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 Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Control, Manage and 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

STAFF'S RESPONSE IN OPPOSITION TO CASS COUNTY'S MOTION TO DISMISS APPLICATION OR, IN THE ALTERNATIVE, TO IMPOSE CONDITIONS ON ISSUANCE OF CERTIFICATE AND MOTION FOR ORAL ARGUMENT

COMES NOW the Staff of the Missouri Public Service Commission and for its Response in Opposition to Cass County's (the "County") Motion to Dismiss Application or, in the Alternative to Impose Conditions on Issuance of Certificate and Motion for Oral Argument (Motion to Dismiss Application) states:

1. On March 20, 2006, the County filed its Motion to Dismiss Application, or in the Alternative, to Impose Conditions on Issuance of Certificate and Motion for Oral Argument, (County Motion) asserting, as did StopAquila.org, (Stop Aquila) that the Commission may not grant a Certificate of Convenience and Necessity (CCN) retroactively.[1] This assertion wholly disregards not only the Western District's decision in *StopAquila.Org. v. Aquila, Inc.*[2] but also Judge Dandurand's order date which stated unequivocally that Aquila is not too late:

> Other states may have specific statutory provisions to address what a public utility is required to do if it wishes to build new facilities or extend its lines in territory already allocated to it, but Missouri does not. We end where we

[1] The fact that Staff has not answered every one of the County's arguments should not be read to indicate agreement with those arguments.

[2] 180 S.W.3d 24 (Mo.App. 2005). .Some parties have referred to this decision as *Cass County v. Aquila*, but that is not the way it is cited in the Southwestern Reporter.

> began, with *section 393.170.1*, which, in plain and unambiguous language, provides "no gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission." . . . **Moreover, we do not intend for this decision to have anything other than prospective effect. Unless other litigants have preserved the precise issue addressed in this opinion, we see no need to apply our interpretation to existing facilities**.[3]

2. Not only did the Court unambiguously state that its decision is prospective only, the Court also held that the Commission has jurisdiction to grant Aquila the authorization it seeks in stating that Aquila is not precluded by the Court's order from now seeking the necessary authority to continue operating the plant and substation:

> 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. In 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.** [4]

3. Furthermore, Judge Dandurand obviously agrees that the Western District decision permits Aquila to seek authorization from the Commission, or he would not have granted a stay of execution of his injunction despite the County's arguments that Aquila should tear down the plant and start over:

> The Court: Okay. This is in the nature of a motion filed by Aquila to extend the stay of an injunction. Mr. Youngs, you may proceed with your argument. [Tr. 2]
>
> Mr. Youngs: But there are essentially two parts to our motion today. The first part is that the Court has the power to grant Aquila the relief that we are asking for today, to grant us a stay from the terms of your January 11, 2005, order so that we can obtain the authority that the Court of Appeals has held is necessary for us to operate the South Harper Peaking Facility and Peculiar Substation that are at issue in the case, and then under the particular circumstances of this case, the Court should exercise that power and do so. [Tr. 4-5].
>
> Ms. Martin: If you remove the plant and substation, if you require Aquila to abide by the judgment, of course, they can still go to the PSC and seek approval generally for a plant, and as part of that

[3] *Id*. at 39 (emphasis added).

[4] *Id*. at 41.

process, the County will argue whatever it is that you are talking about locating it, you must have some indication of County approval. [Tr. 61].

. . . if the plant and the substation are dismantled . . . Then you have a procedure that's fair and open where no one can be accused of making decisions based upon this pending judgment and whenever it's going to be enforced and whether the time limit is coming due or not coming due. I mean, I truly can hear the arguments now. The Court imposes three months or four months or six months, or whatever it may be, anything the County may do to protect its interest will be perceived as some sort of a delay tactic or some sort of attempt to somehow prevent Aquila from getting relief. [Tr. 62].

