

**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

**APPLICATION FOR REHEARING OF
FRANK DILLON, KIMBERLY MILLER, JAMES & LINDA DOLL, KENDRA & RANDY
COOPER, GARY & CHERYLE CRABTREE, AND ALLEN & SHIRLEY BOCKELMAN**

COMES NOW Frank Dillon, Kimberly Miller, and James & Linda Doll, Kendra & Randy Cooper, Gary & Cheryle Crabtree, and Allen & Shirley Bockelman (hereinafter collectively the "Nearby Residents"), by and through counsel, pursuant to Section 386.500 RSMo. 2000 and 4 CSR 240-2.160, and respectfully apply for a rehearing of the Public Service Commission's ("Commission's") Report and Order issued in the above-styled matter on May 23, 2006, and bearing an effective date of May 31, 2006 ("Report and Order"), relating to an electrical peaking facility (commonly known as the "South Harper Facility" or the "South Harper Power Plant") and an electric substation (commonly known as the "Peculiar Substation").

The Report and Order issued on May 23, 2006 is an outrageous and unlawful governmental action by the Commission, an apparent attempt to take away any due process rights that the Nearby Residents may have to present their case to the

democratically-elected representative body which governs land use decisions in the jurisdiction where they live.

The Commission's Report and Order as written, if it were allowed to stand, would have an impact even **worse** than the exercise of eminent domain, allowing Aquila to take significant property rights from the Nearby Residents **without** just compensation. The Report and Order is astonishingly critical of Cass County, attacking that governmental party on numerous matters irrelevant to this case, revealing a serious bias. The Commission purports to go far **beyond** the granting of a simple certificate of convenience and necessity and attempts to take away the lawful authority of a sovereign county. Sadly, while it is attempting to usurp local zoning control from Cass County in this matter, it is the rights of the Nearby Residents that the Commission would most severely impact.

In support of their Application for Rehearing, the Nearby Residents state as follows:

1. The Nearby Residents are the individuals who have the most at stake with regard to issues involving South Harper Power Plant and the Peculiar Substation. These illegally-built facilities severely impact their homes, their life savings, and their way of life.

Frank Dillon owns and resides on approximately 9.1 acres of land, at 24211 South Harper Road in unincorporated Cass County, Missouri, directly across the street from the property upon which Aquila, Inc. ("Aquila") illegally built the South Harper Power Plant. This is where Mr. Dillon has lived for over 17 years and where he raised his family. Mr. Dillon also raises horses on this property.

Kimberly Miller owns and resides at a home at 23815 South Harper Road in unincorporated Cass County, Missouri, where she can see the South Harper Power Plant from her dining room window. Ms. Miller owns 12.5 acres at this address and has lived there with her family for over 10 years.

James and Carolyn Doll have resided on 9.9 acres that they own at 10312 E. 2043rd Street in unincorporated Cass County, Missouri for over 18 years, and where they can now see the South Harper Power Plant from their bedroom window.

Kendra and Randy Cooper have resided on 9.8 acres that they have owned at 23903 S. Harper Road in unincorporated Cass County, Missouri for over 7 years and where they have raised their family.

Gary and Cheryle Crabtree reside on 10 acres that they own at 24005 S. Harper Road in unincorporated Cass County, Missouri and where they had planned to retire. This land is directly across the street from the property on which Aquila has built the South Harper Power Plant without proper zoning approvals.

Allen and Shirley Bockelman own and reside on approximately 42 acres of land at 203rd Street and Knight Road in unincorporated Cass County, Missouri. This property is adjacent to the land upon which Aquila illegally built the Peculiar Substation without proper zoning approvals.

2. This Report and Order is unlawful, unjust, unreasonable, arbitrary, capricious, and unsupported by competent and substantial evidence on the whole record, in the following respects:

a. The Commission lacks the jurisdiction to retroactively approve a certificate for a power plant and substation which were already constructed (illegally). Section 393.170 RSMo. 2000 clearly limits the Commission's certificate authority to prospective requests only. The Court of Appeals states that a utility is required to seek certificate approval from the Commission "before the first spadeful of soil is disturbed." Cass County v. Aquila, 180 S.W.3d 24, 37 (Mo. App. W.D. 2005). In this case, the Commission acts outside its legal authority by issuing a *post facto* decision. The final sentences of the Cass County decision, upon which Aquila and the Commission heavily rely, is, in fact *dicta* and does not relate to the legal authority to construct a power plant and substation. The actual holdings of the Cass County decision affirmed the injunction against Aquila and affirmed the finding that these facilities were constructed illegally. The *dicta* at the end of that decision (relating to what the appellate decision does *not* address) cannot control the holdings of that case nor change the meaning of Section 393.170.

b. The Commission also acts outside of its statutory authority by attempting, through its Report and Order, to engage in zoning and to issue decisions which purport to change land use designations. These are matters that are legally the exclusive province of Cass County in this situation. The law anticipates and requires parallel authority for approval of the facilities in question. The Commission has jurisdiction over need for these facilities and Cass County has jurisdiction over land use planning and zoning regarding these facilities. To

the extent that the Commission's decision engages in land use decisions (Report and Order, pp. 11-21, 34-47), it exceeds its jurisdiction and lawful authority.

