IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

CASS COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV104-1443CC
	)	
AQUILA, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF CASS COUNTY, MISSOURI'S SUGGESTIONS IN OPPOSITION TO DEFENDANT AQUILA, INC.'S MOTION TO EXTEND STAY OF INJUNCTION

COMES NOW Plaintiff, Cass County, Missouri ("Cass"), by and through its counsel of record, Cindy Reams Martin, P.C. and Debra L. Moore, Cass County Counselor, and for its Suggestions in Opposition to Defendant Aquila, Inc.'s ("Aquila") Motion to Extend Stay of Injunction ("Motion"), states as follows:

INTRODUCTION

Aquila seeks an order from this Court extending a stay of the Permanent Injunction entered by this Court on January 11, 2005 ("Judgment"). The County opposes Aquila's Motion. The County believes this Court lacks jurisdiction to grant Aquila's Motion. Even presuming this Court has jurisdiction to grant Aquila's Motion, the circumstances do not warrant this Court's exercise of its discretion to do so.

PROCEDURAL BACKGROUND

In the late fall of 2004, Aquila advised the County it intended to construct the South Harper Plant ("Plant") and the Peculiar Substation ("Substation") on agriculturally classified land, without first seeking the County's approval of the location for the Plant and Substation.

The County advised Aquila that it had no authority to proceed with construction of the Plant and Substation without first complying with the County's Zoning Ordinance and with the legislative scheme empowering the County to regulate land use, including R.S.Mo. § 64.235. Aquila nonetheless proceeded with construction of the Plant and Substation. The County was faced with only two options: (i) either ignore a significant violation of its Zoning Ordinance, and an invasion of its legislative authority to regulate land use; (ii) or pursue, at the unfortunate expense of the County's taxpayers, legal action to enjoin Aquila's blatantly defiant activities.

The County filed suit against Aquila on December 1, 2004, seeking temporary, preliminary, and permanent injunctive relief enjoining construction of the Plant and Substation. The County amended its Petition on December 8, 2004 to seek injunctive relief enjoining operation of the Plant and Substation as well.

This Court heard evidence and substantial argument relating to the County's request for preliminary injunctive relief on January 5 and 6, 2005. Prior to that date, the County had filed a motion to advance the hearing on the County's request for preliminary injunction to a final determination on the merits in accordance with Missouri Supreme Court Rule 92.02(c)(3). After hearing evidence and substantial argument, the Court granted the County's motion to advance the proceedings to a trial on the merits, and announced its intention to grant the County's request for preliminary and permanent injunctive relief, enjoining Aquila's construction and operation of the Plant and Substation. **[Transcript, pgs. 496-509]** The Court formally entered its Judgment on January 11, 2005. The Judgment provides:

> 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 <u>are ordered to remove, at Aquila, Inc.'s expense, all improvements, fixtures, attachments, equipment or apparatus of any kind or nature inconsistent with an</u>

> 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. [Emphasis added]**[Judgment, pgs. 4-5]**

The Judgment authorized Aquila, at its option, to post a $350,000.00 bond, upon which the Judgment's enforcement would be suspended pending appeal, pursuant to the Court's discretionary authority set forth in Rule 92.03. **[Judgment, p. 5]** With full knowledge and awareness of the risk and consequences of its choice, Aquila elected to post the $350,000.00 bond, and to proceed with construction of the Plant and Substation, pending its appeal of the Judgment. Aquila, a publicly traded company, thereafter invested $150,000,000.00 (according to Aquila) to construct the Plant and Substation, gambling that it could secure a reversal of the Judgment on appeal, but knowing that if it could not, the Plant and Substation had been ordered dismantled.

Immediately after the Judgment was entered, Aquila filed its appeal. On January 28, 2005, Aquila also filed an application ("Application") with the Public Service Commission ("Commission") asking the Commission to clarify that Aquila's prior certificates of convenience and necessity specifically authorized Aquila to construct the Plant and Substation, though the Judgment included an express finding to the contrary. **[Judgment, p. 3]** On April 7, 2005, the Commission entered an Order in which it concluded, in direct conflict with the Judgment, that the prior orders and certificates issued by the Commission conferred specific authority on Aquila to build the Plant and Substation. The County, as Relator, filed a Petition for Writ of Certiorari or Review ("Writ Case") from this Order, Case No. CV105 558CC, which action pends before this Court. Aquila intervened as a party to the Writ Case in support of the Commission. The Writ Case has been stayed by agreement of the parties pending Aquila's appeal from the Judgment.

