

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 20th day of
April, 2006.

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| In the Matter of the Application of Aquila, Inc. for |) | |
| Permission and Approval and a Certificate of Public |) | |
| Convenience and Necessity Authorizing it to Acquire, |) | |
| Construct, Install, Own, Operate, Maintain, and |) | <u>Case No. EA-2006-0309</u> |
| Otherwise Control and Manage Electrical Production |) | |
| and Related Facilities in Unincorporated Areas of |) | |
| Cass County, Missouri Near the Town of Peculiar. |) | |

ORDER DENYING MOTIONS TO DISMISS

Issue Date: April 20, 2006

Effective Date: April 30, 2006

On January 25, 2006, Aquila, Inc., applied to the Missouri Public Service Commission for a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri. StopAquila.org and Cass County filed motions to dismiss.

StopAquila.org

StopAquila.org argues that the Commission does not have jurisdiction to rule on Aquila's petition because Aquila does not have the required consent of proper municipal authorities required by Section 393.170.2, RSMo. Further, StopAquila.org argues that Cass County has the power to regulate location of buildings, and further argues that zoning regulations supersede other laws.¹ StopAquila.org cites several cases for the proposition

¹ Sections 64.255, .285 RSMo (2000)(all statutory cites are to Revised Statutes of Missouri 2000 unless otherwise noted.

that a utility must get permission from the county and this Commission to build a power plant.

In addition, StopAquila.org argues that Sections 393.170.1 and .2 require a utility to get permission before it builds a power plant. And, before the Commission can grant permission under Section 393.170.2, the applicant must first show the Commission that it has received the required consent of the proper municipal authorities. Quite simply, StopAquila.org contends that the Commission cannot approve a power plant after the fact.

Responses of Staff and Aquila

Staff and Aquila argue that the required local government consent is the franchise that Aquila already has, not the zoning authority that Aquila does not have. Also, they differentiate between a line certificate, which Section 393.170.1 addresses, and an area certificate, which Section 393.170.2 addresses. They submit that Aquila requests a line certificate, and that Section 393.170.1 does not require Aquila to have municipal consent for a line certificate.²

Furthermore, Aquila and Staff point to the *Aquila* opinion's statement that Aquila qualifies for an exemption from Section 64.235 RSMo³, and argue that the exemption from zoning authority would be meaningless if Aquila then had to get zoning authority to qualify for the exemption.

² *StopAquila.org v. Aquila*, 180 S.W.3d 24, 35 (Mo.App. 2005).

³ *Id.* at 32.

Discussion

Commission Rule 4 CSR 240-2.117 allows the Commission to grant motions for summary determination if the record shows that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that it is in the public interest. Upon review of the pleadings and after hearing the arguments of the parties, the Commission concludes that it should deny the motions to dismiss.⁴

StopAquila argues that Aquila must first obtain Cass County zoning approval for the facilities at issue here because, under Section 393.170.2, Aquila is required to show it has received “the required consent of the proper municipal authorities.” However, Section 393.170 provides two kinds of certificate authority – subsection 1, authority for a public utility to construct an electric plant, and subsection 2, authority to serve a territory.⁵

Aquila’s application is a request for a certificate of convenience and necessity under Section 393.170.1.⁶ Section 393.170.2, which contains the local consent requirement and which StopAquila urges the Commission to apply here, is simply inapplicable to this case. Sections 393.170.1 and 393.170.2 are not interchangeable.⁷ Subsection 1 “sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate. . . . The elements of proving the public necessity of a line are different

⁴ Commission Rule 4 CSR 240-2.116 is the Commission’s rule on dismissal. That rule allows dismissal when a party dismisses its petition or complaint, when the case languishes due to inactivity, when a party fails to obey a Commission order, or for good cause. Commission Rule 4 CSR 240-2.117 is the Commission’s rule on Summary Disposition, and is a more appropriate rule to use to decide the motions to dismiss, because the motions ask for relief as a matter of law.

⁵ *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960); *Aquila*, 180 S.W.3d at 33.

⁶ *Aquila*, 180 S.W.3d at 35.

⁷ *State ex rel. Union Elec. Co. v. Public Service Comm’n of Mo.*, 770 S.W.2d 283, 285 (Mo.App. 1989); *Aquila*, 180 S.W.3d at 33, 35.

from the test applied to proving the public necessity of area certificate authority.”⁸ Simply put, the local consent requirement in subsection 2 applies only to applications for area certificates, not to applications under subsection 1, as is the case here.

Further, even if Aquila were obligated to make such a showing, Aquila received the type of local consent contemplated by subsection 2 when, in 1917, and pursuant to what later became Section 229.100, the Cass County Court granted Aquila’s predecessor the right to utilize county rights of way.⁹ “Utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen.”¹⁰ The Supreme Court of Missouri has stated that “. . . the permission granted by a county court pursuant to Section 229.100 . . . to a public utility to use the county roads is a ‘county franchise,’ supplying the consent required by Section 393.170.”¹¹

The Commission rejects StopAquila’s argument that Aquila would be required to obtain county zoning approval for the facilities as a prerequisite to the Commission’s order granting Aquila’s application. In *Aquila*, the Court of Appeals recognized that Aquila qualifies for the exemption from county zoning found in Section 64.235 and further held that the approval required to exempt Aquila could come from either the Cass County

⁸ *Union Elec. Co.*, 770 S.W.2d at 285.

⁹ The 1917 franchise was presented to the Commission as part of the application in Case No. 9470 pursuant to what is now Section 393.170.2, resulting in the Commission’s issuance of the 1938 area certificate under which Aquila now serves most of Cass County, as well as several other counties. See *also* Appendix 6 to Aquila’s application in Case No. EA-2005-0248. The Commission takes administrative notice of this franchise.

