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March 2, 2005

FILED

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Missouri Public  
Service Commission

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

Re: Case No. EA-2005-0248

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of Cass County's Response to Aquila's Proposed Clarification Order.


Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
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MWC:ab  
Enclosure

cc: Office of Public Counsel  
General Counsel's Office  
Paul A. Boudreau  
Gerard Eftink  
Debra L. Moore

FILED

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

During the parties' on-the-record presentation to the Commission on February 25, 2005, Aquila, Inc. (Aquila) submitted as Exhibit 1 its proposed form of a "clarification order" which it contends is the preferred outcome of a truncated procedural schedule set out in the Joint Response to Commission Order filed on or about February 18, 2005. At the close of the on-the-record presentation Cass County reserved an opportunity to respond to the proposed order. Also on February 25, 2005, at the direction of the Commission, Aquila submitted electronically a series of certificates of convenience and Commission orders that Aquila contends support its arguments that Aquila has already acquired the Commission authority to construct the South Harbor facilities. Hard copies of those certificates and other Commission orders, which were more legible than the electronic versions, were delivered to the parties on February 28, 2005. Cass County submits this in response to Exhibit 1 and the documents Aquila has produced in purported support.

First, it deserves repeating that Judge Dandarand's Final Judgment<sup>1</sup> has not invalidated any Commission rule or regulation or directed a change in the Commission's practices or procedures. The Judge has not directed the Commission to engage in any kind of proceeding or to refrain from any proceeding. His judgment interprets a zoning statute and its application to a regulated utility.

Judge Dandarand's decision does lend definition to the relationship of the parties however. His findings and conclusions are matters of law and form the issues presently pursued by Aquila on appeal. Those findings and conclusions cannot be ignored as the Commission undertakes the review of Aquila's application in the instant case. Judge Dandarand has concluded that Aquila's existing certificate of convenience and necessity lacks any language specifically authorizing or permitting construction of a power plant in unincorporated Cass County as required by Section 64.235, and therefore Aquila is not exempt from county zoning regulations in connection with construction of the South Harbor Plant and associated substations. Judge Dandarand has not directed Aquila to seek specific authorization from this Commission. Rather he has ruled as a matter of statutory construction that in order to be exempt from zoning regulations for construction of the South Harbor Plant, Aquila must have one of two things, and specific authorization from this Commission is one of them.

#### **The Proposed Clarification Order**

##### ***a. Exhibit 1 is a declaration of law.***

At the outset Cass County contends that Aquila's Exhibit 1 proposes to this Commission that it enter an order in direct opposition to the declaration of law issued by Judge Dandarand. Cass County developed this argument in its previously filed Motion to Dismiss and will not repeat it in full here. The Commission is powerless to render declarations of law, and labeling

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<sup>1</sup> See Appendix 2 to Aquila's application.

Exhibit 1 a "clarifying" or "supplemental" order does not change its effect. No degree of euphemism can change the stripes of this proposed order. Exhibit 1 is a declaratory judgment respecting the scope of the certificates of convenience and necessity and other orders issued by this Commission. Judge Dandarand has already rendered this judgment.

***b. The South Harbor Plant is not specifically authorized.***

Aquila bases its conclusion that it is authorized to build the South Harbor Plant and associated substations on the basis of essentially three decisions,<sup>2</sup> excerpts of which are quoted in Exhibit 1. Not a single order can reasonably be interpreted to confer that authority.

Case No. 3171 involved an application for authority to issue stocks. In the order approving the issuance, the Commission did not expand any of the authority already granted to Aquila or its predecessors. The Commission confined the company's expenditure of the new capital on its electrical assets. There was no mention of authority to build a plant with the new money.

Case No. 9470 involved an application for certificate of service authority and the Commission approved a certificate to construct transmission lines and distribution systems in several Missouri counties including Cass County. There is no grant of authority to construct a power plant.

