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March 21, 2005

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

Re: Case No. EA-2005-0248

Dear Judge Roberts:

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

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

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

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By: Mark W. Comley

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MWC:ab
Enclosure
cc: Office of Public Counsel
General Counsel's Office
Paul A. Boudreau
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[4]
MAR 2 1 2005
Missouri Public
Service Commission

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

INTERVENER CASS COUNTY, MISSOURI'S BRIEF IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY MATTERS

A. The Scope of this Brief

It was on February 18, 2005 that the parties filed a Joint Response to Commission Order and set out alternative procedural schedules. One proposed schedule was found under a heading titled "Order of Clarification" and the other under one titled "Site Specific/Overlapping Certificate." On March 3, 2005, the Commission approved the much shorter procedural schedule that had been proposed for consideration of a "Clarification Order" but "Clarification Order" has not been mentioned by name in the Commission's orders. In the order approving the procedural schedule, the Commission set a deadline for filing briefs and proposed findings of fact and conclusions of law but did not suggest that they be restricted to the merits of a clarification order. Cass County has accordingly not limited its brief to the topic of the clarification order. It has

included arguments on the "site specific" request in Aquila, Inc.'s (Aquila) application (Aquila's Application, ¶6) and added proposed findings, conclusions and arguments pertaining thereto.

B. Cass County's Motion to Dismiss

To date, the Commission has not ruled on Cass County's "Motion to Dismiss Aquila's Application" filed on February 3, 2005. On grounds asserted therein, and on those appearing in this brief, Cass County repeats its prayer that the Commission dismiss Aquila's application in this case.

ARGUMENT

A. Judge Dandurand's Final Judgment

The appropriate point of departure for any of the arguments the Commission may consider in this matter has been, and has always been, the findings and determinations made by Judge Dandurand in the now often quoted Final Judgment.[1] Again, the dispositive findings were found on page 3 of that judgment:

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

Nothing in the Final Judgment directs Aquila to apply to this Commission for further or "clarified" authority. Nothing in the Final Judgment overrules a Commission decision, vacates a Commission order or directive or invalidates a Commission rule or procedure. The Final Judgment pertains to the authority of Cass County to regulate the construction of public

[1] See Aquila's Application at Appendix 2.

improvements under its lawfully enacted zoning code. The Final Judgment contains no order, implied or direct, that interferes with the operations and jurisdiction of this body. The Final Judgment leaves intact the allied, but not overlapping, relationship between the Commission's authority to regulate public utilities and Cass County's authority to regulate land use within its borders. The Final Judgment acknowledges the meet point between co-extensive regulators, but does not cause them to collide. When read correctly, the Final Judgment illuminates how the County and the Commission can protect their respective constituencies without encroaching on each other.

Aquila and the Staff have misread the Final Judgment. Aquila perceives that the Final Judgment allows the Commission to have a second look at Aquila's certifications and other orders and "clarify" its authority to include the "specific authorization" that Judge Dandurand has concluded already it lacks. (Aquila Application ¶¶ 5, 23). The Staff sides with Aquila and declares that Judge Dandurand's order "makes no determination concerning Aquila's authority under its current CCN. . . ." (Staff's Response to Motions to Dismiss, at 6). The Staff has not noticed the bold faced type in the judgment entry quoted above.

Aquila's plea for "clarification, " and Staff's endorsement of that plea, are invitations for the Commission to overstep its jurisdiction and authority. Aquila's request for specific confirmation under its existing certificate, or a new site specific certificate of convenience and necessity, to construct the South Harper Plant and associated substation(s) must be denied.

B. The Clarification Order

1. The Commission should deny Aquila's request for a clarification order because the order would constitute a declaration of law which the Commission has no power to issue.

During the parties' on-the-record presentation to the Commission on February 25, 2005, Aquila submitted as Exhibit 1 its proposed form of a "clarification order." For the purpose of this brief, Cass County will assume that Exhibit 1 will find its way into Aquila's proposed findings of fact and conclusions of law for this matter.