The Court: So to begin with, as I indicated before, I am going to assume that I have the authority to fashion a remedy consistent with the request that's made by Aquila. If I do not, that's an easy matter to be taken up on a writ to the Court of Appeals, and that's a short matter, and if the Court of Appeals determines I do not have this authority, then you will know in a heartbeat, and they will say the Judge's orders are quashed and he did not have the jurisdiction to do it. So we might as well go on on that as opposed to coming back here another day with another group full of people and arguing these things again. [Tr. 78].

And waste is a concern of mine . . . and this is not a small dollar matter. . . .
The Order I am going to enter I believe to be fair. I wouldn't enter it if I didn't think it was fair, but it's not what Aquila wants, and it is certainly not what the County wants because they would like for me to order you tomorrow to tear that thing down and get it done quickly.
That Aquila is directed to dismantle the plant in its entirety commencing May 31st of 2006 under penalty of contempt of court; that they are to immediately cease operations of the plant in its entirety regardless of emergencies; that the substations will be allowed to continue to operate; that they will post a $20 million bond with the Court as security for compliance with this Court's Order. [Tr. 79-80].[5]

4. The County asked Judge Dandurand to immediately enforce the injunction and order the plant to be torn down. But Judge Dandurand refused to do so because he is concerned with "waste" and noted that "this is not a small amount." Because of his concern with waste and his stated intention of issuing an order that is fair, Judge Dandurand ordered a stay until May 31, 2006, so that Aquila could "obtain the authority that the Court of Appeals has held is necessary for us to operate the South Harper Peaking Facility and Peculiar Substation that are at issue in the case . . ." From this decision forward, a public hearing will be necessary. However, as explained above, Aquila is not too late, given that both the Western District and Judge Dandurand have given Aquila the opportunity to seek Commission authorization.

[5] Transcript of January 27, 2006 hearing before Judge Joseph P. Dandurand in *Cass County v. Aquila, Inc.*, Cass County Case No. 17V010401443.

5. While Staff agrees with the County that the Western District is certainly in no position to give Aquila guarantees as to the Commission's decision, (Motion to Dismiss Application at p. 3), there is nothing in the *StopAquila.Org* decision that precludes Aquila from seeking the necessary specific authority either from this Commission **or** from the County, which would allow the plant to continue in operation.

6. The County further argues that the Commission, in order to consider Aquila's Application for a CCN must waive or ignore "the clear plain language of the law" and that the Commission is not authorized to waive the provisions of the statute. (Cass Motion to Dismiss at p. 6) This argument strains credulity in light of the clear language of the Western District decision noted above.

7. In *StopAquila.Org.*, the Western District Court of Appeals held the statutory exemption from Cass County's zoning ordinances found in §64.235 is available to Aquila.[6] The exemption would allow Aquila to construct the South Harper Facility and Peculiar Substation if **either** the Cass County Commission or the Public Service Commission specifically so authorize.[7]

8. Staff has stated in its earlier responses to StopAquila's *Motion to Dismiss*, the fact that the zoning statute at issue in this case, §64.235[8] provides an exemption to a utility other than obtaining zoning approval. Simply put, the County's position is that Aquila must comply with its zoning ordinances before the Commission can specifically authorize Aquila to construct the South Harper Facility and Peculiar Substation. The Staff disagrees. So does the Western

[6] *Id.* at 32.
[7] *Id*.
[8] All statutory cites are to RSMo 2000 or RSMo Supp 2004, unless otherwise indicated.

District when it stated that it determined that Aquila qualifies for the first class non-charter county zoning exemption for projects approved by the Public Service Commission."[9]

9. The court also noted that there are two ways for Aquila to obtain an exemption from county zoning requirements:

> 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. n14 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.
>
> > n14 Recall that *section 64.*235 provides "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 order issued by permit of the county commission after public hearing* in the manner provided by *section 64.231*." (emphasis in opinion).[10]

10. The County repeats StopAquila's arguments[11] that "required consent of the proper municipal authorities" includes compliance with their zoning ordinances. First this requirement is in §393.170.2 and the Western District found that this is a §393.170.1 and 393.170.3 case. The requirement for local consent is found only in §393.170.2 and the consent referred to is that of the granting of a franchise.

