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April 13, 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 an Application for Rehearing.

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: /s/ Mark W. Comley

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Enclosure
cc: Office of Public Counsel
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

APPLICATION FOR REHEARING

Comes now Cass County, Missouri, (Cass County) by and through its attorneys, and pursuant to Section 386.500 RSMo and 4 CSR 240-2.160, moves and applies for rehearing of the Commission's Order Clarifying Prior Certificates of Convenience and Necessity (hereinafter "the Order"). In support, Cass County submits the following to the Commission:

1. On April 7, 2005, the Commission entered the Order purportedly clarifying previous certificates issued to Aquila, Inc. (Aquila). The Order bears an effective date of April 17, 2005. This application is therefore timely under Section 386.500 and 4 CSR 240-2.160.

INDEFINITE SUSPENSION OF THE REMAINDER OF HEARING DENIED CASS COUNTY AND OTHER PARTIES DUE PROCESS OF LAW

2. The Commission scheduled an evidentiary hearing and oral argument for March 28 and 29, 2005 at which only witnesses for Aquila were allowed to testify. Cass County's cross examination of Aquila witness, Terry Hedrick, had not concluded at the time the hearing was adjourned on March 29, 2005. On March 30, 2005, the Commission notified the parties that the hearing would continue on April 4. On March 31, 2005, without any explanation the

Commission suspended the hearing until further notice. It rendered the Order on April 7, 2005 on the basis of Aquila's evidentiary presentation alone and deprived the other parties, including Cass County, of the opportunity to fully cross examine Aquila's witnesses and Staff's witness(es); to present their own evidence and to present oral argument adverse to Aquila's position. "Due process contemplates that the opportunity to be heard be at a meaningful time and in a meaningful manner." *McCormack v. Maplewood-Richmond Heights School Dist. Bd. of Education,* 935 S.W.2d 703, 708 (Mo.App. E.D. 1996). Here the only party that had a meaningful opportunity to present its case in a meaningful way was Aquila. A meaningful time was scheduled for continuation of the hearing but the Commission canceled it. The Commission should set aside the Order and reschedule the remainder of the hearing so that the interveners can meaningfully present their evidence and be heard on their objections to Aquila's request for relief.

THE COMMISSION'S PURPORTED CLARIFICATION OF AQUILA'S CERTIFICATES IS A DECLARATION OF LAW THE COMMISSION LACKS POWER AND AUTHORITY TO ENTER

3. Judge Dandurand's Final Judgment[1] makes these findings:

> 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]

4. In ORDERED paragraph no. 1 of the Order, the Commission,

> confirms that the Commission has already granted Aquila, Inc., under its existing certificates of convenience and necessity, **specific authorization** to construct plant in its service territory, **specifically including,** but not limited to, the **specific**

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

> **authorization** to . . ., construct, . . . an electric power generation station. . . .[2] [emphasis supplied]

There is no way to reconcile the findings of the Commission with those of the Court. The Commission has entered a conclusion in direct opposition to one entered by a circuit judge and in so doing, has elevated itself beyond the scope of its powers and authority.

5. 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 should set aside its order clarifying the certificates.

THE COMMISSION HAS MISINTERPRETED AQUILA'S CERTIFICATES

6. The Commission bases the entirety of the Order on three previous Commission orders relating to Aquila's, or its predecessors', authority. The Commission has not clarified these orders but rather has completely misinterpreted them. The first order the Commission uses

[2] ORDERED paragraph 2 is nearly identical with the exception it concerns authority to construct the Peculiar Substation.

to support its conclusions was entered on December 6, 1921[3] 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 December 6, 1921 order did not describe, modify or expand the rights, privileges and franchises acquired or controlled by Green Light and Power Company. It limited West Missouri Power to exercise the rights Green Light and Power already had. **The Commission will not find an order granting the Green Light and Power Company the authority to build power plants in Cass County.** The order quoted above has no logical connection to Aquila's rights to build power plants in Cass County.

7. The Commission interprets the terms of an order dated March 21, 1922 in the same case. In that order the Commission allowed West Missouri Power to spend the proceeds of an authorized stock issuance,

> For extensions and additions to distribution systems and street lighting systems now or hereafter owned by the said Company in Jackson, Cass [and other] counties and for the reimbursement of monies heretofore or hereafter actually expended from the income of the company for the acquisition or property, the construction, completion, extension or improvement of the plants or distribution systems of said Company . . . .

[3] Case No. 3171

Neither West Missouri Power nor Green Light and Power owned electric generation plants in Cass County at the time. This order did not profess to authorize construction of such a plant. It did allow money from this stock sale to be used on a plant if it were ever authorized and built.

8. In the Order, the Commission cites with approval the certificate issued in Case No. 9470,[4] but Cass County points out again that no authority to build a plant was ever sought by Missouri Public Service Corporation in this case. Missouri Public Service Corporation (Aquila's predecessor) requested 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 replete 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. This certificate was construed by the Western District Court of Appeals (at that time the Kansas City Court of Appeals) in *State ex. rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (KC Ct. App. 1960). As stated by Judge Cross in *Harline* at page 185, "[t]he 1938 certificate permitted [Aquila's predecessor] to serve a territory - - not to build a plant." Whether the 1938 certificate can be interpreted to grant Aquila authority to construct a generating plant is *res judicata.* The issue has been resolved against Aquila as a matter of law.