In Exhibit 1 Aquila draws attention to isolated language from four orders of the Commission to support its claim that by clarification of those orders it is "specifically authorized" to construct the South Harper Plant and the Peculiar Substation in unincorporated Cass County. They are a December 21, 1921 Order from Case No. 3171; a March 1922 Order from the same case; a 1938 Order in Case No. 9470; and a 1950 Order in Case No. 11,892 (sometimes referred to for brevity herein as "the Orders").

(a) The December 21, 1921 Order (Case No. 3171):

The Commission order entered on December 21, 1921 was in response to an "Application for Authorization of the Reorganization of the Green Light and Power Company and for an order authorizing the issuance of stocks and bonds." The Application did not seek Commission authorization to construct power plants, nor seek service of any type in unincorporated Cass County. The Commission authorized the reorganization of the Green Light and Power Company pursuant to the Application and stated:

> That the present and future public convenience and necessity require the exercise by the said New Company [West Missouri Power Co.] of all the rights, privileges and franchises to construct, operate and maintain electric plants and systems in the State of Missouri and respective counties and municipalities thereof, now acquired or controlled by Applicant, Green Light and Power Company. [emphasis supplied]

This order, by its clear language, simply states that West Missouri Power Co. will have all rights, privileges and franchises "now acquired or controlled" by Green Light and Power Company. The December 21, 1921 order did not describe, modify or expand the rights, privileges and

franchises acquired or controlled by Green Light and Power Company and now to be exercised by West Missouri Power Co.

(b) The March 1922 Order (Case No. 3171):

The Commission's March 1922 order was issued in response to an "Application of West Missouri Power Company for Permission to Issue Preferred Stock." The order authorized the sale of stock and directed the proceeds be applied:

> For extensions and additions to distribution systems and street lighting systems now or hereafter owned by the said Company in Jackson, Cass . . . counties . . .

The order did not mention or authorize the construction of a power plant in unincorporated Cass County. Moreover, no request for such authority was included in the Application giving rise to the order.

(c) The 1938 Order, Case No. 9470:

The petition filed in this case is most instructive. The 1938 order issued by the Commission in Case No. 9470, arose out of a petition by Missouri Public Service Corporation (Aquila's predecessor) requesting an order of the Commission "authorizing it to construct, operate and maintain extensions to its electric transmission and distribution lines . . . or to make major alterations in its existing transmission and distribution facilities within the territory now being served by Petitioner. . . ." [emphasis supplied] The Petition is covered with references to Missouri Public Service Corporation's desire to extend electric transmission and distribution lines within its service territory and its desire, by securing the order requested, to avoid the need to come before the Commission for a certificate of convenience and necessity each time it sought to extend its distribution lines within its service territory. The Petition makes no reference to, and requests no order of, the Commission specifically authorizing the construction of new

electric generation facilities or power plants. The 1938 order issued in response to the Petition states:

> That the Missouri Public Service Corporation be and is hereby authorized to construct, maintain and operate electric transmission lines and distribution systems over, along and across the highways of the counties of . . . Cass . . . with authority to furnish electric service to all persons in the area for which this certificate is granted." [emphasis supplied]

The 1938 order does not address, mention or authorize construction of new electric generation facilities, or power plants, in unincorporated Cass County. In fact, the emphasized language merely reaffirms the limited franchise received from Cass in 1917, (Joint Stipulation of Facts ¶18; Aquila Application, Appendix 6) and thus limits Aquila's authorization in Cass County to construction, maintenance and operation of electric transmission lines and distribution systems along the highways in the county. A careful reading of the order finds numerous references to electric transmission lines and electric distribution systems, but no reference whatsoever to electric generation facilities or to power plants. Though the 1938 order extends a general grant of "authority to furnish electric service to all persons in the area for which this certificate is granted," this language includes no reference to power plants and no specific authorization to construct a power plant in Cass County.

