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

SUPPLEMENTAL SUGGESTIONS IN SUPPORT OF CASS COUNTY'S MOTION TO DISMISS

Comes now Cass County, Missouri (hereinafter "County"), by and through its counsel, and for its Supplemental Suggestions in Support of its Motion to Dismiss Application or, in the Alternative, to Impose Conditions on Issuance of Certificate and Motion for Oral Argument, which are filed to address certain matters raised in the Supplemental Suggestions filed by Aquila, Inc. on April 10, 2006, respectfully states as follows to the Missouri Public Service Commission (the "Commission").

INTRODUCTION

On March 20, 2006, Cass County filed its Motion to Dismiss Application or, in the Alternative, to Impose Conditions on Issuance of Certificate and Motion for Oral Argument. Aquila previously filed Suggestions in Opposition to the Motion, and the Motion was set for oral argument on April 5, 2006. Following oral argument, Aquila filed Additional Supplemental Suggestions purporting to explain its failure to return to the County Planning Board for appropriate land use regulatory authority to construct the South Harper Power Plant and the

Peculiar Substation after the determination by Judge Dandurand to extend to May 31, 2006, the date on which the South Harper Plant and Peculiar Substation must begin being dismantled.

DISCUSSION AND ARGUMENT

A. Seeking County Zoning Approval Would Not be Futile.

Aquila paints a self-serving picture intended to excuse its refusal to submit itself to the jurisdiction of Cass County for purposes of consideration of a rezoning application and/or a special use permit ("Application") for the South Harper Plant and the Peculiar Substation subsequent to the finality of the Western District Court of Appeals' Decision in Cass County v. Aquila, 180 S.W.3d 24 (Mo.App. 2005) and subsequent to the trial court's determination on January 27, 2006 (reduced to a written order on February 15, 2006) to extend to May 31, 2006, the deadline for Aquila to commence dismantling the South Harper Plant and Peculiar Substation. Aquila claims it would be futile to submit an Application to the County because the County has already predetermined to deny any Application. To support this unwarranted conclusion, Aquila refers to three categories of materials: (i) unsubstantiated hearsay statements in newspaper articles which predate Aquila's admitted January 20, 2006 attempt to file an Application with the County; (ii) opinions offered by Judge Dandurand during the January 27, 2006 oral argument on Aquila's Motion to Extend the Stay of the trial court's January 11, 2005 Judgment as to delay the obligation to dismantle of the Plant and Substation; (iii) the County's arguments opposing the request to extend the Stay of the January 11, 2005 Judgment. None of these materials bear any relationship to the legal duties and obligations of the County to fairly and objectively evaluate an Application. None of these materials reflect an admission or statement by the County with respect to how the County would determine an Application. None of these materials takes into consideration that any determination of an Application by the

County would be subject to judicial review, allowing Aquila to test the validity of its claims that the County has predetermined its Application. Rather, Aquila's Supplemental Suggestions purposefully blur the County's efforts to protect its land use authority over developments within the County, improperly transforming same into an "anti-power plant" mentality. There is a material difference between the County's demand that Aquila follow the law, and the view falsely attributed by Aquila to the County that land use applications for the South Harper Plant and the Peculiar Substation will never be approved. Aquila's accusation that the County can not be fair in evaluating an Application is as inappropriate and unsupported as would be a similar accusation from the County suggesting this Commission is incapable of evaluating the matter now before it in compliance with the standards by which the Commission is bound merely because the Commission previously issued an Order that Aquila already had all the authority it needed to construct the South Harper Plant and the Peculiar Substation. Such an accusation would undoubtedly be as offensive to this Commission as Aquila's accusation is to the County.

First, many of the materials relied upon by Aquila, particularly the unsubstantiated hearsay statements drawn from newspaper articles, predate January 20, 2006. This is important and telling. On January 20, 2006, Aquila attempted to submit an Application to the County. Because the trial court's January 11, 2005 Judgment (which ordered immediate dismantling of the plant and substation) was, on that date, final, and unmodified as to the time for compliance, Aquila knew any attempt to submit an Application would be rejected. The County had so advised Aquila. Despite having this knowledge, Aquila nonetheless made an attempt to submit an Application on January 20, 2006. Either Aquila's attempt to submit its Application was disingenuous, and was designed to provide fodder for manufacture of the very argument Aquila now makes, or Aquila's attempt was a genuine effort to submit itself to the County's land use

jurisdiction (as Aquila claims), a compelling indication that Aquila believed on January 20, 2006 that the County would provide it the full and fair review of its Application to which Aquila is entitled by law. Aquila can't have it both ways. Thus, any materials relied upon by Aquila which predate its January 20, 2006 attempt to submit an Application to the County should be ignored.

