

**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 ) Case No. EA-2006-0309  
Manage Electrical Production and )  
Related Facilities in Unincorporated )  
Areas of Cass County, Missouri Near the )  
Town of Peculiar.

**SUMMATION OF STOPAQUILA.ORG  
PUBLIC VERSION**

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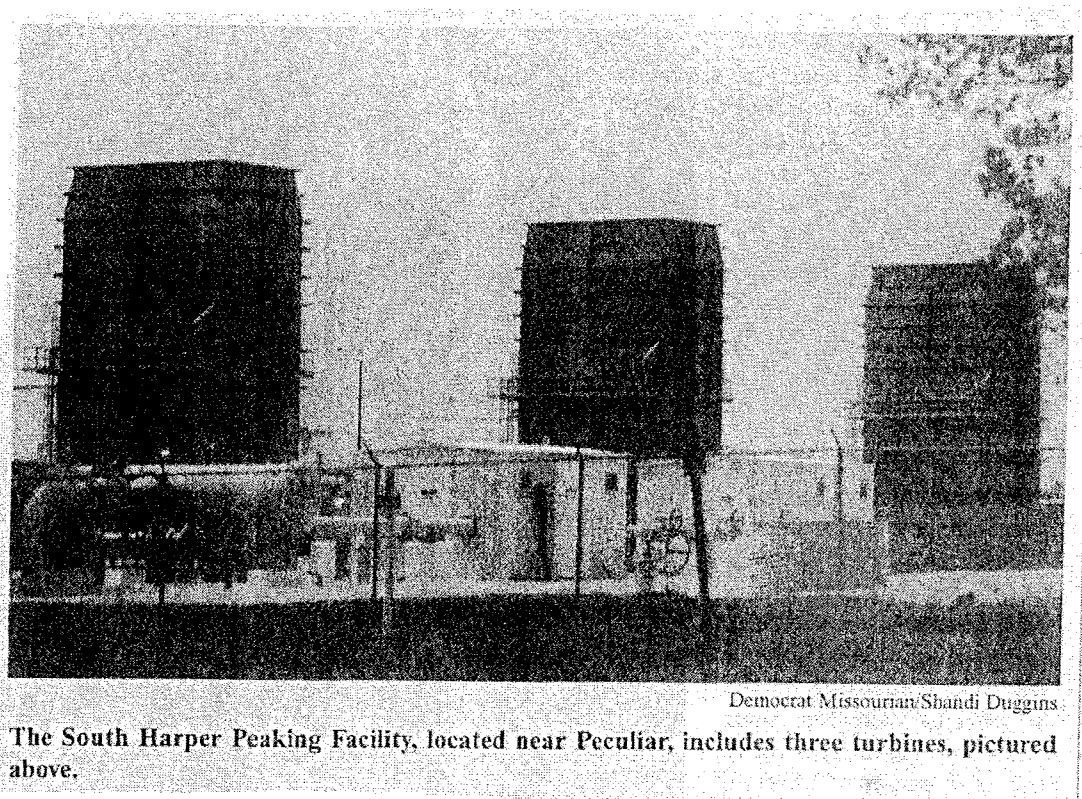
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**I INTRODUCTION.**

StopAquila.org represents 120 adults who live within a two mile radius of the South Harper Peaking Facility (SHPF) and they are vehemently opposed to the application filed by Aquila. Exhibit 28. StopAquila.org opposes any entity doing anything to permit the SHPF to remain, be it the PSC, or the County, or the Circuit Court.

We request that the PSC deny the application of Aquila.

A current photograph of how the SHPF appears was printed in the Cass County Democrat Missourian on May 5, 2006. Since Aquila introduced photographs which obviously were taken at angles that would distort the true look, we think we should begin our summation by taking a look at the actual photograph published in the Democrat:



There are three reasons why the application should be denied:

1. Because the right thing to do is to deny the application.
2. Because approval of the application would be contrary to the law.
3. Because approving the application would set a terrible precedent.

