

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

3

4

TRANSCRIPT OF PROCEEDINGS

5

ON-THE-RECORD PRESENTATION

6

February 25, 2005

7

Jefferson City, Missouri

8

Volume 2

9

10

In the Matter of the Application of)
11 Aquila, Inc., for Specific Confirmation)
or, in the Alternative, Issuance of a)
12 Certificate of Convenience and)
Necessity Authorizing It to Construct,) Case No.
13 Install, Own, Operate, Control, Manage,) EA-2005-0248
and Maintain a Combustion Turbine)
14 Electric Generating Station and)
Associated Electric Transmission)
15 Substations in Unincorporated Areas of)
Cass County, Missouri, Near the Town of)
16 Peculiar)

17

18 RONALD D. PRIDGIN, Presiding
REGULATORY LAW JUDGE
19 JEFF DAVIS, Chairman,
STEVE GAW,
20 CONNIE MURRAY,
ROBERT M. CLAYTON, III,
21 COMMISSIONERS.

22

23 REPORTED BY:
TRACY L. THORPE, CSR, CCR
24 MIDWEST LITIGATION SERVICES

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1 P R O C E E D I N G S

2 JUDGE PRIDGIN: Good morning. We are on the
3 record. This is the on-the-record presentation for Case
4 No. EA-2005-0248 in the matter of the application of Aquila,
5 Incorporated for specific confirmation or, in the alternative,
6 issuance of a certificate of convenience and necessity
7 authorizing it to construct, install, own, operate, control,
8 manage and maintain a combustion turbine electric generating
9 station and associated electric transmission substations in
10 unincorporated areas of Cass County, Missouri near the town of
11 Peculiar.

12 I am Ron Pridgin. I am the regulatory law
13 judge assigned to preside over this hearing. It's being held
14 on February 25th, 2005. The time is 8:40 a.m. and we are in
15 the Governor Office Building in Jefferson City, Missouri.

16 At this time I would like to get entries of
17 appearance from counsel beginning with Aquila, please.

18 MR. BOUDREAU: Thank you. Let the record
19 reflect the appearance of Paul A. Boudreau with the firm of
20 Brydon, Swearngen and England, Post Office Box 456, Jefferson
21 City, Missouri on behalf of applicant, Aquila.

22 MR. ZOBRIST: Karl Zobrist, Blackwell Sanders
23 Peper Martin. We just moved, 4801 Main Street, Kansas City,
24 Missouri 64108 on behalf of Aquila.

25 JUDGE PRIDGIN: Mr. Boudreau, Mr. Zobrist,

1 thank you.

2 On behalf of STOPAQUILA.org, please.

3 MR. EFTINK: Gerry Eftink. My address is --
4 Gerry Eftink, 704 West Foxwood Drive, Raymore, Missouri.

5 JUDGE PRIDGIN: Mr. Eftink, thank you.

6 On behalf of Cass County, Missouri, please.

7 MR. COMLEY: Thank you, Judge Pridgin. Let the
8 record reflect the entry of appearance of Mark W. Comley,
9 Newman, Comley and Ruth, 601 Monroe Street, Jefferson City,
10 Missouri 65101 on behalf of Cass County.

11 Also, I'd like to introduce co-counsel, Debra
12 Moore, who is behind me. Her business address is 102 East
13 Wall, Harrisonville, Missouri 64701.

14 And also appearing with us today, in case there
15 are questions of her, is Cindy Reams Martin. Her business
16 address is 408 Southeast Douglas, Lee's Summit, Missouri
17 64063.

18 JUDGE PRIDGIN: Mr. Comley, thank you.

19 Ms. Moore, Ms. Reams Martin, thank you.

20 On behalf of the Staff of the Commission,
21 please.

22 MS. SHEMWELL: Good morning and thank you,
23 Judge. Lera Shemwell and Nathan Williams appearing on behalf
24 of the Staff of the Missouri Public Service Commission, Post
25 Office Box 360, Jefferson City, Missouri 65102.

1 JUDGE PRIDGIN: Ms. Shemwell, Mr. Williams.
2 thank you.

3 On behalf of Office of the Public Counsel,
4 please.

5 MR. COFFMAN: John B. Coffman appearing on
6 behalf of the Office of the Public Counsel and rate-paying
7 public, Box 2230, Jefferson City, Missouri 65102.

8 JUDGE PRIDGIN: Mr. Coffman, thank you.

9 I know that I have pending motions to dismiss
10 from STOPAQUILA.org and Cass County. I don't plan on
11 entertaining any kind of motions today so -- and I put that
12 out there to ask if there's anything that the parties want to
13 bring to my attention before we proceed. Again, this is just
14 to be a question and answer question for the Commissioners to
15 ask question of counsel what procedural path they think this
16 case should take and why and they may also have some
17 substantive questions as well. So with that in mind, I don't
18 plan to discuss the motions to dismiss.

19 Is there anything else counsel wants to bring
20 to my attention before we proceed? Mr. Boudreau?

21 MR. BOUDREAU: Just as a matter of
22 clarification, will we have an opportunity to address the
23 Commission at the outset? Because I may be able to answer
24 some of the questions --

25 JUDGE PRIDGIN: Yes, sir.

1 MR. BOUDREAU: Very good. Thank you.

2 JUDGE PRIDGIN: Yes, sir.

3 All right. If there's nothing further, what I
4 would like to do is begin with Aquila. And, Mr. Boudreau,
5 will you be speaking or Mr. Zobrist?

6 MR. BOUDREAU: I will be speaking, thank you.

7 JUDGE PRIDGIN: Mr. Boudreau, if you will
8 please approach the podium. Whenever you're ready, sir.

9 MR. BOUDREAU: May it please the Commission.
10 Good morning.

11 As you have already noted, with me here today
12 is Karl Zobrist, also counsel for Aquila. Mr. Zobrist and his
13 law firm have been handling the litigation in Cass County and
14 the pending appeal out of that litigation.

15 I've asked Mr. Zobrist to be here today if the
16 Commission has any questions they want to ask about what
17 transpired at that level. I wasn't present there and I
18 thought it might be helpful to get some high-quality
19 information without me speculating about what the judge said
20 or how things played out in Cass County or where things stand
21 with respect to the appeal. So with the Commission's
22 permission, of course, I may defer to Mr. Zobrist from time to
23 time depending on what the questions are.

24 I thought it might be helpful to give the
25 Commission a little bit of an update on a couple of items.

1 You may already be aware of these. And if you're not, I
2 apologize. As far as the briefing schedule at the Court of
3 Appeals level, I thought I'd give you a couple of dates. The
4 Appellant's brief was filed on February 14th. The
5 Respondent's brief, I'm given to understand, is scheduled to
6 be filed on March 14th. And Appellant's reply brief will be
7 filed shortly thereafter on March 21st.

8 The exact date for oral argument is unknown at
9 this point. It's apparently going to be some time in April.
10 I think the company's expectation of it will be mid to late
11 April, although it could be earlier in the month, but the
12 expectation is it will be mid to late April when argued to the
13 Court of Appeals.

14 I also wanted to bring you -- or update the
15 Commission on some timing considerations. There have been
16 some pleadings that have addressed some of the timing
17 construction schedules. The wonderful wet weather we've had
18 this spring has delayed the construction a little bit.
19 It's pushed back the in-service -- expected in-service dates
20 by approximately two weeks.

21 The company's looking to start commissioning
22 the first of the combustion turbines in early June with an
23 in-service date of about mid-July. To meet that date, the
24 company will be starting to move the CTs from current storage
25 locations to the project site commencing in early to mid

1 March. So it's just about right there now.

2 The Commission yesterday order -- issued an
3 order directing filing in -- and directed the company to file
4 copies of certificate orders that it is relying on for
5 purposes of its argument that its existing certificates were
6 sufficient to authorize the construction of the South Harbor
7 facility and the associated substations.

8 As you are aware, that we were not able to
9 comply with that by the end of business tomorrow. I'm
10 coordinating that effort with Mr. Zobrist and we hope to --
11 depending on how long this proceeding takes today, we may be
12 able to get those orders on file before the end of business
13 today. Certainly no later than Monday of next week, but our
14 objective is to get those filed by the end of today.

15 So having covered a couple of miscellaneous
16 items, let me get to the topic at hand. And I will try to
17 keep my comments as brief as possible.

18 Things have happened rather quickly to bring
19 this case to the Commission's attention. I guess probably the
20 starting point for that was the issuance of a permanent
21 injunction by Judge Dandurand of Cass County Circuit Court
22 enjoining the construction of the South Harbor facility and
23 the associated Peculiar substation. That order issued on
24 January 11th of this year. Enforcement of that judgment, I'm
25 given to understand, has been stayed pending the filing of

1 appeal bond, which has happened, and the outcome of the
2 pending appeal.

3 The company filed its application with the
4 Commission on January 28th of 2005. The purpose of which is
5 to take action which is, in its view, consistent with the law
6 and with the judgment of Judge Dandurand. The motion for
7 expedited treatment was filed by the company shortly
8 thereafter on February 1st, 2005 identifying a number of items
9 that the company feels compels expedited consideration of the
10 application.

11 The primary item of which is the expiration of
12 500-megawatt purchased power agreement on May 31st, 2005.
13 Actually that 500 megawatts is of summer capacity
14 requirements. We have the summer cooling season commencing as
15 early as June of this year and another driving force is the
16 need to have a facility online to meet the peaking capacity
17 demands because of the west Missouri service area where this
18 is located is one of Aquila's fastest growing service areas.
19 So there are a number of driving forces.

20 The Commission I guess what -- the bottom line
21 here is the Commission -- the company feels strongly the
22 Commission should proceed to address the merits of this
23 application. It believes the overriding practical public
24 service considerations, frankly, dwarf all other contrary
25 views. The company has the need for the capacity. And if you

1 look at the pleadings, no one's really arguing that the
2 capacity is not needed to meet the company's system peak
3 demand requirements.

4 The application requests relief in alternative
5 approaches. It's apparent from previous discussions that the
6 Commission has had concerns concerning this filing and also from
7 comments and observations received from other parties to this
8 case, that the nature of the relief being requested is not
9 clearly understood. And perhaps that is a result of lack of
10 clarity in draftsmanship, for which I apologize. I would like
11 to take the opportunity to clarify the basis for the
12 application and to answer any questions the Commission may
13 have as to exactly what the company has requested in its
14 application.

15 First, the Commission has before it an
16 application for specific confirmation that Aquila possesses
17 sufficient authority under its existing certificate --
18 certificates, excuse me, of convenience and necessity to
19 construct, own, operate, and manage electric power production
20 facilities and electric transmission substations, including
21 the South Harbor facility and the Peculiar substation
22 throughout those portions of the state of Missouri with
23 respect to which Aquila, through its predecessors and
24 interests, has been certificated to provide regulated electric
25 service to the public.

1 Aquila views an order of this type to be in the
2 nature of a clarification order. A clarification order would
3 be an affirmative resolution of the issue as opposed to an
4 order that would dismiss the application as moot or
5 unnecessary, as the Commission did in its Union Electric case
6 in 1980 and that's the EA-79-119 case.

7 As I will explain in a moment, a summary
8 dismissal of this nature likely would not be legally
9 sufficient, in the opinion of the company, to address the
10 outstanding legal issue.

11 The alternative count is that the application
12 request the Commission issue a new overlapping site-specific
13 certificate of convenience and necessity for Aquila to
14 construct and own, operate and manage the South Harbor
15 facility and the Peculiar substation on the two tracts of
16 property identified in the application. Aquila has proposed
17 alternatives for the Commission's consideration because,
18 frankly, it was unsure whether, and if so, how the Commission
19 would like to proceed with this matter.

20 Let me address first the clarification order
21 approach. The first option that the company has submitted for
22 the company -- for the Commission's consideration, and in the
23 company's view, the most straightforward approach, simply
24 would be to clarify the scope of Aquila's existing
25 certificates of convenience and necessity by reviewing the

1 terms of those prior orders and decisions and conferring --
2 and confirming that the terms of those decisions include
3 specific authority to build power plants and substations and
4 other forms of electric infrastructure within its certificated
5 service territory, including the South Harbor facility and the
6 Peculiar substation at the locations described in the
7 application.

8 Although there are no assurances or guarantees,
9 Aquila believes an order of this nature would address
10 satisfactorily the legal issue Judge Dandurand identified in
11 his January 11th judgment in consolidated Case No.
12 CV104-1380CC and CV104-1443CC.

13 This conclusion is based on a detailed analysis
14 of that opinion. And I would remind the Commission that a
15 copy of that judgment was attached as Appendix 2 to the
16 company's application. And I would direct the Commission's
17 attention to the language in that order, that judgment rather.
18 We've identified it in the application.

19 And if you look at page 3 of the
20 Commission's -- or of Judge Dandurand's judgment, the first
21 finding of the court, it says, The court finds that either
22 Aquila's Cass County franchise must give Aquila specific
23 authority to build a power plant within Aquila's certificated
24 area or service territory and that Aquila's 1917 franchise
25 with Cass County does not, or -- and here's the key

1 language -- that Aquila must obtain a, quote, specific
2 authorization, end quote, in its certificate of convenience
3 and necessity pursuant to the provisions of Section 64.235 of
4 the Revised Statutes of Missouri to build a power plant within
5 its certificated area or service territory from the Missouri
6 Public Service Commission and that Aquila has not.

7 What I'd like to do at this time, I do this for
8 a very limited purpose, I'd like to provide -- to approach the
9 Bench and provide the Commissioners with a copy of the
10 statute.

11 JUDGE PRIDGIN: You may.

12 MR. BOUDREAU: I'm not going to ask this be
13 made an exhibit because it's simply a recitation of what the
14 law is. But I would direct the Commission's attention to the
15 end of that provision. This is the provision where -- which
16 has really been the crux of the litigation and the dispute in
17 Cass County.

18 But if you look near the end of the statute,
19 there's a phrase that says, Or may hereafter be specifically
20 authorized or permitted -- are you with me? This is third
21 line from the bottom -- by a certificate of public convenience
22 and necessity or order issued by the Public Service Commission
23 or by permit of the County Commission.

24 So the statute provides that an exemptions's
25 available, an exemption applies, an exemption to the local

1 planning and zoning codes, through an order through -- by
2 specific authorization or permission under a certificate of
3 convenience and necessity or order of this Commission.

4 That's the basis for the company's position an
5 order in the nature of a clarification order would be
6 sufficient. It is not limited to just the issuance of a
7 certificate of convenience and necessity. So we think that
8 there's anchorage in the law and the judgment and that circles
9 back to the approach the company's taken with the application
10 that it has filed.

11 I might point out that the Commission routinely
12 issues orders clarifying the meaning and scope of its previous
13 orders in those circumstances when uncertainty has arisen.
14 And the company will be asking that the Commission do exactly
15 that, that it clarify the meaning and scope of the underlying
16 certificates of convenience and necessity that Aquila believes
17 authorizes it to build electric power plants generally and
18 substations generally and included in that the Peculiar -- or
19 the South Harbor facility and the Peculiar substation.

20 What I'd like to do is have a document marked
21 as an exhibit.

22 JUDGE PRIDGIN: You may.

23 (Exhibit No. 1 was marked for identification.)

24 JUDGE PRIDGIN: And when you get a moment,
25 Mr. Boudreau, if you could identify that for the record and

1 I'll label that as Exhibit No. 1 for identification purposes.

2 MR. BOUDREAU: I'll do that. Thank you.

3 Probably as good as an identification for this
4 document as any would be proposed clarificational language.

5 JUDGE PRIDGIN: All right. This is language
6 that you drafted -- just some proposed language for the
7 Commission's --

8 MR. BOUDREAU: Yes.

9 JUDGE PRIDGIN: All right.

10 MR. BOUDREAU: The purpose of this language is
11 to illustrate what the company would be requesting from the
12 Commission and just an illustration of the way the Commission
13 could address the clarification of the underlying
14 certificates. So I wanted to give this to the Commission to
15 consider in terms of the approach of a clarification.

16 This language may also be submitted later in
17 this case in the context of a more comprehensive proposed
18 Report and Order, but for today's purposes it's illustrative.
19 And with that in mind, I suppose I should offer it into the
20 record at this time as part of this proceeding.

21 JUDGE PRIDGIN: All right. Exhibit No. 1 has
22 been offered. Any objections?

23 Hearing none, Exhibit No. 1 is admitted.

24 (Exhibit No. 1 was received into evidence.)

25 JUDGE PRIDGIN: Mr. Boudreau.

1 MR. BOUDREAU: Thank you.

2 The company feels that the clarification
3 approach would be the most procedurally efficient route for
4 the Commission to follow in this case. The key facts,
5 frankly, are not in dispute and have been stipulated to
6 largely in the underlying litigation in Cass County.

7 And, in fact, I have another document to offer,
8 which is a copy of the stipulation of facts that was offered
9 in the Cass County litigation. This will be the only other
10 document I propose to offer today.

11 JUDGE PRIDGIN: I'll label that as Exhibit
12 No. 2 for identification purposes.

13 (Exhibit No. 2 was marked for identification.)

14 MR. BOUDREAU: This, as you can see, is the
15 joint stipulation of facts that was offered and utilized in
16 the Cass County litigation, which resulted in Judge
17 Dandurand's judgment.

18 I'd like to offer this into the record with one
19 caveat. I'd like the Commission to take official notice of
20 it, I guess is what I'm actually requesting with one caveat.
21 By offering this, I don't want to concede that each and every
22 fact that appears in this stipulation is particularly relevant
23 for this case. There may be some facts that are relevant. I
24 want to reserve the right to argue that some of the facts that
25 are contained in this stipulation are not relevant for

1 purposes of this proceeding.

2 And you'll see when you look through it,
3 there's some stipulations as to the local planning and zoning
4 compliance and some of those things, which I would argue
5 aren't relevant, but other parties may argue they are relevant
6 and, in fact, are arguing that they are relevant.

