

Exhibit No.:
Issues: Land Use
Witness: S. Mark White
Sponsoring Party: Aquila Networks-MPS
Case No.: EA-2006-0309

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Missouri Public
Service Commission

Before the Public Service Commission
of the State of Missouri

Surrebuttal Testimony

of

S. Mark White

Exhibit No. 14
Case No(s). EA-2006-0309
Date 4-26-06 Rptr KF

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI
SURREBUTTAL TESTIMONY OF S. MARK WHITE
ON BEHALF OF AQUILA, INC.
D/B/A AQUILA NETWORKS-MPS
CASE NO. EA-2006-0309**

1 Q. What is your name and position?

2 A. My name is S. Mark White. I am a Partner with White & Smith, LLC.

3 Q. What is the nature of your business?

4 A. White & Smith, LLC is an urban planning and law firm.

5 Q. What are your professional qualifications?

6 A. I am a certified planner with a Masters in Urban and Regional Planning, and a
7 land use attorney. My qualifications are summarized in my resume (attached).

8 In particular, I have published articles relating to land use classification.

9 ("Classifying and Defining Uses and Building Forms: Land-Use Coding for

10 Zoning Regulations," *Zoning Practice* (American Planning Association,

11 September 2005)) and the need for regional or state review of locally unpopular

12 land uses ("State and Federal Planning Legislation and Manufactured Housing:

13 New Opportunities for Affordable, Single-Family Shelter," 28 *The Urban*

14 *Lawyer* 263 (Spring 1996); "Affordable Housing: Proactive and Reactive

15 Planning Strategies" (American Planning Association, Planning Advisory

16 Service Report No. 441, December 1992)).

17 Q. What is the purpose of your surrebuttal testimony?

18 A. I am responding to the rebuttal testimony filed by Mr. Bruce G. Peshoff. At

19 page 7 of his testimony, Mr. Peshoff indicates that the South Harper Peaking

20 Facility and Peculiar Substation were not given adequate development review.

21 My testimony indicates that the location and design of the South Harper Peaking

22 Facility and the Peculiar 345kV Substation are consistent with sound planning

1 principles, were sited using defensible planning practices, are compatible with
2 surrounding development, and are consistent with the Cass County
3 Comprehensive Plan.

4 Q. What documents have you reviewed in preparing this testimony?

5 A. I have reviewed the Special Use Permit applications dated January 2006 for the
6 Aquila Peculiar 345 kV Substation Project and the South Harper Peaking
7 Facility Project, the Cass County, Missouri Comprehensive Plan Update 2005,
8 the Cass County Zoning Order and Subdivision Regulations, and Mr. Peshoff's
9 Rebuttal Testimony dated April 4, 2006.

10 **I. Comprehensive Plan/Zoning Order**

11 Q. Does Mr. Peshoff make reference to a Cass County Comprehensive
12 Development Plan?

13 A. Yes. At page 11 of his testimony, Mr. Peshoff discusses the origination of a
14 Cass County Comprehensive Plan and then provides a brief review of a number
15 of amendments and modifications to the original plan that have taken place in
16 recent years.

17 Q. What is a "comprehensive plan"?

18 A. A comprehensive plan is the statement of a jurisdiction's land use policies.

19 Q. What is the role of the comprehensive plan in the land development process?

20 A. Missouri follows a practice known as the "unitary" view, which is consistent
21 with the majority of states. The "unitary" view means that the plan may be
22 found in the text of the zoning ordinance itself, or in a separate document. In a
23 "unitary" view state, there is no hard and fast rule that all development must
24 conform to the comprehensive plan. However, the comprehensive plan is used
25 as a guide to determine whether a particular land use is compatible with its

1 surroundings, and as a basis for developing a local land use regulation such as
2 zoning and subdivision controls.

3 Q. In land use matters, is there something known as the "consistency doctrine"?

4 A. Yes. Some states require that zoning and land use regulations conform to the
5 comprehensive plan - the so-called "plan as law" or "consistency" doctrine.

6 Other states provide that the plan is merely advisory. By statute or case law,
7 several states have mandated that land use decisions implementing the
8 comprehensive plan, such as rezonings, permit approvals, and subdivision
9 approvals, must also conform to the comprehensive plan. In Missouri, the plan
10 is considered advisory, not mandatory.

