

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 7th day of  
April, 2005.

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	)	<b><u>Case No. EA-2005-0248</u></b>
Electric Generating Station and Associated Electric	)	
Transmission Substations in Unincorporated Areas	)	
of Cass County, Missouri, Near the Town of Peculiar	)	

**ORDER CLARIFYING PRIOR CERTIFICATES  
OF CONVENIENCE AND NECESSITY**

**Syllabus:** This order clarifies prior certificates of convenience and necessity of Aquila, Inc., and confirms that, in order to serve its customers, Aquila has already been granted specific authorization to build its South Harper Facility and Peculiar Substation.

**Background**

In October 2004, Aquila, Inc., began land clearance and site preparation in the unincorporated area in Cass County, Missouri, near the City of Peculiar for the installation of a peaking power facility comprising three 105-MW, natural gas-fired combustion turbines and an associated electric transmission substation, collectively referred to as the “South Harper Facility.” The South Harper Facility is immediately adjacent to a gas compressor facility operated by Southern Star Gas Pipeline that will provide natural gas for the

operation of the new peaking power facility. This facility will replace part of Aquila's current capacity represented by a Power Purchase Agreement dated February 22, 1999, that expires on May 31, 2005.

Aquila also began land clearance activities in preparation for the construction of a related electric transmission substation in Cass County, Missouri, approximately two miles northwest of Peculiar at a location adjacent to the intersection of an existing 345 kv electric transmission line and an existing 69 kv electric transmission line, each of which is owned by Aquila. Aquila refers to this as the "Peculiar Substation." Both parcels of property are located within Cass County and are in Aquila's certificated areas identified in the Commission's 1938 certificate of convenience and necessity.<sup>1</sup>

In response to Aquila's site preparation activities, separate petitions for injunctive relief were filed by Cass County, Missouri, and StopAquila.org, an unincorporated association of individuals made up of area residents who oppose Aquila's plans. These lawsuits were filed in the Circuit Court of Cass County, Missouri. The lawsuits challenged Aquila's right to construct the South Harper Facility and the Peculiar Substation claiming, among other things, that the provisions of Section 64.235, RSMo 2000, providing for the conformance of improvements to the county's master plan superseded the authority of Aquila's certificates of convenience and necessity. In the alternative, the lawsuits asserted that Section 64.235, RSMo, imposed additional requirements on Aquila to seek more specific authority from the Commission to construct and operate the South Harper Facility and Peculiar Substation.

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<sup>1</sup> In re the Application of the Missouri Public Service Corporation, 23 MO.P.S.C. 740 (1938); In re the Application of the Missouri Public Service Corporation, Case No. 11,892 (April 28, 1950).

The two cases were consolidated, and following an evidentiary hearing the Cass County Circuit Court, in Case No. CV104-1443CC, issued a Permanent Injunction on January 11, 2005. Aquila posted an appeal bond on that same date that was approved by the circuit judge and that stayed the injunction portion of the Final Judgment while Aquila appeals the order.

On January 18, 2005, Aquila filed a Notice of Appeal at the Missouri Court of Appeals, Western District. The court assigned the case W.D. Case No. 64985. The case is on the court's April docket for oral argument.

On January 28, 2005, Aquila, Inc., filed an application asking the Commission to clarify that its prior certificates of convenience and necessity specifically authorize Aquila to build the South Harper Facility and its Peculiar Substation. In the alternative, Aquila asks the Commission to grant a site-specific certificate of convenience and necessity to build these electric facilities. Aquila asks for this relief so that it can continue, without hindrance, the construction of its South Harper Facility and Peculiar Substation. In its application, Aquila noted that the circuit court's order in Case No. CV104-1443 required Aquila to obtain "specific authorization" from the Commission pursuant to Section 64.235, RSMo, to build the plant, and that Aquila had not done so. StopAquila.org and Cass County intervened before the Commission, and oppose Aquila's application.

### **Discussion**

As noted, Aquila has requested relief in the alternative: (1) a new site-specific certificate of convenience and necessity for the South Harper Facility and Peculiar Substation; or (2) a clarification of its existing certificates of convenience and necessity showing that Aquila is specifically authorized to construct the South Harper Facility and the

Peculiar Substation. For the reasons stated below, the Commission finds that Aquila's existing certificates give it the authority it needs to build the South Harper Facility and the Peculiar Substation. In deciding this, the Commission must review and interpret the prior certificates it granted Aquila. The Commission has authority to do so.<sup>2</sup>

Aquila and its predecessors in interest have been doing business in Missouri since 1916. Aquila's predecessor was granted a franchise by Cass County in 1917 that was perpetual in nature. As the utility began to grow and expand its operations, Aquila's predecessors were granted three certificates of convenience and necessity by the Commission.

