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February 8, 2005

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

FILED

FEB 8 2005

**Missouri Public
Service Commission**

Re: Case No. EA-2005-0248

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of Suggestions in Opposition to Aquila's Motion for Expedited Treatment and Motion to Establish Accelerated Procedural Schedule.

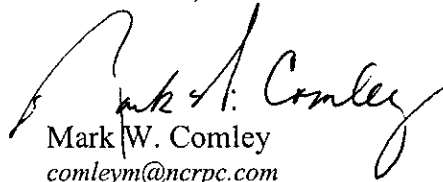
Would you please bring this filing to the attention of the appropriate Commission personnel.

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

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
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MWC:ab

Enclosure

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

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

FEB 8 2005

Missouri Public
Service Commission

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

SUGGESTIONS IN OPPOSITION TO AQUILA'S
MOTION FOR EXPEDITED TREATMENT AND
MOTION TO ESTABLISH
ACCELERATED PROCEDURAL SCHEDULE

COMES NOW the County of Cass, Missouri (Cass County), and respectfully moves the Commission to deny Aquila, Inc.'s (Aquila) Motion for Expedited Treatment and related Motion to Establish Procedural Schedule¹ and in support thereof, submits the following to the Commission:

a. **The Motions.**

On February 1, 2005, Aquila filed a Motion for Expedited Treatment of its Application in the captioned matter requesting that the Commission enter an order specifically confirming or granting the requested certificate of convenience and necessity by March 15, 2005, bearing an effective date of no later than March 25, 2005. In support Aquila argues that construction of the South Harbor Plant and associated electric substations is ongoing unabated despite the injunction

¹ These opposing suggestions are filed not as a waiver of the matters addressed in Cass County's Motion to Dismiss Application filed with the Commission on February 3, 2005; but rather are being filed to cover all contingencies in the event Cass County's Motion to Dismiss is overruled.

entered by Judge Dandurand; that construction of the facilities is under authority of Aquila's earlier obtained certificates of convenience and necessity;² that Aquila has already established the timeframe within which the new plant is to be operational and any delay in approving this Application would affect available power for the 2005 cooling season; that considerable financial resources have been committed to construction of the plant; and that because of these factors an expedited pace of the proceeding leading to approval of the certificate is warranted.

On February 4, 2005, Aquila filed a Motion to Establish Procedural Schedule proposing the adoption of an aggressive schedule that commits the Commission to an order by March 15, 2005. The schedule presumes that there will be no written testimony, and with an intervention deadline of tomorrow (February 8, 2005), reasonably envisions no other interveners except those whom have sought that status to date. Two days are reserved for hearing. Little time is given for discovery.

b. Discussion.

Provided the Commission decides to allow this Application to proceed,³ it should adopt a procedural schedule allowing sufficient time for intervention, for the discovery of relevant facts, and for the preparation of testimony. The time for completion of these tasks should be meaningful and should be set in proportion to the magnitude of the decision the Commission has been asked to render.

Aquila has applied for site authority to construct a major industrial grade addition in Cass County. It is now attempting to erect structures, over Cass County's vigorous objection, which, if operational, will amount to the most intense of uses on real estate. The uses proposed will

² In the Final Judgment, attached to Aquila's Application as Appendix 2, Judge Dandurand ruled that Aquila's present list of certificates from this Commission do not authorize construction of the South Harper Plant and the associated substations.

³ Cass County incorporates by reference its Motion to Dismiss Application as if fully set forth herein.

have a range of effects on county transportation systems, law enforcement, taxation, land use and the rights of adjacent property owners. Cass County has pointed out in other motions before the Commission how it is uniquely affected by the prospect of the South Harbor Plant and associated electric substations within its borders. Aquila has proposed a procedural schedule that accelerates the deadlines normally set in certificate cases. In effect, it has asked that the Commission render a decision on almost a "summary" basis, with limited participation by interested parties and with little or no time to explore salient facts and meaningfully craft the issues.

