ordinances.

24 This appears to be a Commission that is a very
25 technically oriented across shareholder return Commission that

1 does that job very well, but the land use analysis is just
2 something that has been, up to this point, the -- the domain
3 of jurisdictions across the state.

4 Q. You have been involved in land use planning
5 across the country. Correct?

6 A. That's correct.

7 Q. In land use planning schemes, do you almost
8 always or always have rules that are laid out as to what is
9 expected, what people's rights are, what the developer's
10 rights are?

11 A. Absolutely. It's critical. There would be no
12 ordinance that we have ever drafted or participating in the
13 drafting of that didn't include a detailed procedural process.
14 It's as important for the property owners, for the developers,
15 for the stakeholders as it is for the government entity to be
16 able to review and process requests for development.

17 Q. Well, regarding this subject matter, Mr. Wood
18 testified last week that his proposed rule or his proposed
19 standard would apply to -- this case to Aquila only and to
20 nobody else ever again. Is there a problem with that kind of
21 an approach?

22 A. Yeah. When I first heard that, I was -- I was
23 a little surprised. I mean, I'm going to make an analogy. I
24 like my ear, nose and throat specialist. I think he's a very
25 good ENT. But I would not want him performing a bypass

1 operation one time.

2 The development review is a complicated
3 process. One has to consider a number of different variables.
4 What does the plan mean? What are the intentions and goals of
5 the community? How do the regulations apply? How are the
6 regulations applied historically along with concerning --
7 excuse me, comparable types of uses.

8 It's not just a one-shot this is an on/off
9 switch, we can answer this question now and never have to deal
10 with it again. I don't think that a planning commission would
11 try to come in and regulate the utility rate structure one
12 time only.

13 I think similarly, we need to have a Public
14 Service Commission, as other states that do have with the
15 authority to do site planning, they have the appropriate
16 procedures, rules and relationships, coordinations with the
17 local jurisdictions.

18 And frequently that's one of the largest
19 components of the public state -- Public Service Commissions
20 in other states is establishing how do local plans and rules
21 get interpreted. And they frequently look to the local
22 officials to make those types of determinations.

23 MS. SHEMWELL: Judge, for the record, I would
24 like to object to Mr. Eftink's characterization of Mr. Wood's
25 testimony. I don't believe it was a correct characterization.

1 MR. EFTINK: Well, I would defer to the
2 record.

3 JUDGE PRIDGIN: Okay. I'll overrule.

4 And for my own benefit, even though this is
5 kind of friendly cross and, Mr. Peshoff, you are being asked
6 some open-ended questions, I may try to curtail some of your
7 narrative answers in the future. So if you could shorten your
8 answers somewhat, I'd appreciate.

9 MS. SHEMWELL: If the Commission would like to
10 entertain an objection that this is friendly cross, I would
11 certainly make one.

12 MR. EFTINK: Your Honor, this is my first
13 opportunity to talk to this witness and there are aspects of
14 land use planning -- we don't know what we're faced with in
15 this case, but we're assuming there may be some aspects of
16 land use planning and I think we need to have the right to
17 delve into this.

18 JUDGE PRIDGIN: I'll let Mr. Eftink continue
19 the cross. I'll overrule the objection, but I do kind of,
20 again, want to try to curtail the narrative.

21 BY MR. EFTINK:

22 Q. Now, Mr. Wood had presented today I think some
23 materials from other states showing what kind of statutory or
24 regulatory scheme they had on this topic. Have you done
25 research on that type of thing?

1 A. Yes, I have.

2 Q. Would you be able to later on supply some
3 legal research about what's going on in other states?

4 A. I would classify it as planning research.
5 We're a planning firm. But, yes, we'd be more than willing to
6 provide you with copies of the documents we've reviewed.

7 MS. SHEMWELL: Excuse me. If that's not
8 available today, then we won't have the opportunity to
9 cross-examine on that, Judge, so I object to supplementing the
10 record without cross-examination, particularly when this
11 witness has had this length of time to realize what the
12 Commission has asked and be able to provide it on a timely
13 basis.

14 MR. COMLEY: I think we'd be entitled to do
15 the same thing as Mr. Wood was.

16 MS. SHEMWELL: Except that the Commission
17 requested that of Mr. Wood.

18 JUDGE PRIDGIN: I would be inclined to not get
19 anything further unless the Commission orders it. Obviously
20 if the Commission orders it, we would expect it.

21 BY MR. EFTINK:

22 Q. I just wanted to determine if it's available
23 if somebody asks --

24 A. If anybody wants it, it's available.

25 Q. Today?

1 A. Absolutely.

2 Q. Okay. Now, you're not -- you weren't employed
3 in any fashion by Cass County until, what, a month or two ago?

4 A. That's correct.

5 Q. And, of course, you're not employed -- you're
6 not on the commission, you're not on the Planning Board of
7 Cass County. Correct?

8 A. No.

9 Q. But you have reviewed this situation from the
10 perspective of a land use planner. Correct?

11 A. That's correct.

12 Q. Do you have experience in the development of
13 electric generating facilities or power plants in other
14 places?

15 A. We have -- I have experience dealing with
16 large industrial type uses. Some of those industrial type
17 uses have been power plants.

18 Q. Now, have you been out to the South Harper
19 location?

20 A. Yes.

21 Q. Have you been to other power plants in this
22 area around Jackson County, Cass County, Missouri?

23 A. Not in relation to this project.

24 Q. Okay. From your work on this project and your
25 view of the South Harper peaking facility, do you have an

1 opinion as to the appropriateness of the site for the South
2 Harper peaking facility?

3 A. In its -- in the current -- the current
4 situation with a plant located where it's located and
5 infrastructure being as it is, my preliminary opinion is that
6 it's not appropriate at this location. That doesn't mean that
7 there couldn't be changes that try to mitigate some of the
8 problems.

9 Q. What kind of problems are there that you are
10 thinking might need mitigation?

11 A. I've taken some photographs just this past
12 week that might help explain, if the Commission is interested
13 in seeing those at some point this afternoon. It actually
14 shows the landscaping as it actually exists on the ground from
15 eye level and whether or not it achieves the purpose of what
16 landscaping and buffering is supposed to do. It does not.

17 The photographs also identify the roadway
18 network leading into and along the facility and whether that
19 is adequate and appropriate for an industrial type use. And
20 it is not.

21 So just looking at those two factors alone, of
22 landscaping and roadway requirements, those could be improved.
23 That could improve its relationship to infrastructure. And
24 the landscaping and the buffering may also provide some
25 compatibility resolution as well. But in its current state,

1 no.

2 MR. YOUNGS: Your Honor, I'm going to object
3 to any further questions along these lines on two primary
4 points, I suppose. There's friendly cross as I understand it
5 and there's friendly cross that attempts to supplement the
6 testimony of a witness.

7 Mr. Peshoff to date has not given an opinion
8 regarding the compatibility of these sites with these
9 adjoining land uses pursuant to the special use permit
10 application or zoning regulations. He's simply to date, if
11 you look at his testimony and the purpose of his testimony,
12 it's everything but that.

13 Today suddenly, through Mr. Eftink's
14 cross-examination, now we have an opinion from Mr. Peshoff
15 that, in his opinion, these sites are not compatible from a
16 land use planning or a zoning perspective, and I object to it.

17 And I will certainly object to any use of
18 additional photographs that have been taken within the last
19 week as an attempt, as I think Mr. Eftink is doing, to try to
20 buttress this witness's rebuttal and surrebuttal testimony.
21 I just don't think it's proper and I object to it.

22 MS. SHEMWELL: Staff joins that objection.

23 MR. EFTINK: Well, your Honor --

24 JUDGE PRIDGIN: Mr. Eftink?

25 MR. EFTINK: As the Court of Appeals said,

1 before the first spade full of dirt, we're supposed to have
2 hearings where all of this is brought up. So I'm thinking if
3 we were having a land use hearing, I would certainly be
4 entitled to ask these questions of a land use planner. So why
5 would I be shut down now?

6 THE WITNESS: I might also offer on Page 25, I
7 do answer that question.

8 MR. YOUNGS: Excuse me. I would like to -- I
9 don't mean to cut Mr. Peshoff off, but I'd like this
10 conversation to be between the Bench and lawyers at this
11 point.

12 I would refer the Bench to Page 1 and 2 of
13 Mr. Peshoff's rebuttal testimony and look at the scope of the
14 testimony that's set forth in that section and it has
15 absolutely nothing to do with any opinion regarding the
16 compatibility of this site from a land use planning
17 perspective with these adjoining uses from a zoning
18 perspective. I just object to it.

19 JUDGE PRIDGIN: Mr. Coffman?

20 MR. COFFMAN: As to that last point,
21 Mr. Youngs mentioned you might be familiar with the statute in
22 Chapter 536 that says that scope of cross-examination does not
23 have to be within direct -- the scope of direct testimony.

24 And as to the -- Mr. Eftink's questions are
25 cross-examination. Mr. Youngs will have an opportunity

1 subsequent to this. He still has not had his chance to
2 cross-examine and explore further what he's just now heard if
3 he think he's hearing some new opinion, although I think
4 certainly questions thus far are appropriate.

5 MR. YOUNGS: I have based my cross-examination
6 today, as I think probably other people have, on the rebuttal
7 and surrebuttal testimony of this witness. And now 5 minutes
8 ago I heard a completely new opinion and I just think it's
9 unfair to the parties. I think the rules exist for a purpose.
10 That's my objection.

11 MR. EFTINK: Your Honor, if I could, on
12 Page 25, Line 41 of Mr. Peshoff's rebuttal, he says, No, in my
13 opinion, the South Harper facility is not consistent with the
14 2003 comprehensive plan.

15 So if that doesn't alert Mr. Youngs as to what
16 the topic of this cross may be, I don't know what would.

17 MR. YOUNGS: As we have heard several times,
18 there's a difference between the comprehensive plan and
19 whether or not it's compatible from a zoning regulation
20 standpoint. And I think that's a difference that everybody
21 has made fairly clear and that's a distinction that this
22 witness made in his testimony and I was relying on that.

23 MR. EFTINK: I think that's a very fine
24 distinction between being consistent and being compatible.

25 JUDGE PRIDGIN: I'm going to overrule, but the

1 friendly cross I'm going to shut down before long. I mean,
2 this is just bordering on just more direct and that's the
3 whole purpose of the pre-filed testimony.

4 BY MR. EFTINK:

5 Q. If a developer builds despite an injunction in
6 place, should the cost of remediation be a factor that's
7 weighed in favor of the project remaining?

8 A. I think -- I think that realistically it will.
9 Should it? I would hope not.

10 MR. EFTINK: Okay. Thank you, your Honor.

11 JUDGE PRIDGIN: Mr. Eftink, thank you.

12 Mr. Coffman?

13 MR. COFFMAN: I will attempt to be brief.

14 CROSS-EXAMINATION BY MR. COFFMAN:

15 Q. Good afternoon, Mr. Peshoff. My name is John
16 Coffman. I represent a few of the landowners who live very
17 close to the site being proposed for a power plant.

18 Let me ask you your opinion that you are --
19 you are an attorney; is that correct?

20 A. No.

21 Q. You received --

22 A. I have a law degree.

23 Q. -- a law degree, but you're not a practicing
24 attorney?

25 A. That's right. I have not taken the bar exam.

1 Q. But you are a very qualified land use planner.
2 I want to ask you, do you understand, I guess, what a
3 franchise is to -- utility franchise?

4 A. I have some understanding of that.

5 Q. And is it your understanding that a franchise
6 would grant the holder of that franchise any particular land
7 use authority or approval?

8 A. I think it would depend on the nature of the
9 franchise that was actually granted.

10 Q. Okay. You talked somewhat about the precedent
11 that this case might set. And one point in your testimony is
12 the fact that approval in this case is being sought after the
13 fact. If this were a zoning issue being tried before a local
14 zoning board or commission in Missouri, would there be any
15 issue with the fact that an applicant came in after the fact
16 to seek approval for something that they already built that
17 was nonconforming?

18 A. Yes.

19 Q. And what would be the issue?

20 A. Well, one, obviously that they didn't comply
21 with the procedure. A followup question may revolve around
22 whether or not what they did do, whether it complied with the
23 development requirements as well.

24 Q. Okay. Is the fact that approval was sought
25 after the fact instead of beforehand an appropriate factor for

1 a local zoning board to consider in whether or not to grant
2 approval?

3 A. The procedures that we drafted, the
4 development review happens prior to development actually
5 occurring. I don't even know if once it's actually occurred,
6 whether it would be a review of a planning commission that
7 should we now grant this retroactive approval because that's
8 effectively what would be requested. And I don't know of any
9 community that has an application for retroactive approval.

10 Q. Okay. And would it be your opinion that that
11 local zoning board would not be able to review that or would
12 that simply be --

13 A. Yeah. It would be -- it would be a legal
14 issue that --

15 Q. Okay. If this specific application in this
16 case were approved, would you see the practice or precedent
17 set by this case preventing Aquila from building a power plant
18 essentially anywhere it wanted to and then seeking approval
19 after the fact?

20 MS. SHEMWELL: Judge, I'd like to lodge an
21 objection here. We are talking about setting of precedent. I
22 think that this witness has expressed he's not familiar with
23 Missouri law in terms of whether or not Commission decisions
24 set precedent. And I would like to object that he's not
25 qualified to speak about the effect of a Commission decision

1 and whether or not it sets precedent.

2 MR. COFFMAN: Well, in this line of
3 questioning I am exploring what a local zoning board would
4 need to do. And one of the issues in this case is the
5 Commission permitted to stand in the shoes of Cass County, and
6 if they are, what standards and rules and procedures should
7 they be making the decision regarding the zoning so that -- in
8 that regard, my question goes to the second part of that
9 issue.

10 JUDGE PRIDGIN: And I'll overrule solely
11 because, I mean, the witness had testified he has a law degree
12 and has some sort of understanding about precedential value as
13 do the members of this Commission and this judge. So he can
14 answer.

15 THE WITNESS: As much as there is a desired
16 belief that this would only be a one-time only action, based
17 on my experiences, I can -- I can virtually guarantee that
18 this exact question will come up in another community in
19 Missouri. It may not be an electric power plant, but it will
20 be another quasi-public use that attempts to circumvent the
21 plan and ordinance.

22 BY MR. COFFMAN:

23 Q. Now, are you aware of issues, legal or
24 procedural or otherwise, that a local zoning board or
25 commission may face if it were to, in one instance, grant

1 zoning approval or special use permit after the fact to one
2 use and then refuse to entertain an application that was being
3 made after the fact in a similar situation?

4 MR. YOUNGS: I'd just object to that on behalf
5 of Aquila as calling for a legal conclusion that I'm not
6 convinced this witness is competent to answer.

7 MR. COFFMAN: It may involve stating an
8 opinion of law. The witness, of course, does have a legal
9 degree. And it may also involve issues of land use planning
10 procedure for which this witness is very qualified.

11 JUDGE PRIDGIN: Ask your question again,
12 please.

13 MR. COFFMAN: My question relates to what
14 issues, legal or procedural or otherwise, might be faced by a
15 local zoning board or commission if it, in one instance,
16 approved a special use permit or zoning application after the
17 fact for one particular use of a property and then in a
18 subsequent situation refused to entertain an application that
19 was being made after the fact.

20 JUDGE PRIDGIN: And, Mr. Youngs, what's your
21 objection?

22 MR. YOUNGS: Same objection. I think this
23 calls for a legal conclusion, a prediction about the legal
24 outcome of a certain set of circumstances and I think it's
25 improper testimony without proper foundation. I object to it.