On December 20, 2005, the Court of Appeals issued its opinion ("Opinion") and affirmed the Judgment. The Court of Appeals ruled: (i) that the Commission's extensive regulatory powers over public utilities do not pre-empt the authority of local governing bodies to regulate where a public utility builds a power plant; **[Opinion, pgs. 6-7]** (ii) that the legislature, in enacting R.S.Mo. § 393.170.1, a provision which directs that no utility shall begin construction of a gas or electric plant without first having obtained the permission and approval of the Commission, "did not give the Commission the authority to grant a certificate of convenience and necessity for the construction of an electric plant without conducting a public hearing that is more or less contemporaneous with the request to construct such a facility;" **[Opinion, pgs. 12-13]** (iii) that although the decision in State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177 (Mo. App. 1960) allows utilities to extend transmission lines in their territory without returning to the Commission to secure specific authority, the distinction made in Harline between transmission lines and electric plants (a distinction in accord with the plain language of § 393.170.1) prevents the extension of such authority to the construction of electric plants; **[Opinion, pgs. 11-18]** (iv) that the Commission erroneously extended Harline to authorize construction of power plants in a utility's existing certificated area when, in Union Elec. Co., 24 Mo. P.S.C. (N.S.) 72 (1980), the Commission, motivated by its administrative agenda, dismissed an application seeking specific authority to construct a power plant, then opined in dicta that such applications were unnecessary under Harline; **[Opinion, pgs. 16-19]** and (v) that Aquila's existing certificates and orders, including the April 7, 2005 clarification order Aquila sought and secured from the Commission after the Judgment, do not give Aquila the authority to build the Plant and Substation in an agricultural district in the County. **[Opinion, pgs. 22-24]**

The Court of Appeals concluded that "[b]y requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature assures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed." **[Opinion, p. 19]** The Court of Appeals thus affirmed the Judgment—a Judgment which permanently enjoined Aquila from building the Plant and Substation in violation of the County's zoning laws without first obtaining approval from the County or the Commission, as required by R.S.Mo. § 64.235. **[Opinion, p. 26]** In so doing, the Court of Appeals ruled a utility: (i) must secure contemporaneous Commission approval to construct a plant under Section 393.170.1 (i.e., authority as to whether the utility can construct a plant); and (ii) must secure local authority to construct the plant through an existing franchise, or by proposing the plant at a site either already suitably classified, or for which suitable classification has been secured (i.e., authority regarding where the utility can construct the plant).

Aquila's deadline for seeking rehearing and/or transfer of the Opinion expired on January 4, 2006 with no action taken by Aquila. The Court of Appeals mandate affirming the Judgment was issued on January 11, 2006 ("Mandate"). As a result, the Judgment is final and non-appealable. The Rule 92.03 suspension of enforcement of the Judgment pending appeal has automatically expired, as there is no longer a "pending appeal." Aquila voluntarily abandoned its appeal, knowing that the Judgment required Aquila to immediately remove the Plant and Substation. Aquila has been twice advised that the County would expect prompt and immediate compliance with the Judgment upon disposition of Aquila's appeal. (See August 16, 2005 letter attached hereto as **Exhibit A**; See January 5, 2006 letter attached hereto as **Exhibit B**.) Yet, Aquila has continued to operate the Plant and the Substation, and has taken no action to dismantle the Plant or Substation, in violation of the Judgment.

LEGAL ARGUMENT

I. This Court Does Not Have Jurisdiction to Extend the Stay of the Permanent Injunction Under the Facts and Circumstances of this Case.

Aquila accurately notes that under Rule 75.01, this Court lost jurisdiction to "vacate, open, correct, amend or modify its Judgment" thirty days after its entry. The Mandate unequivocally affirms the Judgment, and includes no language remanding this case with instructions. There is nothing, therefore, in the Mandate that restores jurisdiction to this Court as to empower the Court to vacate, reopen, correct, amend or modify its Judgment. Aquila requests this Court to exercise jurisdiction over the Judgment, nonetheless, and asks this Court to enter an order "extending the stay of the permanent injunction." This Court does not have jurisdiction to grant Aquila's request.

The initial fallacy in Aquila's request is its belief that this Court has, under any set of circumstances, the authority to stay enforcement of a judgment that has become final and non-appealable. Aquila essentially asks that the injunction be placed in a state of "extended" suspense, while it sets out to attempt to remedy, through means it may or may not have disclosed, the factual and legal conditions that gave rise to the injunction, which conditions remain, at this point, unchanged. There is no authority cited by Aquila, and none known to the County, which authorizes a trial court to suspend a prevailing party's right to seek enforcement of a judgment, including a permanent injunction, once appeals have been exhausted or abandoned, merely because the party bound by the judgment or permanent injunction claims it would be unjust or unfair not to do so. Not surprisingly, there is no authority cited by Aquila, and none known to the County, which authorizes a trial court to suspend a prevailing party's right to seek enforcement of a judgment, including a permanent injunction, once appeals have been exhausted or abandoned, for any reason.

Aquila's characterization of the relief it seeks as an "extension" of the stay originally afforded by the Judgment belies this jurisdictional infirmity. Though the Judgment includes provision for suspension of its enforcement pending appeal, this was relief the Court, in its discretion, was expressly authorized to provide under Rule 92.03.[1] **[Judgment, p. 5]** Rule 92.03 does not authorize, however, further suspension of a prevailing party's right to enforce a permanent injunction after appellate remedies have been exhausted. Aquila's Rule 92.03 suspension of the Judgment pending appeal expired upon Aquila's voluntary abandonment of its appeal. No "suspension of enforcement of the Judgment" remains for this Court to extend, even assuming it had the authority to do so. There is simply no provision in the Missouri Supreme Court Rules extending jurisdiction to a trial or appellate court to suspend enforcement of a judgment in the absence of a pending appeal. The practical effect of such an exercise of authority over this Judgment would be to deprive the County and its citizens of the benefit of a Judgment the County was forced by Aquila to secure, without recourse to Aquila, and with no provision in the Rules for the County's protection from loss or damage during the Judgment's post-appellate suspension.