The Court of Appeals clearly stated that the Missouri State Legislature has given the Public Service Commission no zoning authority whatsoever:

While it is true that the Commission has extensive regulatory powers over public utilities, the legislature has given it no zoning authority, nor does Aquila cite any specific statutory provision giving the Commission this authority. See *Mo. Power & Light Co.*, 18 Mo.P.S.C. (N.S.) 116, 120 (1973) . . .

Cass County v. Aquila, 180 S.W.3d 24 (W.D. 2005).

The Commission actually goes further, attempting to place itself in the position of Cass County, claiming that its process “has been more than the ‘functional equivalent’ of the process involving a special use permit or rezoning application before the County.” (Report and Order at 34). However, the Commission's legal authority is limited to those powers that it has been granted by statute. None of the Commission's powers listed in Chapter 386 or in Chapter 393 grant the power to issue a **zoning** decision. The Commission has no right to question the validity of zoning ordinances, no right to grant variances to zoning ordinances, and no right to issue its own zoning proclamations through the vehicle of a certificate of convenience and necessity. The “public interest” that the Commission protects is legally recognized to be the balance of economic interests between ratepayers and utility shareholders—not the balance of interests between adjacent landowners.

c. Without waiving the foregoing, to the extent that the Commission has any authority to issue land use decisions affecting the Nearby Residents, the

Report and Order is unlawful, unreasonable, arbitrary and capricious in that it does **not** do so in a manner functionally equivalent to the manner in which a hearing could be conducted by the Cass County Commission. Moreover, the Commission's Report and Order is unlawful and unreasonable in that it issues a construction certificate without any rules of general applicability regarding land use and without any staff that is qualified as an expert in land use planning.

d. The Commission also violates Section 393.170 RSMo. 2000 and the Commission's own rules, because Aquila has not yet "received the required consent of the proper municipal authorities" (in this case, proper zoning approvals from Cass County) as dictated by that statute prior to any application for approval of a certificate. When an area certificate is requested, the required consent may be a franchise. When the request is for the construction of electrical facilities, the required consent must be zoning approvals from the proper local authorities.

e. The Commission's Report and Order erroneously interprets statutes in Chapter 64 RSMo. 2000. The Commission's decision directly violates Section 64.285 RSMo. 2000 which states that county zoning regulations supersede other laws or regulations. This statute was enacted at the same time that Section 64.235 was enacted (1959), and it clearly prohibits the Public Service Commission from attempting to trump county ordinances through a certificate order, as if it were a super zoning board. Although Aquila may have

been able to qualify for a 64.235 exemption from having to undergo a second land use review (after it had already secured local permission prior to a proper requesting for a certificate under Section 393.170), **nothing** in Chapter 64 grants Aquila a “free pass” to ignore zoning ordinances. The law grants no deference to the Public Service Commission interpretation of this statutory chapter, and its legal pronouncements regarding Section 64.235 are incorrect.

f. The Commission’s Report and Order violates the due process rights and equal protection rights of the Nearby Residents by denying them the right to present their testimony to their democratically elected representatives which have the authority to address their local land use concerns. Their reasonable expectations regarding the zoning of their property and the zoning designations of nearby property have been frustrated by the Commission’s actions and they have been denied basic rights that individuals in similar situations have been granted in Cass County.

The Nearby Residents also incorporate herein the due process issues that were raised prior to the evidentiary hearing regarding the expedited schedule adopted by the Commission in this case and the failure of the Commission to provide any guidance to the parties to this case regarding what standard would be applied and what evidence would be considered in its final decision.

g. The Commission’s Report and Order is unlawful and unreasonable in that an essential and critical issue was not decided—the issue of whether the

facilities in question have lowered property values. Ibid., pp. 49-50. The failure of the Commission to decide this issue is also contrary to the weight of the evidence on the record (Ex. 91HC and 92HC). The Report and Order is further unreasonable in that it failed to order any condition on the certificate that would address the fact that property values have been detrimentally impacted by the construction of the facilities in question.

h. To the extent that the Commission's 3-2 decision is based on the vote of Commissioner Lin Appling, the Concurring Opinion of this commissioner makes it clear that the burden of proof in this case has been inappropriately placed on parties other than Applicant Aquila.

Furthermore, this Concurring Opinion suggests that Aquila is being treated in this case differently than future applicant utilities will be treated. To the extent that Aquila is being treated with a lower standard than the certificate standard applicable to future utilities, the Report and Order is arbitrary and capricious.

i. The Nearby Residents have also reviewed the Application for Rehearing filed today by Cass County, Missouri, and hereby incorporates by reference each of the grounds for rehearing included in that document in their own Application for Rehearing.

WHEREFORE, the Nearby Residents respectfully request that the Commission grants its Application for Rehearing, issuing a new order that complies with the law and which does not infringe the rights of those most directly impacted by Aquila's actions.

Respectfully submitted,

/s/ John B. Coffman

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to the following counsel on this 30th day of May, 2006:

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