7 I'd also like the Commission to take official
8 notice with the additional caveat there may be other
9 undisputed facts that the parties will submit to the
10 Commission to form a basis of a record under a clarification
11 order approach. But with those two caveats, I'd like the
12 Commission to take official notice of this document,
13 Exhibit 2.

14 JUDGE PRIDGIN: All right. Mr. Boudreau, are
15 you just asking the Commission to take notice or are you
16 offering it?

17 MR. BOUDREAU: I think I'm just asking the
18 Commission to take official notice of it.

19 JUDGE PRIDGIN: All right. Thank you.

20 MR. BOUDREAU: That case, the Cass County
21 litigation, like this involved primarily a question of law --
22 or questions of law I guess I should say. Consequently, the
23 topic submitted in this case is one of interpretation or
24 application of the Commission's prior orders, a matter well
25 within its specialized area of expertise.

1 It involves a straightforward exercise of the
2 Commission's primary jurisdiction; that is, to clarify the
3 history, meaning and scope of Aquila's certificates of
4 convenience and necessity. And, in fact, this can be
5 illustrated by no better fact than STOPAQUILA.org has already
6 filed both a brief and a Motion to Dismiss, largely the same
7 document, just packaged a little differently, but largely just
8 legal arguments as to the validity of the application and the
9 impact of the application. So these lend themselves -- the
10 case lends itself quite directly to an argument -- legal
11 argument about the scope and effect of the prior orders.

12 In this regard, Aquila's corporate history and
13 that of its predecessors and interests as well as all of the
14 relevant certificates of convenience and necessity were facts
15 that were well developed in the context of the Cass County
16 litigation. As you review that document, you'll see what I
17 mean.

18 The parcels of property identified as tracts A
19 and B in the application that the company's filed in this case
20 are both within Aquila's certificated area, a fact stipulated
21 to in the Cass County litigation. No one disputes Aquila's
22 need for the 318 megawatts of peaking power production
23 capacity that the South Harbor facility will provide.

24 The only dispute goes to whether there are
25 other or better sources for that capacity and whether there

1 are other places the facility could be built, constructed and
2 operated. These latter considerations, as the Commission has
3 previously determined, are business decisions that
4 traditionally have been left to the informed discretion of the
5 utility's management in furtherance of its obligation to
6 provide safe and adequate public service to the customers in
7 those areas that it's been authorized to serve.

8 In the context of a clarification order, need
9 is not necessarily an element of the Commission's analysis.
10 In its application, Aquila has suggested, and it will make the
11 argument to the Commission in support of its request for a
12 clarification order, that the determination of need was made
13 by the Commission at the time those certificates were
14 originally issued in Case Nos. -- there's more than this, but
15 Case No. 3171, Case No. 11892.

16 And further, that the determination of need in
17 those cases is conclusive as a matter of law in all collateral
18 actions. Therefore, a reexamination of the public convenience
19 and necessity is both unnecessary and, in fact, precluded.

20 And I would direct the Commission's attention
21 to the language of 386.550. It's one sentence, but it's a
22 powerful sentence. It reads, In all collateral actions or
23 proceedings, the orders and decisions of the Commission which
24 have become final shall be conclusive, end quote.

25 Now, the procedural implications of the

1 clarification order approach. As to the request for a
2 clarification order, the jointly proposed procedural schedule
3 that's been submitted to the Commission contemplates the
4 creation of a record for the Commission through comments
5 received at a local public hearing and the submission of
6 stipulated facts, some of which I've already referred to.

7 All of the fundamental elements of due process
8 will be afforded in a fashion that will position the
9 Commission to issue an order after having heard legal argument
10 by as early as March 31st, 2005.

11 Also, a clarification order obviates the
12 distraction of determining whether the Cass County franchise
13 that's been filed by the company is sufficient local
14 authorization for a certificate because the Commission is not
15 issuing a new certificate, but rather clarifying the meaning
16 and scope of Aquila's existing certificates. As such, there's
17 no cause for reexamining the adequacy of the company's
18 certificate filing in 1937.

19 The Commission's clarification order could be
20 filed with the Court of Appeals in advance of oral argument
21 and presumably taken into account in the deliberations by that
22 court. Aquila strongly favors this approach and this outcome.

23 As to the issuance of an overlapping
24 site-specific certificate of convenience and necessity, to
25 Aquila's knowledge, this set of circumstances with which the

1 company and the Commission is confronted presents a case of
2 first impression. As such, the application also submits the
3 alternative of a procedure that would hopefully culminate in
4 the issuance of an overlapping site-specific certificate of
5 convenience and necessity specifically authorizing the
6 construction and operation of the South Harbor facility and
7 the Peculiar substation.

8 The approach set forth in the application has
9 been modelled on two similar cases, the most recent being a
10 Report and Order of the Commission in its Case No. EA-7738
11 issued in February of 1977, at which time the Commission
12 granted a certificate of convenience and necessity for the
13 construction of the LaRussell Energy Center at the request of
14 Empire District Electric Company.

15 Though not an approach thought to be favored by
16 the Commission, Aquila believes the Commission is not
17 precluded from proceeding in this fashion should it choose to
18 do so, if special circumstances justify doing so. And Aquila
19 believes it has presented special, even unprecedented
20 circumstances.

21 Let me take an opportunity to address some of
22 the arguments that you've already heard in some of the
23 pleadings by some of the intervening parties in this case, but
24 I'll do so in just a very summary fashion.

25 It's important to know that -- well, I expect

1 that the Intervenor are likely to raise a variety of
2 arguments today and later on in this proceeding that any
3 relief requested in the application should be denied.
4 None of these arguments, we believe, are related to the matter
5 that are actually before the Commission today.

6 As you've noted earlier, Mr. Pridgin, the
7 STOPAQUILA.org has filed a Motion to Dismiss. This appears to
8 me to be just a repackaging of its February 1st, 2005 brief.
9 I would suggest that the motion just be taken with the case as
10 one of the legal arguments that can be addressed by the
11 Commission at the conclusion of this process. Handling the
12 motion in this fashion will avoid the need to address the same
13 issue two, maybe three times in the case as it goes on.

14 The application does comply with the
15 Commission's filing requirements. A number of arguments have
16 been made I think by both Intervenor that they challenge the
17 application, it appears to me, on the grounds that Aquila
18 cannot be allowed to establish it's exempt from the local
19 planning and zoning code of Cass County because it has not
20 showed it has complied with the local planning and zoning code
21 of Cass County.

22 This is clearly circular reasoning and I don't
23 think warrants any summary action by the Commission. In other
24 words, the application is sufficient for the Commission to
25 entertain.

1 The application does not conflict with Judge
2 Dandurand's judgment or the pending appeal before the Western
3 District Court of Appeals.

4 The issue of whether Section 64.235 RSMo
5 imposes new power plant siting requirement on utilities is not
6 an issue in this case. That's an issue on appeal. It does
7 not need to be an issue in this case. The issue of whether
8 the 1917 Cass County consent held by Aquila is deficient
9 because it does not make specific reference to destruction of
10 power production facilities is not an issue in this case.
11 Judge Dandurand's order expressly provides for the alternative
12 means to address his concerns.

13 The question of Aquila's compliance with Cass
14 County local planning and zoning code is not an issue before
15 the Commission. The Circuit Court of Cass County already has
16 concluded that sufficient specificity in the certificate of
17 convenience and necessity would have the effect of exempting
18 Aquila from any local planning and zoning considerations.

19 And although a number of parties have gone to
20 great lengths to try and convince the Commission the filing
21 of the application in some way conflicts with Judge
22 Dandurand's judgment or the pending appeal, this is simply an
23 elaborate exercise in misdirection.

24 The Commission is not being asked to opine
25 whether it believes that Judge Dandurand's judgment was right

1 or wrong. To the contrary, the application conforms fully
2 with the express language of the judgment. The terms of that
3 judgment do not bar Aquila from filing this application with
4 the Commission and the other issues taken up on the appeal
5 need not be addressed in this proceeding and, frankly, are
6 better left for the Court of Appeals to decide.

7 And finally, the Commission has not been
8 enjoined from holding proceedings on the merits of the
9 application and exercising its primary and statutory
10 jurisdiction to interpret, and/or issue certificates of
11 convenience and necessity for investor-owned electric
12 utilities.

13 To conclude, Aquila strongly urges the
14 Commission to pursue the more time efficient track of working
15 towards the issuance of a clarification order in this case.
16 This approach would most quickly address the pressing time
17 considerations identified by Aquila both in its application
18 and the associated motion for expedited treatment.

19 The question of primary jurisdiction is one of
20 law as evidenced by the filing of the Motion to Dismiss filed
21 by STOPAQUILA.org. This approach would be the least likely to
22 implicate the concerns voiced by Staff and the Office of
23 Public Counsel concerning the prudence implications, siting
24 considerations and other matters that may be perceived to have
25 a broader public policy or rate-making impact down the road.

1 Commissioner Murray, any questions?

2 CHAIRMAN DAVIS: I'm going to wait.

3 COMMISSIONER MURRAY: Mr. Boudreau, I have a
4 few questions for you. In order to establish the record
5 sufficiently to clarify Aquila's existing authority, do you
6 think it's sufficient for us to review the pleadings and the
7 terms of the certificates and then issue a clarifying order?
8 And the reason I'm asking that is I do not understand why any
9 other proceedings would even be relevant to what I consider a
10 purely legal argument.

11 MR. BOUDREAU: There may be some basic facts
12 that need to be established I would think even for a
13 clarification order. One that comes to mind is establishing
14 for the record the location of the facilities in question and
15 establishing that they're within the certificated area or the
16 service area that's been certificated in the company. So that
17 would be one set of facts that I think would be relevant to
18 establish in this record. Those that --

19 COMMISSIONER MURRAY: Were they already --
20 excuse me. Were they already stipulated to though?

21 MR. BOUDREAU: They were stipulated to I
22 believe in the joint stipulation of facts in the litigation in
23 Cass County. And I would anticipate a similar document that
24 would be filed with respect to undisputed facts in this case.
25 So a record can be established, I think, of those facts

1 necessary for a final determination from this Commission
2 simply by stipulation.

3 COMMISSIONER MURRAY: All right. And then as
4 to a local public hearing, what would be relevant about a
5 local public hearing?

6 MR. BOUDREAU: I think a local public hearing
7 is always discretionary with the Commission in terms of
8 receiving public comment and input from both presumably
9 opponents and proponents of whatever the particular project or
10 objective is.

11 I think it's a discretionary call. If the
12 Commission's determined it's going to have a local hearing to
13 receive public comment, and I wouldn't presume to suggest that
14 it wasn't an appropriate thing to do, but it frequently does
15 have -- hold a forum for interested members of the public to
16 express their views.

17 COMMISSIONER MURRAY: My question though is,
18 what could we hear at a local public hearing that would have
19 any relevance to our determination of your legal status?

20 MR. BOUDREAU: It may depend, frankly, on which
21 track the Commission decides to take. If the Commission were
22 to take the track of doing a -- what I call a duplicate or
23 overlapping footprint certificate for the plant, I think there
24 may be a more significant call for receiving public comment in
25 terms of establishing a record for that process.

1 It -- because the issue then, in my view, is
2 more purely one of public convenience and necessity and what
3 that encompasses has not been really all that comprehensively
4 defined in the Commission's prior decisions, but that is an
5 issue. And presumably there may be a reason to want to hear
6 from the public on its views on it.

7 COMMISSIONER MURRAY: That's only an issue with
8 the alternative proposal?

9 MR. BOUDREAU: I would suggest it's more to the
10 point with the alternative proposal. It's discretionary with
11 the Commission as far as the clarification order.

12 COMMISSIONER MURRAY: And if we were to opt for
13 that alternative proposal, that is, an overlapping
14 certificate, wouldn't that create some kind of an unattractive
15 precedent that any time a utility that had been certificated
16 was needing to construct within the certificated area and
17 there were objections from the community, that we might have
18 to go through this same kind of duplicative, unnecessary
19 process?

20 MR. BOUDREAU: I think that this whole process
21 has raised some troubling issues in that respect. And
22 probably not the least of -- it's one thing for the issue to
23 be raised in the context of building a power production
24 facility. But Judge Dandurand's judgment also addresses the
25 Peculiar substation. It also enjoins the construction of the

1 remote substation.

2 There's -- just for clarity, there's a
3 substation that's adjoining and built on the same tract as the
4 Peculiar -- or as the South Harbor facility, but there's a
5 remote electric substation north of that location, the
6 construction of which also has been enjoined.

7 And I would suggest to the Commission that that
8 truly is troubling. I mean, because I don't know how far that
9 you go down this road about what sort of facilities can and
10 can't be built without having to go in and say Mother May I to
11 the Commission every time. It's going to be procedurally
12 burdensome, I think it's -- I think it raises serious concerns
13 about meeting customer demand for power in a timely basis.
14 And I do think the Commission ought to be concerned. The
15 company is somewhat concerned about that as well that this
16 does potentially set a troublesome precedent for the
17 Commission

18 COMMISSIONER MURRAY: And if it did, in fact,
19 create a trend toward more delay and more processes through
20 this Commission, could that not and would that not be likely
21 to eventually drive up rates?

22 MR. BOUDREAU: I think it -- I think it quite
23 easily could drive up costs, the process the companies have to
24 go through to -- to meet their public service obligations.
25 And I think that that is why some of the prior decisions on

1 the issue of local versus statewide regulation of utilities
2 has -- have opined that trying to exalt local regulation of
3 these facilities over statewide regulation creates a chaotic
4 is the term I think I've seen used -- a chaotic regulatory
5 environment. Not only does it cause delays in terms of
6 service, but it also can quite clearly drive up costs. And
7 this case is a perfect -- perfect example of that.

8 COMMISSIONER MURRAY: And just one last
9 question. The statute that you provided a copy of, 64.235 --

10 MR. BOUDREAU: Yes.

11 COMMISSIONER MURRAY: -- regarding county
12 planning, zoning, etc., as I understand it, there is an
13 argument from the Intervenorors that this only applies to public
14 improvements and that this does not fit the definition of
15 public improvement.

16 But my question to you is, we don't -- this
17 Commission doesn't specifically authorize or permit by a
18 certificate of public convenience and necessity the type of
19 public improvement that the Intervenorors are referring to
20 there, does it? And it's probably not fair because I'm not
21 directing you to the document in which that was stated.

22 MR. BOUDREAU: I'm aware of those allegations.
23 I may not be the best individual to address that. What I may
24 do is defer to Mr. Zobrist, with the Commission's permission
25 because he's been intimately involved in these arguments and

1 developing the company's position with respect to those.

2 MR. ZOBRIST: Should I come up to the lectern,
3 Judge?

4 JUDGE PRIDGIN: If you'd come to the podium,
5 please.

6 MR. ZOBRIST: Good morning. Karl Zobrist on
7 behalf of Aquila.

8 Commissioner Murray, I think your observation
9 is correct. And my adversary from the county, Ms. Reams
10 Martin here, and I spent a lot of time trying to discern what
11 was the meaning of 64.235. And I think the one thing that we
12 might agree upon is that it could have been better written.

13 That certainly is one of the arguments that I
14 argued to the court, that if there was a literal
15 interpretation of what development of public improvement
16 meant, did it refer to those public improvements by a
17 municipality, a county public board or commission. In which
18 case, the Public Service Commission never issues CCNs or
19 orders to those entities, or if it has, it was in cases that
20 did not apply to electric utilities.

21 And Judge Dandurand in his order, if you might
22 remember it before he got to his holding, did say whatever
23 such meant, you know, it's vague and ambiguous and I'm not
24 really sure what it means and it probably means a or any.

25 Aquila took the position before the court and

1 is taking the position before the Missouri Court of Appeals
2 that whatever this means, it has meant -- it was meant by the
3 legislature to not take away from this body its authority
4 over statewide utility regulation and that's how it should be
5 interpreted and that a literal -- a really literal
6 interpretation of this statute leads to an absurd or an
7 incongruous result.

8 COMMISSIONER MURRAY: Thank you.

9 Thank you, Judge. That's all I have right now.

10 JUDGE PRIDGIN: Commissioner Murray, thank you.

11 Commissioner Gaw?

12 COMMISSIONER GAW: I think I'll wait.

13 JUDGE PRIDGIN: Commissioner Clayton?

14 COMMISSIONER CLAYTON: Yeah, I'll ask a few
15 questions.

16 Mr. Boudreau, I just -- you've said a lot in
17 your opening statement and I just want to be clear in exactly
18 what the position of the company is. You're saying that the
19 company wants an order basically dismissing this case with
20 this language as your first choice; is that right?

21 MR. BOUDREAU: No. The company is requesting
22 that there be -- a clarification order be issued in an
23 affirmative fashion. We don't --

24 COMMISSIONER CLAYTON: Following any hearing at
25 all or just show up on Tuesday and vote on an order that

1 includes this language?

2 MR. BOUDREAU: I believe there will be a record
3 for the Commission. Let me be clear. The company does not
4 believe that an order dismissing the application as
5 unnecessary or duplicative is going to be sufficient to
6 address the issue that it sees in the judgment issued by Judge
7 Dandurand.

8 The company is requesting an order in the
9 nature of an affirmative order of clarification where the
10 Commission would address the scope and meaning of its prior
11 orders and issue some language similar to what we've suggested
12 in --

13 COMMISSIONER CLAYTON: I understand that.

14 MR. BOUDREAU: -- that Exhibit 1.

15 COMMISSIONER CLAYTON: I'm having difficulty
16 understanding what type of order that would be. Is it an
17 order that basically is making a statement that -- that these
18 past certificates have already dealt with this issue or is it
19 a statement that the question is moot in some way that the
20 decision's already been made or are you talking about
21 establishing a record, moving forward with an evidentiary
22 hearing and then issuing an order like this?