The County appreciates the Judgment requires Aquila to immediately remove the Plant and Substation, an exercise that Aquila deems would be "wasteful" should Aquila subsequently secure the necessary authority it requires from both the Commission and the County to construct the Plant and Substation at their present locations. However, Aquila created this predicament. Aquila voluntarily erected the hazards it now seeks to evade. It proceeded with construction of the Plant and Substation when it knew the Judgment required Aquila to immediately remove the Plant and Substation should Aquila lose or voluntarily abandon its appeal. Any "waste" which

[1] There is a corollary to Rule 92.03 that extends similar authority to Courts of Appeal while an appeal is pending. See Rule 92.04.

results from enforcement of the Judgment is "waste" Aquila should have taken into account when it decided to proceed with construction of the Plant and Substation pending appeal. Aquila cannot manipulate its own "public policy" argument when it knowingly gambled that it would either secure reversal of the Judgment, or that the Plant and Substation, once built, would never be ordered dismantled, despite the clear language of the Judgment.

In effect, Aquila wants to pretend the Judgment does not exist. Aquila wants to buy time before it is obliged to comply with the Judgment so it can retroactively scramble to find some way to change the facts and/or the law which gave rise to the existence of the Judgment, all while Aquila continues to reap the benefit of operation of its illegally constructed Plant and Substation. It is immaterial that Aquila claims it will be "wasteful" to require the Plant's and Substation's dismantling. Aquila's claim is insufficient to create jurisdiction for this Court to perpetually suspend enforcement of a final, non-appealable Judgment. Moreover, Aquila's claim rings hollow in light of Aquila's calculated decision to risk the waste of its resources by proceeding with construction of the Plant and Substation despite the Judgment's mandatory directive that offending improvements be removed.

Recognizing this dilemma, Aquila attempts to conform its circumstances to the very limited exception to the general final judgment rule that recognizes a "court has authority to modify a permanent injunction which is based on a condition subject to change." Twedell v. Town of Normandy, 581 S.W.2d 438, 440 (Mo. App. E.D. 1979) Under the authority of Twedell, courts "retain jurisdiction to vacate or modify the terms of [an] injunction in order to avoid unjust or absurd results when a change occurs in the factual setting or the law which gave rise to its exercise." Id. at 440. It follows that a court does not have jurisdiction to modify a permanent injunction when there has been no change to the factual setting or the law which gave

rise to the injunction's existence. See C.L. Smith Industrial Company, Inc. v. Matecki, 914 S.W.2d 873, 877 (Mo. App. E.D. 1996)(trial court had no jurisdiction, under exception to general final judgment rule, to modify non-compete injunction that it had entered against former employee, since case did not involve claim of any change to factual setting or law which gave rise to the injunction). The "changed circumstances" rule is rarely employed. It extends limited continuing jurisdiction to a trial court to provide relief from an injunction when, after a permanent injunction has been entered, an intervening event or change in the law materially undermines or alters the basis for the injunction's issuance as to render further enforcement of the injunction absurd. For example, in Twedell, an injunction was issued to enforce a statute that prohibited extension of municipal control over private land used for "farming, gardening, horticultural or dairy purposes." Id. 581 S.W.2d at 440. When, 24 years later, the party enjoined demonstrated that the land in question was no longer used for "farming, gardening and horticultural purposes," the trial court modified the original injunction to conform to the change in the factual circumstances that had given rise to the injunction's issuance. Id. Aquila's circumstances do not comport to the requirements of, and/or to the intended purpose of, the "changed circumstances" rule.

Aquila is not seeking "vacation" or "modification" of the scope of the injunction because of an intervening event or change in the law that has undermined the basis for the Judgment's issuance. The Judgment was entered because Aquila was threatening to construct and operate the Plant and Substation without first complying with Section 64.235. **Nothing has changed since the entry of Judgment except that Aquila lost and then abandoned its appeal**. Neither the factual setting, nor the law, which supported the issuance of the Judgment, has changed. If anything, the factual circumstances giving rise to the Judgment have worsened, as Aquila, since

entry of the Judgment, has now completed construction of the Plant and Substation and continues to operate both illegally. Aquila argues that since there MAY be a future intervening event or change in the law that COULD undermine this Court's basis for issuing the Judgment, the Court should, essentially, temporarily vacate the Judgment's effect, while Aquila attempts to generate "changed circumstances" sufficient to warrant future permanent vacation of the Judgment. The "changed circumstances" rule is not intended to allow a litigant a "free pass," so that it can, if it fails to prevail in its view of the law, suspend the consequences of a permanent injunction while it attempts to erase the circumstances leading to the injunction's issuance.

