

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

STOPAQUILA.ORG, et al.,

Plaintiffs,

v.

AQUILA, INC.,

Defendant.

Case No. CV104-1380CC

CONSOLIDATED WITH

CASS COUNTY, MISSOURI,

Plaintiff,

v.

AQUILA, INC.,

Defendant.

Case No. CV104-1443CC

JOINT STIPULATION OF FACTS

COME NOW the parties, StopAquila.org, et al., by and through its counsel of record Gerry Efink; Cass County, Missouri (hereinafter "Cass"), by and through its counsel of record Cindy Reams Martin and Debra L. Moore, Cass County Counselor; and Aquila, Inc. (hereinafter "Aquila"), by and through its counsel of record Karl Zobrist, J. Dale Youngs, and Andrew Bailey of the firm of Blackwell Sanders Peper Martin LLP, and hereby stipulate to the following facts for the purposes of all proceedings in these consolidated actions.

1. Cass is a County of the State of Missouri and is a first class, non-charter county.

Exhibit No. 2
Case No(s). CA-2005-0248
Date 2-25-05 Rptr. TM

2. The individual persons named as Plaintiffs in the case styled StopAquila.org. et al. v. Aquila, Case No. CV 104-1380CC are each landowners within Cass, some of whom reside in Peculiar, Missouri.

3. StopAquila.org. is an unincorporated association of the individual Plaintiffs identified in StopAquila.org. et al. v. Aquila.

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

5. Cass has adopted, pursuant to the authority of Chapter 64 R.S.Mo., various planning and zoning ordinances and regulations, including, without limitation, a Comprehensive Plan (adopted in 1991 and from time to time thereafter amended), Zoning Ordinance, and a Procedural Manual.

6. Pursuant to the authority of R.S.Mo. § 64.905.4 the Cass County Commission ordained, by duly enacted Ordinance No. 03-15 enacted on December 15, 2003 and effective on January 1, 2004, that Cass would conduct planning and zoning as provided in R.S.Mo. §§ 64.211 to 64.295 as applicable to first class non-charter counties, and that any and all existing regulations affecting planning and zoning, including but not limited to Cass' Comprehensive Plan and Zoning Ordinance, would remain in effect until such time as same may be revised.

7. Cass has authority to adopt a building code pursuant to R.S.Mo. §§ 64.170 to 64.200.

8. On June 17, 2002, Cass promulgated Ordinance No. 02-14, thereby adopting the 2000 Edition of the International Building Code ("IBC"), including Appendix Chapters A through J. The Ordinance states that the IBC establishes "the minimum regulations governing the conditions and maintenance of all property, buildings and structures; by providing the

standards for supplied utilities and facilities and other physical things and conditions essential to ensure that structures are safe, sanitary, and fit for occupation and use; . . .” Section 1 of Ordinance No. 02-14 formally adopts the IBC as the “Building Code” for Cass County to provide “for the control of buildings and structures as herein provided; and each and all of the regulations, provisions, penalties, conditions and terms of said Building Code are hereby referred to, adopted and made a part hereof, as if fully set out in this Ordinance, . . .”

9. Section 105.3.1 of the IBC states, in part, that “If the application of the construction documents do not conform to the requirements of pertinent laws, the building official shall reject such application in writing, stating the reasons therefor. If the building official is satisfied that the proposed work conforms to the requirements of this code and laws and ordinances applicable thereto, the building official shall issue a permit therefor as soon as practical.”

10. Section 105.2.3 of the IBC, entitled “Public service agencies,” states that “A permit shall not be required for the installation, alteration or repair of generation, transmission, distribution or metering or other related equipment that is under the ownership and control of public service agencies by established right.”

11. 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 Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions. As such, Aquila is engaged in providing electrical, natural gas and industrial steam service in those areas of the State certificated to it by the Commission, including most of Cass County.

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

13. 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 on or about September 5, 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., Ex. B at 4, 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. Id. Ex. B at 1-2, 4.

14. 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. Id., Ex. B at 1, 4.

