Aquila's application is simply a request for a certificate of convenience and necessity pursuant to Section 393.170.1, wherein the Commission is to apply the "public convenience and necessity" standard in determining whether to authorize Aquila to acquire, construct, install, own, operate, maintain, and otherwise control and manage the Facilities. The Commission has jurisdiction over Aquila's application, and, in its order denying the motions to dismiss, the Commission held that it "is unwilling to conclude as a matter of law that it cannot consider Aquila's application." These legal issues have been fully briefed in Aquila's previously filings in this matter and are summarized herein in order to further address the issue: Does the Commission have the jurisdiction to consider Aquila's application?

1. Aquila has the only local consent which is required. Section 393.170.2 is not applicable to this proceeding. In *State ex rel. Union Elec. Co. v. Public Service Comm'n of Mo.*, 770 S.W.2d 283, 285 (Mo. App. 1989), the court rejected the utility's argument that the requirements of section 393.170.1 and 393.170.2 are interchangeable. Subsection 1 "sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate. . . . The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority." *Id.* The "local consent" requirement in subsection 2 applies only to applications for area certificates, not to applications under subsection 1 as is the case here.

In any event, it is clear that Aquila received the type of "local consent" contemplated by subsection 2 from Cass County when, in 1917 and pursuant to what later became section 229.100, the County Court granted Aquila's predecessor the right

to utilize County rights of way. In fact, Aquila and its predecessors have been operating electric transmission and distribution systems in unincorporated Cass County for nearly 90 years.

"Utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." *Union Electric.* 770 S.W.2d at 285-86. The Missouri Supreme Court later confirmed, in *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593 (Mo. 1964), that "the permission granted by a county court pursuant to Section 229.100 . . . to a public utility to use the county roads is a 'county franchise,' supplying the consent required by Section 393.170." *Id.* at 599 (quoting *In Re Union Elec. Co.*, 3 Mo. P.S.C. (NS) 157 (1951)).

2. Aquila qualifies for a statutory exemption from County zoning. It is indisputable that the Court of Appeals recognized that the Company qualifies for the county zoning exemption under Section 64.235 and further held that the approval required to exempt Aquila could come from either the Cass County Commission or the Public Service Commission.[1] On January 20, 2006, Aquila attempted to file Special Use Permit applications for the Facilities,[2] applications that were rejected by the County. After Judge Dandurand granted Aquila's request for a stay to seek Commission approval, the County "invited" Aquila to re-file its applications.[3]

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[1] 180 S.W.3d 24, 32.

[2] Aquila's attempted filing with Cass County on January 20, 2006 was an effort on the part of the Company to resolve the pending dispute by voluntarily submitting to the zoning process in addition to seeking Commission approval for the Facilities, even though the Court of Appeals had clearly held such action was not necessary. When the County rejected these applications, citing the pending injunction and writ proceeding, and followed up that rejection with a letter accusing Aquila of "brinksmanship" and threatening to seek an order holding Aquila in contempt, Aquila rightfully determined that the County was not interested in such a resolution.

[3] Letter from Cindy Reams Martin dated February 1, 2006.

The County's subsequent "invitation" to re-file these applications was a disingenuous attempt to trap Aquila into conceding the County's position that both County zoning approval and Commission approval were required. The letter from Cass County's counsel made this clear when she stated that the County "assumed" Aquila would want to re-file because "evidence of local consent" was necessary before the Commission could process the application.

Other public comments by the County around this same time period clearly indicated to Aquila that seeking County zoning approval again would be a futile effort that would later be used against Aquila in this proceeding, and that the County's primary motivation remained the destruction of the facilities. These statements were set forth in Aquila's Supplemental Suggestions filed herein. Further, when making the decision whether to accept the County's February 1, 2006 invitation to re-file its applications, Aquila had to consider the County's recent argument that the County lacked authority to consider the application because the facilities were already constructed.

It thus appeared clear to Aquila that Cass County was poised to determine innumerable ways to reject any application Aquila filed, much as the County has done here in asking the Commission to either refuse to exercise its broad authority or to cede part of it to the County. The ultimate position of the County was further expressed in its Motion to Dismiss wherein the County characterized the South Harper project as a "colossal unplanned for use of property." The County repeatedly has made it clear to Aquila that its earlier desire to work through the County's zoning process as a supplement to the Commission proceeding would be pointless. It is also clear that the County's purported invitation that Aquila do so is a disingenuous one. Moreover, it

would be an effort that is clearly not required by the Court of Appeals' recent holding in *Cass County v. Aquila*, 180 S.W.3d 24 (Mo. App. 2005).