1 JUDGE PRIDGIN: I'm going to sustain. It
2 sounds like speculation, asking him to speculate what issues
3 another body might be faced with.

4 MR. COFFMAN: Well, I believe there are
5 certain legal issues and procedural due process issues that
6 apply in that situation. And I don't know, but I assume
7 Mr. Peshoff might be familiar with those.

8 JUDGE PRIDGIN: Well, I mean --

9 MR. COFFMAN: I would ask for an offer of
10 proof if you are indeed going to hold that.

11 JUDGE PRIDGIN: Then you can make that offer
12 of proof.

13 BY MR. COFFMAN:

14 Q. Okay. Now we are at a point where despite the
15 fact the Judge has overruled that question, you are permitted
16 so that we have some record of what your answer might be on
17 appeal.

18 A. I wasn't going to give a legal conclusion and
19 I will make every effort not to do so throughout my testimony.

20 What I can say from a planner's perspective,
21 communities already struggle with making every effort to
22 appear impartial and fair. When there is an example -- a
23 glaring example of some entity, developer, property owner that
24 was able to bypass, that will come up in other communities
25 because communities already face that in their plan review

1 processes. So and so was allowed to do this, they were able
2 to extend their garage, etc, etc. These are the types of
3 issues that planning boards, city councils, county commissions
4 routinely deal with.

5 JUDGE PRIDGIN: Is that the end of your offer
6 of proof?

7 MR. COFFMAN: Yes.

8 JUDGE PRIDGIN: All right. Thank you.

9 BY MR. COFFMAN:

10 Q. Are there restrictions on local zoning boards
11 and commissions with regard to making consistent decisions in
12 all land use matters or is it completely on a case-by-case
13 basis in most jurisdictions?

14 A. No, no. There should be a significant amount
15 of consistency, following the plan, following the provisions
16 of the ordinance.

17 Q. Is that just a good idea or is there some
18 higher standard? Where is that? Is that just a principle of
19 good land use planning or is there some higher level of
20 restriction that you're referring to?

21 A. It's both. It's good planning. And most
22 enabling statutes identify when a commission is authorized to
23 review and what their parameters are, consistency with the
24 plan, following the -- it's usually embedded in the statutes.

25 Q. And are you familiar with those statutes --

1 those type of statutes in Missouri?

2 A. Somewhat. Our -- our practice is a planning
3 practice and we regularly, routinely work with other
4 attorneys. Whenever there is a question that even remotely
5 resembles calling for a legal opinion or direction, we look
6 then to the legal component of the team, whether that be the
7 jurisdiction's attorney or an attorney that's working on
8 our -- on our team. So we try not to interpret the statutes.

9 Q. Okay. Let me ask you from a perspective of a
10 land use planner, how should the concerns of landowners who
11 are adjacent to the subject tract be weighted against the
12 concerns of those who may not -- who may live further away?

13 A. It's a balancing act. Frequently, it's most
14 obvious in the notification requirements whether it's for
15 rezoning, special use permit. There are property owners that
16 need to be notified, for example, in a particular manner, mail
17 notification, personal notification or as the community at
18 large may just be able to receive some type of notice.

19 So there's an expectation that property owners
20 close by should be made aware. But as far as their opinions,
21 that's a weighting decision that each body ultimately makes.

22 Q. Okay. And are you familiar with any
23 procedural or due process rights that would adhere to those
24 individuals who are, say, adjacent to the subject tract if
25 this were a zoning application?

1 MR. YOUNGS: Once again, your Honor, the
2 witness has said he doesn't want to give legal opinions and
3 Mr. Coffman insists in trying to elicit them. I object that
4 it calls for a legal conclusion.

5 MR. COFFMAN: It may overlap in that area,
6 your Honor, but Mr. Peshoff in his duties is responsible for
7 preparing land use applications and has to, I think, through
8 his profession and through his practice be familiar with those
9 type of legal issues.

10 JUDGE PRIDGIN: Okay. Sustained.

11 BY MR. COFFMAN:

12 Q. Do you need me to repeat the question?

13 A. Yes, please.

14 Q. My question was, what due process rights or
15 other procedural issues would apply to those individuals who,
16 say, were adjacent to the subject tract if this were a
17 rezoning or special use permit?

18 MR. YOUNGS: Your Honor, I'm assuming that
19 this is an offer of proof after the Court has sustained my
20 objection.

21 JUDGE PRIDGIN: I did sustain. If you're
22 making an offer of proof or if you want to --

23 MR. COFFMAN: I can move on.

24 JUDGE PRIDGIN: All right. Thank you.

25 BY MR. COFFMAN:

1 Q. In your capacity as a land use planner, are
2 you familiar with the use of -- the use that would be referred
3 to as far as a gas pumping station similar to the one near the
4 subject tract in this case?

5 A. Somewhat.

6 Q. Are you familiar with the Southern Star gas
7 pumping station in this case?

8 A. Somewhat. I'm not very familiar with it. I
9 actually learned something listening to the earlier testimony
10 about what they do, in today's hearing.

11 Q. Are you familiar enough with that use to make
12 a land use comparison between that use and the use of the
13 South Harper power plant?

14 A. I believe so.

15 Q. And how would you compare those uses or
16 categorize those uses from a land use perspective?

17 MR. YOUNGS: Your Honor, I object to the
18 question. I don't think there's proper foundation for this
19 witness to give that kind of comparison. He just said that
20 the bulk of what he heard about it was news to him until he
21 came into the hearing room today. I don't think there's
22 proper foundation for this witness to give that kind of
23 comparison. I object.

24 MR. COFFMAN: My understanding is Mr. Peshoff
25 is extremely experienced and qualified in categorizing uses

1 under different zoning designations or -- this is what he does
2 for a living. I don't know who else would be able to --

3 JUDGE PRIDGIN: I'll overrule. And the
4 Commission certainly knows that Mr. Peshoff said under oath he
5 just learned about some of this in this afternoon's hearing.
6 So with that in mind, he can answer the question.

7 BY MR. COFFMAN:

8 Q. If I might ask some additional foundation
9 questions, you have viewed this location, have you not?

10 A. Yes, I have.

11 Q. In person?

12 A. Yes.

13 Q. And so you have been to the site and seen both
14 the South Harper power plant facility and what has been called
15 the gas pumping station, smaller facility that's nearby?

16 A. That's correct.

17 Q. And to the extent that you can, based on what
18 you know and what you see, how would you compare and contrast
19 these uses?

20 MR. YOUNGS: Will the Court grant me a
21 continuing objection?

22 JUDGE PRIDGIN: Yes, sir. Continuing
23 objection.

24 THE WITNESS: Yes. When I had mentioned that
25 I had learned something, no one truly is going to know what

1 happens on every single site. And learning about the
2 operations in more detail was something that was new.

3 I don't think that detracts from its use as an
4 industrial use. It has characteristics of industrial use.
5 It's got the outside storage, it's got the tanks, it is a --
6 it is an intensive industrial use consistent with what we see
7 at the -- what one can see at the South Harper facility.

8 BY MR. COFFMAN:

9 Q. Okay. If this had not been built before
10 zoning had occurred, would it be classified, as you understand
11 Cass County zoning, as either I2 or I2 or would you know?

12 A. It would be one of those two zoning. I don't
13 know which one.

14 Q. Okay.

15 A. And the ordinance has changed and it would be
16 a question of which ordinance is going to apply.

17 Q. Okay. You provided some description of
18 research that you had done into the statutes and zoning -- or
19 the siting -- s-i-t-i-n-g -- laws and procedures in some
20 states. I believe you listed six states in your testimony.
21 Did you do a thorough state-by-state review of siting
22 authority around the country?

23 A. No, we did not. We did a review, I did the
24 review with help from my staff of the material that we could
25 easily find. We weren't trying to sift through and only use

1 examples that were favorable. We were just doing a review of
2 what communities, what states had siting authority and had a
3 fairly good volume of information -- readily, easily
4 accessible information that we could review.

5 Q. Okay. And would you characterize each of the
6 states that you refer to as having fairly specific statutory
7 or regulatory guidance as to what would be -- need to be
8 considered regarding land use and siting?

9 A. Yes. Yes, they did.

10 Q. Were you also able today to see what was
11 identified as Exhibit 115, and I believe described as
12 materials reviewed by Warren Wood in this case?

13 A. I'm not familiar with that document.

14 Q. Okay. And I believe he includes some
15 information from states that you did not include. Are you
16 familiar with siting procedures in the state of Iowa?

17 A. No.

18 Q. Or the state of Arkansas?

19 A. No.

20 Q. Okay. Were you here to hear questions
21 regarding a potential condition -- if this Commission were to
22 grant this application, a condition on the siting of a power
23 plant here that would include a requirement for Aquila to
24 provide a pool of resources that would be available for
25 residents to make claims against regarding detrimental impacts

1 on their land value and quality of life?

2 A. Have I heard about that in testimony?

3 Q. Yes.

4 A. No, I have not.

5 Q. Have you heard of that type of remedy or
6 condition in any other land use proceedings that you've been
7 involved with?

8 A. Yes, I have.

9 Q. And what would those be?

10 A. Well, I've seen examples of that in the
11 literature. In some of the examples that we had identified,
12 one of them being -- I think a fairly detailed example from
13 Huntington, New York where there are a number of inducements
14 that the city and the utility agreed to to be good neighbors,
15 to cohabitate peacefully. Those are also the types of issues
16 that we have raised as well as being options for the county to
17 consider.

18 MR. COFFMAN: Okay. Just one minute. I may
19 have one other question.

20 JUDGE PRIDGIN: And we will break after
21 Mr. Coffman is completed.

22 BY MR. COFFMAN:

23 Q. I'll just ask a couple more clarifying
24 questions following up on my last question regarding the
25 potential condition regarding a pool of resources, for lack of

1 a better word. Would that be some type of an escrow fund that
2 Aquila would pay into up to a certain amount?

3 A. Yeah. It could be structured in a number of
4 different ways, but the concept is that if property owners
5 would be able to prove that there was some diminution in
6 value, that this fund might be used then to offset those
7 claims and loss of value.

8 Q. Okay. And are there any -- in specific
9 instances you mentioned, Huntington, New York?

10 A. Yes. Huntington Township, New York was one
11 example that included pools of money that were used for a
12 variety of different uses. All energy related, all dealing
13 with the approval of a plant.

14 Q. And was that offered before the fact?

15 A. Yes, it was. And an interesting point, it was
16 also offered within a structure in which the state utility
17 commission routinely regularly ruled against local objections
18 to power plants. So this was a recognition by the utility and
19 the local community that trying to resolve this before going
20 through years and untold dollars and expenses, time,
21 resources. And so they ended up working together on it.

22 Q. And did that particular pool involve just
23 claims made regarding loss of property value or did it also
24 include loss of quality of life or other heritage value?

25 A. No, no. Again, it wasn't purely from a

1 punitive loss perspective. It was also inducements in terms
2 of -- it included converting vehicles to compressed national
3 gas, identifying a commercial corridor for reduced electric
4 fees as an economic development tool.

5 It included improvements -- green type
6 improvements to existing facilities -- HVAC facilities in
7 buildings. So there were a number of factors all related to
8 the provision of service -- of electrical service that were
9 improved.

10 Q. And in that situation, who was to be the body
11 determining what claims would be made out of that fund?

12 A. I don't know.

13 MR. COFFMAN: That's all I have.

14 JUDGE PRIDGIN: All right, Mr. Coffman, thank
15 you.

16 This is as convenient time as any to take a
17 break. I show the clock at the back of the wall to be about
18 12 after. Let's try to resume about 3:25 and I understand
19 we'll be back on the record with Staff cross-examining
20 Mr. Peshoff; is that correct?

21 MS. SHEMWELL: Yes.

22 (A recess was taken.)

23 JUDGE PRIDGIN: All right. We're back on.

24 And we will resume with the cross-examination of Mr. Peshoff.

25 And, sir, you are still under oath.

1 Ms. Shemwell, any questions for the witness?

2 MS. SHEMWELL: Yes, thank you, Judge.

3 CROSS-EXAMINATION BY MS. SHEMWELL:

4 Q. Mr. Peshoff, I'm Lera Shemwell. I represent
5 the Staff of the Commission in this case.

6 Mr. Peshoff, when were you hired?

7 A. It was about -- it was about a month, month
8 and a half ago.

9 Q. Who specifically hired you?

10 A. The county counselor for Cass County.

11 Q. Are you talking about Debra Moore?

12 A. Yes, I am.

13 Q. Are you being paid by the county?

14 A. Yes, I am.

15 Q. Are you being paid by the hour?

16 A. Yes, I am.

17 Q. And what is your fee per hour?

18 A. 135.

19 Q. Do you have any business or other business or
20 personal relationship with Cass County?

21 A. We have other clients that I've worked on that
22 happen to be in Cass County.

23 Q. Do you know Mr. Mallory personal?

24 A. No, I do not.

25 Q. Do you know who Bucher, Willis is?

1 A. Yes, I do.

2 Q. They're a consulting firm hired by the county;
3 is that right?

4 A. That's correct.

5 Q. Do you have any relationship with Bucher,
6 Willis?

7 A. No, I do not.

8 Q. Would you agree with me that they have worked
9 on the Cass County laws and helping Cass County develop the
10 laws? Do you know?

11 A. They have worked on the Cass County plans and
12 zoning ordinances.

13 Q. Would you agree with me that they then should
14 have a considerable degree of familiarity with those laws and
15 ordinances?

16 A. They should.

17 Q. Did you indicate earlier that you are not
18 licensed to practice law in any state?

19 A. That is correct.

20 Q. Have you seen the Cass County zoning map, sir?

21 A. Yes, I have.

22 Q. And when did you first see that?

23 A. I actually first saw it perhaps as long ago as
24 a year ago on a completely unrelated matter.

25 Q. And how did you receive that map?

1 A. I saw it by going to the courthouse and
2 meeting with one of the planning staff, who I don't know who
3 it was. I didn't know who it was at the time. I was walking
4 in, someone was available and I asked them about their mapping
5 capabilities.

6 Q. Would you look at the curled up document
7 that's right there to your right, please, and tell me if that
8 is similar to what you viewed when you requested it?

9 A. Yes, I believe it was.

10 Q. Do you want to open the whole thing to make
11 sure? Would you like some assistance?

12 A. It looks -- it looks similar.

13 Q. Were you here when Mr. Mallory testified that
14 Cass County is experiencing rapid growth and, in fact, is the
15 fastest growing county in the state of Missouri?

16 A. Yes.

17 Q. And you agree with that?

18 A. It is a fast growing county. I don't know
19 what its rank is.

20 Q. You have attached to your testimony
21 Schedule BGP-2; is that correct?

22 A. Yes.

23 Q. And would you agree with me that this is the
24 American Planning Association Policy Guide on Energy?

25 A. Yes.

1 Q. And if I turn to Page 2 under Policy Findings,
2 the first finding is that a safe, reliable energy supply is
3 important to every community's health safety and commerce.

4 Would you agree with that?

5 A. Yes.

6 Q. On the next page it says, The urbanization
7 that has occurred over the past few decades has created a
8 demand for energy that is quickly surpassing its current rate
9 of production.

10 Do you also agree with that, sir?

11 A. Yes.

12 Q. You have questioned this Commission's ability
13 to make certain decisions concerning local zoning. Would you
14 agree with me that this Commission is capable of determining
15 what is necessary for the provision of safe and reliable
16 electric service for Aquila's customers?

17 A. Yes, I believe so.

18 Q. On Page 22, I believe it is, you talk about
19 zoning is the most widely applied land use control in the
20 United States on page -- or I'm sorry, Line 12 and 13; is that
21 correct? Zoning is the most widely applied land use control
22 in the United States?

