NEWMAN, COMLEY & RUTH P.C.

ATTORNEYS AND COUNSELORS AT LAW

601 MONROE STREET, SUITE 301
P.O. BOX 537
JEFFERSON CITY, MISSOURI 65102-0537
TELEPHONE: (573) 634-2266
FACSIMILE: (573) 636-3306
www.ncrpc.com

ROBERT K. ANGSTEAD
ROBERT J. BRUNDAGE
MARK W. COMLEY
LANETTE R. GOOCH
CATHLEEN A. MARTIN

MARTIN A. MILLER
STEPHEN G. NEWMAN
THOMAS R. O'TOOLE
JOHN A. RUTH
ALICIA EMBLEY TURNER

February 22, 2006

FILED[2]
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Missouri Public Service Commission

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

Re: Case No. EA-2006-0309

Dear Judge Dale:

Enclosed for filing in the referenced matter please find the original and five copies of the Response of Cass County, Missouri to Aquila's Motion to Set Early Prehearing Conference, to Establish Procedural Schedule and for Issuance of Protective Order.

As always, please contact me if you have any questions. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By: Mark W. Comley

Mark W. Comley
comleym@ncrpc.com

MWC:ab
Enclosure
cc: Office of Public Counsel
General Counsel's Office
All parties of record

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

RESPONSE OF CASS COUNTY, MISSOURI
TO AQUILA'S MOTION TO SET EARLY PREHEARING CONFERENCE,
TO ESTABLISH PROCEDURAL SCHEDULE
AND FOR ISSUANCE OF PROTECTIVE ORDER

Comes now Cass County, Missouri, ("Cass"), by and through counsel, and for its response to Aquila's Motion to Set Early Prehearing Conference, to Establish Procedural Schedule and for Issuance of Protective Order ("Motion"), states as follows:

1. At the outset, Cass notes that it is not yet a party to these proceedings. Aquila correctly anticipates that Cass will become a party. The County intends to file its Motion to Intervene on or before the Commission's February 27, 2006 deadline.

2. Furthermore, Cass is aware of the Commission's order issued this morning which set the prehearing conference in this case for March 2, 2006 and which appears to excuse the filing of a response to Aquila's Motion by February 22, 2006. Nonetheless, Cass has filed this response at this time in order to early raise its objections to the pace at which Aquila proposes for the disposition of this important case – a pace with which the Staff of this Commission ostensibly agrees.

BACKGROUND

3. Aquila's Motion relates to its application ("Application") seeking a certificate of convenience and necessity for a power plant and a related electrical substation (the "South Harper Plant" and the "Peculiar Substation," respectively). The South Harper Plant and the Peculiar Substation are already constructed in unincorporated Cass County, on sites that are zoned agricultural. This is Aquila's second application to the Commission pertaining to the South Harper Plant and the Peculiar Substation.

4. Aquila commenced construction of the South Harper Plant and the Peculiar Substation in December 2004 without first securing Cass' approval for the improvements as required by § 64.235, RSMo. 2000. [1] As a result, Cass filed suit against Aquila in the Circuit Court of Cass County, Missouri, Case No. CV104-1443CC, seeking to enjoin the construction and operation of the South Harper Plant and the Peculiar Substation ("Lawsuit").

5. The Honorable Joseph Dandurand entered a judgment in the Lawsuit on January 11, 2005 ("Judgment"), a copy of which is attached as **Exhibit A**.

6. In the Judgment, Judge Dandurand found that Aquila's existing certificates and orders from the Commission did not constitute "specific authorization" to construct the South Harper Plant and the Peculiar Substation of the nature required by § 64.235 as to exempt Aquila from the obligation to secure Cass' approval before construction of said improvements. The Judgment thus permanently enjoined the construction of the South Harper Plant and the Peculiar Substation, permanently enjoined the operation of both the Plant and the Substation, and ordered the removal of all improvements constructed by Aquila, whether before or after the Judgment, on the Plant and Substation sites.

7. At the time of the Judgment, the South Harper Plant and the Peculiar Substation had not been constructed.

[1] Statutory citations herein shall be to RSMo. 2000 unless otherwise indicated.

8. The Judgment was stayed pending Aquila's appeal, subject to Aquila's posting of a $350,000.00 bond. Aquila elected, at its risk, and despite the Judgment, to continue with construction of the South Harper Plant and the Peculiar Substation pending its appeal, with full knowledge and awareness that should its appeal be lost or abandoned, Aquila would be bound by the Judgment to dismantle the South Harper Plant and the Peculiar Substation.

9. The Judgment made no findings or determinations with respect to the requirements of § 393.170, or with respect to the Commission's practices as declared in *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980).

THE COURT OF APPEALS

10. On December 20, 2005, the Missouri Court of Appeals, Western District, affirmed Judge Dandurand's Judgment. In its opinion in Case No. WD 64985 ("Opinion"), a copy of which is attached as **Exhibit B**, the Court of Appeals determined that the certificates and/or orders already possessed by Aquila do not constitute specific authorization to construct the South Harper Plant and the Peculiar Substation as to exempt Aquila from the obligation to comply with § 64.235.

11. Though the Judgment reflected no determinations or findings with respect to the requirements of § 393.170, or with respect to the propriety of the Commission's practices under that statute, the Court of Appeals noted that the Commission's practices had effectively evaded review since 1980, and would likely continue to evade review. In consequence, the Court of Appeals, as requested by Cass, analyzed § 393.170 and the decision in *State ex rel. Harline v. Public Service Commission,* 343 S.W.2d 177 (Mo. App. 1960). The Court of Appeals determined that the Commission's practice that utilities need not return to the Commission for specific authority to build an electric plant in their certificated area, declared in, and followed

since, its decision in *Union Elec. Co.,* 24 Mo. P.S.C. (N.S.) 72, 77 (1980), violated the unambiguous requirements of § 393.170.1, and improperly applied *Harline.* See, **Exhibit B.**

12. The Court of Appeals specifically found that ". . . examining the language of section 393.170 in its entirety, we believe the legislature, which clearly and unambiguously addresses electric plants in subsection 1, *did not give the Commission the authority to grant a certificate of convenience and necessity for the construction of an electric plant without conducting a public hearing that is more or less contemporaneous with the request to construct such a facility.*" The Opinion also declared that "[b]y 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*. Moreover, the county zoning statutes discussed above [§ 64.235] also give public utilities an exemption from 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." [Emphasis Added] See, **Exhibit B.**

13. The Court of Appeals could not more clearly announce that the Commission must require public utilities to secure authorization to construct a power plant, whether or not construction is proposed in the utility's certificated area, and that such authorization must be sought and secured from the Commission BEFORE the plant is constructed. The Court of Appeals also clearly announced that the Commission must consider whether the proposed plant's

location is in harmony with local zoning as a part of its determination whether to issue a specific certificate authorizing construction of a plant. The law interpreted by the Court of Appeals was not a recent enactment that had reached the appellate level under some test condition. Rather, the Court rendered a declaration of the state of law that existed at the time Aquila imprudently inaugurated South Harper and its substation.

14. As of the date the appeal concluded, Aquila was, and still is, under a mandatory permanent injunction directing that it tear down the South Harper Plant and the Peculiar Substation. As will be detailed subsequently, the injunction now carries a date certain for obedience.

AQUILA'S APPLICATION

15. Aquila's Application represents the first time in over a quarter of a century that this Commission will entertain an application by a public utility for specific authorization to construct a power plant and related facilities. Aquila's Application is complicated by the fact that it seeks authorization to construct the Plant and Substation, after their construction, contrary to the Court of Appeals' clear announcement that § 393.170.1 requires the Commission's authorization of a plant before it is constructed.[2]

16. Aquila's Application is also the first opportunity for the Commission to formulate appropriate practices, standards, procedures, conditions and requirements related to the issuance of a specific certificate for convenience and necessity for the construction of a power plant since 1980. This Application is, therefore, extraordinarily important. It will be the map that all other affected utilities will follow. The Commission should be particularly mindful of the need to

[2] Cass submits that the Commission lacks authority to approve the erection of these facilities retroactively. Without citation of authority, it is an elementary maxim of the regulatory law governing this Commission that utility transactions closed or completed in advance of Commission approval are void. Aquila's instant application is no exception. Cass will file a Motion to Dismiss the Application based in part on this contention.

carefully declare and determine the practices it will oblige public utilities to follow when presenting applications under § 393.170. The Commission should be guided, in developing those practices and procedures, by the important public policy principals announced in the Opinion, and not by Aquila's desperation to beat a deadline.

17. Despite the importance of this Application to the overall regulation of electric utilities Aquila has filed this Motion, seeking adoption of an extraordinarily aggressive, accelerated procedural schedule, designed with one purpose in mind: to insure disposition of the Application by early May, 2006.

18. Aquila's Motion is driven by Aquila's need to secure favorable disposition of its Application by May 31, 2006 as to avoid being required to dismantle the South Harper Plant and the Peculiar Substation in accordance with the Judgment.[3]

19. The Motion gives no, or insufficient, regard to the rights of others interested in the Application to have a meaningful opportunity to be heard with respect to the propriety, both legally and factually, of the Application. The Motion naively presumes an Application of this importance and complexity can be summarily disposed of with very limited time for discovery, and with only two days allotted for evidentiary hearings. Historical experience requires a different conclusion. As this Commission is well aware, on January 28, 2005, Aquila filed an earlier Application for Specific Confirmation, or in the Alternative, Issuance of a Certificate of Convenience and Necessity, Case No. EA-2005-0248, in connection with the South Harper Plant and the Peculiar Substation. In that matter, after two days of evidentiary hearings conducted on

[3] The Judgment ordered the Plant and Substation to be dismantled immediately. The Judgment became final and nonappealable on January 11, 2006, after Aquila abandoned further appeals, and when the Court of Appeals handed down its Mandate affirming the Judgment. On January 12, 2006, Aquila filed a Motion to Extend the Stay of Judgment with the trial court. Aquila had been previously notified in writing that Cass would expect immediate compliance with the Judgment. On January 27, 2006, Judge Dandurand heard argument on Aquila's Motion to Extend the Stay of Judgment. The Court orally announced that Aquila would be obligated to dismantle the South Harper Plant and the Peculiar Substation commencing May 31, 2006. The written Order relating to this hearing was entered on February 15, 2006, and is attached as **Exhibit C**.

March 29-30, 2005, Aquila had not yet completed the presentation of its case, and other interested parties had yet to begin the presentation of their evidence. At the end of the second day of hearings, the Commission scheduled five (5) additional days of hearings for April 4-8, 2005. It was not at all clear that those five (5) additional days would suffice. The next day, the Commission entered an order suspending the hearing. The Commission thereafter abandoned consideration of Aquila's request for a specific certificate for convenience and necessity to authorize the Plant and Substation, and instead, issued its "Clarification Order," which by consent of the parties and approval of the Cass County Circuit Court will be soon set aside. [4] Given this experience, it is facially obvious that the Application cannot be disposed of within the procedural schedule proposed by Aquila, a schedule that assumes only two days of hearings, without having a dramatic impact on each interested parties' rights to be heard. Moreover, the proceedings on this Application will be considerably longer than those that would have been required in Case No. EA-2005-0248. As will be further discussed, since Aquila has not secured the approval of Cass for the locations of the Plant and Substation, the Commission will be required by the Opinion to conduct a full and complete hearing on land use issues related to the propriety of the sites.