11. Aquila already has a CCN to serve this territory, most of Cass County, under §393.170.2. Aquila has already proven to this Commission that it has the "required local consent" or it would not have been granted under a CCN §393.170.2. There has been no serious challenge to Aquila's authority to provide electric service to this area. Now, as a result of the

[9] 180 S.W.3d p. 32.
[10] 180 S.W.3d at 37.
[11] *Motion to Dismiss or Deny Application of Aquila.*

Western District's decision, Aquila seeks specific authority under §393.170.1, which does not require proof of municipal consent.

12. Staff has already stated its position that the "required consent of the proper municipal authorities" required under §393.170.2 is a franchise—"local permission to use the public roads and rights-of-way in a manner not available to or exercised by the ordinary citizen."[12] Unlike a franchise, where a governmental entity ***grants consent*** to use of a public right in land in a manner otherwise unavailable to the public, zoning ordinances are where a governmental entity ***imposes restrictions*** on the use of land, including privately-owned land.[13]

13. The County cleverly invites the Commission to "work in tandem" with the County toward a resolution. (Motion to Dismiss Application p. 8) While that invitation may seem eminently reasonable, it is **not** what the legislature intended in promulgating §64.235 or §393.170. Specifically in §64.235 the Legislature provided that local zoning is not to interfere with developments or public improvements specifically authorized by the Commission:

> 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

14. That legislative directive cannot and does not lead to the conclusion that the Legislature intended the County and the Commission to work in tandem in exercising their separate powers. To read §64.235 otherwise would make the exemption to zoning requirements a nullity and would read the Commission out of the statute entirely. The Western District refused to read the statute that way and so should this Commission. Neither should the Commission read the County into §393.170.

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[12] *State ex rel. Union Electric Co., v. Public Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo App. 1989).

[13] See §64.040, and *e.g., Strandberg v. Kansas City*, 415 S.W.2d 737 (Mo banc 1967).

15. The County's interests are more limited than those of the Commission and the County is actually fighting with one of the cities located in Cass County. The Commission, on the other hand, is statutorily charged in §386.610 as follows: "The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

16. Section 393.170.3 establishes the standard the Commission must use to determine whether a CCN should be granted: whether the construction or the exercise of the CCN is necessary or convenient for the public interest. Specifically, in pertinent part, the statute says:

> The commission shall have the power to grant the permission and approval herein specified [granting a certificate] whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.

Section 393.170.3.

17. In accord with this sub-section, the Commission may grant Aquila's request if, after hearing, it determines that the certificate is necessary or convenient for the public interest. In construing the term "necessary or convenient," the Court has stated that "the term 'necessity' does not mean 'essential' or 'absolutely indispensable,' but that [the] service would be an improvement justifying its cost."[14] In the *Intercon Gas* case, the Court further construed this statutory section and noted several criteria for evaluation of the necessity and convenience of the proposed project:

> Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n, 600 S.W.2d 147, 154 (Mo.App.1980). The safety and

[14] *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n.* 848 S.W.2d 593, 597(Mo.App. 1993)(*citing State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

> adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n, 527 S.W.2d 390, 394 (Mo.App.1975). Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate. *Id*. at 392.

848 S.W.2d 593, 597 - 598.

The Court further has described what the terms convenient and necessary mean in the context of granting a CCN, explaining that the Commission:

> has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is 'necessary or convenient for the public service.' §393.170.3. The term 'necessity' does not mean 'essential' or 'absolutely indispensable,' but that an additional service would be an improvement justifying its cost. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate.[15]

18. After defining and interpreting the meaning of the phrase "necessary or convenient," the Court indicated that it is up to the Commission to decide "when the evidence indicates the public interest would be served." *Id*.