23 A. I believe so.

24 Q. Would you agree with me that zoning
25 regulations are restrictions on land use?

1 A. Yes.

2 Q. You have testified that this plant is in an
3 agricultural area; is that correct?

4 A. Yes. It's in a rural area. It has
5 agricultural zoning.

6 Q. Have you made any studies as to how many other
7 power plants in the state of Missouri are in agriculturally
8 zoned areas?

9 A. No, we have not -- I have not.

10 Q. When were you last at the South Harper site?

11 A. Friday afternoon.

12 Q. And if you will look behind you, would you
13 agree with me that this is a picture or an accurate
14 representation of the Southern Star compressor station?

15 A. It would appear to be.

16 Q. Mr. Peshoff, if you built your home directly
17 across the street from this, would you assume that there could
18 be no other similar uses as a -- you know, as just a builder
19 of a home, would you assume that there could be no other
20 residential uses close to -- I'm sorry, similar industrial
21 uses close to this?

22 A. I don't know. The fact that there's one means
23 that there could be another. But if I were truly interested,
24 I would look towards the plan to see how the land is projected
25 for future land uses.

1 Q. But you can clearly see this from the street;
2 is that correct?

3 A. Yes. Yes, you can.

4 Q. Is there any attempt around this station to
5 mitigate view of neighbors?

6 A. I don't believe -- I would say that there is.

7 Q. You don't believe that there is?

8 A. That there isn't any, no.

9 Q. Would you agree with me that Aquila has taken
10 steps to mitigate the view of their property in terms of berms
11 and plants?

12 A. They've made some effort to do so, but I don't
13 believe it was adequate.

14 Q. More than Southern Star though? More than
15 around here (indicating)?

16 A. More than Southern Star.

17 Q. I'd like to put up the map. I'm sorry. That
18 that color is not very good. But this is your map that you've
19 replaced as Page 4 of 7; is that correct?

20 A. Yes, it is.

21 Q. Is that little purple cutout where the
22 Southern Star plant is --

23 A. Yes, it is.

24 Q. -- or station? Perhaps I should use that
25 term.

1 And is the South Harper plant immediately
2 south of that?

3 A. Yes, it is.

4 Q. The South Harper station does not take up that
5 whole area in orange, does it?

6 A. No, it does not.

7 Q. What is the remaining use of the land that's
8 not taken up by the South Harper station?

9 A. It may be still an agricultural use. It's
10 vacant, it's not developed.

11 Q. Mr. Peshoff, let's turn to Page 17 of your
12 testimony. And you discuss the zoning of the Aries plant; is
13 that correct?

14 MR. COMLEY: Is that the rebuttal testimony?

15 MS. SHEMWELL: Yes, his rebuttal.

16 THE WITNESS: Yes.

17 BY MS. SHEMWELL:

18 Q. Are you aware now, after the discussions that
19 you've heard, that that plant was not regulated by the
20 Missouri Public Service Commission?

21 A. Yes. I have -- I have been aware of that.

22 Q. And when you say at Line 10 -- I'm sorry, sir.
23 So when you say in your testimony that this is
24 an approved plant, you weren't referring to approved by the
25 Missouri Public Service Commission; is that correct?

1 A. I don't know which line you're referring to,
2 but it was not. It was approved by Cass County.

3 Q. I'm looking at Line 10, Aquila application
4 that was approved concerning erection of the Aries facility.

5 A. That's correct. Not by the Public Service
6 Commission.

7 Q. Were you here when Mr. Wood testified that --
8 or are you aware that he testified that Cass County ranks 11th
9 in terms of population?

10 A. No, I was not here and I'm not aware of that.

11 Q. Well, then for the purposes of my question,
12 let's assume that he testified to that and the record will
13 reflect that. He also testified that in terms of generation,
14 Cass County is 11th. You have posed, I think, a question in
15 your testimony about whether or not Cass County is being
16 overburdened with power plants; is that correct?

17 A. That's correct.

18 Q. Then for my question, if they're 11th in terms
19 of population and 11th in terms of generation, would you
20 consider them to be overburdened?

21 MR. COMLEY: I will object to the form of the
22 question, because I'm not too sure about the assumptions being
23 made and let my objection rest on that.

24 JUDGE PRIDGIN: I'll overrule that. I think
25 that's a hypothetical and the record either will or will not

1 reflect if the hypothetical is what's in the record. But I'll
2 let him answer the question.

3 THE WITNESS: Well, I don't know if I would
4 use the term "overburdened." The research that I did do
5 identified that there are very few counties with two plants in
6 them in Missouri and the same goes for the different types of
7 plants. So there is a question that is raised about whether
8 or not this is appropriate.

9 BY MS. SHEMWELL:

10 Q. The counties that have more than two plants,
11 are they larger than Cass County?

12 A. They actually included -- I don't know if
13 they're larger, but they did include a large city -- a larger
14 city than anything that's in Cass County.

15 Q. So the population would likely be larger?

16 A. Likely, yes.

17 Q. If Cass County issued a special use permit,
18 let's just say that they did, could they condition that on a
19 establishing a fund to compensate people who assert that they
20 may have been harmed by this project?

21 A. I don't see why not.

22 Q. So they could force Aquila to set up a fund?

23 A. I understand your question. I -- let me then
24 restate my -- I misunderstood. Do I think that a condition of
25 approval that would include some type of a fund, would that be

1 appropriate? No. Do I think that agreeing to conditions as
2 part of the approval process is typical to any development
3 agreement that communities participate in with developers?

4 Q. Are you aware of the things that Aquila has
5 done for the community in an attempt to be a good corporate
6 citizen, I'll use that phrase, for example, putting in a park?

7 A. I've -- I've -- I've read of some of the
8 improvements that Aquila has either made or is willing to
9 make.

10 Q. And you would consider this condition to be
11 along the lines of things that then are voluntarily done to
12 improve the community relations?

13 A. Yes.

14 Q. When you referred earlier, you, I believe,
15 criticized Mr. Wood's testimony indicating that he referred to
16 delay as a negative thing. Does that properly characterize
17 your testimony?

18 MR. COMLEY: I would object to the word
19 "criticized."

20 JUDGE PRIDGIN: I'll overrule. He can answer.

21 THE WITNESS: I'm not sure if that's how I
22 would word it. I guess my -- my question, for clarification,
23 would be identifying the statement. You had -- there's a
24 statement in my rebuttal testimony that you're pointing to?

25 BY MS. SHEMWELL:

1 Q. No. I think you discussed it earlier with
2 Mr. Eftink is what I'm talking about.

3 A. Okay. And what's the question?

4 Q. My question is, you seem to criticize Mr. Wood
5 for saying in his testimony that delay was a negative thing.

6 A. That the delay was an excuse for bypassing the
7 development review time -- review process.

8 Q. Okay. I've put Mr. Wood's rebuttal testimony
9 in front of you. It's marked as Exhibit 19. Do you have
10 that, sir?

11 A. Yes.

12 Q. Would you turn to Page 18, please?

13 A. Yes.

14 Q. At the top of the page, Mr. Wood specifically
15 indicates that he expects utility companies to make efforts to
16 work with the local community and homeowners before a plant is
17 constructed. And indicates it could add months to the site's
18 selection process. Did I read that correctly?

19 A. I'm sorry. Could you repeat that?

20 Q. Just reading Line 1.

21 A. Okay. All right.

22 Q. And additionally, utilities should consider
23 the time necessary for development of these relationships.

24 That's not really criticism or an excuse for
25 delay, is it?

1 A. I think that's the direction that this is
2 going to. He's not making a statement, in my opinion, reading
3 this text, that adding months does not seem to be a positive
4 statement about the review process. This -- this tells me
5 that adding months to the process was going to be too long.

6 Q. I think -- I'm sorry. Don't you think the
7 phrase "utilities should consider the time necessary for
8 development" as a statement that utilities should consider
9 that time necessary and take that into account?

10 MR. COMLEY: Objection, argumentative.

11 JUDGE PRIDGIN: I'm going to overrule. I
12 mean, I think she's asking him to talk about what that
13 testimony means in his opinion.

14 THE WITNESS: Yes. I think he's doing it on
15 the one hand and on the other hand -- utilities should be and
16 counties and cities need to be cognizant, but --

17 BY MS. SHEMWELL:

18 Q. But would --

19 A. -- nonetheless, we still have -- it would add
20 months.

21 Q. Excuse me. I didn't mean to interrupt you.

22 Would you also agree that counties and cities
23 need to recognize the need for adequate electric service?

24 A. Absolutely.

25 Q. That's been your testimony, hasn't it?

1 A. Yes.

2 Q. There's been a lot of discussion about the
3 precedent setting value of a decision by the Commission.
4 Mr. Peshoff, are you aware that by law, the Commission's
5 decisions are not considered to set precedent?

6 A. No, I'm not aware of that.

7 Q. Would you agree with me, sir, that one
8 interpretation of 64-235 is that the Missouri legislature
9 intended for utility companies to go either to the local
10 zoning authorities or to this Commission?

11 A. That's an answer that I'm going to -- to say
12 calls for a legal conclusion. To begin with, it's a very
13 poorly drafted piece of legislation, a statute.

14 Q. Well, sir, you've made many legal conclusions
15 on the stand this afternoon.

16 A. Actually, I have not. I've tried not to make
17 any legal conclusions. There may be planning implications to
18 questions that also have legal implications, but I have not
19 given a legal conclusion.

20 Q. Well, in terms of planning implications then,
21 would you agree that 64-235 allows for electric facilities
22 that the legislature -- that that's one interpretation that
23 the legislature intended, for utility companies to be able to
24 go to either the local zoning board -- local planning
25 authority or this Commission?

1 A. I don't know what the legislature intended in
2 that statute because it is poorly written. Reading it, I do
3 not agree with that interpretation that you've just furthered.

4 Q. I just asked, is that one interpretation?

5 A. It -- it is one.

6 Q. I think most would agree that it's not the
7 best drafted statute we've read.

8 You indicated that you do not believe that
9 Aquila has taken adequate mitigation measures around that
10 plant; is that correct?

11 A. That's correct.

12 Q. To mitigate the view of the plant?

13 A. That would be one of the issues is
14 landscaping, buffers.

15 Q. Sir, have you heard any noise from that
16 facility?

17 A. When I was out there most recently, it was
18 raining. And I don't know what's happening at night when
19 things are very quiet.

20 Q. So you can't really know if their mitigation
21 efforts in terms of noise have been sufficient?

22 A. That's correct.

23 MR. COMLEY: For the record, it should not be
24 operating at this time.

25 JUDGE PRIDGIN: So noted.

1 MR. EFTINK: That would be illegal.

2 MS. SHEMWELL: I wasn't suggesting that it
3 was.

4 I think that that's all that I have. Thank
5 you.

6 JUDGE PRIDGIN: Ms. Shemwell, thank you.

7 Mr. Youngs or Mr. Swearngen for Aquila?
8 Mr. Youngs?

9 MR. YOUNGS: Yes. Thank you. May I proceed,
10 Judge?

11 JUDGE PRIDGIN: Yes, sir.

12 CROSS-EXAMINATION BY MR. YOUNGS:

13 Q. Mr. Peshoff, good afternoon.

14 A. Hello.

15 Q. A little out of order, but in response to some
16 of the questions, I'm compelled to ask you some questions in
17 response to some of the other cross-examination I've heard of
18 you, for fear of forgetting it.

19 You talked in the questions that Mr. Eftink
20 was asking you about -- and I think you referred in your
21 testimony to the fact that Missouri has strong home rule
22 predispositions. Would that be a fair way to say it?

23 A. I think so.

24 Q. Okay. And when you say home rule, are you
25 thinking -- and the reason I ask you this, because I know that

1 you had some involvement in the unified development code for
2 Jackson County; is that correct?

3 A. That's correct.

4 Q. And you understand that Jackson County is a
5 home rule charter county. Correct?

6 A. Yes.

7 Q. That's because it is a first-class charter
8 county. Correct?

9 A. I believe so, yes.

10 Q. You understand that Cass County is a
11 first-class non-charter county. Do you understand that?

12 A. Yes.

13 Q. Okay. And, in fact, with regard to home rule,
14 if you'd look at your surrebuttal testimony -- or excuse me,
15 your rebuttal testimony, as an Exhibit BGP-2, you attached the
16 American Planning Association's Policy Guide on Energy; is
17 that correct?

18 A. That's correct.

19 Q. That's ratified by the board of directors
20 effective April 25th, 2004; is that correct?

21 A. That's correct.

22 Q. All right. And, in fact, with regard to the
23 position of the American Planning Association and the policy
24 guide on energy, if you'd turn to Page 8 --

25 A. Yes, sir.

1 Q. -- are you with me?

2 A. Yes.

3 Q. And that initiative 10 -- reasons to support
4 initiative 10, utility regulation is a state level function.

5 I've read that correctly, have I not?

6 A. I -- I believe so, yes.

7 Q. Okay. And I guess nobody's asked you, but
8 have you read the Court of Appeals' decision in Cass County
9 versus Aquila?

10 A. I read it one time. And my purpose for
11 reading it was just to become familiar with the background
12 facts.

13 Q. All right. You're not here today to express
14 any opinions on what the Court of Appeals held in terms of
15 Aquila's obligation before this Commission versus Cass County.
16 Correct?

17 A. No, I'm not.

18 Q. Or their interpretation of 64-235?

19 A. That's correct.

20 MR. COMLEY: Just cut out some of my redirect.

21 BY MR. YOUNGS:

22 Q. And you don't have an opinion, as you sit here
23 today, for any reason, legal or otherwise, as to whether or
24 not Aquila is exempt from county zoning if the Commission
25 grants the relief requested?

1 A. Reading the statute as a planner, I think that
2 the county should be reviewing the development application for
3 the South Harper facility.

4 Q. Should be?

5 A. Should.

6 Q. Okay. You're not equating that to a legal
7 obligation as a result of the Court of Appeals' decision in
8 the Cass County case though?

9 A. That's correct.

10 Q. Okay. Just wanted to make sure I was clear on
11 that.

12 Similarly, you have not conducted any review
13 of any Commission cases from the 1960's or the 1970's in which
14 companies have come to the PSC for, among other things,
15 approval to site plants at various facility locations.
16 Correct?

17 A. That's correct.

18 Q. You haven't reviewed 393.170, have you?

19 A. I don't know what that provision is.

20 Q. Okay. So with regard to what, if any, cases
21 or other sources there are that define the various terms of --
22 that are contained in Section 393.170, you would not have done
23 that either, I presume?

24 A. I may have read that statute. I don't know.
25 I have not memorized what it includes, so I'm not sure what

1 the question really --

2 Q. Well, and as we sit here today, are you even
3 aware of what 393.170 says?

4 A. If I saw it, I could tell you if I read that
5 before. But I've not memorized the statute with its number.

6 Q. All right. All right. Just from a background
7 perspective, you have a law degree. Correct?

8 A. That's correct.

9 Q. You're not licensed to practice law in any
10 state?

11 A. That's correct.

12 Q. Have you sat for the bar in any state?

13 A. No, I have not.

14 Q. And you are a land use planner; is that
15 correct?

16 A. That's correct.

17 Q. And there are certifications available for
18 land use planners; is that correct?

19 A. There is.

20 Q. And the one that I'm thinking of, it's
21 probably the same one you're thinking of, is the American
22 Institute of Certified Planners; is that correct?

23 A. That's correct.

24 Q. And just so we're clear, in order to be
25 certified, in addition to being engaged in professional

1 planning and have some combination of education and
2 professional experience, you have to sit for an examination;
3 is that correct?