15. On or about August 15, 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 PSC Case No. 1074).

16. On or about September 12, 1916, the Commission issued an order authorizing and approving J.F. Johnston's purchase from J.E. Rawls, and J.E. Rawls' sale to J.F. Johnston, of the electric plant at Pleasant Hill (Case No. 1073). A companion order on the same date by the Commission (Case No. 1074) authorized and approved J.F. Johnston's exercise of the franchise granted by the City of Pleasant Hill to Rawls.

17. On or about October 5, 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) (confirmed by vote on October 25, 1916).

18. On or about October 12, 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.

19. On or about January 1, 1917, the Cass County Court issued a County franchise to L.K. Green & Sons ("Cass County Franchise") to set Electric Light Poles for the transmission of light for commercial purposes.

20. On or about November 23, 1917, the Articles of Association forming Green Light & Power Corporation are filed with the Cass County Recorder of Deeds.

21. On or about December 17, 1917, L.K. Green & Sons applied to the Commission (PSC Case No. 1409) for permission to transfer all real estate, personal property, franchises, and contracts of every kind to Green Light and Power Company.

22. Green Light and Power Co. requested on November 21, 1921, that the Commission approve a Plan of Reorganization, whereby all of its property and franchises be transferred to a "New Company" to be known as West Missouri Power Company. See Application for Authorization of the Reorganization of Green Light and Power Co., Case No. 3171. In its Preliminary Order of December 6, 1921, the Commission granted the request and authorized the formation of the West Missouri Power Company from the assets of Green Light and Power Co. See Preliminary Order, Case No. 3171 at 3. The Commission issued further orders concerning the finances and powers of the West Missouri Power Company in January and March, 1922. See Supplemental Order, Case No. 3171 (Jan. 4, 1922); Order, Case No. 3171 (Mar. 21, 1922).

23. On or about November 12, 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.

24. On or about April 1, 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.

25. On or about November 20, 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 (Mo. P.S.C., December 1, 1936).

26. On or about December 1, 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.

27. On or about January 18, 1938, the Missouri Public Service Corporation received a CCN from the Commission to serve an area ("1938 CCN Order"). Case No. 9470.

28. The Commission's Report and Order (Case No. 9470) granting that 1938 Certificate 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 (Case No. 9470).

29. Aquila's certificated area includes Western Missouri and North Central Missouri, including, but not limited to, the majority of Cass County.

30. In its CCN Petition in Case 9470 to the Commission, 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 PSC as Exhibit A-6.

31. Aquila's service territory in Missouri is also set forth in its tariff, which is on file with and maintained by the Commission.

32. Exhibit B-5 to the CCN Petition in Case 9470 is the Cass County Franchise.

33. 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 at 2, 5.

34. On or about April 5, 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.

35. On or about April 7, 1950, Missouri Public Service Company was incorporated in Missouri.

36. On or about 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. Case No. 11,892.

37. 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.

Case No. 11,892 at 4.

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

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

40. On or about 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. Case No. EM-87-26.

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

42. On or about 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. Case No. EM-2002-297.

43. On or about March 15, 2002, UtiliCorp United Inc. changed its legal name to Aquila, Inc.

44. Aquila is the owner of two tracts of real estate identified as follows:

- a. 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 A").
- b. 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 B").

45. Tracts A and B are located in Aquila's certificated area as identified in the PSC's 1938 CCN Order (Case No. 9470).

46. Tract A is located in unincorporated Cass and is currently zoned as an agricultural district.

47. Tract B is located in unincorporated Cass and is currently zoned as an agricultural district.

48. Pursuant to Cass' Zoning Ordinance, the intent of an Agricultural District is "To preserve and protect land valuable for agriculture and as open space from urban-type activities. The intent is not the development of low density residential areas." (Emphasis in original).

49. "Agricultural Purposes" is defined by the Cass Zoning Ordinance as:

The use of a tract of land of not less than forty (40) acres for the growing of crops, pasturage, nursery, or the raising of livestock and poultry, including the structures necessary for carrying out farming operations and maximum of two residences of those owning or operating the premises, a member of the family thereof, or persons employed thereon, and the family thereof, but such use shall not include feedlots as defined by State statute (additional residences may be permitted with a special use permit).