20. Aquila's Motion improperly presumes that the Commission is obliged to adopt an aggressive, accelerated procedural schedule to protect Aquila from the obligation to dismantle the South Harper Plant and the Peculiar Substation. "Protecting" public utilities from self created hardships is not the province, nor a priority of, the Commission.

21. Aquila's Motion also improperly presumes that the Commission is obliged to accelerate consideration of the Application, at the expense of interested parties who will be

[4] The parties have agreed to the form of a Consent Judgment by which to vacate the April 7, 2005 Clarification Order, and entry of that Consent Judgment by Judge Dandurand is imminent.

affected by the Application, because the "need" to save Aquila from its self created hardship outweighs the need to protect the fairness and sanctity of the Commission's procedures and the public's right to due process. Aquila's request for favored treatment is unwarranted. Aquila created its own hardship by constructing the Plant and Substation, at its risk, despite the Judgment enjoining and ordering dismantling of same. The public will not be financially affected if Aquila is required to dismantle the Plant and Substation and to rebuild them at properly approved sites. At the hearing on February 9, 2006, where the Commission asked Aquila and other parties to Case No. ER-2005-0436 about a stipulation entered in the case, representatives for Aquila, as well as Staff witnesses, confirmed that any cost Aquila may incur to dismantle the Plant and Substation, and/or to rebuild the Plant and Substation at appropriately approved locations, will be borne by Aquila, and will NOT be passed through to the public as a part of any future rate case.[5] Thus, the public interest is not served by aggressively accelerating the procedural schedule for this unusually important Application. Rather, the public's interest is best served by treating this Application in the ordinary course, allowing all interested parties a full and complete opportunity to conduct discovery, and to present all relevant evidence and legal argument regarding the propriety of the Plant and Substation, generally, and at their present locations. The Commission should not rush the disposition of the Application in deference to Aquila. Aquila has not engaged in behavior which warrants such favor.

22. The predicament in which Aquila finds itself is of Aquila's own making. Aquila elected to proceed with construction of the South Harper Plant and the Peculiar Substation pending its appeal of the Judgment, and at its peril, knowing that the Judgment meant demolition of the Plant and Substation should Aquila's appeal not succeed. The Commission did not make or direct that decision for Aquila. Aquila had the choice not to take such a risk. Its decision to

[5] The transcript of this hearing is not yet available.

do so was declared by Judge Dandurand on January 27, 2006 as "arrogant." See Transcript of Record, January 27, 2006 (hereinafter cited as "Tr.") at p. 44, line 25 through p. 45, lines 1 through 11.[6] In announcing his ruling on January 27, 2006, Judge Dandurand stated: "I will tell you that I have nothing but respect for the position taken by the County of Cass, and I have nothing but frustration for the position taken by Aquila. I don't understand—I don't understand how they could have the nerve to do what they did in the face of what the rulings were, other than to have total, utter disregard for the Ruling of this Court. . . . you, Aquila, made a determination to proceed in the face of this ruling, in the posting of a bond as if my ruling didn't matter at all, and you knew darn well, with arrogance, as far as I'm concerned, that I didn't have any idea what I was doing. . . . So you made that decision. So far as whose problem it is, it falls squarely on Aquila." Tr. p. 78, line 4 through p. 79, line 2.

23. Though Judge Dandurand has postponed Aquila's obligation under the Judgment to dismantle the Plant and Substation to May 31, 2006[7], the Order makes no reference or statement whatsoever to any event or condition that could or might occur, or that the Court expects would or should occur, that will relieve Aquila of the obligation to commence dismantling the Plant and Substation on that date.

24. In fact, Judge Dandurand made it abundantly clear during the January 27, 2006 argument on Aquila's Motion to Extend the Stay of Judgment that whatever extension of time he granted Aquila before it would be obligated to commence dismantling the Plant and Substation, that time frame would not be dependent upon or tied to a condition that the Commission make a decision with respect to the Application. Judge Dandurand expressly stated: ". . . . what you can count on, . . . I'm not going to say, if I say anything, if I give you a week, I am not going to say

[6] Excerpts of the transcript of proceedings before Judge Dandurand are attached as **Exhibit D** to this Response.
[7] See Judge Dandurand's Order dated February 15, 2006 attached hereto as **Exhibit C**.

that you have until the Public Service Commission does something with this case because that's unreasonable." Tr. p. 19, lines 15 – 19.

25. Thus, the premise underlying Aquila's Motion is false. The fact that Judge Dandurand has given Aquila until May 31, 2006 to begin dismantling the Plant and Substation, does not bind this Commission to proceed without caution, to ignore the due process rights of interested parties, and to adopt a procedural schedule that is unbelievably aggressive, if not facially unworkable, just so Aquila can insure disposition of its Application by early May, 2006.

26. Equally unpersuasive is Aquila's attempt to claim an "entitlement" to the unyielding, accelerated procedural schedule proposed by its Motion by its suggestion that, but for Aquila's reliance on the "Commission's long standing regulatory policy . . . that 'area' or 'territorial' certificates are sufficient authority for a utility to construct any and all facilities within that area including power plants and substations," Aquila would not be in this position. Motion, ¶ 1.

27. Aquila's suggestion, in effect, blames the Commission for its predicament. In so doing, Aquila conveniently fails to note that the Commission's decision in *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980) did not in any manner address whether a public utility is obligated to comply with county zoning statutes. This important distinction was noted, with vigor, by Judge Dandurand in the hearing on January 27, 2006, when Aquila attempted to excuse its decision to proceed with construction of the South Harper Plant and the Peculiar Substation despite the Judgment, claiming it had detrimentally relied on the Commission's practices. Judge Dandurand stated: ". . . this 1980 case, it didn't say, I don't think, that you can build a plant anywhere you want to build a plant. . . ." Tr. p. 8, lines 2-4. The trial court thus noted the obvious. The Commission's decision in 1980 to change its procedural requirements did not

purport to elevate public utilities to "super sovereigns" with the right to build power plants wherever they wish, without regard to local land use regulations.

28. In fact, the Commission's decision in *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980) left unaffected the Commission's previous rulings that a public utility seeking authority to build a plant must be able to demonstrate that the utility had secured appropriate local authority to construct the plant in its proposed location. The Commission held in *In the Matter of the Application of Missouri Power & Light Company,* 18 Mo. P.S.C. (N.S.) 116 (1973) that:

> "We should also state parenthetically at this point that we are of the opinion that the citizens, through proper zoning ordinances, have already designated the area in question as an industrial area. . . . For us to require the Applicant to move the proposed site to the alternative site suggested by the intervenors would be to suggest a location that is not now zoned for industry but is zoned as residential. ***In short, we emphasize we should take cognizance of—and respect—the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning.***" [Emphasis added]

The Commission has always appreciated and honored the material distinction between whether a plant can be built (a determination within the exclusive jurisdiction of the Commission under § 393.170)[8] and where a plant should be built (a matter which, at least historically, the Commission has left to the sound judgment of local authorities). The *Union Elec. Co.* decision had no impact on this practice, and thus no impact on the Commission's longstand recognition that it should respect local zoning in determining whether to approve a pub utility's request for authorization to construct a power plant.

29. The reality is that Aquila made the unilateral decision, unsupported by language in the Commission's decision in *Union Elec. Co.*, to attempt to expand the appli of that decision by arguing it created tacit authority for a public utility to build a power p

[8] Although the Commission's jurisdiction is exclusive in this sense, the Commission cannot disregard lack o consent in connection with exercise of the rights described in § 393.170.2.

any specific location it wants within its certificated area. Aquila's claim that it detrimentally relied on the Commission's practices to pursue the position it unsuccessfully advanced in the Lawsuit is self serving and inaccurate.

30. In short, the fact that Aquila may be required to dismantle the Plant and Substation before this Commission can fully and fairly determine the Application is immaterial and irrelevant to the procedural schedule the Commission should adopt.

31. If there is one principle clearly announced by the Opinion which cannot be controverted it is that power plants cannot be built at a particular proposed location without a full and complete opportunity for a public hearing, where matters related to the proposed location, *including zoning*, can be properly vetted by all interested parties, and considered. See **Exhibit B.** As noted above, the Commission has been cognizant of this requirement in the past, obliging a public utility to demonstrate that it has secured local authority for the proposed location of the power plant as a condition of securing a specific certificate of convenience and necessity authorizing construction of the plant. As the Commission returns to the practice of requiring specific certificates of convenience and necessity before, and as a condition of, a power plant's construction, it will be necessary for the Commission, in order to comply with the Opinion, to: (i) either return to its pre-1980 practice of requiring an applicant to prove it has local authority for the plant's proposed location (a practice that is consistent with the express requirements of § 393.170.2); (ii) or expand the scope of its evidentiary hearings on applications submitted pursuant to § 393.170.1 to include a meaningful opportunity for interested parties to submit evidence with respect to the propriety of the proposed location for a power plant, including

evidence of applicable zoning, whereupon the Commission will be required to do what it has heretofore stated it will not---make a site specific determination as to the plant's location.[9]

32. Aquila concedes it does not have Cass' authority to construct the South Harper Plant and the Peculiar Substation at their current locations. Cass has reminded Aquila of the obligations under law to acquire local zoning approval for the Plant and Substation and has set aside justified objections, on a conditional basis, to Aquila's filing of such a zoning request. Aquila labels this gesture as an "invitation." It is no more an invitation than this Commission's published rules on filing of applications for authority. Nonetheless, Aquila concedes that Cass "invited" Aquila to submit an application for special use permit or for rezoning of the Plant and Substations sites, AFTER the January 27, 2006 hearing on Aquila's Motion to Extend the Stay of Judgment. This was AFTER Aquila was temporarily relieved of the obligation to immediately dismantle the Plant and Substation. After securing temporary relief from the Judgment, Aquila has elected not to seek Cass' approval for the location of the Plant and Substation.[10] Motion, ¶ 5.

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[9] The Commission has never presumed it possesses superior knowledge of, or expertise about, the land use issues and concerns that influence local authorities in their adoption of zoning ordinances or master plans. In fact, the Commission has heretofore given appropriate deference to local authorities with respect to where a proposed plant should be located, or "sited," mindful that local authorities are in a superior position to evaluate the suitability of a proposed site consistent with local zoning. The Opinion does not mandate the abandonment of this practice. The Opinion simply holds that public utilities do not have the unfettered right to build plants at any location they choose. The Opinion requires either the local authority or the Commission to carefully consider a plant's proposed location before it is constructed, giving due regard to local zoning. The Opinion leaves the Commission free to continue its practice of deferring siting approval to local authorities by requiring a public utility to demonstrate it has secured local authority for a plant's proposed location as a condition of receiving a specific certificate of convenience and necessity for the plant. See *In the Matter of the Application of Missouri Power & Light Company*. Cass encourages the Commission to continue this practice as its means of complying with the Opinion, and submits that such a course of action is suggested, if not mandated, by § 393.170.2.