4 A. That's correct.

5 Q. And that examination is a 3 1/2 hour
6 examination of 150 scoreable multiple choice questions in a
7 variety of areas. Have you sat for that examination before?

8 A. No, I have not.

9 Q. To your knowledge, are any of the members of
10 the Planning and Zoning Department in Cass County -- first of
11 all, are any of them -- do they hold themselves out as land
12 use planners?

13 A. I really don't know their backgrounds.

14 Q. And so you don't know if any of them would be
15 considered land use planners and certainly you wouldn't know
16 whether any of them had any specific certification as land use
17 planners. Correct?

18 A. That's correct.

19 Q. Okay. Would the same hold true for the Cass
20 County Planning Board in terms of their backgrounds?

21 A. I don't know anything about the Planning
22 Board's composition.

23 Q. And the Cass County Commission, would that be
24 fair to say as well?

25 A. Yes.

1 Q. Ms. Shemwell asked you when you had been
2 retained, and I think you said about a month and a half ago.
3 Quickly, that puts me at like March 20th, is that -- or
4 thereabouts?

5 A. Yeah. I think that we started doing the work,
6 started re-- I started reviewing in early April. And I'm only
7 saying that because I don't believe we had any type of billing
8 in the March cycle, so that's why I think it was April when we
9 were doing our work.

10 Q. Okay. Clarification, I appreciate it. So you
11 were retained in mid to late March, didn't actually start
12 doing any work until the first part of April?

13 A. April, yes.

14 Q. And keeping in mind that your rebuttal
15 testimony was filed on April 4th, your testimony is that you
16 would have started doing work on the project a few days prior
17 to that?

18 A. No. Then I have got my dates wrong. I would
19 have to look at our billing records. It was clearly a good
20 month before the due date for the -- so it must have been at
21 the end of February and then beginning of March is when it
22 must have been.

23 Q. When what must have been?

24 A. When I started work on the project. I know I
25 was not operating under any type of a severe time constraint.

1 Q. When, in relation to filing your rebuttal
2 testimony on April 4th, did you first visit the South Harper
3 site?

4 A. I don't recall the -- the specific date. It
5 was a -- just a drive by. And the last time I went was
6 actually to take photographs.

7 Q. And this was just this last week?

8 A. Just this last Friday.

9 Q. All right. So the only thing you did prior to
10 filing your surr-- excuse me, your rebuttal testimony on
11 April 4th was drive by the site?

12 A. Right. Without taking photographs.

13 Q. Without getting out of your car?

14 A. That's correct.

15 Q. I want to talk to you just a little bit about
16 what you're here to talk about and what you're not here to
17 talk about today. Specifically in your rebuttal testimony, I
18 think, pages 23 and 24 -- sorry, your surrebuttal testimony
19 pages, pages 23 and 24 -- wait a minute. I'll get my act
20 together here in a minute. I apologize. I was right the
21 first time, your rebuttal testimony.

22 You asked several questions and raise a
23 variety of different issues in your testimony about nagging
24 questions that arise from Aquila's proposal for the peaking
25 facility. Without going through each of them, you ask a lot

1 of questions in those two pages and maybe throughout, but
2 those were the ones that struck me, about the need for these
3 facilities. You recall that testimony?

4 A. Yes.

5 Q. And one of the facilities that you talk about
6 that that you talk about the need is the Aries facility. Do
7 you recall that testimony?

8 A. Yes.

9 Q. And, again, we've talked about it a lot, but
10 you understand that the Aries facility is what's referred to
11 as a merchant facility. Correct?

12 A. I believe so. That's my understanding.

13 Q. And among other factors that are -- or facets
14 of a merchant facility, the one that I'm wondering if you're
15 aware of is that the merchant facility is not subject to the
16 regulation of this Commission. You understand that?

17 A. Yes, I do.

18 Q. Okay. You also talk about the burden on Cass
19 County -- I think Ms. Shemwell asked you a few questions about
20 that -- by having more than one plant. Do you agree with the
21 assumption that electrical generation or transmission facility
22 is a burden to a community?

23 A. No, I don't.

24 Q. And you're certainly not of the opinion that
25 there's no benefit to a community that comes as a result of

1 having facilities like those that are at the South Harper site
2 and the Peculiar substation?

3 A. No. I'm raising the question of whether a
4 county that is growing but is still largely rural should have
5 a disproportionate responsibility to providing electric
6 facilities for a metropolitan area.

7 Q. Okay. And your opinion on that, that they may
8 be providing a disproportionate -- bearing a disproportionate
9 burden is based simply on the fact that you don't know of any
10 other county that has more than two facilities like these. Is
11 that what I'm understanding you to say?

12 A. Not -- not -- not necessarily. What I'm --
13 the questions I'm asking are the types of questions that could
14 have been and should have been asked during the development
15 review process. The Planning Board, the county commissioners
16 may have decided that this is fair, it's reasonable, it's
17 consistent, but these are just the types of questions that
18 would typically come up for any type of industrial type use,
19 do we want this here, do we have too much of X.

20 Q. Okay. So just to make sure, the bottom line
21 is you're not here to tell this Commission that you're an
22 expert in determining whether there's a need for these
23 facilities in Cass County?

24 A. I am not.

25 Q. Nor that the Commission should consider you

1 such an expert?

2 A. That's correct.

3 Q. And to the extent you talk about reasonable
4 siting alternatives and the burden on Cass by having more than
5 one plant, those, in your opinion, are just issues that some
6 authority should take into account, according to your
7 opinions?

8 A. I think it's reasonable.

9 Q. Okay. Similarly, in pages 30 and 31 of your
10 rebuttal testimony in which you discuss maps and potential
11 other industrial sites -- are you with me there?

12 A. Yes. 30 -- Page 30, yes.

13 Q. Right. The sites that you propose in BGP-3,
14 in that schedule, you're not here to testify with regard to
15 the suitability of those sites for a peaking plant or a
16 substation?

17 A. Not at all. And in reading some of the
18 surrebuttal testimony, I think that the map and the text were
19 misinterpreted. The purpose of those sites were to identify
20 with significant staff -- county staff assistance that there
21 are other areas that possibly could accommodate industrial
22 type uses such as a plant. But it wasn't meant to suggest
23 that they were better uses or the only alternative locations.

24 Q. All right. You'd agree with me that there's a
25 discussion that has to take place both with regard to the

1 suitability of a site for a particular purpose and the
2 compatibility of that site with surrounding purposes?

3 A. Absolutely.

4 Q. Would that be a fair summary of your opinion?

5 A. Yes.

6 Q. And in this case, you're not offering an
7 opinion on the first of those --

8 A. That's correct.

9 Q. -- is that fair to say?

10 A. Yes.

11 Q. Okay. You simply included those as examples
12 of areas that appear to accommodate heavy industrial uses
13 without regard to their suitability for those uses in this
14 case?

15 A. That's correct.

16 Q. Okay. And, in fact, you'd agree with me that
17 suitability and compatibility both have to be weighed in the
18 decision?

19 A. Yes, they do.

20 Q. Because as the APA says, potential sites for
21 electric generating and transmission facilities are becoming
22 increasingly difficult to find?

23 A. That's true.

24 Q. Some of your testimony appears to indicate
25 that the facilities that are at issue in this application

1 should be put in or closer to incorporated areas; is that
2 correct?

3 A. That -- that is another alternative.

4 Q. Not necessarily the only alternative, just one
5 that --

6 A. That's correct.

7 Q. -- you're offering?

8 You'd agree with me that the City of Peculiar
9 is about a mile and a half away from the site, the South
10 Harper site?

11 A. Actually, about 1.4 miles.

12 Q. Okay. In fact, with regard to the American
13 Planning Association document that you attached, if you'd turn
14 to Page 9 up towards the top, the second paragraph, you'd
15 agree with the APA that, in fact, large power plants are often
16 located in or near rural communities. You'd agree with that?

17 A. Yeah. It's a statement that -- yes, yes, I
18 would.

19 Q. Okay. In fact, are you familiar with the
20 Nodaway peaking facility in Nodaway County?

21 A. No, I'm not.

22 Q. Are you familiar with the Holden plant in
23 Holden, Missouri?

24 A. No, I'm not.

25 Q. Are you familiar with Kansas City Power &

1 Light's West Garner station in Kansas?

2 A. No, I'm not.

3 Q. Would it surprise you to know that each of
4 those facilities are all located in rural areas similar to the
5 ones that we're talking about in this case?

6 MR. COMLEY: Objection. He has no foundation
7 for that.

8 JUDGE PRIDGIN: Mr. Youngs?

9 MR. YOUNGS: I'm asking him if he's aware and
10 if he's not, I suppose he could say so.

11 JUDGE PRIDGIN: I think the question was would
12 it surprise him, so you might be asking him to speculate so
13 I'll sustain.

14 THE WITNESS: I'm not aware where they're
15 located.

16 BY MR. YOUNGS:

17 Q. Okay. That's fine. You wouldn't have one way
18 or another to know where those facilities are located --

19 A. No, sir.

20 Q. -- is that fair to say?

21 You'd agree with me -- I think we've talked
22 about it a lot and your testimony talks about it, that the
23 comprehensive plan generally establishes the vision of the
24 community; is that correct?

25 A. Yes.

1 Q. And I think with regard to your rebuttal
2 testimony on Page 2, you talk about comprehensive plans and
3 you say that a plan should be future-oriented, establishing
4 goals and objectives for future land use and development,
5 continuous, flexible and able to adjust to changing conditions
6 based on an assessment of present, actual and future
7 reasonable conditions and comprehensive; in other words,
8 coordinated, not haphazard or incremental.

9 Have I read that correctly?

10 A. Yes, you have.

11 Q. And that's your opinion in this case; is that
12 correct?

13 A. Yes, sir.

14 Q. In this case, the most current version of the
15 comprehensive plan is the 2005 update; is that correct?

16 A. The most current one, yes.

17 Q. And you would agree with me and I think -- I
18 don't know if you'll agree with Mr. Mallory, the presiding
19 commissioner, when he said this, but you would agree that in
20 order to determine the current vision of the community, you
21 look to the most current vision of the comprehensive plan?

22 A. That's correct.

23 Q. And the 2005 update extends the use of this
24 multi-tier system that was originally established in the 2003
25 plan; is that correct?

1 A. It -- yes, it does.

2 Q. In fact, the 2003 plan, one of the things that
3 it did was it got rid of this concept of urban area reserves;
4 is that correct?

5 A. That's correct.

6 Q. So urban area reserves do not exist in Cass
7 County anymore --

8 A. That's correct.

9 Q. -- from a planning and zoning standpoint?

10 A. That's correct.

11 Q. If you'd turn to your rebuttal testimony on
12 Page 26. Are you with me?

13 A. Yes.

14 Q. One of the things that you talk about in that
15 section of testimony is whether or not the South Harper
16 facility is consistent with what you believe should apply here
17 in the 2003 plan.

18 In the first bullet point up there you say
19 that the facility is an urban use in a rural location that is
20 incompatible with the surrounding rural residential uses and
21 should have been located nearer to or within an urban area
22 reserve or incorporated area.

23 I assume that since even under the 2003 plan
24 there are no such things as urban area reserves, we should
25 strike that phrase from your testimony. Is that fair to say?

1 A. Yes.

2 Q. Okay. It would be impossible for Aquila to do
3 as you suggest and locate within an urban area reserve under
4 the 2003 plan?

5 A. It should be urban tier.

6 Q. Okay. The third bullet point, I assume your
7 answer will be the same, the location of the facility is
8 outside of a designated urban area reserve, has an industrial
9 use with urban character, the facility should be located
10 within an urban area reserve. Again, since those don't exist
11 anymore --

12 A. Yes.

13 Q. -- it would have been hard for Aquila to put
14 it in there. Right?

15 A. Urban tier is what it should read.

16 Q. Okay. One of the things that we have talked
17 about a little bit before you got here today -- you have
18 Exhibit 118 and 119 up there?

19 MR. YOUNGS: May I approach, your Honor?

20 JUDGE PRIDGIN: You may.

21 BY MR. YOUNGS:

22 Q. Do you have those exhibits in front of you,
23 Mr. Peshoff?

24 A. Yes, I do.

25 Q. All right. With regard to Exhibit No. 118,

1 which is the comprehensive plan update for 2005, in fact, it
2 refers to itself on Page 2 as the 2004 master plan, does it
3 not?

4 A. Yes. There's a reference to a 2004 master
5 plan.

6 Q. Would you expect that that's because the plan
7 was in some form of creation during 2004, or do you know one
8 way or the other?

9 A. I don't know.

10 Q. Okay. On Page 2 it also talks about that the
11 comprehensive plan must guide the direction of growth in the
12 county; is that correct?

13 A. Is there --

14 Q. I'm sorry. Underneath the 2004 master plan
15 heading, the second paragraph, the second sentence, The plan
16 must guide the direction of growth, but at the same time be a
17 dynamic tool that accommodates changes in our style of living.

18 Have I read that correctly?

19 A. Yes, you have.

20 Q. And you agree with that statement, do you not?

21 A. Yes, I do.

22 Q. Serves as the basis for zoning changes -- or
23 excuse me, zoning decisions. Correct?

24 A. Yes.

25 Q. And if applications for zoning changes are in

1 accordance with the plan, they are presumed to be reasonable.

2 Have I read that correctly?

3 A. Yes.

4 Q. And you agree with that?

5 A. Yes.

6 Q. On Page 3 the plan talks about -- just
7 generally without just reading it into the record -- that the
8 protection and the public -- promotion of the public welfare
9 has to be balanced with the property owner's rights to promote
10 reasonable economic use of his property. And that's a
11 statement you agree with as well, don't you?

12 A. Yes, sir.

13 Q. It would be inappropriate to just consider the
14 impact on surrounding properties while balancing that with the
15 other factors we've been talking about today, would it?

16 A. It's a balancing test.

17 Q. There is this thing called a multi-use tier
18 that we've been talking about, which is discussed first on
19 Page 25 of the comprehensive plan which talks about that these
20 are areas near towns and cities and along paved highways and
21 thoroughfare roads where non-agricultural development such as
22 commercial and industrial uses and residential development
23 that's denser than 20-acre lots is encouraged.

24 Large scale development is allowed, including
25 commercial and industrial zoning, provided there are provision

1 for direct access to paved roads.

2 Have I read that correctly?

3 A. Yes, you have.

4 Q. On Page 28, again, multi-use tiers are
5 representative of development areas within Cass County that
6 exhibit the following characteristics: Positioned as
7 transitionaries from urban to rural densities located along
8 rural highways, main arterials and intersections or close
9 enough to such major roads to provide access for more intense
10 levels of non-agriculture traffic; and third, predominantly
11 developed for a mix of land uses, residential, industrial and
12 commercial purposes.

13 I've read that correctly, have I not?

14 A. Yes, you have.

15 Q. All right. And, again, we've talked about how
16 Peculiar is about a mile and -- you've said 1.4 miles away
17 from the South Harper site. Correct?

18 A. Yes.

19 Q. This is TSH-1, I think, which for the record
20 is an enlargement of an aerial photograph of the South Harper
21 site and the surrounding areas.

22 MR. YOUNGS: May I approach, Judge?

23 JUDGE PRIDIGN: You may.

24 BY MR. YOUNGS:

25 Q. I'll represent to you, and then maybe you can

1 figure this out yourself too, but this is a view looking west
2 onto the plant's site.

3 A. Looking east.

4 Q. Excuse me. Thank you. Good thing you weren't
5 trusting me.

6 Looking east and there's also a view to the
7 northeast; is that correct?

8 A. That's correct.

9 Q. And there's a few of some of the properties
10 that are north of the 74-acre parcel; is that correct?

11 A. Yes.

12 Q. And you can see how around the plant site you
13 would agree with me that residences are less dense than they
14 are as you approach Peculiar, which is to the northeast.
15 Would that be fair to say?