Second, Aquila points to the County's objection to Aquila's attempt to extend the stay of the January 11, 2005 Judgment as dispositive of the County's alleged intended treatment of any Application Aquila might file. Such an argument is patently preposterous. The County has steadfastly insisted that Aquila comply with the law—both initially when Aquila illegally began construction of the Plant and Substation without County approval, and subsequently when Aquila defied and ignored a final Judgment directing immediate dismantling of the judicially determined illegal Plant and Substation. The County's insistence on compliance with the law can not be fairly equated with the County's intended disposition of an Application. There is simply no correlation between these independent functions. In fact, the County's insistence that Aquila follow the law is itself evidence of the County's commitment to do the same. The County has no lawful right to predispose Aquila's Application merely because Aquila has, to this point, arrogantly refused to conduct itself in a law abiding manner. The County has committed to Aquila, to the trial court, and to this Commission that it has every intention of doing that which it has demanded Aquila to do—follow the law. Moreover, if the County were to negatively determine Aquila's Application, Aquila would have every opportunity to attempt to prove its wild accusations of unfairness by seeking review of the County's disposition with the trial court, and ultimately the Court of Appeals. The County has no right, nor intent, to evaluate an Application based on factors it is not authorized to consider.

Third, Aquila relies heavily on off-the-cuff comments expressed by Judge Dandurand during the January 27, 2006 oral argument on Aquila's Motion to Extend the Stay of Judgment. This oral argument was not an evidentiary hearing. With due respect to Judge Dandurand, there was no record made from which he could conclude anything, positively or negatively, with respect to the County's future treatment of an Application. Judge Dandurand's comments are not the comments of the County, were not evidentiary findings or conclusion, and are not binding on the County. In any case, Aquila has conveniently failed to cite to other portions of the transcript from the oral argument where the County made it clear, and the Court agreed, that the County's view with respect to an Application had not been predetermined. The transcript from the oral argument on January 27, 2006 provides as follows:

(Transcript pg. 38 line 24 through pg. 39 line 25)

"Ms. Martin: I do want to point one thing out, Your Honor. You know, it's the County's position it's not predetermined what the County would or would not do with an application, but consider the County's situation. We have a judgment. That judgment has not been modified. For Aquila to present an SUP application at our doorstep on Friday –

The Court: It's inconsistent. Their argument to the County is inconsistent. The County's position is exactly what I would expect it to be.

Ms. Martin: Right.

The Court: And I don't have any problem or I am not casting any aspersions toward the County. I mean, if I were the County, I would take the same position.

Ms. Martin: Well, I just don't want this Court to be of the view that the County is predisposed one way or the other what would or would not occur on a permit application. There is, obviously, a whole lot of factors that we are obligated by law to look at with respect to an application, but the fundamental issue was [sic] whether an application can even be accepted under circumstances where the law in effect at that time is that this plant and this substation are to be dismantled."

(Transcript pg. 42 line 12 through pg. 43 line 25)

"Ms. Martin: And I guess, the part of that is it's a little tough to sit here and have the County be attacked because it has rejected permits that are inconsistent with a judgment that is in force and effect, and it is a little bit concerning to me to be in a position to hear any suggestion by Aquila or otherwise that somehow or another the County has made up its mind.

The County has concerns about a plant, a substation, about any development being built someplace where the process has not been followed, and as I point out in our Suggestions, Your Honor, the most difficult situation that what Aquila is asking of you creates for the County is that after the fact we are being asked to evaluate, whether it is by way of intervention in the PSC or by way of a process here in the county, something that has already occurred.

