MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NO. WD67739

STATE EX REL. CASS COUNTY, MISSOURI and

STOPAQUILA.ORG

Appellants
v.

PUBLIC SERVICE COMMISSION

FOR THE STATE OF MISSOURI, and

AQUILA, INC.

BRIEF OF STOPAQUILA.ORG

Appeal from the Circuit Court of Cass
County, Missouri, Case No. 06CA-CV01698 on review of
Public Service Commission Report and Order in EA-2006-0309

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Public version

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JURISDICTIONAL STATEMENT

This case involves the construction of a power plant that was built illegally (without any prior consent) and despite an injunction. This is a review of a report and order of the Public Service Commission (PSC). Subsequent to the decision in Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005), Aquila requested that the PSC issue a certificate that would permit it to construct the already built power plant that was the subject of Cass County v. Aquila, supra. StopAquila.org, Cass County and others intervened. StopAquila.org Appendix page 2 (A-2). The report and order of the PSC was issued on May 23, 2006. Legal File page 6 (L.F. 6). The Circuit Court issued its Judgment setting aside the order of the PSC on October 20, 2006. L.F. 341. Appeals were timely filed. L.F. 394, 448, 505. The Court of Appeals has jurisdiction under Missouri Constitution Article V, Section 18, RSMO 386.510 and 386.540.

STATEMENT OF FACTS

PROCEDURAL HISTORY. Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005), was decided on December 20, 2005. L.F. 57. Aquila filed its application in PSC case number EA-2006-0309 on January 25, 2006, asking for a certificate from the PSC that would permit it to build the already constructed South Harper Peaking Facility (SHPF) and related Substation. L.F. 8. The PSC issued its report and order on May 23, 2006, giving the relief requested by Aquila. L.F. 6. StopAquila.org and others filed a motion for rehearing, which were denied by the PSC on June 1, 2006. Commission Record 0001541-0001543. On June 2, 2006, a timely application was filed by Cass County with the Circuit Court (case number 06CA-CV01698). L.F. 1. StopAquila.org filed a timely motion to intervene in 06CA-CV01698. L.F. 94. Judgment was entered by the Circuit Court on October 20, 2006, setting aside the report and order of the PSC. L.F. 341.

STATUS OF STOPAQUILA.ORG. StopAquila.org is an unincorporated association which includes many people who live near the site of the power plant (the SHPF). Commission Record Exhibit 28 (hereafter "Exhibit"), StopAquila.org v. City of Peculiar, Mo. Supreme Court No. SC87302, WL 3791969 (December 19, 2006). StopAquila actually filed the first suit to seek an injunction to stop the construction, on November 14, 2004, Commission Record Transcript Vol. 3, p. 217 (hereafter "Transcript"). Exhibit 28 contains a list of the residents who signed up as members of StopAquila.org to oppose the location of the SHPF.

Transcript Vol. 8 p. 1302 to p. 1303.

NOISE. After construction of the SHPF, Aquila did a noise study, but during the study only one of the three combustion turbines (CT) was operating. Transcript Vol. 5 p. 587, Exhibit 76. According to the study, the noise level on site, immediately adjacent to the one running CT, was 112 dBA. Transcript Vol. 5 p. 591 line 11. At the home of Harold Stanley, 3,690 feet away, the noise level was measured at 64 dBA in the daytime and 59 dBA in the nighttime. Transcript Vol. 5 p. 589 line 12 to p. 590 line 2. At the home of Frank Dillon, 1,190 feet away, the noise level was measured at 64 dBA in the daytime and 56 dBA in the nighttime. Transcript Vol. 5 p. 587 line 23, Exhibit 76, p. 7, table 3.2.

This noise study did a comparison between a.) the noise with no CTs operating and b.) the noise with one CT operating, and reported that there was a "significant increase" in noise when one CT was operating (Exhibit 76, page 13 [the number 9 is printed in lower right hand corner of this page]). The report also stated that this increase is particularly noted in the frequencies below 63 Hertz (HZ) and between 1000 HZ and 3150 HZ (Ibid., at par. 2); that with one CT operating the noise may cause vibrations in the ceilings, windows and ductwork at R1 (residence one) (Ibid., at par. 2); that the noise from one CT will cause annoyance at R1 (Ibid., at par. 2); and that with one CT operating, similar results were obtained at other residences (Ibid., at par. 3). R1 was the home of Frank Dillon, 1190 feet from the tested CT (Ibid., at page 9 [marked as page 5 in lower right hand corner]).

