

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

Case No. EA-2005-0248

PROPOSED FINDINGS OF FACTS
AND CONCLUSIONS OF LAW

COMES NOW the Staff of the Missouri Public Service Commission and files it
Proposed Findings of Fact and Conclusions of Law

Proposed Findings of Fact

1. Aquila, Inc. is a Delaware Corporation with its principal office and place of
business at 20 W. 9th Street, Kansas City, Missouri 64105-1711.

2. Aquila is a regulated public utility corporation subject to the jurisdiction of the
Public Service Commission (“Commission” or “PSC”), which has authorized Aquila to conduct
its business in its certificated areas in Missouri through its Aquila Networks-MPS and Aquila
Networks-L&P operating divisions. As such, Aquila is engaged in providing electric, natural gas
and industrial steam service in those areas of the State certificated to it by the Commission,
including most of Cass County.

3. Aquila has begun construction of a 315-megawatt peaking power plant known as
the South Harper facility in Cass County, southwest of Peculiar, Missouri. The power will be

generated by three 105 megawatt gas-fired combustion turbine generating units to provide electric peaking power.

4. Cass County, which is a first-class nonchartered county, has challenged Aquila's authorization to construct facilities in Cass County without complying with Cass County's zoning ordinances.

5. StopAquila.org is an unincorporated association of individuals who generally reside in Cass County, and some of whom are Aquila customers. This association opposes construction of the South Harper facility.

6. Aquila and its predecessors have been operating electric transmission and distribution systems in unincorporated Cass County for nearly 90 years.

7. The earliest known franchise issued by City of Pleasant Hill, Cass County, Missouri ("Pleasant Hill") for the operation of an electric plant in Pleasant Hill, was issued in September 1905, to the Pleasant Hill Electric Light Company and its successors and assigns to operate the electric light plant at Pleasant Hill. *See* Application of J.E. Rawls, et al., Case No. 1073 (August 22, 1916). This franchise was subsequently assigned to William Reader, William A. Reader, and Charles E. Reader, who were doing business as a partnership known as Reader Light, Ice & Fuel Co.

8. The Reader Light, Ice & Fuel Co. operated the electric plant at Pleasant Hill until it declared bankruptcy, as a result of which J.E. Rawls purchased all assets, including the franchise related to the electric plant, from the bankruptcy trustee in March 1915.

9. In August 1915, City of Pleasant Hill issued another franchise to J.E. Rawls, his successors, assigns, and grantees for the purpose of "generating electricity and for the sale thereof." (Ordinance No. 407, in Case No. 1074).

10. In October 1916, Pleasant Hill issued a franchise to Aquila's predecessor, L.K. Green & Sons, their successors and assigns, to purchase, erect, establish, maintain and operate a plant or plants for the generation or transformation of electrical energy, among other things (Ordinance No. 421).

11. In October 1916, J.F. Johnston applied to the Commission (PSC Case No. 1100) for permission to transfer all the property, franchises, and contracts of Pleasant Hill Electric Light & Power Company to L.K. Green & Sons.

12. In December 1917, L.K. Green & Sons applied to the Commission (Case No. 1409) for permission to transfer all real estate, personal property, franchises, and contracts of every kind to Green Light and Power Company.

13. In November 1926, West Missouri Power Company executed a contract with National Public Service Corporation (NPSC), a Virginia corporation, to sell and transfer the assets of West Missouri Power Company to a new corporation named Missouri Public Service Company, which NPSC had organized. *See* Case No. 5109.

14. In April 1927, the Commission authorized and approved application of Missouri Public Service Company to acquire the public utility properties of West Missouri Power Company, and issued the Missouri Public Service Company a certificate of convenience and necessity ("CCN") (effective 4/11/27) to "own, maintain and operate all the properties, works and systems acquired" *See* Case No. 5109.

15. In November 1936, Missouri Public Service Corporation, a Delaware corporation, was incorporated out of the bankruptcy and court-ordered reorganization of the Missouri Public Service Company and its parent, Middle West Utilities Company. *See* Case No. 9070.

