

# NEWMAN, COMLEY & RUTH

PROFESSIONAL CORPORATION  
ATTORNEYS AND COUNSELORS AT LAW  
MONROE BLUFF EXECUTIVE CENTER  
601 MONROE STREET, SUITE 301  
P.O. BOX 537  
JEFFERSON CITY, MISSOURI 65102-0537  
www.ncrpc.com

TELEPHONE: (573) 634-2266  
FACSIMILE: (573) 636-3306

ROBERT K. ANGSTEAD  
ROBERT J. BRUNDAGE  
MARK W. COMLEY  
CATHLEEN A. MARTIN  
STEPHEN G. NEWMAN  
JOHN A. RUTH

March 21, 2005

**FILED**<sup>4</sup>

MAR 21 2005

Missouri Public  
Service Commission

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: Case No. EA-2005-0248

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of Cass County's Proposed Findings of Fact and Conclusions of Law along with Intervener Cass County, Missouri's Brief in Support of its Proposed Findings of Fact and Conclusions of Law.


Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
Mark W. Comley  
comleym@ncrpc.com

MWC:ab

Enclosure

cc: Office of Public Counsel  
General Counsel's Office  
Paul A. Boudreau  
Gerard Eftink  
Debra L. Moore

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

**FILED<sup>4</sup>**

MAR 21 2005

Missouri Public  
Service Commission

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

**CASS COUNTY'S PROPOSED**  
**FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>**

**Summary**

In this order, the Commission finds that Aquila, Inc. (Aquila) is not entitled to: 1) an order of this Commission confirming that its existing certificates specifically authorize it to construct a power generating facility in Cass County; or 2) a site-specific certificate of convenience and necessity for the same purposes.

**FINDINGS OF FACT**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position, or argument of any party

---

<sup>1</sup> Cass County's has drafted its Proposed Findings of Fact and Conclusions of Law using a presumption that the Commission will take its Motion to Dismiss "with the case." However, by so presuming, Cass County does not waive, and specifically reserves, all its rights and arguments in its Motion to Dismiss.

does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

### **PROCEDURAL HISTORY**

On January 28, 2005, Aquila applied for a certificate of convenience and necessity to provide electrical service so that it could build a combustion turbine electric generating station and associated electric transmission substations (referred to for brevity as “the South Harper Facility and Peculiar Substation”) in an area of unincorporated Cass County. Timely applications to intervene were filed by the County of Cass and STOPAQUILA.ORG, an unincorporated association of residents living near the site where Aquila proposes to construct the South Harper Facility. Both were allowed to intervene on February 10, 2005. On February 25, 2005, the Commission conducted an on the record presentation where the parties presented their respective positions on the issues and responded to questions from the Commission. On March 3, 2005, the Commission adopted a procedural schedule leading to a brief evidentiary hearing and oral argument on March 28, 2005.

On March 15, 2005, the Commission conducted a local public hearing at the Cass County Justice Center during which the Commission heard comments from supporters and opponents of the relief Aquila is seeking in its application.

The evidentiary hearing began on March 28 and concluded on March 29, 2005.

### **THE JOINT STIPULATION OF FACTS**

On March 10, 2005, Aquila, Staff and interveners filed an extensive stipulation of facts and without repeating them herein, the Commission adopts as its findings each of the eighty two facts agreed to by the parties including all abbreviations that have been used therein. Additional

evidence was adduced at hearing and where appropriate in this order, we will note those findings.

### **OVERVIEW**

Aquila is a Missouri public utility that provides electrical, natural gas and industrial steam utility service through its two operating divisions known as Aquila Networks-MPS and Aquila Networks-L&P. In connection with its service obligations Aquila has been party of a power purchase agreement (PPA) for 500 Megawatts in the summer months and 200 Megawatts in the winter. Because this agreement is scheduled to expire on May 31, 2005, Aquila began construction of the South Harper Facility as a replacement for the contract power that would no longer be available. As explained in the Joint Stipulation, Aquila's activity at the South Harper site drew the attention of neighboring residents and also officials of Cass County. Lawsuits ensued and on January 11, 2005, the Circuit Court of Cass County entered an injunction against Aquila permanently enjoining the Company from constructing and operating the South Harper Facility, and from constructing and operating the Peculiar Substation. The circuit court also ordered the Company to remove at its own expense all of the improvements or structures that were inconsistent with Cass County's zoning classification for the site. Aquila stayed the injunction by filing a bond in an amount specified by the trial court. The matter is now on appeal to the Missouri Court of Appeals, Western District.

Aquila has filed the present application because of the litigation just described.