When all three CTs were running, Dillon described the noise as follows:

> [T]he noise is absolutely unacceptable. One cannot carry on a normal conversation outside. *** With all three turbines running, the C weighted sound level is 70 dB outside my garage. Pub. Hrg. Vol. 3, p. 53 line 3 to 12.

The Cass County noise ordinance prohibits noise over 60 dBA during the day and 55 dBA at night. Transcript Vol. 5 p. 589 line 12.

POLLUTION. In the hearings before the PSC, Harold Stanley, an engineer with 33 years of experience working at power plants, testified that the three combustion turbines (CTs) installed by Aquila at the SHPF are permitted to operate at 422,000 brake horsepower, Exhibit 25, Exhibit 26, page 5, Transcript Vol. 8 p. 1274, and that the emissions from the SHPF are greater than the emissions produced by 1,000 diesel pickup trucks in terms of pounds of pollutants emitted per hour. Exhibit 25 p. 61 line 18 to p. 62 line 6, 26, p. 6 line 6 to p. 9 line 16, and Exhibit 25. The SHPF emissions reports filed for the year 2005 with the Missouri Department of Natural Resources showed that when the three CTs are running, the total emitted is over 500 pounds per hour of the pollutants that are measured. Exhibits 25 p. 57, 26, 79.

START OF MATERIAL DEEMED BY PSC TO BE HIGHLY CONFIDENTIAL

Transcript Vol. 5 p. 617. END OF HIGHLY CONFIDENTIAL.

According to a report of the U.S. Environmental Protection Agency regarding fine particulate matter (known as PM 2.5):

> Health studies have shown that there is no clear threshold below which adverse effects are not experienced by at least certain segments of the population. (69 Federal Register No. 20, January 30, 2004, at Page 4571, Column 1.) (Exhibit 29, Transcript Vol. 8 p. 1278 line 21.)

This EPA report stated that problems due to PM2.5 include lung disease, asthma attacks and certain cardiovascular problems. Exhibit 29 at page 4571, Transcript Vol. 8 p. 1278 to p. 1279. The EPA report states that electric generating units are a major source of sulphur dioxide and nitrogen oxide, both of which contribute to PM2.5 production. Exhibit 29 at page 4571, Transcript Vol. 8 p. 1278 to p. 1279.

The EPA report also states that electric generating units contribute to ozone problems; that ozone is produced after the emissions leave the exhaust stacks where the emissions react to natural conditions, including sunlight; that ozone can reduce lung function and make it more difficult to breathe deeply; increased hospital admissions have been associated with ozone exposure; long term ozone exposure can inflame the lining of the lungs; and children, active adults and people with respiratory problems are unusually sensitive to ozone. Exhibit 29, at page 4571, column 3, Transcript Vol. 8 p. 1279 to p. 1280.

This EPA report said that ozone has some adverse health affects – however

slight - at every level. Exhibit 29, at page 4584, column 1.

The EPA stated that the electric generating units discussed in the report are those units that use fossil fuels, and this includes combustion turbines. Natural gas is a fossil fuel. Exhibit 29, page 4609, col. 3; Transcript Vol. 5, p. 599 to p. 601.

The Clean Air Task Force Report states that for ozone, even at low concentrations, health problems can be triggered. Exhibit 30, page 4. The report also states:

> There is no "safe" threshold for PM2.5 below which no effect occurs.... What this means is that fine particles may adversely impact human health at any concentration. Page 5 of Report, Exhibit 30.

