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Opinion
Missouri Court of Appeals
Western District

Case Style: StopAquila.Org, et al.; Plaintiff, Cass County, Missouri, Respondent, v. Aquila, Inc., Appellant.

Case Number: WD64985

Handdown Date: 06/21/2005

Appeal From: Circuit Court of Cass County, Hon. Joseph Paul Dandurand

Counsel for Appellant: Karl Zobrist, James D. Youngs and Andrew J. Bailey

Counsel for Respondent: Cynthia R. Martin and Debra L. Moore

Opinion Summary:
Aquila, Inc. appeals the judgment of the circuit court permanently enjoining it from constructing and operating an electrical power plant and transmission substation in an agricultural district in unincorporated Cass County. Aquila claims that the circuit court erred in finding that neither the certificates of convenience and necessity and other Public Service Commission orders issued to Aquila and its predecessors nor the 1917 Cass County franchise authorizing one of Aquila's predecessors to place transmission lines along county roads specifically authorized the construction and operation of an electrical power plant and transmission substation in the county. Aquila began constructing such facilities in a district not zoned for this use without county or commission approval and without a special use permit or rezoning for either site.
AFFIRMED.
Division Three holds: The circuit court did not collaterally attack prior commission orders when it interpreted them, and the commission may not enlarge the authority conferred by a county or municipal franchise to a public utility. The circuit court did not err in finding that the county franchise did not allow Aquila to do anything more than set poles on which to string wires to transmit light across the county and in granting injunctive relief to Cass County.

Citation:

Opinion Author: Thomas H. Newton, Presiding Judge

Opinion Vote: AFFIRMED. Breckenridge and Howard, JJ., concur. Attachment 1

Opinion:

Aquila, Inc. appeals the judgment of the Cass County Circuit Court permanently enjoining it from constructing and operating an electrical power plant and transmission substation in an agricultural district located in unincorporated Cass County. The dispositive issue raised on appeal is whether the circuit court erred in finding that, regardless whether Aquila qualified for the zoning exemption provided under section 64.235, (FN1) neither the certificates of convenience and necessity and other Public Service Commission (Commission) orders issued to Aquila and its predecessors nor the 1917 Cass County franchise authorizing one of Aquila's predecessors to place transmission lines along county roads specifically authorized said construction. (FN2) Because we agree that Aquila has not been given the authority to build a power plant and substation in Cass County, we hereby affirm the circuit court's order.

In response to a growing demand for electricity, Aquila decided in 2004 to upgrade its Cass County infrastructure by building a small electric peaking plant(FN3) and an electric transmission substation. (FN4) The company located in unincorporated Cass County two parcels of land, zoned agricultural, on which it decided to construct its new facilities. Such use is not permitted in an agricultural district. The parcels, a 74-acre tract (South Harper plant) southwest of the City of Peculiar, that is convenient to a fuel source and a 55-acre tract (Peculiar substation) northeast of Peculiar, were purchased from willing sellers in October. Without submitting plans to Cass County or the Commission for approval and without a special use permit or rezoning for either site, Aquila began construction activities.

Cass County sued Aquila on December 1, seeking injunctive and declaratory relief to halt construction of the South Harper plant and the Peculiar substation.(FN5) The judge heard argument on the county's request for a temporary restraining order. An evidentiary hearing was scheduled for and took place on January 5-6, 2005. The parties agreed upon a joint stipulation of facts, and evidence was received as to the county's damages for purported zoning violations, Commission regulatory practices, and Aquila's actions with respect to the two tracts at issue and its operations throughout its service territory in the county.

The circuit court made no conclusions of law regarding the interpretation of section 64.235, but, finding that it was vague in part, determined that Aquila was required to have specific authority either from the Commission or the county to build its power plant and substation. Finding that neither the certificates of convenience and necessity and other orders issued by the Commission nor the county's 1917 franchise gave Aquila the specific authority to build a power plant, the circuit court granted the request for temporary restraining order and for preliminary and mandatory permanent injunction restraining construction of the South Harper plant and the Peculiar substation. Aquila was ordered to remove any construction on either tract inconsistent with an agricultural zoning classification, but the court suspended the permanent injunction pending appeal and the posting of a $350,000 bond.