16. In December 1936, the Commission authorized and approved the transfer of all properties, rights, and franchises from the Missouri Public Service Company, a Missouri corporation, to the Missouri Public Service Corporation, a Delaware corporation. *See* Case No. 9070.

17. In January 1938, the Missouri Public Service Corporation received a CCN from the Commission to serve an area (1938 CCN Order). *See* Case No. 9470.

18. The Commission's Report and Order (Case No. 9470) granting that 1938 CCN noted on page one that the company's application, filed November 23, 1937 (CCN Petition), sought a CCN "to construct, maintain and operate, as a public utility, electric transmission and distribution lines for the purposes of furnishing electric service to the public" in its certificated area, including most of Cass County. *See* Case No. 9470.

19. Aquila's current certificated area includes the majority of Cass County.

20. In its CCN Petition to the Commission, in Case No. 9470, Aquila's predecessor attached maps and legal descriptions of the areas of each county to which the certificate applies. The PSC's 1938 CCN Order stated that the maps had been marked as Exhibits A-1 to A-19. 1938 CCN Order at 3. A copy of the legal description for the area of Cass County was submitted to the Commission as Exhibit A-6.

21. In its 1938 CCN Order, the Commission stated that the Cass County Court, as well as the courts of the other counties covered by the CCN, had authorized the construction and maintenance of electric distribution lines across "public streets, roads and alleys, and other public places and grounds." 1938 CCN Order.

22. In April 1938, Pleasant Hill issued a franchise (Ordinance No. 608) to Missouri Public Service Corporation to operate an electric light, heat and power system (subject to a vote on April 26, 1938) within the City of Pleasant Hill.

23. On April 7, 1950, Missouri Public Service Company was incorporated in Missouri.

24. On April 28, 1950, the Commission issued a CCN to Missouri Public Service Company, a Missouri corporation, authorizing and approving the merger of the Missouri Public Service Corporation, a Delaware corporation, with and into the Missouri Public Service Company. *See* Case No. 11,892.

25. In Case No. 11,892, the Commission granted Missouri Public Service Company a Certificate 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 in the State of Missouri described and designated in the order of this Commission” entered in Case No. 9470 on January 18, 1938. *See* Case No. 11,892 at 4.

26. On May 31, 1950, the Missouri Public Service Corporation merged fully with and into Missouri Public Service Company.

27. On May 2, 1985, Missouri Public Service Company changed its name to UtiliCorp United Inc., a Missouri corporation.

28. On March 20, 1987, the Commission issued an order (effective April 1, 1987) authorizing and approving the merger of UtiliCorp United Inc., a Missouri corporation, with and into UtiliCorp United Inc., a Delaware corporation. *See* Case No. EM-87-26.

29. On April 1, 1987, UtiliCorp United Inc., a Missouri corporation, merged fully with and into UtiliCorp United Inc., a Delaware corporation.

30. On February 21, 2002, the Commission issued an order (effective March 3, 2002) authorizing the merger and name change between UtiliCorp United Inc. and Aquila, Inc. *See* Case No. EM-2002-297.

31. On March 15, 2002, UtiliCorp United Inc. changed its legal name to Aquila, Inc.

32. Aquila is the owner of two tracts of real estate located in Cass County that are identified as follows:

a. An approximate 74 acre tract of real estate at or near 243rd Street and Harper Road, and generally located in parts of Sections 29 and 32, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter “Tract A”).

b. An approximate 55 acre tract of real estate at or near 203rd Street and Knight Road, and generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter “Tract B”).

33. Both of these tracts are located in Aquila’s certificated area as that area is identified in the Commission’s 1938 CCN Order (Case No. 9470).

34. Aquila has begun construction of an electric utility substation (Peculiar Substation) on an approximate 10-acre parcel situated within the property boundaries of the fifty-five (55) acre tract.

35. The Peculiar Substation is designed to support the electric utility power plant on Tract A, which is known as the South Harper Facility, by allowing the power output of the plant to flow to an adjacent, higher voltage transmission line. From there, power would then flow through Aquila’s transmission grid to where it is needed. The Peculiar Substation would also serve load growth in this area.