(d) The 1950 Order:

The Commission's order in Case No. 11,892 (1950), was in response to the Joint Application of Missouri Public Service Corporation and of Missouri Public Service Company to merge, and sought authority for Missouri Public Service Company to own and operate the properties and assets of Missouri Public Service Corporation. The Application did not seek specific authorization to construct a power plant in unincorporated Cass. At page 4, the 1950 order states Missouri Public Service Company may:

> . . .own, maintain and operate all properties and assets, and to acquire, hold and exercise all contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; including, without limitation, all rights to construct, own and maintain electric utility facilities in the areas in the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938. [emphasis supplied]

This order did not describe or modify the "contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; including with limitation, all rights . . . designated in . . . Case No. 9470. . . ." The order merely afforded Missouri Public Service Company the relief it requested - - ownership of all that had been previously owned by Missouri Public Service Corporation, including any rights Missouri Public Service Corporation had under the 1938 order.

The orders that Aquila relies on in contending it has specific authorization to build a power plant in Cass County were the same orders reviewed by Judge Dandurand in reaching his Final Judgment. Aquila's request for a Commission confirmation that its certificates specifically authorize the South Harper Plant sends the Commission down the same analytical trail that has been blazed and cleared already by the trial court. The trial court found and determined that Aquila lacks "in its certificate of convenience and necessity. . . specific authorization to build a power plant in its certificated area. . ." It has declared the legal significance of the certificate as part of a civil case. A Commission determination on this issue that is contrary to the trial court's pits the administrative authority of the Commission against the judicial power of the state in a face to face confrontation.

The Commission, and other executive administrative agencies, do not have the power to apply or announce any principles of law or equity. The Commission is not a court of law. No

statute or case authority confers upon the Commission the power to overrule findings of circuit courts. It is powerless to vacate, modify or overturn their judgments.

As stated in *State Tax Commission v. Administrative Hearing Commission,* 641 S.W.2d 69, 75 -76 (Mo.banc 1982):

> "[T]he judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law." *See also Lightfoot v. City of Springfield,* 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission "has no power to declare ... any principle of law or equity"); *State ex rel. Kansas City Terminal Railway v. Public Service Commission,* 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern Railroad v. Public Service Commission,* 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914) (Public Service Commission has no power to declare statutes unconstitutional); *State ex rel. Missouri & North Arkansas Railroad v. Johnston,* 234 Mo. 338, 350-51, 137 S.W. 595, 598 (banc 1911) (secretary of state has no power to declare a statute unconstitutional).

Any announcement by the Commission of an interpretation of Aquila's certificates in conflict with the Final Judgment would constitute a decree of their legal effect which is the province of courts and not administrative commissions. The Commission must deny Aquila's proposed clarification order.

2. The certificates of convenience and necessity obtained by Aquila, and the other orders Aquila seeks to have clarified are already clear and unambiguous. They are final orders of the Commission and cannot be reopened for modification or revision.

(a) No ambiguity exists in the four Orders.

There is no question that the four Orders are final orders of the Commission. They are certainly final enough under applicable tests to have been judicially reviewable.

> "Finality" is found when "the agency arrives at a terminal, complete resolution of the case before it. An order lacks finality in this sense while it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration by the issuing agency." *Dore & Assoc. Contracting, Inc. v.*

Missouri Dept. of Labor & Indus. Relations Com'n, 810 S.W.2d 72, 75-76 (Mo.App. 1990).

State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State of Mo. 26 S.W.3d 396, 400 (Mo.App. W.D.2000). None of the Orders remains tentative, provisional or contingent, subject to recall, revision or reconsideration. After all, the period within which these cases could be judicially reviewed has long since past. The youngest of the four Orders is fifty-five years old. The applications for rehearing by which to perfect rights of appeal of the orders are--yielding briefly to understatement--over due; likewise out of time are petitions for writs of review before the circuit court. See, §§386.500, 386.510 RSMo 2000. No procedural infirmity lingers such that a doubt may exist about the final form of the Orders.

