

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Aquila, Inc.,)
for Authority to Acquire, Sell and Lease Back)
Three Natural Gas-Fired Combustion Turbine)
Power Generation Units and Related) Case No. EO-2005-0156
Improvements to be Installed and Operated in)
the City of Peculiar, Missouri.)

**DISSENTING OPINION OF COMMISSIONER
ROBERT M. CLAYTON III**

This Commissioner dissents from the majority's Order Granting Motion For Reconsideration. The majority Order sets aside a previous order suspending the evidentiary hearing which, in effect, held the case in abeyance until other issues involving a collateral case were resolved. This matter involves power plant financing arrangements for Aquila and the City of Peculiar in which the parties pray for certain financial findings and authorization to move forward with Chapter 100 municipal bonding.

Without dwelling on the tedious and painful history of this fledgling power plant near Peculiar, Missouri, the pertinent facts and procedural history are as follows. Aquila sought construction of a 315 MW combustion turbine power plant in Cass County, Missouri, near the community of Harrisonville. Aquila alleges it has a need for additional peaking generation following its release from obligations and corresponding rights to capacity from the jointly owned Aries facility, owned in partnership with Calpine. Following an outcry from the public and apparent lack of support from local

leaders, the project location focus changed to unincorporated Cass County near Peculiar. The power plant is referred to as the South Harper facility.

Aquila held various discussions with Peculiar officials and believed that it had all of the local support necessary for the project. In addition, Aquila assumed that because it held various certificates of convenience and necessity, held the electricity utility franchise for the area and had provided electricity to the area since 1917, that it had attained the necessary regulatory approval for power plant construction and, therefore, was exempt from additional local franchising regulation and zoning restrictions.

On November 15, 2004, a Petition was filed by StopAquila.org in the Circuit Court of Cass County seeking an injunction against Aquila from proceeding with the construction of the power plant. On December 1, Cass County filed a similar petition. After evidentiary hearing and legal arguments in the case that Cass County filed, the Court issued an injunction halting construction of the plant. The Court held that Aquila was either required to have approval from the local zoning or franchise authority or it must have "specific approval" from the Missouri Public Service Commission. The Court found that Aquila had neither. Aquila posted an appeal bond to continue construction of the plant and immediately filed an appeal to the Western District Court of Appeals for a reversal of the decision.

While the case was on appeal, Aquila sought the "specific approval" referenced by the Cass County Circuit Court by filing an application before this Commission in Case No. EA-2005-0248. In that case, Aquila requested a "clarifying" order indicating that Aquila did have the necessary "specific authority" granted by previously issued certificates of convenience and necessity. In the alternative, Aquila requested that the

Commission issue a new Certificate of Convenience and Necessity giving “specific authority” to build the peaking facility. After hearing and argument, the Commission majority, of which this Commission was a member, held that after review of multiple certificates that Aquila did indeed have the “specific approval” necessary to construct the power plant according to prior Commission precedent and practice. The majority and dissenting opinions were referenced in arguments before the Court of Appeals for the original Cass County case.

On June 21, 2005, the Western District affirmed the Cass County decision and upheld the Circuit Court’s interpretation of the various statutes involved in the case. Aquila immediately filed an Application for Rehearing or in the alternative a Motion for Transfer to the Missouri Supreme Court. In the meantime, Aquila continues to finish construction of the power plant while it maintains its posted bond before the Court.

The matter presently before the Commission was set for hearing on July 13-14, with pre-filed written testimony, a schedule of witnesses and plan of discovery prior to hearing. The question is, does this Commission move forward with this case despite two contrary Circuit Court and appellate court rulings halting construction of the power plant? Secondly, should this Commission move forward in this case with its own decision now subject to review by the same Court who disagrees with this Commission’s statutory interpretation? ¹

This Commissioner does not believe that moving forward on this case would be a wise use of Commission resources considering that Aquila will need a Supreme Court reversal to continue with construction. The majority originally decided to hold the case

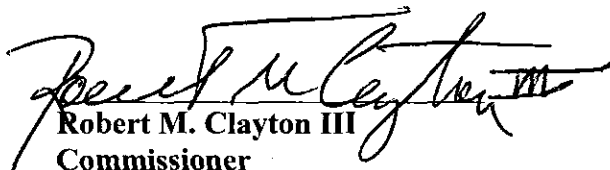
¹ The Commission’s decision has now been appealed to the appropriate court of appellate jurisdiction, which is the Circuit Court of Cass County. The review of the decision will be decided, most likely, by the same judge who issued the original injunction. See Case No. CV104-1380CC, Cass County Circuit Court.

in abeyance until a later date to determine how best to move forward with judicial direction. The majority now holds that "proceeding with this case, which is limited to determining the value of the turbines installed at Aquila's controversial South Harper location, does not conflict with Aquila's pending case at the Court of Appeals." P. 2, Order Granting Motion for Reconsideration. This case not only conflicts with the pending case, but is absolutely dependent upon it. This case is simply irrelevant unless and until the Western District or the Missouri Supreme Court reverses the Cass County Circuit Court's decision.

Until such time, this Commissioner believes that this case should be halted and that the Commission should wait at least until it knows whether the Court of Appeals will rehear the case or whether the Supreme Court will grant transfer of the case. Otherwise, any financing arrangement will have a dark cloud of uncertainty hanging over it. This Commissioner does not believe that the Commission should send such a message, nor should the Commission ignore the authority of a higher Court.

For the foregoing reasons, and without stating an opinion as to the merits of the underlying case, this Commissioner dissents.

Respectfully submitted,


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 10th day of August 2005.

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