16 A. Yes.

17 Q. Okay. And we've talked a lot about this gas
18 compressor station, which is behind you on the screen. That
19 is a -- what you've I think referred to as an industrial use
20 of that property just north of the power plant. Correct?

21 A. Yes.

22 Q. And, in fact, from this view, which I'll
23 represent was taken from resident Frank Dillon's front yard,
24 you can just barely see any of the power plant; is that
25 correct?

1 A. In this photograph.

2 Q. I'm not saying that there aren't angels from
3 which you can see the power plant, but from this one, which is
4 directly across the street, you can't see it, can you?

5 A. That's correct.

6 Q. And that's because the gas compressor station
7 is in the way?

8 A. It's the orientation of the photograph and the
9 area -- area that's being shown. So since there are three
10 towers out there, actually standing there with a photo that
11 isn't cropped to those dimensions, you would see much more of
12 the South Harper facility.

13 Q. But in terms of the towers, they're right
14 behind, you can just barely see, that's because the compressor
15 station is in the way?

16 A. It's in front of. It's between the
17 photographer and the facility.

18 Q. Fair enough. There's no dispute that under
19 the 2005 comprehensive plan, the South Harper facility is
20 within the multi-use tier. Correct?

21 A. That a portion of it is.

22 Q. What portion of it is not?

23 A. If we look at the map -- the tiers map for
24 2005, we see that the boundary for the multi-use tier does not
25 include all of the South Harper site area.

1 Q. If I represented to you, Mr. Peshoff, that the
2 multi-use tier encompasses everything except some portion of
3 the switchyard, which is just west of the facility, you'd
4 agree with that, would you not?

5 A. It -- yes, includes part of the facility and
6 excludes part of the facility.

7 Q. Okay. So the portion that we're looking at
8 right here, which includes the compression station, the
9 plants -- or excuse me, the exhaust towers and the turbines,
10 your position would be that those are included or excluded?

11 A. I don't know. We would have to superimpose
12 the imagery from the multi-use tier boundaries as shown on the
13 map -- plan map over some aerial imagery and see where that
14 boundary exists. I believe that one of our maps might do that
15 and we could see what portion of that --

16 Q. You certainly haven't done that in this case,
17 have you? In preparation for the filing of your rebuttal --

18 A. In my rebuttal --

19 Q. -- or your surrebuttal testimony under the
20 2005, you have not?

21 A. No. Not for 2005.

22 Q. Okay. And under any circumstances --

23 A. Actually, I'm going to clarify that, if I may.
24 It has not been presented with this rebuttal testimony, but we
25 looked at a number of different scenarios. And that is one

1 that we did prepare. So I don't want to imply that we did not
2 consider that.

3 Q. Mr. Peshoff, you've put together a map showing
4 the 2005 multi-use tier and the location of the properties
5 within that tier as part of your rebuttal testimony, did you
6 not?

7 A. Yes, we did.

8 (Exhibit No. 125 was marked for
9 identification.)

10 BY MR. YOUNGS:

11 Q. I'm showing you what's been marked -- and I'm
12 sorry, I don't have an extra copy, but it is one of your
13 schedules, Exhibit No. 125, which is the map you prepared
14 showing the subject properties in conjunction with the 2005
15 multi-use tier. Correct?

16 A. Yes.

17 Q. Okay. And so what you're saying is with
18 regard to the South Harper facility, this is the entire
19 parcel, is it not?

20 A. That's correct.

21 Q. And you understand that the facility does not
22 take up the entire parcel?

23 A. That's correct.

24 Q. Okay. So there's some portion of the facility
25 that's located within this box that, as you've indicated, is

1 on the edge of the multi-use tier. Correct?

2 A. Yeah. I -- yes, outside of the multi-use
3 tier.

4 Q. And so with regard to the Peculiar
5 substation -- and I think we need to clarify -- this actually
6 needs to be on the other side of this line, doesn't it?

7 MR. COMLEY: I'm confused. Excuse me,
8 Mr. Youngs, but can you, for the record, show me what you're
9 referring to when you say, This has to be on the other side of
10 the line?

11 MR. YOUNGS: Yeah. I'll put it up.

12 BY MR. YOUNGS:

13 Q. I've put it on the overhead projector,
14 Mr. Peshoff. And with regard to the substation, I think that
15 we've established that your map is wrong, that the substation
16 actually needs to be reflected on the east side of that
17 intersecting roadway. Would you agree or disagree with that?

18 A. I don't know, to tell you the truth, exactly
19 if that is on the wrong side. The problem that we've had in
20 getting data using -- getting the best available information
21 is that the county's planning maps have not been parcel based.
22 So this has been a continual process whereby we've been
23 improving the data that the county has.

24 We now do have some parcel data, parcel
25 boundaries. I don't know how that -- how that fits in with

1 that location.

2 Q. So using the data that the county has given
3 you up to this point, this is the best you can do?

4 A. This is the best information that we have.

5 Q. All right. Good enough. But under any
6 circumstance -- I'm not sure if I got my question answered.
7 Under any circumstance, the substation is located -- at least
8 part of it is located in a multi-use tier under either the
9 2003 or the 2005 plan?

10 A. That's correct.

11 Q. And, in fact, if it's not all in the tier, the
12 northern part of it may be in an urban surface tier --

13 A. Yes, sir.

14 Q. -- correct?

15 With regard to the comprehensive plan -- and,
16 again, for purposes of this, I'm talking about both the 2003
17 or 2005 update. Both have codes of conduct, do they not?

18 A. I'm sorry? The comprehensive plans --

19 Q. Correct.

20 A. -- have codes of conduct?

21 Q. Correct. If you'd turn to page 77 of Exhibit
22 No. 118.

23 A. Yes, I see that.

24 Q. And do you see this code of conduct is to
25 govern the conduct of the planning commission's business; is

1 that right?

2 A. Yes.

3 Q. Turning to page 79 -- and just so we're clear,
4 this code of conduct applies to anybody within the county who
5 has a role within the planning and zoning process, doesn't it?

6 A. Well, that's a good question. I don't know.
7 Because it's an appendix to the comprehensive plan and it
8 could be added for information only. I mean, it does make a
9 statement in its opening line governing the conduct of the
10 planning commission's business, but I don't know whether it
11 would carry the weight as an appendix as a part of the
12 comprehensive plan. It may, I just don't have an answer for
13 you.

14 Q. Okay.

15 A. But it is an appendix.

16 Q. So you just don't know if has got any effect
17 at all or if it should guide the activities of the various
18 members of the county staff or government who deal with these
19 issues?

20 A. That's right. Obviously this was created at
21 some point by the county and included with the plan. To
22 answer your questions, I don't know if it carries the same
23 weight as an appendix.

24 Q. Well, then let's set aside the comprehensive
25 plan for just a second. Do you think that it's crucial in the

1 planning and zoning process that decisions by anybody
2 associated with that process be made fairly?

3 A. Yes.

4 Q. And that they be made impartially?

5 A. Yes.

6 Q. And that not only are they made fairly and
7 impartially, but that they give the appearance of being made
8 fairly and impartially?

9 A. I agree with that.

10 Q. Do you agree with me that the credibility of
11 the planning board's function and the other boards, including
12 the Board of Zoning Adjustment, depends on that impression and
13 the actual compliance of those principles?

14 A. Yes.

15 Q. Would it be fair to say that you agree that
16 someone who is associated with the review of a Planning Board
17 decision should not have discussions in a case with anyone who
18 has an interest in the outcome of that development proposal
19 while that process is ongoing?

20 A. Well, we would -- and we deal with this type
21 of an issue regularly, especially with smaller communities.

22 Q. First of all, I'm sorry, sir. Is it possible
23 for you to answer my question yes or no?

24 MR. COMLEY: At this point I'd interpose an
25 objection based upon vagueness.

1 MR. YOUNGS: I'm asking the witness if he
2 thinks it's important that somebody who's associated with the
3 review of a zoning decision should or should not have
4 conversations with people who have an interest in that
5 decision.

6 JUDGE PRIDGIN: I'll overrule. He can answer
7 if he knows the answer.

8 THE WITNESS: If they do, disclosure should
9 occur at the public meeting. That's what I was trying to get
10 to.

11 BY MR. YOUNGS:

12 Q. Okay. I guess I want to just go back to your
13 surrebuttal testimony then, because if -- you're not sure
14 whether the appendix has any impact on this. You would agree
15 with me that you prefer decision makers to remain impartial
16 and not appear to align themselves either for or against a
17 proposal or project. The proposal should be judged solely on
18 its merits and ability to comply with plans, regulations,
19 rules and policies --

20 A. Yes.

21 Q. -- have I read that correctly?

22 And that's your testimony which you agree with
23 as we sit here today; is that right?

24 A. Yes.

25 Q. And you wrote that testimony with regard to

1 your concerns about Mr. Fischer's involvement on behalf of the
2 City of Peculiar in working with Aquila regarding the South
3 Harper site. Correct?

4 A. If you could tell me what page we're on, but I
5 believe that is correct, from my recollection.

6 Q. Pages 9 and 10 of your surrebuttal.

7 A. Yes.

8 Q. And you took some of the statements in his
9 rebuttal testimony as raising a red flag for you; is that
10 correct?

11 A. That's correct.

12 Q. There's been evidence in the case -- and I
13 don't know if you're aware about it or not, I assume you are,
14 that Mr. Mallory in his capacity as the chair of the Board of
15 Zoning Adjustment, after the Planning Board voted to recommend
16 denial of Aquila's special use permit application for the Camp
17 Branch facility, had conversations with Aquila representatives
18 prior to a scheduled BZA hearing in which he told those
19 representatives that he believed their application had about a
20 snowball's chance in hell of being approved.

21 MR. COMLEY: I'll object to the question. I
22 think it mischaracterizes part of the evidence that was heard
23 today.

24 MR. YOUNGS: I think it's a pretty fair
25 summary of what Mr. Mallory's testimony was, but I'll defer to

1 the record.

2 JUDGE PRIDGIN: I'll overrule. That's
3 essentially how I remember the evidence.

4 BY MR. YOUNGS:

5 Q. Had you heard of that conversation?

6 A. Yes.

7 Q. All right. I would assume you'd agree whether
8 it's under the appendix or whether general principles of even
9 the appearance of fairness or impartiality that you've talked
10 about today, that that conversation should not have taken
11 place in that capacity. You'd agree with that, wouldn't you?

12 A. That kind of blustering is just inappropriate.

13 Q. You talk about Mr. Fisher's support is a red
14 flag. What color flag did Mr. Mallory's conduct raise for
15 you?

16 A. One of frustration.

17 Q. Let's talk about the adoption of the 2005
18 comprehensive plan. I think there's been evidence that's, I
19 think, undisputed that this process began in early 2004.
20 That's your understanding; is that correct?

21 A. I believe so, yes.

22 Q. And that there were meetings in the fall and
23 winter of 2004 and early January of 2005 in which the plan was
24 raised, discussed and concerns and objections in some cases
25 aired to it. You're familiar with that?

1 A. Yes. But I think that overstates what the
2 process was. Because my understanding of the process, after
3 interviewing staff, is that it was a planning process devoted
4 primarily to the zoning ordinance and not the plan and that
5 the plan changes did not even get discussed until the very end
6 of the process.

7 Q. Okay. You would, of course, yield to the
8 minutes of those meetings in terms of what they show was
9 discussed at those various meetings?

10 A. Yes.

11 Q. As opposed to the recollection of the staff
12 members who you interviewed?

13 A. That's correct.

14 Q. Which conversations are not reflected in your
15 direct testimony as anything you relied on in giving your
16 opinions in this case. You'd agree with that?

17 A. It may not be, but it would just be a normal
18 course of doing any type of a planning analysis.

19 Q. And it's also been established the
20 construction of the facilities did not begin until after
21 January 11th, 2005. You agree with that?

22 A. I believe that's a -- I believe that's true.

23 Q. You're aware --

24 A. And it would --

25 Q. -- of the fact that -- excuse me.

1 A. It would depend on how one would define
2 construction activities as well.

3 Q. I'm just going by what Mr. Mallory said in his
4 direct testimony.

5 You would agree that Cass County did not begin
6 conducting zoning as a first-class non-charter county until
7 January of 2004. You're aware of that?

8 A. When their status changed.

9 Q. Correct.

10 A. Yes.

11 Q. As this process was going through and the plan
12 was being discussed and the zoning -- the changes to the
13 zoning ordinance were being discussed, there's nothing that
14 would prevent anybody during that process from recommending or
15 actually making changes to the comprehensive plan as a result
16 of those discussions. Fair to say?

17 A. Yes.

18 Q. In fact, that's the purpose of the
19 discussions, isn't it?

20 A. Yes, sir.

21 Q. You'd agree with me -- I want you to assume
22 some facts here -- that Aquila did not know that Peculiar
23 would not annex the South Harper site until October 23rd of
24 2004 and that Aquila decided to file a special use permit
25 application for the plant with Cass County. And further

1 assume that it was able to get the information assembled and
2 the application filed by mid-December.

3 You'd agree with me that although the process
4 can go faster, the Planning Board has 60 days in which to make
5 a decision on that application?

6 A. Yes.

7 Q. And from that application's recommendation,
8 denial or approval, the Board of Zoning Adjustment has another
9 60 days in order to make its decision?

10 A. I believe so.

11 Q. So conceivably under my hypothetical, a final
12 decision by the BZA would not have occurred until after the
13 February 1, 2005 effective date of the comprehensive plan.
14 Correct?

15 A. Theoretically.

16 Q. Similarly, there's been evidence about a
17 letter and an invitation to Aquila in a letter from counsel
18 dated February 1st of 2005 inviting Aquila to file a special
19 use permit application for both the substation and the plant
20 site. Are you aware of that?

21 A. No, I'm not.

22 Q. Assuming that Aquila accepted that invitation
23 and filed that special use permit application, it would be
24 filed after February 1st, 2005. Correct?

25 A. Presumably, yes.

1 Q. In any event, you and I can agree that in
2 order to get the current vision of the county with regard to
3 land use issues, you should look to the current plan?

4 A. Yes.

5 Q. And there's nothing cited in your testimony
6 that purports to indicate that the Commission is prohibited,
7 as a matter of law, from looking at the 2005 update, is there?

8 MR. COMLEY: I'll object to that. It implies
9 he has an obligation to render a legal conclusion in
10 connection with his testimony.

11 MR. YOUNGS: I'll rephrase the question.

12 JUDGE PRIDGIN: All right.

13 BY MR. YOUNGS:

14 Q. You're not aware of anything that prohibits
15 the Public Service Commission in this case from looking to the
16 comprehensive plan to determine the issues in this case?

17 A. Nothing that would prohibit them from it.

18 Q. Your question is just which one makes the most
19 sense to use?

20 A. Yes.

21 Q. All right. You talk in your testimony a
22 little bit about some factors. And you use the 2003 plan, but
23 I'm just trying to figure out some facts that we can agree on.
24 Again, we've talked about Peculiar being about 1.5, 1.4 miles
25 away from the South Harper site. Correct?

1 A. Yes.

2 Q. And we've established that there is, in fact,
3 a gas compressor station immediately north of the plant site.
4 Correct?

5 A. Yes.

6 Q. Now, just so we're clear, in terms of the
7 plant site, there's been a lot of discussion. You understand
8 that the parcel at South Harper Road and 241st Street is
9 approximately 74 acres?