23 MR. BOUDREAU: The company's position is that
24 the record would be established through primarily stipulated
25 facts. And that most of the arguments are in the nature of

1 legal arguments about what does the prior language in the
2 prior certificate orders mean.

3 And the crux of the language I believe the
4 company is looking for you'll find at the bottom of the second
5 page of Exhibit 1. The company suggests that the Commission
6 make a finding similar to this: The Commission finds that the
7 words "electric utility facilities" were intended to encompass
8 electric plant, which is defined in Section 386 at 020 as
9 including different categories of plant, including generation
10 plant. And by doing so, making that affirmative clarification
11 of what the meaning of the language the Commission used in its
12 prior orders, would be specific authorization pursuant to an
13 order of the Commission as contemplated by 64.235.

14 So there reason a record established through
15 stipulated facts, there will be a record also established
16 through comments received in the local public hearing, but
17 with that, the Commission could proceed to issue an
18 affirmative order looking at the language of its prior orders
19 and clarifying the scope, meaning and effect of those orders.

20 COMMISSIONER CLAYTON: But hasn't a judge -- a
21 circuit judge already done that?

22 MR. BOUDREAU: The circuit judge has concluded
23 that he didn't find specific authorization either in the
24 county franchise -- the 1917 county franchise or in the
25 company's certificates. But he says -- basically the judgment

1 says the company either needs to get that or get clarification
2 on the franchise. We're, of course, before the Commission to
3 get specific authorization in the form of clarification from
4 the Commission, which is contemplated, we think, by the
5 express language of --

6 COMMISSIONER CLAYTON: This specific
7 authorization that you're seeking in your first option
8 presented --

9 MR. BOUDREAU: Yes.

10 COMMISSIONER CLAYTON: -- is basically just
11 a -- an interpretation of what this Commission has already
12 said and done?

13 MR. BOUDREAU: Essentially, yes. An
14 interpretation and clarification. To, in effect, say that
15 when the Commission used the language in its prior orders of
16 electric utility facilities, it meant to include -- that
17 language was meant to include power plant, generation plant.
18 It's the company's position that that's the way they've
19 interpreted their certificates for years, but --

20 COMMISSIONER CLAYTON: So you're asking --
21 you're asking for the Commission to interpret one of its prior
22 orders?

23 MR. BOUDREAU: Well, perhaps a series of its
24 prior orders, but in essence, yes, sir. The company has more
25 than just one certificate. There's a number of other

1 certificates and we will file the ones that we think are the
2 crucial orders.

3 COMMISSIONER CLAYTON: Does the Public Service
4 Commission have the ability to interpret its prior orders?

5 MR. BOUDREAU: I believe the Commission does,
6 particularly if there's a record --

7 COMMISSIONER CLAYTON: Based on what? Based
8 on --

9 MR. BOUDREAU: I think the Commission has
10 routinely established -- or issued orders clarifying the
11 meaning and scope of previous orders that it has issued in a
12 number of different contexts.

13 COMMISSIONER CLAYTON: Could you give me some
14 examples of -- not case numbers, but could you give me
15 examples of certain context -- contexts where we have
16 interpreted our prior orders?

17 MR. BOUDREAU: I'm not sure that I can -- I'm
18 not sure that I'm aware of --

19 COMMISSIONER CLAYTON: I don't want to put you
20 on the spot right now. Maybe if you think of some examples --

21 MR. BOUDREAU: I will do that. I think this
22 particular circumstance with which the Commission is
23 confronted, to my knowledge is somewhat unprecedented. I'm
24 not aware of a case where a circuit judge has come in and said
25 that a certificate the Commission has issued has been

1 inadequate for some particular purpose and the Commission has
2 come back and clarified. I'm not aware. We'll do some
3 research and find that out.

4 But I think that the Commission has inherent
5 authority under its -- under its primary jurisdiction to
6 determine what its orders mean. And I think that there is
7 some case law on that.

8 COMMISSIONER CLAYTON: We can determine what
9 our -- our orders mean?

10 MR. BOUDREAU: I think the Commission has
11 primary jurisdiction to -- to state what it thinks its orders
12 mean. I mean, otherwise, it doesn't have any authority at
13 all.

14 COMMISSIONER CLAYTON: Even if that is in
15 direct contradiction to what a judge has already said?

16 MR. BOUDREAU: I don't believe it will be in
17 contradiction to what the judge says, because the judge -- the
18 judge has indicated that if the company were to, pursuant to
19 64.235, get either a certificate or an order from the
20 Commission with specific authority to build power plants, that
21 that would address his concerns. So I don't think it's
22 inconsistent with what the judge has said at all.

23 We can all have different views about whether
24 Judge Dandurand was right or wrong. I'm not encouraging the
25 Commission to stay Judge Dandurand -- or to render an opinion

1 or suggestion about whether Judge Dandurand's interpretation
2 was right or wrong. But I do think the Commission has the
3 direct primary and statutory jurisdiction to determine what
4 its orders provided in the first instance. And I think that's
5 an exercise of its primary jurisdiction. I think that's been
6 recognized by the courts as well.

7 We will brief that topic. I've -- in the
8 application, I believe, I have to go back and confirm that
9 I've got this right, but it's certainly in some of the
10 pleadings that have been filed by the company we've cited the
11 primary cases that address the concept of Commission's primary
12 jurisdiction so --

13 COMMISSIONER CLAYTON: I'm struggling with this
14 concept. I want to make that statement. I'm struggling with
15 this concept because we have a situation where the judge said,
16 Commission did not give specific authorization. And I have a
17 difficult time figuring out how us making a statement saying
18 well, yes, we did, how that is going to affect anybody
19 legally, how it will have any effect on the Court of Appeals
20 or -- or on any of these proceedings.

21 MR. BOUDREAU: I think the Commission's
22 guidance can be found in what the judge pointed to. The judge
23 pointed to 64.235 where he talks -- where the statute refers
24 to specific authorization or permitting by a certificate or
25 order issued by the Missouri Public Service Commission.

1 So I think the judge -- my reading of the
2 judgment is that it contemplates that there's an avenue for
3 the Commission to address this either by the issuance of a new
4 certificate or by the issuance of some other order. And we
5 think an order in the nature of a clarification order would
6 meet that statutory requirement and would be fully consistent
7 with the language in Judge Dandurand's judgment.

8 COMMISSIONER CLAYTON: Okay. Thank you.

9 JUDGE PRIDGIN: Commissioner Clayton, thank
10 you.

11 Commissioner Gaw, any questions?

12 COMMISSIONER GAW: I do have some questions,
13 but I'm going to wait.

14 JUDGE PRIDGIN: Thank you.

15 Commissioner Davis?

16 CHAIRMAN DAVIS: Pass.

17 JUDGE PRIDGIN: Before Commissioner Gaw, any
18 follow-up questions for Commissioner -- or excuse me, for
19 Mr. Boudreau or Mr. Zobrist?

20 Mr. Boudreau, just a quick question. Are you
21 essentially asking the Commission for a nunc pro tunc type
22 order just to say that what the prior order in 11,892 meant
23 when it said electric utility facilities was really electric
24 plant?

25 MR. BOUDREAU: I think we are asking the

1 Commission to clarify and interpret its prior orders to that
2 effect, yes, to say that the language that was used in those
3 prior orders was meant to encompass production -- you know,
4 power production facilities and electric substations in
5 addition to other types of electric infrastructure. The
6 alternative, of course, is to issue an overlapping footprint
7 certificate, but the company's stated preference is the
8 clarification order.

9 JUDGE PRIDGIN: All right. Thank you.

10 Commissioner Gaw, if you'd like to reserve the
11 right to question until later --

12 COMMISSIONER GAW: I was going to wait until
13 everyone was completed, but I guess I'll -- you've been to me
14 three times and three times is too many times to give me that
15 chance so I will -- I'll inquire of Mr. Boudreau then.

16 Mr. Boudreau, first of all, I'm trying to
17 understand one comment that you made in regard to needing to
18 know something today --

19 MR. BOUDREAU: Yes.

20 COMMISSIONER GAW: -- if possible. And what is
21 it that you would like to know today, if possible?

22 MR. BOUDREAU: I'm sorry if I was unclear,
23 Commissioner.

24 COMMISSIONER GAW: You probably weren't. I
25 probably just didn't understand.

1 MR. BOUDREAU: A joint response to Commission
2 order was filed in this case. And that's the document that
3 set forth the alternative proposed procedural schedules,
4 depending on whether the Commission chose to issue -- to go to
5 the order of clarification route or the overlapping
6 certificate.

7 If you'll look at the overlapping certificate
8 scenario, it's on page 3 of that pleading -- do you have that
9 handy?

10 COMMISSIONER GAW: Commissioner Clayton has
11 provided it to me.

12 MR. BOUDREAU: You'll see that the company's
13 commitment was to file -- if the Commission chose this
14 procedural alternative, to file its Direct Testimony on the
15 2nd, which I understand to be next Wednesday. If I don't hear
16 something from the Commission until next week, I'm in kind of
17 a box. I mean, my choice -- practical choice is do I start
18 proceeding testimony for a procedure that the Commission
19 ultimately chooses not to pursue in anticipation that they
20 might.

21 COMMISSIONER GAW: I get you.

22 MR. BOUDREAU: In other words, I'm looking for
23 some guidance today about --

24 COMMISSIONER GAW: I understand what you're
25 suggesting. Although it may be possible for direction to be

1 given to you, I'm not sure that what I've heard so far, and
2 just speaking here, is that this issue in regard to the first
3 question is going to be briefed or is going to be discussed
4 more, there will be more information coming in.

5 So I'm having trouble understanding how I could
6 come to the conclusion that that's the right place to go when
7 we haven't even heard all of the law on it yet to give you any
8 direction today. From my perspective, the problem is more --
9 is more about whether or not that date needs to be -- or the
10 date needs to be adjusted rather than -- the other
11 Commissioners may disagree with me, but that's my -- would be
12 my feedback to you on that issue.

13 MR. BOUDREAU: No, and I appreciate it.
14 Clearly the Commission controls how it goes about that.

15 COMMISSIONER GAW: Well, and I appreciate your
16 dilemma and I hope that we don't put you in that spot from the
17 standpoint of trying to work on getting something out by then,
18 but I'm not sure what the solution is.

19 My next question is this. Tell me what the
20 difference is between what you're asking in your first request
21 of the two, between that and issuing some sort of a
22 declaratory judgment.

23 MR. BOUDREAU: Well, I think the Commission --
24 I suppose it's not unlike that. I mean, there will be a
25 record established, but there's, you know, often a record

1 established with a declaratory judgment. But I'm not sure
2 that that's some sort of obstacle to the Commission proceeding
3 with this because although the Commission doesn't issue
4 judgments per se, the Commission frequently does issue orders
5 that clarify a meaning of a prior order if there's some
6 confusion that has arisen over it.

7 It often happens within the context of the same
8 docket. There will be an order issued, parties have some
9 confusion about what it means and they'll come back to the
10 Commission and say, Tell us what you meant, how does it plat
11 out.

12 COMMISSIONER GAW: I'm familiar with doing that
13 when we still have the case in our hands, but I'm not familiar
14 with any case where some sort of a clarification order has
15 been entered for an order that incurred decades ago.
16 Do you have any kind of case that has occurred similar to
17 that?

18 MR. BOUDREAU: Well, I think the --

19 COMMISSIONER GAW: Because I understand the
20 concept of a request for clarification of an order while it's
21 still pending on -- prior to or during a rehearing request.

22 MR. BOUDREAU: Let me give you an example
23 that's pertinent to this case. And it's a case that's been
24 mentioned. I mentioned the 1980 Union Electric case. I
25 believe the docket number was -- came up in a somewhat

1 different procedural stance, but let me remind the Commission
2 of what happened. I'll give you the case number here. Let me
3 try and locate it. EA-79-119.

4 That was the case where Union Electric Company
5 filed for, in essence, an overlapping certificate of --
6 footprint certificate for a couple of combustion turbines that
7 they were proposing to install on -- in an area that had
8 previously been certificated to it through an area
9 certificate.

10 The Commission summarily dismissed the
11 application finding that the underlying certificates were
12 adequate to permit it to go ahead and build these plants and
13 it chose not to entertain the application and dismissed it.
14 Now, it came up in a procedurally different sort of route, but
15 the importance there is the Commission looked to its prior
16 orders and said, Well, wait a minute, we've already told you
17 you can do this and dismissed the application.

18 So that's an order that was issued in the
19 nature of a declaration about what the meaning of its prior
20 decisions and the effect of its prior decisions were. So
21 that's one that comes readily to mind.

22 COMMISSIONER GAW: Was the authority of the
23 Commission to do that appealed in that case?

24 MR. BOUDREAU: I don't recall whether Union
25 Electric Company or any other party took that decision up on

1 appeal. I'm sorry, I just don't.

2 COMMISSIONER GAW: Second of all, in that case
3 had there been any circuit court order stating that there was
4 not authority from the Public Service Commission for Union
5 Electric to do whatever it was they requested in that EA-79
6 case?

7 MR. BOUDREAU: Not to my understanding of that
8 case. I think it came up based on a Motion to Dismiss that
9 was filed by -- I believe it was the Commission's general
10 counsel at the time.

11 COMMISSIONER GAW: All right. You mentioned
12 collateral attacks as being something that should not occur on
13 Commission orders, I believe, or something to that effect.

14 MR. BOUDREAU: Yes, Section 386.550.

15 COMMISSIONER GAW: Tell me why this proceeding
16 of yours in your first count is not a collateral attack on the
17 Cass County order.

18 MR. BOUDREAU: I don't think it's a collateral
19 attack on the Cass County order because it's requesting relief
20 that is contemplated -- expressly contemplated in the judgment
21 of Judge Dandurand. He said basically there's two ways to
22 cure this issue that I see, one of which is to get further
23 authority directly from Cass County through the -- what's been
24 referred to as the Cass County franchise and the other way is
25 to get more specific authority from the Commission consistent

1 with 64.235, either a certificate or an order of some sort.
2 So I don't think it's -- it's conflicting at all. I think
3 it's consistent with the language that was contemplated in the
4 judgment.

5 COMMISSIONER GAW: It strikes me that your
6 second request may be consistent with that, but I'm having a
7 little difficulty understanding why the first request would be
8 anything more than just either seeking an order that's
9 different than what you got out of the circuit court on the
10 same -- same topic that's already been ruled on there.

11 MR. BOUDREAU: And I appreciate that. But I
12 think if that were the case, Section 64.235 wouldn't include
13 the additional language order. If what was contemplated was
14 just a certificate, was the only way to deal with this, then I
15 think the statute would say that a new certificate -- or a
16 certificate is the only way to deal with this. But it says a
17 certificate of convenience and necessity or order. Those
18 presumably are two different things.

19 COMMISSIONER GAW: I'm not sure what order
20 might mean either, but it may mean something that is specific
21 authorization by the Public Service Commission and that's
22 outside the scope of a certificate. I'm not sure what that
23 is.

24 MR. BOUDREAU: Yes.

25 COMMISSIONER GAW: But I don't know -- I'm not

1 sure that it's a grant for us to issue declaratory judgments
2 or to issue an order that is somehow different in its
3 interpretation of the grant of authority given to a public
4 utility that's already been interpreted by another -- another
5 court. I guess I should say a court since we're not --
6 anyway, I'm looking forward to hearing more from you on that
7 when you -- when you get your briefing time done.

8 MR. BOUDREAU: Very good. I'll make sure to
9 address that in a good deal of detail.

10 COMMISSIONER GAW: That's all I have right now.
11 Thanks, Judge.

12 JUDGE PRIDGIN: Commissioner Gaw, thank you.

13 Any other questions from the bench for Mr.
14 Boudreau or Mr. Zobrist?

15 COMMISSIONER CLAYTON: Can I ask one question?

16 JUDGE PRIDGIN: Yes, sir.

17 COMMISSIONER CLAYTON: If you're only asking --
18 in this first option if you're only asking for a clarification
19 order, why would there need to be any stipulation of facts
20 filed?

21 MR. BOUDREAU: I think that to establish a
22 couple of things. The nature of the facility, because the
23 order that we're asking for would be a clarification of
24 authority to build power plant generally and including the --
25 the South Harbor facility and the Peculiar substation. So we

1 need to establish what those are -- you know, fundamentally
2 what those facilities are.

3 COMMISSIONER CLAYTON: Well, is there some type
4 of facility that would not be included in the original orders
5 in your opinion?

6 MR. BOUDREAU: I think the company's view is
7 that the original certificates authorize the construction of
8 any electric plant.

9 COMMISSIONER CLAYTON: Then why does it matter
10 that you stipulate the type --

11 MR. BOUDREAU: Because that goes to the
12 specific authorization language that needs to be -- to try and
13 get specific authorization from this Commission in the form of
14 either a certificate or a clarification order, but to -- to
15 deal with the particular facilities that have caused this
16 crisis in addition to the broader question.

17 COMMISSIONER CLAYTON: Are there any other
18 facts?

19 MR. BOUDREAU: Whether or not the facilities
20 are actually in the certificated area of those prior orders
21 to --

22 COMMISSIONER CLAYTON: So the plot of land is
23 within the territory?

24 MR. BOUDREAU: Exactly. Exactly.

25 COMMISSIONER CLAYTON: Anything else?

1 MR. BOUDREAU: There were a number of -- the
2 corporate genealogy of the prior -- the prior certificates
3 because there were predecessors and interests, that's all been
4 established.

5 COMMISSIONER CLAYTON: Okay. Okay. Thank you.

6 MR. BOUDREAU: There are things like that.

7 JUDGE PRIDGIN: Commissioner Murray?

8 COMMISSIONER MURRAY: Mr. Boudreau, Aquila has
9 constructed power plants within its certificated areas since
10 its original certificates were granted; is that correct?