In short, Aquila's stated intention to seek either a change in the zoning classification for the properties, and/or an order from the Commission specifically approving the Plant and Substation, is not a change in circumstances from the factual setting giving rise to the Judgment, and does not create jurisdiction for this Court to perpetually suspend enforcement of the permanent injunction. The only "change" between the circumstances predating the Judgment and the circumstances today is Aquila's newly expressed intention, having lost its appeal, to attempt to comply with the law, something which can no longer be accomplished, as the offending improvements have already been constructed in violation of the law. This is not the type of "change" envisioned by the "change in circumstances" rule. Aquila concedes it has not yet secured the necessary authority from the County or from the Commission for the Plant or Substation. *It is not, and cannot, be known whether Aquila will ever succeed in securing the authority it requires*. No actual or certain change in circumstances from the factual setting giving rise to the Judgment has been presented to this Court to invoke this Court's limited continuing jurisdiction to relieve Aquila from the permanent injunction, as no intervening event

has occurred since the entry of the Judgment which undermines or materially alters the reason for the Judgment's issuance. The "changed circumstances" rule does not apply to this case.

Aquila also argues that since the Court of Appeals rejected 25 years of Commission practice, a practice altered to serve the Commission's administrative self interests, the law which gave rise to the existence of the Permanent Injunction has changed. To the contrary. The Judgment was entered in reliance on, and consistent with, Harline (a 1960 decision), R.S.Mo. § 64.235 (enacted in 1959), and R.S.Mo. § 393.170.1 (enacted in 1913). This Court's interpretation and application of the law was affirmed by the Opinion. There has been no intervening change in the law which gave rise to the existence of the Judgment.[2] The Court of Appeals may well have derailed 25 years of erroneous Commission practice that had, by its very nature, effectively evaded judicial review until this case. However, neither the Commission's erroneous practices nor Aquila's argued interpretation of the law, served as the law on which this Court relied to issue its permanent injunction. Thus, Aquila's loss of its appeal, and the resultant rejection of Aquila's view of the law, are not representative of, and are, in fact, the antithesis of, the type of "change in the law" required to invoke this Court's jurisdiction to suspend enforcement of the injunction. Taken literally, the effect of Aquila's argument would be to extend to Aquila the same relief—relief from the obligation to comply with the judgment—it would have secured had the Court of Appeals reversed the Judgment! That, of course, is not what occurred. As there has been no intervening change in the law giving rise to the Judgment, this Court has no jurisdiction to suspend enforcement of the Judgment under the "changed circumstances" rule.

[2] After the Judgment, Aquila sought to introduce and secure passage of legislation in the form attached hereto as **Exhibit C,** drafted to expressly result in legislative reversal of the Judgment. Its attempts were not successful.

Stripped of its awkward attempt to comport its circumstances to those envisioned by the "changed circumstances" rule, Aquila's true agenda is revealed. Aquila desires a suspension of enforcement of the Judgment while it attempts to erase or alter the facts and/or the law which gave rise to the permanent injunction in the first place. If Aquila secures the suspension it requests, it can, over an indeterminate period of time, and while enjoying the benefits of its illegal Plant and Substation, explore multiple options to create future "changed circumstances." Aquila can attempt to seek, as it claims it will, the necessary authority for the Plant and the Substation from the County and the Commission. Though it has not revealed its plans to do so, given its prior attempt, Aquila may also intend to take advantage of any respite from the Judgment it is provided by this Court to seek a legislative remedy which could effectively circumvent the Judgment and the Opinion. (See fn. 2) All the while, the County will be denied the benefit of the Judgment, and Aquila will have had, with impunity, what it defiantly advised the County it wanted all along—the Plant and Substation constructed and operating by July 2005, without first (or maybe ever) complying with the County's land use regulations.

According to Aquila, it would be "absurd" to make Aquila comply with the Judgment if there is a chance it might later secure the necessary authority from the County and the Commission for the Plant and Substation. If by "absurd," Aquila is referring to the fact that it will actually be held accountable for its actions, and its knowing choice to proceed with construction of the Plant and Substation at its peril, given the terms of the Judgment, then so be it. The natural, logical and anticipated result of a party's loss on appeal is not an "absurd" result. Moreover, an alleged absurd or unfair result does not create jurisdiction under the "changed circumstances" rule in the absence of a change in the factual circumstances or the law giving rise to a permanent injunction's existence. It is apparent that: (i) Aquila either arrogantly presumed

it would not lose this appeal, and thus built the Plant and Substation paying no heed to this Court's order that said improvements be removed should the appeal be unsuccessful; or (ii) Aquila purposefully elected to build the Plant and Substation, though it knew of the risk described in the Judgment, believing, should it lose its appeal, it could manipulate a public policy argument that a forced dismantling of the Plant and Substation, now that both are constructed and operating, would be "wasteful." In either case, Aquila has created its own "absurd result." Aquila's plea that it should be spared from a predicament born of its own greed, arrogance, and sense of supremacy invokes no sympathy. Nor does it invoke this Court's jurisdiction to entertain or grant Aquila's request.