INCOMPATABILITY. Land Planner Bruce Peshoff testified that the SHPF is not compatible with the surrounding area. Transcript Vol. 10 p. 1569 line 18 to 25, p. 1570 line 1. The SHPF has 70 foot stacks. Transcript Vol. 10 p. 1575 line 8, Vol. 11 p. 1690 line 8. There is nothing comparable in the area. Transcript Vol. 10 p. 1520 line 9 to 25. Photographs were offered to show that the SHPF is out of character for the area. Transcript Vol. 10 p. 1520 line 11 to 25, Exhibits 93, 94. Prior to the construction of the SHPF, areas nearby had developed into a residential area. Transcript Pub. Hrg., March 30, 2006, p. 107 to p. 111.

PROPERTY VALUES. START OF MATERIAL DEEMED BY PSC TO BE HIGHLY CONFIDENTIAL:

Transcript of May 1, 2006, Volume 9, Page 1101, Line 9, Exhibits 91 HC and 92 HC. END OF HIGHLY CONFIDENTIAL.

DUE PROCESS, EQUAL PROTECTION AND PROCEDURE. The Report and Order (the "Order") issued by the PSC in case number EA-2006-0309 was a 3-2 decision. L.F. 7. The dissent of Commissioners Robert Clayton III and Steve Gaw states that they were concerned about the process employed by the PSC in this case, that the criteria selected by the Staff of the PSC was not available to opponents before the hearing and that therefore opponents were hindered in preparing for the hearing. L.F. 204, 215-216. The dissenters wrote that the other 3 commissioners shifted the burden to opponents of Aquila to prove that the utility was not prudent. L.F. 215, footnote 13.

Prior to the beginning of construction on the SHPF, the PSC Staff indicated that Aquila needed more base load facilities (i.e., coal powered facilities) and that it had too much peaking. (The SHPF is a peaking plant.) Transcript Vol. 5 p. 681 line 17 to p. 684 line 13, Transcript Vol. 11 p. 1737 line 5 to p. 1738 line 24, Exhibit 82, Transcript Vol. 3 p. 307 line 5 to 11, Transcript Vol. 5 p. 681 line 17 to p. 684 line 13, Transcript Vol. 3 p. 290 line 5 to p. 290 line 17. Exhibit 38, created in 1999, shows Aquila had 125 megawatts (MW) too much in peaking, 57

megawatts too little in intermediate, and 67 MW too little in base. Transcript Vol. 3 p. 307 line 5 to 11

START OF MATERIAL DEEMED BY PSC TO BE HIGHLY CONFIDENTIAL:

END OF HIGHLY CONFIDENTIAL.

After deciding to self-build, Aquila began a site selection process. The first list of preferred sites did not include SHPF. The preferred site was the Camp Branch site near Harrisonville, and before Aquila terminated its interest in the Aries in 2003, Aries had been the preferred site. Transcript Vol. 3 p. 343 line 14 to p. 344 line 4, p. 347 line 16 to p. 348 line 14, p. 357 line 21 to p. 358 line 6, p. 365, line 12 to p. 366 line 5, p. 392 line 12 to p. 394 line 5, p. 633 line 22 to p.

634 line 8, p. 336 line 22 to line 25. From an electricity transmission analysis, the Camp Branch site and the Aries site were preferred. Transcript Vol. 5 p. 634 line 15 to p. 635, line 14, p. 642 line 10 to line 15.

Mr. Caspary (Southwest Power Pool) stated that the SHPF was not identified in 2003 or in 2004 as expected projects. Transcript Vol. 5 p. 470 line 8 to line 22. The expansion plan of the Southwest Power Pool did not identify a need for a new 345 kilovolt line near Peculiar. Transcript Vol. 5 p. 470 line 23 to p. 471 line 2.

Richard Green, Chief Executive Officer of Aquila, stated on May 1, 2006:

> "The biggest mistake we made was we didn't listen to and respect our neighbors." (Exhibit 132, Transcript Vol. 12 p. 1780 line 21-25, p. 1781 line 1-25, p. 1782 line 1-25, p. 1783 line 1-25.)

The PSC Dissent stated that for the SHPF, Aquila failed to work with neighbors and built despite local opposition. L.F. 205 line 4, L.F. 217 line 16.

