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January 13, 2005

**FILED<sup>2</sup>**

JAN 13 2005

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. EO-2005-0156

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of a Motion to Suspend Proceedings and Cass County's Response to Aquila's Suggestions Opposing Intervention.

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  
comleym@ncrpc.com

MWC:ab

Enclosure

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

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

**FILED<sup>2</sup>**  
JAN 13 2005

Missouri Public  
Service Commission

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 Improvements to be )  
Installed and Operated in the City of )  
Peculiar, Missouri )

Case No. EO-2005-0156

**MOTION TO SUSPEND PROCEEDINGS**

COMES NOW the County of Cass, Missouri (hereinafter Cass County), by and through its attorneys, and moves to suspend these proceedings pending the outcome of appeals in Cass County, Missouri v. Aquila, Inc., Case No. CV104-1443CC in the Circuit Court of Cass County, Missouri. In support thereof Cass County submits the following:

1. This case arose upon Aquila's filing of an application to obtain from the Commission (i) a determination that its acquisition for its regulated Missouri electric utility operations from an affiliated entity of three (3) 105 megawatt natural gas-fired combustion turbines for the purpose of constructing an electric generation station in an area near the City of Peculiar, Cass County, Missouri does not provide a financial advantage to the unregulated affiliate, (ii) authorization to enter into a sale and leaseback arrangement with the City of Peculiar to facilitate the issuance of tax-advantaged Chapter 100 revenue bonds to finance the construction and operation of a power generation station and, (iii) authorization to cause said electric generation station to be subjected to the lien of the Indenture as security for the benefit of the holders of the revenue bonds.

2. As verified in Cass County's application to intervene in this matter, Aquila is already in the process of constructing the plant it refers to in its application (the South Harbor Plant) outside Peculiar, Missouri, which is an unincorporated area within Cass County.

3. On December 1, 2004, Cass County filed in the Circuit Court of Cass County a Petition for Declaratory Judgment, and for Temporary Injunction, Preliminary and Permanent Injunctive Relief against Aquila in which Cass County seeks to enforce its police power under Section 64.235, RSMo 2000. Among other things, this section requires all improvements constructed on area in unincorporated Cass County to be first approved by the County unless exempt from complying with the County's land use regulations by the express language in the statute. Aquila has not acquired Cass County approval for construction of this plant, nor has it acquired special authorization from this Commission. The case was assigned Case No. CV104-1443CC.

4. On January 11, 2005, the Circuit Court of Cass County entered judgment against Aquila and in favor of Cass County for the relief requested in the Petition. A copy of the Court's judgment is attached as Exhibit 1 (Final Judgment). As a consequence of the ruling,

Aquila, Inc., and all others acting in concert with, at the direction of, or behalf of, under contract with, or otherwise in collaboration with Aquila, Inc., are mandatorily and permanently enjoined from constructing and operating the South Harbor Plant, and from constructing and operating the Peculiar Substation, and are ordered to remove, at Aquila, Inc.'s expense, all improvements, fixtures, attachments, equipment or apparatus of any kind or nature inconsistent with an agricultural zoning classification placed, affixed or constructed at anytime, whether before or after this Judgment, upon the South Harper Power Plant or Peculiar Substation sites described in the evidence.

(Exhibit 1, Final Judgment, page 5)

5. Aquila has represented that it will appeal the Final Judgment and has already posted an appeal bond by which to suspend the injunction entered by the Court. With the

injunction suspended Aquila continues its construction of the South Harbor Plant. If the Final Judgment is affirmed on appeal, the injunction shall re-activate and so will its order and directive that all work done by Aquila on the plant shall be torn down.

6. The Final Judgment calls directly into serious question whether the Chapter 100 financing for which Aquila seeks approval will even be issued, as the South Harbor Plant, even if constructed, will be demolished if Aquila is unsuccessful on appeal.

7. Until the question of whether the South Harbor Plant can be lawfully constructed has been resolved, there is no immediate or compelling reason for this application to proceed. If as a result of all appeals the judgment of the circuit court is affirmed, the relief requested by Aquila in this application becomes moot. Any action this Commission may take on Aquila's application may be rendered meaningless by subsequent orders and opinions issued on appeal.