11 Q. Please explain.

12 A. The Missouri zoning statutes provide that zoning must be "in accordance with a
13 comprehensive plan." This language is typical of a unitary view state.

14 However, this phrase is not defined in the statute. A generally accepted
15 definition of the concept of consistency is found in the Florida Local
16 Government Comprehensive Planning and Land Development Regulation Act,
17 which provides:

18 A development approved or undertaken by a local
19 government shall be consistent with the comprehensive
20 plan if the land uses, densities or intensities, capacity or
21 size, timing, and other aspects of the development are
22 compatible with and further the objectives, policies, land
23 uses, and densities or intensities in the comprehensive plan
24 and if it meets all other criteria enumerated by the local
25 government.

1 Florida Statutes § 164.3194(3)(b). This definition is generally accepted in the
2 planning profession.

3 Q. At page 25 of his rebuttal testimony, Mr. Peshoff indicates that in assessing the
4 South Harper Peaking Facility, he applied the 2003 Cass County Comprehensive
5 Plan and the 1997 Zoning Ordinance. Are these the appropriate versions of the
6 Comprehensive Plan and Zoning Ordinance to apply to this project?

7 A. No. The 2003 version of the comprehensive plan is not the appropriate version to
8 apply to this project.

9 Q. Please explain.

10 A. The most recent versions of the Comprehensive Plan and Zoning Ordinance
11 should be consulted in determining whether the South Harper Peaking Plant and
12 the Peculiar Substation are compatible with surrounding land uses. According to
13 my document review, this is the document entitled "Comprehensive Plan Update
14 2005" dated February 1, 2005. This document indicates that it was adopted by the
15 Cass County Planning Board and the Cass County Commissioners.

16 Former versions of the Comprehensive Plan and Zoning Ordinance, such as the
17 2003 Comprehensive Plan and the 1997 Zoning Ordinance, do not apply to this
18 situation. Planning is a continuous and fluid process. This is exemplified in part
19 by the fact that, in the 2003 Plan, the land on which the South Harper facility is
20 now located, was designated a "Rural Density Tier" whereas now, the area on
21 which the plant sits is designated a "Multi-Use Tier". The significance of these
22 designations is discussed in more detail below. Land use policies and the
23 "vision" of the community as set forth in the Comprehensive Plan change to
24 accommodate changing conditions. The question of land use compatibility
25 requires only a comparison of the proposed use with current surrounding uses and
26 land use policies, not those that were in effect two years ago. The procedure

1 chosen by an entity to seek entitlement, and when it chose to invoke that
2 procedure, has nothing to do with whether or not a facility or the actual, physical
3 use of the property is compatible with surrounding land uses.

4 Q. Why does Mr. Peshoff use former versions of the Plan?

5 A. Mr. Peshoff apparently believes that former versions of the Comprehensive Plan
6 should be consulted because of his belief that Aquila was required to submit
7 applications for approval to the County in 2004, prior to construction (Peshoff
8 Rebuttal, page 25). First, it is my understanding that Aquila had been working
9 with the City of Peculiar on an annexation plan for this site until the end of
10 October, 2004. It is my understanding that Cass County was revising its
11 Comprehensive Plan during 2004 and took a formal action in November 2004 to
12 adopt the changes. Given the time to prepare an application for zoning or special
13 use permit, Aquila would not have made a filing until after the County had
14 already adopted the changes that now comprise the 2005 Comprehensive Plan.
15 Second, although Aquila was engaged in grading and excavation activities at the
16 Power Plant and Substation sites in late 2004, actual construction did not
17 commence until early 2005. Third, it is my understanding that the court of
18 appeals in December 2005 and the trial judge in January 2006 have determined
19 that Aquila may seek the appropriate authority for the South Harper Peaking
20 Facility from either the County or the Public Service Commission and have
21 chosen to seek authority from the latter body in this proceeding. To the extent
22 that the Public Service Commission evaluates land use issues associated with
23 these facilities in this proceeding, and utilizes the County Comprehensive Plan
24 and Zoning Order in its review, it should utilize the most current version.

