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

SUPPLEMENTAL SUGGESTIONS OF AQUILA, INC.
IN OPPOSITION TO MOTIONS TO DISMISS

COMES NOW Applicant, Aquila, Inc. (hereinafter, "Aquila" or "Applicant") and submits the following Supplemental Suggestions in Opposition to the separate Motions to Dismiss filed by intervenors Cass County, Missouri and STOPAQUILA.ORG.

1. On February 3, 2005 and February 23, 2005, intervenors Cass County, Missouri ("Cass County") and STOPAQUILA.ORG filed their respective Motions to Dismiss. On February 9, 2005, Aquila filed its Provisional Response to Cass County's Motion to Dismiss because Cass County had not yet been authorized to intervene as a proper party to the case. Aquila has not yet filed its response to the Motion to Dismiss that recently was filed by STOPAQUILA.ORG.

The Application Does Not Conflict with the Final Judgment
of the Honorable Joseph P. Dandurand.

2. Cass County and STOPAQUILA.ORG have suggested that there are some inconsistencies or direct conflict between the relief requested by Aquila in the Application and the terms of the Final Judgment of Circuit Judge Joseph P. Dandurand

dated January 11, 2005 (the "Judgment").[1] Such suggestion is not correct. To confirm this, the Commission needs look no further than the express terms of the Judgment. At page 3 thereof, the Court included the following:

> THE COURT FINDS that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not. (emphasis added)

This language expressly provides that Aquila may take steps to apply to the Commission to obtain "specific authorization" in its certificate of public convenience and necessity or in an order, as expressly permitted by Section 64.235 RSMo, as a means of addressing the concerns of the Circuit Court of Cass County. The phrase "must obtain" used by Judge Dandurand clearly allows Aquila to request relief from the Commission consistent with the powers delegated to the Commission by the Missouri General Assembly. *See*, ¶¶ 4, 5 and 6, *infra*.

3. It is important also to note that the phrase "pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri" as used in the Judgment incorporates by reference that portion of §64.235 RSMo that provides that specific authorization or permission may be obtained "by a certificate of public convenience and necessity, or order issued by the Public Service Commission." (emphasis added) The Judgment therefore authorized Aquila to obtain specific authorization or permission by virtue of an order of interpretation and clarification by this Commission or, alternatively, an overlapping certificate of convenience and necessity from the Commission. This is

[1] Consolidated Case Nos. CV104-1380CC and CV104-1443CC, Circuit Court of Cass County.

precisely what Aquila has requested by filing its Application. Aquila has filed an Application for a grant of specific authorization to construct power plants in its service area, in the form of either an order of clarification and confirmation under Aquila's existing certificates of convenience and necessity or a new overlapping, site-specific certificate of convenience and necessity.

4. Finally, it bears repeating that Aquila is not enjoined by the terms of the Judgment from filing the Application with the Commission. Similarly, the Commission has not been enjoined or bound by the Judgment from holding proceedings or ruling on the requests for relief contained in the Application. Indeed, the Judgment expressly "removes the Missouri Public Service Commission as a party to these proceedings." *See* Judgment, p. 2, ¶3.

5. Moreover, it is well-established law in Missouri that:

> the power rests in the Public Service Commission, in the first instance, to decide all matters placed with the Commission's jurisdiction . . . ; that no court can enjoin the Commission in the performance of its duties, nor alter its decisions except in review in the manner provided in the Act; and that any decision otherwise rendered by a court would not be binding on the Commission. (Emphasis in the original)

State ex rel. and to Use of Public Service Commission v. Blair, 146 S.W.2d 865, 870 (Mo. 1941). The Missouri Supreme Court has determined that this principle is applicable to the Commission's determination of a matter of fact in support of its jurisdiction. *See State ex rel. and to Use of Public Service Commission v. Padburg*, 145 S.W.2d 150, 151 (Mo. 1941). The question of whether the term "electric utility facilities" as used in the Commission's order in Case No. 11,892 (in conjunction with other relevant certificate orders) was intended to and does include the types of property encompassed by the term "electric plant" as defined in §386.020(4) RSMo, is a question

of fact, practice and interpretation going to the very core of the Commission's expertise and jurisdiction. Thus, this proceeding was not and could not be enjoined by an action of a circuit court.

There is No Basis for Dismissing Aquila's Request for a Clarification Order.

