BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri Near the Town of Peculiar	)))))))	**Case No. EA-2006-0309**

DISSENTING OPINION OF COMMISSIONERS ROBERT M. CLAYTON III AND STEVE GAW

We dissent from the majority Report and Order granting Aquila a Certificate of Convenience and Necessity to construct the South Harper facility. Throughout this case, Aquila has consistently taken action without necessary regulatory approval only to ask for permission after the fact. This strategy has resulted in the filing of multiple cases before the Missouri Public Service Commission (Commission or PSC), various challenges at the Circuit Court, two ongoing cases before the Western District of the Missouri Court of Appeals, and so far, one case ultimately transferred to the Missouri Supreme Court.[1] The controversy surrounding the construction of the facility and its accompanying financing has enveloped a significant amount of resources by state and local governments, the company (its shareholders and potentially its ratepayers), as well as local residents who have defiantly—and often successfully—fought the siting, development, construction, and operation of the power plant.

While much of the blame in this case can be attributed to Aquila, there is plenty of responsibility to be passed around to others, including the Missouri Public Service Commission and its Staff. At times Staff has acted as a willing participant in assisting Aquila from the

[1] *See*, PSC Case Nos. EO-2005-0156, EA-2005-0248 and EA-2006-0309; Case Nos. CV104-1443CC, CV105-558CC, 06-CA-CV-01698, WD 6500 and SC87302; *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App., W.D. 2005).

beginning of the process, and during parts of the litigation,[2] by not critically and independently reviewing the facts and assessing the impact on all concerned parties to reach an impartial conclusion. The Commission itself has encouraged that behavior through its Orders,[3] allowing the construction, financing and operation of the plant in spite of local opposition and in defiance of judicial orders.[4]

The case at hand raises many issues that must ultimately be decided by a court of law with the authority to clarify the interpretation of statutes and cases on which the Commission, Missouri citizens, and utilities rely when addressing the construction of power plants. The lack of clarity in the applicable statutes requires the Court to design a roadmap for this and future cases. Without clarification, the precedent established by the majority will permit the Commission to hastily invade the province of county government's land use expertise and the authority given to it by the Missouri Legislature. These Commissioners disagree with this inappropriate interpretation of Commission jurisdiction and local zoning authority in the absence of specific legislative direction.

DOES THE PSC HAVE JURISDICTION OR AUTHORITY TO GRANT A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR A PREVIOUSLY CONSTRUCTED POWER PLANT?

The initial question in this case involves the interplay among various provisions of Missouri law, including land use planning and zoning statutes found within Chapter 64 and the relevant Missouri Public Service Commission provisions found in Chapter 393, RSMo.[5] The

[2] *See*, Exhibits 15 - 20.
[3] EA-2005-0248, Order Clarifying Prior Certificates of Convenience and Necessity. The Commission vacated EA-2005-0248 on March 7, 2006, pursuant to the February 28, 2006, Circuit Court of Cass County's Consent Judgment directing the Commission to set aside and vacate its April 7, 2005 Order.
[4] *See*, Case No. CV104-1443CC (Cass County); *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App., W.D. 2005).
[5] All references are to the Revised Statutes of Missouri (RSMo) 2000, unless otherwise specified.

zoning statute at issue, §64.235,[6] permits Cass County's Planning Board to exert zoning authority over new construction. However, the section provides that certain developments may avoid this requirement if appropriately authorized by the PSC or the County Commission pursuant to §64.231. Conflicting interpretations of these provisions has produced uncertainty about the appropriate process to use when an electric generation facility is proposed to be sited in an area for which it is not properly zoned. We believe that the majority opinion misapplied the law in arriving at a decision which will lead to future confusion.

The Western District Court of Appeals clarified the relationship of the two statutory provisions in its most recent decision on the request to permanently enjoin Aquila from proceeding with construction of the South Harper facility. *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App., W.D. 2005). The Court specifically delineated the power of the Missouri Public Service Commission to site power plants prior to construction, pursuant to §393.170.1, reversing the Commission's interpretation of *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960).[7] Section 393.170.1 grants the Commission the authority to issue an Order Granting a Certificate of Convenience and Necessity for the specific authority to construct an electric plant. Specifically, §393.170.1 reads, "[n]o gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant,

[6] The statute mandating adherence to local zoning laws is §64.235, which reads:

> From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefore to the planning board, nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission after public hearing in the manner provided by section 64.231.