50. Permitted Uses for Agricultural Districts are listed in Appendix A to the Cass Zoning Ordinance.

51. Appendix A to the Cass Zoning Ordinance indicates that Industrial Machinery and Equipment, including engines and turbines, are not permitted uses in an Agricultural District.

52. Appendix A to the Cass Zoning Ordinance indicates that Electronic and Other Electronic Equipment, including electric distribution equipment and electrical industrial apparatus, are not permitted uses in an Agricultural District.

53. Appendix A to the Cass Zoning Ordinance indicates that Electric, Gas and Sanitary Services, including electric services, are permitted uses in an Agricultural District if a Special Use Permit is secured.

54. The Cass Zoning Ordinance empowers the Zoning Officer to "administer and enforce the provision of these zoning regulations."

55. Aquila has begun land clearance activities on Tract A in preparation for the construction of an electric utility substation ("Peculiar Substation") on an approximate 10-acre parcel situated within the property boundaries of the larger 55-acre tract.

56. The Peculiar Substation is designed to support the South Harper plant 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 the area.

57. Aquila has begun land clearance activities in preparation for construction of an electric utility power plant ("South Harper plant") within the property boundaries on Tract B. The proposed South Harper plant 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.

58. Immediately adjacent to Tract B is a gas compressor facility operated by Southern Star Gas Pipeline since about 1951 when the facility began operation. Cass did not have a zoning ordinance at the time the pipeline was constructed. When Cass 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 plant.

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

60. On December 1, 2004, Aquila applied to the County for an entrance permit for Tract B, which application was approved.

61. On December 3, 2004, Aquila applied to the County for a building permit, application number 241206, to construct a plant service building as part as part of the South Harper plant on Tract B.

62. On December 14, 2004, Aquila applied to the County for a building permit (Application No. 241217) to setup temporary power on Tract B.

63. On December 17, 2004, Aquila applied to the County for a building permit (Application No. 241219) to install a control enclosure structure at South Harper substation on Tract B.

64. On December 17, 2004, Aquila applied to the County for a building permit (Application No. 241220) to install a control enclosure structure at Peculiar Substation on Tract A.

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

66. In June, 2004, Aquila filed an Application for Special Use Permit in Cass County, Missouri to construct a 315-megawatt peaking power plant to generate electric power by three combustion turbine generators fueled with natural gas on a site located in unincorporated Cass near Harrisonville and commonly referred to as the Camp Branch Energy Center.

67. The Application for Special Use Permit was denied after public hearing by the Planning and Zoning Board on July 13, 2004. The Application for Special Use Permit was then scheduled for a public hearing before the Board of Zoning Adjustment ("BZA") for August 26, 2004. On August 19, 2004, Aquila requested that the hearing before the BZA of its Application for Special Use Permit be postponed until rescheduled by Aquila.

68. Aquila's Application for Special Use Permit for the power plant at the Camp Branch Energy Center remains pending.

69. On or about 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 or about September 13, 2004, reflecting a change in location of the proposed peaking facility to the South Harper location (Tract B). 69. MDNR conducted a public hearing on the draft PSD Permit on November 22, 2004.

70. MDNR issued a final PSD Permit to Aquila for the South Harper plant at Tract B on December 29, 2004.

71. Aquila intends to commence construction of the South Harper plant now that it has received a final PSD Permit from MDNR.

72. Aquila could not have commenced construction of the South Harper Plant until it had a final PSD Permit from MDNR.

73. On September 29, 2004, Aquila filed an Application for Rezoning of Tract A from agricultural to I1 (light industrial) for purposes of constructing the Peculiar Substation.

74. On October 25, 2004, Aquila, through its counsel, requested that its Application for Rezoning of Tract A be continued from the Planning and Zoning Board hearing scheduled for October 26, 2004.

75. On November 19, 2004, Aquila withdrew its Application for Rezoning of Tract A.

Respectfully submitted,

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