When Aquila was a partner in building the merchant power plant known as the Aries Plant, it applied to Cass County for county zoning and received zoning approval in 1999. Transcript Vol. 10 p. 1439 line 17-24. In 2002, when Aquila sought to expand by placing the 3 CTs immediately adjacent to the Aries plant, it applied for consent from the County, and the County agreed in writing to allow Aquila to place these 3 CTs next to the Aries plant, but then Aquila did not place the CTs there. Exhibit 81, Transcript Vol. 10 p. 1439 line 25, p. 1440 line 1-10.

In June 2004, Aquila sought a special use permit from Cass County to place

the same 3 CTs at the proposed Camp Branch facility, near Harrisonville. Transcript Vol. 3 p. 344 line 14-19. That application was withdrawn by Aquila after an adverse vote by the 6 member County planning board (6-0 against Aquila). Transcript Vol. 3 p. 347 line 8-11.

On September 29, 2004, Aquila filed for a special use permit from the County for the proposed Peculiar Substation, to be connected to the SHPF. Transcript Vol 3. p. 390 line 5-6. Aquila's application for this special use permit was scheduled to be heard by the County on October 25, 2004, but was continued at the request of Aquila. Transcript Vol. 3 p. 416 lines 15-19, Exhibit 68.

In Exhibit 41, Page 8, prepared by Aquila to apply for a special use permit for the Camp Branch site in June 2004, Aquila stated that it will secure all appropriate state permits and will operate at all times in accordance with all state and local ordinances. Transcript Vol. 3 p. 346 line 4-5. In a lease executed between the City of Peculiar and Aquila for the financing of the SHPF in December 2004, it stated that Aquila "shall comply in all material respects with all statutes, laws, ordinances, orders, judgments, decrees, regulations, directions and requirements of all federal, state, local and other government or governmental authorities, now or hereafter applicable . . ." (Exhibit 96, at Page 6, Section 3.3[b], Transcript Vol. 8 p. 1176 line 20-25, p. 1177 line 1). The lease also stated that Aquila represents that it is in compliance with presently applicable zoning ordinances (Exhibit 96, page 5). In this lease, Aquila agreed that if it contested the legality of any law or ordinance, it would be at Aquila's cost. Exhibit 96, page 6.

In Exhibit 72, Aquila stated in an application with Cass County that it agreed to abide by all building codes and the zoning order of Cass County. Transcript Vol. 3 p. 437 line 16-24.

On November 14, 2004, StopAquila.org filed for an injunction. Transcript Vol. 3 p. 217 line 8-10. On November 19, 2004, Aquila withdrew the request it had filed with Cass County for a special use permit for the substation. Exhibit 71. On December 1, 2004, Cass County filed for an injunction. Transcript Vol. 3 p. 231 line 8. A Circuit Court hearing was held on January 5 and 6, 2005, and the Circuit Court announced its judgment in favor of Cass County orally on January 6, 2005. (This case culminated with the decision of the Court of Appeals, which has been referred to as StopAquila.org v. Aquila, or Cass County v. Aquila, 180 S.W.3d 24 [Mo. App. W.D. 2005]. We will refer to this Court of Appeals decision hereafter as the "Opinion.")

All of the construction of the buildings at the SHPF was done after the Circuit Court announced its injunction. Transcript Vol. 3 p. 443 line 6 to p. 444 line 8. Aquila calculated this was a risk that was worth taking. Transcript Vol. 3 p. 230 line 2-11. Aquila did not secure approval from the PSC before construction and Aquila refused to comply with zoning. L.F. 354.

At the hearing on the request for injunction on January 5, 2005, PSC employee Warren Wood testified that the PSC did not have the authority to site power plants and did not have the authority to tell regulated utilities where they cannot build. Transcript Vol. 7 p. 756 line 20 to line 25, p. 757 line 1 to line 19.

He had written the same thing in November 2004 to Nanette Trout (a member of StopAquila.org), on PSC letterhead, saying that the PSC did not have the authority to tell a utility where to not build a power plant. See attachment to Exhibit 1. Transcript Vol. 5 p. 716 line 10 to line18, Vol. 7 p. 730 line 16 to p. 751 line 17, p. 757 line 7-19.