[7] *See, Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980). *See also*, Dissent of Commissioner Steve Gaw, Case No. EA-2005-0248.

electric plant, water system or sewer system without first having obtained the permission and approval of the commission." (emphasis added). Furthermore, §393.170.1 is the only statute referenced in the Western District opinion which gives the Commission the authority to approve the siting of power plants and is the only statute granting the PSC to "specifically authorize" a project from §64.235.

The Court found that the Area Certificates previously issued to Aquila by the Commission did not "specifically approve" the construction of the new power plant at issue in this case. In addition, because the County had not provided the necessary permission to construct the plant, the Western District upheld the Circuit Court's permanent injunction. At the time, the complete impact of the Court's ruling was not clear. This impact is now realized. Due to the South Harper facility's violation of Cass County zoning, the plant must be dismantled, unless a legal remedy can be found to overcome the restriction. The Commission majority attempted to find this legal remedy to save the electric power plant, resulting in its flawed order, rather than focusing on determining the appropriate interpretation of the law.

The majority ignores the significance of the fact that the electric power plant was built before Aquila made its request of the Commission, a fact which we believe is critical in the analysis and decision of this case. Section 393.170.1 specifically provides that a utility must receive the Commission's permission and approval prior to beginning the construction of an electric plant. The Court of Appeals wrote, "Aquila is seeking to build an electric power plant, a matter that is governed by section 393.170.1." *StopAquila* at 35. This distinction between construction of the plant and its operation is the underlying theme found throughout this Court's opinion. The Western District's ultimate finding "affirm[ed] the circuit court's judgment permanently enjoining Aquila from building the South Harper plant . . ." *Id.* at 41 (emphasis added).

As discussed later in this dissent, we believe that this Commission has the authority pursuant to §393.170, to override county zoning in the siting of electric plant. However, the Western District confirmed that the Commission's power to grant a regulated utility permission to build a plant in a particular location under §393.170.1 exists only prior to the commencement of construction. The Court explained:

> By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan. (FN14) This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months *before* construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission. *StopAquila* at 37 (emphasis added).

The Western District pointed out that the authority of this Commission is significant but not unlimited. This Commission may only act under its statutory authority because "[i]n all these things [the Public Service Commission] acts by virtue of the legislative authority with which it is clothed, and necessarily within the limits of the legislative power, for the stream cannot rise above its source nor the creature above its creator." *StopAquila* at 34 (citing *Mo. Valley Realty Co. v. Cupples Station Light, Heat & Power Co.,* 199 S.W.2d 151, 153 (Mo.banc 1917). We have not located any alternate statutes that act as a basis for pre-empting county land use control, thereby designating §393.170.1, the Commission's limited statutory authority. Aquila's attempt to obtain permission from the Commission after the power plant's construction did not fall within this statutory authorization.

In its ultimate holding, the Western District made it very clear that Cass County was correct in its assertion that Aquila had not obtained the necessary authority to construct the South

Harper facility:

> The overriding public policy from the county's perspective is that it should have some authority over the placement of these facilities so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. As the circuit court stated so eloquently, "to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants . . . The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities".
>
> For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County's zoning law without first obtaining approval from the county commission or the Public Service Commission . . . *StopAquila* at 41.

According to the literal and strict reading of the statute and the language of the Western District's opinion, the Commission's authorization is clearly not available to Aquila nearly a year after the unauthorized construction of the plant began. This Commission cannot statutorily authorize the siting of the South Harper facility and thus does not have the statutory license in this case to override the County's authority.

However, the Court in dicta seemed to imply that Aquila may have a remedy to its predicament. The Court added, as the last sentence of its opinion:

> [i]n so ruling, however, we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate. *StopAquila* at 41.

The parties have made various interpretations of this portion of the opinion. These include Cass County's argument that the Court gave no direction regarding the appropriate course of action for Aquila, but only suggested that if a remedy existed outside of that previously pursued by Aquila and ruled on by the Court, it was not constrained from pursuing it. However, the majority of the Commission concludes that the Court was declaring a path to a solution for Aquila. According to the majority, dicta from the Western District permits Aquila to receive the

necessary permission to operate the facility from either Cass County or the Commission.

The majority's line of reasoning equates permission to operate the South Harper facility with authority to build it under §393.170.1. The majority's opinion ignores the distinction in the Court's opinion between construction and operation, and concludes that the Court was instructing Aquila to file a request with either the Commission or the County. The majority thereafter applies an analysis it believes would be appropriate in a siting case under §393.170.1, while ignoring that this section does not apply because the plant is already built.