## **II. THE RIGHT THING TO DO IS TO DENY THE APPLICATION.**

Even if Aquila had applied to the PSC for specific authorization to construct the SHPF and the substation at the locations herein at issue before construction, the application would have been denied on substantive grounds.

**A. THE SHPF SHOULD BE DISMANTLED.**

The problems caused by the SHPF cannot be “fixed.” The problems include pollution, noise, view, incompatibility with the area and decreased property values.

**1. POLLUTION.**

The SHPF does not belong in an area close to residences. It belongs in an industrial area where power plants are appropriate. Harold Stanley, an engineer with 33 years of experience working with power plants, testified that the 3 combustion turbines (CTs) of the South Harper peaking facility (SHPF) operate at over 422,000 brake horsepower and are permitted to emit over 500 pounds per hour of pollutants into the atmosphere. Exhibit 26, page 5. According to the reports filed by Aquila with the Missouri DNR, if 3 CTs are running, the 3 together emit a little over 500 pounds per hour of pollutants (on average). This is based on the actual report, using simple math to add the weight and divide it by the hours. Exhibits 26, 27. The emissions from the SHPF are greater than the emissions produced by 1,000 diesel pickup trucks in terms of pounds of pollutants emitted per hour. Exhibit 26, Page 9, Exhibit 27. Aquila claims compatibility with the compressor. (See photo above and photos attached, from the Democrat Missourian.) The compressor is permitted to utilize up to 5,647 horsepower (which is dwarfed by the 422,000 horsepower of the SHPF) and is permitted to emit up to 22.4 pounds per hour of pollutants (which is dwarfed by the 500+ pounds per hour that

SHPF actually emits when the 3 CTs are operating). Witnesses said at the public hearings that the compressor was hardly noticed before Aquila began construction of the SHPF. Witnesses said it was like a barn to them. The compressor's horsepower is about 1% of that of the SHPF. The amount of emissions permitted for the SHPF is over 30 times more than for the compressor. Exhibits 26, 27, 75, 77, 78, 79. (Keep in mind there have already been excess emissions reports for the SHPF. See Exhibits 77, 78.)

Exhibit 80, an e-mail, from Gary Clemens to Warren Wood, dated March 24, 2005, says that the exit gas temperatures from SHPF range from 849 to 955 degrees F, and under some atmospheric conditions, the emissions will impact areas within 2 miles of the plant.

According to the Environmental Protection Agency, Exhibit 29, there is a substantial problem with certain things, and one of those is fine particles, which are known as PM2.5. Research on PM2.5 has been done over the last few years, and at this particular time, apparently, Aquila is not required to measure the emission level of PM2.5. However, scientists report to the EPA that there is a substantial problem with PM2.5, and that PM2.5 is produced by electric generating units such as the combustion turbines operated at the South Harper peaking facility. The EPA stated:

**Health studies have shown that there is no clear threshold below which adverse effects are not experienced by at least certain segments of the population.** (69 Federal Register No. 20, January 30, 2004, at Page 4571, Column 1.) (Emphasis added.)

The EPA report discussed the problems that are experienced due to PM2.5, which includes increased hospital admissions, absences from school or work, restricted activity days, lung disease, decreased lung function, asthma attacks and certain cardiovascular

problems. (Ibid.) The EPA states that electric generating units are a major source of SO<sub>2</sub> and NO<sub>X</sub>, both of which contribute to PM<sub>2.5</sub> production.

The EPA report also states that electric generating units contribute to ozone problems. Ozone can reduce lung function and make it more difficult to breathe deeply. Increased hospital admissions have been associated with ozone exposure. Long term ozone exposure can also inflame the lining of the lungs. Children, active adults and people with respiratory problems are unusually sensitive to ozone. (Ibid., at column 3)

The EPA has determined that ozone has some adverse health affects – however slight, - at every level. (Ibid. at Page 4584, column 1.)

The EPA stated that the electric generating units discussed in this report are units that use fossil fuels; this includes turbines. Fossil fuel includes natural gas. (Ibid. at page 4609, column 3.)