36. Aquila has begun construction of the South Harper Facility within the property boundaries on Tract A. The proposed South Harper Facility is a 315-megawatt peaking power plant that will generate electric power by use of three 105 MW gas-fired combustion turbine generating units, fueled by natural gas.

37. Immediately adjacent to Tract A is a gas compressor facility operated by Southern Star Gas Pipeline (formerly Williams Gas Pipeline Central) since about 1951 when the facility began operation. Cass County did not have a zoning ordinance at the time the pipeline was constructed. When Cass County first adopted a zoning ordinance in June, 1972, the gas pipeline property was zoned I1 (light industrial) based on its pre-existing use. This gas compressor facility will provide the natural gas for the operation of the South Harper Facility.

38. Aquila is party to a Power Sales Agreement dated February 22, 1999, (PPA) that expires on May 31, 2005. The PPA is for 500 MW of capacity during the summer months and 200 MW in the winter.

39. Aquila has expressed its desire to complete construction of the South Harper Facility and the Peculiar Substation by June 2005.

40. Aquila has not secured a Special Use Permit or Rezoning of Tract A or Tract B from Cass County to authorize or permit construction of a substation or power plant at these locations.

41. On March 26, 2004, Aquila applied to the Missouri Department of Natural Resources (MDNR) for a Prevention of Significant Deterioration construction permit (PSD Permit) for the proposed Camp Branch Energy Center near Harrisonville, Missouri. A revised PSD Permit application was submitted to MDNR on September 13, 2004, reflecting a change in location of the proposed peaking facility to the South Harper Facility location.

42. MDNR conducted a public hearing on the draft PSD Permit on November 22, 2004, and MDNR issued a final PSD Permit to Aquila for the South Harper Facility on December 29, 2004, a copy of which has been attached to Aquila's January 28, 2005 Application as Appendix 7.

43. Aquila has begun construction of the South Harper Facility now that it has received a final PSD Permit from MDNR. Aquila could not begin construction of the South Harper Facility until it obtained a final PSD Permit from MDNR.

44. On January 28, 2005, Aquila filed its Application with this Commission asking that the Commission confirm that it has authority under its current CCN to construct electric generation facilities or, in the alternative, for an additional overlapping or site-specific CCN to construct the South Harper Facility's combustion turbine electric generating power station with associated electric transmission substations in Cass County, Missouri.

45. In the on-the-record presentation held on Friday, February 25, 2005, Aquila expressed its preference that the Commission proceed with Aquila's first request, which is for a clarification order, that Aquila already has the specific authority it needs under its current CCN to proceed with construction.

46. In the 1938 Commission order granting Aquila a CCN to serve most areas of Cass County, among other areas, the Commission carefully reviewed the communities and areas for which Aquila had obtained a local franchise. (Case No. 9470)(This Order was filed in this case on February 25, 2005, in *Response of Aquila Inc. To The Commission Order Directing Filing.*) The Commission stated that Aquila had obtained a franchise for service in Cass County. (Case No. 9470) In 1950, the Commission issued in Case No. 11,892, (also filed in this case on

February 25, 2005) in which the Commission issued a CCN for Aquila's predecessor permitting it 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 in the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.

Conclusions of Law

47. Aquila is a public utility company, and an electrical corporation as defined in §386.020 RSMo 2000. As such, Aquila is subject to the jurisdiction of this Commission under Chapters 386 and 393.

48. Aquila is asking this Commission to interpret its past orders and to determine whether Aquila has permission under its existing Commission approved CCNs to construct the South Harper facilities.

49. The Commission acts within its jurisdiction when it interprets its enabling statutes and when it interprets its own past orders. *State ex rel. Orscheln Bros. Truck Lines v. Public Serv. Comm'n*, 110 S.W.2d 364, 366 (1937). In interpreting its past orders the Commission does not act judicially, but as a fact-finding agency. *State ex rel. Beaufort Transfer Co. v. Public Serv. Comm'n*, 312 S.W.2d 363 (Mo.App. 1958).

50. Before the Commission will issue a CCN, a utility company must demonstrate that it has the required local consent or permission, in other words that it has obtained a local franchise to operate in a particular area. Section 393.170 RSMo 2000.