25 Q. What policies of the Cass County Comprehensive Plan apply to the Peaking Plant
26 and the Peculiar Substation project?

1 A. The 2005 Plan is designed to accomplish a number of objectives, and balances
2 local land use policy with the type and nature of growth that Cass County is
3 experiencing. The plan acknowledges that the rural county does not have needed
4 infrastructure (p. i), that limits on development must be balanced with private
5 economic interests (page 3), and that it is not a zoning document (page 3). In
6 addition, it recognizes that Cass County is experiencing rapid growth (pages 9-10)
7 that requires extensions of infrastructure and infrastructure capacity.

8 The 2005 Comprehensive Plan establishes a "tier" system to "help evaluate
9 proposed residential and commercial development" (2005 Plan, page 25). These
10 include the incorporated cities, Urban Service Tier, Multi-Use Tier, and Rural
11 Density Tier. The plan provides for most of the County's growth to occur in the
12 incorporated cities, Urban Service Tier, and Multi-Use Tier.

13 The Multi-Use Tier is located near cities, along paved highways and thoroughfare
14 roads (2005 Plan, page 25). The Plan encourages non-agricultural uses, "such as
15 commercial and industrial uses," in these areas. It also encourages urban services
16 in the Multi-Use Tier. This includes direct access to paved roads for large-scale
17 commercial or industrial development, and central wastewater treatment rather
18 than septic. This tier is "representative of development" in Cass County "that
19 exhibits the following characteristics":

- 20 • positioned as transition areas from urban to rural densities,
- 21 • located along rural highways, major arterials and intersections, or close
22 enough to such major roads to provide access for more intense levels of
23 non-agricultural traffic, and
- 24 • predominately developed for a mix of land uses: residential, industrial
25 and commercial purposes.

1 Q. Where are the projects subject to this proceeding located with regard to the Land
2 Use Tiers?

3 A. Both the Peaking Plant and the Substation are located in the Multi-Use Tier. This
4 is consistent with Mr. Peshoff's testimony on page 29, lines 18-21, that "[t]he
5 application correctly identifies the area for the Peaking Facility as being located
6 in a Multi-Use Tier..."

7 Q. How does the Plan provide for public utilities?

8 A. Public utilities are important to the pattern of "orderly growth" envisioned by the
9 Plan. The Plan provides that no land may be approved for urban services without
10 adequate public facilities, including electrical service (2005 Plan, page 27).
11 Public improvements must be located in Urban Service Area, city service area
12 ("generally" within 1.5 miles of a city) or inside the Multi-Use Tier.

13 Q. Are the locations of the Peaking Plant and Peculiar Substation consistent with the
14 pattern of land use envisioned by the 2005 Comprehensive Plan?

15 A. Yes. Not only are the facilities located in the Multi-Use Tier, but they are also
16 roughly 1.5 miles from Peculiar. These are not only the areas designated for
17 industrial uses, but are also the same areas reserved for public improvements that
18 are needed to meet the demands of existing and future growth.

19 Q. Are the Peaking Plant and Peculiar Substation consistent with the public facilities
20 policies established by the 2005 Comprehensive Plan?

21 A. Yes. As the policies recited above indicate, electrical services are needed to
22 accommodate the demands of future growth that are required in the County's
23 Urban Service Tier, Multi-Use Tier and Incorporated Areas. The plan requires
24 the phasing and extension of utilities (including electricity) by development (2005
25 Plan, page 28). Policy G1.1, R1.2 (residential) requires new urban development
26 to locate in and around incorporated communities where municipal services are

1 already present and encourage them to connect to those services. In addition,
2 public improvements must be completed within a prescribed time period (2005
3 Plan, page 31). This would be impractical in a remote location. The locations of
4 the Peaking Plant and Substation are proximate to urban development without
5 having to abut existing, higher density residential neighborhoods. This strikes an
6 appropriate balance between compatibility with urban residential development,
7 accommodating orderly development, and avoiding urban sprawl.