Cass County submits that issuance of the authority to construct a generation facility of South Harbor's dimensions and anticipated impacts deserves the full complement of procedural safeguards customarily afforded the staff and interveners in like cases. This would also include adequate time to investigate need, efficiency, site characteristics, and fuel sources to name a few relevant issues. The procedural schedule Aquila asks the Commission to approve is only slightly longer than what the law provides to evict hold over tenants. The establishment of a new power source on a multiple acre footprint in a first class county cannot be compared in scope with a rent and possession case. It would be violative of due process for the Commission to grant Aquila's motion to expedite and its companion motion to establish an accelerated procedural schedule.

Moreover, Aquila has not supplied a compelling reason for its motions. The circumstances pleaded by Aquila for these special exceptions are or were within its control. Aquila decided that it did not need Cass County approval or consent for the construction of the South Harbor Plant. It was Aquila that decided to continue construction of the South Harbor Plant despite entry of a permanent injunction which directs the demolition of the plant when its terms are final and unappealable; and it is Aquila that has decided to continue investing a

purported \$3 million per week in the South Harbor Plant. Aquila has been in control of the strategy it seeks to employ while a case of first impression is heard in our courts, and Aquila's strategic choices do not compel expedited process particularly when compared to the due process rights of Cass County and others who have a unique and distinct interest in whether this plant should be specifically authorized.

Moreover, Aquila fails to disclose in its motions that Judge Dandarand's Final Judgment will be handled on an expedited appeal with the voluntary consent and cooperation of Cass County. A copy of the parties' Joint Motion for Expedited Appeal is attached to these suggestions as Exhibit 1. The expedited appeal schedule has the case fully briefed by March 21st of this year and argued in early April before the Court of Appeals with a decision likely within approximately thirty days. Since the requests for relief in the Application, as presently written, are essentially the same legal issues already pending before the Western District Court of Appeals, an expedited proceeding before the Public Service Commission is not only unnecessary but inappropriate.

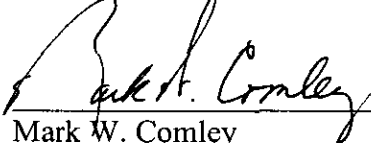
c. Conclusion.

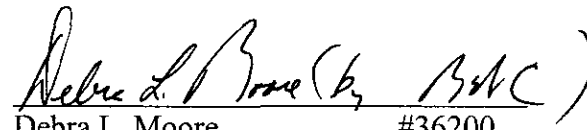
Based on the above, Cass County respectfully requests that the Commission deny Aquila's Motion for Expedited Treatment and related Motion to Establish Procedural Schedule.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

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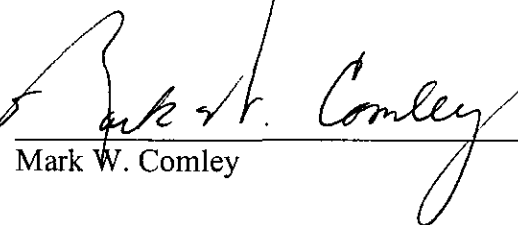

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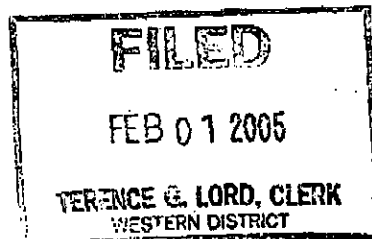
ATTORNEYS FOR CASS COUNTY, MISSOURI

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 8th day of February, 2005 to the Office of General Counsel at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; and Paul A. Boudreau at paulb@brydonlaw.com and Gerard Eftink at geftink@kc.rr.com and geftink@comcast.net.


Mark W. Comley

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT



CASS COUNTY, MISSOURI,)	
)	
Respondent,)	
)	
v.)	WD64985
)	
AQUILA, INC.,)	
)	
Appellant.)	
)	
)	

JOINT MOTION FOR EXPEDITED APPEAL

Appellant Aquila, Inc. ("Aquila") and Respondent Cass County, Missouri ("the County"), pursuant to Rules 81.20 and 84.05(a) of the Missouri Rules of Civil Procedure, hereby jointly move for an Order shortening the deadlines for filing the record on appeal and briefs, and expediting the setting of this cause on the docket for oral argument.

