BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In The Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of 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

STOPAQUILA's APPLICATION FOR REHEARING

In the May 25, 2006, edition of the Kansas City Star, the lead editorial blasts the Report and Order of the PSC in this case "disturbing." The Star urges Cass County to continue to fight on. The PSC should take the opportunity to correct errors made in its Report and Order. See copy of editorial and cartoon attached at the end of this document.

COMES NOW Stopaquila.org, by and through its attorneys, and pursuant to RSMo. 386.500 and 4 CSR 240-2.160 moves and applies for rehearing of the Commission's Order dated May 23, 2006 (effective date of May 31, 2006)(the "Report" or the "Report and Order"). As suggestions in support, Stopaquila.org states:

I. THE PUBLIC SERVICE COMMISSION HAS FAILED TO AFFORD DUE PROCESS TO THE PARTIES BY ITS ACTIONS.

The Public Service Commission (PSC) has denied due process to StopAquila and others in one or more of the following regards:

A. The PSC's Staff proposed ad hoc rules, which Staff said would apply to this case only, and/or which were never before published, relating to whether the PSC should approve retroactively the application of Aquila to build the power plant.

B. These ad hoc rules were not revealed to StopAquila or others before rebuttal testimony was filed.

C. These ad hoc rules were drafted with a view to determine, after the fact, whether the PSC could say the decision of Aquila was reasonable.

D. The PSC took the burden off of Aquila and placed the burden on the intervenors to prove that the plant and substation should be dismantled.

E. Rules of practice and procedure and/or rules regarding the presentation of evidence were changed on short notice. This included the action of the PSC in sending out notice approximately one week before the hearing that the parties would commence with cross-examination, which meant that no one would be permitted to present evidence that was not profiled. This notice was sent after the deadlines for filing prefiled testimony.

F. Hearsay and double hearsay was accepted as evidence over the objection of parties at the hearing and then relied upon by the PSC.

G. The PSC applied the rules inconsistently, allowing Aquila and Staff to introduce hearsay and double hearsay while declining to allow opponents to do the same.

H. Various commissioners were absent from hearings for long periods of time and on some occasions out of town during the hearings. One commissioner was absent from the room for all but a couple of hours of the evidentiary hearings, yet voted. The commissioners failed to give due consideration to the facts and the law before casting their vote.

I. The same commissioners of the PSC in an earlier hearing involving the same parties bearing docket number EA-2005-0248 started a hearing and then in the middle of cross-examination of an Aquila witness by Cass County, and before StopAquila or other parties could present any of their witnesses or any of their evidence, decided that it had heard enough and issued its order giving Aquila what it had requested. This is prejudgment. Three of the commissioners who voted to terminate that hearing before hearing the evidence in that case are the same three commissioners who ruled in favor of Aquila in the present case. These commissioners had already made up their minds before the hearing in this hearing began, and further these commissioners could not act in a fair and impartial manner given their actions in the prior case. These commissioners in essence issued the same decision again.

J. Commissioner Murray asked whether the county and its citizens should be somehow penalized if there was a shortage of electric power. After the county won in court, based on its request that Courts determine that Aquila must comply with the law, the comments of this commissioner that

suggest that the county somehow did something wrong is evidence of a bias against the county and its citizens.

K. In the Report and Order the PSC stated that the "activities of the county were inexplicable." Report and Order at page 33, line 13. After the county won in court, based on its request that Aquila simply comply with the law, the comments of the PSC that the county's actions were inexplicable is indicative of a bias against the county and its citizens.

L. The three commissioners had discussed and had decided how they would rule before the parties filed post-hearing proposed findings of fact and conclusions of law and before they had time to review the extensive record and the over one hundred exhibits.

M. The commissioners met with Staff attorneys to discuss the case without any notice to attorneys representing other parties.

N. Staff worked with Aquila before the hearing to prepare evidence.

O. One of the commissioners indicated that his view of his vote in favor of the Report was a confirmation of the PSC's (past) practice, including that the previous certificates given to Aquila gave it the authority it needed (which was rejected by the Trial Court and the Court of Appeals) and that the Report confirmed the substance of the letter dated November 4, 2004, sent by the PSC to Nanette Trout (that letter from the PSC stated that the PSC could <u>not</u> tell Aquila where to not build a plant). This indicates a rejection by that commissioner of the ruling of the Court of Appeals and

the Trial Court and an acceptance of the view that the PSC cannot tell Aquila where to build or not build.

J. In a concurring opinion filed on May 19, 2005, in Case Number EA-2005-0248, entitled "In the Matter of the Application of Aquila....," Commissioner Davis indicated that a hearing on a request for authority to build was not the place for complaints from citizens and seemed to say that the question of the prudence of building the plant was also not properly to be considered in a hearing on a request for authority to build. Commissioner Davis wrote that there were numerous complaints received by the Public Service Commission about the conduct of Aquila. Commissioner Davis said that Aquila should be admonished. In concluding his concurring opinion, Commissioner Davis stated as follows:

> In conclusion, this case was not the proper venue for the questions raised in the *ex parte* pleadings and the testimony at the local public hearing, but the next rate case will be the proper venue for the parties to raise all the issues including, but not limited to, whether the construction of this plant was prudent and whether the company should be penalized for poor management. (This statement by Commissioner Davis was also captured in a footnote in the Court of Appeals decision.)