The EPA states that the formation of ozone increases with temperature and sunlight and that this is one reason ozone levels are higher during the summer. The increased temperature also increases the level of NO<sub>X</sub>. As an example, the EPA states that increased electric generation in the summer to supply power for air conditioning can increase NO<sub>X</sub> production. The EPA pointed out that summer time conditions that result in episodes of large scale stagnation promote the buildup of direct emissions and pollutants. (Ibid at page 4575, column 1.) In other words, the operation of the SHPF during the summer increases production of these very things that are problematic. It is clear that it is a vicious cycle. Increased heat in the summer causes increased use of the SHPF, resulting in increased health problems. The increase in pollution in the summer often coincides with the stagnant summer weather conditions, which causes a further

increase in health problems. (For example, when there is little or no wind, the 500+ pounds of pollutants pumped into the air 70 feet above the ground will not disperse, but rather will come down on my clients' homes.) The proper way to handle such a problem is to put peaking facilities in areas zoned for power plants, away from residential areas.

In the Clean Air Task Force Report, Exhibit 30, it states that for ozone, even at low concentrations, health problems can be triggered. Report at Page 4. The report also states:

**There is no "safe" threshold for PM2.5 below which no affect occurs.... What this means is that fine particles may adversely impact human health at any concentration.** Page 5 of Report, Exhibit 30.

## **2. NOISE.**

After construction of the SHPF, a noise study (Exhibit 76) was done with only one of the combustion turbines operating. According to this ATCO study, with one turbine operating, the noise level on site near the turbine was 112 dBA.<sup>1</sup> At the home of Harold Stanley, 3,690 feet away from the turbine, the noise level was recorded as being 64 dBA during the day time and 59 dBA at night time. At the home of Frank Dillon, 1,190 feet from the turbine, the noise level was 64 dBA during the day time and 56 dBA at night time. The readings were similar at other points. Exhibit 76. As Aquila claims no more than one CT was operating when this ATCo study was done, how loud will it be with 2, 3, or 6 CTs operating?

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<sup>1</sup> Why didn't Aquila do any post-construction noise studies with two or three CTs operating? It is obvious that two or three would have been louder. Did Aquila choose to operate one particular CT that was not as loud as the other two? Why did Aquila withhold the post-construction noise study from various people, including its own land use witness?

The noise levels for one CT exceeded the level that is forbidden by the Cass County Noise Ordinance. It is obvious why Aquila did not conduct the post-construction noise study with more than one CT running. It is only logical that if one CT produces noise at the legal of 112 dBA, 2 CTs will be louder and 3 CTs will be louder still. It is obvious that if Aquila succeeds in putting in 6 CTs at this location, the noise level will be incredibly high. There is no way that Aquila can be the “good neighbor” that it pretends to try to be. Devices that produce 112 dBA do not belong next to a residential area.

### **3. VIEW AND INCOMPATIBILITY WITH THE AREA.**

Land Planner Bruce Peshoff spent considerable time reviewing this matter and viewed the site and stated that the SHPF is not compatible with the surrounding area. The SHPF has 70 foot stacks. There is nothing comparable in the area. Aquila has planted some tiny trees, but this does not obscure the view. Photographs show that the sight of the SHPF is out of character for the area. Prior to the time that Aquila constructed the SHPF, the area had developed, and was continuing to develop into a residential area, with upscale homes along the two lane roads southwest of the city of Peculiar. That development has now stopped due to the SHPF.

**Highly confidential. (deleted from public version)**

As set out above, the SHPF, with 3 CTs, produces 422,000 brake horsepower, produces up to over 500 pounds of pollutants per hour, and is very loud. With the

planned expansion to 6 CTs, the facility will be able to produce over 840,000 brake horsepower, over 1,000 pounds of pollutants per hour, and the noise will be unbelievable

#### **4. PROPERTY VALUES.**

It is no wonder that property values have dropped. A stark example of the sharp decline in property values is shown in the case of two homes near the SHPF purchased by Aquila. **Confidential: (deleted from public version)**

#### **B. AQUILA HAS NOT PROVEN NEED.**

Staff of the PSC expressed the concern that Aquila was focusing too heavily on natural gas as a resource for the generation of electricity. Wood, Mantel, Boehm. The Staff indicated that Aquila needed more base and that it had too much peaking. Wood, Mantel, Boehm.