9. The last order the Commission relies upon in its interpretation is one entered in a 1950 merger case granting Aquila's predecessor all the rights of Missouri Public Service Corporation to construct, own and maintain electric utility facilities as allowed in Case No. 9470

discussed above. The order afforded Missouri Public Service Company just 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.

10. At page 5 of the Order the Commission states that all of the orders above are conclusive and free from collateral attack. Even though there is no known inconsistency or lack of harmony in these orders (none has ever been identified by Aquila and the years they have been in effect prove that they are not at war with each other), the Commission goes on to rule that it "will **reconcile these orders** to mean that Aquila already has specific authority from the Commission to build the [South Harper Plant]. [emphasis supplied]

11. The orders were harmonious, yet in the name of reconciliation, the Commission has injected new grants of authority in those orders. The Commission has engaged in much more than mere reconciliation. The Commission found "specific authority" in previous orders that failed to speak of even "general authority" to build generation plants. No doubt to the delight of other regulated electric companies, the Commission has found authority in decades-old orders that was beyond the scope of the applications upon which they were based. The Commission's rule that applications govern the extent of the relief granted in Commission orders has been constructively abandoned. The Commission has collaterally modified the applications and orders in three separate cases; cases that the Commission first determined were beyond collateral attack. None of the orders construed contains the word "specific" and none of the orders contains the words "South Harper Plant," hence the certainty expressed by the Commission that Aquila has specific authority to build the South Harper Plant is chemeric.

[4] 23 Mo.P.S.C. 740 (1938)

THE COMMISSION HAS UNLAWFULLY EXPANDED AQUILA'S FRANCHISE IN CASS COUNTY

12. The Commission has mischaracterized the orders and directives contained in the Final Judgment. At page 8 of the Order, the Commissions states:

> The Commission recognizes, however, that Aquila is under order by the Circuit Court of Cass County to obtain "specific authorization" for construction of the South Harper Facility and the Peculiar Substation pursuant to the language in Section 64.235, RSMo.

The Final Judgment did not direct or order Aquila to apply to this Commission for any relief. If anything, it ordered and directed Aquila to submit the South Harper Plant for zoning approval before Cass County boards and commissions; or acquire the franchise from Cass County it lacks.

13. The Commission's misunderstanding of the Final Judgment generated its closing finding in the Order on page 8 where it finds that Aquila has "specific authority under its existing certificates to construct and operate the South Harper Facility and Peculiar Substation. . . ." The Commission has hybridized Aquila's applied for requests for relief. The Commission has "clarified" the orders above to grant Aquila a site specific certificate.

14. At no point in the Commission's Order is there a quarrel with Judge Dandurand's other finding that Cass County has not granted Aquila the privilege of constructing power generation facilities in the County. (Final Judgment, page 3). Judge Dandurand has determined that Aquila's 1917 Franchise with Cass County does not authorize the construction of a power plant. Cass County's franchise is required before Aquila can build its generation facilities and associated electric substations. Section 393.170.

15. On page 4 of the Order, the Commission has already cited with favor *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton,* 379 S.W.2d 593 (Mo. banc 1964).

This case also addresses the complementary relationship between the Commission's certification requirements and local franchises. At page 599 of that opinion, Judge Welborn writes:

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

The principles announced in *Burton* have underpinnings in the cited case of *State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co.* 331 Mo. 337, 53 S.W.2d 394 (Mo.1932). In analyzing the requirements of the statutory predecessor to Section 393.170, the court, in agreement with Judge McQuillan, himself a former member of the Missouri Public Service Commission, quoted from his treatise:

> It is not intended by [Section 393.170] to substitute a 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 a commission has no concern. Therefore, **it cannot demand that the local authorities add to or take from the conditions upon which they were willing to consent.** [emphasis supplied]

331 Mo. 337, at 348-349, 53 S.W.2d 394, at 398.

16. The Commission has interpreted Aquila's previous certificates to specifically authorize the construction of the South Harper Plant and Peculiar Substation without regard to the limitations imposed on Aquila in its franchise with Cass County. The Commission has enlarged Aquila's rights under Cass County's franchise and by law, the Commission has no

power to amend that franchise. Moreover, to the extent the Commission's order grants site specific authority, it is a "new" grant of authority to Aquila and in the absence of a franchise from Cass County, the Commission's own rules require that site specific authority be denied. 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). 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 cannot produce this essential ingredient for its application. Granting it site specific authority without Cass County's consent is unlawful.