6. The Commission's authority to interpret the meaning and application of §393.170 RSMo cannot be seriously questioned. The Missouri Court of Appeals acknowledged the importance of the Commission's views in the key case of *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960). It stated the Commission's interpretation of that statute "is entitled to great weight." *Id*. at 183. It is well-recognized that an agency's construction of its enabling legislation is entitled to judicial deference. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 22 (Mo. banc 1975); *Foremost-McKesson, Inc., et al., v. Davis et al.*, 488 S.W.2d 193, 197; *State ex rel. Curators v. Neill*, 397 S.W.2d 666, 670 (Mo. 1966). The courts are not permitted to substitute their judgment for the Commission's if the Commission decision is based on substantial and competent evidence on the record as a whole. *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W.2d 283, 284 (Mo. App. 1989).

7. It is equally apparent, that the Commission has exclusive jurisdiction to make decisions within the specialized expertise reserved to it by law. In this regard, the Missouri Supreme Court and other appellate courts have recognized that the Commission has primary jurisdiction to interpret its enabling legislation and its prior rules, decisions and orders. *State ex rel. MCI Metro Access Transmission Services v. City of St. Louis*, 941 S.W.2d 634, 644 (Mo. App. 1997); *Killian v. J&J Installers, Inc.*,

802 S.W.2d 158, 160 (Mo. banc 1991); *Union Electric Company v. City of Crestwood*, 499 S.W.2d 480, 482-84 (Mo. 1973); *Union Electric Company v. City of Crestwood*, 562 S.W.2d 344, 346 (Mo. banc 1978); *State ex rel. Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044 (Mo. 1943).[2] There is no question of the Commission's power to examine and interpret the Public Service Commission Act and its own prior orders (including its various orders in Case Nos. 3,171, 9,470 and 11,892) and to grant Aquila the specific authorization it has requested in the Application. This conclusion is amply supported by past practice.

8. The Commission often has examined, interpreted and clarified its prior orders, policies and practices, including in the context of interpreting and examining the terms of certificates of convenience and necessity. In its Application, Aquila has directed the Commission's attention to three (3) illustrative decisions.

9. In 1973, in *Re Missouri Power & Light Company*, 18 Mo.P.S.C. (N.S.) 116, Commissioner Clark concurred in the result of the majority opinion to give the utility a site-specific certificate of convenience and necessity to construct, install and operate a combustion turbine within its certificated service area in Jefferson City, Cole County, Missouri. Commissioner Clark was firm in his view that Missouri Power & Light Company did not need any additional authority from the Commission. He could not have ventured this view without examining and taking into account the terms of the Commission's prior orders and decisions. *See*, Application,¶¶17 and 19.

[2] "It is the exclusive jurisdiction of the public service commission, in the first instance, to decide all matters placed within the commission's jurisdiction by the Public Service Commission Act." *Id*. at 1046.

10. Aquila also directed the Commission's attention to Case No. EA-77-38[3] wherein the Commission granted The Empire District Electric Company a site-specific certificate of convenience and necessity associated with the construction and operation of the LaRussell Energy Center located in Jasper County, Missouri. In doing so, the Commission expressed some reservations about the need for doing so in light of its prior order in Case No. 9,420. Again, the Commission was looking to its prior decision in 1937 to decide what it should do in 1977. *See*, Application, ¶ 20.

11. Not long thereafter in 1980 in Case No. EA-79-119[4], the Commission dismissed an application of Union Electric Company for a certificate of convenience to install two (2) combustion turbine generating units at locations within its existing certificated service area. The Commission could not have done so without being cognizant of, interpreting and applying the authority it had granted Union Electric Company in its prior orders. *See*, Application, ¶ 18.

12. Further research has led to additional decisional guidance. In its August 31, 2000, Report and Order in Case No. WR-2000-281[5] in the context of a rate case, the Commission construed the language and effect of a certificate of convenience and necessity issued to Missouri-American Water Company nearly three years earlier in Case No. WA-97-46.[6]

13. More recently in Case No. GM-2001-585,[7] the Commission looked to the language of its prior orders in Case Nos. GA-89-126, GA-90-280 and GM-94-252 to

[3] Reported at 21 Mo.P.S.C. (N.S.) at 352.
[4] Reported at 24 Mo.P.S.C. (N.S.) at 725.
[5] *Re Missouri-American Water Company*, 9 Mo.P.S.C.3d 254.
[6] *Id.* at 264
[7] *Re Gateway Pipeline Company*, 10 Mo.P.S.C.3d at 520.

interpret and apply an operational restriction it imposed on Missouri Pipeline Company ("MPC") when it first granted MPC its certificate of convenience and necessity. This occurred in the context of a subsequent sale of stock. 10 Mo.P.S.C.3d at 535-536.[8] In that case, the Commission looked to the terms of orders issued in 1989 and 1994 to interpret the purpose of the connection restriction language to determine what it should do in 2001.