[10] Aquila claims it was refused the opportunity to submit an application for special use permit on January 20, 2006, suggesting or implying its decision not to attempt to file such an application now is "excused." On January 20, 2006, Aquila had secured NO relief from the Judgment, which was, as of that date, final and unappealable, and which unambiguously required the immediate dismantling of the Plant and Substation. It appears Aquila purposefully attempted to file its application for special use permit with Cass at a time when Aquila knew the application would have be refused by Cass, given the status of the Judgment. If Aquila truly intended to work cooperatively with Cass to seek the County's approval of the Plant and Substation sites, then Aquila could easily have resubmitted the application for special use permit on the afternoon of January 27, 2006, after receiving Judge Dandurand's ruling on its Motion to Extend Stay of Judgment. Judge Dandurand had observed during the oral

Aquila claims, in explanation, that "it is imperative that the resources of all concerned be focused" on its Application, since, even if Aquila could secure approval for the location of the Plant and Substation from Cass, Aquila would still be required to seek the Commission's approval of its Application. Motion, ¶ 5. However, Aquila's explanation ignores that, one way or the other, whether before the County or this Commission, Aquila will be required to sustain its burden to prove that the Plant and Substation are proposed at appropriate sites, a determination that, according to the Opinion, must take into consideration existing zoning. Aquila acknowledges in its Motion that "issues such as land use . . . 'may' be considered in the context of the case before the Commission. . . ." Motion, ¶ 5. In fact, it is not a matter of whether land use issues "may" be considered by the Commission. As Aquila is not able to submit evidence to the Commission that the locations of the Plant and Substation have been authorized by Cass, land use matters **MUST** be fully evaluated by the Commission as a part of its consideration of the Application. Absence of Cass' zoning approval of the project sites has created a wider scope of issues for Commission consideration within the framework of a certification proceeding. [11]

33. The Opinion clearly envisions that, under such circumstances, the Commission will be expected to act as the functional equivalent of Cass, accepting and properly weighing and considering land use issues, just as Cass would be obliged by law to do, and consistently with the standards that would be applied to Cass' determination as to whether Aquila is entitled to construct the Plant and Substation at their current locations. The objective of the Opinion was the protection of the public—not the protection of public utilities. The aggressive, accelerated

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argument on that motion that, on January 20, 2006 , Cass had no choice but to refuse the tendered application given the status of the Judgment. Tr. p. 38, line 24 through p. 39, line 25; p. 42, line 12 through p. 43 line 25. The same cannot be said for the period following the Court's announced ruling on January 27, 2006. Aquila's refusal to file its application for special use permit immediately following Judge Dandurand's announced ruling, at a point when Aquila knew Cass could not refuse to accept the application without defying the trial court, speaks for itself.

[11] See footnote 9.

procedural schedule proposed by Aquila will not properly protect the public interest, nor this Commission's interests. The Motion is designed and intended to protect only one entity—Aquila.

34. If the Commission grants Aquila's Motion, it will be adopting a result oriented procedural schedule driven **not** by what is reasonably necessary to insure that the Commission sustains its obligations to the citizens of this State and/or to the sanctity of its procedural requirements, but rather by Aquila's desperate attempt to be spared the consequences of its purposeful and unlawful conduct. The Commission should insure that every procedural safeguard is afforded all parties to avoid the specter of a "predetermined" outcome in this case. Cass raises this matter because of certain exchanges between Aquila's attorneys and the court on January 27 of this year. During oral argument before Judge Dandurand on Aquila's Motion to Extend the Stay of Judgment, Mr. Youngs told the trial court that Aquila had "consulted with the Public Service Commission," (Tr. p. 20, lines 4 through 9) and Chris Reitz, Aquila's General Counsel, told the trial court: ". . . we are very confident . . . that the Commission wants the plant. They believe it's in the right place, and they will approve our application." Tr. p. 22, lines 5-11. Mr. Reitz went on to tell the trial court: "I am telling you we are confident that they believe that the decision that we made to construct this particular plant in this particular spot is absolutely the right one and they will, in fact, give us the specific authority that we need." Tr. p. 23, lines 8-13. The basis for Mr. Reitz's sense of confidence was not disclosed. That these representations were made of record underscores the importance now for the Commission to implement procedures and deadlines by which to guarantee without challenge a report and order untainted by partiality or the dreaded unfairness of predetermination. Cass respectfully submits that there is no compelling reason bearing any relationship to the public interest that warrants granting Aquila's Motion, particularly under circumstances where, fair or not, a predetermined outcome before the

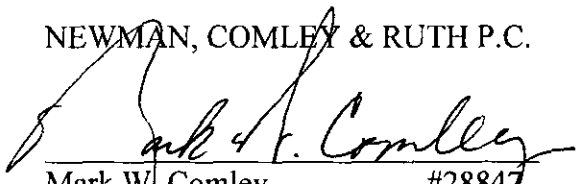
Commission has already been claimed by Aquila—a shadow over the proceeding that should not be lengthened by the adoption of the unrealistic procedural schedule proposed by Aquila.

35. Cass does not object to March 2, 2006 as the date of the prehearing conference as the Commission ordered today. Cass concurs with the recently filed suggestions of the Office of Public Counsel that all parties (including those yet to intervene by the February 27, 2006 deadline) be given a reasonable period of time after the Prehearing Conference to submit an agreed procedural schedule, or in the alternative, to submit each party's proposed procedural schedule for the Commission's consideration, in the absence of such agreement.

WHEREFORE, to the extent it may still be necessary, Cass respectfully requests the Commission deny (and supports the Commission's denial today of) that portion of Aquila's Motion directing the parties to file an agreed procedural schedule by March 1, 2006, and further requests that the Commission reject and not adopt the procedural schedule suggested by Aquila in its Motion, or any procedural schedule identical or substantially similar to the schedule suggested by Aquila in its Motion.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: 

Mark W. Comley #28847
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
Telephone (573) 634-2266
Facsimile (573) 636-3306
Email comleym@ncrpc.com

CINDY REAMS MARTIN, P.C.

By: _____

Cindy Reams Martin - No. 32034
408 S.E. Douglas
Lee's Summit, Missouri 64063
Telephone 816/554-6444
Facsimile 816/554-6555
Email crmlaw@swbell.net

CASS COUNTY COUNSELOR

By: _____

Debra L. Moore #36200
Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701
Telephone (816) 380-8206
Facsimile (816) 380-8156
Email dmoore@casscounty.com

Attorneys for Cass County, Missouri

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on this 22nd day of February, 2006 to the following:

General Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 64102-2230

James C. Swearengen
Paul A. Boudreau
Janet E. Wheeler
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102

Attorneys for Aquila, Inc.

As well as to parties on the Commission's service list in Case Numbers EA-2005-0248, EO-2005-0156 and ER-2005-0436 who are as follows:

Sid E. Douglas
City of Peculiar
2405 Grand Blvd., Suite 1100
Kansas City, MO 64108

Stuart Conrad
Finnegan, Conrad & Peterson
3100 Broadway, Suite 1209
Kansas City, MO 64111

Major Craig Paulson
Federal Executive Agencies
139 Barnes Drive
Tyndall Air Force Base, FL 32403

John Coffman
871 Tuxedo Blvd.
St. Louis, MO 63119

William Steinmeier
William D. Steinmeier, P.C.
2031 Tower Drive, P.O. Box 104595
Jefferson City, MO 64110

Gerald Eftink
Attorneys for STOPAQUILA.ORG
P.O. Box 1280
Raymore, MO 64083

Jeremiah Finnegan
Finnegan, Conrad & Peterson
3100 Broadway, Suite 1209
Kansas City, MO 64111

Shelley Woods
Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

Mr. Jeffrey Keevil
Stewart & Keevil
4603 John Garry Drive, Suite 11
Columbia, MO 65203

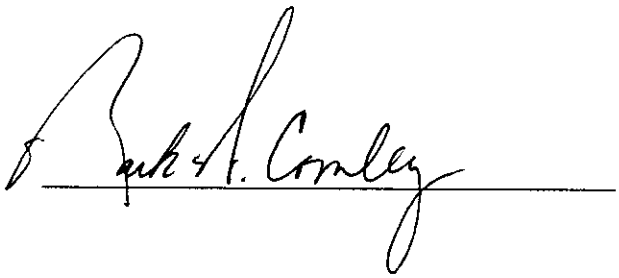


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Exhibit A

Judgment entered in the Lawsuit on January 11, 2005

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

STOPAQUILA.ORG, et al.,	)	
Plaintiffs,	)	Case No. CV104-1380CC
v.	)	
AQUILA, INC.	)	
Defendant.	)	**CONSOLIDATED WITH**
CASS COUNTY, MISSOURI,	)	
Plaintiff,	)	
v.	)	Case No. CV104-1443CC
AQUILA, INC.,	)	
Defendant.	)	

FINAL JUDGMENT
CASE NO. CV104-1443CC
(SEVERED FROM CASE NO. CV104-1380CC)

This Court convenes on January 5-6, 2005, for an evidentiary hearing on the Applications for Preliminary Injunctions filed by Plaintiff Cass County, Missouri and by Plaintiffs StopAquila.org, et al. against Aquila, Inc. These two actions were consolidated by previous order of this Court pursuant to Rule 66.01(b).

Plaintiff Cass County, Missouri appears by and through counsel of record Cindy Reams Martin of Cindy Reams Martin, P.C., and Debra L. Moore, Cass County Counselor. Plaintiff StopAquila.org, et al. appears by and through counsel of record Gerard Eftink. Defendant Aquila, Inc. appears by and through counsel of record Karl Zobrist, J. Dale Youngs, and Andrew Bailey of Blackwell Sanders Peper Martin, LLP. The Missouri Public Service Commission was,

on its Motion, granted leave to intervene in this case at the beginning of the hearing for the limited purpose of addressing possible conflict between Section 393.170 of the Revised Statutes of Missouri and Section 64.235 of the Revised Statutes of Missouri, and appears through General Counsel Dana K. Joyce, and through attorneys Steven Dottheim and Lera Shemwell.

On the pleadings and evidence adduced, and based upon the arguments of counsel, the Court makes the following findings and orders:

1. The Court, having previously consolidated these actions for hearing on the respective Plaintiffs' Applications for Preliminary Injunction, now severs Case No. CV104-1380CC from Case No. CV104-1443CC from this point forward, and for all purposes, pursuant to its discretion under Rule 66.01(b). All findings and orders hereinafter set forth relate to Case No. CV104-1443CC.

2. The Court adopts as its findings of fact all of the Joint Stipulated Findings of Fact entered into by the parties as reflected in the record.

3. The Missouri Public Service Commission was granted leave to intervene at the beginning of the hearing for the limited purpose herein described. At the conclusion of the hearing, the Court removes the Missouri Public Service Commission as a party to these proceedings with the consent of the Missouri Public Service Commission.

4. Because the Court has now severed Case No. CV104-1443CC from Case No. CV104-1380CC, and because Plaintiff Cass County, Missouri and Defendant Aquila, Inc. have rested with respect to their evidence on Plaintiff Cass County, Missouri's Application for Preliminary Injunction, the Court grants Plaintiff Cass County, Missouri's pending Motion to Advance Trial of the Action on the Merits with the hearing on Plaintiff Cass County, Missouri's

Application for Preliminary Injunction pursuant to this Court's discretion under Rule 92.02(c)(3).

5. The Court finds that the reference in Section 64.235 of the Revised Statutes of Missouri to "such" development is either vague or constructively meaningless and likely was intended by the legislature to mean "a" or "any" development. However, this Court specifically makes no conclusions of law regarding interpretation of the word "such" as used in Section 64.235. The Court bases its conclusions of law in this case as follows:

THE COURT FINDS that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not.

THE COURT FURTHER FINDS that 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. No one else has such unfettered power; not landfills, bedrock quarries, and not processing plants. Although not any of these are exactly on point, even the Missouri Highway and Transportation Commission has to go through the condemnation process before a circuit court regarding roads. Roads and landfills, at least, arguably have as much to do with the public good and welfare as power plants. The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.