19. This raises the issue of exactly what is the public interest. In the broadest sense, the Public Service Commission Law is a remedial statute, and as such should be liberally construed with a view to the public welfare. The Court in *City of St. Louis*[16] indicated that the purpose of the Public Service Commission law is intended to protect the public interest:

> The whole purpose of the act is to protect the public. The public served by the utility is interested in the service rendered by the utility and the price charged

[15] *Intercon Gas, Inc. v. Public Service Comm'n*, 848 S.W.2d 593, 597-98 (Mo.App. W.D. 1993) (internal citations omitted).

[16] *State ex rel. City of St. Louis v. Public Service Comm'n*, 73 S.W.2d 393, 399 (Mo. 1934)(internal citation omitted).

> therefor; [the] investing public is interested in the value and stability of the securities issued by the utility. In fact the act itself declares this to be the purpose. Section 5251, R. S. 1929 (Mo. St. Ann. § 5251, p. 6674), in part reads: "The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.

20. In *DePaul Hospital*,[17] the Court discussed the long-standing doctrine that the Public Service Commission Law is to be "liberally construed for the public's, ergo the consumer's protection," holding that:

> (T)he Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to, the police power of the state, and under well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be 'liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.' State ex rel. Laundry, Inc. v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37, 42--3(2, 3) (Mo. 1931). 'In its broadest aspects, the general purpose of such regulatory legislation is to substitute regulated monopoly for destructive competition. But the dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental.' State ex rel. Electric Company of Missouri v. Atkinson, et al., 275 Mo. 325, 204 S.W. 897; State ex rel. Pitcairn v. Public Service Commission, 232 Mo.App. 535, 111 S.W.2d 222.[18]

21. As noted in *DePaul Hospital,* and in other cases, when the Commission is considering a CCN application, the protection of the public is the dominant concern. "In the determination of these matters, the rights of an applicant, with respect to the issuance of a certificate of convenience and necessity, are considered subservient to the public interest and convenience." *State ex rel. Missouri Pac. Freight Transport Co. v. Public Service Comm'n*, 295 S.W.2d 128, 132(Mo. 1956).

[17] De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co., 539 S.W.2d 542 (Mo.App. 1976)

[18] *Id. at* 73 S.W.2d 393, 335 Mo. 448, State ex rel. City of St. Louis v. Public Service Comm'n of Missouri, (Mo. 1934)

22. Accordingly, the primary duty of the Commission in addressing the question of what is the "public interest," in a proceeding involving a request for permission and authority under §393.170, is the interest of the public as a whole.

> It is clear that the public interest – the public interest as a whole—with which public utility regulation and the Commission's jurisdiction is primarily concerned, is directed at a much broader segment of the public. Within that segment, the Commission's interest and duty is primarily directed to the interests of [all] the regulated utility ratepayers. State ex rel. Capital City Water Co. v. Public Serv. Comm'n, 850 S.W. 2d, 903, 911 (Mo. App. W. D. 1993)(The Commission's principal interest is to serve and protect ratepayers).[19]

23. The application in this case involves Aquila's request to continue to operate a power plant located in Cass County, one of the fastest growing areas in Aquila's territory. StopAquila consists of individuals many of whom are not Aquila customers, but instead are customers of an electric cooperative. This raises the issue of whether the Commission may give particular consideration to a single group of individuals over utility customers as a whole. The Commission may not favor one group of individuals over another:

> It is true that the cases indicate that the Commission will, in general, give more weight to its role of protecting *utility patrons*—whether they be utility shareholders or customers – than is given to the utility itself, but no case has ever held . . . that the public interests of one [customer can or should] take precedence over the public need to ensure that there exists reliable, adequate and safe electric service for regulated utility customers. . . . [T]he Commission's primary duty is to protect the interests of ratepayers.[20]

24. This Court holding is equally true in this case where the interests of a single group of individuals cannot take precedence over the interests of the public as a whole. The Court in *StopAquila* recognized this fact when it stated that "the regulatory powers accorded the Commission . . . ultimately answer to the public interest . . . ."[21]

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[19] State ex rel. Public Water Supply Dist. No. 8 of Jefferson City v. Public Serv. Comm'n, 600 S.W. 2nd 147, 156 (Mo.App. W.D. 1980).