According, this commissioner was on the record, before the present case began, stating that the complaints of citizens and the questions of whether

it was prudent to build this plant are not properly to be considered in a case in which the utility applies for a certificate to build a power plant. He took the position that such matters are to be considered in a rate case. In a rate case the PSC is not considering whether a plant can be built in a location but rather whether the financial issues can be part of a rate base. Thus, this commissioner has prejudged this case and taken an erroneous position, which is that complaints of citizens and the question of whether the plant should be build are not proper questions to be addressed in an application for a certificate for authority. This commissioner had already indicated that he does not think the PSC can tell a utility to not build a plant in a particular location.

K. The fact that no preconstruction hearings were held means due process was denied. No amount of post-construction hearings will make up for it.

L. The issuance of a retroactive approval is a denial of due process.

M. The three commissioners ruled that the rights of my clients were subservient to the rights of others, which is a denial of due process and equal protection.

II. THE REPORT AND ORDER MISINTERPRETS AND MISAPPLIES THE LAW, INCLUDING THE DECISION OF THE COURT OF APPEALS AND THE STATUTES (CHAPTER 64 AND CHAPTER 393).

In the Court of Appeals case the Court made the following comments which are either ignored, misapplied, misconstrued or misquoted by the PSC in its 3-2 Report and Order:

While it is true that the Commission has extensive regulatory powers over public utilities, **the legislature has given it no zoning authority**, nor does Aquila cite any specific statutory provision giving the Commission this authority. See Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973)[1] (regarding the location of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states, "In short, we emphasize we should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning."). It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, a municipality may regulate the location of public utility installations." 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986). While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because facility location has particularly local implications, it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant. See generally St. Louis County v. City of Manchester, 360 S.W.2d

[1] It should be noted that this is the case that the Report and Order blatantly misconstrues. See pages ___, below.

638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact location and that public interest is best served in requiring it be done in accordance with county zoning laws). See also State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934, 938 (1951) (upholding validity of county rezoning to accommodate electric power plant construction). Aquila further relies on Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo.1973) (Crestwood I), and cases in other states for the proposition that local regulation of public utilities is not allowed. This case, however, is not about local regulation; rather, the case involves the interplay between statutes enacted by the legislature and how to harmonize police powers possessed both by local government and public utilities. ***

FN8. The non-charter first class county statutory provision that parallels 64.090 and 64.620 in placing limitations on county commission zoning authority is section 64.255, and it does not include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions. ***

... we believe that if we were to extend Harline as urged by Aquila, we would effectively be giving electric companies in the state carte blanche to build wherever and whenever they wish,

subject only to the limits of their service territories and the control of environmental regulation, without any other government oversight. *** By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. ***

[T]here is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant. *** See, e.g., St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant, court concludes that charter county's zoning ordinance restricting plant's location is lawful restriction, stating, "the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county,[2] and the public interest is best served in requiring it to be done in accordance with the zoning laws.").

The overriding public policy from the county's perspective is that it should have some authority over the placement of these facilities so that it can impose conditions on permits, franchises or rezoning

[2] Of course, that is the same as the present case, where nothing gives the PSC or Aquila the right to select the location. (Comment by StopAquila.org in the present case, not part of the Court's decision.)

> for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. As the circuit court stated so eloquently, "to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants.... **The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.**"

Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. 2005)(also referred to as StopAquila.org v. Aquila)(emphasis added).

At page 34, the Report first states that the PSC is no less capable than Cass County to consider land use concerns, then states that the PSC is the "**preferred authority**" to handle land use concerns. (Page 34, paragraph 2.) Well, there are at least two problems with that idea. That is, first, no statutes give zoning authority to the PSC, and, second, this very lack of authorization was specifically declared by the Court of Appeals, above, in this very case. The law is that the PSC has no zoning power.[3] In blatant disregard of this, the PSC not only claims it is the **preferred authority** to decide land use concerns, it goes so far as to then collaterally attack the zoning ordinances and procedures of Cass County. As an agency with no zoning power, it has no

[3] Of course, the last prior pronouncement of the PSC before this case on the issue of zoning was Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973), in which the PSC said that it requires utilities to demonstrate compliance with local zoning before constructing a power plant.

authority or direction from the state to collaterally attack the zoning ordinances of a county. The Report and Order is based on false premises and erroneous interpretations of law.

As will be discussed further below, the PSC then went on to declare the rights of the people who are most affected to be subservient. Therefore, we have an agency that has no zoning power declaring that it is the preferred zoning authority and that in its wisdom the rights of the people who are not nearby are to be preferred over the rights of the people nearby. This is error.