Exhibit 38, dated in 1999, shows Aquila had 125 megawatts too much in peaking, 57 megawatts too little in intermediate, and 67 megawatts too little in base.

**CONFIDENTIAL (deleted from public version)**



Aquila's own analysis determined that building a facility with 3 CTs was not the least cost option. Boehm. After deciding to self-build, Aquila began a site selection process. The first list of preferred sites did not include any site close to the South Harper peaking facility tract. The preferred site was the Camp Branch site. Prior to 2003, the Aries site was the preferred site.

From a transmission standpoint, the Camp Branch site and the Aries site were preferred. Huslig testimony.

Mr. Caspary (of the SPP) stated that the South Harper peaking facility was not identified in 2003 or in 2004 as expected projects. The expansion plan of the Southwest Power Pool did not identify a need for a new 345 kW source near Peculiar, Missouri. Mr. Caspary also seemed to indicate that there is sufficient capacity that we could utilize without the SHPF.

After Aquila entered into a contract in October 2005 for one year to buy 200 MW from Calpine, the Aries plant has another 385 MW available, with the Aries plant sitting there in Cass County. StopAquila.org urges that there is more than enough capacity in Cass County, in Aquila's system, and in the Southwest Power Pool. There is not a need for more peaking power. There is a need for base and intermediate. Aquila has not proven need and has not proven that this is the least cost option.

## **II. APPROVAL OF THE APPLICATION WOULD BE CONTRARY TO THE LAW.**

Aquila has to comply with local zoning, but much of the following discussion is necessary because Aquila argues that it is "exempt." ("Exempt" is not defined. The word does not even appear in the statute that Aquila refers to, 64.235.)

Richard Green, Jr., stated to the shareholders, **"The biggest mistake we made was we didn't listen to and respect our neighbors."** Exhibit 132. This case is a classic example of why we should not be entertaining the notion of having the PSC override local zoning (even if we assume the PSC has such power).

Aquila applied for county zoning with Aries. When Aquila sought to expand by placing these same 3 CTs next to Aries, it applied for permission from the county in 2002, and the county agreed to allow Aquila to place these 3 CTs next to the Aries plant. (The Aries plant was already properly zoned for a power plant.) See Exhibit 81. In June 2004, Aquila sought a special use permit from the county for the Camp Branch facility. That was withdrawn by Aquila after an adverse vote by the Planning Board. On September 29, 2004, Aquila filed for rezoning from the county for the Peculiar substation. Exhibit 57.

Aquila's application for rezoning from the county for the substation was scheduled to be heard by the county on October 25, 2004. Obviously, the 2003 comprehensive plan would have controlled.

In Exhibit 41, Page 8, a document prepared by Aquila to apply for a special use permit in June 2004, Aquila states that it will secure all appropriate state permits and will be operated at all times in accordance with all state and local ordinances.

In the lease between the City of Peculiar and Aquila dated in December 2004, Aquila represents to the City that Aquila will comply in all material respects with all presently applicable zoning ordinances, to the best of its knowledge. See Exhibit 96, at Page 5.

In Exhibit 72, Aquila states in an application with Cass County that it agrees to abide by the zoning order of Cass County.

(Apparently what Aquila meant in these representations was that it will comply, until it gets a hint that maybe the local government is not going to give it everything it wants, and then it will go ahead and do what it wants while arguing that it does not have to comply with the zoning ordinances that it said it would obey. Estoppel should run against Aquila, for starting more than once down a course of complying and then changing its mind when it decides the result might not be the "slam dunk" that it wanted.)