PSC Commissioner Linn Appling met with Aquila employees and toured the site for the SHPF on January 14, 2005. Exhibit 40, page 3. Major concrete pouring began on February 15, 2005, and installation of the three CTs began on March 10, 2005 (Exhibit 40).

After the Opinion of the Court of Appeals affirmed the injunction, Aquila stated in a press release dated January 4, 2006, that it "will file an application for a special use permit for its South Harper Peaking Facility in Cass County... [W]e will apply to Cass County for approval." Exhibit 86. Aquila acknowledged on January 12, 2006, in a letter to Cass County that it knew that Cass County had not predetermined the propriety of the location of the SHPF and the Substation. Exhibit 87. Cass County then sent a letter to Aquila dated February 1, 2006, that said it could then accept, and would expect Aquila to submit, appropriate applications to the County for its consideration regarding the facilities. Exhibit 88. Instead of then carrying through with its statement that it would file with the County, Aquila filed application only with the PSC, in the case at issue, EA-2006-0309, seeking an order from the PSC that would permit it to build the already constructed power plant. L.F. 7.

The bulk of the electricity generated at the SHPF goes to Jackson County. Transcript Vol. 7 p. 981 line 17, p. 995.

In a different case, case number EO-2006-0356, filed on March 16, 2006, the Office of Public Counsel filed a motion for a management audit of Aquila, Inc. L.F. 191. The motion states:

> Perhaps the most glaring example of Aquila's mismanagement is the quagmire that is South Harper. It is simply astonishing that one power plant project could have spawned so many poor decisions. From the beginning – deciding to add more gas generation to its portfolio, sizing the plant at 315 megawatts, buying the turbines at an inflated price from an affiliate – management decisions were made in a haphazard manner. And the siting issues! It is literally impossible to find one good decision made about siting. When Aquila should have asked for permission in advance, it opted for forgiveness later. L.F. 193.

In that case, EO-2006-0356, on June 13, 2006 the PSC ordered a management audit of Aquila. L.F. 195. While the PSC (in the present case under review, EA-2006-0309) issued a certificate (hereafter the "Order") on May 23, 2006 permitting Aquila to build the already constructed SHPF, the PSC stated in its June 13, 2006, order (in EO-2006-0356) that the PSC shall investigate past decisions of Aquila, including those involving "the South Harper generating facility." L.F. 196, line 2.

In the hearing in the case now under review, PSC employee Warren Wood

testified that this case is being treated by the PSC differently than cases that will come up in the future. Transcript Vol. 7, p. 887 to 888, p. 980 to p. 981. Wood said the reason for this different treatment was because this plant was already built. Vol. 7, p. 981.

Wood testified that if he had a zoning matter, he would go to the County:

> Q. If you wanted to look at a zoning matter *** would you go to Cass County, Missouri and follow their master zoning plan or would you go to the PSC?
>
> A. (By Mr. Wood) If I had a zoning matter that I felt I needed to address, I would go to the county of that zoning. (Vol. 7, p. 997 line 22 to line 25.)

At paragraph 82 of the PSC Order in the present case (the "Order"), there is reference to "letters of support" for Aquila. L.F. 27. At the public hearing on March 30, 2006, Jennifer Bailey testified that she had letters of support for Aquila. Ms. Bailey said that people who signed the letters of support for Aquila were in the crowd, and at her request some people stood up. Mr. Eftink (for StopAquila) then asked for the people who signed letters of support for Aquila and who actually lived within one mile of the SHPF to raise their hand. Not a single hand was raised. Public Hearing of March 30, 2006, Vol. 3 p. 33 through p. 44, particularly p. 43 line 13 to 44 line 2.

Julie Noonan, a StopAquila member who gathered petitions against the location of the SHPF, said that: a.) 269 individuals at 178 different addresses had

signed petitions against the SHPF; b.) that within a two mile radius maybe three households supported Aquila, if you ignore the people who received compensation from Aquila; and c.) that if you looked at those within one mile of the plant, maybe two households filed some kind of statement in support of the plant. Exhibit 28, Transcript Vol. 8 p. 1302 line 21 to p. 1303 line 22.