It is truly disheartening that Aquila continues to refuse to accept accountability for its actions, and continues to seek from others "equity" and "fairness" when it has deliberately engaged in behavior in defiance of the County's authority. Aquila has expressed "disappointment" that the County will not acquiesce to Aquila's request of this Court for suspension of the enforcement of the Judgment. The County has no ability to confer jurisdiction on this Court by consenting to Aquila's request. The County has repeatedly advised Aquila it has no prejudice against power plants—in fact it worked cooperatively with Aquila when Aquila constructed the Calpine plant in the County in 1999, at a time when Aquila was willing to submit to, and to act in conformance with, the County's land use regulations. But, as this Court noted in entering its Judgment, the County has been irreparably harmed by Aquila's defiance of the County's land use regulatory authority in connection with construction and operation of the Plant and Substation. **[Judgment, p. 4]** That irreparable harm continues, and has, in fact, been exacerbated by the now actual, as opposed to threatened, construction of the Plant and Substation since entry of the Judgment. It is, frankly, offensive that Aquila would have the audacity to

express "disappointment" in the County's refusal to forbear from enforcement of the Judgment given these circumstances. All the County has ever asked is that Aquila follow the law. Before this Judgment was entered, that would have required Aquila to submit to the County's land use regulatory authority before it constructed the Plant and Substation. Now that the County has been forced to secure a Judgment enjoining the Plant and Substation and ordering their removal, following the law requires Aquila to comply with the Judgment. The County is not "punishing" Aquila. It is simply expecting of Aquila what it expects of any land owner in the County. Follow the law, and if you chose not to, be prepared to abide by the consequences imposed by a judgment the County secures at taxpayer expense to enforce the law.

Aquila's characterization of its self–imposed plight as worthy of sympathy or equitable relief is in complete and utter disregard for the burden Aquila's conduct has imposed on the County's financial and other resources, and on the 200 plus homeowners living near the Plant who have had no recourse pending Aquila's appeal but to sit and wait for justice to be served. The County has stepped up to the plate to protect the interests of its citizens. It is not Aquila, but, rather, the County, and those citizens aggrieved by this Plant and Substation, who now deserve primary consideration. Aquila's self-serving statements that it has taken steps to reduce noise and to address resident's concerns with respect to the detrimental effect of the Plant and Substation on environmental concerns are irrelevant to this Motion, and, in any case, based upon the innumerable communications the County has been receiving from its constituents, are the subjects of significant dispute. Aquila claims that it has offered to purchase, at a premium, the homes of anyone living adjacent to the Plant. However, there are over 200 residents living in close proximity to the Plant. The County is aware of only four residents whose property has been purchased by Aquila. Aquila's self-serving and self-proclaimed "good deeds" are

immaterial to the determination of whether this Court has jurisdiction to entertain and/or to grant this Motion. The County respectfully suggests this Court does not have any such authority given the facts and circumstances of this case. The Judgment is final. It is time for Aquila to comply with the Judgment.

II. The Court of Appeals' December 20, 2005 Opinion Did Not Convey Jurisdiction on this Court to Modify its Permanent Injunction, nor Mandate this Court to Modify its Permanent Injunction.

The Court of Appeals' Opinion closes with this sentence: "In so ruling, however, 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." **[Opinion, p. 26]** Like a lifeline thrown to a drowning man, Aquila has latched on to this sentence for dear life. Aquila tells this Court that this sentence from the Opinion reflects the Court of Appeals' recognition "that Aquila can seek authority for these facilities but that it may continue to operate them while it does," **[Aquila's Motion at p. 4]**, boldly suggesting that the Court of Appeals has imposed, or directed this Court to impose, a suspension of enforcement of the Judgment, despite the Opinion's unequivocal affirmation of the Judgment. Aquila next tells this Court that the cited sentence from the Opinion "evidences an expectation that this Court's Injunction should be modified as Aquila is requesting," **[Aquila's Motion at p. 4]**, again boldly suggesting the Court of Appeals has mandated this Court to modify the Judgment, despite affirmation of the Judgment, and a Mandate void of such instruction.

Rule 84.14 gives the Court of Appeals broad power to fashion relief in disposing appeals. Rule 84.14 empowers the Court of Appeals to "award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or in part, or give such judgment as the

court ought to give." [Emphasis added] Had the Court of Appeals intended to impose a directive on this Court to modify its Judgment, there is little doubt the Court of Appeals would have so stated via a mandate that remanded this case to the trial court with instructions to modify the Judgment. The Court of Appeals did not enter such a mandate. Rather, the Court of Appeals simply stated, having found that Aquila did not have the prior authority necessary from either the County or the Commission to construct the Plant or Substation, that the Court of Appeals had not determined, and thus had not disposed, the extent to which Aquila could attempt to secure the necessary but absent authority, after the fact. Aquila had not, as part of its appeal, sought relief in the form of time to remedy its transgressions. The Court of Appeals simply made clear it was not foreclosing, one way or the other, an issue not presented to the Court for it consideration.