On appeal Aquila essentially argues that, as a public utility regulated by the Commission, it is exempt from county zoning regulations, including the requirements of section 64.235, which, according to Aquila, contains an exemption that must be interpreted in a manner that would allow it to build its South Harper plant and Peculiar substation without first obtaining county approval. Aquila also argues that the certificates of convenience and necessity and other orders issued to it and its predecessors by the Commission, allowing it to provide electrical services in most of Cass County, constitute all the authority that Aquila needs to site and build anywhere within the county those facilities necessary to provide that service. As noted above, the Commission agrees with Aquila on the latter point and ruled that the company did not have to seek new and specific authorization to build the South Harper plant and Peculiar substation. (FN6)

In an appeal from a zoning dispute that is resolved with the grant of injunctive relief, our standard of review is the same as in any other court-tried case as articulated in *Murphy v. Carron* , 536 S.W.2d 30 (Mo. banc 1976). *Gray v. White,* 26 S.W.3d 806, 814-15 (Mo. App. E.D. 1999). Thus, the circuit court's judgment will be affirmed unless it is not supported by substantial evidence, it is against the weight of

the evidence, or it erroneously declares or applies the law. *Id.* at 815. In addition, we will affirm the circuit court's grant of injunctive relief unless we are left "with a definite and firm conviction that a mistake has been committed." *Vocational Servs., Inc. v. Developmental Disabilities Res. Bd.,* 5 S.W.3d 625, 629 (Mo. App. W.D. 1999). Whether the circuit court properly interpreted a Commission order presents a question of law, not of fact, for our review. *State ex rel. Pub. Water Supply Dist. No. 2 of Jackson County v. Burton* , 379 S.W.2d 593, 598 (Mo. 1964).

Section 64.235, which applies to Cass County as a non-charter county of the first class that has elected to establish county planning under section 64.211, provides in relevant part:

[A]fter the adoption of the master plan ... no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board ... If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefor to the planning board, nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission after public hearing....

Conceding that its power plant and transmission substation are improvements of the type embraced within Cass County's master plan, Aquila argues that the exemption contained in the last sentence of the statute is not limited to the clause it directly modifies, i.e., developments or public improvements proposed by "any municipality, county, public board or commission," but rather encompasses any improvement coming within the master plan and that the word "such" renders the statute ambiguous. Because we agree with the circuit court and find that Aquila did not have authority from the Commission or the county to build the South Harper plant or Peculiar substation, we find it unnecessary to interpret section 64.235.

Aquila argues, because it comes within the section 64.235 exemption, that the certificates of convenience and necessity and other orders issued by the Commission throughout the 20th century to the company and its predecessors are legally sufficient to specifically authorize the disputed construction. Aquila further argues that the circuit court's ruling constitutes an unlawful collateral attack on Commission certificates of convenience and necessity, which is not allowed under section 386.550. While this section provides that final Commission orders are conclusive in all collateral actions or proceedings, what the circuit court did in this case was interpret the terms of the certificates, which are not as broad as Aquila suggests. The circuit court specifically found that the 1917 Cass County franchise, which gave to Aquila's predecessor only the authority to set poles on which to string wires to transmit light, did not give Aquila the authority to build a power plant or substation. By ruling on April 7 that existing certificates of convenience and necessity, which are based on the 1917 franchise, give Aquila the authority to build a power plant in Cass County, the Commission has effectively enlarged the authority conferred by the franchise, something it cannot do. *Burton* , 379 S.W.2d at 599.

The Commission asserts in its April 7 order that all of its previous orders and certificates are conclusive and free from collateral attack. The *Burton* court, however, stated that limiting the authority granted under Commission orders does not constitute a collateral attack on those orders. "Such limitation in no way questions the validity of the original order. Interpretation of an order necessarily acknowledges its validity and does not constitute a collateral attack." *Id.* at 600.