### **DISCUSSION**

We begin our discussion by quoting the following findings of the circuit court which are critical to our decision here. From page 3 of the Final Judgment:

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 supplied]

**A. Confirmatory or Clarification Order**

The trial court's review of Aquila's pertinent certificates and its conclusion that Aquila lacks a specific authorization therein to construct a power plant in Cass County, is, in our estimation, an insurmountable barrier to Aquila's first requested form of relief. We are mindful that the Commission is a creation of state law and has no power or authority except that which has been conferred by statute. The Commission has not been granted authority to render judgments or declarations of law or equity. Such powers are held by the judicial branch of government. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 - 76 (Mo.banc 1982). If we were to undertake the examination of Aquila's certificates and reach a contrary conclusion to that of the court, it would be a meaningless exercise and of no value to Aquila. The Commission cannot overturn or vacate what the circuit court of Cass County has already ruled. The Commission has no authority to reverse or vacate the judgments and determinations of circuit courts. For this reason, there is adequate justification for the Commission to conclude its analysis of Aquila's request for a confirmatory or clarification order.

Our conclusions above notwithstanding, we have nonetheless examined Aquila's certificates that are highlighted in the evidence. Aquila has relied on the provisions of four orders of this Commission for the proposition that it has authority to construct the South Harper Facility and associated substations. They are a December 21, 1921 Order from Case No. 3171; a March, 1922 Order from the same case; a 1938 Order in Case No. 9470; and a 1950 Order in Case No. 11,892. Based upon our review of those orders and the certificates they represent, we

conclude that those orders are clear and unambiguous and cannot be stretched to encompass authority for Aquila to construct and operate a power generation plant in unincorporated Cass County. To the extent our prior decisions on the authority granted to utilities under “area certificates” would suggest a different result, we reject them.

Aquila’s request for an order of this Commission confirming that its existing certificates specifically authorize it to construct a power generating facility in Cass County is denied.

**B. Site Specific Certificate**

As an alternative to the confirmatory or clarification order, Aquila has asked the Commission for a certificate of convenience and necessity to construct, own, operate and manage the South Harper Facility and the Peculiar Substation. This is generally referred to as a site specific certificate.

The judgment of the Cass County Circuit Court again is our first point of reference. The court found and determined that Aquila’s 1917 Franchise with Cass County does not give Aquila the specific authority to build a power plant within Aquila’s certificated area or service territory in that County. In order for Aquila to exercise any privileges, power or authority that our site specific certificate for the South Harper Facility and Peculiar Substation may confer, Aquila must first acquire the required local franchises or consents. See Section 393.170.1 and .2, RSMo 2000. The Commission’s rules on the filing of applications of this genre make this clear. Our rule at 4 CSR 240-3.105(1)(D)(1) applies to Aquila’s application, and provides that

[w]hen consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired.

This rule is well grounded in Missouri law.

The courts have recognized that the corporate charter and the local franchise provide the **fundamental bases** for a public utility's operation and that the certificate of the Commission cannot enlarge the authority thereby conferred. In *State ex rel. Harline v. Public Service Comm.*, Mo.App., 343 S.W.2d 177, 181(3), the court stated: 'The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent. *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607. [emphasis added]

*State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton* 379 S.W.2d 593, 599 (Mo. banc 1964). Municipal consent refers as well to county consent or franchise. *Id.* at 600.

Aquila cannot comply with the filing requirement set out in 4 CSR 240-3.105(1)(D)(1) because it has not acquired Cass County's consent for construction of a power plant. Section 393.170 contemplates that the municipal or county consents required for a utility to do business shall be obtained before it applies for certificate of service authority. Aquila has reversed this sequence. It has filed this application before all necessary local consents have been obtained. As a consequence, Aquila's alternative request for site specific authority to construct the South Harper Plant and associated electric substations is denied.

#### CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Aquila is a public utility, and an electrical, gas and heating corporation (or company), as those terms are defined in Section 386.020(42), (14), (2) and (18), RSMo 2000. As such, Aquila is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Section 393.170, RSMo 2000, gives the Commission the authority to approve requests for permission to construct electric plant and to condition exercise of any rights or privileges granted by local franchise upon proper Commission certification.

Because Aquila's application seeks relief that 1) asks the Commission to render a decision which would conflict with an identical ruling of the Circuit Court of Cass County, and otherwise is not supported by the evidence; and 2) does not conform to the requirements of Section 393.170 and the rules of this Commission, specifically, 4 CSR 240-3.105(1)(D)(1), the application is denied in its entirety.

**IT IS THEREFORE ORDERED:**

1. That Aquila's application in the captioned case is denied.
2. That any pending motions the Commission has not specifically ruled upon are denied.
3. That this report and order shall become effective on \_\_\_\_\_, 2005.

**BY THE COMMISSION**

**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

( S E A L )