10 A. I believe so.

11 Q. But you'd agree with me that of that 74 acres,
12 only a little more than 9 acres of it is occupied by the South
13 Harper plant?

14 A. Well, yes and no. I understand that there's a
15 larger parcel that's under control and ownership of the South
16 Harper peaking facility. And they're only at this point in
17 time using a portion of that parcel. There are questions as
18 to what decisions should be made for just -- to restrict any
19 decisions to a portion or whether it should apply to the
20 entire site.

21 Q. My only question to you in terms of what
22 machinery is occupying that 74 acres, you'd agree with me that
23 only about 9 acres of that are occupied by Aquila?

24 A. I don't know that.

25 Q. You just don't know one way or the other?

1 A. I don't know how many acres are being used for
2 the machinery.

3 Q. Okay.

4 A. We typically do not look at a use
5 compartmental-- compartmentalizing it within a parcel. It is
6 what is the use of the parcel, not just a piece of the parcel.

7 Q. All right. So taking a look again at TSH-1,
8 which is the aerial photograph, the use that I was talking
9 about that comprises about 9 acres is this area here
10 (indicating) where the turbines and the exhaust and the other
11 portions of the facility are, plus the substation switchyard.
12 That's about 9 acres. And what you're saying is you're
13 supposed to look at the entire parcel to determine --

14 A. Yeah. I guess the question I'd have is would
15 that substation exist without the plant being located there.

16 Q. And that's kind of a need question. Wouldn't
17 you agree?

18 A. No. It's about could that substation on the
19 western portion of the southern parcel -- portion of the
20 parcel exist independent of the towers on the eastern portion
21 of the parcel.

22 Q. Okay.

23 A. And that's one reason to tie these together,
24 because they are a use that are -- or effectively appear to be
25 joined at the hip.

1 Q. Well, and that's what I'm doing. When I'm
2 saying the entire area here, the plant and the substation
3 comprise about 9 acres, you don't have any reason to dispute
4 that, do you?

5 A. No reason to agree or dispute it.

6 Q. So you would also agree with me -- set aside
7 the, I think, 6 or so acres that are occupied by the Southern
8 Star gas compressor station. You would also agree with me
9 that the remaining part of the parcel north of there, there is
10 a use on there. And what is that use?

11 A. It must -- I said it was some ag use. I
12 didn't --

13 Q. Okay. In fact, maybe you didn't notice it
14 when you were driving by, but the fact of the matter is
15 there's a farm on that piece of property, isn't there?

16 A. It would appear to be, yes.

17 Q. And a barn. Correct?

18 A. I'd have to look at the photograph.
19 Whatever's there is there. I was just going from recollection
20 and I recalled it was agricultural. It apparently had a barn
21 and a farm there. It's not critical.

22 Q. Well, and four ponds. Correct?

23 A. I don't know.

24 Q. Okay. And you say it's not critical, but
25 isn't one of the things that you're trying to make a

1 determination of and one of the opinions that you're giving to
2 this Commission, the use of the parcel that you and I were
3 talking about and the adjacent uses of that parcel from a land
4 use planning perspective?

5 A. Uh-huh.

6 Q. That's true, isn't it?

7 A. Yes. Yes, it is.

8 Q. So it would be significant to you to know that
9 the northern half of that parcel is occupied by a farm?

10 A. And that's the precise reason why maps and
11 photographs are helpful to make sure we don't just rely on our
12 memory. After looking at that, we can -- I can see, yes, I
13 misspoke because I had the impression because of the large
14 rural nature, that there was not on that immediate parcel on
15 that corner a farm. So there is. It's not a big deal.

16 Q. Okay. And the reason I bring it up -- and I
17 appreciate you clarifying that for me -- is because that in
18 your testimony and I think it was on page -- make sure I've
19 got it right here. On Page 27 in the second bullet point you
20 say, Instead, the facility is currently adjacent to
21 residential areas on the north and east sides.

22 And I just wanted to make sure that when you
23 were talking about what was adjacent to the site on the north,
24 that you were recalling the gas compressor station that's
25 immediately north to the site.

1 A. No. No. You are misconstruing. Because we
2 have not given the impression that we are somehow splitting
3 the parcel that is under the control and ownership of the
4 South Harper Road peaking facility. That's -- that's an
5 effort that you are attempting to do and that's why I just
6 stated a moment ago, that's not how a planner would look at
7 this. We would not try to split the parcel.

8 And the calculations you were coming up with
9 for the 9 acres here, that's more a measure of what's the
10 amount of impervious area. We wouldn't say that's the only
11 amount of the area that's being used for that site.

12 Q. Well, and another part of that area -- of that
13 64.3 acres that remains when you take out the 9.3 acres that's
14 occupied by the facility itself, that's another set of acreage
15 that would be available for screening. Correct?

16 A. Absolutely could be.

17 Q. And has been, hasn't it?

18 A. For some screening.

19 Q. And, in fact, to the west and the south
20 there's existing screening?

21 A. That's correct.

22 Q. As depicted on TSH-1. Correct?

23 A. Yes.

24 Q. So that's a factor that you have to take into
25 account when you're looking at the compatibility of this site

1 with the surrounding uses?

2 A. Yes, we would.

3 Q. Taking a look at the zoning order that was
4 adopted in 2005 -- just so we're clear, the 2005 zoning order,
5 which is Exhibit 119, it repeals the 1997 ordinance, does it
6 not?

7 A. Yes.

8 Q. And there's no dispute that electric services
9 and power generation facilities are permitted uses in an
10 agricultural district with a special use permit. Correct?

11 A. I believe that's correct.

12 Q. Okay. As are commercial feed lots, metal
13 mining, coal mining, railroad switching, truck terminals,
14 airports, sewage, sanitary landfills and correctional
15 institutions. That's true, isn't it?

16 A. I'll take your word for it.

17 Q. I just pulled it off the chart. And that's
18 not to say there aren't other factors, but there's no dispute
19 that those are permitted uses with a special use permit.
20 Correct?

21 A. Yes.

22 Q. And, in fact, as a matter of right, if you
23 have a piece of agricultural property, you can operate a food
24 plant, newspaper publishing facility, you can conduct ship
25 building and you can have an auto repair shop. True?

1 A. If that's what the ordinance identifies, yes.

2 Q. And you reviewed the special use permit
3 application for the substation and the South Harper peaking
4 facility as part of your preparation in this case. Correct?

5 A. Yes. We gave -- I gave it preliminary review,
6 not a detailed review.

7 Q. Okay.

8 (Exhibit Nos. 126 and 127 were marked for
9 identification.)

10 BY MR. YOUNGS:

11 Q. Mr. Peshoff, I'm showing you what's been
12 marked as Exhibit No. 126, which is the special use permit
13 application for the South Harper peaking project that was
14 attempted to be filed in January, and the special use permit
15 application for the Aquila Peculiar 345 kilovolt substation
16 project also attempted to be filed.

17 Can you just confirm for me that those were
18 what you reviewed? And I understand it was a brief review as
19 part of the presentation for the giving of your opinions in
20 this case.

21 A. These -- these look to be -- it looks to be
22 the same document.

23 Q. All right.

24 MR. YOUNGS: Your Honor, I will offer Exhibits
25 126 and 127.

1 JUDGE PRIDGIN: And let me make sure that I've
2 got the exhibits straight. 126 is the SUP application for
3 South Harper peaking facility.

4 MR. YOUNGS: That's correct.

5 JUDGE PRIDGIN: And 127 is the SUP for the
6 Peculiar substation.

7 MR. YOUNGS: That's correct.

8 JUDGE PRIDGIN: Any objection?

9 Hearing none, Exhibits 126, 127 are admitted.

10 (Exhibit Nos. 126 and 127 were received into
11 evidence.)

12 BY MR. YOUNGS:

13 Q. One of the things -- since we've been talking
14 about this gas compressor station, it's reminded me to ask you
15 about additional conditions. I think you referred to those in
16 your testimony. Can you pull Exhibit 119 out for me for just
17 a moment? Have you got it?

18 A. Yes.

19 Q. And turning to Page 86, in Article 8, which
20 deals with special use permits in Cass County, there are
21 additional conditions for particular special uses set out; is
22 that correct?

23 A. Yes.

24 Q. And just from a general standpoint, those are
25 uses in which Cass County or any regulatory body has

1 determined have some special features that need to be dealt
2 with specially. Is that a fair summary?

3 A. Yes.

4 Q. Okay. And that would include in this case
5 residential or outpatient facilities for drug or alcohol
6 abuse. Correct?

7 A. Correct.

8 Q. Special manufactured home placement. Correct?

9 A. Yes.

10 Q. Uses involving the storage, processing or
11 manufacturing of large quantities of toxic chemicals.
12 Correct?

13 A. All right. Yes.

14 Q. Communication towers, adult entertainment
15 establishments, which is on Page 89, composting sites on
16 Page 92, sanitary landfills on Page 93. Have I read those off
17 correctly?

18 A. Yes.

19 Q. And just so we're clear, there's no dispute
20 power generating and transmission facilities are not included
21 in that list of uses that require additional conditions; is
22 that correct?

23 A. Say it again.

24 Q. Just so there's no dispute, power generation
25 and transmission facilities are not included in those listings

1 of uses for which there are additional conditions?

2 A. That's -- that's correct.

3 Q. And our discussion about the gas compressor
4 station has reminded me. One of the things that you do when
5 you have come to your conclusions in this case is you look at
6 the factors for evaluating special use permit applications and
7 one of those factors is adjoining uses and the general
8 compatibility of the use with the surrounding area. Correct?

9 A. Yes.

10 Q. Would it be fair to say -- and you tell me if
11 you can find it -- nowhere in your rebuttal or your
12 surrebuttal testimony do you consider the impact of the gas
13 compressor station in that analysis, do you?

14 A. I'm not sure I understand your question.

15 Q. Well, take a minute and look through your
16 rebuttal and your surrebuttal testimony and let me know if you
17 considered the existence of the gas compressor station that's
18 on the screen now in coming to your conclusion that the South
19 Harper facility was not a compatible use for this area. I'll
20 represent to you that I couldn't find it.

21 A. Yeah, it may not have been mentioned. Again,
22 this was a -- never mind.

23 Q. Well, go ahead.

24 A. No, that's all right.

25 Q. In fact, you weren't really -- when you

1 prepared your rebuttal and your surrebuttal testimony, you
2 weren't planning to opine on the ultimate issue of whether or
3 not this facility was compatible with this area, were you?

4 A. No. Actually, that was one of the points we
5 did make that it wasn't consistent with the plan. And
6 consistent with the plan means a lot of things and
7 compatibility is clearly one of those land use factors that we
8 were looking at.

9 Q. I want to look at your rebuttal testimony and
10 I'll ask you to look with me. On Page 27 -- and, again,
11 setting aside the fact that you're using the 1997 zoning
12 ordinance which has been repealed, you say that it does not
13 meet the criteria of the 1997 zoning ordinance because a
14 special use permit is required to support electrical services
15 and power generation facilities in an agricultural district.

16 The land the facility is located on is
17 identified as an agricultural district. Such a facility is
18 allowed in an agricultural district only with a special use
19 permit.

20 Secondly, electric services and power
21 generation is a use permitted by right in an I1 and I2
22 district. It is not a use permitted in any other district.
23 The facility should be located in an appropriately zoned
24 industrial district.

25 And three, Article 8, special use permits,

1 describes the Board of Zoning Adjustments' right to grant or
2 deny special use permit and delineates proceeds for
3 application, hearing, findings and action by governing body.
4 As the facility is located in an agricultural district, a
5 special use permit should have been obtained.

6 Have I read that correctly?

7 A. Yes, you have.

8 Q. And that's the sum total of the comments that
9 you had supporting the statement that the South Harper
10 facility does not meet the criteria of the 1997 zoning
11 ordinance, as stated in your rebuttal testimony? And I've
12 heard what you said today, but have I read this correctly?

13 A. No. These are not the only items. If we were
14 doing a staff report, it would have been a detailed analysis
15 of compliance with the applicable plan and ordinance, which in
16 2004 would have been the 2003 plan and the '97 ordinance. We
17 weren't doing a detailed staff report. We were trying to hit
18 the major points to give the flavor of why development review
19 was important for the county to do.

20 Q. Okay. And one of the factors, as we talked
21 about, is the compatibility of the site with adjoining uses
22 and the general nature of other uses in that area. Correct?

23 A. Yes.

24 Q. And in your report you did not mention the
25 Southern Star gas compressor station in any respect; isn't

1 that true?

2 A. And that doesn't mean it's not a valid issue.

3 MR. YOUNGS: Thank you. Those are all the
4 questions I have for this witness.

5 JUDGE PRIDGIN: Mr. Youngs, thank you.

6 Let me see if we have any questions from the
7 Bench. Commissioner Gaw?

8 QUESTIONS BY COMMISSIONER GAW:

9 Q. I can start. I don't know if I can finish.
10 Good afternoon, sir.

11 A. How are you?

12 Q. Enlighten me on your opinion of an evaluation
13 of this question. If you assume that the 2005 comprehensive
14 plan is in effect at the time you're doing the evaluation, how
15 much difference is there in that plan being adopted and the
16 evaluation of this land use?

17 A. There's a -- there's a significant change in
18 the -- in an enlargement of the multi-use tier in the 2005
19 plan. If this development review occurred in a timely manner,
20 that is, prior to construction, again, that would have taken
21 us through 2004. And in 2004, the documents that any planner
22 would have used for review would have been those in existence
23 at that time, which would have been included the '03 plan and
24 the '97 ordinance.

25 Q. Okay. But my question is this. If I'm

1 looking at this under the 2005 plan, tell me what the process
2 would be and contrast it to what the process would be under
3 the previous plan.

4 A. The process would be the same. It would only
5 be the documents that change.

6 Q. And how does that impact the evaluation of
7 land use?

8 A. The -- the question that I believe ought to be
9 asked is, what would the decision have been at the time if it
10 was made at that time. And it would have been made on the
11 best available information, which would have been the '03
12 plan.

13 Q. I understand -- I understand your argument,
14 but that's not my question.

15 A. I guess I don't understand your question.

16 Q. My question is, if we're looking at this today
17 and there was a proposal to build a plant today at a site that
18 was next to or close to the South Harper facility, what would
19 be the difference in the evaluation that would be done by the
20 entities in Cass County if they were examining this from the
21 land use standpoint?

22 A. Then the review would be taking place under
23 the '05 plan. And under that plan, if it's in this area or
24 nearby --

25 Q. Yes.

1 A. -- it would now be included within the
2 multi-use tier. And then the question would be, is this an
3 appropriate use within the multi-use tier for this location.

4 Q. Okay.

5 A. I don't mean to run on, but its --

6 Q. No, that's okay.

7 A. -- inclusion in the multi-use tier now is by
8 no means a guarantee that it would have been approved any
9 place within the multi-use tier. Just that its use would be
10 restricted in some area within the multi-use tier, different
11 locations or possibilities.

12 Q. Okay. And from the standpoint of how that
13 procedure works, can you give me a little more comprehension
14 here about what changes in regard to the evaluation? Is there
15 a burden of proof change? Is there something that occurs in
16 regard to how much you have to demonstrate before you get a
17 special use? Is it called something different? I need to be
18 walked through how that would proceed and compare and contrast
19 the two time frames for me.

20 A. All right. I think that the -- perhaps the
21 best way to do it might be to actually look at the provisions
22 in either the '05 or the '03 plan. And the only reason I use
23 '03 is because the text is unchanged, describing what should
24 be permitted what the policies ought to be within a multi-use
25 tier versus a rural tier.