Aquila did not apply for rezoning<sup>2</sup> or for a SUP from Cass for the SHPF. Aquila clearly indicated it would apply for zoning from the City of Peculiar. When that fell through when the City decided to not annex on October 23, 2004, Aquila decided to change its course and to construct an argument that it did not have to comply with county

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<sup>2</sup> Since a rezoning is intended for permanent changes and a SUP is intended for temporary changes, it is more appropriate to apply for rezoning.

zoning. The reason for this was simply because Aquila or its subsidiary had 3 CTs, costing the subsidiary over \$77 million, and it wanted to get the 3 CTs in operation somewhere by July 2005. The location was not important *to Aquila*. The best interests of its *customers or of others* was not important to Aquila. It was also important to Aquila to try to get a bond issue from a local government so it could use the bond money to pay *itself* for the CTs. The brash mayor indicated that he could accomplish that. He testified that he didn't care about the people affected. (Lewis testimony on cross examination.) The attorneys paid for by Aquila told the mayor that it could be done without a vote of the people. (Additionally, Aquila described this as a "Slam dunk." Exhibit 51.)

On November 14, 2004, StopAquila.org filed suit. On December 1, 2004, Cass County filed suit. A hearing was held on January 5 and 6, 2005, and the Circuit Court announced its judgment orally on January 6, 2005. All of the construction of the buildings at the SHPF was done after the Circuit Court announced its injunction.

Staff witnesses stated that the Staff did not tell Aquila to continue despite the injunction. Aquila obviously decided on its own.

Despite the attempt by Aquila to blur the legal holdings of court cases and PSC decisions, the fact is, as Judge Dandurand has himself said, the law did not change. The legal issues here relate to the power to zone. The law at all times relevant was that first class noncharter counties have zoning authority over the location of power plants. See RSMO 64.255, 64.285, In re Missouri Power & Light and Missouri Valley Realty Company v. Cupples, *infra*. As the Court of Appeals said in the present case, there is *no exemption for power plants in RSMO 64.255*. Since there is no exemption for Aquila from county zoning, and the PSC has no zoning power, it is hard to understand how we

are in front of the PSC arguing about land use issues. These issues belong in front of the local government.

The power of the PSC, and the obligations of Aquila when it applies to the PSC for a certificate to construct a power plant, is discussed in RSMO 393.170. This statute is in three sections, and the three sections have a logical progression. To get a general certificate (i.e., to put lines in in Cass County), the utility must comply with subparts 2 and 3. To get a certificate to build a power plant, the utility must comply with sections 1, 2 and 3. Section 2 is the section Aquila seeks to avoid, because section 2 mentions the requirement that the utility get the consent of the local government before its gets a certificate from the PSC.

The contention of Aquila that it is not required to comply with section 2 is illogical. Why would a utility have to comply with section 2 to get a general certificate to put in a transmission line, but not when it builds a power plant? The contention of Aquila runs contrary to the restriction found in RSMO 393.190 (and in the case law) that says that a franchise cannot be expanded by the PSC. Since a franchise cannot be expanded by the PSC, if a utility receives a franchise from a county that says it can put in transmission lines, the PSC cannot then expand on that franchise to say that the county has agreed to let the utility put in power plant (and then take it one step further and declare it never has to comply with zoning). Yet that is exactly the argument made by Aquila.

To recap, first, the utility must get the franchise from the local government; second, this franchise cannot be expanded by the PSC; and third, the utility must get a

certificate from the PSC to construct a power plant.<sup>3</sup> Therefore, the utility must get the consent of the local government. In this case, that means the consent of the county commission.

At the hearing on January 5, 2005, Warren Wood testified that the PSC did not have the authority to site power plants and does not have the authority to tell utilities where they cannot build their power plant. In a letter drafted by Warren Wood in November 2004 to Nanette Trout, on PSC letterhead, he wrote that the PSC does not have the authority to tell a utility where to not build a power plant.

Having declared that it cannot stop Aquila from picking a location to build a power plant, for some unknown reason, the PSC Staff and Mr. Wood have now done an about face and now take the position that the PSC should craft a one-time rule, applicable only to Aquila, and only in this case, that would allow Aquila to keep the facility.