Pursuant to the opinion of the Court of Appeals, if Aquila's application is approved by the Commission and Aquila is thus granted the specific authority to operate the Facilities, the Facilities will be exempt from county zoning. The Court of Appeals held as follows:

> Because **we find that Aquila qualifies for an exemption** under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities **and, thus, is exempt.**[4]

It is simply nonsensical to argue that if Aquila has specific Commission approval for the Facilities, Aquila is exempt from local zoning under section 64.235, but before the Commission can give specific approval for the Facilities, Aquila must show that it has obtained local zoning approval. The Commission's acceptance of such circular reasoning would render the exemption in Section 64.235 meaningless.

In fact, in addressing similar zoning enabling statutes, Missouri courts have held that a county may not interfere with Commission-authorized construction by a Missouri utility by means of county zoning regulations. Dealing with Section 393.170 and the zoning exemption contained in Section 64.620,[5] the Western District Court of Appeals held as follows:

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[4] 180 S.W.3d 24, 32 (emphasis added)

[5] Section 64.235 applies to first class nonchartered counties and requires construction in Cass County to conform to the County's plan, but specifically states that the statute shall not "interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission." Section 64.620 applies to building restrictions for second and third class counties and also states that the statute shall not be construed to "authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission."

> Although Platte County is authorized by §64.620 to restrict the use of land within the county, that is, zone the land as it deems advisable, that section provides as well that the powers granted "shall not be construed . . . to authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission . . ." The public service commission is specifically empowered in §393.170 to grant permission and approval for construction of an electric plant "whenever it shall . . . determine that such construction . . . is necessary or convenient for the public service." **These sections, taken together, necessarily mean that the county could not have interfered with the construction of the Iatan Plant by means of its zoning regulations.**

Kansas City Power & Light Co. v. Jenkins, 648 S.W.2d 555 (Mo.App. W.D. 1983) (emphasis added). The Court also noted that its holding was consistent with *Union Elec. Co. v. Saale*, 377 S.W.2d 427, 430 (Mo. 1964), which held that a county cannot by zoning restrictions limit the use of land by a public utility to construct a power plant to generate electric energy for public use. In the *Saale* case, the Missouri Supreme Court stated:

> When the purpose of this exception to the powers granted by the enabling act is considered, it is obvious that the intent and purpose of the legislature was that a county which adopts and approves a county plan for zoning, as authorized by Sections 64.510 to 64.690, cannot by zoning restrictions limit or prohibit the use of land by a public utility to provide authorized utility services. This would necessarily include the use of land by a public utility to construct a power plant to generate electric energy for distribution to the public.

Id. at 430.

3. The fact that the Facilities have been constructed does not preclude the Commission from granting the requested authority. The Court of Appeals decision clearly contemplates that Aquila is not precluded from attempting to secure the necessary authority that would allow the plant and substation to continue operating. In this regard, the Court held as follows:

> For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County's zoning law without first obtaining approval from the county commission or the Public Service Commission. In so ruling, however, **we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating**, albeit with whatever conditions are deemed appropriate.

180 S.W.3d 24, 41 (emphasis added).

Additionally, in 11 Mo. P.S.C. (N.S.) 599, 1964 Mo. PSC LEXIS 106, the Commission considered an application of Olympian Utilities, Inc. for authority to construct and operate facilities which had already been constructed. The Commission held: "Insofar as the application relates to a request for a certificate to construct that portion of the system already in operation the same will been denied." Ultimately, however, the Commission did grant a certificate of convenience and necessity to Olympian Utilities for the company to continue to operate the system.

In a case involving a motor carrier (1950 Mo. PSC LEXIS 33), the Commission granted a certificate to Merchants Contract Deliveries, Inc. after it had been providing services without authority. The Commission held that although the applicant had in the past engaged in certain unauthorized operations, it was being granted a contract hauler's permit because the improper operations were not the basis for proving the need for the service and were not of such a shocking nature as to show that the applicant was unfit to engage in the field of regulated transportation.

In a case involving Sho-Me Power Corporation (1993 Mo. PSC Lexis 48, Commission Case No. EO-93-259), the Commission authorized the company to convert to a rural electric cooperative after the company had already filed its articles of

conversion with the Secretary of State and had stated that it would not submit to the jurisdiction of the Commission. The Commission determined that RSMo. 393.250 applied to the company's act of converting instead of RSMo. 393.190 – which would have voided the transaction.

In conclusion, upon exercising its statutory authority and obligation to consider Aquila's application in its entirety, the Commission should grant to Aquila a certificate of public convenience and necessity to acquire, construct, install, own, operate, maintain, and otherwise control and manage the electrical production and related facilities located in Cass County, Missouri near the Town of Peculiar and known as the South Harper Facility and Peculiar Substation.