Specifically, the parties request the establishment of the following expedited schedule:

- Deadline for filing record on appeal – February 8, 2005
- Deadline for filing Appellant's brief – February 14, 2005
- Deadline for filing Respondent's brief – March 14, 2005
- Deadline for filing Appellant's reply brief – March 21, 2005
- Oral argument – April 2005

In support of this motion, the parties state as follows:

1. This appeal concerns Aquila's plan to construct a 315-megawatt ("MW"), natural gas-fueled electric peaking plant and an electric transmission substation on sites located in unincorporated Cass County. In early December 2004, the County sued Aquila in Cass County Circuit Court, Case No. CV104-1443CC, requesting that Aquila be enjoined from constructing

these facilities. The County's primary argument was that Aquila was subject to the County's zoning ordinances, and that the proposed plant and substation were impermissible uses of the properties which are zoned agricultural. Earlier in November 2004, a group of private landowners had filed a similar suit against Aquila in Cass County Circuit Court (Case No. CV104-1380CC), seeking an injunction to halt the construction of these facilities.

2. The key issue in this case is whether Aquila, a regulated public utility operating under Certificates of Convenience and Necessity and other orders issued by the Missouri Public Service Commission ("PSC"), is exempt from the County's zoning ordinances under Section 64.235, RSMo (2000). This case presents significant issues of law involving, among other things, the nature and extent of the control by local authorities over the activities of regulated public utilities. Several of the issues in this case have not been directly addressed by Missouri appellate courts.

3. The two suits against Aquila were consolidated by Circuit Judge Joseph P. Dandurand, and the matter was heard on plaintiffs' motions for preliminary injunction on January 5 and 6, 2005. On January 6, 2005, Judge Dandurand severed the County's case from the action filed by the private plaintiffs and stayed that case. He advanced the trial of the County's action on the merits with the hearing on its request for a preliminary injunction pursuant to Rule 92.02(c)(3), and entered a permanent injunction against Aquila to halt construction of the plant and substation. Judge Dandurand's ruling also contained an order that Aquila remove anything that has been constructed which is inconsistent with the agricultural zoning of the properties. On January 6 Judge Dandurand also ordered under Rule 92.03 that the injunction be stayed during the pendency of this appeal upon Aquila's posting a \$350,000.00 bond.

4. Judge Dandurand entered a final written judgment on the County's case on January 11, 2005. Aquila posted a \$350,000.00 surety bond on January 11 which the Circuit Judge approved. Aquila filed its Notice of Appeal on January 12, 2005.

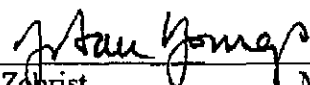
5. Having posted the bond, Aquila is continuing with construction activities at the two project sites. Aquila contends these facilities must be able to generate and transmit power by June 2005 with the advent of hot weather. Otherwise, Aquila contends it will be forced to supply that power by purchasing electricity on the wholesale market that will cost Aquila at least \$1 million. Aquila will soon reach significant construction and financial milestones that involve, among other matters, the transportation and installation of three 105-MW natural gas-fueled turbines at the plant site. Aquila contends it will incur construction costs of approximately \$3 million per week through March 2004, and has estimated that the total project costs will exceed \$144 million. Given these obligations, the time deadlines under which Aquila is operating, and the language in the Judgment requiring it to remove any construction that is inconsistent with the current agricultural zoning of the properties, Aquila requires an expedited review of the issues in this appeal.

6. The County has alleged that the construction of these facilities violates its zoning ordinances and is an affront to its police powers. The County believes that those powers specifically charge it with the right and responsibility to promote and protect the health, safety, convenience, prosperity and general welfare of its inhabitants through, among other things, the zoning laws which it claims Aquila has violated. Therefore, the County requires a prompt resolution of this appeal, as well.



7. Given the need of both Aquila and Cass County for a prompt resolution of the issues in this appeal, the parties have jointly agreed upon the proposed schedule set forth above, and represent to this Court that they will abide by it.

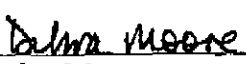
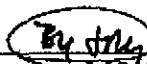
WHEREFORE, Aquila, Inc. and Cass County, Missouri jointly request an Order expediting this appeal as proposed above, and for such other relief as the Court deems just and proper.

Respectfully submitted,


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