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February 3, 2005

FILED

FEB 3 2005

Missouri Public
Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. EA-2005-0248

Dear Judge Roberts:

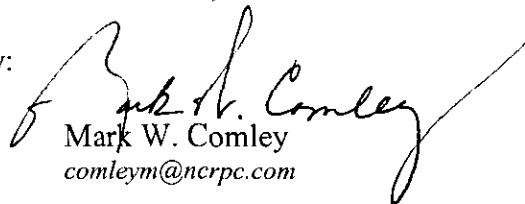
Please find enclosed for filing in the referenced matter the original and five copies of an Application to Intervene and Motion to Dismiss Aquila, Inc.'s Application.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
comleym@ncrpc.com

MWC:ab

Enclosure

cc: Office of Public Counsel
General Counsel's Office
Paul A. Boudreau
Gerard Eftink
Debra L. Moore

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

FEB 3 2005

Missouri Public
Service Commission

In The Matter of the Application of Aquila,)
Inc. for Specific Confirmation or, in the)
Alternative, Issuance of a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own, Operate,)
Control, Manage, and Maintain a)
Combustion Turbine Electric Generating)
Station and Associated Electric)
Transmission Substations in)
Unincorporated Areas of Cass County,)
Missouri Near the Town of Peculiar.)

Case No. EA-2005-0248

MOTION TO DISMISS AQUILA, INC.'S APPLICATION

COMES NOW the County of Cass, Missouri (Cass County), and respectfully moves the Commission to dismiss Aquila, Inc.'s (Aquila) Application in the captioned matter. In support, Cass County submits the following:

Summary

There are two prongs to the relief requested by Aquila in its Application. First, it has requested that the Commission confirm specifically that Aquila's existing certificate of convenience and necessity authorizes it to construct and operate the South Harper Facility and Peculiar Substation (for brevity hereinafter "the South Harbor Plant"). Second, as an alternative, Aquila has requested a site-specific certificate of convenience and necessity for the construction and operation of the South Harper Plant.¹

As to the first request for relief, Aquila has asked the Commission to render a declaration or principle of law which the Commission is powerless to issue. Most importantly, this issue has

¹ The term "South Harbor Plant" as used throughout this motion means and refers to the South Harper Facility, the Peculiar Substation and other electric transmission substations, if any, associated with the South Harper project.

already been resolved against Aquila by Judge Joseph Dandurand in the Final Judgment entered in Cass County Circuit Court, and is currently under review on appeal.

Regarding the second request for relief, that request is premature. As ruled by Judge Dandurand, Aquila lacks local consent – a local county franchise—by which to lawfully construct or operate the South Harbor Plant. Given the Judge’s ruling, Aquila must first acquire a franchise from Cass County specifically authorizing the construction and operation of a generation facility. For its Application to be properly pleaded, Aquila officers must verify that the franchise has been granted. Even if the Commission were to grant this second prayed for order, it would not expand Aquila’s franchise rights in Cass County. To repeat, Aquila is legally barred by law from constructing or operating the South Harbor Plant absent a county franchise granting Aquila the authority to construct and operate a generation facility.

Discussion

Regarding the South Harbor Plant, the relationship between Cass County, Aquila and even this Commission is defined by Judge Dandarand’s Final Judgment.² The questions raised in that judgment are matters of law, and now disputes pertaining to them are vested in the jurisdiction of the Western District Court of Appeals. The Final Judgment constitutes the prevailing standard by which to measure Aquila’s Application. Judge Dandarand made two central legal determinations that warrant dismissal of Aquila’s Application. He has already declared that as a matter of law, 1) Aquila’s 1917 franchise with Cass County does not give Aquila the specific authority to build a power plant within Aquila’s certificated area; and 2) Aquila lacks a “specific authorization” in its current certificate of public convenience and necessity from this Commission to build a power plant in Cass County. These legal

² See Appendix 2 to Aquila’s application.

determinations were made in response to a lawsuit filed by Cass County seeking a permanent injunction to prevent Aquila from building the South Harper Plant without first complying with Cass County's zoning and land use regulations as required by R.S. Mo §64.235. It is important to note that this Commission sought and was granted leave to intervene during the trial of Cass County's lawsuit for the limited purpose of addressing, if it felt necessary, any concern this Commission had that the Court, in interpreting and applying R.S.Mo. §64.235 to Aquila's intent to build a power plant and related substation(s), was somehow invading the province of the Commission. The Commission remained a silent observer during the two day trial, and at the close of the proceedings, and after the Court entered its legal rulings on the record, consented to being removed as a party.