In 1921, Aquila's predecessor sought the Commission's permission to reorganize as a newly named company and to increase its capitalization. The Commission granted the request in a preliminary order stating the following:

" . . . that the **present and future public convenience and necessity** require the exercise by the said new company [West Missouri Power Company] 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 added).<sup>3</sup>

In that same case, the Commission granted a subsequent order in 1922, setting forth how West Missouri Power Company was required to use the capital that the Commission permitted it to raise. The Commission specifically directed how those funds were to be used:

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<sup>2</sup> See, e.g., *Missouri Pacific Freight Transport Company v. Public Service Commission*, 312 S.W.2d 363, 365 (Mo.App. 1958); *State ex. rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 598 (Mo.banc 1964).

<sup>3</sup> See *In re Green Light and Power Co.*, Case No. 3171 (December 6, 1921).

“That the said West Missouri Power Company shall sell the said stock hereby authorized . . . and that the proceeds thereof shall be applied to the following purpose:

For extensions and additions to distributions systems and street lighting systems now or hereafter owned by 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 of property, the construction, completion, extension or improvement of the plants** or distribution systems of said Company . . . .”

(emphasis added).<sup>4</sup>

In 1938, the Commission granted another of Aquila’s predecessors a certificate to serve Cass County.<sup>5</sup> Finally, in a 1950 merger case, the Commission granted Aquila’s predecessor a certificate of convenience and necessity to

“. . . 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 of the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.”

(emphasis added).<sup>6</sup>

All of these orders are conclusive, and free from collateral attack.<sup>7</sup> The Commission will reconcile these orders to mean that Aquila already has specific authority from the Commission to build the proposed plant.

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<sup>4</sup> See In re Green Light and Power Co., Case No. 3171 (March 21, 1922).

<sup>5</sup> See In re the Application of the Missouri Public Service Corporation, 23 Mo. P.S.C. 740 (1938).

<sup>6</sup> See In re the Application of the Missouri Public Service Corporation, Case No. 11,892 (April 28, 1950).

<sup>7</sup> Section 386.550, RSMo 2000.

## Specific Authorization

The Court of Appeals has held that utilities desiring to build additional facilities within their certificated area need not seek additional authority from the Commission to proceed.<sup>8</sup> The Harline court interpreted the grant of a certificate of convenience and necessity to be a triggering mechanism for the utility to exercise the corporate powers it already has under Sections 351.385 and 393.010, RSMo. Those powers include the power to purchase and develop real property and to exercise all powers necessary or convenient to affect any or all of the purposes for which the corporation was formed.<sup>9</sup> In addition, Section 393.010, RSMo, grants an electric utility the “full power to *manufacture* and sell and to furnish such quantities of . . . electricity . . . as may be required” (emphasis added).<sup>10</sup>

In interpreting Section 393.170, RSMo, which authorizes the Commission to grant certificates of convenience and necessity, the Harline court held that this section constituted the “permission and approval” of the Commission. Further, the court stated that such a certificate was only required: (1) for any *new* company or *additional* company to *begin* business anywhere in the state; or (2) for any established company to enter into *new territory*.<sup>11</sup> Thus, a certificate of convenience and necessity is only needed when an electric utility corporation starts business or if it attempts to expand its authority in an entirely new area. The court, however, left open the possibility that an electric utility might have to seek a specific certificate of convenience and necessity for the construction of new plant facilities, citing to Section 393.170.1, RSMo.<sup>12</sup>

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<sup>8</sup> See Harline v. Public Service Commission of Missouri, 343 S.W.2d 177 (Mo.App. 1960).

<sup>9</sup> Id. at 180-81.

<sup>10</sup> Id.

<sup>11</sup> Id. at 182 (emphasis supplied).

<sup>12</sup> Id. at 185.