The Report attempts to construe RSMO 393.170, saying that it would be "nonsensical" to require that before the Commission can give specific approval for the Facilities, Aquila must show that it has obtained local zoning approval. (Page 37, paragaph 2.) This is not nonsensical. It is the decision of the Legislature. RSMO 393.170 states that before a utility can get a certificate it must show to the PSC that it has obtained the consent of the municipality. The Supreme Court, as well as the PSC itself, have said that the county is a "municipality" under this statute. In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941), State v. Burton, 379 S.W.2d 593 (Mo. 1964) In any event, the PSC itself has stated that a utility must get local zoning before it seeks a certificate to authorize it to build a power plant. In the Matter of the Application of Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116. This is based on the language of 393.170, which plainly requires local consent.

393.170 wisely provides that the applicant must show to the PSC that it has consent from the local government before it gets a certificate. This includes a certificate

to build a power plant. The PSC's actions in this very case – supporting a utility that violates local zoning, allowing a utility to build a power plant next to residences, retroactively approving the plant, declaring people's rights to be subservient, and even attacking a local government's zoning program - demonstrate the wisdom of the legislature in requiring that the utility get local consent first and the wisdom of prior PSC Commissioners in so declaring. Aquila did not get the requisite consent.

Despite the fact that the courts in the present case held that the 1917 consent of Cass for Aquila to put up transmission lines did not give it the authority to build a power plant, the PSC goes back to that rejected argument. (Page 39.) The PSC expands on the 1917 consent, in violation of RSMO 393.190, which prohibits the PSC from expanding on a local franchise. This is error.

The Report claims that the Court of Appeals "expressly stated that Aquila could still seek authority to operate the already built facilities." (Page 41.) Not true. The decision of the Court of Appeals expressly said that a.) the PSC had no zoning authority, b.) that authority to construct must be gained through hearings (plural) where zoning is considered,[4] c.) that the "exemption" that might be available is from the county planning board, d.) that there is no exemption from the power given to the county commission under 64.255, and e.) that there is nothing in the statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant. The Court said a lot of things, but it did not say that the PSC could "trump" the county commission. It

[4] Query how when the Court of Appeals says that a.) hearings must be held before construction where zoning shall be considered and b.) that the PSC has no zoning authority, the PSC could interpret this to mean that the Court said it had zoning power, and further that it was the "preferred" zoning authority and could trump the county. This is a case where the PSC built false premise on top of false premise.

did not say that when the county insists on zoning that it can somehow usurp the zoning authority of the county commission.

At page 42, the Report claims that the so-called "exemption" (a word that does not appear in the statute 64.235) is an exemption not merely from the planning board but rather from zoning of the county (the word zoning also does not appear in 64.235). There is no citation to anything for this statement. In fact, the Court of Appeals said the opposite. The Court made a point of saying that there is no exemption from the power granted to the county commission in 64.255.

It is indeed remarkable that a.) the statute cited by the PSC (64.235) does not contain either the word "exemption" or the word "zoning," b.) the Court of Appeals in fact said there is no exemption from the application of 64.255 (which does specifically refer to the county commission and zoning), and c.) the statute cited by the PSC refers to an application to the planning board, yet the PSC contorts this and concludes, erroneously, that 64.235 exempts Aquila from all county zoning including exempting it from control of the county commission. This is simply wrong. This is an attempt by the PSC to reject the decision of the Court of Appeals and to rewrite statutes.

The PSC takes the position that the Court of Appeals said Aquila could either go to the County or to the PSC. That canard has been repeated several times by Aquila and by Staff, but it still is untrue. The Court of Appeals never said that. The opinion cannot be read this way.

The PSC started this affair by stating that it did not have the power to tell Aquila to not build the plant in a chosen location. See letter from PSC to Nanette Trout, attached to Exhibit 1. After that statement, the action was started by StopAquila to seek an

injunction. The County likewise filed suit. The PSC confirmed at the January 2005 hearing before the Circuit Court that it did not have the authority to stop Aquila from building. After the Court of Appeals decision saying that the PSC has no zoning authority, the PSC unexpectedly changed its story. It now says it is the preferred authority on zoning. The PSC now seems to imply it has the power to tell Aquila to not build at a particular location. At page 47, the Report states that "Mr. Wood was not locked into a conclusion that the plant should stay..." That is convenient to say now, but the truth is that Mr. Wood wrote the letter that said (back in November 2004) that the PSC could not tell Aquila to not build the plant at that location. His testimony is impeached by his own words. Further, and more importantly, it is untenable to say that the PSC has the power to decide land use issues when the PSC also has said in this very case that it does not have the power to say "no" to Aquila. It cannot claim to have the power to tell someone whether it can build in a particular location when it has for years, and in this very case, declared it cannot stop a utility from building in a particular location. In any event, since the PSC said in this very case that it cannot stop Aquila, it is obvious that Aquila would use that against the PSC if it did try to tell Aquila to dismantle the plant. The PSC has put itself in a box where it cannot tell Aquila to dismantle the plant. The PSC has effectively removed itself from the decision making role on zoning (even assuming it ever had a role).

Reviewing the dissent written by Commissioner Davis in EA-2005-0248 (quoted above in part I) and the concurring opinion of Commissioner Appling in the present case, we see that at least these two commissioners have expressed views that are consistent with the idea that the PSC does not tell utilities where to build their plants.

