BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Aquila, Inc. for a 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

STAFF'S RESPONSE TO AQUILA'S PROPOSED CLARIFICATION ORDER AND TO CASS COUNTY'S RESPONSE TO AQUILA'S PROPOSED CLARIFICATION ORDER

COMES NOW the Staff of the Missouri Public Service Commission and responds both to Exhibit 1, Aquila's suggested language for a Commission clarification order (proposed order language) from the Friday, February 25, 2005 on-the-record presentation in this case, and to Cass County's Response to Aquila's Proposed Clarification Order.

During the February 25 on-the-record presentation in this case, Aquila offered a three-page document, which was marked as Exhibit 1 and admitted into the record, which suggested some language for the Commission's consideration in a clarification order. This proposed order language is specifically directed to Aquila's request for a "clarification" order confirming that Aquila has authority under its current certificate of convenience and necessity (CCN) to construct facilities in Cass County, Missouri.

In its application, Aquila requests that the Commission issue an order confirming or "clarifying" that Aquila has specific authority in its current CCN to construct an electric generation plant and substation in Cass County, Missouri – the South Harper

facility or, alternatively, that the Commission to grant Aquila a specific CCN for the South Harper facility and the associated transmission substation.

It is Staff's understanding that Aquila proffers Exhibit 1 for purposes of its clarification-order request only. Aquila proposed language is specifically designed for an order granting relief on Aquila's first for an order confirming that it has authority under its current certificate of convenience and necessity (CCN) to build facilities in Cass County, Missouri.

Aquila cites a number of past Commission orders in its proposed language. Copies of these past Commission orders, on which Aquila relies, were filed with the Commission on February 25 and hand delivered to the Staff on February 28, 2005.

Aquila's request for clarification raises the question of whether Aquila has authority under or in its current CCN to construct the South Harper facility. Staff agrees that Aquila has accurately quoted the passages from these documents in its proposed order language and that, at some future time this language may be appropriate to include in a clarification order since the orders cited in the proposed order language are relevant to Aquila's authorization to serve its certificated area that Aquila has obtained from this Commission.

It is not unreasonable for Aquila to ask the Commission to confirm that Aquila has certain authority under its current CCNs. In a similar request for a CCN from Union Electric Company (UE) for authority to construct facilities in its certificated area, the Commission considered the function of a CCN and concluded that UE did not need any additional authority to build power plants in its certificated area beyond what it already possessed in its existing CCN. Case No. EA-79-119, *In the Matter of Union Electric*

Company for permission and authority to construct, operate and maintain two combustion turbine generating units in the State of Missouri, 24 Mo. P.S.C. (N.S.) 72 (1980).

In the above *UE* case, the Commission discussed the function of CCNs, noting that the utility company' powers are actually its corporate powers:

> The threshold question to be addressed in this proceeding is whether electric utilities under the Commission's jurisdiction must obtain our approval through the issuance of a certificate of convenience and necessity before it can build plant within its certificated area.
>
> Initially, it is relevant to discuss what function a certificate of convenience and necessity fulfills in the administrative process. A certificate of convenience and necessity does not grant a utility any powers it does not already possess. On the other hand, a certificate cannot take away any right or power then existing to the utility. The corporate powers of a utility are not found in a certificate of convenience and necessity. *State ex rel. City of Sikeston v. Missouri Utilities Company, 53 SW2d 394, 399* (Mo. banc 1932). A certificate only permits a utility to utilize those rights and privileges already conferred upon it. *State ex rel. Harline v. Public Service Commission, 343 SW2d 177 (Mo. App. KCD 1960).*

The Commission then discussed the Court's decision in *Harline*,[1] which addresses a CCN issued to Aquila's predecessor company, and this Commission's January 19, 1938 order in Case No. 9420. The Commission stated:

> In the *Harline* case, the court held that all corporate powers of a utility are derived from the State by virtue of its charter, which includes all enacted statutes. A utility derives from *Section 351.385, RSMo 1978* all powers necessary or convenient to affect any or all purposes for which it is formed. *Section 393.010, RSMo 1978* confers on the utility the special power to manufacture, sell and furnish electricity.

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[1] *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177 (Mo.App. 1960).