In a subsequent case, the Commission dispensed with the need for an existing electric utility to seek a certificate of convenience and necessity to build a plant in an area where it already held an area certificate. Following the logic of Harline, the Commission found that the statutory power granted in section 393.170, RSMo, was “a tool to regulate competition between utilities and to avoid the needless duplication of electric facilities.”<sup>13</sup> The Commission concluded that “a certificate is only needed when an electric corporation starts in business or if it attempts to expand its authority in an entirely new area,” even when constructing plant.<sup>14</sup>

By the grant of area authority and by the natural duties that a corporation is obligated to under its charter, an electric utility corporation has the duty to provide safe and adequate power to the area that it serves. The Commission cannot interfere with the management and exercise of these duties; its only authority is to determine where the electric utility is obligated to provide service. The Commission, in applying Harline and Union Electric, again must conclude that an electric utility need not apply for any additional certificate of convenience and necessity to build plant in its certificated areas to meet the need of power generation for that area. This has been the case since 1980. The Commission will continue to adhere to this ruling.

In the instant case, the Commission issued three orders to Aquila’s predecessor corporations over the years in response to either an *expansion* into new territories or during a merger of companies. These orders contained **specific language** that outlined Aquila’s existing authority to build or construct plants. In 1921, the Commission granted a certificate that specifically authorized Aquila’s predecessor corporation “to construct, operate and

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<sup>13</sup> See In re Union Electric Company, 24 Mo.P.S.C. 72, 77 (1980).

<sup>14</sup> Id. at 78.

maintain electric plants” in its authorized territory. In 1922, in the same case, the Commission specifically ordered Aquila’s predecessor corporation to expend additional income on the “construction, extension or improvement of the plants or distribution systems of said Company” in Cass County and other authorized territories. And finally, in 1950 following the merger of Aquila’s predecessor corporation, the Commission transferred all rights of the predecessor to the new corporation, “including, without limitation, all rights to construct, own and maintain electric utility facilities” in its authorized territories, which included unincorporated areas of Cass County. As the successor corporation to these prior entities, Aquila retains the authority granted by these three certificates and already has the necessary authority to build electric generation facilities within its certificated areas.

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. Therefore, the Commission finds under the broad authority for oversight of electric utilities found in Chapters 386 and 393, RSMo, and pursuant to the ruling by the Cass County Circuit Court under Section 64.235, RSMo, that Aquila has specific authority under its existing certificates to construct and operate the South Harper Facility and Peculiar Substation, both of which are fully contained within Aquila’s certificated area.

**IT IS THEREFORE ORDERED:**

1. That the Commission confirms that the Commission has already granted Aquila, Inc., under its existing certificates of convenience and necessity, specific authorization to construct plant anywhere in its service territory, specifically including, but not limited to, the specific authorization to install, acquire, build, construct, own, operate,

control, manage and maintain an electric power generation station comprised of three 105-MW, natural gas-fired combustion turbines and an associated transmission substation, transformers and breakers together with any and all other installations, facilities, structures, fixtures and equipment related thereto for the production and transmission of electric power and energy at the following described location in Cass County, Missouri:

The Southeast Quarter (SE  $\frac{1}{4}$ ) of the Southeast Quarter (SE  $\frac{1}{4}$ ) of Section Twenty-Nine (29), and the Northeast Quarter (NE  $\frac{1}{4}$ ) of the Northeast Quarter (NE  $\frac{1}{4}$ ) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32).

2. That the Commission confirms that the Commission has already granted Aquila, Inc., under its existing certificates of convenience and necessity, specific authorization to construct plant anywhere in its service territory, specifically including, but not limited to, the specific authorization to install, acquire, build, construct, own, operate, control, manage and maintain an electric transmission substation together with any and all other associated installations, facilities, structures, fixtures and equipment related thereto for the transmission of electric power and energy at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW  $\frac{1}{4}$ ) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW  $\frac{1}{4}$  a distance of 2,508.18 feet more or less to the South line of said NW  $\frac{1}{4}$ ; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning.

This plot contains approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203<sup>rd</sup> Street and Knight Road.

3. That this ruling is not binding for ratemaking or financing purposes, and that the Commission reserves the right to consider the treatment to be given the described plant additions in a subsequent proceeding or proceedings.

4. That all pending motions are denied as moot.

5. That this order shall be effective on April 17, 2005.

6. That this case may be closed on April 18, 2005.

**BY THE COMMISSION**

**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

( S E A L )

Murray and Appling, CC., concur;  
Davis, Ch., concurs, concurrence to follow;  
Clayton, C., concurs, opinion to follow;  
Gaw, C., dissents, dissent to follow

Pridgin, Regulatory Law Judge