THE COURT FURTHER FINDS that irreparable harm to Plaintiff Cass County is both actual as it concerns potential damage to county roads and presumed by law as the Defendant's proposed actions violate existing County Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Count I of Plaintiff Cass County, Missouri's First Amended Petition requesting a Declaratory Judgment is dismissed without prejudice at Plaintiff's request as effectively duplicative of the relief hereinafter granted under Count II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of Plaintiff Cass County, Missouri, and against Defendant Aquila, Inc. on Count II of Plaintiff Cass County, Missouri's First Amended Petition. Plaintiff's request for a temporary restraining order and for a preliminary injunction restraining construction of the Peculiar Substation and the South Harper Power Plant are, therefore, granted. Further, this Court, having advanced the hearing and cause and determination and judgment and order of this Court to a final judgment, hereby enters a mandatory permanent injunction against Aquila, Inc. as prayed by Plaintiff Cass County, Missouri in Count II of its First Amended Petition, as follows:

Aquila, Inc., and all others acting in concert with, at the direction of, on behalf of, under contract with, or otherwise in collaboration with Aquila, Inc., are mandatorily and permanently enjoined from constructing and operating the South Harper Plant, and from constructing and operating the Peculiar Substation, and are ordered to remove, at Aquila, Inc.'s expense, all improvements, fixtures, attachments, equipment or apparatus of any kind or nature inconsistent with an agricultural zoning classification placed, affixed or constructed at anytime, whether

before or after this Judgment, upon the South Harper Power Plant or Peculiar Substation sites described in the evidence.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction herein entered against Aquila, Inc. will be suspended, pursuant to this Court's discretion under Rule 92.03, during the pendency of any appeal by Aquila, Inc. from this Court's Judgment, subject to and conditioned upon Aquila, Inc. posting a $350,000.00 cash or surety appeal bond in form satisfactory to the Court for the security of the rights of Cass County, Missouri. The bond shall reflect that Aquila, Inc. is held and firmly bound unto Plaintiff Cass County, Missouri in the sum of $350,000.00 for the payment of which Aquila, Inc. and its surety, if applicable, bind themselves, on the condition that in the event the permanent injunction herein granted becomes a final non-appealable judgment, and/or is affirmed on appeal, then the bond shall be available to satisfy such damages, if any, deemed by the Court to have been incurred by Plaintiff Cass County, Missouri; otherwise the obligation shall be void. The Court finds that Plaintiff Cass County, Missouri has stipulated to a waiver of its rights under Rule 92.04 to seek from the Court of Appeals relief inconsistent with this Court's suspension of the injunction pending appeal.

IT IS SO ORDERED AND JUDGMENT IS HEREBY ENTERED, EACH PARTY TO BEAR ITS OWN COSTS.

Dated: Jan. 11, 2005

The Honorable Joseph P. Dandurand

Exhibit B

Opinion entered in Case No. WD 64985

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STOPAQUILA.ORG, ET AL.;	)	
	)	**WD64985**
Plaintiff	)	
	)	**OPINION FILED:**
CASS COUNTY, MISSOURI,	)	
	)	**December 20, 2005**
Respondent,	)	
v.	)	
	)	
AQUILA, INC.,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Cass County, Missouri
Honorable Joseph Paul Dandurand, Judge

Before: Thomas H. Newton, P.J., Patricia A. Breckenridge, and Victor C. Howard, JJ.

Aquila, Inc. appeals the judgment of the Cass County Circuit Court permanently enjoining it from constructing and operating an electrical power plant and transmission substation in an agricultural district located in unincorporated Cass County. The issues raised in this appeal present matters of first impression that require us to discern legislative intent in the enactment of two statutes, one dealing with an exemption from county zoning authority and the other addressing Public Service Commission (Commission) authority over the construction of public-utility facilities.

Specifically, Aquila's claims require us to determine whether (i) Aquila is exempt from county zoning regulation because the legislature has given exclusive regulatory authority over public utilities to the Commission; (ii) Aquila is exempt under section 64.235[1] from county zoning authority because it has obtained Commission approval to build power plants in its service territory; (iii) the certificates of convenience and necessity and other Commission orders issued to Aquila and its predecessors specifically authorized said construction under section 393.170.1;[2] and (iv) the 1917 Cass County franchise authorizing one of Aquila's predecessors to "set Electric Light Poles for the transmission of light for commercial purposes . . . provided the wires do not interfere with the ordinary use of the public roads" similarly authorized this construction. Because we find that Aquila did not have specific authority from the Commission to build these facilities, we hereby affirm the circuit court's order.

MOOTNESS

Before we can consider the merits, we must determine whether actions Aquila took after filing its appeal have deprived this court of jurisdiction. The circuit court determined that Aquila was required to obtain and did not have specific authority from the Commission to build a power plant and substation in Cass County. After filing its appeal from that decision, Aquila filed an application with the Commission seeking either confirmation that the company already possessed the authority to build the power plant and substation or the issuance of a certificate of convenience and necessity to do so. On April 7, 2005, a divided Commission issued an order

[1] All statutory references are to RSMo. (2000) and the Cumulative Supplement (2004), unless otherwise indicated.

[2] On April 7, 2005, a divided Commission issued an order confirming Aquila's authority under existing certificates and orders to build a power plant anywhere in its service territory. The April 7 order became effective on April 17, and Cass County filed an Application for Rehearing that was denied May 3. Cass County has since filed a petition for writ of certiorari with the Cass County Circuit Court, seeking its review of the Commission's ruling. While the Commission's ruling is not before the court in this appeal, the parties submitted it to the court for informational purposes, and we refer to it *infra* in our legal analysis.

confirming Aquila's authority under existing certificates to build a power plant anywhere in its service territory. A case is moot if something occurs that makes a court's decision unnecessary. *State ex rel. County of Jackson v. Mo. Pub. Serv. Comm'n*, 985 S.W.2d 400, 403 (Mo. App. W.D. 1999). A narrow exception to that rule gives the court "discretion to review a moot case where [it] presents a recurring unsettled legal issue of public interest and importance that will escape review unless the court exercises its discretionary jurisdiction." *Id.* (citation omitted).

Inasmuch as the circuit court ruled that Aquila was required to and failed to obtain Commission approval to build the power plant and substation at issue, Aquila's decision to seek Commission approval could have eliminated any justiciable controversy between the company and respondent Cass County, Missouri. The Commission, however, based its ruling on existing certificates and orders, a decision that directly conflicts with the circuit court's interpretation of those documents. Moreover, this appeal involves issues of statutory interpretation of first impression and calls on us to determine the respective authorities of counties and the Commission as to zoning matters involving public utilities. As well, the Commission decision on which Aquila relies for its claim that it is not required to seek a certificate of convenience and necessity to build the specific facilities at issue in this case establishes an interpretation of section 393.170.1 that has evaded court review for twenty-five years. *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980). Accordingly, we will consider the matter on the merits.

FACTUAL AND PROCEDURAL BACKGROUND

In response to a growing demand for electricity, Aquila decided in 2004 to upgrade its Cass County infrastructure by building a small electric peaking plant[3] and an electric

[3] A peaking plant is apparently designed to generate electricity only during peak demand, mainly during the summer months. This particular plant would generate 315 megawatts (MW) of electricity with three 105-MW turbines fueled by natural gas supplied by a compressor station owned by a third party and located on adjoining property that is zoned light industrial.

transmission substation.[4] The company located in unincorporated Cass County two parcels of land, zoned agricultural, on which it decided to construct its new facilities. The parcels, a 74-acre tract (South Harper plant) southwest of the City of Peculiar that is convenient to a fuel source, and a 55-acre tract (Peculiar substation) northeast of Peculiar, were purchased from willing sellers in October. Without submitting plans to Cass County or the Commission for approval and without a special use permit or rezoning for either site, Aquila began construction activities.

Cass County sued Aquila on December 1, seeking injunctive and declaratory relief to halt construction of the South Harper plant and the Peculiar substation.[5] The judge heard argument on the county's request for a temporary restraining order. An evidentiary hearing was then scheduled for and took place on January 5-6, 2005. The parties agreed upon a joint stipulation of facts, and evidence was received as to the county's damages for purported zoning violations, Commission regulatory practices, and Aquila's actions with respect to the two tracts at issue and its operations throughout its service territory in the county.

The circuit court made no conclusions of law regarding the interpretation of section 64.235, but, finding that it was vague in part, determined that Aquila was required to have specific authority either from the Commission or the county to build its power plant and substation. Finding that neither the certificates of convenience and necessity and other orders issued by the Commission nor the county's 1917 franchise gave Aquila the specific authority to build the power plant, the court granted the request for a temporary restraining order and for a

[4] The Peculiar substation is designed to support the electric plant by allowing its output to flow to an adjacent, higher voltage transmission line and will also serve area load growth.

[5] The case was initially consolidated with a case brought by a group of Peculiar residents identifying themselves as StopAquila.Org, and the Commission asked for leave to intervene for the limited purpose of addressing a possible conflict between sections 64.235 and 393.170. The court subsequently severed the actions and removed the Commission as a party with its consent.

preliminary and mandatory permanent injunction restraining construction of the South Harper plant and the Peculiar substation. Aquila was ordered to remove any construction on either tract inconsistent with an agricultural zoning classification, but the court suspended the permanent injunction pending appeal and the posting of a $350,000 bond.

On appeal Aquila essentially argues that, as a public utility regulated by the Commission, it is exempt from county zoning regulations, including the requirements of section 64.235, which, according to Aquila, contains an exemption that must be interpreted in a manner that would allow it to build its South Harper plant and Peculiar substation without first obtaining county approval. Aquila also argues that the certificates of convenience and necessity and other orders issued to it and its predecessors by the Commission, allowing it to provide electrical services in most of Cass County, constitute all the authority that Aquila needs to site and build anywhere within the county those facilities necessary to provide that service. As noted above, the Commission agrees with Aquila on the latter point and ruled that the company did not have to seek new and specific authorization to build the South Harper plant and Peculiar substation.[6]

Aquila sought rehearing after this court issued an opinion in the case, and we granted its application so that the panel could reconsider the issues raised and modify our decision to address its concerns.

STANDARD OF REVIEW

In an appeal from a zoning dispute that is resolved with the grant of injunctive relief, our standard of review is the same as in any other court-tried case as articulated in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). *Gray v. White*, 26 S.W.3d 806, 814-15 (Mo. App.

[6] The Commission based its ruling, in part, on its interpretation and application of *State ex rel. Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177 (Mo. App. 1960), which in turn interpreted and applied section 393.170. Dissenting Commissioner Gaw and the parties herein have invited this court to address the meaning of *Harline*, and we do so *infra*.

E.D. 1999). Thus, the circuit court's judgment will be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* at 815. Whether the circuit court properly interpreted a Commission order presents a question of law, not of fact, for our review. *State ex rel. Pub. Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 598 (Mo. 1964).

To the extent that the issues raised require our interpretation of a statute, we will not defer to the trial court, but rather will address the matter *de novo,* seeking to give effect to legislative intent. *Carmack v. Mo. Dep't of Agric.*, 31 S.W.3d 40, 46 (Mo. App. W.D. 2000). We look first to the plain and ordinary meaning of the words used to discern legislative intent and will only look past the plain and ordinary meaning when statutory language is ambiguous or leads to an illogical result. *Id.* Moreover, we do not read the provisions of a legislative act in isolation; we look as well to the provisions of the whole law, including its object and policy, to harmonize all of the provisions if possible, and consider statutes involving similar or related subject matter "to shed light on the meaning of the statute being construed." *State ex rel. Sprint Mo., Inc. v. Pub. Serv. Comm'n*, No. WD 63580, 2004 WL 2791625 at *6 (Mo. App. W.D. Dec. 7, 2004).