The Commission provides several examples in its April 7 order that it interprets as providing Aquila with the specific authority it needs to build an electric plant in Cass County. These examples were also considered by the circuit court. They include a 1921 preliminary order giving a predecessor permission to reorganize as a newly named company and to increase its capitalization:

[T]hat the present and future public convenience and necessity require the exercise by the said new company [West Missouri Power Company] of all the rights, privileges and franchises to construct, operate and maintain electric plants and systems in the State of Missouri and respective counties and

municipalities thereof, now acquired or controlled by Applicant, Green Light and Power Company.
Another example is a certificate of convenience and necessity issued in a 1950 merger case giving Aquila's predecessor the authority to:
[O]wn, maintain and operate all properties and assets, and to acquire, hold and exercise all contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; including, without limitation, all rights to construct, own and maintain electric utility facilities in the areas of the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.
Aquila and the Commission focus on the text in these orders regarding "electric plants" and "electric utility facilities." What Aquila ignores is the language about the exercise of "rights" and "franchises" held or controlled by these companies. The original and only existing Cass County order, otherwise known as a franchise, on which all subsequent orders are based dates from 1917 and simply gives Aquila's predecessor the authority to "set Electric Light Poles for the transmission of light for commercial purposes ... provided the wires do not interfere with the ordinary use of the public roads." As the Missouri Supreme Court noted in *State ex. inf. Shartel v. Mo. Utils. Co.* , 53 S.W.2d 394, 399 (Mo. banc 1932), a certificate of convenience and necessity does not confer any new powers on a public utility; it simply permits the utility "to exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent." *Id.* Thus, even if, as Aquila argues, a Commission order or certificate preempts local authority to determine where a power plant will be located, the certificates and orders herein only give Aquila the authority to put up transmission lines and furnish electric service throughout Cass County and do not and cannot give the company authority to build a power plant and substation. Furnishing electric service is not the same as building a power plant, which can be located hundreds or thousands of miles away from a service territory. Simply put, if, as here, the company does not have the right to do anything more than place poles and string wires along roads and highways in a particular county or municipality, then it does not have the authority to build a power plant wherever it wishes within that part of its territory so restricted.
If we were to hold otherwise, the granting of franchises would be meaningless. Just because a public utility has permission from one municipality or one county to build electric plants in that municipality or county, it does not follow that the public utility has permission to build an electric plant anywhere in its service territory, including other counties and municipalities. Such an interpretation would give one sovereign power unprecedented authority over other co-equal sovereign powers.
We are not convinced that the circuit court erred in finding that neither the franchise nor the Commission orders and certificates gave Aquila specific authority to build the disputed facilities. *Vocational Servs., Inc.,* 5 S.W.3d at 629. Accordingly, 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.

Footnotes:

FN1. All statutory references are to RSMo. (2000) and the Cumulative Supplement (2004), unless otherwise indicated.

FN2. On April 7, 2005, a divided Commission issued an order confirming Aquila's authority under existing certificates and orders to build a power plant anywhere in its service territory. The April 7 order became effective on April 17, and Cass County filed an Application for Rehearing that was denied May 3. Cass County has since filed a petition for writ of certiorari with the Cass County Circuit Court, seeking its review of the Commission's ruling. While the Commission's ruling is not before the court in this appeal, the parties submitted it to the court for informational purposes, and we refer to it *infra* in our legal analysis.

FN3. A peaking plant is apparently designed to generate electricity only during peak demand, mainly during the summer months. This particular plant would generate 315 megawatts (MW) of electricity with three 105-MW turbines fueled by natural gas supplied by a compressor station owned by a third

party and located on adjoining property that is zoned light industrial

FN4. The Peculiar substation is designed to support the electric plant by allowing its output to flow to an adjacent, higher voltage transmission line and will also serve area load growth.

FN5. The case was initially consolidated with a case brought by a group of Peculiar residents identifying themselves as StopAquila.org, and the Commission asked for leave to intervene for the limited purpose of addressing a possible conflict between sections 64.235 and 393.170. The court subsequently severed the actions and removed the Commission as a party with its consent.

FN6. The Commission based its ruling, in part, on its interpretation and application of *State ex rel. Harline v. Public Serv. Comm'n of Mo.* , 343 S.W.2d 177 (Mo. App. 1960). Dissenting Commissioner Gaw and the parties herein invited this court to address the meaning of *Harline* , which we decline to do as unnecessary to the disposition of this appeal.

Separate Opinion:
None

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