If an entity declares in advance that it cannot stop a utility from choosing a particular location, that entity cannot later decide whether or not that particular location is to be permitted. **The power to decide land use obviously must rest on the power to say no. The PSC has given up the power to say no (even assuming it ever had such power).**

Mr. Wood was correct when he said the PSC does not tell utilities where to not build. In this case, that job belongs to the county.

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<sup>3</sup> RSMO 64.235, which applies to the *county planning board*, begins with the assumption that a utility has already received the franchise from the county commissioners and then took that to the PSC where it received a certificate. When 64.235 says that the planning board cannot interfere with a development approved by the county commission or by the PSC, it is based on the assumption that the requisite *authorities* (county commission approval *and* PSC approval) have already been given., and the *planning board* cannot overrule the county commission. Also note that 64.235 does not use the word *exempt*.

The law on complying with local zoning has never been in doubt. In Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.)

116, the applicant sought to put in a peaking plant. The PSC said:

**The applicant has satisfied all requirements of state and local agencies concerning the construction and operation of the plant.**

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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.**

\*\*\*

**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.)**

Earlier, in In the matter of the complaint of Missouri Valley Realty Company v. Cupples Station Light, Heat and Power Company et al., 2 Mo. P.S.C. 1, 6 (1914), the PSC stated:

Consent of the municipality is **always required** as a condition precedent to the granting of permission and approval by this Commission ... (emphasis added).

There are no decisions of the PSC saying that it can ignore or overrule the zoning of a county.

The power of the commissioners of a first class noncharter county over a utility that desires to build a peaking facility is found in RSMO 64.255 and 64.285. The zoning power given to the county commission (formerly known as the county court) is extensive. See 64.285.

The PSC does not have the authority to zone. The PSC does not have the authority to trump the county commission. The PSC cannot issue a decision that says Aquila is free from control by the county commission.

Even if we were to assume for argument that the PSC could trump the county, there would have to be proof of a truly urgent need to do so. The position of those in favor of the application is that, looking backwards, now that the plant is there, it is perhaps reasonable to put it there, and that although Aquila needs more base and intermediate, it could maybe use peaking power too. This falls far short of what would be required to override zoning, assuming the PSC did have the power to trump zoning.

### **III. APPROVING THE APPLICATION WOULD SET A TERRIBLE PRECEDENT.**



There are three aspects of the terrible precedent that would be set if the application of Aquila were granted. First, it would allow utilities to build where ever they want. Second, it would allow utilities to build without showing need for that type of generating facility. Third, it would allow utilities to build first and seek approval later.

ALLOWING UTILITIES TO BUILD WHERE EVER THEY WANT AND WITHOUT A TRUE SHOWING OF NEED FOR THAT TYPE OF GENERATION. Assuming for the sake of argument that it is possible for the PSC to override zoning, Aquila did not prove the need, now, or in 2004, to build a plant that consists of 3 CTs. The evidence showed a need to build base and intermediary. In fact, Aquila had more in the way of CTs than it needed. Exhibits 36 through 39, Exhibit 82.

The land use issues are extremely important to the citizens. Aquila did not present evidence that the plant is compatible with the surrounding area. Aquila did not present evidence that there is any reason to override county zoning. Aquila failed to present evidence that it would solve the problems of noise and pollution (there is no way to adequately resolve these problems in a residential area). Aquila failed to present evidence that it would solve the problem of having tiny trees that do not come close to obscuring the 70 foot towers. (See photos attached.) Aquila offered no solution to the dramatic drop in property values. The weak case presented by Aquila would apply to just about any location anywhere in Cass County or in Missouri. If you take the simplistic position that more electric generating power is good, so we must build a plant anywhere they want, then you could justify building power plants next to hospitals, old folks' homes, day care centers, schools, national landmarks, parks, your house and mine.

The case of Aquila comes down to the fact that the plant is already built, and Aquila does not think anyone will force it to dismantle it. This is called *CHUTZPAH*. This cannot be the basis for the type of relief sought by Aquila before the PSC.