1 So the change that occurred with the '05 plan
2 is that now there is an understanding and a general agreement
3 in the county that in this area these types of more intensive
4 uses are appropriate, that development occurring -- and I
5 think the number is 20-acre size -- 20-acre size lots or
6 smaller is appropriate in this area.

7 And that's the prospective that the planning
8 commission and the County Commission should be using, is this
9 appropriate for a more intensive use in the multi-use tier or
10 in the rural tier is this not appropriate type of use. So
11 it's a paradigm. It's a different perspective of what should
12 go in this type of -- in this area.

13 Q. In evaluating an application under the '05
14 plan as compared to the '03 plan, is it the -- how much
15 difference is there in the likelihood of approval of a power
16 plant or something of this sort like we're looking at in this
17 case?

18 A. Well, I think that there are more arguments in
19 favor of locating a plant in a multi-use tier than there are
20 in a rural tier. So the fact that the '05 allows development
21 in this area for this -- this type of development rather,
22 gives a certain amount of weight and credibility that this is
23 not a unexpected and unreasonable request.

24 Q. Okay. Now, does that mean that a request does
25 not have to be made in order to utilize the property in that

1 fashion?

2 A. No. An application would still need to be
3 brought forward.

4 Q. And what would the application be for? What
5 would be included?

6 A. Well, there would still be an application for
7 either a special use permit because of the agricultural zoning
8 or an application for rezoning. The fact that it's in a
9 multi-use tier now would be one of the arguments in favor of
10 approving either the special use permit or the rezoning
11 application --

12 Q. Okay.

13 A. -- because of that designation. The
14 designation of a tier, the type of tier, is an important
15 statement that communities and counties make.

16 Q. Okay. And what would be the arguments that
17 would be available against granting a special use or -- I
18 forget what the other one --

19 A. Rezoning.

20 Q. Rezoning?

21 A. The arguments would be the same. That it may
22 not be compatible, there may not be infrastructure. When one
23 looks at the -- the policies that should apply for a multi-use
24 tier, you also have infrastructure -- there's a list of the
25 three items that we just talked about in the previous list of

1 questions. One of them identified is the type of roadway,
2 highway -- rural highway, a primary arterial.

3 So within that multi-use tier, there are going
4 to be areas that are located along, for example, rural
5 highways or primary arterials that point to directly this is
6 an appropriate use in a multi-use tier when you're on a rural
7 highway, primary arterial. We look to see how those are
8 defined. What is a primary arterial? We look at South Harper
9 and see it's not a primary arterial.

10 So there are areas within the multi-use tier
11 that have primary arterials that have rural highways. There
12 are areas within the multi-use tier that do not have primary
13 arterials. They mainly have collector roads or minor
14 arterials. And that deals with how wide the road is, how deep
15 the pavement is.

16 In this portion it's only 6 inches deep so it
17 means that it's -- all the measurable factors for this type of
18 roadway are that it's a minor arterial, slash, collector and
19 it's not within the framework of what would be anticipated for
20 a multi-use tier for industrial more intensive use because
21 that asks for rural highway or primary arterial.

22 Q. Give me some other factors that weigh against
23 it under the '05 plan.

24 A. There would also be the land use compatibility
25 issues. Is this an appropriate use? What are the intentions

1 for the area? One of the problems that I've identified with
2 the '05 plan and with the '03 plan, as a matter of fact,
3 relate to the definition and use of the tiers that have been
4 drafted by the planning consultant for the county.

5 Tiers are supposed to be a second level of
6 analysis. Your future land use map ought to identify with
7 some broad brush strokes where future land use types ought to
8 be located.

9 Within that map across the landscape,
10 commercial use is here and here and what have you, there
11 should be a tier system that identifies a temporal element.
12 When should these areas be developed? When should facilities,
13 infrastructure be extended to these areas?

14 The defect with this tiers map -- tiers,
15 slash, future land use maps is it tries to do two things and
16 it does neither very well. If the future land use map were to
17 identify specific future uses, we would have our question
18 answered, is this area appropriate for an industrial use.

19 It doesn't. It paints a very broad picture of
20 any place within a multi-use tier might be appropriate. And
21 that's one of the handicaps we have, but one that the
22 flexibility apparently that the county wanted to be able to
23 look at different types of uses anywhere within the multi-use
24 tier. So there's a conceptual range. A lot of flexibility, a
25 lot of discretion versus less discretion.

1 Q. Is that kind of discretion in any way unlawful
2 or can it reach a point where it becomes a problem legally
3 from a procedure standpoint?

4 A. I -- it's -- I guess anything -- it could be
5 possible, but from what I've seen, I don't view this as being
6 an illegal plan. I wouldn't even remotely consider that.

7 I would say that it could be done in a more
8 defined, concise manner, that more specificity would be easier
9 for decision makers to be able to rely on and say, this is why
10 we think an industrial use is appropriate for this area
11 because our long-range planning process said this is where our
12 industrial uses should be located.

13 So I'm more of an advocate for providing more
14 precision, but again, we need that flexibility and certainty.

15 Q. And that's because it gives parties out there
16 more notice of where the county would find acceptability in
17 particular projects or particular sites or things?

18 A. Absolutely. Trying to identify the key
19 activity centers for more intensive uses, the key corridors
20 for more intensive uses is critical to a sound growth
21 management plan.

22 Q. Is it any indication that the county or --
23 county is ceding its authority or ceding its ability to make
24 decisions in regard to what is the appropriate use within a
25 multi-tier or an area that has -- allows a development for

1 industrial and agricultural and residential in its plan?

2 A. I'm not sure I --

3 Q. Yeah, that was a little convoluted. I'm
4 trying to ask whether or not the county, by not having a more
5 specific road map as it were, is in any way ceding its
6 authority to make the decisions on what is appropriate siting
7 in a particular area?

8 A. I think it raises their burden. It means they
9 have to do more work. It's going to involve more public
10 participation and outreach to clarify these specific
11 questions.

12 And that may have been what the county
13 intended, but that has potential -- the example with it could
14 take 60 days, it could take 60 days. Our goal ought to be
15 streamlining and condensing the review process. If we leave
16 more questions unanswered, it means then that the review
17 process for these types of applications have to be expanded to
18 be able to ask those types of questions.

19 Q. If I understood you correctly, it's not
20 indication that the county doesn't want to make those kinds of
21 examinations. Would that be correct?

22 A. That's correct.

23 Q. In regard to your view that trying to
24 determine what is appropriate land use is helped or aided by
25 specifics that give people guidance in regard to what is or is

1 not an appropriate use, I want to turn for a moment to this
2 Commission and looking at particular land use.

3 I think you may have said, but I can't recall.
4 Did you look at or attempt to look at material that would
5 provide you with information on what this Commission's factors
6 or criteria would be for determining appropriate -- the
7 appropriate placement or siting of power plants in an area?

8 A. I didn't find any. We did do a search, we
9 didn't find anything.

10 Q. Did you say you looked on our website?

11 A. Yes.

12 Q. Where else did you look, do you recall?

13 A. We also did some general searches, newspaper
14 searches, google searches trying to find something that would
15 point us in the direction so that we could follow up with
16 additional research.

17 Q. And I see in regard to your concerns about
18 having some degree of transparency in regard to what is
19 appropriate siting or what is appropriate land use, you had
20 difficulty finding any criteria or any guidance at all in
21 regard to the Public Service Commission's idea of what is
22 appropriate for the siting of power plants?

23 A. Yes. The information that I reviewed pointed
24 to a Public Service Commission that appears to be extremely
25 adept at dealing with the technical issues and the fiscal

1 issues and land use is just an area that you haven't gotten
2 into.

3 Q. Okay. So in that regard, tell me how you view
4 the ability of preparing testimony for the purpose of helping
5 to give the Commission guidance on what is appropriate -- an
6 appropriate siting for a particular power plant.

7 A. Yeah. That's -- that's a difficult question.
8 Because the -- the reason that we're here, that I'm here, the
9 question -- the two questions that I had mentioned early on
10 are very difficult questions.

11 One, does the Commission have the authority,
12 should the county have the authority? And two, what's the
13 land use answer? Is it suitable or is it not suitable? Each
14 of those are important questions that deserve their own
15 hearing to focus solely on those types of questions.

16 If there were a development review question, a
17 site suitability analysis that was being conducted, then I
18 would suggest that that ought to be the sole focus of the
19 public hearings and the discourse with the county, property
20 owners is, is this suitable. And the issue of who's going to
21 have that, that needs to get resolved before that happens.

22 But the fact that we're talking about should
23 the Public Service Commission do this, should the county,
24 who's in the better position, that starts to cloud the
25 ultimate question I think that we all want to get to which is,

1 is this site appropriate for this use.

2 Q. I'm trying to understand. If you jump to an
3 assumption -- and only for assumption purposes -- that this
4 Commission is going to determine appropriate land use in Cass
5 County for purposes of siting this power plant, how do you
6 prepare your testimony in giving this Commission the evidence
7 that's necessary to determine it if you don't know what the
8 Commission's criteria on land use is?

9 A. Well, I haven't found any criteria. And
10 that's part of the problem. And I was hoping that one example
11 pointing to other public utility commissions that do have a
12 siting assessment, they have a very detailed process. They
13 identify factors to be considered, they identify the
14 relationship of the communities, they identify the role for
15 the public to participate.

16 I mean, some of them go so far such as with --
17 with Oregon that has an endorsement by the Association of
18 County Planning Directors or Florida that has the Department
19 of Community Affairs actively participating as part of the
20 conduit to make sure that the local issues are addressed and
21 that the Public Utility Commission issues are addressed. And
22 I haven't found that.

23 So I think that one of the best things that
24 perhaps this report might do is raise the flag that says
25 perhaps before going down this road of a land use suitability

1 analysis, we ought to make sure that we understand what's
2 included, we take it into consideration or have a process to
3 consider public local plants and ordinances and what have you.

4 Q. Okay. And I believe in some of your testimony
5 you went through a few states, and you may have just said
6 that, to give us some idea of what criteria they utilize; is
7 that correct?

8 A. Yes, sir.

9 Q. Did you say earlier that you could provide
10 some backup material for that?

11 A. Yes.

12 Q. That would be similar to what Warren Wood has
13 done in regard to his backup material for his criteria that
14 he's proposed?

15 A. Yes. And after we -- I submitted the rebuttal
16 testimony is when I had conversations that led me to believe
17 that the Commission might be interested in -- excuse me -- in
18 getting more information about what do other jurisdictions do,
19 how do they handle this issue.

20 And then that put us on the path of let's see
21 if we can find more information that we could provide or do a
22 quick analysis or description of what types of examples from
23 other communities. And that's what we did do, but that was
24 after the rebuttal testimony.

25 Q. Well, I was -- Warren Wood's is after the

1 rebuttal too. I'm curious about -- but if you have something
2 that backs up your testimony that's similar to what Warren
3 Wood has done, Judge, I'd be interested in seeing that.

4 MR. COMLEY: Your Honor, we'll supply that.

5 JUDGE PRIDGIN: Thank you.

6 COMMISSIONER GAW: And, Judge, I apologize,
7 but I'm going to have to stop at this point so I'll do so.

8 JUDGE PRIDGIN: Commissioner Gaw, thank you.

9 And I did note that I think on the list of witnesses and
10 times, that Mr. Peshoff was potentially available in the
11 morning; is that correct?

12 THE WITNESS: For what day?

13 JUDGE PRIDGIN: For further cross-examination.

14 THE WITNESS: Yes. I'll make my schedule
15 available.

16 JUDGE PRIDGIN: Very good. In case
17 Commissioner Gaw has more questions, very well. Commissioner
18 Clayton indicated he has no questions.

19 Commissioner Appling, any questions for this
20 witness?

21 Do we have any recross based on the cross from
22 the Bench thus far? I'm seeing none.

23 Any redirect?

24 MR. COMLEY: Yes, there is.

25 REDIRECT EXAMINATION BY MR. COMLEY:

1 Q. And I think -- I'm going to try to make it
2 brief. And it may seem a little bit random, Mr. Peshoff, but
3 I'm going to try to do it from this chair.

4 I think it was during the course of
5 Mr. Youngs' examination that you talked about the extent of
6 data available from the county in connection with map
7 preparation. Let me ask you, Mr. Peshoff, are the Cass County
8 zoning maps presently being updated?

9 A. Yes, they are.

10 Q. Is your firm involved in that process?

11 A. Yes, we are.

12 Q. Can you briefly describe what that process is?

13 A. The -- the county's zoning map stopped being a
14 current map in about 1999, but the data relating to zoning was
15 being maintained. So that meant that anyone that made an
16 inquiry how is a parcel zoned could answer that question.

17 What we're doing now is taking the textual
18 data that identifies the parcel and designates a zoning
19 classification and updating the graftable component of the
20 zoning ordinance which is the zoning map.

21 Q. Whatever the conditions of the maps, are you
22 still able to determine without question how the South Harper
23 plant and Peculiar substation locations have been zoned?

24 A. Yes. We could identify the zoning for every
25 parcel in the county. I don't know of any parcel where there

1 is any question about its zoning.

2 Q. And do you feel in any manner that the
3 updating process that's underway has compromised the zoning
4 process?

5 A. Not at all. Communities frequently update
6 their zoning maps on a regular basis. It may happen monthly,
7 it may happen quarterly, it may even happen in real time. But
8 maps get updated on a regular basis as ordinances change.
9 Because all the map is doing is identifying how a parcel is
10 classified. It's not changing the regulatory structure,
11 development standards, design standards. It's not doing
12 anything of the sort. It's just identifying its use.

13 Q. You were questioned by Ms. Shemwell and
14 Mr. Youngs regarding the gas compressor station near the South
15 Harper site. And I think there was discussion about its
16 relationship to the neighboring uses.

17 Can you tell the Commission from a planning
18 perspective if there is an explanation of why these uses are
19 nearby each other in Cass County?

20 A. I'm not sure if I understand the question.

21 Q. Do you know why the gas compressor station is
22 in that area and why it would come about that residential uses
23 may be nearby?

24 A. No. The compressor station has been there for
25 quite some time. The statement that was pointed out to me in

1 the APA policy guide about the location of plants in rural
2 areas, a lot of that occurred as well because plants have been
3 around a long time. Development occurred around the gas --
4 the Southern Star plant or facility. Apparently the people
5 that developed felt that it was a use that they could live
6 with.

7 Q. You were questioned by Mr. Youngs regarding
8 the multi-use tiers and also by Commissioner Gaw in which the
9 southern -- the South Harper facility is partly located. And
10 my question is, even if the 2005 comprehensive plan is used in
11 determining the compatibility of land use, as Mr. Youngs has
12 asked about, is it a guarantee that this site will be approved
13 for a power plant under the plan?

14 A. No, it's not.

15 Q. And can you explain why not?

16 A. Because the -- and perhaps I wasn't as
17 effective in trying to describe that. The inclusion in the
18 '05 plan for this parcel in the multi-use tier creates a
19 certain presumption, a certain expectation that these types of
20 uses could be appropriate within the tier. Whether or not
21 this -- a specific use is appropriate for a specific location
22 is a case-by-case analysis and that's what the development
23 review process is supposed to do.

24 Q. During the course of her cross-examination,
25 Ms. Shemwell asked you a question regarding the Commission's

1 ability to set rates for utilities. Is there a difference
2 between the determination for a need for energy and the
3 determination for the location where energy is going to be
4 produced?

5 A. Yes.

6 Q. Should there be a determination of location
7 independent of need for a power plant?

8 A. I think that it -- I think the two are very
9 related. If there is a need, then it becomes a question of
10 where should it be located.