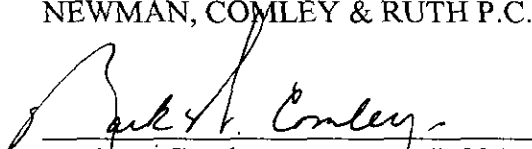
8. In the interest of conserving its resources, and preventing a potential waste of time and expense for itself and the parties, the Commission should suspend all proceedings involving this application until the Final Judgment is final and unappealable.


WHEREFORE, Cass County respectfully requests the Commission to suspend all proceedings involving this application until the Final Judgment is final and unappealable.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By:

  
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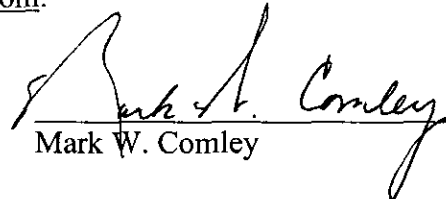
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ATTORNEYS FOR CASS COUNTY, MISSOURI

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 13th day of January, 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).

  
Mark W. Comley

**FILED**

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

JAN 11 2004

05 JAN 11 PM 2:30

STOPAQUILA.ORG, et al.,

Plaintiffs,

v.

AQUILA, INC.

Defendant.

) FILED  
) CIRCUIT CLERK CASS COUNTY CIRCUIT CLERK  
) CASS COUNTY, MO.  
) Case No. CV104-1380CC

CONSOLIDATED WITH

CASS COUNTY, MISSOURI,

Plaintiff,

v.

AQUILA, INC.,

Defendant.

Case No. CV104-1443CC

**FINAL JUDGMENT**

**CASE NO. CV104-1443CC**

**(SEVERED FROM CASE NO. CV104-1380CC)**

This Court convenes on January 5-6, 2005, for an evidentiary hearing on the Applications for Preliminary Injunctions filed by Plaintiff Cass County, Missouri and by Plaintiffs StopAquila.org, et al. against Aquila, Inc. These two actions were consolidated by previous order of this Court pursuant to Rule 66.01(b).

Plaintiff Cass County, Missouri appears by and through counsel of record Cindy Reams Martin of Cindy Reams Martin, P.C., and Debra L. Moore, Cass County Counselor. Plaintiff StopAquila.org, et al. appears by and through counsel of record Gerard Eftink. Defendant Aquila, Inc. appears by and through counsel of record Karl Zobrist, J. Dale Youngs, and Andrew Bailey of Blackwell Sanders Peper Martin, LLP. The Missouri Public Service Commission was,

on its Motion, granted leave to intervene in this case at the beginning of the hearing for the limited purpose of addressing possible conflict between Section 393.170 of the Revised Statutes of Missouri and Section 64.235 of the Revised Statutes of Missouri, and appears through General Counsel Dana K. Joyce, and through attorneys Steven Dottheim and Lera Shemwell.

On the pleadings and evidence adduced, and based upon the arguments of counsel, the Court makes the following findings and orders:

1. The Court, having previously consolidated these actions for hearing on the respective Plaintiffs' Applications for Preliminary Injunction, now severs Case No. CV104-1380CC from Case No. CV104-1443CC from this point forward, and for all purposes, pursuant to its discretion under Rule 66.01(b). All findings and orders hereinafter set forth relate to Case No. CV104-1443CC.
2. The Court adopts as its findings of fact all of the Joint Stipulated Findings of Fact entered into by the parties as reflected in the record.
3. The Missouri Public Service Commission was granted leave to intervene at the beginning of the hearing for the limited purpose herein described. At the conclusion of the hearing, the Court removes the Missouri Public Service Commission as a party to these proceedings with the consent of the Missouri Public Service Commission.
4. Because the Court has now severed Case No. CV104-1443CC from Case No. CV104-1380CC, and because Plaintiff Cass County, Missouri and Defendant Aquila, Inc. have rested with respect to their evidence on Plaintiff Cass County, Missouri's Application for Preliminary Injunction, the Court grants Plaintiff Cass County, Missouri's pending Motion to Advance Trial of the Action on the Merits with the hearing on Plaintiff Cass County, Missouri's

Application for Preliminary Injunction pursuant to this Court's discretion under Rule 92.02(c)(3).