Furthermore, Aquila and its predecessors have been operating under the authority conferred by these decisions for five decades and longer. Aquila and its predecessors have accepted the terms of the Orders, all their benefits and regulatory limitations. The length of time Aquila and its predecessors have operated under the Orders is itself testament to their inherent clarity.

The Orders have no language expressly or specifically authorizing Aquila to construct the South Harper Plant or the Peculiar Substation in Cass County. Neither can there be implied in the four orders any authority to construct a generating plant. The only order of the four which directly involves Cass County is the certificate to build transmission lines that was granted to Aquila's predecessor in the 1938 order, Case No. 9470. Some may raise the argument that authority to build transmission lines implies the authority to build generation facilities. However, the 1938 order did not come with an elastic clause. If the argument were accepted that generation is implied by the grant of transmission authority, then arguably the right to install a water distribution line on private property would imply the right to build a water treatment plant

on the same ground; or a right to graze livestock over pasture would imply the right to operate a confined animal feeding operation as well. Implied terms of this dimension defy reason. As a matter of law, the courts have already interpreted the scope of the order in Case No. 9470, finding no ambiguity or doubt. As stated by Judge Cross in *State ex. rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 185 (KC Ct. App. 1960) "[t]he 1938 certificate permitted [Aquila's predecessor] to serve a territory - - not to build a plant." Aquila is bound by that determination. The 1938 order is one which the Commission can remove from any consideration.

The language used by the Commission in each of the four orders is plain, clear and hence unambiguous. How are they then to be interpreted? They should be interpreted as any written instrument or contract is interpreted. Accordingly,

> "[I]t is not within the province of the court to alter a contract by construction, or to make a new contract for the parties." *Rickey v. New York Life Ins. Co.*, 229 Mo.App. 1226, 71 S.W.2d 88, 93 (1934). "[A] court's duty is confined to the interpretation of the contract which the parties have made for themselves, without regard to its wisdom or its folly, and ... a court may not read into a contract words which the contract does not contain." 71 S.W.2d at 93.

Textor Construction, Inc. v. Forsyth R-III School Dist. 60 S.W.3d 692, 697-698 (Mo.App. S.D. 2001). Judge Dandurand reviewed the four orders under the interpretive principles above. The Orders include no language from which Judge Dandurand could find that Aquila was specifically authorized to construct the South Harper Plant or the Peculiar Substation in Cass County. This Commission is faced with the same orders and the same duties of interpretation as the court. Aquila's request for "clarification" notwithstanding, the Commission must arrive at the same conclusion.

(b) The four Orders cannot be reopened for modification or revision.

Aquila's request to clarify unambiguous Commission orders is, in truth, a plea to the Commission to reopen the Orders, or any one of them, and alter one or all so that the missing authority to construct a South Harper power plant can be added. Restated, Aquila is saying that it knows what the Commission said in the Orders, but now wants the Commission to tell the court what it **meant to say**. No matter what appellation may be attached to Aquila's request—whether it is called an "interpretation," "clarification, " or *nunc pro tunc* order—the effect is the same: the Commission is being asked to alter or modify the plain meaning of its previous orders and decisions so that Aquila may try to escape the consequences of its failure to comply with Cass County zoning laws. The Commission is powerless to comply.

Section 386.550 provides "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Actions brought in the Commission itself about final Commission orders are barred by this section. *State ex rel. Licata v. Public Service Commission of the State of Missouri,* 829 S.W.2d 515 (Mo. App. W.D. 1992). There is no direct action in this Commission by which to alter, modify, revise or challenge a previous Commission order.[2] "If a statutory review of a [Commission] order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding." *State ex rel. Mid-Missouri Telephone Co. v. Public Service Commission* 867 S.W.2d 561, 565 (Mo.App. W.D. 1993).

