

**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**

**Dissenting Opinion of Commissioner Steve Gaw**

I respectfully dissent from the majority's order. First, the majority's decision comprises an inappropriate collateral attack on the order of the Cass County Circuit Court which is currently on appeal to the Western District. Second, the majority's order incorrectly interprets past Commission orders as having granted authority for construction of a generation facility anywhere the utility chose within its certificated service area. Finally, the majority's order appears to be an improper interpretation of the Harline decision, *State ex. rel. Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177 (Mo. Ct. App. 1960).

This case came about after Aquila, Inc. (Aquila) had lost a decision in the Circuit Court of Cass County. In that decision the Court determined that Aquila did not have the required authority to construct a generation facility in an agricultural/residential area in Cass County outside of Peculiar, Missouri. After a hearing requesting injunctive relief the Circuit judge found that:

... [E]ither 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.

Aquila filed two cases with the Missouri Public Service Commission after the ruling, one involving financing of the construction and the other a two-count request for an order regarding siting. The first count requested clarification from the Commission that the previous orders regarding Aquila's certificates of convenience and necessity in Cass County provided authority for Aquila to construct the plant. In the event the Commission did not find such authority already exists, the second count was a request for specific authority to construct the facility. The Commission began the hearing but terminated it prior to its conclusion – issuing an order on the first count clarifying that the requisite authority from the Commission already existed.

### **I. Collateral Attack**

Noticeably, the Cass County Circuit Court has previously ruled on the very same issue the Commission is now asked to rule upon: whether Aquila has pre-existing authority sufficient to allow construction of the facilities. The Court, reviewing the very same documents that are now being examined by the Commission, concluded that insufficient authority exists. Although an argument could have been made that the initial interpretation of the utility's authority previously granted by the Public Service Commission should be made at the Commission, the parties were applying for injunctive relief that the Public Service Commission did not have the authority to deliver. Furthermore, no party argued that the Circuit Court halt its proceedings until a case could be filed at the Commission. Instead, Aquila made its request only after it had lost its argument in Circuit Court. Aquila now seeks to collaterally attack the Circuit Court's decision at the Public Service Commission.

This Commission does not have the authority to overrule the Circuit Court's decision. Only the Western District or the Supreme Court can do that. If the Court of Appeals finds an error in the decision it will be the Court's sole responsibility to correct such error. As such, this case should be dismissed in Count 1 based on the fact that the matter has been decided by the Circuit Court of Cass County and would be an inappropriate collateral attack on such decision.

## II. Past Commission Decisions

Even had this matter been appropriately placed before the Commission, further analysis does not lead to the majority's conclusion. Even if some general authority might be found in previous orders of the Commission to have an electric generation plant constructed in Cass County (which does not appear to exist), it is not the specific authority for construction of a generation facility which should be required under §393.170.1 RSMo and which has been sought by the Cass County Circuit Court. Yet, this is the conclusion reached by the majority of the Commission and indeed the Commission that rendered the decision in Case No. EA-79-119<sup>1</sup>.

The Commission's past orders regarding Aquila's certificates do not grant authority to construct generation facilities in Cass County. The majority's attempt to characterize the past orders as having granted such authority should fail when read together. The first order from the Public Service Commission cited its "Application of Authorization of the Reorganization of Green Light & Power Company and for an order authorizing the issuance of stocks and bonds"<sup>2</sup>. The order in pertinent part stated:

... [T]he Commission finds that the present and future public convenience and necessity require the exercise by the said New 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. [emphasis added]

This order simply transferred existing authority of Green Light & Power to a new company, West Missouri Power Company. No additional authority was conferred and Aquila has not shown that the authority thus transferred pursuant to this order contained any right to build generation facilities in Cass County.

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<sup>1</sup> In re Union Electric Company, 24 Mo. P.S.C. (N.S.) 72 (1980).

<sup>2</sup> Mo. Public Service Commission Case No. 3171 (1921).

In a subsequent order the Commission authorized the issuance of preferred stock for the purpose of:

... [E]xtensions and additions to distribution systems and street lighting systems now or hereafter owned by said company in Jackson, Cass, Bates, Henry, Lafayette, Johnson, Cedar, St. Clair, and Vernon Counties and for the reimbursements of moneys heretofore or hereafter expended for the acquisition of property, the construction, completion extension or improvement of the plants or distribution systems of said company; provided, that before any stock shall be issued for the reimbursement of moneys actually expended from income, a detailed statement of such expenditures shall be filed with and approved by the Commission ...

Again, nothing in this order gives authority for construction of generation facilities in Cass County. The order merely authorizes the issuance of preferred stock and restricts the use of the proceeds.

In 1938 the Commission entered an order in Case No. 9470. The order is important in that it appears to be the foundation upon which the majority bases its decision. The order, however, only grants authority to construct, maintain and operate electric transmission lines and distribution systems over, along and across the highways of several counties including Cass, and along such other routes as may be properly provided for in such counties and along private right of ways as may be secured by the utility. The order grants authority for the utility to serve all persons in the area for which the certificate is being granted in conformance with extension rules that the applicant has on file with the Commission, it is clear that the order does not pertain to generation facilities. In fact, the Harline court interpreting this same certificate concluded that it did not extend to the construction of generating facilities.

