

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

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

Case No. EO-2005-0156

**SUGGESTIONS IN OPPOSITION TO APPLICATION
OF STOPAQUILA.ORG TO INTERVENE**

COMES NOW Applicant in the captioned case, Aquila, Inc. (hereinafter "Aquila") and offers the following suggestions in opposition to the Application to Intervene filed by STOPAQUILA.ORG (hereinafter the "Residents"):

1. On January 3, 2005, the Residents caused to be filed an Application to Intervene in this proceeding. The Residents correctly state that the Application filed by Aquila seeks a determination associated with an affiliate transfer and approval of various aspects of tax-advantaged project financing available under Chapter 100 RSMo.

Procedural Objections

2. The Residents state that they are an unincorporated association of individuals. (App. to Int., ¶ 1) As such, the Residents have no capacity under Missouri law to sue or be sued except as a class certified by a court of competent jurisdiction. See, Civil Rule 52.10; *State ex inf. John Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99 (Mo. App. 1984). Consequently, the Residents have no capacity to intervene in this case as a group.

3. The Commission's intervention rule, 4 CSR 240-2.075 (3), which permits participation by "an association" must be read to refer back to §386.390 RSMo. Which permits participation only by "civic, commercial, mercantile, traffic, agricultural or manufacturing" associations. See, *State ex rel. Dyer v. Public Service Commission*, 341 S.W.2d 795 (Mo. 1960), cert. denied, 366 U.S. 924 (1961). STOPAQUILA.ORG is merely an unincorporated group of residents living in and near Peculiar, Missouri. Consequently, they have no standing to intervene.

4. Furthermore, the Commission's intervention rule necessarily contemplates possible intervention only by an incorporated association (i.e., a legal entity) and not an *ad hoc* group of wholly independent individuals. There is good reason for this application of the rule. First of all, the Commission, unlike a Court, has no authority to certify a class action. Also, permitting the Residents to intervene would be to Aquila's disadvantage and prejudice in that there is no means for it to undertake effective discovery from, and cross-examination of, "over 350 adults". Likewise, it would be impractical for the Commission to effectively enforce its discovery rules and otherwise process this case in an orderly and timely fashion.

5. In the event the Commission determines that its intervention rule permits the participation of an unincorporated association of over 350 individuals, the Residents have failed to comply with the requirement that a proposed intervention "shall list all of its members." See, 4 CSR 240-2.075(3). The Residents have only provided the names of a small representative group. (App. to Int., ¶1.)

6. Although the Residents state at paragraph 3 that their Application to Intervene is timely, it was not filed until January 3, 2005, four (4) days after the

Commission's intervention deadline of December 30, 2004. The Residents have provided no good cause for its untimely filing.

Failure to Meet intervention Standard

7. The standard for intervention in Commission proceedings is set forth at 4 CSR 240-2.075. Subsection (4) of that rule states that the Commission may authorize intervention on a showing that (A) the proposed intervenor has an interest different than that of the general public that may be adversely affected by a final order in the case; or (B) granting the proposed intervention would "serve the public interest." The Residents' proposed intervention does not meet either of the Commission's criteria. Consequently, the Residents' Application to Intervene should be denied. As noted above, the Residents are an unincorporated association having no capacity to sue or be sued. Moreover, the Commission does not have the authority to certify the Residents as a class under Civil Rule 52.10. This is a power reserved exclusively to the judicial branch of government. Consequently, the Residents not only have no authority to represent themselves as a group or collective, they certainly have no authority to represent the larger public interest before the Commission in this case.

8. The responsibility to represent the interests of the general public is statutorily vested in the Office of the Public Counsel ("OPC"). See, §386.700 and §386.710 RSMo 2000. OPC is actively reviewing the Application as evidenced by the filing of its January 4, 2005, Request for Hearing.

9. As to Aquila's request for a Commission determination concerning the affiliate transfer, the Residents state no interest. Aquila's request that the Commission

determine that the transfer of the CTs provides no financial advantage to its unregulated affiliate is merely in furtherance of accurate corporate recordkeeping.