¹⁰ *Union Elec. Co.*, 770 S.W.2d at 285.

¹¹ *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964)(quoting *In re Union Elec. Co.*, 3 Mo. P.S.C. (N.S.) 157 (1951)).

Commission or the Public Service Commission.¹² Thus, if the Commission approves Aquila's application, the facilities may be exempt from county zoning.

Next, StopAquila.org argues that Section 64.285, which gives first class non-charter counties the power to control land use, supersedes any other statute which would interfere with such power. According to that argument, Section 64.285 would then be an exception to Section 64.235, which would render the exemption in Section 64.235 meaningless. Furthermore, the *Aquila* court stated, "(b)ecause we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt."¹³ Put another way, Commission approval alone might be all that Aquila needs for South Harper. The Commission is unwilling to conclude that Commission approval alone is insufficient, at least at this stage of the case.

Finally, StopAquila.org argues that the Commission cannot retroactively approve Aquila's application for South Harper. In light of the Court of Appeals' statement that Aquila could still apply for permission for South Harper¹⁴, and in light of the Circuit Court of Cass County's order allowing Aquila until May 31 before the injunction against South Harper can be enforced¹⁵, the Commission is unwilling to conclude, as a matter of law, that it cannot consider Aquila's application.

¹² *Aquila* at 32.

¹³ *Id.* (emphasis supplied).

¹⁴ *Id.* at 41.

¹⁵ Circuit Court of Cass County, Case No. CV104-1443CC (Order dated February 15, 2006).

Cass County

Cass County also argues that the Commission has no authority to retroactively permit Aquila to build South Harper. It contends that the Court of Appeals, in related litigation between Cass County and Aquila, stated that a public hearing should be held before construction begins.¹⁶ In other words, Aquila is too late.

In the alternative, Cass County argues that the Commission should defer to the county, and should condition a potential certificate for South Harper upon Cass County's zoning approval. While the *Aquila* decision stated that either Cass County or the Commission can hold hearings relating to South Harper, Cass County argues that the Commission would be wise to leave land-use planning matters to the county.

Section 393.170.3 allows the Commission to impose conditions upon certificates and, Cass County argues, that the Commission should impose Cass County's zoning approval as a condition upon any certificate it may grant to Aquila. Cass County claims that to do so would be consistent with the Commission's history of recognizing the dual oversight that the Commission and local authorities have over siting power plants. Moreover, because Cass County is in the business of zoning, a land-use planning hearing before Cass County would be a far more efficient use of resources than would a similar hearing before the Commission, which is less experienced in those matters. What is more, Cass County points out that should the Commission decide to hear evidence on land-use planning, the Commission has no standards to guide it on how the land on which South Harper sits should be used.

¹⁶ *Id.* at 37-38.

Response of Aquila

Aquila believes that Cass County's argument completely ignores the *Aquila* opinion, which states that ". . . we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate." ¹⁷ Aquila argues that the Commission has the authority to consider land use issues for power plants proposed for first class non-charter counties, such as Cass County¹⁸. Furthermore, not only zoning, but other issues, such as identifying locations near load centers, identifying locations of existing gas pipelines that could deliver sufficient fuel at acceptable pressure, evaluating potential transmission infrastructure upgrades, evaluating access to water supplies, and considering construction issues, are more properly before the Commission, rather than Cass County. What is more, Aquila indicates that any attempt it would make to ask for Cass County zoning approval is doomed to fail, because Cass County is vigorously fighting to have South Harper dismantled.

Response of Staff

Staff believes that Cass County's argument discounts the Western District's opinion, as well as the Circuit Court of Cass County's order staying the injunction against Aquila until May 31. The circuit court obviously did so under the impression that Aquila could still get approval for South Harper. Staff states that the exemption in Section 64.235 would allow South Harper to remain if either the Commission or Cass County approved the

¹⁷ *Id.* at 41.

¹⁸ Section 64.235.

plant.¹⁹ Staff believes that Aquila has as much local consent as it needs through its franchise. Staff differentiates between a franchise, which is consent, and zoning, which is restriction, to advance its argument that zoning is not the consent contemplated in Section 393.170.2, .3.

Discussion

Cass County argues that the Commission cannot retroactively approve Aquila's application for South Harper. As mentioned in the StopAquila.org Discussion section, the Commission is unwilling to conclude as a matter of law that it cannot consider Aquila's application. This decision is in line with the concept that the Commission's authority over public utilities is sweeping and, as at least one court has observed, essentially includes everything except the power to operate and manage them itself.²⁰ Moreover, the Public Service Commission Act's provisions are to be "liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."²¹

Cass County argues in the alternative that any approval of Aquila's application should be conditioned upon the Company seeking, and obtaining, county zoning approval for the facilities. The Commission has the authority to impose conditions upon a certificate as it may deem reasonable and necessary.²² The Commission will wait until after the evidentiary hearing to decide what conditions, if any, that it may impose upon a certificate that the Commission may, or may not, grant Aquila.

For these reasons, the Commission will deny the motions.

¹⁹ *Aquila* at 32.

²⁰ *State ex rel. PSC v. Bonacker*, 906 S.W.2d 896, 900 (Mo.App. 1995).

²¹ Section 386.610.

IT IS ORDERED THAT:

1. The motions to dismiss filed by StopAquila.org and Cass County, Missouri are denied.

2. This order shall become effective on April 30, 2006.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton,
and Appling, CC., concur.
Gaw, C., concurs, with separate
concurring opinion to follow.

Pridgin, Regulatory Law Judge

²² Section 393.170.3.