LEGAL ANALYSIS

Preemption

Aquila argues that it is exempt from Cass County's zoning regulations because the Commission has exclusive authority to regulate public utilities. It claims that such preemption is recognized by the plain language of the provisions in Chapter 64, regarding county planning, zoning, and recreation, and in Chapters 386 and 393, setting forth the comprehensive statutory framework for electric utility regulation. 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) (regarding the location of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states, "In short, we emphasize we should take cognizance of – and respect – the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning."). It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, a municipality may regulate the location of public utility installations." 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986).

While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because facility location has particularly local implications, it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant. *See generally St. Louis County v. City of Manchester*, 360 S.W.2d 638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact location and that public interest is best served in requiring it be done in accordance with county zoning laws). *See also State ex rel. Christopher v. Matthews*, 240 S.W.2d 934, 938 (Mo. 1951) (upholding validity of county rezoning to accommodate electric power plant construction).

Aquila further relies on *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo. 1973) (*Crestwood I*), and cases in other states for the proposition that local regulation of public utilities is not allowed. This case, however, is not about local regulation; rather, the case

involves the interplay between statutes enacted by the legislature and how to harmonize police powers possessed both by local government and public utilities. Moreover, *Crestwood I* was not about a county's zoning authority; the issue was whether a city could prohibit above-ground transmission lines and thereby impose significant expenses on a utility in derogation of the Commission's regulatory authority. *Id.* at 483. Similarly, *Union Electric Co. v. City of Crestwood*, 562 S.W.2d 344 (Mo. banc 1978) (*Crestwood II*), which also involved transmission lines, called into question the authority of a municipality to interfere with a public utility's use of a private right-of-way to place high voltage lines that would deliver electric energy to several parts of the utility's system in the St. Louis metropolitan area. The court in *Crestwood II* determined that the application of a local zoning ordinance to the "intercity transmission" of high voltage electricity invaded the area of regulation and control vested in the Commission. *Id.* at 346. The court did not rule that the application of a zoning ordinance to the siting of a power plant invaded the Commission's area of regulation and control. Hence, the case provides no guidance for the issues raised herein.

Statutory Interpretation

Section 64.235, which applies to Cass County as a non-charter county of the first class that has elected to establish county planning under section 64.211, provides in relevant part:

> [A]fter the adoption of the master plan . . . **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 . . . **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 therefor 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 . . . .**

(emphasis added).

Conceding that its power plant and transmission substation are improvements of the type embraced within Cass County's master plan, Aquila argues that the exemption contained in the last sentence of the statute is not limited to the clause it directly modifies, i.e., developments or public improvements proposed by "any municipality, county, public board or commission," but rather encompasses any improvement coming within the master plan and that the word "such" renders the statute ambiguous. The circuit court decided not to make any conclusions of law regarding the interpretation of the word "such" as used in section 64.235, but it did suggest that the word "likely was intended by the legislature to mean 'a' or 'any' development."

We agree that the statute, which was enacted in 1959, is ambiguous. If the phrase "such development or public improvement" only refers to the developments and public improvements proposed by governmental entities that are referred to immediately before the exemption, then the exemption makes no sense, because the Commission, except in limited circumstances, has no statutory authority to regulate public utilities that are owned and operated by governmental entities. *City of Columbia v. Pub. Serv. Comm'n*, 43 S.W.2d 813, 817 (Mo. 1931). For example, the Commission was given jurisdiction over municipally owned electrical utilities wishing to serve customers outside their service territories in 1991, § 386.800, and over the territorial agreements entered into by rural electric cooperatives, electrical corporations and municipally owned utilities in 1988. § 394.312. The Commission also had jurisdiction over joint municipal utility commissions from 1978 until 2002. § 393.765, RSMo. (2000).

Attempting to ascertain legislative intent when section 64.235 was adopted in 1959, we can look to similar provisions applying to first class counties with a charter form of government and counties of the second and third classes.[7] Sections 64.050 and 64.570, adopted in 1941 and 1951 respectively, are similar to section 64.235 to the extent that they address *planning board* approval for improvements of a type embraced within the recommendations of a county's master zoning plan. Sections 64.050 and 64.570, like section 64.235, contain specific requirements as to developments or public improvements proposed by governmental entities, but unlike section 64.235, do not contain an exemption for such development or public improvement that is authorized by the Commission.

Sections 64.090.3 and 64.620.3(3), which place limits on *county commission* zoning powers, specifically and unambiguously provide 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, or by permit of the county commission. Section 64.090.3 (first class charter counties) provides, in part, "nor shall anything in sections 64.010 to 64.160 interfere with such public utility services 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." Section 64.620.3(3) (second and third class counties) provides, "The powers granted by sections 64.510 to 64.690 shall not be construed: . . . (3) To authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission or by permit of the

[7] For the reader's convenience, the statutes *in pari materia* are compared in a table format and set forth in an appendix attached to this opinion with the relevant differences between them highlighted.

county commission, as the case may be."[8] These sections were enacted well before section 64.235 was drafted. Why the legislature chose to provide a public-utility exemption applicable to non-charter first class counties in ambiguous language applicable to a single zoning provision is anyone's guess.

Aquila argues that the legislature could not have intended to accord "superpowers" to non-charter first class counties by providing a narrow exemption from planning commission authority only for those public-utility projects proposed by governmental entities, and we are constrained to agree so as to avoid an illogical result. *Carmack*, 31 S.W.3d at 46. When we interpret statutes, we do not presume that the legislature has enacted a meaningless provision. *State v. Winsor*, 110 S.W.3d 882, 887 (Mo. App. W.D. 2003). Were we to interpret the section 64.235 in a way that renders it applicable only to those improvements and public developments proposed by governmental entities that are not regulated by the Commission, the exemption would be meaningless.

Because we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt.

Section 393.170 and Harline

Aquila argues, because it comes within the section 64.235 exemption, that the certificates of convenience and necessity and other orders issued by the Commission throughout the 20th century to the company and its predecessors under the authority of section 393.170 are legally

[8] The non-charter first class county statutory provision that parallels 64.090 and 64.620 in placing limitations on *county commission* zoning authority is section 64.255, and it does *not* include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions.

sufficient to specifically authorize construction of the South Harper plant and Peculiar substation. The company cites *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960), to argue that it is not necessary to return to the Commission for new authority to build a power plant where a public utility has Commission approval to provide service within a territory already allocated to it. Before reaching Aquila's interpretation of *Harline*, we will start where all statutory interpretation begins, i.e., with the statute itself.

Section 393.170 has remained essentially unchanged since it was first adopted in 1913.[9] In 1949 the statute was given its current designation and was divided into three distinct subsections:

> 1. 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.
> 2. No such 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 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.
> 3. The commission shall have the power to grant the permission and approval herein specified 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. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Harline explains that the Commission's primary function is to allocate territory and that once authority is given under section **393.170.2**, it is unnecessary for an electric company to return to the Commission to extend its *transmission lines* within the area allocated. 343 S.W.2d

[9] RSMo. 1919 § 10481; RSMo. 1929 § 5193; RSMo. 1939 § 5649.

at 185. The court's rationale was that the Commission, as an administrative body of limited jurisdiction, was not given the general power of management incident to ownership, and that once a public utility has been permitted by a certificate of convenience and necessity to provide service to a territory, the company can only perform its duty by extending its lines and facilities as required. *Id.* at 181-82. The *Harline* court, nonetheless, states in no uncertain terms:

> Certificate 'authority' is of two kinds and emanates from two classified sources. Sub-section 1 requires 'authority' to construct an electric plant. Sub-section 2 requires 'authority' for an established company to serve a territory by means of an existing plant. We have no concern here with Sub-section 1 'authority'. The 1938 certificate permitted the grantee to serve a territory – not to build a plant. Sub-section 2 'authority' governs our determination."

343 S.W.2d at 185 (internal citation omitted).[10]

In light of the distinction acknowledged by the court in *Harline*, and examining the language of section 393.170 in its entirety, we believe that the legislature, which clearly and unambiguously addresses electric plants in subsection 1, did not give the Commission the authority to grant a certificate of convenience and necessity for the construction of an electric plant without conducting a public hearing that is more or less contemporaneous with the request to construct such a facility. Subsection 3 requires a hearing to determine if "such construction . . . is necessary or convenient for the public service." § 393.170.3. It also gives the Commission the discretion to impose "conditions as it may deem reasonable and necessary." *Id.* The subsection also imposes a time limit on the exercise of the authority granted by the certificate of convenience and necessity. *Id.* If Aquila's interpretation of the statute is correct, then a Commission hearing held fifty or more years before construction was even contemplated adequately protects the public interest today. Such an interpretation endows the Commission

[10] Interestingly, 1938 certificate the *Harline* court was interpreting is one of the certificates on which Aquila relies for its authority to build the South Harper plant and Peculiar substation. Nowhere in that certificate is it stated that Aquila's predecessor is given the authority to construct power plants in its certificated territory.

with truly prescient powers in that it presupposes the Commission will know that a specific power plant will be necessary or convenient for the public service far into the future and will impose appropriate conditions for construction that will not take place for decades to come.

If we consider the Public Service Commission Law as a whole and bear in mind the essential purposes of public-utility regulation, it becomes clear that a Commission order granting a service territory to one utility does not function as the "specific authority" required for the construction of an electric plant under section 393.170.1 in derogation of county zoning authority. §§ 64.090.3 and 64.235.[11] Policymakers long ago agreed that competition is not an efficient way to operate a public utility. Herbert Hovenkamp, *Technology, Politics and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1280 (1984). Thus, the states enacted legislation establishing regulatory bodies that would have the authority to grant utilities a monopoly to serve a particular territory and to regulate rates that would give the utility a fair rate of return and preclude it from imposing monopoly prices on ratepayers. *Id.* at 1273-74.

The Missouri Supreme Court eloquently summarized Commission powers early in the 20th century, stating:

> Its powers and duties are broad and comprehensive. They include the protection of the people of the state against extortion and inconvenience arising from neglect and misconduct in the service of the public utilities which have been placed under its supervision and control . . . In all these things it 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.

[11] A law review article worthy of note, which discusses several Missouri cases involving the interplay between zoning regulation and governmental immunity, including *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. banc 1962), argues that land-use authority can and should be harmonized with the placement of public improvements when feasible. Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869, 876 (1971).

Mo. Valley Realty Co. v. Cupples Station Light, Heat & Power Co., 199 S.W. 151, 153 (Mo. 1917). *See also State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n*, 205 S.W. 36, 42 (Mo. 1918) ("The right to regulate under the present law must be measured by the public interest.") (citation and internal quotations omitted). This court has addressed Commission authority as follows:

> To secure to the public all advantages to be gained from competition in obtaining fair rates and good service and also to protect them from its disadvantages, the commission was given authority to regulate rates, to investigate complaints about service, to compel companies to adequately serve all persons and industries in the territory in which they operate, to order improvements and safety equipment, and to authorize the abandonment or extension of lines and the financing of all improvements or purchases. The question of whether regulated monopoly or regulated competition will best serve the public convenience and necessity in a particular area at any time is for the commission to decide . . . .