Commissioner Appling makes it clear that he believes the PSC decided to analyze the case as follows: the burden is on the County, StopAquila and others to prove that there are compelling reasons to tear down the plant. This is a failure on the part of Commissioner Appling and perhaps the other two in the majority to follow the law.

The Report would leave us in a strange world where the PSC protects utilities and allows utilities to build anywhere they want, secure in the knowledge that the PSC will not tell them to not build at the chosen site and that if the county tries to enforce zoning, the PSC will come to the rescue and make the opponents prove compelling reasons why the building should come down. Utilities could never lose in such a world.

Someone has to have the power to tell the utility to not build a power plant. The PSC has abdicated any such power (even if we assume for argument that it had the power). If the county does not have that power, my clients and others similarly situated are then locked out of the process, have no significant rights in this matter and will have to endure whatever the utilities put upon them.

If this Report stands, the language of 64.235 will be greatly expanded. The language of 64.235 is that (referring to the requirement that an application be made to the planning board), 'nor shall anything interfere with such development as may have been specifically authorized or permitted (by the county commission or the PSC).' The Report rewrites this section to apply it to the County Commission, to apply it across the board to all aspects of zoning, to expand on the term "interfere" to create a presumption that any effort to regulate any placement of a power plant is "interference," [5] to allow for retroactivity, to elevate the PSC to a super zoning board, and to further rewrite 64.285 to

[5] Obviously the Court of Appeals did not consider it interference for a county to tell a utility where to put a power plant. The opinion indicated that this authority was important in the last paragraph of the opinion.

take out the reference to the county zoning authority superseding other authority and delete the requirement of 393.170 that the utility get prior consent of the county to build. This is all erroneous.

Retroactivity is illegal. The PSC simply does not have the power to issue a retroactive certificate. Not only is retroactivity in violation of the statutes, it violates due process and equal protection.

In addition to the fact that the Court of Appeals said that the statutes do not give to the PSC any zoning power, the record in this case demonstrates why it would be a mistake to ever give zoning power to the PSC. The PSC has stated that "it won't impose a zoning requirement on Aquila" (page 51), indicates that it won't seriously address the question of loss of value of surrounding property (page 49 –50), issues orders that keep confidential the amount that Aquila would have actually saved by entering into a proposed contract with Calpine and the amount of loss of value of homes near the SHPF, stated that it thinks a power plant is "consistent" with the residences in the area (page 57 line 6), states that it will not require Aquila to file plans and specifications required by the regulations (page 57), states that is looks at the interest of the public as a whole, with the rights of the people nearby being **subservient** (page 28, lines 5-9), and states that it does not believe that there is any requirement that its evaluation be the functional equivalent of a hearing on a zoning application (page 29).

The fact that the PSC has decided the rights of the people near the plant are "subservient" to the rights of others is the antithesis of land use planning shows that the PSC has a role in government that is antithetical to it being a land use authority. If it takes the view that the rights of the people next to a power plant are subservient to the

rights of others, then it will never be able to stop a power plant from being built anywhere. When the rights of those far away are always given more weight than the rights of those nearby, the result is preordained. All the utility would have to do is make a simplistic statement that "more capacity is good" for the general public and the PSC would conclude that the people next door to the power plant just have to shut up and accept it. The PSC has proven that it cannot serve as a zoning authority.

The citizens of Cass County and the public in general suffer from this Report and Order.

III. THE REPORT AND ORDER MISSTATES THE HOLDINGS OF PRIOR CASES INCLUDING THE IMPORTANT CASE OF MISSOURI POWER & LIGHT.

IV. THE PSC FAILS TO FOLLOW ITS OWN PRECEDENTS AND FAILS TO EXPLAIN WHY.

The Report and Order at page 35 discusses the important case of Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973). However, the Report does not draw from this case the language cited from it by the Court of Appeals, which was:

> **"In short, we emphasize we should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning."**

Nor does the Report note that this decision (Mo. Power & Light Co.) contained the following important language:

> We should also state that parenthetically at this point that we are of the opinion that the citizens, through proper zoning ordinances, have already designated the area in question as an industrial area. *** For us to require the Applicant to move the proposed site to the alternative site suggested by the intervenors would be to suggest a location that is not now zoned for industry but is zoned residential. In short, we emphasize we should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning.
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> ***
>
> **We also find that the Applicant has met our Public Service Commission requirement that it has complied with municipal requirements before construction of the facility**. (Emphasis added.)

Instead of trying to distinguish this case (which it cannot do) or explain why it is not following it, PSC in its Report and Order only makes one comment about the Mo. Power & Light case, and that is to say incorrectly (at page 35) that in this case the PSC apparently gave retroactive approval to the construction of a combustion turbine. The facts are that the applicant in Mo. Power & Light. had first obtained proper zoning, then went to the PSC and the PSC commented that the applicant had met the PSC requirement that it comply with local zoning before it begins construction. See quote above.