THE COMMISSION FAILS TO PROPERLY INTERPRET AND APPLY THE RULING IN *HARLINE*

17. The Commission's order issued to Aquila's predecessor in Case No. 9470 is an "area certificate" under the authority of Section 393.170.2. *Harline* at 179-180, 185 (holding Aquila's general certificate, Case No. 9470, to be an "area certificate" under Section 393.170.2). "Certificate 'authority' is of two kinds and emanates from two classified sources. 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." *Id.* at 185. In *State ex rel. Union Electric Co. v. Public Service Commission*, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989) the Western District also found

> "[t]wo types of certificate authority are contemplated in Missouri statutes. Section 393.170.1, RSMo 1986 **sets out the requirement for authority to construct electrical plants**. This is commonly referred to as a line certificate. . . . [Section 393.170.2] sets out the requirement for authority to serve a territory which is known as an area certificate. . . . This . . . type of authority . . . has been

the principal vehicle for saturating a geographically defined area with retail electric services." Id. [emphasis supplied]

18. A "line certificate" is, therefore, a **specific** certificate of convenience and necessity that authorizes construction of a **particular** plant or infrastructure. In contrast, an "area certificate" defines a geographic area where a public utility has been authorized to provide electric service. No Missouri court has **ever** held that an area certificate extends specific authorization or permission to construct a power plant. In fact, two Missouri cases have held to the contrary.

19. In *Harline*, the Court interpreted the authority extended by Case No. 9470. The court found the area certificate authorized Aquila's predecessor to serve territories and to construct and extend electric transmission lines throughout its existing service territory without having to secure a new certificate for each extension. *Id.* at 182, 183 and 185. However, the court in *Harline* did not extend this holding to power plants. As already asserted in this brief, the court expressly found: "We have no concern here with Sub-section 1 'authority'. The 1938 certificate permitted the grantee to serve a territory - - **not to build a plant**." [emphasis added] *Id.* at 185. [5]

20. In further support of the distinction between the authority provided by an area certificate to allow the extension of transmission lines within a service territory, and the specific line certificate authority required to build a power plant, the *Harline* court cited *In Missouri Valley Realty Co. v. Cupples Station Light, Heat & Power Co*, 2 Mo. P.S.C. 1 (1914). The court

[5] Aquila, as the current holder of the area certificate interpreted in *Harline*, and the Commission, the agency that issued it, are both bound by the Court's finding that Aquila's area certificate does not permit Aquila to build a power plant. The doctrines of *res judicata* and estoppel are applicable here. *Fischer ex rel. Scarborough v. Fischer*, 34 S.W.3d 263, 265 (Mo. App. W.D. 2000) ("Also referred to as 'issue preclusion,' the collateral estoppel doctrine 'provides that an issue judicially determined in one action may not be relitigated in another action.'" *Shahan v. Shahan*, 988 S.W.2d 529, 532 (Mo. banc 1999)).

in *Harline* noted that in *Cupples*, this Commission construed Section 393.170 and determined that,

> when a utility is legally serving the public under a certificate of convenience and necessity, the law does not require a certificate for every extension of its lines to render additional services, and that, "as to electrical corporations (referring to those already constructed and operating) the only certificate of permission and approval required from the Commission **is that required before the company shall begin construction of its plant**." [emphasis supplied]

Harline, 343 S.W.2d at 182. Consistent with this authority, *Union Electric*, 770 S.W.2d at 285, identifies line certificates issued pursuant to Section 393.170.1 as **the type of certificate required to authorize construction of electrical plants.**

21. In the instant case, *Harline* and *Union Electric* should have led the Commission to conclude, as Judge Dandurand did, that Aquila lacks authority in its certificate of convenience and necessity to build a power plant in Cass County. Yet, despite the clear distinction drawn between Section 393.170.2 area certificates and Section 393.170.1 line certificates, and the clear distinction between the authority to extend transmission lines within a service territory and the need for a specific line certificate to authorize construction of a power plant, the Commission clings improperly to interpretations of *Harline* that erase those distinctions.

22. Before 1980, and in keeping with the distinction between a Section 393.170.2 "area certificate" and a Section 393.170.1 "line certificate," this 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).

23. In 1980, the Commission altered this practice. 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.

24. *In Re Union Electric Co.,* was the first time the Commission ruled that an area certificate authorizes construction of a power plant within an existing service territory. The Commission's conclusions in that case were based on an erroneous interpretation of *Harline* that has continued to the present Order. (Order page 7) The Commission has ignored that the court in *Harline* carefully distinguished between electric transmission lines and power plants. *Harline*, 343 S.W.2d at 183. The Commission has also ignored the obviously incongruent finding in *Harline* that, though an "area certificate" authorizes the extension of transmission lines, it does not extend authority to construct a power plant. *Id.* at 185. In failing to properly interpret *Harline,* the Commission in turn has rendered the requirements of Section 393.170.1 meaningless and of no effect. The Commission has no power to nullify a statute. *State ex rel. Sprint Missouri, Inc. v. Public Service Commission*, ___ S.W.3d ____; 2004 WL 2791625 (Mo.

App. W.D. 2005). (". . . the Commission 'has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.' [citation omitted]).

WHEREFORE, on the basis of the above and foregoing, Cass County requests that the Commission set aside its Order Clarifying Prior Certificates of Convenience and Necessity and grant Cass County rehearing.

Respectfully submitted,

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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 12th day of April, 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