POINTS RELIED ON

POINT I.

THE PSC ERRED IN GRANTING THIS CERTIFICATE TO AQUILA TO PERMIT CONSTRUCTION OF THE SHPF BECAUSE THE PSC DOES NOT HAVE THE AUTHORITY TO ISSUE A PERMIT TO CONSTRUCT FOR A POWER PLANT AFTER CONSTRUCTION HAS COMMENCED IN THAT RSMO 393.170.1 PROVIDES THAT AN APPLICANT FOR A PERMIT TO CONSTRUCT A POWER PLANT SHALL APPLY FOR SUCH PERMIT BEFORE CONSTRUCTION BEGINS AND FURTHER IN THAT RSMO 393.170.2 REQUIRES THAT THE APPLICANT MUST GET CONSENT FROM THE LOCAL GOVERNMENT BEFORE IT APPLIES TO THE PSC FOR SUCH CERTIFICATE.

Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005)

In re Missouri Power & Light, 18 Mo. PSC (N.S.) 116 (1973)

State v. Burton, 379 S.W.2d 593 (Mo. 1964)

RSMO 393.170

RSMO 64.255

RSMO 64.285

POINT II.

THE ORDER OF THE PSC GRANTING THE CERTIFICATE REQUESTED BY AQUILA IS IN ERROR BECAUSE THE ORDER IS UNLAWFUL, UNREASONABLE, ARBITRARY, CAPRICIOUS, INVOLVED UNLAWFUL PROCEDURES, WAS AN ABUSE OF DISCRETION AND/OR VIOLATED DUE PROCESS AND EQUAL PROTECTION RIGHTS OF THE MEMBERS OF STOPAQUILA.ORG IN THAT IT DECLARED THE RIGHTS OF THE NEARBY CITIZENS TO BE SUBSERVIENT TO THE RIGHTS OF OTHERS, PLACED THE BURDEN OF PROOF ON OPPONENTS OF AQUILA, FAILED TO FOLLOW THE LAW, DEVELOPED NEW RULES OR RULES TO APPLY FOR THIS CASE ONLY AND IGNORED EVIDENCE.

Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005)

Missouri Power & Light Co., 18 Mo. P.S.C. (N.S.) 116 (1973)

Missouri Constitution Article V, Section 1

Missouri Constitution Article I, Section 10

Missouri Constitution Article I, Section 2

RSMO 386.250(6)

ARGUMENT

POINT I.

THE PSC ERRED IN GRANTING THIS CERTIFICATE TO AQUILA TO PERMIT CONSTRUCTION OF THE SHPF BECAUSE THE PSC DOES NOT HAVE THE AUTHORITY TO ISSUE A PERMIT TO CONSTRUCT FOR A POWER PLANT AFTER CONSTRUCTION HAS COMMENCED IN THAT RSMO 393.170.1 PROVIDES THAT AN APPLICANT FOR A PERMIT TO CONSTRUCT A POWER PLANT SHALL APPLY FOR SUCH PERMIT BEFORE CONSTRUCTION BEGINS AND FURTHER IN THAT RSMO 393.170.2 REQUIRES THAT THE APPLICANT MUST GET CONSENT FROM THE LOCAL GOVERNMENT BEFORE IT APPLIES TO THE PSC FOR SUCH CERTIFICATE.

STANDARD OF REVIEW. Under RSMO 386.510, the courts review the lawfulness and reasonableness of the PSC action. The issues in this case primarily

involve interpretation of the law, and the Courts alone have the power to say what the law is. Lederer v. State, Dept. of Social Serv., 825 S.W.2d 858 (Mo. App. W.D. 1992). Additionally, reversal can be warranted where the action of the PSC was arbitrary, capricious and without reasonable basis. State ex rel Fee Fee Trunk Sewer, Inc. v. Public Service Commission, 550 S.W. 2d 945 (Mo. App. 1977); State ex rel Office of the Public Counsel v. Public Service Commission of Missouri, 938 S.W. 2d 339 (Mo. App. W.D. 1997).