What is more important is that the PSC does not explain why it fails to follow now this PSC requirement that that the applicant prove to it that it has complied with local zoning before it begins construction of its plant. If there is a reason why the PSC now refuses to follow this rule, it is hard to understand, and it is certainly not stated by the PSC.

The Report and Order not only gives short shrift to Mo. Power & Light., it also blatantly misstates the facts. The Report claims that in Mo. Power & Light.the applicant had "apparently" already constructed its power plant before it came to the PSC. This is simply false. Anyone reading the decision will see that the applicant filed its application with the PSC in early 1973, the PSC had hearings in the Spring and Summer of 1973, and when the order was issued in mid-1973 it stated that the proposed plant was scheduled to be completed in the Summer of 1974. It is unclear how the Report could so badly misstate the facts of this important case.

At pages 31- 32, the Report and Order discusses Kansas City Power & Light v. Jenkins, 648 S.W.2d 555 (Mo. App. 1983) and Union Electric v. Saale, 377 S.W.2d 427 (Mo. 1964). The Report claims these cases stand for the proposition that a utility is exempt from zoning. In truth, in Kansas City Power & Light , the applicant did apply for rezoning and did receive it from the county. As our discussions and citations in prior briefs show, Union Electric traditionally complied with zoning in the St. Louis area, although we have been unable to find any comments in the court decisions that indicate whether there was a question of zoning in this particular situation. Both Kansas City Power & Light and Union Electric were cases involving condemnation. In both cases, the language quoted in the Report and Order is dicta, because zoning was not an issue in

either case. Regarding the Kansas City Power & Light, the very language quoted at page 31 of the Report and Order states that the applicant sought zoning and received zoning. It is impossible to rationalize saying that a condemnation case in which the Court in dicta said the applicant sought and received zoning is precedent for the idea that zoning is not required.

Of the three commissioner majority, we have one commissioner who questioned whether Cass County should be punished, one commissioner who wrote that a proceeding on a request for authorization is not the venue to bring up citizen's complaints and that a rate hearing is the proper place to review the propriety of putting in this power plant, and one commissioner whose writing reveals that he believes this PSC Report and Order is rightfully rejecting the Court of Appeals decision.

Caught between the efforts of the County to enforce and/or establish rules of lawful conduct and the efforts of the PSC to fight back are the people who are being damaged. It should not be this way. We should be able to balance the interests of supplying power with the interests of the people who are bearing the brunt. We have had rules to balance these interests. Until now, the rules had been that the utility must comply with zoning and must demonstrate this to the PSC.

Until now the PSC had never declared in a case that the utility did not have to comply with local zoning. Now the PSC seeks to change the rules by taking authority away from the county. The people are caught in the middle and it is the fault of Aquila and the PSC that the people are being damaged. The PSC has the ability to change this by rewriting its Report and Order and following the statutes and the Court of Appeals

decision and the Mo. Power & Light Report and the various other court decisions that require that the utility comply with the rules of the local government.

A decision of the magnitude involved here should not rest on misquotes, misconstruction and misapplication.

V. THE REPORT VILOLATES DUE PROCESS AND EQUAL PROTECTION BY DECLARING THE RIGHTS OF CERTAIN CITIZENS TO BE SUBERVIENT TO THE RIGHTS OF OTHERS.

The Report states that the rights of people nearby the SHPF are subservient to the rights of the public. That means the rights of the people nearby are subservient to the rights of other people.

The Report also stated that the PSC did not believe that there is any requirement that its evaluation be the functional equivalent of a hearing on a zoning application (page 29).

The Report treats the people nearby differently than other people, affording them less in the way of due process. The Report does not afford equal protection to the rights of people nearby.

Whether before a county zoning authority or the PSC, the rights to the people must be respected. It is error to deny due process to the people. It is error to treat them differently than other people.

VI. THE VOTES OF THREE COMMISISONERS SHOULD BE SCRUTINIZED BECAUSE OF THEIR STATEMENTS.

In his concurring opinion, filed on May 23, 2006, Commissioner Appling wrote:

> In my opinion, this order confirms the Commission's standard practice and affirmations, including: the Public Service Commission's November 5, 2004 letter advising Nanette L. Trout that Aquila, Inc.'s existing certificates of convenience and necessity conferred the authority needed to build generation in its existing service territory; the Commission's April 7, 2005 order clarifying the adequacy of Aquila's certificate authority (EA-2005-0248); and decades of similar findings made by our predecessors. ***
>
> As this order notes, the Western District's opinion found that Aquila ... is exempt from Cass County zoning and that it had the option to seek specific authority from either Cass County or the Commission. Aquila chose to come here. The Commission made its decision. ***
>
> I agree with the majority that ... there is no compelling reason to deny the company's request for a certificate of convenience and necessity. It is in the public interest for all of us to learn from this experience.

In his concurring opinion written in 2005 in case number EA-2005-0248, Commissioner Davis wrote:

> In conclusion, this case was not the proper venue for the questions raised in the *ex parte* pleadings and the testimony at

> the local public hearing, but the next rate case will be the proper venue for the parties to raise all the issues including, but not limited to, whether the construction of this plant was prudent and whether the company should be penalized for poor management.