The permission to operate the facility as discussed by the Western District is different from permission to construct pursuant to §393.170.1. The Western District declared that Aquila failed to secure the necessary permission to construct the plant from the County or the Commission. Thus, the Western District found that the trial Court's injunction would stand. It is from this finding by the Court that without such permission from the Commission or Cass County, the plant would be subject to being dismantled.[8]

Failure to comply with the requirements of Chapter 393 leads to a different type of consequences, presumably levied by the Commission. The consequences of not procuring Commission authority could involve penalties under Chapter 393 or 386, refusal of the Commission to recognize the plant in rate base and the loss of the authority of the Commission to preempt county zoning requirements.

Noncompliance with county zoning often means the violating structure must be removed. When the Western District stated that Aquila could pursue continued operations of the plant, it seems probable that the Court was not suggesting that such permission could be granted by the Commission to override County zoning; rather, it was referring to Aquila seeking permission from Cass County for a variance from zoning requirements.

[8] While Aquila appears to have missed its opportunity to request that the Commission override the County's zoning requirement, it is the failure to abide by the zoning laws that has led to such a threat of dismantling, not the failure to follow the provisions of §393.170.

For the reasons that follow, these Commissioners believe that §393.170.1 does provide an opportunity to override county zoning when its provisions are followed. However, as previously stated, the door to this opportunity is closed.[9]

IF AQUILA HAD TIMELY REQUESTED PSC AUTHORITY TO CONSTRUCT THE SOUTH HARPER FACILITY, WOULD THE PSC HAVE THE POWER TO GRANT THE AUTHORITY CONTRARY TO COUNTY ZONING?

Despite our belief that the Commission lacks the legal authority under the facts in this case to override Cass County's zoning laws, we believe it is helpful to discuss the process that should occur when a utility properly seeks authority to site an electric plant prior to construction contrary to county zoning decisions. The Western District previously found that the area in controversy known as South Harper is zoned as agricultural by Cass County. Other than an electric plant or transmission owned by a regulated utility, there is no dispute that industrial facilities that are to be located in the area must make application to the appropriate county authority prior to construction.

While the Western District spent considerable time regarding the importance of zoning to the siting of an electric plant, the parties have continued to argue the issue in this case. Cass County and StopAquila maintain that the County has the authority to determine land use in the county and that both the utility and the Public Service Commission must respect its authority. Aquila, having lost in its previous interpretation of Missouri law regarding the siting authority of both public bodies, argues that the Commission can site a generation plant over a county's objection and without submitting a request to that county for a special use of the area. The majority opinion adopts the Staff view that the Commission can at any time override Cass County zoning without the county ever being given an opportunity to hear the matter. The majority further concludes that zoning is an insignificant factor in siting a generation facility.

[9] The Commission had an opportunity to dismiss this case based partially on the rationale listed in this section. These Commissioners supported the Order Denying the Motions to Dismiss filed by Cass County and StopAquila.org based on their desire to allow the parties to have a full evidentiary hearing in this case.

We disagree with the majority's analysis and conclusions.

The majority relies heavily on the testimony of the Staff witness, who compiled a list of factors he believed to be the important criteria in making a determination of the appropriate site for a power generating facility. His list was created after using a sampling of other states' criteria. Several states were used because of their proximity to Missouri while others had no relation or similarity to Missouri. According to the Staff witness, the states chosen by him did not see zoning as a significant issue and his summary of factors did not include land use planning or zoning as a priority. The Staff witness was asked directly about requiring zoning as a condition, to which he responded that the Commission should not impose any such condition.[10] In testimony assessing the importance of zoning and the factors to be examined by the Commission, the following exchange took place with staff witness:

> Q. In other words, would it be fair to say that Staff did not view a county's determination as to land use or a municipality's determination as to land use within their jurisdiction as an important factor in determining whether or not a site is ranked higher or lower?
> A. No, it did not.
> Tr. Vol. 7, p. 875.

While the Staff's disregard of the importance of zoning is reflected in the majority Report and Order, the Western District, in contrast, spent a significant amount of time in its opinion emphasizing the importance of zoning. The Western District explored the interrelation of zoning power and other governmental police power. *StopAquila* at 41. The Court made it clear that zoning is an important matter to be considered in a siting case. It rejected Aquila's arguments that Cass County zoning ordinances are unimportant and that proper zoning is not necessary in condemnation cases. As previously stated, the Court made this clear in stating "[b]y requiring public utilities to seek Commission approval each time they begin to construct a power plant, the

[10] Tr. Vol. 7, p. 794.

legislature ensures that a broad range of issues, including county zoning, can be considered . . ." (emphasis added) *Id.* at 37. Later in the opinion, the Court elaborated further and stated:

> Aquila bolsters its contention that counties have no authority over the construction of an electric power plant by citing section 229.100, which Aquila contends prohibits a county from issuing a franchise for such construction. The statute is silent with respect to power plants and simply prohibits public utilities from erecting power lines "without first having obtained the assent of the county commission of such county therefore." Section 229.100. While counties may not have the authority to issue franchises as to the construction of power plants, there is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant. *Id* at 40.