[20] State ex rel. Capital City Water Co. v. Public Serv. Comm'n, 850 S.W.2d 903, 911(Mo. App. W.D. 1993)."

[21] 180 S.W.3d at 35.

25. The County suggests, without benefit of page citation, that one of the themes of the *StopAquila.Org* order is that there must be a hearing in which "**land use controls and the impact on adjacent uses of property must be reviewed and evaluated by the fact finder.** Failure to do so will be error." (Motion to Dismiss Application p. 10.) Staff has not found this language in the decision. If the County interprets the following to indicate what it has so boldly asserted, Staff disagrees:

> 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. 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.[22]

27. While the Commission may consider zoning when considering the public convenience and necessity, it is only one of many factors that the Commission may consider in determining what the public convenience and necessity requires. "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."[23] One considering county zoning and two, making zoning authority a prerequisite for Commission approval of a CCN are two very different things and the Western District said nothing to suggest that zoning authorization is a prerequisite.

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[22] 180 S.W.3d at 36-37. (emphasis added).
[23] 180 S.W.3d at 37.

To do so would nullify the exemption found in §64.235. The Court refused to presume that this exemption was a "meaningless provision."[24]

28. Staff has explained its position that requiring zoning authority before the Commission may grant a CCN eviscerates the exemption in §64.235:

> Staff believes compliance with Cass County's zoning ordinances is not a requisite to Commission consideration of the pending certificate of convenience and necessity (CCN) application for the South Harper Generating Station and the Peculiar Substation. If "proof of compliance with local zoning" were a requisite to this Commission's authorization to build plant, then the exemption in § 64.235 based on a utility company obtaining authorization from the Commission would be meaningless. This is because a utility would have to comply with the zoning requirements to obtain the exemption from the zoning requirements. In its *StopAquila.org* Opinion, the Western District Court of Appeals refused to interpret § 64.235 in a way that rendered it meaningless. Neither should this Commission. The Western District Court of Appeals' decision accords with rules of statutory construction and should be followed by this Commission.[25]

29. The County further suggests that its police powers and the Commission's police powers are complimentary. (Motion to Dismiss Application p. 8) While that might be true in some circumstances, such an assertion in this instance again misreads the very statute conferring exclusive power to either the Commission **or** the County. To further indicate that concurrent authority has not been provided to this Commission and the County, Section 64.235 states that **nothing** in the zoning statute may "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.[26]

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[24] 180 S.W.3d at 32.

[25] *Murray v. Missouri Highway & Transportation Commission*, 37 S.W.3d 228, 233 (Mo.banc 2001): "Construction of statutes should avoid unreasonable or absurd results."

[26] Section 64.235.

30. The County suggests that the Commission has a long practice of requiring zoning approval as "the necessary local consent" before issuing CCN's. (Motion to Dismiss Application at pp. 11-12.) That is simply false. The Commission is required by statute to assure that a utility company has a local **franchise**. Even the cases cited by the County to support its position refer to "franchises" not zoning as the required local authority.[27]

32. Staff agrees with the County that the Commission must preserve its statutory obligation §393.170 to require proof that a utility has obtained a local franchise before granting a CCN.