ARGUMENT. StopAquila agrees with the result of the Judgment handed down by the Circuit Court (the "Judgment")(L.F.341) and agrees with the main point expressed in the PSC Dissent (the "Dissent")(L.F. 204). That is, both are correct in stating that the PSC lacks authority to issue a certificate (or order) to permit the building of the power plant after construction has commenced. L.F. 359, L.F. 207 - 209. The Order of the PSC in EA-2006-0309 (the "Order") must be set aside as beyond its authority. StopAquila would urge the the Court of Appeals go further than the Judgment and the Dissent, in that StopAquila would also urge that RSMO 393.170.2 applies in a straight forward fashion; that is, under it Aquila must get the "consent" of Cass County before it can procure a certificate from the PSC that would allow it to construct a proposed power plant.

StopAquila writes this brief for two reasons: first, to express its very strong opposition to the location of the SHPF and, of course, the attempt by the PSC to grant a retroactive permit (or any permit) for that location, and, second, to suggest

that there is a more straight forward legal analysis, which involves applying RSMO 393.170.2.

In pertinent part, 393.170 subpart 1 and subpart 2 state:

> 1. No ... corporation ...shall begin construction ... of a ...electric plant ...**without first having obtained** ...permission and approval of the commission.
>
> 2. *** Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed ... together with a verified statement ... **showing that (applicant) has received the required consent of the proper municipal authorities**. (Emphasis added.) (A full copy is found in the Appendix, at A-66.)

RSMO 393.170.2 applies to counties. It was decided many years ago by the PSC and the Courts that the term "proper municipal authorities" in RSMO 393.170.2 applies to both counties and cities. Therefore, when 393.170.2 requires prior "consent," it requires that the utility get prior consent from the county for matters within the unincorporated areas of the county. In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941); In the matter of the application of Union Electric Company, 3 Mo.P.S.C. (N. S.) 157 (1951); and State v. Burton, 379 S.W.2d 593 (Mo. 1964). As will be discussed below, the cases have given broad authority to local governments under 393.170.

In any event, the PSC simply does not have the authority to issue a retroactive permit to construct under 393.170. This is the logical reading of the

Court of Appeals Opinion [Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005)] (hereafter the "Opinion"), which stated that the utility shall apply before the first spadeful of soil is disturbed. Opinion, at 34, 36-38 (that is, 180 S.W.3d at 34, 36-38). This is also clearly expressed by the Dissent of Gaw and Clayton and the Judgment of the Circuit Court. L.F. 359, L.F. 209.

The rights of the people who live nearby are violated if the PSC allows a utility to build its power plant first and seek approval later. Those persons represented by StopAquila filed suit in November 2004 against Aquila to seek an injunction. Cass County then filed suit, and the people were glad when Cass County was successful in getting an injunction *against the construction of the SHPF* in early January 2005. The people expected that Aquila would comply with the injunction. Aquila then posted bond and completely constructed the SHPF by June or July 2005, apparently believing that if it built it, no one would have the fortitude to actually force it to dismantle and move it. Aquila knowingly took a risk. Transcript Vol. 3 p. 230 line 2-11. Later, after the Opinion upheld the injunction and said that hearings are to be held before the first spade full of dirt is disturbed, the PSC issued its Order that purported to retroactively permit the construction of the already constructed building. L.F. 7 (A copy of the PSC Order is also found at StopAquila's Appendix, at A-1). This action by the PSC violates the rights of the people who had expected that the parties and the government would follow the law.

The PSC majority and Aquila seem to not appreciate that the posting of an appellate bond is for the purpose of security so that if the appellant fails on appeal, it will then comply with the judgment. It does not serve as an excuse.