If Aquila truly believed the last sentence of the Opinion represented its salvation, it is inconceivable that Aquila would rely on the sentence as written, in the presence of the Court of Appeal's unequivocal affirmation of the Judgment—a Judgment which mandates removal of the Plant and Substation. Rather, it is reasonable to expect, that instead of voluntarily abandoning its appeal, Aquila would have filed a timely Motion for Rehearing, seeking clarification from the Court of Appeals regarding its intent of including the final sentence in the Opinion. As a part of such a Motion, Aquila could have requested the Court of Appeals to modify its disposition of the appeal by remanding the Judgment to this Court with clear instructions consistent with the Court of Appeals' intent. Had Aquila timely filed such a Motion, its appeal would have remained pending, and the Rule 92.03 suspension of enforcement of the Judgment would have remained in effect. Curiously, Aquila did not seek this critical clarification, and elected instead to abandon its appeal. One wonders why. Perhaps Aquila was reluctant to file a Motion for Rehearing seeking clarification of the Court of Appeals' intent, on the chance, if not likelihood, that

Aquila's desired interpretation of the force and effect of the Court of Appeals' conciliatory final sentence would be rejected, forever foreclosing Aquila's ability to cast itself as a victim worthy of unprecedented, post-appellate, suspension of enforcement of the Judgment under the cloak of ambiguous "guidance" drawn from the Opinion. Instead of seeking certainty, Aquila once again gambled, opting to abandon its appeal, thus reserving the opportunity to "spin" the Court of Appeals' final sentence into a non-existent mandate, apparently believing it could pressure this Court into believing it has been directed to suspend enforcement of the Judgment. Aquila has committed an enormous tactical error. The Mandate from the Court of Appeals affirms the Judgment with no further instructions or directions to this Court. No further jurisdiction (or direction) was extended by the Mandate, therefore, to authorize this Court to do anything other than to enforce the Judgment.

Regardless whether the Court of Appeals intended by its inclusion of the final sentence in the Opinion to telegraph a message that this Court should consider modifying the Judgment, this Court is nonetheless bound to independently evaluate its jurisdiction to grant Aquila's Motion. As noted in Section I, above, this Court does not have jurisdiction under Rule 92.03, or under any other Rule, to suspend the enforcement of the Judgment, absent a pending appeal. This Court further has no jurisdiction to grant Aquila's Motion under the "changed circumstances" rule, as the rule has no application given the facts and circumstances of this case.

III. Even if this Court Believes it has Jurisdiction to Entertain Aquila's Motion to Further Suspend Enforcement of the Judgment, it should not Exercise its Discretion to do so.

Even if this Court believes it has jurisdiction to entertain Aquila's Motion, this Court should not exercise its discretion to grant the Motion. Suspension of enforcement of the Judgment while Aquila attempts to seek, for an indeterminate period of time, the authority

required for the Plant and Substation will be fraught with uncertainty, and with an increased risk of future dispute and discord, and will create significant legal predicaments for the County. Moreover, suspension of enforcement of the Judgment will virtually insure this Court's need to provide regular, hands on maintenance over the continuing issue of whether the conditions of the suspension have been met. For example:

- How long would the suspension remain in effect? Indefinitely?
- By what standard would this Court measure whether Aquila is diligently attempting to secure the authorizations required by the Court of Appeals from the County and the Commission for the Plant and Substation, Aquila's stated reason for requesting suspension of enforcement of the Judgment?
- What if, instead of attempting to secure the necessary authority for the Plant and Substation from the Commission and the Plant, Aquila takes advantage of the suspension of enforcement of the Judgment to seek a legislative remedy that retroactively circumvents the Judgment? How will such conduct affect the suspension?
- The procedure for securing a special use permit, or rezoning, from the County can take several months or longer. What if the County concludes that Aquila's special use permit and/or rezoning application should not be granted? Would the suspension of the Judgment remain in further effect while Aquila exhausts its rights of review from the County's denial of such an application?
- As noted by the Opinion, the Commission has promulgated no rules as to the type of information it will require to accompany an application seeking specific approval for a plant within a certificated area. **[Opinion, p. 18]** There is no way of knowing how long it might take the Commission to process Aquila's application for specific approval of the

Plant. If the Commission denies Aquila's application for specific authority for the Plant, will the suspension of the Judgment remain in further effect while Aquila exhausts its rights of review from the Commission's denial of the application?

- Section 393.170.1 requires PRIOR approval of a plant. Citizens potentially aggrieved by the Plant will have the right to intervene in Commission proceedings relating to Aquila's application for specific approval of the Plant. Would the Judgment remain suspended through the exhaustion of any legal wrangling over the Commission's authority under Section 393.170.1 to even consider an application to approve a plant that has already been constructed?
- Similarly, the County has expressed concern to Aquila that its Zoning Ordinance may not contemplate allowing an applicant to remediate an existing illegal use via an "after the fact" application for rezoning and/or for a special use permit, particularly where, as here, the County has already sought and secured an injunction declaring the improvements to be illegal and ordering their removal. The suspension of the Judgment would not determine this complex issue, and would, in fact, inject mind-boggling circular reasoning into the mix, as Aquila would undoubtedly argue that by suspending the enforcement of the Judgment this Court was implicitly directing the County to accept and process an application that attempts to seek "post facto" approval of an existing illegal use. This leaves the County exposed to complaints, if not worse, from aggrieved citizens who believe the County has no authority under its Zoning Ordinance to entertain an application to approve an existing illegal use already enjoined and ordered removed by a court. Would the Judgment remain suspended while the County is forced to unravel this

thorny legal issue, and who will bear the expense of same given the issue is one imposed on the County by Aquila's conduct?