RETROACTIVE APPROVAL. Aquila and the Staff suggest that a one time rule can be constructed. This is untrue. If the PSC adopts a rule that Aquila can get retroactive approval, other regulated entities will have a legitimate claim to expect similar treatment. Due process and equal protection rights are violated if government treats one entity differently from another entity. Soon other entities will build first and then ask for approval after the fact. This gives an enormous advantage to the utility, which can then threaten to pass the costs of dismantling on to the ratepayers. Likewise, the utility can threaten that if it is not permitted to buy cheaper ground next to residential areas, it will have to pass on the increased cost to customers. This places the decision maker in a very difficult position, deciding in actuality whether the costs of dismantling will be high and whether the costs will be passed on to ratepayers, instead of determining whether the project should be undertaken in the first instance.

Pandora's Box is opened, to the detriment of all Missourians, if the PSC permits Aquila to have a retroactive permit to place a power plant next to residential areas, and purports to override county zoning. It is vitally important that the PSC send the message to utilities throughout the state that they will not be permitted to build wherever they want, and they will not be permitted to seek retroactive approvals.

**V. RELIEF.** StopAquila.org requests that the PSC deny the application. This will hopefully result in the matter of the dismantling of the plant and the substation being addressed by the Judge. Dismantling of the plant is clearly what StopAquila.org thinks is

proper. StopAquila.org believes that the determination of damages to be awarded to people who have been damaged by Aquila is not properly resolved before the PSC but rather is properly resolved in a court of law. (There is tremendous damage now, but the full extent of damage cannot be realized for many years.) StopAquila.org does ask that the PSC assess all attorneys' fees in favor of all other parties against Aquila, flatly deny the application, and let the courts take it from here.

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 12<sup>th</sup> day of May, 2006 to the following:

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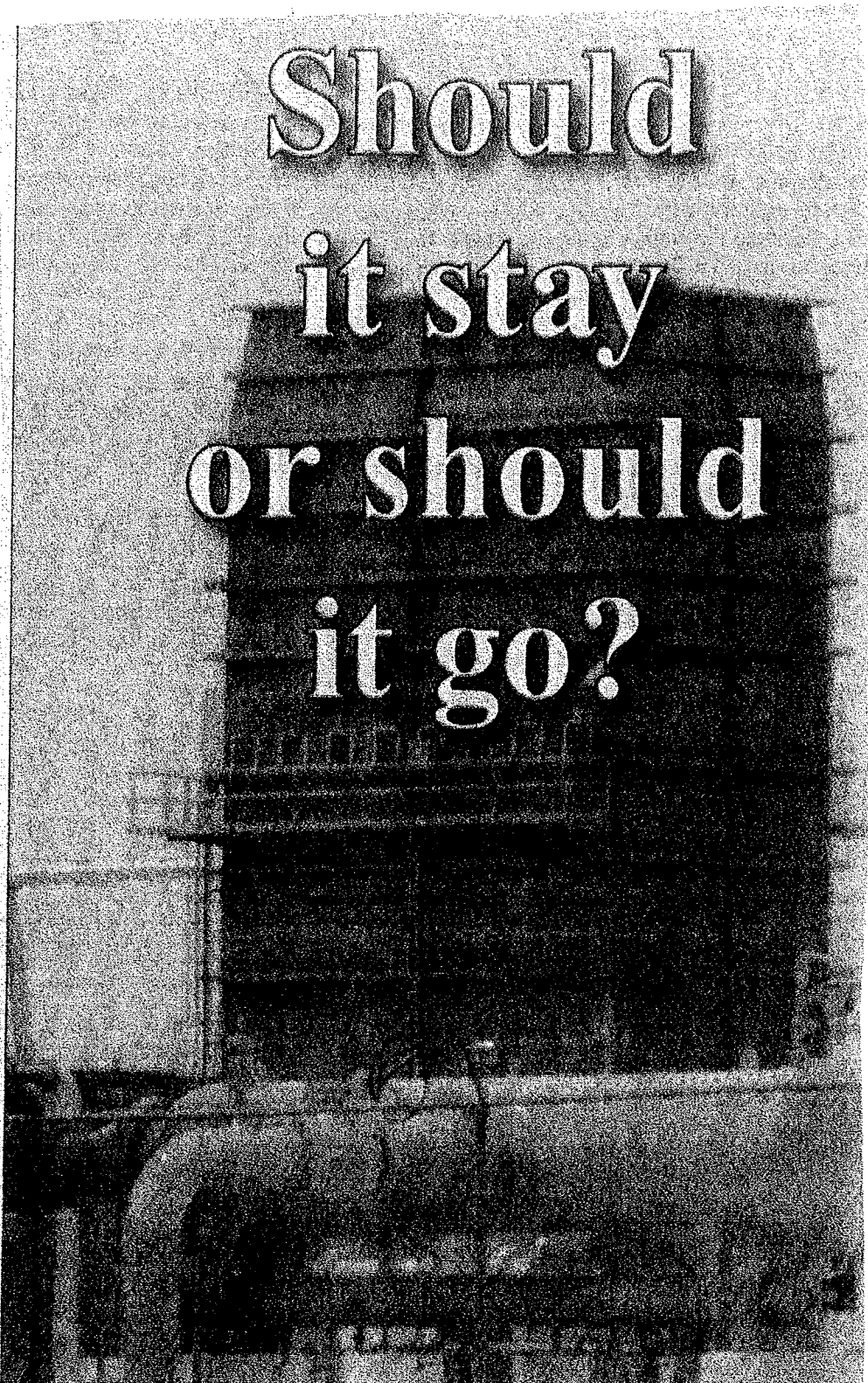
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Friday, May 5, 2006