11 MR. BOUDREAU: I believe that to be the case,
12 yes.

13 COMMISSIONER MURRAY: And is this the first
14 time you've ever had to come back for specific authority
15 within the certificated areas?

16 MR. BOUDREAU: The reason I hesitate -- I think
17 the answer to that is yes, but the reason I hesitate is I'm
18 trying to think back now on how the Iatan facility was built.
19 It was near the juncture of the service area of Missouri
20 Public Service at that time and I think St. Joseph Light and
21 Power Company. There may have been a number of proceedings
22 where there were specific certificates sought by one or the
23 other of those companies. And I don't have a good grasp of
24 those facts. But with that caveat, I believe that to be the
25 case.

1 I'm not aware of where Aquila in -- in the area
2 certificated pursuant to 9470 and then subsequently 11,892
3 came in to get a -- any additional authorization. I believe
4 that the Sibley -- its base-load coal-fired power plant in
5 Jackson County, I believe Sibley was built pursuant to its
6 existing certificate, the same certificates we're talking
7 about here today. And I believe that the Greenwood facility
8 was as well.

9 There may have been others, but I'm not aware
10 of any where the company has come back in regarding this
11 certificated area and sought additional Commission authority.

12 COMMISSIONER MURRAY: And are you aware of
13 other utilities that have constructed within their
14 certificated areas without coming back for specific
15 authorization?

16 MR. BOUDREAU: I believe that -- it's been kind
17 of a mix of experiences. Up until about 1980, Union Electric
18 Company I think its practice was to come in and get a new
19 facility footprint certificate. That ended about 1980 because
20 of the Commission's policy determination at that time.

21 I can think of one example that I've referred
22 to earlier where the Empire District Electric Company,
23 pursuant to its 9420 certificate, sought a specific footprint
24 certificate for LaRussell generating station, but I don't
25 believe that that was a -- an established corporate policy. I

1 think that was an exception to the rule. And that other
2 facilities were built without coming back to the Commission.

3 COMMISSIONER MURRAY: In fact, if the Empire
4 case you're referring to is 1990 -- a 1977 case?

5 MR. BOUDREAU: I believe that's correct.

6 COMMISSIONER MURRAY: Okay. And I happen to
7 have that on my screen right now and the Commission stated
8 there in that order, Inasmuch as Empire has submitted
9 voluntarily to this Commission its application for authority
10 to construct these facilities, notwithstanding its existing
11 certificate of convenience and necessity under the Report and
12 Order in Case No. 9420, we choose to exercise our authority
13 and jurisdiction and do not treat the issue respecting the
14 efficacy of that certificate as authority for this facilities
15 involved in this proceeding.

16 MR. BOUDREAU: Right.

17 COMMISSIONER MURRAY: It seems clear that the
18 Commission was making a statement that because Empire came in
19 and voluntarily sought to -- authority to construct those
20 facilities, even though the existing certificate of
21 convenience and necessity allowed it, that they would
22 entertain the application and treat it as a separate request.

23 MR. BOUDREAU: That is the way that I've read
24 the language. I think that that was an indication from the
25 Commission of we're not sure why you're here, but since you've

1 asked for the authority, we'll go ahead and give it to you
2 without examining whether or not your existing certificate
3 does it for you or not. I think that was a signal from the
4 Commission that they thought that the filing was probably
5 unnecessary. That's the way I've read that language.

6 COMMISSIONER MURRAY: And would you
7 characterize what you are asking us here today similar to that
8 request from Empire?

9 MR. BOUDREAU: It's similar to that. If the
10 Commission -- if the Commission decides that it's
11 uncomfortable with the clarification order procedure, that the
12 alternative count -- or the alternative relief of
13 plant-specific overlapping certificate has been -- has
14 generally been modelled after the approach that was followed
15 in that Empire case.

16 COMMISSIONER MURRAY: Thank you.

17 MR. BOUDREAU: Thank you.

18 JUDGE PRIDGIN: Any further questions for
19 Aquila?

20 All right. Seeing none, this looks to be a
21 natural time to break. If we could, let's try to go back on
22 the record at the time on the clock at the back of the hearing
23 room at five after 10:00. We are off the record for a break.

24 (A recess was taken.)

25 JUDGE PRIDGIN: We're back on the record.

1 Next, I would like to hear from STOPAQUILA.org. Mr. Eftink,
2 if you would approach the podium, please.

3 MR. EFTINK: Yes. Judge Pridgin,
4 Commissioners, I appreciate the opportunity to be able to
5 speak today. And certainly if you guys have any questions at
6 all about my client's position, I would be glad to entertain
7 those questions.

8 I am Gerry Eftink, I have my office in Raymore,
9 Missouri and I represent an unincorporated organization known
10 as STOPAQUILA.org. And it consists of about 360 adults who
11 live around the site where Aquila has started building this
12 power plant without getting zoning or a proper franchise.

13 Of course, we oppose that. There's never been
14 a zoning hearing on this site, there's never been an
15 opportunity for the people to come in and state their
16 objections to the location, the pollution, to the noise and
17 all these problems, to the destruction of the roads that are
18 currently going on. I think the people have got a right
19 somewhere to come in and state their opposition.

20 And Aquila, it appears, is trying to avoid any
21 kind of a zoning type of a hearing under the first approach
22 anyway. Under the second approach, they're talking about a
23 public hearing or maybe they're asking that under either
24 approach, but what Aquila is asking for is that no city or
25 county have any zoning authority over it when it wants to put

1 in a power plant.

2 Now, what I want to impress upon you is how
3 serious this is. This would be such a precedent one way or
4 the other. Can you see imagine that you wake up one day and a
5 power company is building a power plant next to your house?
6 Now, when that happens, you might wonder where the zoning
7 authorities are and how they let that happen.

8 That's what happened to my clients. Aquila
9 started building this power plant and it turned out they did
10 not apply for a permit from the zoning authority for that
11 particular location. In fact -- and this is in the
12 stipulation of facts which is marked as Exhibit 2 -- Aquila
13 had applied for a permit from the planning and zoning board at
14 another location and had a hearing before the county planning
15 and zoning and got turned down.

16 And what they did was they moved into a more
17 populated area to start building their plant and Aquila
18 decided not to file any kind of application for zoning for
19 that power plant. So we filed suit to try to stop it and then
20 Cass County filed its action.

21 Now, when we started looking into the facts,
22 I'd point out that the joint stipulation of facts,
23 paragraph 19 talks about the county franchise. Under our
24 statutes, under our regulations and our case law, the public
25 utility, in order to build a power plant, has got to submit to

1 both the local authority and the Public Service Commission.
2 It can't just go to the Public Service Commission and ignore
3 the local authority.

4 Under the statute as I recall, it's 393.170,
5 there's a concept of something called franchises. And in
6 Missouri historically, power companies have got franchises
7 from the local authority, whether it's the city if it's built
8 in the city, or the county if they're building power plants in
9 the county.

10 And in paragraph 19 of the stipulation of
11 facts, it sets out in 1917 the Cass County Court, that would
12 be the Commissioners, at that time it was called the County
13 Commission, issued a franchise to Green, which is the
14 predecessor of Aquila. And that franchise was to set electric
15 light poles for the transmission of light.

16 The only thing that the franchise in Cass
17 County gave to Aquila or its predecessor was permission to put
18 in transmission lines. That's not permission to put in a
19 power plant. There's a huge difference between putting in a
20 power plant and putting in a transmission line. Okay. So
21 Aquila got that permission to put in transmission lines.
22 That's all they've ever gotten from Cass County.

23 Never before had Aquila tried to put in a power
24 plant in unincorporated Cass County, well, except for the
25 Harline deal where they went through zoning, they got zoning

1 approval for that. Then when 2004 came up, as I just
2 mentioned, Aquila applied for zoning for its power plant. It
3 was only after Aquila was turned down in its request that it
4 decided it didn't need county zoning. It also, as Judge
5 Dandurand pointed out, did not have a county franchise that
6 says anything about building a power plant.

7 In our brief, we go through the history of the
8 statutes and the case law and the PSC decisions and the PSC
9 regulations that talk about this dual authority system. Under
10 the interpretation of the courts of 393.170, the utility has
11 to get the consent of the local authority, in this case it's
12 Cass County, before it gets its certificate.

13 And the case law has fleshed this out. Under
14 the case law, the local authority continues to have control to
15 quite an extent over the public utility. I would point out
16 that in the case cited by the Public Service Commission called
17 Missouri Power and Light, it's cited on the first page of our
18 Motion to Dismiss, decided in 1973, I'll just read a quick
19 quote from that. And keep in mind that decisions of the PSC
20 and court decisions had already said that when these statutes
21 talk about the municipality, that means either the city or the
22 county, whichever is applicable.

23 The Public Service Commission in the Missouri
24 Power and Light said, We emphasize we should take cognizance
25 of and respect the present municipal zoning and not attempt,

1 under the guise of public convenience and necessity, to ignore
2 or change that zoning. That's exactly what Aquila's wanting
3 you to do. They want to have some kind of an order that says
4 they don't have to get zoning.

5 Further, in Missouri Power the Commission said,
6 about the application filed by Missouri Power to build a --
7 some kind of a peaking plant, We find that the applicant has
8 met our PSC requirement, that it has complied with municipal
9 requirements before construction of the facility.

10 Now, I emphasize the word "before" because, as
11 I said, we may be setting a terrible precedent one way or
12 another. The PSC has said before you start construction of
13 your plant, you meet all the local requirements. Well, Aquila
14 takes the position that it doesn't have to. In fact, it got
15 sued and an injunction was issued against Aquila. It kept on
16 building. So Aquila wants you to, you know, throw out these
17 prior decisions.

18 Now, there's a good reason why this Missouri
19 Power and Light case said that before you come in and ask for
20 a certificate, you have to show before construction that you
21 complied with all the local requirements because those
22 requirements are found in the case law in the prior PSC
23 decisions and the statutes and the regulations.

24 I have never found a case where a public
25 utility in Missouri in a first-class non-charter county has

1 attempted to put in a power plant without complying with the
2 local authorities. But that's what Aquila wants. If Aquila
3 gets its way, it will, and other public utilities, will be
4 able to put power plants anywhere they want. And nobody will
5 be able to stop them. They could put it next to your house or
6 your house or your house or your house. Because they say,
7 well, we've got a certificate of convenience and necessity
8 issued, what, 80 years ago and it contemplated this.

9 That is not logical. When you read the case
10 law, and we tried to cite it all in our Motion to Dismiss,
11 you'll see that there are numerous cases decided by the
12 Supreme Court and other courts and the PSC which talked about,
13 as I mentioned, this dual authority system where, and wisely
14 so, the electric company has got to comply with both the
15 Public Service Commission and the local authority.

16 If you knock the local authority out of it,
17 we're going to have chaos. This will be just an awful
18 precedent if you issue some kind of an order that says, well,
19 you don't have to comply with local zoning, you can put your
20 power plant anywhere you want.

21 And further, we've got a case where Aquila is
22 trying to say, oh, gosh, we're already half done, you know,
23 save us from our own bad conduct. Aquila knew before it
24 started that it had to get the local permits, but it went
25 ahead, started building. Now it's about halfway done and

1 says, oh, gosh, you can't expect us to tear this down.

2 Well, that puts you guys in quite a position.

3 That's not fair to you guys to come to you and say, hey, we're
4 halfway down, now can we have permission that we should have
5 got before we started from somebody. And I urge that the law
6 is if they've got the certificate of convenience and necessity
7 and they want to build a power plant, what they need to do is
8 go to the local authority, comply with their zoning
9 requirements, look at their franchise, see if the franchise
10 says that they can build a power plant.

11 If it doesn't, it should be simple to work with
12 the county, find a proper spot in its zoning scheme, get the
13 franchise or amend the franchise and they wouldn't bother the
14 Public Service Commission. But Aquila is trying to drag you
15 guys into this because Judge Dandurand issued an injunction
16 against Aquila which specifically says they have to comply
17 with the local zoning.

18 As I said, that would just be an awful
19 precedent because you know that other utilities would say,
20 well, Aquila got away with it, gosh, that's the way to do
21 things. Instead of applying for the permits that you need,
22 just go ahead and start building. And then when you're
23 halfway done, you can take the position that nobody should
24 make us tear this down. If you let Aquila get away with this,
25 then everybody else will follow.

1 But that's not the way it's supposed to be in
2 Missouri. If you read the cases and the statutes, look at
3 this legal scheme that we have in Missouri, it clearly
4 requires that the public utilities comply with both the local
5 authority and the Public Service Commission.

6 Now, okay, let's look at Judge Dandurand's
7 decision. If you interpret Judge Dandurand's decision to mean
8 that Aquila can do what's required if it goes to the PSC and
9 gets a specific order, okay, the law still requires that to
10 get the specific order from the Public Service Commission, the
11 utility has to show that it complied with all the local
12 requirements, including zoning.

13 Yeah, that's kind of a circuitous argument, but
14 that's the law. And there's a good reason for that. It's
15 because our General Assembly has passed these statutes that
16 recognize that zoning is very important.

17 How important is zoning? Well, I'll tell you.
18 We're talking about a first-class non-charter company. We're
19 not talking about second-class county, we're not talking about
20 third-class counties, which are in some of the cases cited by
21 Aquila. What we're talking about is a first-class,
22 non-charter county.

23 And under RSMo 64.285, title of that section is
24 Zoning Regulations to -- let me back up and start over. The
25 title of that section of the law is 64.285, Zoning Regulations

1 to Supersede Other Laws or Restrictions. This is discussed on
2 page 7 of our Motion to Dismiss. Okay. There are no
3 exceptions to this. This statute talks about how the zoning
4 authority for the first-class non-charter county supersedes
5 other provisions of a regulation and statute. Seems to me
6 like the General Assembly was saying we hold the zoning
7 statutes and the regulations there under in high regard.

8 Now, that section that was referred to by
9 Mr. Boudreau on zoning is also found in the section on
10 first-class non-charter counties. It's 64.235. And you may
11 have to, as I did, read this over two or three times to try to
12 understand what they meant.

13 First of all, you look at it literally, it says
14 that everybody has to comply with the zoning. And then it
15 talks about municipal projects, public improvements. And it,
16 in my opinion, says that if it's a municipal project or a
17 county project, then there's a limited exclusion. And in this
18 context what we're talking about is a possible exclusion for
19 the municipal entity when it gets a specific permit or order
20 from the Public Service Commission.

21 Now, Mr. Boudreau says that doesn't make any
22 sense. Well, first of all, I think it made sense to the
23 General Assembly. And there have been times, including now,
24 when there are statutes that do submit municipal commissions
25 or municipal entities to the jurisdiction of the Public

1 Service Commission. If I can find this, I'll tell you.

2 All right. Mr. Zobrist said that the Public
3 Service Commission has no authority to issue orders regarding
4 municipal entities. But if you look, for example, at RSMo
5 Section 386.800, it gives the Public Service Commission some
6 jurisdiction over municipally-owned utilities.

7 And if you go back through the statutes, you
8 know, some of these sections have been repealed, but there
9 were sections that talked about the Public Service Commission
10 having some control over municipal entities and utilities that
11 they get involved in. That was the context of when -- of the
12 time when our General Assembly passed these statutes.
13 I submit that they made sense at that time.

14 Well, today I understand the Public Service
15 Commission doesn't issue certificates of convenience and
16 necessity to municipal entities, but did they back in 1959?
17 The statute talks about specific permit or order. Did the
18 Public Service Commission ever issue orders involving
19 municipal entities? Well, I read some cases where they did.

20 So you can't say that the General Assembly was
21 nuts when they passed this statute. They were thinking that
22 everybody has to comply with zoning in a first-class
23 non-charter county, well, except if there's a government
24 entity, city or a county that's involved in a project --
25 owning a project. And there's an exception for them and

1 through that -- the end of that sentence about if it's
2 specifically authorized or -- that's not the right word,
3 specifically permitted by the PSC or by an order of the PSC.
4 That does not apply to Aquila.

5 Now, the judge talked about it a little bit,
6 but in his judgment issued in January, the judge -- one of the
7 first paragraphs said he wasn't making a legal interpretation
8 of that section. He made his decision regardless of how you
9 interpret 64.235. And Judge Dandurand said, okay, you have
10 caused or you will cause irreparable damage by not complying
11 with the local ordinances. And then he concluded by saying,
12 Aquila is enjoined from putting anything up that is not
13 consistent with the county zoning.

14 So did Judge Dandurand say they had to comply
15 with the county zoning? Yes, he did. That's what the
16 injunction plainly says.

17 So Aquila gives you half of the equation. They
18 just want to talk about the Public Service Commission and what
19 kind of certificates it can issue. It doesn't talk about the
20 meat of this case, which is the local zoning. And, of course,
21 that's going to be decided by the Court of Appeals.

22 I would fully expect that in short order, since
23 they're trying to expedite this, the Court of Appeals will
24 issue a decision -- and, of course, this is my opinion, but
25 I've spent quite a bit of time reading these old cases and

1 trying to sort this out, so my opinion might have a little bit
2 of merit. My opinion is that the Court of Appeals in short
3 order will say, as they've said before, the utility has got to
4 submit to authority of both the local city or county and the
5 Public Service Commission. They have different spears of
6 authority. In this case, they don't really overlap.

7 I would expect the Court of Appeals to say if
8 Judge Dandurand is saying that they have to comply with local
9 zoning, obviously he is, then, yes, that's a correct
10 interpretation of the law, the decision of Judge Dandurand is
11 fully supported and Aquila has to tear that down.

12 Now, that doesn't bother me. And I think it
13 shouldn't bother you. Because it is so important that we make
14 these public utilities comply with the rule of law. We should
15 not feel bad because a public utility intentionally decided
16 not to apply for zoning, knew that its franchise didn't say
17 anything about building a power plant and decided to go ahead
18 and build it and then try to throw itself, you know, in front
19 of you or in front of the court and say, oh, golly, we're
20 almost finished, you're certainly not going to make us tear it
21 down now.