- The County believes the Court of Appeals' Opinion should dispose the Writ Case, filed in response to the April 7, 2005 Commission Order "clarifying" that the Commission's previous orders and certificates issued grant Aquila all the authority it needs to construct a plant. However, so long as the Writ Case remains pending, the County's land use regulatory authority over public utilities is still being contested by Aquila and by the Commission. The County has directed its lead counsel in the Writ Case to prepare and circulate a proposed judgment, suggesting a disposition of the Writ Case that vacates the Commission's April 7, 2005 clarification order. If Aquila and the Commission cannot reach agreement with the County on a form of proposed judgment, the matter will have to be taken up with this Court. Aquila has been advised that the County will not process an application for special use permit or for rezoning submitted by an applicant who is, at the same time, engaged in litigation challenging the County's land use regulatory authority. If the Judgment's enforcement is suspended, Aquila will be excused from performing the Judgment, while at the same time "excused" from not seeking authority for the Plant and Substation from the County, so long as Writ Case remains pending.
- What if the Commission confers authority for the Plant but the County does not confer authority for the location of the Plant or vice versa? Aquila has expressed its belief that the Opinion allows Aquila to get either the Commission's specific authority for the Plant, or the County's specific authority for the location of the Plant. That is not how the County reads the Opinion. The County believes the Opinion requires a utility to secure specific authority for a plant from the Commission pursuant to Section 393.170.1 in

every instance, and that the Opinion requires a utility to demonstrate, in every instance, that the utility is proposing construction of the plant in a specific location authorized by the local municipality or county. The County particularly believes the Opinion requires Aquila to secure both Commission approval for the Plant, and County approval for the location of the Plant, as the Plant has been constructed on land that is not suitably zoned. If this Court suspends the Judgment, how will it unravel this disparate view as to determine whether the conditions of a further suspension have been satisfied in a manner sufficient to warrant relieving Aquila of the obligation to comply with the Judgment's directive to remove the offending improvements?

- If this Court suspends the Judgment pending Aquila's attempts to seek required authority for the Plant and Substation after the fact, the County is placed in an untenable position. The County is obligated to weigh land use applications evenly, applying those factors authorized by its Zoning Ordinance and/or by law. If the Judgment is suspended, and if Aquila files an application for special use permit or for rezoning seeking approval of the existing Plant and Substation, the County will face unfair criticism and the increased risk of litigation no matter which way it turns. If the application is denied, Aquila will undoubtedly seek review of the County's decision, arguing the County was motivated by a desire to subvert further suspension of enforcement of the Judgment. If the application is granted, citizens in this County will undoubtedly argue (if not litigate) whether the County improperly "gave in" to Aquila, feeling the pressure of this Court's suspension of enforcement of the Judgment.

Certainly, some of these concerns may well exist even if Aquila is required to comply with the Judgment, and thereafter seeks approval to rebuild the Plant and Substation in the locations

they once stood. However, some of these concerns arise only if the Judgment's enforcement is further suspended while Aquila seeks such approvals. Moreover, each of these concerns is exacerbated by suspension of enforcement of the Judgment. These concerns are themselves a dramatic indication of the fact that there exists no current change in the factual setting or the law giving rise to the Judgment as to warrant this Court's exercise of any jurisdiction it may have to suspend enforcement of the Judgment. These concerns reflect the substantial and potentially adversarial events and proceedings which must not only take place in the future, but which each must be disposed in Aquila's favor, before Aquila can legitimately argue that a change has actually occurred in the factual setting or the law giving rise to the existence of this Court's permanent injunction as to warrant vacation or modification of the Judgment. If this Court grants Aquila's Motion to suspend enforcement of the Judgment as to allow Aquila "time" to secure necessary authorizations for the Plant and Substation, it is no exaggeration that the "extended stay" could remain in place for years. This Court would be granting Aquila the unprecedented relief of time to see if Aquila can achieve a state of affairs that might qualify Aquila for some relief from the Judgment in the future. In the mean time, it would be as if the Judgment had never been entered. Though the County has secured a moral and intellectual victory, the County and its citizens would be perpetually denied any meaningful benefit from the Judgment. Aquila cites no precedent to this Court to suggest the Court has such jurisdiction, or, even if it does, that it should so exercise its jurisdiction, given the complex and lengthy applications and/or events which must hereafter be undertaken by Aquila, each promising uncertain and potentially disparate results. Further, if this Court grants Aquila the relief it seeks, the "road map" for future scofflaws will be clearly marked. Start construction illegally, and when the County secures an injunction, post a bond to allow construction to proceed, knowing

that if an appeal is subsequently lost, further suspension of the appeal can be secured while the applicant goes back to attempt to secure what it should have secured in the first place.