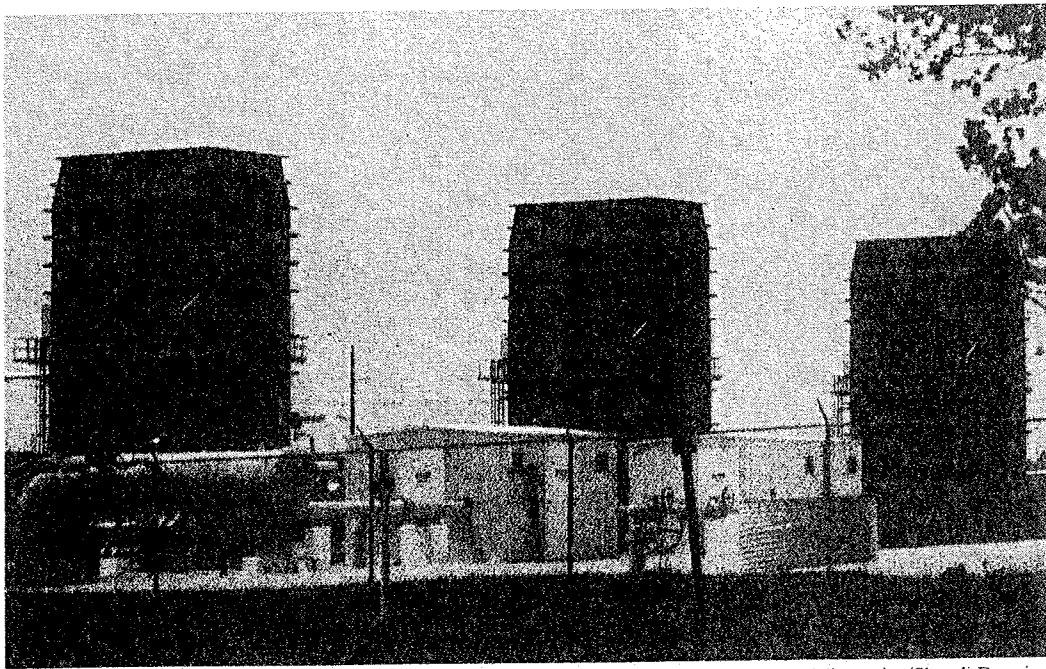


**Should  
it stay  
or should  
it go?**

DEMOCRAT MISSOURIAN

# FROM PAGE ONE

Friday, May 5, 2006



Democrat Missourian/Shandi Duggins

The South Harper Peaking Facility, located near Peculiar, includes three turbines, pictured above,