8 Q. What does the 2005 Plan say about land use compatibility?

9 A. The 2005 Plan includes a number of policies governing land use compatibility.
10 These include:

- 11 • Policy G1.2 provides for new urban development to occur contiguous to
12 existing development.
- 13 • Policy G1.3 provides for rural development in to occur in the Urban
14 Service Tier.
- 15 • Policies G2.1 and G2.2 provide, with regard to agricultural compatibility,
16 for industrial land use to develop where it will not become a nuisance to
17 normal farm operations.
- 18 • Industrial location policies are established in Objective I, page 42 of the
19 2005 Plan. These require direct or indirect arterial road access, adequate
20 services, minimizing negative impacts on the environment, buffering from
21 surrounding non-industrial uses, and screening.
- 22 • Policy P1.2 encourages public facilities to locate in industrial areas which
23 contain similar types of users.

24 Q. Are the Peaking Plant and Substation facilities consistent with these policies?

25 A. Yes. The facilities encourage new development in existing locations due to their
26 location near an incorporated area. The facilities include screening and

1 landscaping, and the majority of each site is undeveloped and will remain
2 undeveloped. In particular, the Peaking Plant is located immediately adjacent to
3 an existing gas compressor station.

4 Q. Are the Peaking Plant and Substation facilities compatible with agricultural uses?

5 A. Yes. In fact, agricultural uses can be intense. Residents in suburban areas often
6 complain of the noise and odors generated by agricultural uses. This condition is
7 widely recognized by urban planners (see Larimer County, Colorado Planning
8 Department, "Code of the West," at

9 http://www.co.larimer.co.us/planning/planning/code_of_the_west/index.htm).

10 Many states, including Missouri, have responded by enacting legislation that
11 protects agricultural uses from nuisance lawsuits (RSMo § 537.295).

12 Concentrated animal feeding operations (CAFOs), an agricultural use, have been
13 identified with health impacts, and many Missouri counties have passed health
14 ordinances to regulate their location and impacts. Therefore, agricultural uses can
15 be compatible with some kinds of industrial uses, especially those that do not
16 impair agricultural functions such as growing crops or livestock.

17 Q. From the perspective of the County's Zoning Order are the Peaking Plant and the
18 Peculiar Substation compatible with surrounding zoning classifications?

19 A. Yes. Each site is zoned "A" (Agricultural) under the Cass County Zoning Order
20 (2005). The predominant zoning of the surrounding areas is Agricultural, and the
21 predominant land use is either open land or low density residential. It is
22 important to note that, pursuant to the County's Zoning Order, the Agricultural

1 Zoning classification is NOT intended "for the development of low-density
2 residential areas." Cass County, Missouri Zoning Order, p.29 ¹.
3 A number of intensive land uses are permitted² in the Agricultural district. These
4 include the following:

5 **Table 1 Uses Permitted in Cass County "A" Agricultural District**

Special Use Permit	By Right or by Conditions in Supplemental Regulations
commercial feedlots, metal mining, coal mining, crude petroleum and natural gas, natural gas liquids, nonmetallic minerals, sawmills, fertilizer mixing, railroad switching and terminal svc, truck terminal, airports, communications, electric service and power generation, gas production, combination utility, water supply, sewage, sanitary landfill, correctional institutions	building contractors and construction, special trade contractors, food manufacturing, newspaper publishing, ship and boat building and repair, musical instrument and toy manufacturing, trucking and courier, services to buildings, automobile repair

6 The Peaking Plant and Substation are consistent with these uses, and are therefore
7 compatible with the zoning permitted on the site and the surrounding area.

8 Q. Are the proposed land uses compatible with the existing land uses in the area?

9 A. Yes. As is discussed above, the land uses are consistent with uses that are
10 already permitted in the Agricultural district. In addition, the special use permit
11 applications that were rejected by the County indicate that Aquila has taken a

¹ Thus, StopAquila witness Harold Stanley's continued characterization of the area surrounding the facilities as "residential areas" (Stanley Rebuttal Testimony, pp. 6, 9, 11, and 14) is inaccurate and misleading.