The last order mentioned is Case Number 11,892 decided in 1950. This order simply conveys to the Missouri Public Service Company all of the rights given to the Missouri Public Service Corporation in the 1938 Case No. 9470 order. There is no additional authority given.

Aquila could not either here or in the Cass County Circuit Court show where authority was given to construct generation in Cass County. The majority of the Commission found language in the orders referring to electric facilities and it is understandable how it could jump to the conclusion that

the authority was granted. However, all such references were broad-brush transfers of whatever authority a predecessor possessed. None of the orders except the 1938 order granted additional authority and that order only pertained to transmission and distribution systems.

### **III. Misreading of Harline**

If the majority is correct, the most disturbing thing about this case is the lack of protection of private property rights under Missouri law. If a utility wishes to put a generation facility in a residential neighborhood or as one citizen put it, next to the Nelson Art Gallery or next to a school, there is no entity that could stop such construction. It would not matter whether the siting is or is not in the public interest so long as the construction is within the certificated area of the utility, for there is no Court or administrative body that has the authority to stop it<sup>3</sup>. This is the reading that many, including the majority, have given the Harline case.

A close reading of Harline does not necessarily produce that conclusion. Harline only concerned the expansion of transmission (and distribution) lines. In fact the Harline court examined many of the same orders of the Public Service Commission which were analyzed here and by the Cass County Circuit Court. In the Kansas City Court of Appeals the appellants argued that transmission lines were electric plant and that specific prior approval under 393.170.1 was needed before expansion could occur. The Court rejected this argument and seemed to say that transmission is not "electric plant" and therefore does not require additional authority beyond that already granted under section 393.170.2 service area certificate requests.

The court states:

Appellants claim that sub-section 1 of Section 393.170 required the company to obtain an additional certificate to construct the transmission line. They say, with no authority except a reference to the statutory definition of "electric plant", that a transmission line is an "electric plant". Hence, it is argued, as no electric plant can be constructed without approval, and as a transmission line is an electric plant, therefore a transmission

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<sup>3</sup> It should be noted that permits for meeting environmental standards must be obtained from the Department of Natural Resources but such permits do not substitute for a public interest review.

line must have approval. We do not share those views. Sub-section 2<sup>4</sup> has no application. The record of this case shows that the company's electric plant had been constructed prior to 1938 and operated continuously since.

It is important to note this case does not deal with transmission expansion; it is about the siting of generation units and a substation. The Court in Harline found a reason to draw a distinction:

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. *Peoples Telephone Exchange v. Public Service Comm.*, 239 Mo. App. 166, 186 S.W.2d 531<sup>5</sup>.

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 [emphasis added]. Sub-section 2 "authority" governs our determination.

Under the Harline decision, construction of new electric generation plants, not including transmission and distribution lines, seem to require specific siting preapproval. Utilities in Missouri have been granted great power in exchange for the distribution of needed electricity in a growing nation. However, the grant of that power has always had some public interest oversight. If the majority is correct, in Missouri, there is no public interest analysis given to the siting of power plants – whether they be gas, coal, or nuclear. A certificate given to a utility to serve a territory covers large geographic areas. The Legislature could not have believed that the Commission, prior to granting a certificate, would analyze every possible location of a power plant within a proposed certificated area. Such a task would be impossible. In fact, the granting of such certificates does not include public policy reviews for siting generation facilities. The object of the grant is to give utilities the opportunity to serve the territory as a monopoly and the responsibility of providing adequate service to its customers within the territory. If the Public Service Commission does not conduct public interest reviews do they occur elsewhere? Certainly not in a condemnation process. The objective in that procedure is to determine the fair market value of the property condemned – not to scrutinize the

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<sup>4</sup> It seems plausible that the Court meant sub-section 1 rather than sub-section 2.

<sup>5</sup> Id 183.

utilities selection of a site. In a rate case the only analysis done by the Public Service Commission as to siting is after the plant is constructed and being used to determine whether expenditures were prudent.

The Western District has an opportunity to clarify the rights of property owners in the case from the Circuit Court in Cass County. The Court will have the ability to revisit the Harline case and state whether siting of generation facilities should be to be treated differently than transmission and distribution lines. It will also have before it the issue of the authority of counties in general or counties of the class of Cass County specifically to restrict siting by not granting sufficient authority in a franchise to construct generation. Further the Court could tackle the issue of the impact of zoning on such siting. Is it irrelevant and immaterial, is it important, or, is appropriate zoning required because of the unique circumstances tied to Cass County's classification? Most importantly, I hope the court takes the opportunity at a minimum to clarify the Harline case and provide the kind of public interest review of siting large generation facilities that the citizens of this state and their private property rights deserve.

Respectfully submitted,



Steve Gaw  
Commissioner

( S E A L )

Dated at Jefferson City, Missouri,  
on this 14<sup>th</sup> day of April, 2005.