Considering that the utility company derives its powers from the Legislature in these statutory sections the Commission then posed the question of what is the purpose of a CCN:

> Having considered the above, then of what value is a certificate of convenience and necessity? The Commission is delegated the statutory authority to grant or deny an application for a certificate, after hearing, to protect the public interest. The statutory power gives the Commission a tool to regulate competition between utilities and to avoid the needless duplication of electric facilities. Thus, when a certificate is granted for a certain area, the Commission has determined through findings of fact and conclusions of law that the utility should operate within the certificated area. The certificate is the triggering mechanism that allows the utility to use the powers it already possesses.

24 Mo.P.S.C. at 77.

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?" 343 SW2d 183.

The Court 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 authority from the Commission being necessary, citing the Company's corporate charter and Section 393.130. *Id*. at 181. Further, the court concluded that the Company could fulfill its duty to provide electric service to its customers in its certificated area only if it continued to extend its lines and facilities as required. *Id.* at 177 (emphasis added).

The *Harline* case supports interpretation of the CCN granted in the 1938 Order No. 9470 as granting Aquila authority to construct whatever facilities it needs to comply with its duty to serve the public. The Commission's further discussion of *Harline*, in its order in the *UE* case demonstrates the Commission's understanding of the Court's decision. The Commission determined: "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." 24 Mo.PS.C. at 78.

In the *UE* case, the Commission declined to issue a CCN because UE had not made a timely application. The Commission did, however, leave open the possibility that a utility company might request authorization from the Commission for a CCN for electric generating plant construction in its certificated areas if timely application (before construction) were made. 24 Mo.PS.C. at 79.

What Aquila is requesting in its clarification order is that the Commission make a finding that Aquila has the specific authority to construct plant in its certificated area under its current operational authority from this Commission. Staff reads the *UE* decision, in combination with *Harline*, to mean that Aquila does not need further authorization from the Commission, that Aquila has the legal duty to serve its certificated area, and that it may engage in the necessary construction to do so under its current powers granted by statute and exercised under its current CCN. But, even though the company is not required to come to the Commission for authority to construct generating

facilities, the Commission may, in the proper circumstance, grant a utility company authority to construct generating facilities or other plant in its certificated area.

In addition to questioning the Parties regarding Aquila's proposed order language, the Commission had questions about the propriety of issuing an order when that order might be in opposition to the order issued by Judge Dandurand in Cass County Circuit Court. The Staff does not believe that an order by this Commission confirming that Aquila has authorization under its CCN to build this power plant would be in opposition to Judge Dandurand's order. Staff reads Judge Dandurand's order to find that, as an alternative to obtaining authorization under its county franchise, Aquila "must obtain" an order from this Commission. In construing Section 64.235, RSMo 2000, Judge Dandurand finds that either the Cass County franchise must give Aquila the specific authority to build a power plant, and that Aquila's 1917 franchise from Cass County does not, or that Aquila must obtain a specific authorization in its certificate of convenience and necessity to build a power plant. (Cass County Order at 3.) Staff does not find any language indicating that Judge Dandurand concluded or found that "Aquila's existing certificate of convenience lacks any language specifically authorizing or permitting construction of a power plant." (Cass County's Answer to Aquila's Proposed Clarification Order at 2.) Instead Judge Dandurand says the Company must "obtain" authorization which means to get, or acquire, authorization or "to succeed in gaining possession of by planning" (The American Heritage dictionary of the English Language 3rd ed. p. 1250.) A clarification order in this case would not be in opposition to the Cass County Circuit Court's Order.

Besides questioning the Parties as to whether the Commission would be in opposition to Judge Dandurand's order, the Commission had questions concerning its past practice in construing its own orders. In response to that question, Staff has found several such instances:

In the 1973 *GTE* rate case, *In the Matter of General Telephone Company of the Midwest Grinnell, Iowa for the authority to file tariffs increasing rates for telephone service provided to customers in the Missouri service area,* 21 Mo. P.S.C. (NS) 257, the Commission construed numerous past orders:

> In Re Springfield City Water Company, 83 PUR (NS) 213 (Mo. 1949), the Commission eliminated from the utility's rate base the cost of construction services (i.e. consultation, purchasing, and engineering) furnished by the parent company where the actual cost of the service performed by the parent company was in dispute. In Public Service Commission v. Empire District Electric Company, 10 PUR (NS) 302 (Mo. 1935), The Commission stated that construction fees should be limited to the cost of services actually rendered excluding any profit to affiliates and that such fees should not be in excess of payments made for similar services elsewhere. See also, Public Service Commission v. Kansas City Power & Light Company, 30 PUR (NS) 193, 202 (Mo. 1939). Furthermore, the Commission has held that it has the power to disallow as an operating expense unreasonable payments to affiliated interest for services, notwithstanding the existence of a contract between the affiliated companies. Public Service Commission v. Missouri Southern Public Service Company, 6 PUR (NS) 269 (Mo. 1934):
>
> To say that the holding company must receive profits upon the activities of service companies, such profits being chargeable to the expenses of the operating utilities and being made the basis for rates charged to the public to enable the companies to finance additions and extensions, is to permit duplication. The return upon the property is allowed for that very purpose (among others) and to allow for it again as a profit upon service fees is to charge twice for the same thing, at the expense of the consuming public. This obviously is unfair and results in the holding company receiving a return greater than that to which it is entitled. The imposition of or attempts to impose duplicate costs and profits into the utility rate structure on the part of some utilities, is one of the reasons why the industry as a whole is growing in disfavor in the

minds of the public.

Therefore, the Commission previously construed its own orders in this case in examining transactions with affiliates. The Staff believes the Commission has jurisdiction to do so in this case as well.

The Commission has similarly construed past decisions and orders in the following cases:

Inter-City Beverage Co., Inc., North Kansas City Beverage Company, Inc. Meiners Thriftway, Inc. d/b/a Meiners Sunfresh, Fixtures Manufacturing Corporation, d/b/a Fixtures Furniture, Hamar, Inc., d/b/a Harry's Factory Outlet, Edcor Safety Equipment Co., Inc. Meiners Country Mart, Inc. Wally's Thriftway, Inc., Complainants, v. Kansas City Power & Light Company, Respondent. 1996 Mo. PSC LEXIS 20, 5 Mo. P.S.C. 3d 4.

In The Matter Of The Application Of Activetel L.D., Inc. For Certificate Of Service Authority To Provide Shared Tenant Services Within The State Of Missouri; In The Matter Of The Application Of Activetel L.D., Inc. For Certificate Of Service Authority To Provide Shared Tenant Services Within The State Of Missouri; In The Matter Of The Application Of Activetel L.D., Inc. For Certificate Of Service Authority To Provide Shared Tenant Services Within The State Of Missouri; In The Matter Of The Application Of Activetel L.D., Inc. For Certificate Of Service Authority To Provide Shared Tenant Services Within The State Of Missouri. 1996 Mo. PSC LEXIS 78; 4 Mo. P.S.C. 3d 388

In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for the Issuance of an Accounting Order Relating to Gas Safety Projects and Clarification of Accounting for Certain Other Assets, Including Ones Relating to Gas Safety Projects. 1994 Mo. PSC LEXIS 39; 3 Mo. P.S.C. 3d 201.

In summary, the language suggested by Aquila for a clarification order states the basis for its request that the Commission issue an order clarifying or confirming that Aquila has the authority in its current CCN's from this Commission to construct facilities in its certificated area to serve the public interest. At this point it is premature to actually consider the pleading as a proposed order. As noted above, the Commission cannot make any determination unless and until there is a sufficient record on which to base its order. While a set of facts, which was stipulated to in the Cass County Circuit Court hearing,

was submitted, it was not admitted into the record during the February 25 on-the-record hearing, so no facts have been developed in this case. This issue will be discussed more fully in Staff's Response to Motions to Dismiss which will follow.

The Commission would not be violating or contradicting Judge Dandurand's order, in that the Cass County Circuit Court's order specifically stated that there are two ways that Aquila could meet the requirements of §64.235. One of those ways is for Aquila to "obtain" specific authorization from the Commission. Thus, Staff reads the order as saying that if Aquila "obtains" an authorization "in" its CCN from this Commission, that is one way that Aquila may comply with the zoning statute.

Staff has provided information concerning the Commission's past practice of interpreting its own orders and it is Staff's opinion that it is reasonable, and even necessary, for the Commission to continue that practice.

WHEREFORE the Staff files its evaluation of the proposed language for a Clarification Order that was entered into the record as Exhibit 1, its recommendation concerning whether a Commission order would violate the Cass County Circuit Court's order and the Commission's practice of interpreting its own past orders in subsequent cases.

Respectfully submitted,

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/s/ Lera L. Shemwell

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record this 4th day of March 2005.

/s/ Lera L. Shemwell_____