² Some of these uses are permitted only by special use permit. A special use is expressly recognized as an appropriate use for the district. A "special use permit" is described as "a species of administrative zoning permission which allows a property owner to put his property to a use which the regulations expressly permit under conditions specified in the zoning regulations themselves." *Ford Leasing Development Co. v. City of Ellisville*, 718 S.W.2d 228, 232 (Mo.App. E.D.1986), citing 82 Am Jur.2d *Zoning And Planning* Section 281 at 827 (1976). It allows a land use authorized by a local legislative body and deemed conducive to the general welfare of the community, but which may be incompatible with the basic uses in the particular location in relation to surrounding properties unless certain conditions are met. *State ex rel. Columbia Tower v. Boone County*, 829 S.W.2d 534, 538 (Mo.App. W.D.1992)." *Gray v. White*, 26 S.W.3d 806, 817-18 (Mo.App. 1999)

1 number of measures to mitigate impacts on its neighbors. These include noise
2 mitigation and screening. Aquila has worked with its neighbors on screening and
3 is committed to continuing with them to develop an adequate screening plan
4 (Application, 2-7). In addition, the low level of traffic is compatible with
5 agricultural and residential uses. For example, the Peaking Plant has only 6
6 employees. According to the Institute of Transportation Engineers, *Trip*
7 *Generation* (7th ed. 2003), a typical residence generates roughly ten (10) trips per
8 day. Accordingly, the number of trips expected at the facility is not significantly
9 in excess of a typical single family residence.

10 **II. Regional Considerations**

11 Q. As a general matter, who determines whether a particular land use or development
12 is consistent with the Comprehensive Plan?

13 A. In Missouri, zoning is normally assigned to local governments such as Cass
14 County. However, contrary to Mr. Peshoff's statement on page 8, line 25,
15 Missouri does not have "strong home rule practices." Home rule means that the
16 local government possesses all powers of local self government not denied by an
17 applicable state statute. While charter cities and counties have home rule, non-
18 charter entities, such as Cass County, do not. Non-charter entities are entirely
19 creatures of the state, and derive their authority from the applicable state statutes.

20 Q. So, when is review of local land use compatibility properly undertaken by a state
21 agency?

22 A. Where a facility or use provides regional benefits or is regionally significant, this
23 function can be assigned to a state agency. This is known as the doctrine of
24 "regional general welfare." This doctrine is designed to remove parochial barriers
25 to the siting and establishment of regionally significant land uses. The doctrine

1 applies not only to public facilities, but more often to private facilities ranging
2 from affordable housing to private utilities. A number of states, such as
3 Massachusetts, Connecticut, and Rhode Island provide for state agency review or
4 special court proceedings for low-income housing which normally encounters
5 local zoning obstacles (White, 1992, at 8-9). A number of states also provide for
6 regional or state review of the siting of solid or hazardous waste facilities.

7 Q. Are the facilities involved in this proceeding regionally significant?

8 A. Yes. These facilities are needed to provide adequate utility service to consumers
9 on a regional basis, avoid shortfalls in capacity, and to extend services to new
10 development in Cass County's incorporated and urban areas.

11 **III. Conclusions**

12 Q. What are your conclusions?

13 A. The Peaking Plant and Substation are located in Cass County's multi-use tier and
14 by definition are therefore consistent with the scheme of development envisioned
15 in the Cass County Comprehensive Plan, the County Zoning Order, the current
16 zoning classification of the site, and the surrounding land use and zoning. They
17 provide essential public services needed to accommodate existing and future
18 development demands. In addition, the regional need for the facilities outweighs
19 their local land use impact. The Peaking Plant and Substation are in the public
20 interest.

21 Q. Does this conclude your testimony at this time?

22 A. Yes.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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 otherwise Control and)
Manage Electrical Production and)
Related Facilities in Unincorporated)
Areas of Cass County, Missouri Near the)
Town of Peculiar.)

Case No. EA-2006-0309

AFFIDAVIT OF S. MARK WHITE

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)


I, S. Mark White, of lawful age, being duly sworn, do hereby depose and state:

1. My name is S. Mark White.
2. Attached hereto and made a part hereof for all purposes is my surreburtal testimony.
3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my personal knowledge, information and belief.



S. Mark White

Subscribed and sworn to before me, a Notary Public, this 15th day of April, 2006.


Susan L. Steen
Notary Public

My Commission Expires: Sept. 20, 2009

SUSAN L. STEEN
Notary Public - Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires: Sept. 20, 2009
Commission #05403588