It is unmistakable that the Commission has the authority to review its orders and interpret them. In this manner it shares a power exercised by the courts. A court is called upon to interpret its own orders, decrees and judgments and those of other courts. Nonetheless, when the

[2] See, *Tari Christ et al. v. Southwestern Bell Telephone Company et al.*, Case No. TC-2003-0066, *Order Regarding Motions to Dismiss*, January 9, 2003 at pages 12-13.

orders of the Commission are final, then like a court and its final judgments, the Commission is not entitled to change them even to rescue a utility in trouble.

C. Aquila's Request for a Site-Specific Certificate

Under the provisions of Section 393.170, RSMo 2000, "certificate authority" can be divided into two kinds based upon the provisions of two subsections in this law. Sub-section 1 requires authority to construct an electric plant. Sub-section 2 requires authority for an established company to serve a territory by means of an existing plant. *Harline*, at 185. The *Harline* court's exposition of the law was approved in *In State ex rel. Union Electric Co. v. Public Service Commission*, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989).

> As an alternative to a clarification or confirmation order, Aquila seeks in its application
>
> a certificate of convenience and necessity to construct, own, operate and manage an electrical power production facility and associated electric transmission substations to be located [in unincorporated Cass County]. . .

(Aquila's Application, ¶5). Per the explanations in *Harline* and in *Union Electric, supra,* Aquila has triggered the provisions of Section 393.170.1.

Before 1980, the Commission routinely entertained and granted applications from public utilities seeking a specific certificate of convenience and necessity to authorize construction of a power plant. *See, e.g., In the Matter of the Application of Missouri Power & Light Co.*, 1973 WL 29307 (Mo. P.S.C.) 18 Mo. P.S.C. (N.S.) 116 (1973). As a condition of approval of these requests under Section 393.170.1, the Commission required the showing that municipal consents for construction had been obtained in advance. A valid franchise is proof of that consent.

A utility franchise is a license. *Union Electric*, 770 S.W.2d at 286. "As a license it promotes civic responsibility and exemplary corporate conduct on the part of the utility." *Id.*

Section 393.170.2 and 4 C.S.R. 240-3.105 require a utility to demonstrate it has necessary local consents as a condition of the Commission issuing a certificate of convenience and necessity.

A county and a public utility are free to negotiate a franchise covering broader authority than the setting of electric light poles. In *Public Water Supply of Jackson County v. Burton*, 379 S.W.2d 593 (Mo. 1964), the Missouri Supreme Court noted that "in compliance with the requirements of the Commission, a franchise was sought from Jackson County for use of county roadways and highways. . . ." *Id.* at 599. The Court went on to comment, however, "no broad, general consent of the [Jackson County] Court was requested and none was granted . . ." indicating the county and the utility were free to negotiate for consent and authority beyond use of the roadways to string light poles and wires. *Id.* [emphasis supplied] This is consistent with the definition of franchise, which is generally understood to be "a positive right or privilege to do something otherwise legally incompetent." *State ex rel. Allen v. Dawson*, 224 S.W. 824, 826 (Mo. banc 1920).

In 1980, the Commission changed its practices. In *In re Union Electric Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980), Union Electric applied for a specific certificate of convenience and necessity to construct two combustion turbines within its service territory. Though no such ruling was requested, the Commission declared that public utilities were no longer required to secure a Section 393.170.1 line certificate to construct a power plant if the power plant is being constructed within the service area defined by the utility's area certificate. *Id.* at 5-6. Though Section 393.170.1 as written specifically requires the Commission's approval before a power plant is constructed, the Commission concluded that a public utility's Section 393.170.2 area certificate sufficiently authorizes a utility to do whatever it deems necessary (including constructing power plants) to fulfill the utility's obligation to serve those in its certificated area.

The Commission also determined to defer evaluation of power plants until after they were constructed, and then only in the context of a rate case. The case did not explain what significance it would have on Commission expectations for valid franchise authority.