The Court also addressed Aquila's contention that cases dealing with eminent domain prohibited the consideration of zoning. The Court stated that:

> A public utility's power of eminent domain and a county's power to zone are derived from a legislative grant of authority. Both powers are police powers derived from statute and are without a constitutional basis, thus neither trumps the other, and both powers can be exercised in harmony. *See, e.g., St. Louis County v. City of Manchester,* 360 S.W.2d 638, 642 (Mo.banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant, court concludes that charter county's zoning ordinance restricting plant's location is lawful restriction stating, "the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county, and the public interest is best served in requiring it to be done in accordance with the zoning laws."). *Id* at 41.

Thus, if it is determined that the Commission has the authority to override a county zoning determination, the Commission must give significant weight to area zoning in making its decision.

When the provisions of §393.170.1 apply, a county's zoning should not be overridden unless there is a finding of good cause that the public interest in siting the plant at the proposed location is greater than the public interest of the county's zoning restrictions. An attempt should be made to balance these two public interests so as to avoid one subverting the other. The provision of safe and reliable electric service at just and reasonable rates is an important public interest. So, too, is the ability of a county or municipality to regulate the use of public land. It

should be the goal of the Commission to satisfy both public interests. When possible, the Commission should defer to the determination of the county as to the appropriate land use for the proposed site. However, there may be occasions when it is not possible to satisfy both public interests, in which case the Commission must carefully evaluate the competing public interests and find the solution that does the most public good.

Thus, when such a decision is necessary, the lynchpin of a Commission override of a county's zoning of a site should be a reason that is within the statutorily recognized expertise of the Commission. The Commission must determine that in order to provide safe and reliable electrical service to the customers of the utility at just and reasonable rates,[11] it is necessary for the public interest expressed in county zoning ordinances to be overridden. This analysis would appropriately entail an evaluation of other potential sites and alternatives for power. The Commission should not override the county's appropriate determination for the use of land within its boundaries if other reasonable alternatives exist.

This approach reflects the significance of the county's zoning while still allowing the Commission to override this interest in the event that other alternative sites do not meet the objective of safe and reliable service at just and reasonable rates. Furthermore, this process is consistent with other cases which suggest that the Commission review lies within its expertise in securing reliable electrical service.[12]

Under this analysis, a thorough review of all possible locations for the plant, without zoning issues, could be conducted. A determination would be made of the negative consequences of placing the plant at locations other than the site requested and whether these consequences were great enough to override the public interest and policy concerns of not

[11] §393.130, RSMo. Supp. 2005.
[12] *See, Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo.banc 1973).

complying with zoning. Such an analysis was simply not done in the majority opinion nor was there sufficient evidence in the record to conduct such an analysis.

We further note the zoning of a county does not represent an example of "not in my back yard" opposition as the majority opinion implies. The majority's analysis is a misapplied balancing of public versus private interests when county zoning is not a private interest. It is a public interest reflected in state statutes and county ordinances, which should be given appropriate weight. It is among these public interests that the difficult decisions must be made. If a "private interest" can be found in the majority opinion, it is the interest of Aquila, which faced the most difficult of circumstances if the plant faced demolition. The majority found that "private interest" paramount in the overall analysis.[13]

While the Commission must face the difficult decisions in balancing public interests, the rights of private citizens are not to be taken lightly. The interference with private property rights including that of siting a generation unit is a serious and important matter both to the individuals involved and to public policy. The progress and economic development of the state is important but so are the rights of our citizens. Those who participate in the process have a right to a process that is fair, understandable, and balanced. Citizens deserve to know that the laws apply fairly to the individual citizen and the corporate giant. This is never more important or obvious than when these interests conflict with each other. The parties must abide by the law and face the consequences of its decisions.