10. Likewise, the Residents are not party to any of the Chapter 100 financing documents that are being submitted to the Commission for its review and approval. Consequently, the Residents have no contractual or proprietary interest that would be adversely affected by a final order in this case. To the contrary, the proper party in interest, the City of Peculiar, Missouri, approved the Chapter 100 financing documentation at a meeting of its City Council on December 28, 2004.

11. Also, the Residents' intervention would not serve the public interest. The Residents correctly state that they have initiated litigation against Aquila in the Circuit Court of Cass County, seeking to enjoin the construction of the South Harper Peaking Facility ("South Harper") currently underway in an unincorporated portion of Cass County. The Residents also state that they have taken the appeal of a Cass County Circuit Court decision authorizing the City of Peculiar, Missouri to issue revenue bonds for the construction of South Harper. (App. to Int., ¶15.) Among other things, the Residents allege that Aquila has not acquired the approval of Cass County to construct and operate South Harper.

12. Several of these claims by the Residents are an impermissible collateral attack on the Commission's Orders in numerous cases, including its Case Nos. 1,074, 1,449, 3,171, 5,109, 9,470, and 11,892 wherein Aquila's predecessors in interest were certificated to provide electric service and to construct electric plant in portions of Cass County, including at the location of South Harper. The Commission determined in those cases that there was a need for electric service and that the public convenience would

be served thereby. Those orders of the Commission are final and conclusive. §386.550 RSMo. 2000. The Residents should not now, many years after the fact, be permitted to take action to undermine the Commission's prior determinations by claiming the tax-advantaged financing to fund the construction of needed plant additions is not in the public interest.

13. The proposed intervention suggests the Residents are opposed to the Chapter 100 financing of the Project but this is misleading. It is apparent that the Residents are opposed to the Project; not the manner in which it is financed. The Residents concede that South Harper is currently under construction. (App. to Int., ¶5). The question in this case is not whether South Harper will be constructed but, rather, whether it will be financed in the most cost-effective manner possible. The Residents' parochial concerns do not justify their claims that tax-advanced financing of South Harper would not be in the public interest. (App. to Int., ¶6).

14. It is apparent that the solitary objective of the Resident's proposed intervention is to gain an advantage in its various legal actions against Aquila and the City of Peculiar. This Commission should not allow this case to become yet another forum for the Residents to pursue their claims that the planning and zoning code of Cass County supersedes the Commission's certification authority. The Commission is in no position to resolve claims that are grounded on the provisions of county planning and zoning code (Chap. 64 RSMo). Likewise, the Commission is in no position to address the vague allegations of whether a public vote was required for revenue bonds to be issued by the City of Peculiar (an issue the Residents state is the subject of a court appeal), whether the operation of South Harper presents any "health risks" to

nearby residents or whether any political subdivisions will be unfairly deprived of local tax revenues. (App. to Int., ¶¶5-6). In the past, the Commission has been extremely reluctant to permit parties to intervene in its cases to pursue private advantage in other pending legal actions or in contract negotiations. This has been a wise policy that should be again employed in this case by denying the Residents proposed intervention.

15. Denying the proposed intervention would not prejudice the Residents. The Residents, to the extent they believe they are entitled to relief, have an adequate opportunity to be heard in the various legal proceedings they have initiated before the Circuit Court of Cass County and the appellate courts. Permitting the Residents to intervene in this proceeding merely to relitigate the claims they have made in their various lawsuits would be wasteful and duplicative. The Resident's intervention would cause undue delay and bring a needed power production facility online thus impairing Aquila's ability to provide safe, adequate and reasonably priced electric service to the customers of its Aquila Networks-MPS division (including many of the customers located throughout Cass County) and, consequently, would not serve the public interest.

WHEREFORE, for the reasons aforesaid, the Resident's proposed intervention should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 12th day of January 2005 to the following:

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