People's Tel. Exch. v. Pub. Serv. Comm'n, 186 S.W.2d 531, 538 (Mo. App. 1945) (quoting *State ex rel. City of Sikeston v. Pub. Serv. Comm'n*, 82 S.W.2d 105,110) (emphasis omitted).

Thus, the regulatory powers accorded the Commission, which ultimately answer to the public interest, must of necessity address conditions existing at the time the power is exercised because such interest is not static and changes over time. When the Commission enters an order in 1950 that, in broad and general language, refers to a public utility's authority to provide electric service and build electric plants in a given territory, such as unincorporated Cass County, area demographics and electric service needs cannot possibly have any bearing on conditions that will later exist in the 21st Century and that must be considered to protect and advance the public interest.[12] Yet, Aquila argues that *Harline's* holding, which allows electric companies to

[12] Of interest in this regard is Commissioner Jeff Davis's concurring opinion to the Commission's April 7, 2005, order clarifying Aquila's authority under existing certificates. He discusses the many *ex parte* complaints filed by Cass County residents about the lack of a company response to their concerns, the heavy-handed approach Aquila took to security issues, and the prudence of building the plant at all. Commissioner Davis invites those affected by the plant to renew their concerns and warns Aquila that its decisions and behavior will be considered in its next rate case. Had the Commission held a hearing in the months *before* this plant was constructed, as required by section

extend transmission lines in their territories without returning to the Commission to secure specific authority, should apply with equal force to the construction of an electric plant.

The issue in this case does not involve a mere extension of transmission lines. Rather, Aquila is seeking to build an electric power plant, a matter that is governed by section **393.170.1.** Aquila argues that because "electric plant" is defined so as to include the generation, transmission and distribution of electricity, § 386.020(14), and because the Commission ruled in 1980 that *Harline* was not limited in its application just to the extension of transmission lines, that it was not required to return to the Commission for specific authority to build an electric plant in Cass County. *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72, 77 (1980).

Before 1980 the Commission did entertain and grant applications filed by public utilities for specific authority to construct power-generating plants. *See, e.g., Mo. Power & Light Co.*, 18 Mo. P.S.C. (N.S.) 116 (1973) (Commission gives public utility permission and authority to construct, operate, and maintain a 54-megawatt combustion turbine generating unit). In that case a concurring opinion was filed that led the way for the Commission to later suggest, without any changes having been made to the law in the interim, that such applications were not always necessary under the authority of *Harline.* Commissioner William Clark was evidently concerned, on the basis of no apparent record evidence, that many plants had been constructed around the state without the Commission's consent. According to Commissioner Clark, requiring a company to seek approval for new construction "would place in jeopardy the many plants heretofore constructed," although he did not say how or why they would be put at risk, particularly where the authority for their construction had not been challenged. *Id.* at 121. Thus,

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393.170.1, the plant's neighbors and Cass County would have had the opportunity to express their concerns in a timely manner without muddying the waters of a future rate case.

he thought that the *Harline* principles should be extended, even though he recognized that the court in that case was *not* addressing the electric-plant construction authority of 393.170.1.

Commissioner Clark's position appears to have prevailed, when, in 1980, the Commission considered an application for authority to construct a power plant and dismissed it because the application was untimely and lacked adequate information. *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) at 79. The Commission, **in dicta**, further opined that such applications were unnecessary, as a general rule, under *Harline*. *Id.* The Commission reached its conclusion by overlooking the distinction made in *Harline* between transmission lines and electric plants, *id.* at 78, and further relied on other transmission-line cases that were without application to the issue before it.[13]

We disagree with its analysis. The terms "electric plant" and "transmission lines" are not synonymous under the Public Service Commission Law. While "electric plant" is defined to include "any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power," § 386.020(14), "transmission line" is not defined. And under any reasonable definition, a transmission line does not generate electricity as an electric plant does. A transmission line is not a source of significant levels of noise, and it does not emit pollutants in the same way that a generating facility emits pollutants. Nor does a transmission line require the

[13] The Commission virtually guaranteed that electric utilities within its jurisdiction would *not* seek such authority by imposing significant and burdensome requirements on those that did, stating:

> If utilities seek Commission approval of any plant construction in their certificated area or accept Commission regulation of their expansion plans, the Commission expects their construction programs over the next twenty (20) years to be submitted with full and complete information updated annually. Such information would include all units proposed, projected load forecasts and full cost information to support a least-cost approach to meeting energy needs. Further, in addition to annual updates of all information, the Commission would expect timely information on any changes proposed in such plans.

Union Elec. Co., 24 Mo. P.S.C. (N.S.) at 79. That the information required is forward-looking is an indication that the Commission appropriately recognized that its legislative mandate requires it to consider only the most updated information in performing its regulatory functions and issuing its orders.

construction of roads and buildings or siting near fuel sources or water. The Commission's interpretation does not accord with the *plain language* of section 393.170.1, which does not contain an exemption for those utilities that are already authorized to operate in a particular service territory and wish to construct an electric plant. Moreover, *Harline* appropriately ruled that transmission line extensions do not need additional authorization from the Commission, because such authority already comes within the franchise granted by a county, and territorial authority is based on the franchise. Accordingly, the Commission has erroneously interpreted *Harline* by extending the court's reasoning in that case to a public utility's request for specific authority to build a power plant under section 393.170.1 in territory already allocated to it.

We understand that a legal construction followed by the Commission for many years "is entitled to great consideration and should not be disregarded or disturbed, unless clearly erroneous – particularly when that construction has been followed and acted upon for many years." *Harline*, 343 S.W.2d at 182. Curiously, as to certificates of convenience and necessity relating to the construction of electric plants, however, the Commission has promulgated no rules requiring the type of information that it said would be required for those utilities seeking Commission approval of plant construction in their certificated areas. *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) at 79; and note 13, *supra*. In fact, the only requirements in the Commission's regulations specific to certificates of convenience and necessity to build "electrical production facilities" are for utilities to include in their applications "[t]he plans and specifications for the complete construction project and estimated cost of the construction project or a statement of the reasons the information is currently unavailable and a date when it will be furnished." MO. CODE REGS. ANN. tit. 4, § 240-3.105(1)(B)2 (2005).

While it could be argued that we will be disturbing an agency's practice and statutory interpretation that have endured for twenty-five years, we believe that if we were to extend *Harline* as urged by Aquila, we would effectively be giving electric companies in the state carte blanche to build wherever and whenever they wish, subject only to the limits of their service territories and the control of environmental regulation, without *any* other government oversight. In some cases, the utility could be relying on territorial authority given to it decades before construction begins. We do not believe this is what the legislature intended when it drafted section 393.170.1.

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.[14] 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.

Looking to the practices in other states, we cannot find any particular trends because the public utility laws vary so widely. In California, for example, where seismic activity is rife,

[14] 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 added).

every electric plant construction or modification project of a certain size must be approved by that state's commission, which appoints a construction project board of consultants to oversee every aspect of the project's design and construction. CAL. [PUB. UTIL.] CODE §§ 1091, 1092, and 1098 (West 1994). States like Iowa, Illinois and Indiana specifically require certification for new construction. IOWA CODE ANN. § 476A.2 (West 1999); 220 ILL. COMP. STAT. ANN. 5/8-406(b) (West 2000); IND. CODE ANN. § 8-1-8.5-2 (West 2001). North Dakota provides that public utilities may file an application with that state's regulatory commission for an advance determination of prudence for new construction proposals, and a commission determination as to prudence is binding for ratemaking purposes. N.D. CENT. CODE § 49-05-16 (2005). And in Wisconsin, all new plants must comply with all orders or rules of the commission, and the commission may require certification of new construction as convenient and necessary for the public. WIS. STAT. ANN. §§ 196.49(2)-(3) (2002).

Other states, like Arizona, Arkansas, Colorado, and South Carolina have statutory provisions requiring a certificate of convenience and necessity for new construction, but specifically exempt "extensions" within territory already served by the utility, where such extensions are necessary in the ordinary course of business. ARIZ. REV. STAT. ANN. § 40-281 (1984); ARK. CODE ANN. § 23-3-201 (West 2003); COLO. REV. STAT. ANN. § 40-5-101 (West 2004);[15] S.C. CODE ANN. § 58-27-1230 (1977). Using the Colorado statute as an example of this type of legislation, we can see how significantly it differs from section 393.170. The Colorado statute provides, in relevant part:

> No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the commission a certificate that the present or future public convenience and

[15] Interestingly, Colorado's legislature revised its statute in 2005 to specifically require that all new public-utility facilities comply with local zoning regulations.

> necessity require or will require such construction. Sections 40-5-101 to 40-5-104 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it has theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, line, plant, or system and not theretofore served by a public utility providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. . . .

COLO. REV. STAT. ANN. § 40-5-101(1) (West 2004).

While we have been unable to locate a judicial interpretation of the term "extension" in this context, at least one court has noted that such provisions require a utility to file for a certificate if it "wants assurance that its investment will be recoverable through rates and charges to consumers." *City of Boulder v. Colo. Pub. Util. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).[16]

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 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." Because subsection 3 further imposes a finding of necessity and convenience "after due hearing" for "such construction," we believe that the legislature wanted the Commission to conduct hearings whenever new construction is proposed. To the extent that the Commission attempted to establish a contrary interpretation in 1980, giving the Commission authority it does not have, in a case that was decided on other grounds, it clearly erred. And we are not constrained to follow that interpretation. *Harline*, 343 S.W.2d at 182. If Aquila is

[16] In Illinois, where the legislature requires certification from the regulatory commission for all new construction, there is a separate Electric Supplier Act, which defines "extension" as "any new construction which increases the length of an existing line laterally or otherwise." 220 ILL. COMP. STAT. ANN. 30/3.7 (West 1997).

dissatisfied with such interpretation, it is free to seek a statutory change, and there are a variety of statutory models available for our legislature's consideration. 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.

CCN Interpretation

Aquila further argues that the circuit court's ruling constitutes an unlawful collateral attack on Commission certificates of convenience and necessity (CCN), which is not allowed under section 386.550. While this section provides that final Commission orders are conclusive in all collateral actions or proceedings, what the circuit court did in this case was interpret the terms of the certificates, which are not as broad as Aquila suggests, particularly in light of the interpretation that we today accord to *Harline*. By ruling that existing CCNs, which simply recognize Aquila's general authority to build power plants in its territory, the Commission has effectively sidestepped the requirements of section 393.170.1.

The Commission asserts in its April 7 order that all of its previous orders and certificates are conclusive and free from collateral attack. The courts, however, have stated that limiting the authority granted under Commission orders does not constitute a collateral attack on those orders. "Such limitation in no way questions the validity of the original order. Interpretation of an order necessarily acknowledges its validity and does not constitute a collateral attack." *State ex rel. Pub. Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 600 (Mo. 1964).

The Commission refers to several documents in its April 7 order from which it concludes that Aquila has the specific authority it needs to build an electric plant in Cass County. These

include a 1921 preliminary order giving a predecessor permission to reorganize as a newly named company and to increase its capitalization:

> 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.