In the present case, early in the hearings, Commissioner Murray asked if Cass County could be penalized. .

These are the three commissioners who voted in favor of the Report and Order.

It is clear from reading the concurring opinion of Commissioner Appling that he was saying a.) he thinks the PSC Report of May 23, 2006, rightly rejected what the Court of Appeals said, and that the PSC to some extent is going back to the way the PSC did things before the Court of Appeals decision, b.) the Court of Appeals decided that in fact Aquila was exempt from "zoning," c.) the Court of Appeals held that Aquila could choose to go "either" to the PSC or to the County, and d.) the burden of persuasion was on the opponents to Aquila to provide "compelling" reasons to dismantle the plant. Appling is right to some extent on (a), in that this is what the Report is based on. He should know what the commissioners discussed. The PSC apparently thinks it can reject what the Court of Appeals wrote. However, that is wrong. The PSC cannot lawfully reject the directions of the Court of Appeals. Commissioner Appling is wrong on (b), as is already discussed above. On (c), he is wrong, because the Court of Appeals did not say that Aquila had the choice of either going to the PSC or to the County. On (d), the fact that Appling believes the burden of proof is on the opponents means that his vote is invalid and should be totally disregarded. The burden is on the applicant to prove that it

should get a certificate. The burden is heightened in the present case where, even if we assume a retroactive grant can be given, Aquila would have to present an extremely compelling case to warrant the action requested. Commissioner Appling's concurring opinion proves that his vote should be voided.

Commissioner Davis' writing from 2005 shows that he had decided that a proceeding on an application for authority brought by Aquila for this plant is not the right forum for citizen complaints and for questions about the propriety of building that plant in the first place. He says a rate case is the right place. Wrong. In a rate case the PSC is not deciding whether to dismantle the plant. Commissioner Davis' writing shows that his vote was hardly free from prejudgment.

Commissioner Murray's comment made during the hearing was evidence that she had prejudged the issues and that she wanted to punish Cass County. This shows that her vote was not free from prejudgment.

The votes of these three commissioners should be set aside.

VII. THE PUBLIC SERVICE COMMISSION HAS IMPROPERLY ATTEMPTED TO ELEVATE ITSELF TO THE LEVEL OF A COURT BY MAKING PRONOUNCEMENTS ABOUT LEGAL MATTERS OUTSIDE OF ITS JURISDICITION.

The PSC is a creature of statute and, just as the County Commission cannot set rates for electricity, the PSC cannot interpret chapter 64 or disagree with the Courts or make rulings about zoning.

In many ways, as already discussed above, the PSC in its Report has attempted to elevate itself to the position of a Court of Law. It has attempted to:

a.) Interpret Chapter 64.

b.) Declare that it is the superior authority over the county on zoning

c.) Declare that Aquila has an exemption from all county zoning

d.) Declare that the zoning of Cass County is deficient

e.) To disagree with the Court of Appeals and re-interpret the decision of the Court

f.) It has attempted to declare that it can issue retroactive approval when the statute does not allow it.

g.) It has attempted to declare that the rights of those nearest the SHPF are subservient to the rights of others.

These are all matters for which the PSC does not have jurisdiction. The PSC Report and Order goes far beyond its mission and far beyond its jurisdiction.

VIII. THE FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

There are numerous errors in the findings, including but not limited to the following:

1. In paragraph 33, the findings state that Aquila decided to not enter into a contract with Calpine because the contract with Calpine offered higher prices. The truth is that the confidential evidence introduced at the hearing showed that the offer from Calpine would have saved consumers very substantial sums of money. Further, the evidence was that the plan adopted by Aquila was not the "least cost option." Clearly, the confidential evidence showed that the best option for ratepayers would have been for

Aquila to enter into a contract with Calpine instead of constructing the SHPF and substation. Of course, the Report fails to note that Aquila did enter into a contract with Calpine, in September 2005, but for only 200 MW. Aquila could have entered into a contract for more capacity.

2. In paragraph 36, the findings state that Aquila used the suggestions of Staff for guidance for its self-build plan. The evidence was that Staff had told Aquila it had too much peaking and not enough base and intermediate load. Charts in evidence showed that Aquila was substantially where it needed to be for base and had more peaking than it needed. Staff told Aquila that it needed to plan for the long term and that it needed to make plans to add base load. Aquila ignored Staff.

3. In paragraph 43, the findings state there is a public need for the Facilities. No citations to the records are made. There was no showing of a need for a peaking plant at South Harper. There was evidence that there is a plant sitting in Cass County (Aries) that has a capacity of over 580 MW; that Aquila needed more base and less peaking; that the Staff had told Aquila it needed more base and intermediate; that peaking is more expensive to operate per hour than the others; that the price of gas had risen even more than anticipated; that the increase in the cost of gas will likely be passed on to ratepayers; that Calpine had offered a contract that would have saved a great deal of money; and that in fact Aquila entered into a contract in September 2005 with Aquila to supply power. Since the current contract with Calpine would supply 200 MW from the Aries plant, and the plant has a capacity of over 550 MW, there appears to be an excess of about 350 MW available just 15 miles away from the SHPF.