In seeming disregard of Judge Dandarand's findings and judgment, Aquila has asked the Commission in this case for two items of relief: 1) the Commission's confirmation that Aquila possesses a certificate of convenience and necessity to construct, own, operate and manage an electrical power plant in Cass County, Missouri; (Application ¶ 5) or 2) a Commission order granting a site-specific certificate of convenience and necessity to Aquila for the same purpose. (Application ¶¶5, 6.). In effect, Aquila seeks legal rulings from this Commission in direct contravention to those it received from the trial court, which rulings, if secured, will have the practical and intended effect of altering the trial court's interpretation and application of §64.235, R.S.Mo 2000 .the statute that defines the scope of Cass County's police powers to control land use.

In terms of its legal effect, Aquila's first request is for a legal finding by the Commission that its general certificate of convenience and necessity constitutes specific authority as required by §64.235, RSMo 2000. Clearly, that form of relief contradicts Judge Dandurand's finding and

judgment on the same issue. First and foremost, Aquila's requested relief is beyond the jurisdiction of this body. It is an elementary maxim of administrative law that the Commission, and other executive administrative agencies, do not have the power to apply or announce any principles of law or equity. Furthermore, this issue has already been decided by a court of law and is now a matter of appeal between the contestants. This Commission is not a court and lacks any superintending authority over the circuit or appellate courts of this state. It is powerless to overturn their judgments.

As stated in *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 -76 (Mo.banc 1982):

"[T]he judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law." See also *Lightfoot v. City of Springfield*, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission "has no power to declare ... any principle of law or equity"); *State ex rel. Kansas City Terminal Railway v. Public Service Commission*, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern Railroad v. Public Service Commission*, 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914) (Public Service Commission has no power to declare statutes unconstitutional); *State ex rel. Missouri & North Arkansas Railroad v. Johnston*, 234 Mo. 338, 350-51, 137 S.W. 595, 598 (banc 1911) (secretary of state has no power to declare a statute unconstitutional).

The first of Aquila's requests for relief is plainly not justiciable before the Commission.

It cannot be a valid basis of the Application.

Aquila's second request for relief³ brings into play the provisions of §393.170.2, RSMo 2000 which provides:

2. No [electrical] . . . corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended

³ Aquila's voluntary submission of this issue to the Commission may raise additional arguments that are more appropriately addressed to, and to the extent necessary are hereby reserved by Cass County for submission to, the Western District Court of Appeals.

for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, **together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.**

Per Judge Dandarand's decree, Aquila is devoid of the "required consent" of Cass County, which in this context is synonymous with the "proper municipal authority." An essential ingredient is missing from Aquila's Application. Notwithstanding what it alleges in Paragraph 30⁴ of its Application, Aquila must allege that it has acquired the consent of Cass County to build and operate the South Harbor Plant, a consent it lacks. Absent that consent, even an order granting this Application would not lift the bar prohibiting Aquila from constructing and operating the South Harbor Plant. Until Aquila can verify to this Commission that it has acquired the "required consent" of Cass County, specifically, a franchise which specifically authorizes Aquila to build and operate a generation facility, its Application before the Commission will lack a mandatory element for approval.

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

State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton 379 S.W.2d 593, 599 (Mo. banc 1964). The rule equally applies to county consent through franchise. *Id.* at 600.

⁴ To date, Aquila has not filed a request with Cass County for the franchise Judge Dandurand has determined it lacks. The general allegation in paragraph 30 of Aquila's application is therefore insufficient. Because of the Final Judgment, the pleaded element of Cass County's consent by a franchise is essential to the Application.

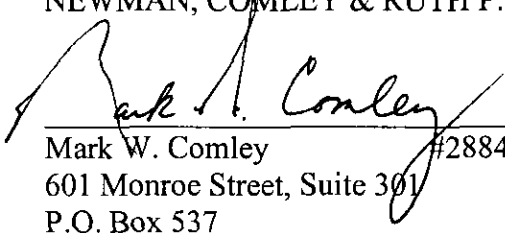
CONCLUSION

Aquila's Application asks the Commission to overturn a legal determination of the Circuit Court of Cass County which, by law, the Commission is powerless to do. Aquila has asked the Commission as well to issue a certificate of authority that Aquila could not exercise until it acquires Cass County's consent. Aquila's Application is pleaded defectively, a matter it cannot cure by the general allegations of Paragraph 30, and is at a minimum premature. Since the Commission is powerless to act on the Application as it has been written, it should be summarily dismissed.

Respectfully submitted,

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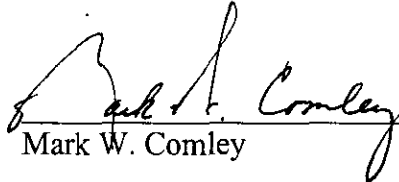
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ATTORNEYS FOR CASS COUNTY, MISSOURI

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 3rd day of February, 2005 to the Office of General Counsel at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; and Paul A. Boudreau at paulb@brydonloaw.com and Gerard Eftink at geftink@kc.rr.com and geftink@comcast.net.


Mark W. Comley