22 Well, as I said, you've got to weigh this
23 against the consequences of permitting Aquila to benefit from
24 its own bad conduct. If you say that Aquila can get away with
25 this, you're opening the door. You would have to say every

1 other utility can go ahead and start building something even
2 if it doesn't have permit from the local authority, thumb its
3 nose at the local authority and then you're going to save it.

4 So I guess you guys would be involved in the
5 zoning business then. You'd have quite a bit of work because
6 you know that if Aquila gets away with this, many more will
7 try this tactic.

8 Now, if you guys have any questions of me, I
9 would try to answer.

10 JUDGE PRIDGIN: Mr. Eftink, thank you.

11 Commissioner Murray?

12 COMMISSIONER MURRAY: Thank you. Is it
13 pronounced Eftink?

14 MR. EFTINK: Eftink.

15 COMMISSIONER MURRAY: Eftink?

16 MR. EFTINK: Yes, that's right.

17 COMMISSIONER MURRAY: I think I understand your
18 position. And I have a few questions for you regarding the
19 proceeding here and why it is that we're being asked to do
20 anything.

21 It's my understanding that the court indicated
22 that -- basically the court interpreted that the certificate
23 of convenience and necessity that we had granted didn't give
24 specific authority. And that's why Aquila is back here to
25 clarify that this Commission gave specific authority. And

1 that is only, as I interpret it, the authority that this
2 Commission has the power to grant. It's not zoning authority,
3 it's not any other requirements that might have to be met.

4 So it appears to me that the only thing before
5 us is to determine whether Aquila has the authority from us to
6 proceed. And if I interpret what you say as being correct,
7 that's not the end of the story.

8 MR. EFTINK: No, that's not the end of the
9 story. And I think the end of the story will be in the court
10 system. And, of course, we maintain our position in the
11 courts that Aquila has to get the local zoning approval. It
12 doesn't have it.

13 COMMISSIONER MURRAY: And that's not anything
14 that we have anything to do with.

15 MR. EFTINK: That's right. That's right.

16 COMMISSIONER MURRAY: But we do have one part
17 of the puzzle, as I see it. Because the court has taken the
18 unusual position that Aquila doesn't have what it needs from
19 us at this point. And, therefore, we are being asked to
20 clarify that, yes, it does have the authority it needs from us
21 to construct within its certificated territory. And it's my
22 understanding that that's what we're being asked to provide,
23 is that authority that the Public Service Commission grants.

24 MR. EFTINK: And when you look at that, you
25 have to keep in mind that under the regulations, under the

1 statute, prior case law, the Public Service Commission has
2 said to the applicant, Show us that you are in compliance with
3 all the local requirements. And that's the insurmountable
4 object that Aquila has here. And it's my opinion that they're
5 trying to avoid that.

6 COMMISSIONER MURRAY: Now, I read that as that
7 they had -- they were granted their original certificates and
8 that they had to be in compliance at that time and that they
9 met those burdens or they wouldn't have been granted their
10 original certificates of convenience and necessity.

11 MR. EFTINK: Well, but if I could draw your
12 attention back to the case of Missouri Power and Light where
13 the PSC said that -- and this was a case where the applicant
14 was wanting to put in I think it was a peaking plant, some
15 kind of electric generating facility, the Public Service
16 Commission said that, We find that the applicant has met our
17 Public Service Commission requirement, that it has complied
18 with municipal requirements before constructing the facility.
19 And to explain that, the --

20 COMMISSIONER MURRAY: Excuse me. But was that
21 seeking a certificate before this Commission?

22 MR. EFTINK: Yes.

23 COMMISSIONER MURRAY: And what was the
24 certificate for?

25 MR. EFTINK: For building a electric generating

1 unit. I said it was a peaking plant. I think that's an
2 accurate representation.

3 COMMISSIONER MURRAY: Okay. Go ahead.

4 MR. EFTINK: And also in that same decision the
5 PSC said, We emphasize that we should take cognizance of and
6 respect the local zoning. So -- and this is backed up, as I
7 said, by the statutes like 393.170 and the regulations. Let
8 me give you a citation to the regulation. The regulation is
9 found at 4 CSR 240-3.105, that before building a power plant,
10 the applicant has to show to the Commission that before it
11 began construction, it met the local zoning requirements and
12 all local requirements.

13 It's obviously very important to require that
14 these public utilities do comply with all the local
15 requirements. And, you know, I'm -- of course, I'm involved
16 in these other cases too so maybe I'm spilling over into that
17 area, but that's really the crux of the matter is Aquila is
18 trying to avoid complying with the local zoning.

19 COMMISSIONER MURRAY: Are you familiar with
20 other utility applications for other utilities constructing
21 power plants within their certificated --

22 MR. EFTINK: Somewhat. I can tell you what I
23 know.

24 COMMISSIONER MURRAY: Okay. Are you aware of
25 other utilities that have constructed without coming back to

1 the Public Service Commission for specific authority to
2 construct on a site that is within their certificated area?

3 MR. EFTINK: Yes. Yes.

4 COMMISSIONER MURRAY: And is it your opinion
5 that they were not allowed to do that?

6 MR. EFTINK: No. That's not my understanding.
7 But I guess I'm talking about something different. I'm
8 talking about complying with the local zoning and you're
9 not -- you're not asking about that.

10 COMMISSIONER MURRAY: We're mixing apples and
11 oranges here.

12 MR. EFTINK: Right.

13 COMMISSIONER MURRAY: Because it appears to me
14 that -- and I'll just tell you where I think this thing falls
15 out, is that the original certificate granted Aquila the
16 authority within their certificated areas to construct. And
17 that they did not need, under our rules and regulations, to
18 come back before us for further authority to do that.

19 However, I don't think that that means that
20 they can ignore any county -- applicable county or zoning
21 laws. But I don't think it involves us. I think the court
22 involved us because maybe it was easier that way, but I think
23 we really are not the determining factor here.

24 MR. EFTINK: Well, in the main I agree with
25 what you're saying. But if I could, I would say that there's

1 case law -- I'd have to go back through and read it because
2 I've cited numerous cases and it's hard to recall all of them
3 right at the moment, but I believe in the Motion to Dismiss, I
4 cite to PSC cases and court cases which have talked about how
5 the certificate issued by the Public Service Commission cannot
6 give rights to the applicant that are not contained in the
7 local franchise.

8 And so you have to look at the local franchise
9 to make sure that you're not granting rights that are beyond
10 what is in the local franchise. So if you look at the local
11 franchise, which is contained as an exhibit to Aquila's
12 application, you'll see that what Cass County authorized
13 Aquila to do back in 1917 was to put in transmission lines.

14 Now, transmission lines are not defined
15 anywhere to be a power plant. So what I'm saying is the
16 present certificate, as far as Cass County is concerned, could
17 not authorize Aquila to put in a power plant in Cass County
18 because you can't go beyond what the franchise says.

19 COMMISSIONER MURRAY: Okay. Let me ask you
20 this. Why should a company have to come back to the Public
21 Service Commission for further certification to construct
22 within a territory that we've given them authority over to
23 begin with? Why shouldn't that just be between the local
24 officials and the utility?

25 MR. EFTINK: I agree with you, I think, because

1 what we are saying is this should only be between Cass County
2 and Aquila. Why are you dragging in the Public Service
3 Commission? You're putting them on the spot.

4 COMMISSIONER MURRAY: Except that the judge
5 stated that -- made some sort of a statement in his order that
6 referenced the Public Service Commission's authority.

7 MR. EFTINK: Right. And when the Court of
8 Appeals decides its case, as I've already said this I think,
9 but to repeat briefly, I would expect the Court of Appeals,
10 you know, to take more time and to give us an exposition on
11 the law and to say like prior cases have said, This is what
12 the PSC does, this is what the county does. In order to build
13 a power plant, you have to have a franchise from the county
14 that allows it, you have to have zoning, of course, you have
15 to comply with all the local ordinances and you have to have
16 the certificate from the PSC.

17 Well, maybe they've already got everything they
18 need from the PSC, but I expect the Court of Appeals to say
19 you don't have what you need from the county and the PSC can't
20 give that to you.

21 COMMISSIONER MURRAY: And I understand your
22 position that no matter what we give -- no matter what we do
23 here in this proceeding, that Aquila has still not met its
24 burdens to go forward. I understand that is your position.

25 MR. EFTINK: That's exactly our position.

1 COMMISSIONER MURRAY: Thank you.

2 MR. EFTINK: This is kind of a follow up, if I
3 could. I think we need to all slow down because this is an
4 important matter. We need to take our time and try to come up
5 with the right decision even on how we proceed. Why should we
6 rush to make a decision as to whether we're going to have, you
7 know, data requests by a certain time and have a hearing by a
8 certain time?

9 I think the first thing we should do is study
10 the issues such as what I put in my Motion to Dismiss. And
11 the County has a Motion to Dismiss also. And determine if
12 this matter should be involving the PSC at this time. If you
13 agree with my position, you would say, we can't give you what
14 you want, you have to go to the Court of Appeals.

15 COMMISSIONER MURRAY: But if we don't clarify
16 that, in terms of the authority they need from us, it is
17 there. If we don't clarify that and then they get to the
18 point where they meet their requirements from the county, then
19 they could be further delayed by having to come back to the
20 Public Service Commission and seek that specific authority.
21 Wouldn't it be better just to clarify that issue now?

22 MR. EFTINK: Well, as long as you don't get
23 into questions about whether they did what they were required
24 for the county or whether they had the proper franchise as far
25 as the county's concerned. This is kind of a brainteaser, you

1 know. It's complex.

2 But if the local franchise says that they can
3 put in power lines, as I said, the Commission can't extend
4 that. You cannot grant additional rights. So the only thing
5 the Commission can say is to clarify our prior order as far as
6 Cass County's concerned, you got to deal with them. Okay?

7 And my own opinion is that the utility -- if
8 they want to build something in Cass County by the way of a
9 power plant, they should first submit to local zoning and work
10 out the problem of the franchise.

11 Have I answered all your questions?

12 COMMISSIONER MURRAY: I think so.

13 MR. EFTINK: Like I said, it's kind of a
14 brainteaser.

15 COMMISSIONER MURRAY: Thank you.

16 JUDGE PRIDGIN: Commissioner Murray, thank you.

17 Do we have any other questions from the Bench?
18 Commissioner Clayton?

19 COMMISSIONER CLAYTON: Mr. Eftink, I just want
20 to ask a few questions for clarification. In your remarks
21 when you began, you made ref-- or it's been ongoing and I've
22 been reading so I apologize for this.

23 MR. EFTINK: Yeah.

24 COMMISSIONER CLAYTON: You referenced the
25 requirement that's listed in the filing requirements rule

1 where approval -- the local approval must be done prior to a
2 certificate being granted. It seems that rule makes reference
3 to in cases where approval is necessary and cases when
4 approval is not necessary. I assume that you have a statute
5 that -- that would set out whether or not prior approval for
6 zoning is necessary?

7 MR. EFTINK: Look at RSMo 393.170.

8 COMMISSIONER CLAYTON: Do you have that statute
9 in front of you?

10 MR. EFTINK: Yes, I do.

11 COMMISSIONER CLAYTON: Exactly what does the
12 relevant language say?

13 MR. EFTINK: Part one says -- and I'll try to
14 shorten it up, referring to electric corporations. No
15 electric corporation shall begin construction of an electric
16 plant without first having obtained the permission and
17 approval of the Commission.

18 Part two, Before such certificate shall be
19 issued, a certified copy of the charter shall be filed with a
20 certificate for the Commission together with a verified
21 statement of the president and secretary of the corporation
22 showing that it has received the required consent of the
23 proper municipal authorities.

24 Part three, Unless exercised within a period of
25 two years from the grant, the authority conferred by the

1 certificate shall be null and void.

2 Now, the cases, including cases we've cited in
3 our Motion to Dismiss, say that when this statute refers to
4 the required consent of the proper municipal authorities, that
5 includes both the cities and the counties which are -- is
6 applicable and in this case, of course, the cite is in the
7 unincorporated county.

8 COMMISSIONER CLAYTON: So basically you're --
9 and I apologize for not having your brief with me. I did look
10 at it a long time ago, but I did not look at it before coming
11 down this morning.

12 Principally you're relying on the rule
13 240-3.105 and Section 393.170?

14 MR. EFTINK: Well, I don't know about the word
15 "principally," but we do rely on that and also the case law.

16 COMMISSIONER CLAYTON: Okay. The first option
17 that has been proposed by Aquila relating to this clarifying
18 statement, my first question is, do you think that -- well,
19 tell me why you think that would not be appropriate to do
20 that, first of all. And second of all, even if we did do it,
21 would it have any legal significance?

22 MR. EFTINK: I doubt that it would have much
23 legal significance. As I was saying to Commissioner Murray,
24 if you look at the franchise that's been granted, if you're
25 just trying to clarify your certificate, I think you'd have to

1 say, Following the case law, we cannot expand upon the rights
2 granted by Cass County -- in Cass County. Now, if it was
3 Jackson County, that would be another matter. But since we're
4 looking at the county franchise, the PSC cannot take that
5 language that talks about allowing it to put in transmission
6 lines and change that into something entirely different.

7 And so if you just wanted to clarify, I don't
8 think you could add anything to that. About the only thing I
9 think you could do in a clarification order is say, hey, as
10 far as we're concerned, you got to go back to the county for
11 everything else.

12 COMMISSIONER CLAYTON: Okay. I don't have any
13 other questions. Thank you.

14 MR. EFTINK: You're welcome.

15 JUDGE PRIDGIN: Commissioner Clayton, thank
16 you.

17 Let me see if we have any further questions
18 from the Bench.

19 CHAIRMAN DAVIS: I'll pass for the time being.

20 JUDGE PRIDGIN: All right. Thank you.

21 Mr. Eftink, I don't believe I have any
22 questions for you. The Commission may have questions for you
23 later in the day. Thank you.

24 MR. EFTINK: Thank you.

25 JUDGE PRIDGIN: Next I'll hear from Cass

1 County. Mr. Comley will you be speaking on behalf of Cass
2 County?

3 MR. COMLEY: Yes. Thank you, your Honor.
4 Judge Pridgin, may it please the Commission.

5 I share the anchor position so there's quite a
6 bit of things already covered, but I think what I'm going to
7 try to do is very quickly and succinctly describe Cass
8 County's position with respect to the judgment entered by
9 Judge Dandurand and its effect on the application pending
10 before the Commission.

11 First, Judge Dandurand's decision is not about
12 Public Service Commission's jurisdiction. It is about zoning.
13 He has made a decision that describes for the Commission's
14 regulatory authority over utilities and Cass County's local
15 zoning authority meet. It represents I think the respected
16 position that municipalities and this Commission have had
17 through the law.

18 I think Mr. Eftink said it very well, that
19 there are two corollary systems that are respected under the
20 law, each respecting the other. Local authorities have
21 authority to examine the way public improvements are
22 constructed under their zoning provisions. This Commission
23 has authority to review safety, rates, other things that would
24 be affected by regulated utilities. They don't collide. They
25 can co-exist very well in a legal environment.

1 Let me emphasize the decision is not a decree
2 on how the Commission should operate. The decision does not
3 void or create any rules or decisions of the Commission. What
4 Judge Dandurand has determined is that Aquila lacks an item by
5 which to be exempt from local zoning, particularly under the
6 provisions of 64.235. They lack the items needed to be exempt
7 from local zoning.

8 There has been some intimation that this is a
9 widespread decision, that utilities statewide will be affected
10 by this. I'll reiterate what Gerry Eftink has said, and that
11 is, this is limited to first-class, non-chartered counties.
12 There are only 14 of those counties, as I understand our
13 reckoning to be. Out of 114 counties in the state,
14 conceivably Judge Dandurand's decision affects only 14.

15 Something that's not been emphasized yet and I
16 think it's time for me to do that, something that Judge
17 Dandurand had very well expressed in his decision was that if
18 he had ruled any other way, it would mean that Aquila could
19 construct power plants and associated facilities with no or
20 very little public oversight. That is the underlying theme of
21 his decision.

22 In this case, the South Harbor plant and the
23 substations represent major land developments in an area that
24 painstakingly went through the process of master planning land
25 use in the county. Under the circumstances, Aquila is not

1 exempt from the review processes established by law for review
2 and approval of such improvements in Cass County. That is the
3 judgment of Judge Dandurand.

4 One of my tort professors in law school was Jim
5 Jeans. And at one time he approached the Supreme Court about
6 the issue of sovereign immunity in the state and won. He had
7 the decision, went to the circuit court which was indicating
8 we're not going to pay you your judgment. And he wrote in his
9 brief at the circuit court that, as Noah would attest, there
10 were no rafts for the unbelievers when the flood hit. And let
11 me tell you, I think what the Commission is struggling with is
12 the effect of this judgment on its own operations. It's
13 there, it has to be contended with.

14 Let's get to the application. Commissioner
15 Murray, you mentioned that you thought that Judge Dandurand
16 entered his decision thinking that it may be the easiest way
17 to get to the conclusion, that is bring the Commission in,
18 have the applicant come before and try to get some order or
19 specific authorization for the plant.

20 Let me retort with, it may be just as easy for
21 Aquila to go ahead and comply with zoning. It didn't have to
22 come here. It could have gone to local zoning. It did not.
23 It decided to come here and ask for something which I
24 understand the Commission has never granted. If the
25 Commission never grants those things, that's irrelevant to the

1 court's decision. If the Commission can't grant the relief by
2 which to exempt Aquila from zoning, then it needs to go back
3 to the county and comply with the zoning requirements.