5. The Court finds that the reference in Section 64.235 of the Revised Statutes of Missouri to "such" development is either vague or constructively meaningless and likely was intended by the legislature to mean "a" or "any" development. However, this Court specifically makes no conclusions of law regarding interpretation of the word "such" as used in Section 64.235. The Court bases its conclusions of law in this case as follows:

THE COURT FINDS that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not.

THE COURT FURTHER FINDS that to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants. No one else has such unfettered power; not landfills, bedrock quarries, and not processing plants. Although not any of these are exactly on point, even the Missouri Highway and Transportation Commission has to go through the condemnation process before a circuit court regarding roads. Roads and landfills, at least, arguably have as much to do with the public good and welfare as power plants. The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.



THE COURT FURTHER FINDS that irreparable harm to Plaintiff Cass County is both actual as it concerns potential damage to county roads and presumed by law as the Defendant's proposed actions violate existing County Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Count I of Plaintiff Cass County, Missouri's First Amended Petition requesting a Declaratory Judgment is dismissed without prejudice at Plaintiff's request as effectively duplicative of the relief hereinafter granted under Count II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of Plaintiff Cass County, Missouri, and against Defendant Aquila, Inc. on Count II of Plaintiff Cass County, Missouri's First Amended Petition. Plaintiff's request for a temporary restraining order and for a preliminary injunction restraining construction of the Peculiar Substation and the South Harper Power Plant are, therefore, granted. Further, this Court, having advanced the hearing and cause and determination and judgment and order of this Court to a final judgment, hereby enters a mandatory permanent injunction against Aquila, Inc. as prayed by Plaintiff Cass County, Missouri in Count II of its First Amended Petition, as follows:

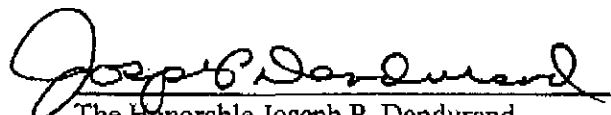
Aquila, Inc., and all others acting in concert with, at the direction of, on behalf of, under contract with, or otherwise in collaboration with Aquila, Inc., are mandatorily and permanently enjoined from constructing and operating the South Harper Plant, and from constructing and operating the Peculiar Substation, and are ordered to remove, at Aquila, Inc.'s expense, all improvements, fixtures, attachments, equipment or apparatus of any kind or nature inconsistent with an agricultural zoning classification placed, affixed or constructed at anytime, whether

before or after this Judgment, upon the South Harper Power Plant or Peculiar Substation sites described in the evidence.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction herein entered against Aquila, Inc. will be suspended, pursuant to this Court's discretion under Rule 92.03, during the pendency of any appeal by Aquila, Inc. from this Court's Judgment, subject to and conditioned upon Aquila, Inc. posting a \$350,000.00 cash or surety appeal bond in form satisfactory to the Court for the security of the rights of Cass County, Missouri. The bond shall reflect that Aquila, Inc. is held and firmly bound unto Plaintiff Cass County, Missouri in the sum of \$350,000.00 for the payment of which Aquila, Inc. and its surety, if applicable, bind themselves, on the condition that in the event the permanent injunction herein granted becomes a final non-appealable judgment, and/or is affirmed on appeal, then the bond shall be available to satisfy such damages, if any, deemed by the Court to have been incurred by Plaintiff Cass County, Missouri; otherwise the obligation shall be void. The Court finds that Plaintiff Cass County, Missouri has stipulated to a waiver of its rights under Rule 92.04 to seek from the Court of Appeals relief inconsistent with this Court's suspension of the injunction pending appeal.

IT IS SO ORDERED AND JUDGMENT IS HEREBY ENTERED, EACH PARTY TO BEAR ITS OWN COSTS.

Dated Jan. 11, 2005

  
The Honorable Joseph P. Dandurand