Case No. 11892 involved a merger application where the Commission authorized Missouri Public Service Company to be the surviving company and exercise the authority issued

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<sup>2</sup> *In the Matter of the Application for Authorization of the Reorganization of the Green Light and Power Company, and for an Order authorizing the issuance of stocks and bonds.* Case No. 3171, Mo. P.S.C., Preliminary Order, December 6, 1921; *In the Matter of the application of the Missouri Public Service Corporation for a blanket certificate of convenience and necessity, authorizing it to construct, operate, and maintain extensions to its electric transmission and distribution lines in [described counties including Cass County]* Case No. 9470, Mo. P.S.C. January 18, 1938; *In the matter of the Application of (1) Missouri Public Service Corporation (a Delaware Corporation) and of Missouri Public Service Company (a Missouri Corporation) for authorization of a merger [and other relief]*, Case No. 11892, Mo. P.S.C. April 28, 1950. All of these cases predate the enactment of the Cass County Zoning Ordinance, the original form of which was enacted in 1959.

in Case No. 9470. Case No. 9470 granted authority to construct transmission lines and distribution facilities.

Exhibit 1 asks the Commission to adopt this conclusion:

Based upon a review of our prior orders, relevant decisions of Missouri appellate courts, as well as the facts that are not in dispute in this proceeding, the Commission hereby clarifies and confirms that the prior Certificates of Convenience and Necessity and other orders issued by this Commission specifically authorize and permit Aquila, as they authorized and permitted its predecessors, to build power plants, substations and other forms of electrical infrastructure, including the South Harbor Facility and the Peculiar Substation in Cass County Missouri, within the service territory that has been granted to Aquila and its predecessors by this Commission.

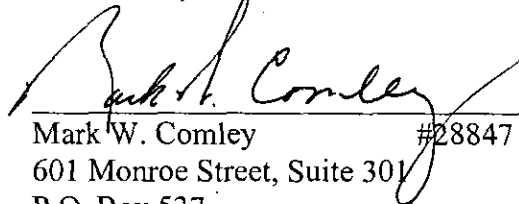
None of the prior orders of the Commission referred to in Exhibit 1 confer "specific" authority on Aquila to build the South Harbor Plant and associated substations in Cass County. None of the orders alter, modify or revise Aquila's limited authority to construct transmission facilities and distribution facilities in the county. Aquila's proposed order may delight the imagination but it is utterly lacking in foundation.

In sum, Aquila's proposed clarification order is unmistakably a declaration of law which the Commission is powerless to enter, and which contradicts the judgment of the circuit court of Cass County. Furthermore, it has no basis in the orders of this Commission. For the Commission to venture down the truncated procedural schedule toward entering such an order is error. If the Commission does not dismiss the application outright, it must consider the site specific authority that is alternatively requested by Aquila, and adopt a procedural schedule to permit meaningful participation by affected parties.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By:



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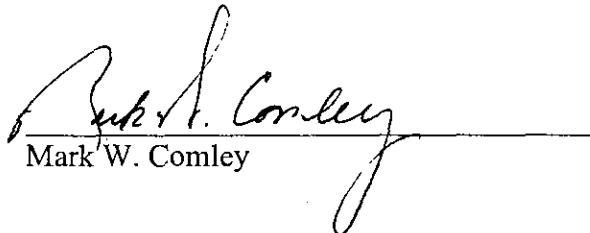
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ATTORNEYS FOR CASS COUNTY, MISSOURI

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 2nd day of March, 2005 to the Office of General Counsel at [gencounsel@psc.state.mo.us](mailto:gencounsel@psc.state.mo.us); Office of Public Counsel at [opcservice@ded.state.mo.us](mailto:opcservice@ded.state.mo.us); and Paul A. Boudreau at [paulb@brydonloaw.com](mailto:paulb@brydonloaw.com) and Gerard Eftink at [geftink@kc.rr.com](mailto:geftink@kc.rr.com) and [geftink@comcast.net](mailto:geftink@comcast.net).

  
Mark W. Comley