51. Franchises that are not of limited duration are perpetual in nature. "In absence of any general law limiting duration of franchises for operation of an electrical system on the roads and highways of a county, the grant of a franchise for that purpose, without specifying a period

of duration, is a grant in perpetuity.” *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc.*, 407 S.W.2d 883, 888 (Mo. 1966).

52. A utility franchise is “local permission to use the public roads and rights-of-way in a manner not available to or exercised by the ordinary citizen.” *State ex rel. Union Electric Co., v. Public Serv. Comm’n*, 770 S.W.2d 283, 285 (Mo App. 1989).

53. The *Harline* Court specifically addressed the issue of Aquila’s authority under its relevant CCN. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 183 (Mo. App. 1960).

54. In *Harline* the Court posed the “basic issue for decision” as “[m]ust a public utility obtain an additional certificate of convenience and necessity from the Commission to construct each extension and addition to its existing transmission lines and facilities within a territory already allocated to it under a determination of public convenience and necessity?” *Id.*

55. The *Harline* case supports interpretation of the CCN granted in the 1938 Order in Case No. 9470 as granting Aquila’s predecessors authority to construct the safe and adequate facilities it needs to comply with its duty to serve the public and to charge just and reasonable rates for that service. The *Harline* Court, citing the Company’s corporate charter and Section 393.130, concluded that the Company had a legal duty to serve the public in its certificated area and that the Company could perform its duty to render electric service by extending lines and building new facilities as required with no further grant of authority from the Commission. *State ex rel. Harline v. Public Serv. Comm’n*, 343 S.W.2d 177 (Mo. App.1960).

56. The *Harline* Court further concluded that the Company could fulfill its duty to provide electric service to its customers in its certificated area by continuing to build facilities as

necessary without obtaining further authority from the Commission to engage in the building of plant. *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177, 183 (Mo. App.1960).

57. In a 1979 Union Electric (*UE*) case at the Commission, Union Electric (*UE*) filed a request similar to Aquila's request in this case. *UE* asked the Commission for authority to construct two combustion turbine generation peaking units in its certificated area. In its Report and Order in *UE*, this Commission relied on the *Harline* case.

58. The Commission's discussion of *Harline* in the *UE* Order demonstrates the Commission's interpretation of the Court's decision. Citing *Harline*, the Commission stated: "that a certificate is only needed when an electric corporation starts in business or if it attempts to expand its authority in an entirely new area Accordingly, the Commission is of the opinion that it is not necessary for electric utilities to come before us to obtain permission to build plant within their certificated areas."

59. The Commission agrees with its analysis in the *UE* case that a CCN does not grant a utility any powers it does not already possess. *State ex rel. City of Sikeston v. Missouri Utilities Company*, 53 S.W.2d 394, 399 (Mo. banc 1932).

60. In *UE*, this Commission explained that the *Harline* case had interpreted Section 393.170 and found that Commission approval "as expressed in a [CCN] is only required . . . (1) for any new company or additional company to begin business anywhere in the state, or (2) for an established company to enter new territory." 24 Mo.P.S.C. (N.S.) at 79.

61. The Commission also noted that an electrical corporation under the Commission's jurisdiction need not obtain additional Commission approval through the issuance of another CCN before it can build plant within its certificated area. 24 Mo.P.S.C. (N.S.) at 79.

62. The Commission also concludes that when a CCN is granted for a certain area, the Commission has already determined through findings of fact and conclusions of law that the utility should provide service to the public within the certificated area. 24 Mo.P.S.C. (N.S.) 72.

63. The Commission concludes that it will not depart from its determinations in the *UE* decision that a company need not obtain additional approval, through the issuance of another CCN to build in its certificated area and concludes that: 1) Aquila does not need further authorization from the Commission, 2) Aquila has the legal duty to serve its certificated area, and 3) that it may engage in the necessary construction of plant to do so under its current powers pursuant to statute and exercised under its relevant CCN.

These Proposed Findings of Fact and Conclusions of Law are being submitted prior to the on-the-record presentation scheduled for March 28 and 29, 2005. Additional relevant facts and legal discussion and conclusions may be presented to the Commission through that process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 22nd day of March, 2005.

/s/ Lera L. Shemwell