We are also concerned about the process employed in this case. The parties had little

[13] It should be noted that neither the Staff nor the majority conducted a public interest evaluation of the site. Instead, they conducted a test to measure the reasonableness of the utility in its decision. In other words, according to the majority, the Commission should not evaluate the public interest of the site in balancing the public interests – rather it should conduct a prudence review of the utility's decision in selecting it. Such an analysis focuses entirely on the decision-making process of the utility and improperly shifts the burden to other parties to prove that the utility was not prudent. Not only is the burden improperly shifted, the prudence test ignores equally important aspects of the public interest.

guidance as to the factors which the Commission might use in deciding a siting case. The selection by Staff of criteria which were not available to the parties prior to the filing of this case (a case scheduled on an expedited basis) created an arguably unfair proceeding for which the parties opposing Staff's position most certainly found difficult to prepare. This is especially the case since the majority adopted Staff's position and its criteria for siting the facility. This Commission should delineate the factors that it will be considering in siting a power plant so that parties have guidance in preparing, presenting, and arguing such cases. These factors should include impact on neighborhoods, the environment and other concerns noted above. Other states have such guidelines set forth in rules and publicly available documents providing the public, utilities, and interest groups access to information on how difficult decisions on siting are made. The current lack of such information and failure to delineate factors to be considered contributes to the lack of trust and confidence that the decision process is fair and open. The Commission should act now to avoid future disputes. Finally, the record is simply incomplete for the Commission to make a reasoned decision on the hypothetical question of whether South Harper is the appropriate location in Cass County for a power plant. While the parties may have established several factors suggesting need for the generation and that Cass County was an appropriate location, in general, many questions remain.

CONCLUSION

The majority improperly relies on Staff's opinion in resolving the appropriateness of the South Harper site. Prior to the beginning of the South Harper facility construction and subsequent litigation, Staff was already working with Aquila to assist in advocating for this site. The majority's Report and Order is in fact a reflection of Staff's advocacy on behalf of Aquila. The lack of weight given to the zoning of the county coupled with the striking weakness in the study of other potential sites make the Report and Order in this case flawed.

The majority opinion consistently ignores the mistakes of this utility in pursuing this project. The failure of Aquila to plan and secure generation, it now claims is necessary, created a self-imposed deadline[14] which it foisted upon those in Cass County, this Commission, and the courts.[15] Aquila and Staff then used their urgent situation as a factor of siting at South Harper. Aquila's track record of mistakes and bad decision-making requiring solutions should not be grounds for bending the rule of law.

Each time Aquila made a mistake, it depended on others to find creative solutions to change or avoid the consequences of the rule of law. For example, in seeking to approve a transfer of the South Harper facility to the City of Peculiar for financing, Aquila misrepresented to this Commission that it awaited Commission approval to make the transfer when the transfer had already occurred; Aquila pursued the financing regardless of a pending court case in which it was found unlawful; Aquila sought the inclusion of the generation facility in its rates despite the fact that it was not "used and useful"[16]; Aquila continued construction of the plant despite a Court order to halt construction requiring the posting of bond and the risking of millions of dollars of ratepayer and/or shareholder money; and, most importantly, Aquila failed to work with the neighbors in the vicinity of South Harper until the situation was beyond repair. These Commissioners will not enable or endorse a utility's pattern of behavior that consistently puts its ratepayers and shareholders in jeopardy.

The focus on the South Harper location only occurred after stiff local opposition at Camp Branch. Other reasonable locations were arbitrarily rejected without full analysis. For example, the Aries facility at Pleasant Hill, despite proper zoning, adequate space, convenience to transmission and fuel lines and NO local opposition was barely even considered. The South

[14] Tr. Vol. 7, p. 785.
[15] Tr. Vol. 12, pp. 1744-1746.
[16] Section 393.135: "fully operational and used for service".

Harper site was selected only because the residents surrounding the Camp Branch location complained loudly first. If South Harper had been the first location inspected and the local opponents involved here had spoken loudly first, the next location would have been chosen. As a consequence, the second selection of the Camp Branch site would have been forced on a different group of Cass County residents. Such an arbitrary decision-making process should not be embraced, but rather should be rejected by the Commission.

The list of potential site locations included several criteria in suggesting whether a site was appropriate or not. That list included an estimation of the litigation expenses associated with the processing of the necessary government approvals and addressing the concerns of citizens opposed to the plant. Other locations had a much higher calculation of litigation expense than the site located at South Harper which, in hindsight, has clearly proven erroneous.[17] That entry on the comparative list can be summarized in a quote from Aquila's CEO, who stated that, "[t]he biggest mistake we made was we didn't listen to and respect our neighbors." *Kansas City Star*, May 4, 2006.[18] If that respect and communication had been shown at the start of the process, the calculation of litigation expenses and headaches would have been far less, regardless of the specific location in Cass County.

For the foregoing reasons, we respectfully dissent.

Respectfully submitted,

Robert M. Clayton III
Commissioner

Steve Gaw
Commissioner

Dated at Jefferson City, Missouri,
on this 15th day of September, 2006.

[17] Exhibit 19, Rebuttal Testimony of Staff Witness, Schedule WW-6a.
[18] Exhibit 132.