Aquila has already demonstrated its intent to manipulate self created public policy arguments to its advantage, purposefully engaging in knowingly risky behavior to only later claim it will be "unfairly" victimized by enforcement of the Judgment. One can only imagine how Aquila's contrived public policy argument will blossom the longer this illegal Plant and Substation are allowed to remain in operation and existence. This Court should not exercise its jurisdiction, assuming it has same, to further suspend enforcement of the Judgment when it is evident Aquila's principal objective is to buy time, knowing the passage of time without enforcement of the Judgment is, in the end, Aquila's greatest ally.

IV. Should this Court Determine to Grant Aquila's Motion to Extend the Stay of Enforcement of the Judgment, It Should Limit its Order to Suspension of the Obligation to Remove the Plant and Substation, and it Should Substantially Increase Aquila's Required Bond.

Should this Court determine to grant Aquila's Motion, this Court should limit the suspension to that portion of the Judgment which obligates Aquila to remove the Plant and Substation, leaving in force and effect that portion of the permanent injunction enjoining operation of the Plant and Substation. The Court should correspondingly impose on Aquila, as a condition of such relief, an obligation to substantially increase its posted bond. The County does not mean by this statement to suggest that the County would be satisfied with this result. The County will not be satisfied with this result, and is not offering this result as an acceptable solution to Aquila's Motion. However, on the chance, despite the County's vehement objections to the contrary, the Court feels compelled to suspend enforcement of the Judgment, then the Court should do so narrowly, only relieving Aquila of the immediate obligation to remove the Plant and Substation while it attempts, subject to carefully crafted time and performance

constraints, to seek both the Commission's, and the County's approval for the Plant and Substation. Aquila should not, under any circumstance, be relieved of the obligation to immediately cease operating the Plant and Substation.

Moreover, the Court must take into consideration Aquila's obvious reluctance to incur the expense of removing the offending Plant and Substation. The Judgment directs that the offending improvements are to be removed at Aquila's expense. Should Aquila ultimately fail to secure the necessary authority for the Plant and Substation from the Commission and the County, the County is concerned it may well be left with the task of removing the offending, illegal improvements at the County's expense. Aquila's present assurances to the contrary are unreliable. Aquila was already ordered by the Judgment to remove the Plant and Substation if it lost its appeal—but it has refused to do so, instead pursuing this Motion—the ultimate delay tactic. There is no reason the County should be exposed to ANY risk that Aquila might fail or refuse to dismantle the Plant and Substation if again directed to do so in the future. Aquila contends it spent $150,000,000.00 to construct the Plant and Substation. One can reasonably presume it will cost at least as much to dismantle the Plant and Substation. Therefore, as a condition of suspension of enforcement of the Judgment (insofar as the obligation to remove the Plant and Substation are concerned) while Aquila seeks necessary approvals for the Plant and Substation from the County and the Commission, Aquila should be required to post cash, or an acceptable surety bond, in the amount of $150,000,000.00 on the condition that it immediately and completely remove the Plant and Substation if the suspension of the Judgment is withdrawn at any time by this or any other Court. A bond in this amount is essential to protect the County from the risk of Aquila's future refusal to abide by the terms of the Judgment. Again, however, it is not the County's desire to suggest this avenue as an "easy" solution to Aquila's Motion. The

County will continue to maintain that there is no jurisdiction for this Court to grant Aquila's Motion, given the facts and circumstances of this case.

CONCLUSION

This Court does not have jurisdiction to modify its permanent injunction. Even if it does, this Court should not exercise its discretion to do so. This Court should deny Aquila's Motion and **should make it abundantly clear that pending any appeal by Aquila of this Court's denial of the Motion, there will be no Rule 92.03 suspension of the Judgment**. This Court should further direct Aquila to immediately comply with the Judgment and, should Aquila fail to immediately cease operation of the Plant and Substation, and to commence immediate dismantling of the Plant and Substation, this Court should notify Aquila it will expect Aquila to appear to show cause why Aquila should not be held in contempt, with the resultant likelihood that this Court will impose such fines or other penalties as it deems necessary and appropriate to coerce Aquila's compliance with the Judgment.

If the Court is inclined to grant Aquila's Motion, over the County's vehement objection, it should only do so as to Aquila's immediate obligation to remove the Plant and Substation; it should impose reasonable time and performance constraints by which Aquila's attempts to secure necessary authority from the County and the Commission can be measured; it should oblige Aquila to abide by the remaining terms of the Judgment, including the obligation to immediately cease operation of the Plant and Substation; and it should require Aquila to post an additional $150,000,000.00 cash or surety bond. **The Court should also make it abundantly clear that, pending any appeal by Aquila of this Court's partial granting of Aquila's Motion, there will be no Rule 92.03 suspension of the remaining portions of the Judgment for which suspension has not been granted**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify
that a copy of the above and foregoing
was hand-delivered, this ____ day
of January, 2008, to:

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