4. At paragraphs 65 through 70, the PSC makes a collateral attack on Cass County zoning. The statements contained therein are of little or no significance. The fact was that no one had any doubt about the zoning designation for the SHPF. It was zoned agricultural. The criticisms of Staff had to do with other areas in Cass County that were irrelevant to this case. If a city boundary has changed and is not recorded promptly on the county zoning map, that is of no importance for the present case. City boundaries change all the time. Zoning changes occur over time. As Bruce Peshoff testified, the county also keeps textual records of all this, in addition to the maps. There was no doubt that the area in question was zoned agricultural. No one ever attacked that. The collateral attack by the PSC on Cass County zoning is an attempt by a governmental agency which (as just recently said by the Court of Appeals in this very case) has no zoning authority to try to support its decision in an improper manner.

5. At paragraph 71 and 77, and pages 48 – 51, and at other points, the Report claims that there is no nuisance, no environmental violations, no noise problems, no health concerns. The evidence was to the contrary. The evidence was that property values for two houses bought and then sold by Aquila had tremendous losses of value; that the noise study commissioned by Aquila with only <u>one</u> turbine operating showed that it had a dBA level that was 112 near the turbine, and the noise levels at residences were recorded as being over the county ordinance; that Aquila had already filed two excess emissions reports in the short period that the SHPF had been operated; and that the level of pollutants coming out in terms of pounds per hour was one hundred times that of the supposedly "comparable" pumping station and equivalent to 1,000 running diesel pick up trucks.

While Harold Stanley, a witness who actually worked for over 30 years in the power plant business filed a sworn statement, was deposed under oath, and offered to also testify live by telephone for the commission, the Report downplays his testimony and instead adopts the hearsay letter of two "doctors" who did not testify under oath and did not offer to submit to cross examination. (The parties objected to this as hearsay, but the PSC allowed this hearsay testimony.) The parties do not know whether correct information was given to the doctors. The parties didn't have the opportunity to question their credentials or cross exam them on their reported opinions, including their reported opinion that a man could stand in the center of the stack with no problem if not for the heat. The heat is over 900 degrees. By comparison, Harold Stanley has over thirty years of actual work around power plants and testified that the SHPF is obviously incompatible with the area and he discussed the health issues from a practical point of view.

The Report at page 51 states that it is inconclusive whether PM2.5 is emitted from the SHPF. However, the Report also says only about 18 pounds per hour of particulate matter is emitted. The Environmental Protection Agency report states that PM2.5 is emitted by electric generating units (EGUs), including combustion turbines; that EGUs operate on fossil fuels, which includes gas; that scientists are concerned about PM2.5 and the other pollutants that come out of EGUs. 69 F.R. No. 20, at pages 4571, 4575, 4584, 4609. The PSC claims that "attributing PM2.5 to any one source would be impossible." This statement is untenable. Significant amounts of PM2.5 are not coming from the homes or from the farms. It is shown by scientific evidence as reported by the EPA in its report published in the Federal Register that PM2.5 comes from generating units. The SHPF is one. Since Aquila does not now measure for PM2.5, we don't know how much

is coming out, but we do know that the EPA report says there is no clear threshold for PM2.5 The situation is similar for ozone. The Report also fails to mention the issue of ozone, which is said by the above cited EPA report to be harmful at any level. (Ibid. at Page 4584, column 1.) Ozone is created after the pollutants exit the stacks, so the health hazards get worse after the pollutants leave the SHPF. This is ignored.

When three turbines are operating, the SHPF produces about as much in the way of pollutants as 1,000 running diesel trucks. The neighbors who might have expected that eventually the 74 acre tract would have perhaps ten to thirty homes with twenty to sixty vehicles now are now faced with the equivalent of 1,000 running pickup trucks. That is many times more intense that is appropriate.

The Report misses the point entirely. A power plant should be in an industrial area chosen by the zoning authorities to be designated for that purpose. This plant may well be appropriate in an industrial area. However, it is not in any way appropriate in or next to a residential area.

6. At paragraph 73, the Report states that at no time did Cass County raise any issues about the land during the Peculiar annexation process or during the grading process. This is contrary to the evidence. .The evidence was that no grading permit was ever required, so there was no reason for any objection on that, and of course Cass County has no concern if a city wants to annex some land. Cass County filed suit promptly on December 1, 2004, before the construction of the buildings even began, and Judge Dandurand announced his injunction on January 6, 2005, before any of the construction of the buildings began. It is simply false to say that the county sat by.

7. At paragraph 82, the Report states that over 250 local residents signed letters of support. The key word to scrutinize is "local." At the public hearing on March 30, 2006, Mr. Eftink was asking questions of Ms. Bailey, who had said she had letters of support and that many of the people were in the crowd. Mr. Eftink asked the people present who signed letters and who ALSO lived within one mile to raise their hand. Not a single hand was raised. None of those Aquila supporters present lived close to the plant. The people who support the SHPF with a few exceptions do not live near the plant. The testimony of Julie Noonan, who conducted a survey, was that maybe a handful of people near the plant supported the SHPF. For the people nearby the plant, the exceptions are those who received money from Aquila. By comparison, over 128 adults who live within a two mile radius signed up as members of StopAquila.org and/or engaged a lawyer to fight this application.