4 It's also talked about -- I haven't had a
5 chance to read Exhibit 1, but I think the request for a
6 specific authorization order, if we use the first request in
7 their application, it's hard for me to understand how using
8 certificates of convenience and necessity that were issued by
9 this Commission over decades and many decades ago, how the
10 Commission could enter an order that says, We've looked at
11 your certificates, you have authority to do the transmission
12 lines and distribution systems and, by the way, you have
13 specific authorization to put the South Harbor plant in based
14 upon these ancient certificates of convenience.

15 I think that under the circumstances, that
16 would be a direct contradiction to the finding of the circuit
17 court. The circuit court has taken on its foundation all the
18 certificates that have been granted to Aquila. The court has
19 made the interpretation, the court has interpreted those
20 certificates and made the conclusion that they are
21 insufficient to grant specific authorization for construction
22 of this plant.

23 Issues of collateral attack. There has not
24 been a collateral attack on any of the Commission's decisions.
25 The Commission's decisions have been interpreted and that is

1 all.

2 Our position is that if you would proceed under
3 the first prong of the applicant's request, and that is for
4 just a clarification order, it would be in defiance of Judge
5 Dandurand's own findings.

6 The second request, as I mentioned, the
7 Commission's rules have not been affected by this. And
8 Mr. Eftink has brought that up as well. Presuming that only
9 the site-specific authority request is left in the
10 application, then in order to comply with the Commission's
11 rules, Aquila will have to show that it has acquired --
12 according to the rule, it has to show it's acquired consent or
13 franchise and that would be from either the county or the
14 city, whichever local subdivision would be affected by the
15 construction.

16 There's been some remarks that this is
17 circuitous reasoning. It's not. I'll point out to you it's
18 very linear. Your own rules require applicants to have these
19 things attached to their applications. Aquila is asking for
20 authority to construct an electric production plant. It is a
21 site-specific request, but nonetheless, it is part of your own
22 rules. These rules comply with -- and are promulgated
23 pursuant to Section 393.170 and other statutes.

24 So our position has been local consent has not
25 been acquired. And I know I'm arguing a little bit about our

1 Motion to Dismiss and I don't intended to re-argue it. It's
2 just that at this stage of the game, and I think Mr. Eftink
3 said it too, it would have been easier for Aquila to simply
4 have gotten the zoning. And that was the requirement of the
5 court.

6 We think the Commission should adopt a
7 procedural schedule in this matter that gives meaningful
8 opportunity for the public to participate. I think it's fair
9 to say Cass County is not opposed to construction of power
10 plants in its county. The unincorporated area of Cass County
11 is a place where power plants can be constructed. The issue
12 is whether those power plants are exempt from zoning.

13 In this case we want to have power plants
14 constructed in accord with the zoning laws of the county or
15 only those that are exempt from those laws. That's the way
16 we'd prefer it.

17 There is a large constituency to consider. And
18 in some respect, STOPAQUILA.org's position and Cass County's
19 position may overlap in that respect because we do in some
20 respects represent similar constituencies.

21 Meaningful opportunity for the public to
22 interact with you and those who may make the decision that
23 affect their livelihoods and the place they live. That is the
24 undercurrent, in fact, the underscored theme of Judge
25 Dandurand's decision in this case. And I think under the

1 circumstances that the Commission would be well within its
2 discretion to allow the procedural safeguards that have been
3 placed into this second procedural pathway in the joint
4 motion.

5 And I think that's all of my remarks. I think
6 I've covered most everything.

7 JUDGE PRIDGIN: Mr. Comley, thank you. Let me
8 see if we have any questions from the Bench.

9 Mr. Chairman?

10 CHAIRMAN DAVIS: Pass.

11 JUDGE PRIDGIN: Commissioner Murray?

12 COMMISSIONER MURRAY: Just one or two,
13 Mr. Comley. Let me think how to phrase this. If we were to
14 proceed under the second alternative to determine whether to
15 grant a specific certificate for that construction site and if
16 you are accurate that Aquila would have to provide to us proof
17 that they had the requisite approvals from the county, then
18 would it not be clear from the pleadings that that
19 requirement --

20 MR. COMLEY: Has not been met.

21 COMMISSIONER MURRAY: -- is not met?

22 MR. COMLEY: Yes. That's clear from the
23 pleadings.

24 COMMISSIONER MURRAY: So what would be the
25 purpose of going forward with that route if we determined that

1 we had to grant specific authority beyond what their original
2 certificate allowed?

3 MR. COMLEY: Please consider all my remarks
4 today contingent upon your decision to deny our Motion to
5 Dismiss. Our Motion to Dismiss indicates there really is no
6 purpose for this.

7 COMMISSIONER MURRAY: Okay. Thank you.

8 JUDGE PRIDGIN: Commissioner Murray, thank you.
9 Commissioner Gaw?

10 COMMISSIONER GAW: I think just, hopefully,
11 quickly. The concept of providing the documentation on the
12 rule, is that clearly established from your standpoint,
13 Mr. Comley?

14 MR. COMLEY: I think it's been a consistent
15 rule of this Commission for some time. I've got a copy of the
16 rule. I noticed that the authority listed is 386.250, but
17 honestly, we're talking about 4 CSR 243.105.

18 COMMISSIONER GAW: Yes.

19 MR. COMLEY: And I'm looking at subparagraph I
20 think it is D1 -- excuse me, yes, subparagraph 1D1. And I
21 think that's pretty well lifted right out of Section 393.170.

22 COMMISSIONER GAW: 393.170. Now, clarify for
23 me in Section 170, I know it was referred to earlier because
24 there it refers to proper municipal authority.

25 MR. COMLEY: Right.

1 COMMISSIONER GAW: And I heard someone say
2 there's case law establishing that that is broader than what
3 would traditionally be --

4 MR. COMLEY: Yes, there is.

5 COMMISSIONER GAW: -- known as a municipality.
6 So have you cited that in your motion?

7 MR. COMLEY: There is authority in our Motion
8 to Dismiss indicating that that has been construed to include
9 county authorities.

10 COMMISSIONER GAW: In regard to that particular
11 statute or just in general, do you recall?

12 MR. COMLEY: As I recall, yes. It was Section
13 393.170 under construction and, yes, the court did conclude
14 that county authorities were required to be conferred with. I
15 think it was a water case.

16 COMMISSIONER GAW: Was it that 64 case with
17 Jackson County or was it something different? That's all
18 right.

19 MR. COMLEY: I don't know. I'm sorry.

20 COMMISSIONER GAW: I know that's hard to do off
21 the top of your head. I know there's a 64 case that happens
22 to be in the RSMo, so I just wondered whether that was it.

23 Now, if that's the case then, if you go to
24 the -- if you go to D1, is your argument that where it says
25 something like when approved -- when approval of the affected

1 governmental bodies is required, evidence must be provided.
2 Now, where do you -- where is it that you're referring to that
3 says it must be --

4 MR. COMLEY: Required?

5 COMMISSIONER GAW: -- required, yeah. That it
6 is required. Where do I go --

7 MR. COMLEY: This may be where the circle
8 starts that Mr. Boudreau was talking about. The court has
9 concluded already that Aquila's franchise with the county is
10 not sufficient to justify the construction of this plant. So,
11 again, I'm thinking the court has made a conclusion already
12 that its franchise is insufficient to warrant the construction
13 has planned.

14 We've got a finding by the court that it's not
15 there. In order for them to be exempt from zoning, they have
16 to have it. In order for them to get a site-specific
17 authority, they've got to have it too.

18 COMMISSIONER GAW: Well, is your argument that
19 393.170, subsection 2 is where it's required that there be
20 some consent from the county?

21 MR. COMLEY: Yes. I think that's the right
22 paragraph. I haven't got that in front of me. There's three
23 paragraphs in that section, aren't there? And I think
24 No. 2 --

25 COMMISSIONER GAW: There are three, yes. In

1 part it says, Before such certificate shall be issued, a
2 certificated copy of the charter of such corporation shall be
3 filed in the office of the Commission together with a verified
4 statement of the president and secretary of the corporation
5 showing that it has received the required consent of the
6 proper municipal authorities.

7 Is that what you're referring to?

8 MR. COMLEY: Right. Exactly.

9 COMMISSIONER GAW: Okay. Now, someone
10 suggested earlier, maybe it was you, that this only applies to
11 first-class non-chartered counties --

12 MR. COMLEY: That's true.

13 COMMISSIONER GAW: -- this argument that's
14 being made. No other county government would have this
15 requirement?

16 MR. COMLEY: That's my understanding of Judge
17 Dandurand's decision. It affects only first-class
18 non-chartered counties.

19 COMMISSIONER GAW: Did you do any research on
20 the other political subdivisions, particular counties in that
21 regard?

22 MR. COMLEY: No, I didn't but there may be
23 someone who did. And she is here ready to visit if you would
24 like.

25 COMMISSIONER GAW: Okay.

1 MR. COMLEY: Would you like that?

2 COMMISSIONER GAW: Is it co-counsel of some
3 sort?

4 MR. COMLEY: Let me introduce you to Cindy
5 Reams Martin. And she can probably describe the extent of
6 research done on this issue.

7 COMMISSIONER GAW: Is she an attorney?

8 MR. COMLEY: Yes, she certainly is.

9 COMMISSIONER GAW: Okay. That's my main
10 concern. Who does she work with and who does she represent?
11 You probably already announced that before I got in.

12 MS. REAMS MARTIN: Your Honor, my name is Cindy
13 Reams Martin, I represented the county in the trial court. So
14 I was intimately involved in the trial of this matter and the
15 briefing of this matter and the research of this matter. And
16 you asked if I'm an attorney and there are days I wonder why I
17 am.

18 COMMISSIONER GAW: I have the same questions of
19 myself.

20 MS. REAMS MARTIN: Two things in response to
21 your question. First, the order by its terms clearly
22 interprets but one statute. And 64.235 by its terms clearly
23 applies only to first-class non-chartered counties.

24 Second, in response to your question, there are
25 corollary statutes in different schemes of the Missouri

1 Revised Statutes that relate to first-class charter counties
2 and to second- and third-class non-charter counties. The
3 language in the corollary statute for second- and third-class
4 non-charter counties, which is 64.620, that is the statute, is
5 different than the language in 64.235 in a number of material
6 respects.

7 And most important to this Commission, the
8 language is different in that 64.235 includes the requirement
9 of specific authorization or permission for the particular
10 plant that is being constructed or development or improvement
11 that's being constructed.

12 The language in 620, which was not applicable
13 to the court's decision, which has not been interpreted in a
14 context to bring a case like this before the Commission, I
15 suspect it remains to be seen, but it is very fair to conclude
16 that this particular judgment will be deemed to apply to
17 interpret a statute that involves approximately 14 counties in
18 this state.

19 COMMISSIONER GAW: Okay. Okay. That's helpful
20 to me. Thank you.

21 Mr. Comley, do you have any other examples of
22 where a rule that you've referred to would require some filing
23 up front as you're suggesting that it does in this case? And
24 I'm not sure that it's -- I mean, I can ask that of some
25 others as well, but the language is there saying that if you

1 have to file -- that if it's required, that you have to file
2 it. But then there's another provision right under it that
3 says if you don't have to file, you don't have to file
4 anything. I don't know exactly -- if it's not required, you
5 don't have to file anything, something like that. I'm really
6 paraphrasing and I apologize, but the rule has disappeared
7 from Commissioner Clayton's computer.

8 So my question is -- my question is, give me an
9 example, if you have any, of any other place where -- I think
10 it's D1 --

11 MR. COMLEY: Well, I scratch my head --

12 COMMISSIONER GAW: -- of 243.105 might apply in
13 a filing other than this non-chartered first-class county.

14 MR. COMLEY: Well, I think that, again, first,
15 the rule may apply to municipalities too, but there would
16 be -- there would be a franchise right for a utility to go
17 ahead and construct a larger power plant within the
18 municipality boundary. There would have to be a filing to
19 that effect or it's not required because they already have one
20 or we're in a small city and we don't need a franchise or
21 we're not going to compete with cooperatives.

22 I guess there's other parts of this rule or
23 like this rule in connection with certification for water and
24 sewer companies. For water companies, I think there would
25 have to be some showing of the community well or whatever

1 other facilities have been approved by DNR. These kinds of
2 permits would have to be required.

3 Local franchises, I suspect there would be a
4 local franchise for a water system too or gas companies. They
5 would have to have showing of a franchise in order to make use
6 of public rights of way. So I wouldn't be able to cite you
7 those exact rules. I contemplate that they are there
8 respecting the certification requirements for gas, water and
9 sewer companies.

10 COMMISSIONER GAW: Okay. All right. I'll
11 leave it at that and maybe some others might want to address
12 it as well. That's all I have. Thank you.

13 JUDGE PRIDGIN: Commissioner Gaw, thank you.

14 Commissioner Clayton? All right. Thank you.

15 Mr. Chairman?

16 CHAIRMAN DAVIS: Mr. Comley, can you explain to
17 me why that this is more than an issue of just a bunch of
18 people who don't want a power plant built in their backyard?

19 MR. COMLEY: Well, the court's decision I think
20 would reflect that that's more than just the issue. It's the
21 issue of local zoning ordinances, comprehensive plans, land
22 use, intensity uses in counties and the rights of others
23 wanting to use those -- those lands. So --

24 CHAIRMAN DAVIS: No further questions at this
25 time.

1 JUDGE PRIDGIN: All right. Thank you.

2 Let me see if we have any follow-up questions
3 from the Bench. All right. Seeing none, Mr. Comley, thank
4 you.

5 Ms. Shemwell, is Staff ready to proceed?

6 MS. SHEMWELL: Yes. Thank you. May it please
7 the Commission. Sorry.

8 The position of the general counsel's office is
9 that Aquila already has the authority it needs under its
10 current certificate of convenience and necessity, that the
11 policy of this Commission has been that there are
12 circumstances under which the Commission may proceed and grant
13 additional authority, but that they don't have to, but that
14 they may. This may be one of those cases.

15 Certainly the Commission I believe has
16 authority -- there's a lot of case law that says you have the
17 authority to interpret the statute under which you operate or
18 your authorizing statute. You also have the authority to
19 interpret the rules under which you order and determine what
20 your own precedent has been as well as to set policy.

21 The parties have suggested two tracks under
22 which the Commission may proceed. It seems to me that Aquila
23 is the applicant in this case, it is asking for specific
24 relief from the Commission. And that if the applicant is
25 comfortable with the clarification or I might call it an

1 interpretation order, then that should be fine. It does
2 permit a more expedited process, which is important to Aquila.

3 Staff agrees that the relevant facts have
4 generally been stipulated to and the issues are primarily
5 legal issues. And I think that the question is, can the
6 Commission grant the relief that Aquila has requested? And I
7 certainly believe that they may.

8 The Commission does have primary jurisdiction.
9 It has certain expertise in considering its authorizing
10 statutes, orders and policies. The Public Service Commission
11 law is a broad regulatory scheme that shows the legislative
12 intent that the Commission be the primary authority regulating
13 utility companies. The Act was promulgated as a remedial
14 statute for the Commission to act in the public interest.

15 I don't know that the Commission need reach
16 firm conclusions about what Judge Dandurand's order says or
17 what Aquila must do to meet it. I think Aquila -- I think the
18 order can be interpreted in a number of ways. Aquila has
19 interpreted it to say that they would like an order from the
20 Commission that their current certificate provides all the
21 authority that they need.

22 The zoning laws that Judge Dandurand
23 interpreted do provide for an exemption and Aquila, I believe,
24 is here asking for what it thinks it needs to meet that
25 exemption.

1 In terms of what kind of hearing is necessary,
2 the Staff is recommending a public hearing. I'm not sure that
3 it is absolutely necessary under the first recommended
4 procedural schedule, but we recommend it as a good idea for
5 the Commission to hold a public hearing.

6 In terms of the zoning authority, Aquila was
7 required to come in before this Commission and get zoning
8 authority before it came for its original certificate. The
9 Commission could not grant the original certificate without
10 that zoning authority.

11 We believe that once they have zoning
12 authority, they have the right to operate within that
13 territory and, in fact, the obligation to serve the citizens
14 of that territory. That obligation includes building of power
15 plants.

16 We believe it is reasonable for the Commission
17 to interpret the statutes under which it operates, its policy,
18 its understanding concerning the scope of the CCN that it
19 granted and its own orders. I do not believe you would be
20 defying the circuit court order in doing that.

21 I think that's all I have unless you have
22 questions.

23 JUDGE PRIDGIN: Ms. Shemwell, thank you.

24 Let me see if we have questions from the Bench.
25 Mr. Chairman?

1 CHAIRMAN DAVIS: Pass.

2 JUDGE PRIDGIN: Commissioner Murray?

3 COMMISSIONER MURRAY: Ms. Shemwell, then is it
4 your interpretation that the original certificate met the
5 requirements of the zoning laws because in order to get that
6 original certificate, they had to provide proof to the
7 Commission that they had met those requirements? Is that your
8 interpretation?

9 MS. SHEMWELL: Commissioner Murray, there's no
10 case law out there interpreting the zoning laws. And I
11 believe the Western District is going to do that. And I'm not
12 sure that this Commission needs to interpret the zoning laws
13 that STOPAQUILA and Cass County are raising.

14 However, I will stay that to get their original
15 certificate, they had to come in here and present to this
16 Commission their authority to operate in Cass County. I don't
17 know that that was their original -- they expanded later in
18 about 1934, but they had to come in in order to get a
19 certificate and show that they had zoning -- or authority from
20 Cass County to build in that area. And once they had that,
21 that's a prerequisite to the Commission granting a
22 certificate.

23 I will say that interpreting certificates, the
24 courts have said that the corporation already says all the
25 authority it needs to operate. The certificate grants it the

1 right to exercise that power and that authority. So as a
2 corporation, it already has all the power it needs to do this,
3 but then they exercise that through the Commission.

4 They had to come in at that point and show that
5 they had permission from local authorities to proceed and
6 build in that area. And I believe that the certificate would
7 not have been issued at that time if they had not shown that
8 they had franchise authority.