The Court: Well, I don't think aspersions have been cast toward the County. I mean, I'm not getting that, Ms. Martin. I don't think they are doing that at all. I mean, I don't think the County can take any other position, and I don't think they do either. How can the County say, "Oh well, what the heck. Go ahead," you know.

Ms. Martin: To be honest with you, that's exactly how I feel.

The Court: And they are not claiming –

Ms. Martin: Quite frankly, Your Honor, we have been accused of engaging in conduct that's disappointing to Aquila. We have been accused of, in a Reply Brief that was filed Wednesday, "it is clear the County intends [sic] to undercut us at every step of the way", and the reality is we are doing our job. There are laws to follow, and we have got an obligation to see –

The Court: That's right. You do.

Ms. Martin: -- that they are followed.

The Court: That's right."

It appears, based on Aquila's current tactics, that Aquila is guilty of doing exactly that about which the County expressed concern to the Trial Court—"confusing" the County's efforts to insure that its laws are followed with predetermination of an Application. Though during oral

argument on January 27, 2006, it is clear the trial court did not believe that Aquila was employing such a tactic, it is certain the trial court would feel differently were it to view Aquila's current accusations, and it is equally certain the trial court would quickly dispel any notion that the County has, by engaging in efforts to insure compliance with its law, deprived Aquila of an ability to be fairly heard should it file an Application.

In short, Aquila's argument ignores facts for hyperbole. Aquila conveniently ignores the County's past practices with respect to the approval of power plants. It is uncontested that when Aquila sought to construct the Aries Plant in unincorporated Cass County in 1999, it worked in partnership with the County and local residents, and had the full support of the County for the plant. Of course, the difference between then and now is that Aquila followed the law when it sought to construct the Aries plant. Aquila sought and secured appropriate County land use approval for the plant's location BEFORE it was constructed. Further, in 2002, Aquila approached the County to secure the County's advance consent to an anticipated expansion of the Aries Plant. Aquila had no difficulty securing the County's written acknowledgment that no additional platting or subdividing authority would be required from the County before Aquila could expand the Aries Plant to add additional turbines.[1] There can be no better evidence than the County's approval of zoning for the Aries plant, and the County's willingness to allow for that plant's expansion, of the fact that the County is not "anti-Aquila" or "anti-power plant." The County has the ability to separate two equally important but independent obligations—the obligation to see that its laws are followed and the obligation to fairly evaluate proposed developments.

[1] These are the same turbines that were subsequently incorporated into the South Harper Plant. **[See Attachment A, letter dated February 26, 2002 from Blackwell Sanders Peper Martin (counsel for Aquila) to Darrell Wilson, Cass County Senior Zoning Officer]**

CONCLUSION

Cass County holds fast to its argument that construction of a generating plant must be approved in advance after a hearing. § 393.170. Aquila's application in this case seeks approval of a plant after construction. It is untimely and should be dismissed. If the Commission elects to proceed nonetheless, there should be no confusion. The Court of Appeals' Opinion clearly requires, **before a power plant is constructed**, a full and complete opportunity for applicable land use regulatory matters, including zoning, to be discussed, debated and evaluated in a public forum. There can be no other reading of the Court of Appeals' Opinion. Any other reading would effectively result in a utility being allowed to build a power plant where ever it wants, an outcome deemed unacceptable in the Court of Appeals' Opinion. Thus, given the confines of the law, this Commission has but two options. Either it must serve, in each case where an application to construct a power plant is filed, as the functional equivalent of a local zoning authority, making a determination with respect to the propriety of a plant's proposed location independent of a determination with respect to the plant's need, or it must, consistent with its authority under R.S.Mo. § 393.170.3, impose a condition on the issuance of a certificate of need for a plant that the utility secure local consent for the plant's location. Cass County strongly encourages the Commission to either dismiss Aquila's Applications for the reasons stated in its Motion to Dismiss, or in the alternative, to condition the issuance of any certificate of need on Aquila's ability to secure approval from Cass County for the location of the South Harper Plant and Peculiar Substation. Just as this Commission's procedures will be subject to judicial review, so will the County's. Aquila's argument that its due process rights will be deprived if it is required to secure authority from the County for the location of the South Harper Plant and the Peculiar Substation is without merit.

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 sent via e-mail on this 17th day of April, 2006 to:

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