14. These cases illustrate that the Commission routinely examines and interprets its prior certificate orders in dealing with current or changed circumstances as presented in entirely different proceedings. Indeed, were the Commission not able to do so, its prior orders and decisions would have no meaning, purpose or effect. Instead, public utility regulation would become needlessly complex and unmanageable because each case filed would necessarily require voluminous filings with background and supporting information, sometimes spanning decades.

There is No Basis For Dismissing Aquila's Application For an Overlapping, Site-Specific Certificate of Convenience and Necessity.

15. As noted in its Application, the Commission has previously granted authority similar to what Aquila has requested in *Re Missouri Power & Light Company*, 18 Mo.P.S.C. (N.S.) 116 (1993) and *Re The Empire District Electric Company*, 21 Mo.P.S.C. (N.S.) 351 (1977). Aquila submits that the Commission has the discretion to grant the relief requested under the special circumstances set forth in the Application.

16. Intervenors Cass County and STOPAQUILA.ORG have asserted that Aquila's 1917 order from the Cass County Court (now Commission)[9] is insufficient local

[8] Report and Order at pp. 28-29
[9] Appendix 6 to the Application.

authority to support the Application. This argument is not supported by any reasonable reading of the applicable law. The relevant statute as it relates to the consent of counties can be found in §229.100 RSMo which states the following:

> No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission. (emphasis added)

It is clear that Aquila already possesses all the authority Cass County can grant as it relates to Aquila's Cass County franchise. By the express terms of the statute, local franchising authority with respect to counties only applies to permission to use "the public roads or highways." That is why the statute requires that the utility comply with the rules and regulations prescribed by the "county highway engineer." Indeed, the Missouri Court of Appeals has concluded that franchises granted to utility companies in Missouri are "no more than local permission to use the public roads and rights-of-way in a manner not available to or exercised by the ordinary citizen." *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W.2d 283, 285 (Mo. App. 1989).[10] Consequently, local franchising authority has nothing whatsoever to do with the use of private property such as the tracts of land upon which the South Harper Facility and the Peculiar Substation are located. Finally, it bears repeating that the 1917 order of the Cass County Commission was sufficient local authority to support the

[10] Citing *State ex inf. Chaney v. West Missouri Power Company*, 281 S.W.2d 709 (Mo 1926).

issuance of the certificate of convenience granted to Missouri Public Service Corporation in 1937 in Case No. 9,470 pursuant to which Aquila operates to this day.

17. Additionally, intervenors Cass County and STOPAQULA.ORG argue that Aquila's Application for a certificate of convenience and necessity is deficient because Aquila has not filed proof of compliance with Cass County's local planning and zoning code. This is an example of circular reasoning: that Aquila cannot file an Application with the Commission that would exempt it from Cass County zoning regulations under §64.235 RSMo because it has failed to comply with such zoning regulations in the first place. Clearly, Judge Dandurand stated that Aquila "must obtain" a "specific authorization" pursuant to the provisions of §64.235 RSMo. It is nonsensical to think that the Judge would refer Aquila to a specific statute that STOPAQUILA.ORG now claims is not applicable to Aquila. The Circuit Court of Cass County has given Aquila clear direction on the steps that can be taken to build the South Harper Facility and the Peculiar Substation, and Aquila has taken the appropriate actions consistent with the express language of the Judgment.

18. At the time of the on-the-record presentation to the Commission on February 25, 2005, counsel for STOPAQUILA.ORG argued that granting Aquila's Application would make no difference and would be a futile enterprise on the part of the Commission because the legal effect of an order of the Commission would be for the Court of Appeals to sort out. Aquila believes this argument runs contrary to the statutory framework of utility regulation in the State of Missouri and the judicial decisions and Commission orders that flow therefrom.

WHEREFORE, for the reasons aforesaid, Aquila requests that the Commission deny the Motions to Dismiss filed by intervenors Cass County, Missouri and STOPAQUILA.ORG.

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, hand delivery or electronically, on this 2nd day of March 2005 to the following:

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