The application of Aquila should be denied.

StopAquila incorporates by reference all the arguments contained in its Motion To Dismiss, Summation and Propose Findings of Fact and Conclusions of Law.

For the foregoing reasons the Report and Order is unlawful, unjust, unreasonable or unwarranted and the Report and Order should be set aside and a rehearing should be granted and the Report and Order modified.

Respectfully submitted by:

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I hereby certify that a true and correct copy of the above and foregoing document was delivered by electronic mail or mailed, on this 30th day of May, 2006 to the following:

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By /s/ Gerard Eftink_____

EDITORIALS

AQUILA POWER PLANT

County shouldn't give up the fight

Cass County officials should continue their legal quest to determine whether Aquila has the right to operate a new power plant in the county.

In a disturbing 3-2 decision Tuesday, the Missouri Public Service Commission essentially said the utility didn't have to follow the county's rules in building a $140 million natural gas-fired facility.

County officials and other opponents had contested Aquila's construction of a plant without approval from the county. A court had determined earlier this year that Aquila must begin tearing down the facility by next Wednesday.

The county wants the Public Service Commission to reconsider its decision from Tuesday. If that avenue fails, the county should pursue the issue in Circuit Court.

Local governments need a definitive answer on whether they can regulate power plant construction. Depending on what the courts rule, the Missouri General Assembly may need to make it clear that cities and counties deserve an important voice.

The Public Service Commission said Aquila's duty to provide power to customers trumped the concerns of nearby Cass County landowners who fear reduced property values as well as noise- and pollution-related problems.

"The rights of an individual resident are subservient to the rights of the public as whole," the majority of commissioners said.

But Aquila did not just go around the concerns of a few landowners. It also did not have zoning approval or a building permit from the Cass County Commission.

This blatant act of ignoring elected officials was one reason a Circuit Court judge had issued the tough and unusual order to tear down the new facility.

No matter how this case turns out, the Public Service Commission and courts must make sure ratepayers are not burdened with legal costs. That weight should fall on Aquila shareholders.

IRAN'S LETTER TO UNITED STATES

Proceed with caution

By the standards of the Iranian regime, it could almost be called "a charm offensive."

Iranian officials are said to be seeking direct talks with Washington. Iranian leader Mahmoud Ahmadinejad managed to write President Bush an 18-page letter without once using the phrase "Great Satan." And the Iranians reportedly at the White House, either.

European leaders have been trying to work out a deal with Iran for years, and where did it all lead? Last week Ahmadinejad was howling at them over their proposed incentives for Tehran to abandon its nuclear project: "Do you think you are dealing with a 4-year-old child ...?"

LETTERS

Action Center

This is in response to a recent let- about Kansas City's Action Cen-. While I agree the staff is friendly d helpful, they simply do not ve the power, as she suggests, to ve trash picked up from a resi- nce in one day's time.

Instead, someone may have al- ady notified the Action Center veral weeks prior. Or, more likely, e homeowner was forced to an up the mess on his/her own e to neighbors' complaints.

When you call the Action Center, ey set up a case on the particular operty. This process takes weeks. most cases, the property owner given 30 days to take care of the

Fountains.

I am speaking for all the St. Louisans who attended games here this past weekend. Thanks for the memories — and the best barbecue in the world.

George Sladek
St. Louis

Protecting life

A seed is not a tree ... check. A tadpole is not a frog ... check. A caterpillar is not a butterfly ... check. A fetus is not human ... huh? What is it?

A fetus is not a human in other stages of development, absolutely. It still requires the nurturing of its mother until it can be independent of the womb. But from the mo-

What am I supposed to do? Put a lid on my yard?

Greyhounds are very gentle animals but are not necessarily cat-safe.

Apparently cat owners think their animals are exempt from all owner obligations and that cats can roam wherever they want.

Jim Layton
Parkville

Missouri GOP

Missouri's Republican majority has got to go. I am tired of "leaders" who put power before people, who obey special interests in opposing lifesaving cures and who deny doctors to our neediest neighbors. This past session of our legislature was

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By BEN WILDA
Special to Th

As educators in Mis nationwide try to enc students to go to coll send them there prep state Board of Educat important opportuni accomplish both goa

It is weighing a pro replace one standard another — a seeming decision that could h reaching consequenc

Missouri high scho

Wildavsky

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on college acceptanc whether, instead, all should take a free col trance exam, most lik of the ACT, which tes subjects and is requi mission to many uni the Midwest and bey

If Missouri follows several other states a ACT compulsory, it v powerful message ab portance of connecti school requirements needed in college (ar work force, too). Righ many high schoolers get the message that option or receive sub preparation for its ac mands. No wonder s dents around the na cluding record numb