A long line of decisions from the Commission and from Missouri Courts describe the separate, but complementary, components of police powers delegated to 1) the Commission in Chapters 386 and 393; and 2) to local authorities in applicable state statutes including Chapter 64. In *In the Matter of the Application of Ozark Utilities Company*, 26 Mo. P.S.C. 635, 639 (1944), the Commission recognized:

> a mere cursory study of this statute, [referencing the predecessor to Section 393.170] as interpreted by the decisions of our Supreme Court, shows the clear purpose of the law is to leave the granting of municipal franchises to local authority untampered by any restraints or limitations from this Commission, and the omission from the statute shows a clear design not to confer upon this Commission any right to approve or disapprove the terms and conditions of a municipal franchise. Such power, if conferred upon this Commission, might result in an intolerable condition, if it should, in passing upon a franchise, undertake to suggest, or to impose, terms which would not be agreeable to both contracting parties, the municipality and the utility corporation."

Id. at 639. In that same case, the Commission cited *State ex inf. Shartel, ex rel. Sikeston v. Mo. Utilities Co.*, 53 S.W.2d 394, 398 (Mo. banc 1932) for the following analysis:

> It is not intended . . . to substitute (the) commission for the local or municipal authorities, when by the constitution and laws of the particular jurisdiction the consent of such local authorities is necessary before the grant of a franchise could be complete, because the constitution and laws contemplated that such local or municipal authorities shall have power to impose such reasonable conditions as the convenience and necessity of the locality may require, and with such conditions for the exercise of the franchise (the) commission has no concern. Therefore, it (the commission) cannot demand that the local authorities *add to or take from* the conditions upon which they were willing to consent. . . .

Id. [emphasis in original text]. In short, grant of a certificate by the Commission does not give a public utility any right to operate in a municipality greater than the municipal consents secured by the utility. For purposes of this analysis, municipal consents have been interpreted to include

county consents. *See In the Matter of the Application of Southwest Water Company*, 25 Mo. P.S.C. 637 (1941).

The interplay between the authority extended a utility by an area certificate and the franchise authority required from a locality was carefully explained in *State ex rel. City of Sikeston v. Public Service Commission*, 82 S.W.2d 105, 108-109 (Mo. 1935). The Supreme Court, in discussing the statutory scheme that was the predecessor to Section 393.170, noted:

> "This court . . . definitely held that municipal consent is still required, in addition to whatever requirements may be imposed by the commission . . . and we find nothing in the Public Service Commission Act or in our decisions construing the same that lends any substantial support to respondent's suggestion that this statutory requirement has been repealed, **or that the commission's grant of a certificate of public convenience and necessity is a grant of any privilege, franchise, or right which municipalities, as agents of the state, are empowered to grant or withhold at their pleasure**.' State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Company, supra. **In other words, a certificate of the commission is only, where required, an additional condition imposed by the state to the exercise of a privilege which a municipality may give or refuse, and the commission is not to give its certificate to a company until after the city has consented that it may operate within its boundaries**."

Id. [emphasis supplied]

The Public Service Commission has long recognized the parallel dichotomy between its regulatory authority over utilities and that exercised by local municipalities. In *In the Matter of the Application of Missouri Power & Light Co.* cited above, the Commission approved an application for a site specific certificate for a combustion turbine generating plant in an area already covered by the applicant's general certificate of public convenience and necessity. In its decision, the Commission, found the following:

- "The applicant has satisfied all requirements of state and local agencies concerning the construction and operation of the plant." *Id.* at 2.