9 COMMISSIONER MURRAY: All right. So is it your
10 interpretation that if Aquila receives what it's requesting
11 from us here in terms of clarification that their original
12 certification granted them the authority, that they are exempt
13 from further planning and zoning laws, or are you taking a
14 position on that?

15 MS. SHEMWELL: Again, I think the Western
16 District is going to interpret 64.235. And I'm not sure that
17 this Commission needs to or should. But Aquila, certainly
18 what they -- I mean, this is their concern with getting their
19 power plant built and what meets their requirements. I think
20 it's up to them to decide and present to this Commission and
21 ask for that relief.

22 COMMISSIONER MURRAY: Okay. And is it your
23 position that it is sensible for Aquila to seek that from us
24 as one step in the process to prevent further delay?

25 MS. SHEMWELL: I do. Clearly the zoning

1 statute has exemptions. And Aquila is coming to this
2 Commission stating that it believes that an order from this
3 Commission will give it the ability to fall within one of
4 those exemptions. And that's their interpretation of the law.
5 I mean, I think that that's fine for them to interpret it that
6 way. We don't know. Again, the Western District will really
7 decide.

8 But they have -- they believe that the order
9 that they're requesting from this Commission will give them
10 that exemption. I don't want to speak for them or misstate
11 their position at all, but I think that's why they're in here
12 is that they believe then they will fall under that exemption.

13 COMMISSIONER MURRAY: And if we were instead to
14 follow the alternative approach and look at granting an
15 overlapping certificate, would that, in your opinion, require
16 a showing that there had been specific authority granted by
17 the county for that location?

18 MS. SHEMWELL: I'm not sure. I mean, Staff's
19 position is that they have that authority already.

20 COMMISSIONER MURRAY: Yes. And that would be
21 if we took the first alternative, we would determine it that
22 way. Correct? That their original certificate gave them the
23 authority?

24 MS. SHEMWELL: I think that's right. I think
25 you can give an additional certificate. I think you would

1 also need to find that its original CCN was issued pursuant to
2 them already having authority from the county. Again, though,
3 I'd like to emphasize that they have really -- I mean, they're
4 the applicant, they're asking for this clarification
5 procedure. And if that's what they're recommending,
6 personally -- I mean, I think that's fine to proceed in that
7 way.

8 COMMISSIONER MURRAY: It's the --

9 MS. SHEMWELL: Mr. Joyce, the general counsel,
10 reminds me that we will address that in our response to their
11 Motion to Dismiss in further detail.

12 COMMISSIONER MURRAY: Okay. But it is somewhat
13 imperative that we make a decision as to which track we're
14 going to follow, I would think. Is it general counsel's
15 position that there is good reason to simply clarify that they
16 have the authority from us that they need under their original
17 certificate?

18 MS. SHEMWELL: I believe that that's the relief
19 that they're asking for.

20 COMMISSIONER MURRAY: And you're not objecting
21 to that relief; is that correct?

22 MS. SHEMWELL: That's correct.

23 COMMISSIONER MURRAY: Thank you.

24 JUDGE PRIDGIN: Commissioner Murray, thank you.

25 Commissioner Clayton?

1 COMMISSIONER CLAYTON: I'm sorry. I've got a
2 bunch of paper up here and I've been reading that. I want to
3 go back and just clarify something.

4 You're not taking a position on the second --
5 the second alternative way of proceeding proposed by Aquila,
6 that granting the overlay certificate -- you're not taking a
7 position whether they can move forward or not?

8 MS. SHEMWELL: We're not taking a position as
9 to -- I mean, as to which is the best approach. We think as
10 the applicant, they've asked for certain relief from the
11 Commission and --

12 COMMISSIONER CLAYTON: I understand. I
13 understand. I understand your position on the first choice
14 that they've provided. On the second choice, in seeking -- or
15 making decisions on their application for an overlaying
16 certificate, is it Staff's position that they've complied with
17 the statutes and Commission rules in making that application?

18 MS. SHEMWELL: I don't -- yes, we haven't
19 looked at that yet, but we can brief it certainly in our
20 response to their Motion to Dismiss.

21 COMMISSIONER CLAYTON: Okay. So you haven't
22 looked at that?

23 MS. SHEMWELL: We haven't looked at that.

24 COMMISSIONER CLAYTON: Okay. How many
25 certificates does -- or I guess which certificates is Staff

1 looking at in relying on its position that the company already
2 has the authority? Are there one, two, three, four? How many
3 certificates are there?

4 MS. SHEMWELL: Aquila has numerous
5 certificates. The Commission has asked for them to file
6 those. And I think they're going to do it as quickly as
7 possible and certainly we can -- perhaps when we have those in
8 front of us, it will be clearer. But that an area certificate
9 gives the company the right to -- and the obligation to serve
10 that community, that area, wherever they're certificated.

11 COMMISSIONER CLAYTON: So you haven't reviewed
12 the certificate?

13 MS. SHEMWELL: We have looked at the
14 certificates.

15 COMMISSIONER CLAYTON: You have?

16 MS. SHEMWELL: I think there's a 1934
17 certificate that expanded to the Cass County area.

18 COMMISSIONER CLAYTON: Do you have the number
19 of the certificates that you say -- I want to know the exact
20 certificate that you say gives them the authority.

21 MS. SHEMWELL: Okay. Our opinion is that the
22 certificate granted -- the area certificate granted -- and
23 I'll get you the number. I don't have it here in front of me.

24 COMMISSIONER CLAYTON: Okay.

25 MS. SHEMWELL: Gives them the authority to

1 provide service and, again, the obligation to provide service
2 to that area. When you grant an area certificate to any
3 company --

4 COMMISSIONER CLAYTON: Whatever -- you're using
5 titles of types of certificates. That's fine. I want to know
6 the actual piece of paper that you are relying on in making
7 this decision.

8 MS. SHEMWELL: Yes, sir.

9 COMMISSIONER CLAYTON: Now, have you looked at
10 the exhibit or the proposed findings that were submitted by
11 Mr. Boudreau earlier?

12 MS. SHEMWELL: I have just seen them. I have
13 not looked at them -- I've not read them completely yet.

14 COMMISSIONER CLAYTON: That document was not
15 provided to you at the beginning of this proceeding?

16 MS. SHEMWELL: It was.

17 COMMISSIONER CLAYTON: It was. Okay. But you
18 just looked at it?

19 MS. SHEMWELL: I haven't actually read it.

20 COMMISSIONER CLAYTON: Are you aware of which
21 certificate numbers, there are several listed on this, that
22 would be applicable? Are you able to look at those in
23 determining where you base your position?

24 MS. SHEMWELL: I think what will be most
25 helpful is once they file those, we can file something with --

1 COMMISSIONER CLAYTON: Do we not have those?

2 Does the Commission not have those?

3 MS. SHEMWELL: Mr. Boudreau had to dig
4 through --

5 COMMISSIONER CLAYTON: Does the Commission not
6 have them? I mean, they may or may not be pre-EFIS, but I
7 assume we've got a paper copy.

8 MR. ZOBRIST: Commission Clayton, Karl Zobrist.
9 We obtained these from the Commission's records. Some were at
10 the Secretary of State's Office in the archives, but these are
11 the Commission records.

12 COMMISSIONER CLAYTON: Okay. Ms. Shemwell,
13 have you reviewed these certificates?

14 MS. SHEMWELL: I have reviewed some of the
15 certificates.

16 COMMISSIONER CLAYTON: Some of the
17 certificates. Okay. Can you tell me whether or not you -- or
18 I mean Staff supports this language that's been submitted by
19 Aquila?

20 MS. SHEMWELL: I have not read it, but I will
21 read it and can tell you after lunch.

22 COMMISSIONER CLAYTON: Okay. Will you be able
23 to tell us after lunch whether you think -- well, I don't know
24 if we're going to be after lunch so I'll withdraw that
25 question.

1 But I will state that I hope that Staff will be
2 able to file with more specificity the certificates on which
3 it's relying. And I also want to know what Staff's position
4 is on the overlying -- the new certificate that's the second
5 request, whether or not we can proceed on that based on
6 whether Aquila has complied with state law and by Commission
7 rule and order, can we move forward or not.

8 MS. SHEMWELL: Yes, sir.

9 COMMISSIONER CLAYTON: I want to make sure we
10 know Staff's position on that.

11 I don't think I have any other questions beyond
12 that. Thank you.

13 JUDGE PRIDGIN: Commissioner Clayton, thank
14 you.

15 Commissioner Gaw?

16 COMMISSIONER GAW: Just, hopefully, briefly.
17 Ms. Shemwell, help me to understand Staff's position -- how
18 Staff's position is not in contravention of the circuit court
19 order in Cass County.

20 MS. SHEMWELL: Could you be a little more --
21 let's look at the order.

22 COMMISSIONER GAW: Go ahead and look at the
23 order if you want to.

24 MS. SHEMWELL: Yes, sir.

25 COMMISSIONER GAW: Help me understand how your

1 conclusion is not contrary to the conclusion of the circuit
2 court.

3 MS. SHEMWELL: The court finds -- and it says
4 that or -- there's an or in there in this -- on page 3, that
5 Aquila must obtain a specific authorization in its certificate
6 of convenience and necessity pursuant to the provisions of
7 this chapter to build a power plant within -- and we know it's
8 within their certificated area and service territory.

9 So it says they must obtain a specific
10 authorization in its certificate of convenience and necessity.
11 I'm not positive what the word "in" means, but I think the
12 position that Aquila is taking is they already have the
13 specific authority.

14 COMMISSIONER GAW: I understand that. But
15 didn't the court hear evidence in regard to that? When we're
16 looking at what's in that order, doesn't it appear to you that
17 the court concluded that they must not have it already or they
18 wouldn't be suggesting that they need to acquire one?

19 MS. SHEMWELL: I think the court was not
20 convinced that it necessarily is already in there. But I
21 think it says that -- it still gives them the right to obtain
22 that from the Commission.

23 COMMISSIONER GAW: But the first request of
24 Aquila is to -- isn't it basically to make a finding opposite
25 to what the court in Cass County has already reached?

1 MS. SHEMWELL: It seems to me that what they're
2 doing is trying to obtain specific authorization from the
3 Commission.

4 COMMISSIONER GAW: But you're suggesting, I
5 thought, that that authority already exists.

6 MR. JOYCE: May it please the Commission, Dan
7 Joyce. Let me -- because this is generally a legal argument
8 and the general counsel's been more involved on the legal part
9 of this case, let me try to address that.

10 I think as Ms. Shemwell started out saying, is
11 that the Staff is stating that it is not opposing the relief
12 that the petitioner, that the applicant has made, which is
13 either for a more specific statement from the Commission as to
14 what authority it has or a -- what we've been calling a
15 footprint certificate.

16 It is not Staff's position and it will not
17 assert a position that the Commission has the authority
18 already. That -- as you correctly state, that is a matter at
19 issue in the circuit court and --

20 COMMISSIONER GAW: You mean that the company
21 has the authority?

22 MR. JOYCE: That the company -- right. That is
23 not a position that we're asserting in this case. If that
24 were to be the case, the Staff would be supporting a Motion to
25 Dismiss the other for another -- for the other reason,

1 opposite the reasons that the county and STOPAQUILA.org are
2 seeking. So that is not a position that the Staff is
3 asserting in this case.

4 Staff is merely stating that the -- the routes
5 that the company wants to proceed in, whether for the more
6 specific statement or for the site-specific authority, are
7 permissible.

8 COMMISSIONER GAW: I guess what I'm having
9 trouble with is the first part of it. Trying to seek some
10 sort of an order, whatever you call it, whether it's a
11 declaratory order or some sort of a modification of an order
12 that has been on the records for many, many years, how is that
13 not just re-interpreting what the circuit court has already
14 interpreted for us?

15 MR. JOYCE: Well, I don't know if it was
16 directly put in front of the circuit court as a matter of
17 determining the authority that the Commission had in the
18 certificate. I think it was put in the context of the
19 statute, 64.235. And the case was framed within that and only
20 insofar as the court had to determine did the Commission
21 have -- already grant specific authority did the court look at
22 the certificates that had been granted to the company.

23 So I think the court was looking at it under
24 the telescope -- or microscope, so to speak, of just how does
25 it fit within 64.235, just not generically what kind of

1 authority does the company have under the -- under the
2 certificates as has been granted.

3 COMMISSIONER GAW: Well, I heard earlier that
4 you all were taking a position, I thought, that, first of all,
5 there may have -- that the company may already have authority
6 from the Commission, which I think has already been determined
7 not to exist, but I'll stand to be corrected if that's not
8 true. And that the County of Cass must have already
9 authorized this franchise before the Commission could have
10 granted that authority. And did not the circuit court rule to
11 the contrary on both of those concepts?

12 MR. JOYCE: And, again, I -- just for
13 clarification, I don't think Staff is going -- is not -- or
14 Staff is not taking the position that the existing certificate
15 is adequate. However it may feel that the judge's decision
16 may have been mistaken, that is something that will be
17 determined by the Court of Appeals.

18 COMMISSIONER GAW: Yeah. I understand that
19 concept.

20 MR. JOYCE: So we're not --

21 COMMISSIONER GAW: If you're talking about
22 whether or not the circuit court is correct or not correct,
23 that's a matter for the Western District to review.

24 MR. JOYCE: Right.

25 COMMISSIONER GAW: I understand that. I'm just

1 trying to understand Staff's position on request 1, because
2 that's the part here that I'm struggling in understanding
3 where you all are coming from.

4 MR. JOYCE: And the clarification language that
5 was given to the Commission this morning is language that
6 Staff just saw yesterday. We have not discussed it internally
7 to determine what position that Staff would present to the
8 Commission on -- on that clarification, as to whether it
9 believes that it's adequate or would meet the requirements of
10 the judge's order.

11 We -- we though on the second site-specific
12 request is something that Staff believes is not prohibited,
13 that the company certainly can do -- come in for that. And to
14 address Commissioner Clayton's question, we will look at the
15 argument that they do not meet the requirements of the rule --
16 whether they do or do not meet the requirements of the rule.

17 COMMISSIONER GAW: That would be helpful to me.
18 I'm going to stop I think. Thank you, Judge.

19 JUDGE PRIDGIN: Thank you, Commissioner Gaw.

20 Commissioner Clayton?

21 COMMISSIONER CLAYTON: One question for
22 Mr. Joyce before he completely runs off. Should we anticipate
23 that Staff will either concur in the proposed language or not?
24 And will you all be providing language on this first
25 alternative that's been proposed? Will Staff propose language

1 in whatever this order would be called that would I guess
2 describe what Staff's position is?

3 MR. JOYCE: I think Staff is going to have to
4 tell you whether it believes that first track is something
5 that will meet the requirements of the judge's order. And I
6 think that's what Staff will weigh in on. As of right now, I
7 can't tell you that that first option, the quick option, is
8 the one that Staff would support. We'll have to consider it
9 and then let the Commission know.

10 COMMISSIONER CLAYTON: Okay.

11 JUDGE PRIDGIN: Commissioner, thank you.

12 Any further questions from the Bench?

13 All right. Seeing none, let's go ahead and
14 Mr. Coffman, anything from the Office of the Public Counsel?

15 MR. COFFMAN: Thank you. May it please the
16 Commission.

17 I will tell you where I'm coming at with regard
18 to this situation. And, first, let me tell you what public
19 interest that I am focusing on and that is, as we typically
20 do, focus on the interest of the ratepayers of Aquila
21 primarily.

22 And if I might remind you again, there is
23 another case that's pending that involves the same project and
24 that is EO-2005-0156. The primary concern I have with this
25 project is the request in that case that the Commission make a

1 finding that the fair market values of these CTs is in excess
2 of \$70 million and that other rate-making findings be made in
3 that case and we've requested a hearing and I'm hopeful that
4 we'll have the opportunity to present our evidence and -- and
5 contest that -- those particular matters.

6 I have some concern -- it may not be a problem,
7 I have some concern that the specific request in this case may
8 overlap and somehow prejudice the issues in that case and I'm
9 hoping that's not going to be a problem, but I have to point
10 that out.

11 My broader interest as it relates to kind of
12 local concerns is that if the Commission proceeds in this
13 matter, we do hope that the Commission continues to go forward
14 with its plan to have a local public hearing because there are
15 obviously some very serious concerns involving zoning or
16 local -- local use in Cass County.

17 It's my opinion, and I think I agree with most
18 parties here, I think that the Commission has given all the
19 PSC authority that would be needed to Aquila to do what it
20 needs to do to build that. It's unclear to me whether Aquila
21 has all the proper local zoning authority or franchise or land
22 use regulation.

23 I think that the Harline case and other cases
24 have made it fairly clear that once you have an area
25 certificate, a blanket certificate, that's the authority that

1 you need, that you don't require an overlapping specific
2 authority type certificate to -- you know, from the Commission
3 as far as Commission authority goes.

4 But I think I do agree with Cass County and
5 STOPAQUILA.org that there is a dual authority that is
6 required. You need PSC authority as well as local zoning
7 authority. It's -- except for these two very strange
8 statutes, I'm not aware of any other area where anyone has
9 suggested that PSC certificates somehow supersede or void
10 local zoning authority.

11 And the specific statute here does not seem to
12 apply to public utilities. It seems to be public
13 improvements. And this is a very fascinating legal issue that
14 I imagine the courts will have to ultimately resolve.

15 My first reading of this proposed order of
16 clarification that was given to me, I don't know that I want
17 to take a final position on it having just only read it
18 through once and under the understanding that under what the
19 parties worked out the other day, that even if the Commission
20 goes on the most expedited approach with an order of
21 clarification, that we would have the opportunity to file a
22 brief and proposed findings of fact on the 11th of March. And
23 that would be my hope, that if you want to go down this route,
24 that we do stick with the schedule that the parties thought
25 would be appropriate in that more expedited approach.