> Staff believes compliance with Cass County's zoning ordinances is not a requisite to Commission consideration of the pending certificate of convenience and necessity (CCN) application for the South Harper Generating Station and the Peculiar Substation. If "proof of compliance with local zoning" were a requisite to this Commission's authorization to build plant, then the exemption in § 64.235[28] based on a utility company obtaining authorization from the Commission[29] would be meaningless. This is because a utility would have to comply with the zoning requirements to obtain the exemption from the zoning requirements. In its *StopAquila.org* Opinion, the Western District Court of Appeals refused to interpret § 64.235 in a way that rendered it meaningless. Neither should this Commission. The Western District Court of Appeals' decision accords with rules of statutory construction and should be followed by this Commission.[30]
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> In interpreting § 64.235, which it found ambiguous, the Western District Court of Appeals looked to other zoning statutes, specifically §§ 64.090.3 and 64.620.3(3), and determined that "first class counties with a charter form of government and counties of the second and third class, respectively, lack the authority to interfere via zoning authority with public utility services authorized by the public service commission . . . ."[31]

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[27] The County refers to: *In the Mater of the Application of Ozark Utilities Co.,* 26 Mo. PSC 635, 639 (1944) *and State ex inf. Shartel, ex rel. Sikeston v. Missouri Utilities Co.,* 53 S.W.2d 394, 398 (Mo. banc 1932).

[28] All references are to RSMo 2000 or Supp 2004 unless otherwise noted. (footnote 5 in original).

[29] The exemption in § 64.235 reads: "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. . . ." (footnote 6 in original).

[30] *Murray v. Missouri Highway & Transportation Commission*, 37 S.W.3d 228, 233 (Mo.banc 2001): "Construction of statutes should avoid unreasonable or absurd results." (footnote 7 in original).

[31] 180 S.W.3d at 31. (footnote 8 in original).

> The Court further noted that these statutory sections "place limits on county commission zoning powers" and that the counties governed by these statutory sections "lack the authority to interfere via zoning authority with public utility services authorized by the public service commission." If utility companies were required to get zoning authority before Commission authorization, **all** of these statutory sections would be meaningless. (Emphasis added.)

33. In addition to holding Aquila qualifies for the exemption under §64.235, in *StopAquila.org*, the Western District analyzed §393.170.1 and §393.170.2, found them to apply to different utility property, and determined § 393.170.1 is the subsection that applies to the South Harper Facility and the associated Peculiar Substation.[32]

34. Section 393.170.1 requires only Commission authorization: "No . . ., electric corporation, . . .shall begin construction of . . ., electric plant, . . . without first having obtained the permission and approval of the commission."

35. As the Staff explained in its March 13, 2006 pleading, *Staff's Opposition to the Proposed Procedural Schedule of Cass County Missouri, StopAquila.org and Nearby Residents,* Aquila already has the local consent required by §393.170.2. In its 1938 Report and Order, as supplemented, in which it granted Aquila's predecessor Missouri Public Service Corporation a certificate of convenience and necessity to serve portions of Cass County, and other areas, the Commission scrutinized the communities and areas for which Missouri Public Service Corporation had obtained local franchises before issuing the certificate of convenience and necessity.[33]

36. "In absence of any general law limiting duration of franchises for operation of an electrical system on the roads and highways of a county, the grant of a franchise for that purpose,

[32] *Id*. at 35-39.
[33] *In re the Application of the Missouri Public Service Corporation*, 23 MO.P.S.C. 740 (1938).

without specifying a period of duration, is a grant in perpetuity." *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc*., 407 S.W.2d 883, 888 (Mo. 1966).

37. The County states that Staff has "confirmed that it lacks staff or resources to consider zoning issues." (Motion to Dismiss Application p. 17) Staff is ready to consider any issue that the County may present.

WHEREFORE the Staff, in response to the County's Motion to Dismiss Application, or in the Alternative, to Impose Conditions on Issuance of Certificate and Motion for Oral Argument, opposes the Motion to Dismiss or to Impose Conditions and recommends the Commission deny the motion. The Commission has already scheduled oral argument.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 30th day of March 2006.

/s/ Lera L. Shemwell