

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

In The Matter of the Application of Aquila,)
Inc. for Specific Confirmation or, in the)
Alternative, Issuance of a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own, Operate,)
Control, Manage, and Maintain a)
Combustion Turbine Electric Generating)
Station and Associated Electric)
Transmission Substations in)
Unincorporated Areas of Cass County,)
Missouri Near the Town of Peculiar.)

Case No. EA-2005-0248

**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. The Missouri Public Service Commission's ("Commission") intervention Rule, 4 CSR 240-2.075, is worded broadly and reflects a general policy of liberal intervention. The Missouri Supreme Court has suggested that the interest necessary to authorize intervention is the same as that required to become a complainant under §386.390 RSMo. See, *State ex rel. Consumers Public Service Company v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46 (Mo. 1944). This can include local public interests, customers and enumerated associations. This guideline is not, however, infinitely flexible. It must be applied with due regard to other important legal principles.

2. On February 2, 2005, the Residents caused to be filed an Application to Intervene in this proceeding. 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 the language of §386.390 RSMo., that contemplates involvement 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. den.*, 366 U.S. 924 (1961). STOPAQUILA.ORG is merely an unincorporated group of residents claiming to live in and near Peculiar, Missouri. Consequently, they have no statutory 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 as is required in the circumstances.

5. 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.

6. 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.

7. Also, the Residents’ intervention would not serve the public interest. The Residents refer to the pending litigation before the Cass County Circuit Court seeking to enjoin the construction of the South Harper Peaking Facility (“South Harper”). (App. to Int., ¶5.) 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. (*Id.*) Among other things, the Residents allege

that Aquila has not acquired the approval of Cass County to construct and operate South Harper.

8. A number 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 already has 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 construction of needed plant additions is not in the public interest. Other of the allegations are issues currently the subject of an appeal before the Western District Court of Appeals in its Case No. WD64985.

9. 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 in the form of obfuscation and/or delay. 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) nor has it been requested by Aquila so to do. 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) or whether the operation of South Harper will cause nearby residents to “suffer from air pollution, noise pollution, electric overhead lines, loss of property value and other damage.” (App. to Int., ¶6). The Commission is not a court of law and it has no statutory authority to encroach on those areas reserved by law to the Air Pollution Control Program (the “APCP”) of the Missouri Department of Natural Resources that has permitted the construction and operation of South Harper¹, to examine or make findings as to any alleged adverse public health considerations or to determine or award damages to person or property for any claims asserted by the Residents.²

10. 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.

11. 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 admit to having 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 or plan to make in their various lawsuits would be wasteful and duplicative. The Resident’s intervention would cause undue delay and bring a needed power production

¹ A copy of APCP New Source Review Permit No. 122004-017 issued under the authority of the Federal Clean Air Act and Chapter 643 RSMo was filed as Appendix 7 to Aquila’s Application.

² It is well-established that the Commission, an administrative body having only those powers delegated to it by the General Assembly, is not a court and has no power to exercise a judicial function or to require the payment of a pecuniary reparation or refund. *State ex rel. Laundry v. Public Service Commission*, 34 S.W.2d 37, 43 (Mo. 1931); *Straube et. al., v. Bowling Green Gas Company*, 227 S.W.2d 666, 668 (Mo. 1950).

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 8th day of February 2005 to the following:

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