1 Again, my concern is that in an order of
2 clarification, that there is reference to very specific
3 projects. So it's an order of clarification, which I think I
4 might agree with primarily, that that past certificate that
5 gave all the PSC authority that would be needed, but then asks
6 that the Commission state here towards the end of what's
7 Exhibit 1, including the South Harbor facility and Peculiar
8 substation in Cass County, which includes the tracts where
9 Aquila proposes to construct and that is somewhat concerning.

10 I think that I agree with the concerns that
11 have been expressed from the Bench, that if -- there might be
12 some type of a precedent set if the Commission begins to weigh
13 in on these local zoning matters, that the Commission is going
14 to be drawn into a lot of complicated land use matters that it
15 hasn't been in the past and I don't know that that's necessary
16 where the Commission has already given an area certificate
17 that includes this area. And so I really think that that's a
18 potential quagmire that the Commission might not want to be
19 involved in. I don't think it needs to.

20 Secondly, any order of clarification or
21 specific certificate I would hope would be very explicit about
22 not making any rate-making determinations as you -- we hope
23 that that will be something that we'll have an opportunity to
24 address in a subsequent case.

25 That's all that I have and be happy to answer

1 whatever questions I can answer.

2 JUDGE PRIDGIN: Mr. Coffman, thank you.

3 Mr. Chairman?

4 CHAIRMAN DAVIS: Mr. Coffman, is it your
5 position that an applicant for a certificate of convenience
6 and necessity would need this concurrent jurisdiction from
7 both the county and the PSC in all counties or just the
8 14 counties that Mr. Comley referred to earlier?

9 MR. COFFMAN: I think those are the only
10 counties that this particular statute applies to. But I
11 think -- generally I think that the Commission does not
12 supersede local zoning authority. And, you know, that the
13 question about where that statute applies, I think that was
14 the question as to what type of counties that particular
15 statute may or may not apply to.

16 But it's never been my understanding in my
17 review of PSC law or my somewhat limited review of zoning law,
18 that -- that they do overlap, generally speaking, that the PSC
19 certificate somehow bleed into land use regulations. My
20 understanding of certificates and the other various laws,
21 territorial agreements, change of suppliers address primarily
22 what privately-held public utilities may do with regard to
23 competition from other such entities and that they didn't
24 supersede zoning.

25 CHAIRMAN DAVIS: Okay. Let's see. What other

1 questions did I have?

2 I'll pass for right now, Judge.

3 JUDGE PRIDGIN: Mr. Chairman, thank you.

4 Commissioner Murray?

5 COMMISSIONER MURRAY: Thank you. Just a
6 couple.

7 Mr. Coffman, I think -- let me see if I fully
8 understand your position. I think what you said is that you
9 agree that the original certificate granted them the authority
10 that they needed to provide -- to put this construction
11 anywhere within their certificated territory, is that correct,
12 from us?

13 MR. COFFMAN: I believe it gives them all the
14 PSC authority they would need, yes.

15 COMMISSIONER MURRAY: All the PSC authority,
16 yes. And that beyond that, there is no need for the
17 Commission to take any position as to county authority. Would
18 that be your position?

19 MR. COFFMAN: I think that's -- that's a fair
20 statement of my position, yes.

21 COMMISSIONER MURRAY: And in terms of
22 clarifying that the original certificate granted them the
23 authority from the PSC that they needed, I was looking at the
24 language -- the court's language. And in its order the court
25 said, The court finds that either Aquila's Cass County

1 franchise must give Aquila the specific authority to build a
2 power plant within Aquila's certificated area or service
3 territory and that Aquila's 1917 franchise with Cass County
4 does not, or that Aquila must obtain a specific authorization
5 in its certificate of public convenience and necessity and
6 then it goes on from there.

7 But the language that the court used that
8 Aquila must obtain a specific authorization in its certificate
9 of public convenience and necessity appears to me to allow
10 what Aquila is requesting here, that we clarify that in its
11 certificate of public convenience and necessity, it did obtain
12 authorization.

13 And the specific authorization that the court
14 references is to build a power plant within its certificated
15 area or service territory. It doesn't state that those
16 specific properties have to be listed as I read it. And I
17 understood you to say that you were a little bit troubled by
18 specifically referencing those tracts.

19 MR. COFFMAN: Yes. It did cause me some
20 concern as to what that might -- what implication that might
21 have as to other rate-making issues. Frankly, I'm not sure I
22 understand exactly what the impact is of the judge's decision
23 here and it -- I'm very cognizant of some of the circular and
24 conflicting law that's before you now. And my hope is that
25 the Court of Appeals clarifies it. Of course, they can always

1 make it more complicated, but it's always our hope.

2 COMMISSIONER MURRAY: It's Office of Public
3 Counsel's position in representing the public interest and
4 specifically the interest of the ratepayers of Aquila that the
5 Commission clarify that Aquila has the authority from the PSC
6 that it needs?

7 MR. COFFMAN: I'm not sure that you need to
8 order -- issue an order of clarification. And I would attempt
9 to be more specific and try to be more definitive about what I
10 think of this order and how it relates to your
11 responsibilities. Would just ask that if you are going to
12 consider any order of clarification, that you consider the
13 expedited schedule that the parties have given and give us
14 another couple of weeks to put those recommendations into
15 writing.

16 COMMISSIONER MURRAY: And why do you think that
17 we don't need to do it?

18 MR. COFFMAN: I think that an area certificate
19 is all the PSC authority that's needed.

20 COMMISSIONER MURRAY: And you think that that
21 will be clarified on the appeal rather than us having to
22 clarify it here. Is that your position?

23 MR. COFFMAN: Well, I don't know. I'm just
24 asking that if you issue an order of clarification, that we be
25 given time to give suggestion as to what that order of

1 clarification should say as opposed to giving a definitive
2 answer right now about what I just got handed.

3 COMMISSIONER MURRAY: But you don't have a
4 problem with us granting an order of clarification, as I
5 understand it; is that correct?

6 MR. COFFMAN: Not conceptually, but based on
7 what the actual words say, I might have a concern about what
8 the specific words say.

9 COMMISSIONER MURRAY: But if it said something
10 in the general nature of a certificate of convenience and
11 necessity granted it the specific authority to build a power
12 plant within its certificated area or service territory, I
13 mean, is that --

14 MR. COFFMAN: That doesn't sound like it would
15 be a problem.

16 COMMISSIONER MURRAY: And I thought I
17 understood you to say that its certificate did grant it that.

18 MR. COFFMAN: That's my understanding.

19 COMMISSIONER MURRAY: Okay. Thank you.

20 JUDGE PRIDGIN: Commissioner Murray, thank you.
21 Commissioner Gaw?

22 COMMISSIONER GAW: Mr. Coffman, explain to me
23 how that would not be contrary to the Cass County Court's
24 decision.

25 MR. COFFMAN: I -- I think I understand your

1 argument that it would, but --

2 COMMISSIONER GAW: I'm just trying to
3 understand what your position is and how that's not contrary
4 to the Cass County Court's decision. Whether that decision is
5 right or wrong is up to the Western District to determine.

6 MR. COFFMAN: That's correct.

7 COMMISSIONER GAW: How is it not contrary to
8 the decision that that court rendered?

9 MR. COFFMAN: I don't know. The court has put
10 you in an awkward position and --

11 COMMISSIONER GAW: I'm not looking for my
12 position. I'm looking for yours.

13 MR. COFFMAN: And now you're putting me in that
14 same awkward position.

15 COMMISSIONER GAW: Yes, I am.

16 MR. COFFMAN: I'm not sure I know what this
17 order means, honestly. It doesn't -- but -- and honestly,
18 having read the Motion to Dismiss and suggestions in support
19 which were filed yesterday by STOPAQUILA.org, I think that I'm
20 in general agreement with their arguments, that the judge made
21 a mistake and that this particular statute cited by the court
22 doesn't seem to apply to public utilities regulated by the
23 Commission. And -- but I -- you know, as Mr. Zobrist says,
24 literally interpreted it doesn't make any sense.

25 COMMISSIONER GAW: What doesn't make any sense?

1 MR. COFFMAN: The statute that the judge is
2 referencing there, 64.235.

3 COMMISSIONER GAW: Oh, the statute doesn't make
4 any sense?

5 MR. COFFMAN: Yes.

6 COMMISSIONER GAW: What about the judge's
7 order? Does it make any sense?

8 MR. COFFMAN: It seems to be very clear that
9 Aquila doesn't have the proper zoning authority it needs.

10 COMMISSIONER GAW: Are you taking the position
11 that the court did not -- did not make any finding in regard
12 to whether or not Public Service Commission had previously
13 issued authority for that generation plant to be constructed?

14 MR. COFFMAN: I'm not sure if this decision
15 addresses that.

16 COMMISSIONER GAW: All right. You're not sure?
17 You don't --

18 MR. COFFMAN: I don't see that.

19 COMMISSIONER GAW: Because you haven't looked
20 at it closely or your position is it doesn't address it? You
21 need more time to look at it?

22 MR. COFFMAN: I don't think the court's
23 decision addresses PSC authority as --

24 COMMISSIONER GAW: All right. Let me ask you
25 this. Does the Public Service Commission have the authority

1 to issue declaratory orders?

2 MR. COFFMAN: I'm not sure.

3 COMMISSIONER GAW: Has the Public Counsel taken
4 the position one way or the other about the Commission's
5 authority to issue declaratory orders in the recent past?

6 MR. COFFMAN: It may have.

7 COMMISSIONER GAW: I think it may have too.

8 MR. COFFMAN: I do agree that the Commission
9 has the authority to clarify its orders and that the courts do
10 give deference to the Commission interpreting its own orders.

11 COMMISSIONER GAW: What kinds of clarifications
12 are you referring to? Give me an example.

13 MR. COFFMAN: Well, I think any -- any of its
14 orders.

15 COMMISSIONER GAW: Are you talking about
16 clarifications that occur while the order is still in front of
17 the Commission? Is that what -- when you're talking about
18 clarification, are you talking about --

19 MR. COFFMAN: That's certainly permitted.

20 COMMISSIONER GAW: Yes. What about orders that
21 are decades old?

22 MR. COFFMAN: Well, I think it has the ability
23 to state its opinion about what those past orders meant now --
24 and that the courts will give some deference to that. That
25 doesn't mean --

1 COMMISSIONER GAW: Do you know who was on the
2 Commission when the certificates of authority were issued for
3 Aquila that you're referring to?

4 MR. COFFMAN: I assume they're dead now, but --

5 COMMISSIONER GAW: Do you know any of them?

6 MR. COFFMAN: No.

7 COMMISSIONER GAW: I'm not sure that I do
8 either.

9 That's all I have. Thank you, Judge.

10 JUDGE PRIDGIN: Commissioner Gaw, thank you.
11 Commissioner Clayton?

12 COMMISSIONER CLAYTON: Mr. Coffman, are you
13 going to respond to the Motion to Dismiss or --

14 MR. COFFMAN: Yes.

15 COMMISSIONER CLAYTON: -- are you going to file
16 a brief on these issues?

17 MR. COFFMAN: It would be my intent to do the
18 best job I can in --

19 COMMISSIONER CLAYTON: I'm sure --

20 MR. COFFMAN: -- why the legal --

21 COMMISSIONER CLAYTON: We expect the best job
22 that you can do. Why do you think that would be?

23 MR. COFFMAN: Well, we had hoped that we would
24 have at least until March 11th under the joint response file
25 that had had been worked out amongst the parties. Again, the

1 most difficult issues before you about interpreting the laws
2 and Commission orders are not my main concern in this case,
3 but I will attempt to weigh into it and --

4 COMMISSIONER CLAYTON: Can we anticipate that
5 you will take a position on the language submitted by Aquila?

6 MR. COFFMAN: Yes. On this Exhibit 1, yes.

7 COMMISSIONER CLAYTON: Or should we anticipate
8 that you'll submit your own proposed language?

9 MR. COFFMAN: I had not planned on submitting
10 my own necessarily, but I might.

11 COMMISSIONER CLAYTON: And can you tell me --
12 along the same lines of the questions I asked Ms. Shemwell,
13 can you tell me exactly which certificate or certificates you
14 are relying in determining that Aquila already has the
15 authority to build?

16 MR. COFFMAN: No. I don't have the citations
17 here. But we have looked at that and we do believe that this
18 is within the general area certificate the Commission has
19 granted.

20 COMMISSIONER CLAYTON: Which one is the general
21 area certificate, do you know?

22 MR. COFFMAN: No. I don't have that citation
23 here.

24 COMMISSIONER CLAYTON: Okay. Okay. I don't
25 have any further questions for Mr. Coffman.

1 I wanted to make one request of Mr. Boudreau
2 since we're at the end.

3 JUDGE PRIDGIN: Absolutely.

4 COMMISSIONER CLAYTON: With the language that's
5 been submitted and the references to the certificates and
6 you'll be filing the certificates that you're referencing,
7 we'll have those.

8 MR. BOUDREAU: Indeed.

9 COMMISSIONER CLAYTON: I also wanted to ask
10 that you submit the statutory -- the statutes that were
11 applicable at the time for any terms that need to be defined.

12 MR. BOUDREAU: Okay.

13 COMMISSIONER CLAYTON: So, for example, you
14 make reference to a definition in -- I guess on page 2 of your
15 language it looks like it's a Report and Order from 1950. If
16 there are statutory definitions that would be applicable at
17 the time rather than present-day definitions, I'd like you, if
18 you could, to file those. It's going to run up your West Law
19 account.

20 MR. BOUDREAU: I think I can handle it.

21 COMMISSIONER CLAYTON: Only the relevant.
22 Don't submit the whole statute book.

23 MR. BOUDREAU: I also might point out in
24 advance, I'll give you all fair warning, the old microfilm
25 orders of the Commission don't copy real well. They're kind

1 of ugly looking documents. We'll get those filed, we'll try
2 to file them electronically. Sometimes they don't translate
3 well in the copying process, so I may also submit them in hard
4 copy. With that understanding, we will get those to you.

5 JUDGE PRIDGIN: Any further questions from the
6 Bench for any counsel?

7 Hearing none -- Mr. Comley?

8 MR. COMLEY: One more thing. Regarding the
9 certificates, in proposed posed exhibit -- or the proposed
10 clarification order, Exhibit 1, am I to take it that the
11 certificates that Aquila's relying on for the clarification
12 order, those are the ones that you're relying on, the ones
13 that are in that order?

14 MR. BOUDREAU: I think there are three primary
15 orders that are referenced in the proposed language. I
16 believe there may be as many as -- there may be one other
17 order that me way want to bring to the Commission's attention.
18 My understanding is there will be four that are filed. Those
19 three will be among those four. 94-3171 I believe, I'm
20 working from memory, 94-70 and 11-892. Again, I'm working
21 from memory, but I think those are the three that are
22 mentioned in the proposed language.

23 Also, by way of clarification, by submitting
24 that language there was no intent to preclude anybody else
25 from submitting comments or their own proposed language. That

1 was just to illustrate to the Commission the company's
2 approach. We didn't mean to foreclose any opportunity or to
3 in any way indirectly modify the proposed procedural schedule.

4 JUDGE PRIDGIN: Commissioner Clayton?

5 COMMISSIONER CLAYTON: Can I ask one other
6 question? Were the certificates filed in the circuit court
7 case? All these certificates?

8 MR. BOUDREAU: My understanding is the
9 certificates, in fact, were filed in the circuit court case as
10 exhibits. They're also I think referenced at least in
11 shorthand fashion in the stipulation of facts, which I believe
12 was Exhibit 2 that was circulated this morning. So as you
13 read through that, you'll see how those piece parts all fit
14 together from I guess all the parties' perspectives in the
15 litigation.

16 MR. COMLEY: My understanding is they're also
17 in the legal file in the appeal.

18 MR. BOUDREAU: That may be the case. In fact,
19 we'll look. In terms of assembling those from the company's
20 perspective, we're going to be looking at some of those same
21 exhibits and getting them assembled to file with the
22 Commission.

23 COMMISSIONER CLAYTON: There is a Motion to
24 Dismiss and there's a brief that's filed. Aquila's filed a
25 response, Staff has not yet filed any response. Correct?

1 MS. SHEMWELL: Correct.

2 COMMISSIONER CLAYTON: And Public Counsel has
3 not filed any either.

4 Are there any other legal briefs or responses
5 regarding these legal issues that are going to be filed? For
6 example, is your-all's stuff in, everything that you're going
7 to submit until we ask for something different?

8 MR. COMLEY: Well, I think we'd like to reserve
9 the right to respond to the proposed clarification order
10 language in Exhibit 1. And I'm thinking other parties want to
11 do that too.

12 COMMISSIONER CLAYTON: Do you want to submit
13 your own proposed language?

14 MR. COMLEY: We have our own language. It's in
15 the Motion to Dismiss.

16 COMMISSIONER CLAYTON: I bet it is. Okay. I
17 understand that. But that's a full recitation of the legal
18 position that I know your two parties have taken. We've got
19 Aquila's, so we're waiting on you two. Okay. Thank you.
20 I'll stop.

21 JUDGE PRIDGIN: Anything else from the Bench?

22 All right. Just one final comment.

23 Mr. Boudreau, I believe the Commission understands your
24 potential dilemma in that if you need to file testimony, you
25 need to do so right away. I will speak with the Commissioners

1 and I will give you an order or some sort of indication as
2 soon as I can.

3 MR. BOUDREAU: Very good. Thank you.

4 JUDGE PRIDGIN: Anything else from the Bench?

5 Hearing nothing further, this will conclude the
6 on-the-record presentation in ea-2005-0248. We are off the
7 record.

8 WHEREUPON, the on-the-record presentation was
9 concluded.

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1	EXHIBITS	
2		Marked Rec'd
3	Exhibit No. 1	
4	Proposed clarification language	48
5	Exhibit No. 2	
6	Joint Stipulation of Facts	50
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