11 Q. And I think it was Commissioner Gaw that
12 inquired about the Commission's rules and what rules may have
13 influenced your testimony. My questioning would be, given the
14 questions that you've received today from the variety of
15 cross-examiners -- and I wrote down questions about
16 neighboring land uses, which plan governs the terms and
17 provisions of the multi-use tier, the manner a parcel might be
18 split, screening and landscaping issues, compatibility of
19 sites and uses, the interpretation of the zoning order, the
20 existence of the gas compressor station, all those questions.

21 From your perspective, are these the kinds of
22 questions that should appear in a rate-making body?

23 A. I think that if it's a Commission structured
24 like some of the states that have Public Utility Commissions
25 with the authority and they're structured and they have the

1 process to do -- make those assessments, then yes.

2 Q. But you're talking about the jurisdictions
3 that were noted in your rebuttal testimony?

4 A. Yes, sir.

5 Q. What would be the difference between those
6 Commissions and this one based upon your understanding and
7 review?

8 A. I haven't seen anything -- we have not -- I've
9 not uncovered anything that identified a process or factors to
10 do a land use suitability assessment with Missouri Public
11 Service Commission.

12 Q. So, in other words, there is a difference
13 between this Commission and those that are in your rebuttal
14 testimony?

15 A. That's correct.

16 Q. And that difference is what?

17 A. The ability to process the factors, the -- the
18 relationship with local units of government to be able to
19 assess the site's suitability and the application, the
20 applicability of the plan-- local plans and ordinances.

21 Q. There's been a number of questions about the
22 2005 plan, the comprehensive plan, but until the 2005
23 comprehensive plan was adopted by Cass County, what plan
24 served as the guide for controlled growth in Cass County?

25 A. It was the 2003 comprehensive plan.

1 Q. I think it was Exhibit 118, if you still have
2 it handy.

3 A. Yes.

4 Q. Can you turn to Page 77 of that exhibit? This
5 will follow up on questions from Mr. Youngs' about the code of
6 conduct. I think it's in the opening paragraph on Page 77.
7 Would you take a moment to review that paragraph?

8 A. Yes.

9 Q. Even presuming that the appendix that's been
10 adopted is part of the comprehensive plan, what were the terms
11 of the code of conduct provisions mandatory on the Commission?

12 A. They are advisory.

13 Q. In questions with Mr. Youngs, you had talked
14 about the fact that you had given only a preliminary review in
15 connection with the -- I think it was the applications for
16 special use permit filed for the South Harper plant and the
17 Peculiar substation which were attempted to be filed. Can you
18 tell us the difference -- what would you have done to have a
19 more detailed review?

20 A. Well, we would have gone into much more detail
21 about the proposed use, a much more detailed description of
22 the existing uses, the relationship of the use to existing
23 uses, the future land use projections for -- for land use.
24 We would have also done some more analysis about the mapping,
25 detailing with what should be occurring, what's occurring,

1 what's proposed on the site plan.

2 For example, I'm just going to use landscaping
3 as the example. We would have identified landscaping -- made
4 landscaping recommendations that would have served the purpose
5 for which they were intended, which was to buffer the site and
6 try and hide its features, soften its features from the
7 roadway and from adjacent properties.

8 The photographs I took identify that the tops
9 of the evergreen tree bushes, whatever those are, are roughly
10 the same height as the top of the berm that's being used. And
11 that means that you've not got anything on top of the berm
12 that's trying to raise the level of that buffer wall, that
13 buffer -- that field of vision.

14 You've also got plantings that are aligned
15 from the roadway in a straight line. So you can see between
16 clearly all of those evergreen bushes, slash, trees. And
17 that, again, is not the purpose of what those bushes, those
18 trees are there for. They're supposed to create a natural
19 landscape barrier, not create view sheds, corridors between
20 them where you can see what's happening there.

21 Another recommendation would have been to have
22 varying heights of plant material, including some trees.
23 Because, again, we've got these tall towers out there that we
24 want the trees to try and obscure that. When one looks south
25 from that east/west road just north of the plant property, you

1 can see the bushes as just being a very insignificant
2 low-lying piece of landscaping that really don't try and break
3 up the visual line of the towers with the horizon.

4 So there are things that we would have made
5 specific recommendations to. Not just throw down some plant
6 material, but throw down these types of plant materials in
7 this type of a pattern and maintain it.

8 Q. To recap a bit, my understanding is your
9 testimony would be that with effective review and detailed
10 review of that application, the landscaping effects that have
11 been affected at the property could have been far more
12 meaningful and effective?

13 MR. YOUNGS: Objection. I'm going to object
14 to the form of the question as leading and suggestive.

15 THE WITNESS: Yes.

16 MR. YOUNGS: Excuse me. My objection is that
17 the question is leading and suggestive.

18 MR. COMLEY: I'll ask it again, if I can.

19 BY MR. COMLEY:

20 Q. If you had had a chance to have a more
21 detailed review, would there have been changes in the
22 landscaping you would have recommended?

23 A. Yes. Yes. We would have recommended changes
24 that -- that do what was intended behind the landscaping
25 improvements that were made.

1 Q. For projects of the nature of a power plant --
2 power plant like South Harper -- excuse me.

3 For projects like South Harper -- a power
4 plant like South Harper, if the construction were scheduled to
5 commence in January 2005, when would development review
6 generally occur with respect to a planned construction date?

7 A. Well, ideologically there would be some type
8 of a preapplication conference that would be taking place.
9 And the -- the level of completeness, the amount of
10 satisfaction between the applicant and any jurisdiction is
11 going to be, to a large part, dependent on what happens at the
12 earlier stages.

13 My understanding is of the Aries process is
14 that involved a significant amount of preapplication
15 conferences, discussions about what was proposed,
16 consideration of comments and concerns and incorporating those
17 into the first application that was submitted.

18 When an applicant -- any applicant does not go
19 through that preapplication conference, they're basically
20 submitting their wish list of what they would like to occur
21 because they've got no feedback at that point. That means
22 that feedback is going to take time in that give and take
23 process.

24 So if there was some preapplication discussion
25 and if the application that was submitted was done with some

1 of the issues and concerns that are bound to be raised during
2 the process anyways, that may have expedited the process. So
3 could it have been done in 60 days? I think yes. Could it
4 have been done in less than 30 days -- in 30 days rather? It
5 possibly could have, but it all depended upon gathering
6 support up front for what the proposal is supposed to be.

7 Q. Is it common for construction of projects to
8 commence before development review has concluded?

9 A. Is it -- no, it's very atypical.

10 Q. Commissioner Gaw asked a question about -- in
11 a hypothetical, I think, about appropriate uses that would be
12 in a multi-use tier. And the hypothetical was I think
13 directed toward whether this power plant was being proposed in
14 the 2005 plan. Would your decision about whether or not a use
15 proposed like a power plant in the multi-use tier also be
16 influenced by whether the parcel involved is on the edge of a
17 tier?

18 A. Yes, it would.

19 Q. Now, why is that?

20 A. Because we're dealing with compatibility
21 issues. Again, these are -- these are not defined boundaries
22 that are hard and fast mos-- hard and fast, I'll re-use the
23 word, boundaries.

24 One of the phrases that I've used regularly in
25 meetings across the country in workshops is our problems don't

1 stop and start at our borders, neither should our solutions.
2 And that applies to this. Just because the multi-use tier may
3 end at a certain roadway or so many feet from a roadway, the
4 fact that it's on the edge means that it's not a hard defined
5 line, it's an area that is transitioning to another type of
6 tier or transitioning to another type of land use.

7 Zoning ordinances frequently have buffer
8 standards that vary depending upon the types of uses that are
9 adjacent to one another. So a more intensive use next to an
10 adjacent, less intensive use is going to require more
11 buffering, more landscaping uses that are more similar, may
12 have less then -- some may have less buffering, less
13 landscaping.

14 So, no, there wouldn't be just a hard line.
15 That would be one of the issues to consider how close to the
16 edge and what's the relationship going to be with adjacent
17 uses.

18 MR. COMLEY: Judge, just a minute. I'm going
19 to check and see if we have any more questions. I think we're
20 about done.

21 JUDGE PRIDGIN: Yes, sir.

22 BY MR. COMLEY:

23 Q. I think it was Mr. Youngs that went through a
24 long list of uses that may be appropriate for a special use
25 permit and they are explicitly set out in the ordinance.

1 Irrespective of how they may be set out in the ordinance, are
2 there other uses that may be appropriate for a special use
3 permit within the county's scheme of multi-use tiers or
4 urban -- or rural density tiers that aren't even listed in the
5 ordinance?

6 A. Like -- it's possible. No ordinance can be so
7 inclusive that it would consider every -- eventually every
8 type of use that might require some type of condition. You
9 would have a monstrous document that considered every use and
10 type of condition that would be associated with it.

11 So what we try and do with plans and
12 ordinances is provide direction. And even though an ordinance
13 is a regulatory document, it still does provide a good deal of
14 direction. So, for example, the list that was mentioned about
15 the conditions for special uses and we talked about adult uses
16 and, you know, this that and the other thing, that gives an
17 indication of the direction that any community is going in
18 terms of what conditions it is imposing.

19 So if these types of uses require these types
20 of conditions, we can extrapolate that and think if this type
21 of use is similar, then these types of conditions would also
22 be reasonable to apply to these types of uses that aren't
23 included in the list. So it provides that type of direction.

24 Q. In other words, there are some other uses
25 where conditions may be imposed?

1 MR. YOUNGS: Objection, leading.

2 THE WITNESS: Yes.

3 JUDGE PRIDGIN: I didn't rule. I'm sorry. I
4 was thinking.

5 MR. COMLEY: I'm doing my best not to lead
6 Mr. Peshoff, but I did want him to make that point.

7 JUDGE PRIDGIN: I understand. I mean --

8 MR. YOUNGS: I'll withdraw the objection.

9 JUDGE PRIDGIN: I was going to say, I think
10 it's more yes or no and doesn't necessarily suggest the
11 answer, so go ahead.

12 MR. COMLEY: I think he answered yes.

13 JUDGE PRIDGIN: He did.

14 MR. COMLEY: That's the conclusion of our
15 redirect, Judge.

16 JUDGE PRIDGIN: Mr. Comley, thank you. At
17 this time I'm hesitant to release Mr. Peshoff because I
18 understand we may have a Commissioner or more who has extra
19 questions for him. And also I believe Commissioner Gaw asked
20 for some supporting documentation. And, Mr. Comley, I think
21 you said on the record that you were going to file something.

22 MR. COMLEY: We're going to try to find that
23 as fast as possible.

24 JUDGE PRIDGIN: I certainly want to give
25 counsel a chance to see that and to potentially cross-examine

1 on that. And I'd hate to release him in case counsel had
2 questions on that. So what I would like to do is resume with
3 Mr. Peshoff again -- assuming that you're able to pull that
4 documentation together, you know, reasonably early by
5 tomorrow. And, Mr. Comley, I don't know what kind of time
6 frame you have with that.

7 MR. COMLEY: We'll have to speak with the
8 witness and see what resources we have.

9 JUDGE PRIDGIN: I understand.

10 Let's resume at 8:30 in the morning with
11 Mr. Peshoff.

12 And also to alert the Staff, I believe that
13 more than one Commissioner may have questions for Mr. Wood and
14 also perhaps for Ms. Mantle. So if they would be prepared to
15 go tomorrow as well.

16 Anything further from counsel before we
17 adjourn for the evening?

18 All right. Hearing nothing, we are off the
19 record. We will resume at 8:30.

20 WHEREUPON, the hearing was adjourned until
21 8:30 a.m. on May 4th, 2006.

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| 1 | I N D E X | |
| 2 | CASS COUNTY'S EVIDENCE | |
| 3 | GARY MALLORY | |
| 4 | Direct Examination by Ms. Martin | 1338 |
| 5 | Cross-Examination by Mr. Eftink | 1340 |
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| 8 | Questions by Commissioner Gaw | 1424 |
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| 1 | | | |
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| 5 | Exhibit No. 22 | | |
| 6 | Surrebuttal Testimony of Gary Mallory | | 1340 |
| 7 | Exhibit No. 23 | | |
| 8 | Rebuttal Testimony of Bruce Peshoff | | 1495 |
| 9 | Exhibit No. 24 | | |
| 10 | Surrebuttal Testimony of Bruce Peshoff | | 1495 |
| 11 | Exhibit No. 102 | | |
| 12 | Cass County zoning map | 1322 | 1327 |
| 13 | Exhibit No. 103 | | |
| 14 | Cass County Comprehensive Plan dated 2/91 | 1322 | 1328 |
| 15 | Exhibit No. 104 | | |
| 16 | Cass County Comprehensive Plan dated 6/97 | 1322 | 1330 |
| 17 | Exhibit No. 105 | | |
| 18 | Cass County Comprehensive Plan dated 7/03 | 1322 | 1331 |
| 19 | Exhibit No. 106 | | |
| 20 | Ordinance No. 03-13 dated 10/16/03 | 1322 | 1332 |
| 21 | Exhibit No. 107 | | |
| 22 | Ordinance No. 03-15 dated 12/15/03 | 1322 | 1333 |
| 23 | Exhibit No. 108 | | |
| 24 | Cass County Comprehensive Plan dated 2/05 | 1322 | 1333 |
| 25 | | | |

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| 1 | Exhibit No. 109 | | |
| 2 | Resolution No. 05-01 effective 2/1/05 | 1322 | 1333 |
| 3 | Exhibit No. 110 | | |
| 4 | Resolution No. 05-02 adopted 2/1/05 | 1322 | 1334 |
| 5 | Exhibit No. 111 | | |
| 6 | Order No. 05-02 dated 2/1/05 | 1322 | 1334 |
| 7 | Exhibit No. 112 | | |
| 8 | Ordinance No. 05-08 dated 8/31/05 | 1322 | 1335 |
| 9 | Exhibit No. 113 | | |
| 10 | Larger scale map | 1322 | |
| 11 | Exhibit No. 114 | | |
| 12 | Cass County, Missouri business records, | | |
| 13 | affidavits and attachment | 1322 | 1337 |
| 14 | Exhibit No. 115 | | |
| 15 | Warren Wood research documents | 1322 | 1337 |
| 16 | Exhibit No. 116 | | |
| 17 | Certified Copy of Record Resolution No. 04-06 | 1375 | 1376 |
| 18 | Exhibit No. 117 | | |
| 19 | E-mail string | 1376 | 1377 |
| 20 | Exhibit No. 118 | | |
| 21 | 2005 Comprehensive Plan Update | 1387 | 1388 |
| 22 | Exhibit No. 119 | | |
| 23 | Zoning Order Subdivision Regulations | 1387 | 1393 |
| 24 | Exhibit No. 120 | | |
| 25 | Fax cover page and Meeting Notice | 1387 | 1394 |

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|----|---|------|------|
| 1 | Exhibit No. 121 | | |
| 2 | Cass County Planning Board Discussion of | | |
| 3 | Comprehensive Plan dated 11/30/04 | 1387 | 1397 |
| 4 | Exhibit No. 122 | | |
| 5 | Record of 1/27 meeting | 1387 | 1400 |
| 6 | Exhibit No. 123 | | |
| 7 | Cass County Planning Board Minutes | | |
| 8 | dated 1/18/05 | 1387 | 1400 |
| 9 | Exhibit No. 124 | | |
| 10 | News Release dated 12/1/04 | 1387 | 1453 |
| 11 | Exhibit No. 125 | | |
| 12 | Map 2 - Subject Properties Land Use Tiers | 1577 | |
| 13 | Exhibit No. 126 | | |
| 14 | Special use permit application for the | | |
| 15 | South Harper peaking facility project | 1595 | 1596 |
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| 18 | Aquila Peculiar 345 kV substation project | 1595 | 1596 |
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