Another example is a CCN issued in a 1950 merger case giving Aquila's predecessor the authority 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.[17]

Aquila and the Commission focus on and emphasize the text in these orders regarding "electric plants" and "electric utility facilities." As the Missouri Supreme Court noted in *State ex. inf. Shartel v. Missouri Utilities Co.*, 53 S.W.2d 394, 399 (Mo. 1932), a CCN does not confer any new powers on a public utility; it simply permits the utility "to exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent." *Id.* Thus, even if, as Aquila argues, a Commission order or certificate preempts local authority to determine where a power plant will be located, the certificates and orders herein only give Aquila the general authority to construct, operate, and maintain electric plants throughout its service territory. They do not give Aquila the authority to build *this* particular facility in an agricultural district in Cass County. Moreover, when the Commission issued these orders, the construction of an electric plant was simply not on the agenda. The issues the Commission

[17] As we noted above, the 1938 order to which the Commission refers does not, in any respect, address company authority to construct power plants.

considered in 1921 and 1950 dealt with corporate reorganization and mergers. The legislature cannot possibly have intended for such statement of general authority to comply with the requirements of section 393.170.1. The circuit court did not err in finding that existing Commission orders and certificates did not give Aquila specific authority to build the South Harper plant or the Peculiar substation.

County Franchise Authority

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." § 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.

Aquila also contends that the franchise Cass County issued to one of its predecessors in 1917 gives the company the right to build a power plant in the county. The original and only existing Cass County order, otherwise known as a franchise, simply gives Aquila's predecessor the authority to "set Electric Light Poles for the transmission of light for commercial purposes . . . provided the wires do not interfere with the ordinary use of the public roads." By its terms and the limitations imposed by section 229.100, this franchise could not give Aquila such authority. As Aquila itself argues in its motion for rehearing, section 229.100 "provides a county no authority to dictate a public utility's ability to construct a power plant on private property." Thus, by allowing Aquila's predecessors to place transmission poles and wires along roads

throughout most of the county, the 1917 Cass County franchise does not give Aquila the authority to build this power plant and transmission substation. And our interpretation of *Harline, supra*, which did not confuse a service-territory CCN with a Commission order relating to power plants, sustains this result.

Eminent Domain

Aquila's final argument is that public utilities have the power of eminent domain and are therefore immune from local zoning because such power is "superior to property rights" and "subject only to such limitations as are fixed by the constitution itself." *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896, 898 (Mo. banc 1957). According to Aquila, even though it purchased the property at issue from willing sellers and did not have to condemn the land, the principle of its immunity applies with equal force. 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.").

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. 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.

Thomas H. Newton, Presiding Judge

Patricia A. Breckenridge and Victor C. Howard, JJ. concur.

APPENDIX

First Class Charter	First Class Non-Charter	Second and Third Class
64.050. Approval of improvements (certain first class counties) 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 commission and receiving the written approval and recommendations of said commission; provided, however, that this requirement shall be deemed to be waived if the county planning commission 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 commission may be overruled by the county commission, which shall certify its reason therefor to the planning commission. 1941	**64.235. Improvements to conform to plan, approval required (noncharter first class counties)** 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 therefor 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**	**64.570. Planning commission to approve improvements – public improvements may be made, procedure (second and third class counties)** From and after the adoption of the official master plan or portion thereof and its proper certification and recording, thereafter no improvement of a type embraced within the recommendations of such official master plan or part thereof shall be constructed or authorized without first submitting the proposed plans thereof to the county planning commission and receiving the written approval or recommendations of said commission. This requirement shall be deemed to be waived if the county planning commission fails to make its report and recommendations within forty-five days after receipt of the proposed plans. In the case of any public improvement sponsored or proposed to be made by any municipality or other political or civil subdivision of the state, or public board, commission or other public officials, the disapproval or recommendations of the county planning commission may be overruled by a two-thirds vote, properly entered of record and certified to the county planning commission,

	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. 1959	of the governing body of such municipality, or other political or civil subdivision, or public board, commission or officials, after the reasons for such overruling are spread upon its minutes, which reasons shall also be certified to the county planning commission. 1951

First Class Charter	First Class Non-Charter	Second and Third Class
64.090. Planning and zoning powers of county commission – group homes considered single-family dwellings – exemptions (certain first class counties) 1. For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land, and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county commission in all counties of the first class, as provided by law, except in counties of the first class not having a charter form of government, is hereby empowered to regulate and restrict, by order, in unincorporated portions of the county, the height, number of stories and size	**64.255. Building and lot regulations – nonconforming uses, regulations limited (non-charter first class counties)** 1. For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county commission in all counties of the first class not having a charter form of government and not operating a planning or zoning program under the provisions of sections 64.800 to 64.905, is hereby empowered to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories, and size of	**64.620. Building restriction – limitations on regulations (second and third class counties)** 1. For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the second or third class to conserve and protect property and building values, to secure the most economical use of the land, and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county commission of any county to which sections 64.510 to 64.690 are applicable as provided in section 64.510 shall have power after approval by vote of the people as provided in section 64.530 to regulate and restrict, by order of record, in the unincorporated portions of the county, the height,

of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry and recreation. . . . 3. The powers by sections 64.010 to 64.160 given shall not be exercised so as to deprive the owner, lessee or tenant of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted except that reasonable regulations may be adopted for the gradual elimination of nonconforming uses, **nor shall anything in sections 64.010 to 64.160 interfere with such public utility services 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.** 1941	buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, signs, structures and land for trade, industry, residence, parks or other purposes, including areas for agriculture, forestry and recreation. 2. The powers by sections 64.211 to 64.295 given shall not be exercised so as to deprive the owner, lessee or tenant of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted, except that reasonable regulations may be adopted for the gradual elimination of nonconforming uses from districts zoned for residential use. 1959	number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the locations and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry, and recreation. . . . 3. **The powers granted by sections 64.510 to 64.690 shall not be construed:** (1) So as to deprive the owner, lessee or tenant of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted; (2) So as to deprive any court of the power of determining the reasonableness or regulations and powers in any action brought in any court affecting the provisions of sections 64.510 to 64.690, or the rules and regulations adopted thereunder; (3) **To authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission or by permit of the county commission, as the case may be.** . . . 1951

Exhibit C

Order entered in the Lawsuit dated February 15, 2006

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

CASS COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV104-1443CC
	)	
AQUILA, INC.,	)	
	)	
Defendant.	)	

ORDER

On this 15th day of February, 2006, the Court enters its Order, having convened on the 27th day of January, 2006 for a hearing, on the record, on the Motion to Extend Stay of Injunction ("Motion") filed by Defendant Aquila, Inc. ("Aquila"). Aquila appears by and through its attorney of record, J. Dale Youngs, and through its General Counsel Christopher M. Reitz. Plaintiff Cass County, Missouri ("County") appears by and through its attorney of record, Cindy Reams Martin, and through its County Attorney, Debra L. Moore.

On the pleadings adduced, and based upon the arguments of counsel on the record, the Court finds and orders as follows:

1. THE COURT FINDS that it entered a Judgment in this case on January 11, 2005.

2. THE COURT FURTHER FINDS that the Judgment permanently and mandatorily enjoined Aquila, and all others acting in concert with, at the direction of, on behalf of, under contract with, or otherwise in collaboration with Aquila, from constructing and operating the South Harper Plant and the Peculiar Substation, and ordered the removal, at Aquila's expense, of all improvements, fixtures, attachments, equipment, or apparatus of any kind or nature inconsistent with an agricultural zoning classification placed, affixed or constructed at anytime,

whether before or after the Judgment, upon the South Harper Plant or the Peculiar Substation sites.

3. THE COURT FURTHER FINDS that the Judgment was stayed pending appeal pursuant to Rule 92.03, subject to Aquila posting a $350,000.00 bond, and that subsequent to the posting of said bond, Aquila constructed and began operating the South Harper Plant and the Peculiar Substation while it appealed the Judgment.

4. THE COURT FURTHER FINDS that the Judgment was affirmed by the Missouri Court of Appeals for the Western District on December 20, 2005, and that neither Aquila nor the County sought rehearing or transfer of the Court of Appeals' opinion.

5. THE COURT FURTHER FINDS that the Court of Appeals issued its Mandate affirming the Judgment on January 11, 2006.

6. THE COURT FURTHER FINDS that the Judgment is final and non-appealable.

7. THE COURT FURTHER FINDS that Aquila filed its Motion on January 12, 2006, which Motion is opposed by the County.

8. THE COURT FURTHER FINDS that it has the jurisdiction and authority to hear the Motion, and to fashion a remedy that addresses the matters raised in the Motion and in the related pleadings filed by the parties.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Aquila's Motion is granted in part and denied in part. Aquila is ordered, beginning May 31, 2006, to commence dismantling the South Harper Plant, including the substation at the South Harper facility, and the Peculiar Substation, in their entirety, under penalty of contempt.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, as required by the Judgment, Aquila, and all others acting in concert with, at the direction of, on behalf of, under

contract with, or otherwise in collaboration with Aquila, are directed to immediately cease operation of the South Harper Plant in its entirety, and for all purposes, under penalty of contempt; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Aquila may continue to operate the substation at the South Harper facility and the Peculiar Substation until May 31, 2006, and that thereafter, as required by the Judgment, Aquila, and all others acting in concert with, at the direction of, on behalf of, under contract with, or otherwise in collaboration with Aquila, are directed to immediately cease operation of the substation at the South Harper facility and the Peculiar Substation in their entirety and for all purposes, under penalty of contempt; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the time permitted Aquila by this Order to delay the commencement of dismantling of the South Harper Plant and the Peculiar Substation until May 31, 2006, and to delay the cessation of the operation of the substation at the South Harper facility and the Peculiar Substation until May 31, 2006, is subject to and conditioned upon Aquila, Inc. posting a $20,000,000.00 cash or surety bond in a form satisfactory to the Court for the security of the rights of Cass County, Missouri. The bond shall reflect that Aquila, Inc. is held and firmly bound unto Plaintiff Cass County, Missouri in the sum of $20,000,000.00 for the payment of which Aquila, Inc. and its surety, if applicable, bind themselves, on the condition that in the event Aquila fails to comply with the terms of this Order, then the bond shall be available to satisfy such damages, if any, deemed by the Court to have been incurred by Plaintiff Cass County, Missouri; otherwise the obligation shall be void.

IT IS SO ORDERED.

Joseph P. Dandurand

The Honorable Joseph P. Dandurand

Dated: 2/15/06

Approved and Submitted As to Form:

CINDY REAMS MARTIN, P.C.

By:_____
Cindy Reams Martin - No. 32034

408 S.E. Douglas
Lee's Summit, Missouri 64063

Telephone Number 816/554-6444
Facsimile Number 816/554-6555

CASS COUNTY COUNSELOR

By:_____
Debra L. Moore – No. 36200

Cass County, Missouri
102 East Wall
Harrisonville, Missouri 64701

Telephone Number (816) 380-8206
Facsimile Number (816) 380-8156

ATTORNEYS FOR PLAINTIFF
CASS COUNTY, MISSOURI

BLACKWELL SANDERS PEPER
MARTIN, LLP

By: _____
J. Dale Youngs - No. 36716

4801 Main Street, Suite 1000
Kansas City, Missouri 64112

Telephone Number (816) 983-8000
Facsimile Number (816) 983-8080

ATTORNEYS FOR DEFENDANT
AQUILA, INC.

Exhibit D

Excerpts of the transcript of January 27, 2006 proceedings before Judge Dandurand

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION NO. II
Honorable Joseph P. Dandurand, Judge

CASS COUNTY, MISSOURI, Plaintiff,	)	
vs.	)	Cass County Case No. 17V010401443
AQUILA, INC., Defendant.	)	ORIGINAL

TRANSCRIPT

On Friday, the 27th day of January, 2006, the above cause came on for hearing at 9:55 a.m. before the Honorable Joseph P. Dandurand, Judge of Division No. II of the 17th Judicial Circuit, at Warrensburg, Missouri.