- "We should also state parenthetically at this point that we are of the opinion that the citizens, through proper zoning ordinances, have already designated the area in question as an industrial area." [emphasis supplied] *Id.* at 4.
- "We also find that the applicant has met our Public Service Commission requirement that it has complied with municipal requirements before construction of the facility." [emphasis supplied] *Id.* at 4

This suggests that the Commission, when reviewing applications for specific certificates, expects public utilities to comply with applicable zoning and land use regulations if the public utility desires a specific certificate authorizing the plant. In fact, in the aforesaid decision, the Commission, in evaluating an intervener's request to move the location of the plant, held:

> **For us to require the Applicant to move the proposed site to the alternative site suggested . . . would be to suggest a location that is not now zoned for industry, but is zoned residential. In short, we emphasize we should take cognizance of - - - and respect - - - the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning.**

Id. at 4 [emphasis supplied]

Notwithstanding the Commission's decision in *In re Union* Electric, there is a longstanding and important balance between the authority granted by the Commission to utilities to operate in an area and the authority granted by local franchises with respect to the specific rights and privileges extended the utility. Aquila's application in this case is but one more example, in a long parade of examples, of how Aquila scorns this balance. Judge Dandurand has determined that Aquila's 1917 Franchise with Cass County does not authorize the construction of a power plant. Aquila has glossed over this deficit. Its application makes no excuse for not having such a franchise, leading Cass County to conclude that Aquila believes that it simply need

not acquire one because the Commission's issuance of the site specific certificate will be enough. Aquila is incorrect.

Aquila's area certificate, supported only by a franchise from Cass to set electric poles for the transmission of light, cannot be expanded by the Commission's 1980 decision in *In re Union Electric* to confer specific authority upon Aquila to construct a power plant in Cass County. As stated by the Western District Court of Appeals in *Union Electric*, 770 S.W.2d at 285-286,

> The statutory scheme at Section 393.170.2, R.S.Mo. 1986 establishes two layers of oversight by providing that the rights and privileges granted by a franchise may not be exercised without having first obtained commission approval. A commission certificate becomes an additional condition imposed by the State on the exercise of a privilege which a municipality or county may give or refuse under its delegated police power.

Id. [emphasis supplied]

To date, Cass County has not granted Aquila the privilege of constructing power generation facilities in the County. (Final Judgment, page 3). Such a franchise is required and constitutes an additional condition upon Aquila before it may exercise the site specific authority it seeks as an alternative in its application. The filing requirements for Aquila's application are governed by 4 CSR 240-3.105 which provides:

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

4 CSR 240-3.105(1)(D)(1). Aquila has not requested a waiver of this rule. Aquila cannot comply with this filing requirement because it has not acquired Cass County consent for construction of the power plant. Section 393.170 contemplates that the municipal or county consents required for a utility to do business shall be obtained before it applies for certificate of service authority. Aquila has filed this application before all necessary local consents have been

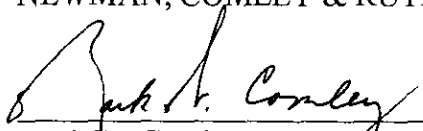
obtained. Its alternative request for site specific authority to construct the South Harper Plant and associated electric substations must be denied.

CONCLUSION

Based upon the above and foregoing, Aquila's request for a Commission order confirming that it specifically possesses certificate of service authority to construct the South Harper Facility and the Peculiar Substation should be denied in that 1) because of the Final Judgment, such a confirmatory order would be a legal declaration the Commission has no power to issue and 2) the certificates relied on by Aquila for this request are already clear and do not confer authority on Aquila to build a power plant in unincorporated Cass County. Furthermore, Aquila's request for a site-specific certificate of convenience and necessity to construct and operate the South Harper Facility and Peculiar Substation should be denied in that Aquila lacks a franchise from Cass County to construct and operate a power plant in unincorporated Cass County, a prerequisite to approval of its request per statute and the filing requirements of this Commission.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: 

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ATTORNEYS FOR CASS COUNTY, MISSOURI

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 21st day of March, 2005 to the Office of General Counsel at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; and Paul A. Boudreau at paulb@brydonloaw.com and Gerard Eftink at geftink@kc.rr.com and geftink@comcast.net.

Mark W. Comley