A P P E A R A N C E S

ATTORNEYS FOR CASS COUNTY: ATTORNEY CINDY REAMS MARTIN
408 S.E. Douglas
Lee's Summit, MO 64063

ATTORNEY DEBRA MOORE
104 East Wall
Harrisonville, MO 64701

ATTORNEY FOR DEFENDANT: ATTORNEY J. DALE YOUNGS
ATTORNEY CHRISTOPHER REITZ
4801 Main Street, Suite 1000
Kansas City, MO 64112

JODI R. QUELLE, CCR
Official Court Reporter, Division No. II
Johnson County Circuit Court
(660) 422-7407

indication that there were nine cases on the docket this morning. But this 1980 case, it didn't say, I don't think, that you can build a plant anywhere you want to build a plant, did it?

MR. YOUNGS: The Court -- the Commission --

THE COURT: We are talking about -- go ahead. Help me out with what that case said.

MR. YOUNGS: I will. As the Court recalls, the issue was whether or not Aquila was subject to Cass County zoning laws --

THE COURT: Right.

MR. YOUNGS: -- as set forth in 64.235 or as enabled by that statute. The question was, if the zoning laws apply for Aquila or if that zoning exemption applied to Aquila, and you didn't reach the issue. The Court of Appeals just recently clearly held that it does. The issue was whether or not we had the type of authorization required to fall within that exemption.

THE COURT: Okay. All right.

MR. YOUNGS: And so what the Commission's decision in the 1980 UE case was that we had all these various orders and certificates that were before the Court and in evidence at the trial of this proceeding. Our position was and our belief

going to be kind of an interesting process.

THE COURT: You know, the other question I have for you before you turn this over --

MR. YOUNGS: Sure.

THE COURT: -- the PSC was here. I mean, they had their nose in this thing from the beginning telling me that they thought that you guys had the authority to do what you were doing. They are not here today, and I want to know if they are so interested in seeing to it that this sort of thing occurs on their behalf, what discussions have been had with the parties about how much time they think they are going to take to review this thing and make a ruling?

Because what you can count on, Mr. Youngs, I'm not going to say, if I say anything, if I give you a week, I am not going to say that you have until the Public Service Commission does something with this case because that's unreasonable.

Has anybody had any discussion with them about what expectations we might have with regard to obtaining some sort of a ruling from them?

Because the facts aren't difficult. They have been hashed over and hashed over. The PSC is either going to vote for you, or they are going to

vote against you.

MR. YOUNGS: I agree, and we have not gotten a commitment from the PSC. Mr. Reitz -- and in putting together our application, we have obviously consulted with the Public Service Commission, and as we do on an ongoing basis, we are in daily contact with their staff over any number of things that fall within our obligation to be regulated by that.

Mr. Reitz might be able to speak to that a little bit more, but we are of the understanding that the PSC will be able to process this, again, subject to protecting the rights of those people who want to be heard on the issue.

THE COURT: Because they have to give a public hearing.

MR. YOUNGS: They absolutely do, and again, we are not trying to avoid that.

THE COURT: Right.

MR. YOUNGS: So the fact of the matter is there is a process, but the PSC understands that everybody wants the process to be undertaken promptly --

THE COURT: Expeditiously.

MR. YOUNGS: -- and disposed of

THE COURT: The intervention deadline.

MR. REITZ: The intervention deadline is February 27th.

THE COURT: The 27th. Okay.

MR. REITZ: So, Your Honor, the reality is the last time the Commission issued an order, they were sued by the County claiming that there was a lack of due process, and we are very confident, as I think you are, that the Commission wants this plant. They believe it's in the right place, and they will approve our application.

THE COURT: Oh, no, wait a minute. Wait a minute. Don't mistake what I -- I think -- I think that the Public Service Commission, what they did -- I don't want there to be any mistake about what I think about what they did -- what they did was come in here and ask me to deal with the buck and not them, and they didn't want to have to do what the Court of Appeals is now telling them what they have to do. That's what I think.

So I think they are unhappy with what has occurred because they did not want to have to make that decision. They wanted to leave it to somebody else. So I don't know what they are

going to do, but what they wanted was for me to do it because they didn't want to have to make the decision. That's what I think. Now they are told they have to make the decision.

MR. REITZ: They are told they have to make the decision.

THE COURT: Yes.

MR. REITZ: I am telling you that we are confident that they believe that the decision that we made to construct this particular plant in this particular spot is absolutely the right one and that they will, in fact, give us the specific authority that we need.

THE COURT: And if you are comfortable with that -- and, again, I'm not ruling this case at this point. All I'm doing is making some comments for myself and for my notes and record -- if you are confident in that, then you are confident that they will do whatever they can if I give you a deadline to make a ruling within that deadline, whatever it is.

MR. REITZ: I certainly am hopeful of that.

THE COURT: If they are on your side, you would think they would.

MR. REITZ: I would say, though, that they

even if there is some thread or shred of hope that they do, the reality of what we are talking about here is something so uncertain, something so indeterminate that we simply don't know what is going to happen with respect to this plant and substation.

THE COURT: But you know, you know, Ms. Martin, that I can make a ruling, if I do, that will take care of the uncertainty by setting times and conditions and limits and orders and the potential for an order to show cause or a motion for contempt. So you can rest assured that when folks walk out the door today, no matter what my ruling is, it is going to be determinant with regard to time. If it's today or tomorrow or four months from now, you are not going to walk out the door wondering if this thing is going to be left in limbo by me because it won't be.

MS. MARTIN: And that I do appreciate and I respect very much, and you will note, of course, on some of the issues that we raised in the Suggestions in Opposition that we filed, some of the concerns that we have.

I do want to point one thing out, Your Honor. You know, it's the County's position it's not

predetermined what the County would or would not do with an application, but consider the County's situation. We have a judgment. That judgment has not been modified. For Aquila to present an SUP application at our doorstep on Friday --

THE COURT: It's inconsistent. Their argument to the County is inconsistent. The County's position is exactly what I would expect it to be.

MS. MARTIN: Right.

THE COURT: And I don't have any problem or I am not casting any aspersions toward the County. I mean, if I were the County, I would take the same position.

MS. MARTIN: Well, I just don't want this Court to be of the view that the County is predisposed one way or the other what would or would not occur on a permit application. There is, obviously, a whole lot of factors that we are obligated by law to look at with respect to an application, but the fundamental issue of whether an application can even be accepted under circumstances where the law in effect at that time is that this plant and this substation are to be dismantled.

motions in suggestions they filed herein, that certainly has not been the position they have taken here today. I haven't heard one word from the mouth of either counsel for Aquila that Aquila is a victim or somehow is being treated unfairly. So we can disregard suggestions and arguments and paperwork filed --

MS. MARTIN: And brinkmanship?

THE COURT: -- yeah, and brinkmanship.

MS. MARTIN: My favorite word.

THE COURT: That had to be yours.

MS. MARTIN: And, I guess, the part of that is it's a little tough to sit here and have the County be attacked because it has rejected permits that are inconsistent with a judgment that is in force and effect, and it is a little bit concerning to me to be in a position to hear any suggestion by Aquila or otherwise that somehow or another that the County has made up its mind.

The County has concerns about a plant, a substation, about any development being built someplace where the process has not been followed, and as I point out in our Suggestions, Your Honor, the most difficult situation that what Aquila is asking of you creates for the County is that after

the fact we are being asked to evaluate, whether it's by way of an intervention in the PSC or by way of a process here in the county, something that's already occurred.

THE COURT: Well, I don't think aspersions have been cast toward the County. I mean, I'm not getting that, Ms. Martin. I don't think they are doing that at all. I mean, I don't think the County can take any other position, and I don't think they do either. How can the County now say, "Oh, well, what the heck. Go ahead," you know.

MS. MARTIN: To be honest with you, that's exactly how I feel.

THE COURT: And they are not claiming --

MS. MARTIN: Quite frankly, Your Honor, we have been accused of exercising in conduct that's disappointing to Aquila. We have been accused of, in a Reply Brief that was filed on Wednesday, it is clear the County tends to undercut us at every step of the way, and the reality is we are doing our job. There are laws to follow, and we have got an obligation to see --

THE COURT: That's right. You do.

MS. MARTIN: -- that they are followed.

THE COURT: That's right.

MS. MARTIN: And from a practical standpoint, as long as the Court understands, it's not a matter of, you know, it's not a matter of who is the victim and who is not the victim. It's just that the County has a role to play, and we have done nothing along the way inconsistent with that role. It's very important, I think, for the Court to take into consideration that despite all of the policy arguments that are advanced here by Aquila this is a self-created hardship. It is a self-created public policy issue. It is a self-created PR mantra, and it's very difficult for the County or for any one else who is impacted by this plant or this substation to feel much sympathy given the self-created nature of this hardship.

There was a gamble when Aquila determined to move forward with the building of the plant. That if it lost, it knew this plant and substation were going to have to be dismantled.

Does that mean the County is vengeful or in some way, you know, thumbing our nose at Aquila? Absolutely not. It means that the County all along has said, "Would you please follow the law."

THE COURT: Actually, I think, if you want to

be accurate about what occurred, the opposite is what occurred throughout this case. That if there is anybody who was arrogant or thumbing their nose, it was not the County. It was the decision that Aquila made unilaterally to decide that, you know, I didn't know what I was talking about, and therefore, there was no risk, and, you know, that's their problem, not yours, and so the shoe is not on that foot. It's on the other foot, and I don't think anything different. They made that decision, not the county.

MS. MARTIN: Excuse me for interrupting. I do agree with that, and I think it is that very fact which compels me to argue to the Court that this plant and substation must be removed because that is what this Court ordered in January, that is what Aquila knew what would happen if they advanced this appeal and they lost or abandoned, as they did. Maybe, they will go to the PSC and get a plant and substation approved. It is not a given. It is absolutely not a given that they will be approved at this site -- or these sites, I should say, with respect both to the plant and the substation.

And where I do disagree fundamentally on the

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.

I will tell you that I have nothing but respect for the position taken by the County of Cass, and I have nothing but frustration for the position taken by Aquila. I don't understand -- I don't understand how they could have the nerve to do what they did in the face of what the rulings were other than to have total, utter disregard for the Ruling of this Court. The taking of an appeal -- I have been doing this for two decades. I get appealed all the time. I get reversed sometimes; I get affirmed sometimes, without ever having any hard feelings, but you, Aquila, made a determination to proceed in the face of this ruling, in the posting of a bond as if my ruling didn't matter at all, and you knew darn well, with arrogance, as far as I'm concerned, that I didn't have any idea what I was doing. "We are very confident that trial judge was way out of his league and didn't know what he was doing when he did it, and, therefore, we are going to continue to build this plant. We are going to get it done because we are right and they are wrong." So you

made that decision. So as far as whose problem it is, it falls squarely on Aquila.

Now, that doesn't mean when I started this out that I can just never mind the consequences of my ruling. I know the County would like for me to do that, and that's the position they should take. I don't have any problem with their position, but that doesn't mean that it is my job to take their position either.

And waste is a concern of mine, and it's a concern that we all have been taught from the time we were born by our parents to be concerned with, and this is not a small dollar matter. So I have to weigh what I consider to be the consequences of a ruling in favor of Aquila to both the County and Aquila and determine whether or not I think there's prejudice to some sort of a remedy being fashioned.

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 under penalty of contempt to begin to tear that thing down and get it done quickly.