A reading of the entirety of RSMO 393.170 leads to the conclusion that the PSC cannot issue a retroactive permit for construction. In our view, the statute requires not just one prior consent, but two prior consents. The first consent is required by 393.170.2 (consent from the local government). The second consent is required by 393.170.1 (the applicant must also get approval from the PSC before it builds its power plant). **It is simply impossible to read the statute as the PSC majority did, to allow Aquila to build first with *no prior consent from anyone*.**

On the subject of retroactivity, we also note that Article I, Section 13 of the Missouri Constitution states: "That no ex post facto law, nor law impairing the obligation of contracts, or **retrospective in its operation**, or making any irrevocable grant of special privileges or immunities, can be enacted." (Emphasis added.) This was applied to administrative regulations in State Ex. Rel. Western Outdoor Advertising Company v. State Highway and Transportation Commission, 813 S.W. 2d 360 (Mo. App. W.D. 1991). The Court held that laws affecting substantive rights shall not be applied retrospectively in administrative cases.

The PSC changed the rules retrospectively by announcing new criteria during the hearing that it would consider when deciding whether to approve the construction of an already constructed power plant. See testimony of Warren Wood, Transcript Vol. 7, p. 887 to 888, p. 980 to p. 98, Vol. 7, p. 981. See L.F.

212 line 2, L.F. 216 line 1. Missouri Constitution Article I, Section 13 should apply to bar the attempt by the PSC to change its rules retrospectively.

A Pandora's Box is opened if the PSC is permitted to do what the 3-2 majority attempted to do in the present case, which is to allow utilities to a.) build wherever they deem appropriate and get approval after construction, b.) ignore the concerns of the local people, c.) ignore the local government, and d.) even ignore injunctions. Transcript Vol. 3 p. 443 line 6 to p. 444 line 8.

The Dissent took the position that if the utility applied prior to construction, and if (after preconstruction hearings) it was determined that there were very important reasons why the County's zoning must be overruled, the PSC should have that authority. L.F. 214. The Dissent stressed that it would limit this to the most unusual situation. L.F. 213 - 214. StopAquila urges there is a simpler answer, one which is found in the statutes, which is that prior to construction, the utility must get consent from the local government in order to get a permit to build from the PSC.

The legal analysis we urge can be stated very plainly:

1. Under RSMO 393.170.2, the applicant must get the "consent" of the local government in order to get a certificate from the PSC to permit construction of a power plant;

2. The PSC cannot expand on the "consent" given by the local government (see discussion on pages 35-39, below);

3. The utility must also get the certificate from the PSC that permits it

to begin construction of a power plant.

The County has authority regarding land use, and it is important that interested parties be able to apply to a Circuit Court for review of the local zoning decisions (see RSMO 64.281.4 in the case of first class noncharter counties). The PSC has authority in ratemaking and regulatory matters, and interested parties must likewise be able to apply to a Court to review decisions of the PSC (see RSMO 386.510). The Dissent does not appear to have adequately considered the fact that interested parties have the right to seek judicial review from both the local government decisions (on zoning) and the PSC decision (on certificates for construction of plants). L.F. 213.

The position of the PSC majority is much worse. Its 3-2 Order would mean that the utility can bypass the county altogether, and even do so retroactively. Thereby, the right of interested parties to appeal from a county land use decision (under RSMO 64.281.4) would be eliminated in matters dealing with power plants.

The three subparts of 393.170 must be read as a whole so as to give meaning to each. In reviewing the statute when dealing with the building of a power plant, the progression begins with subpart 2, then goes on to subpart 1. Subpart 2 is broader in scope than subpart 1. However, any utility that seeks to build a power plant necessarily must comply with subpart 2.

StopAquila and Cass County appear to approach this matter somewhat differently in briefs filed to date. Cass County has focused on its zoning interests.

In this recent litigation, Cass has not phrased the question as whether Aquila must get the "prior consent" of Cass County pursuant to 393.170.2 in order to build a power plant in Cass. We respect Cass County and we respect its view. Perhaps Cass County's view is based on the principle that any "prior consent" requirement of 393.170.2 should be limited to matters that are within both the *authority* of the County and the *interests* of the County, i.e., *land use authority*. StopAquila would suggest that 393.170.2 itself grants authority to the County that may be broader than land use authority. Regardless whether the consent requirement of 393.170.2 is interpreted such as to give a broad "prior consent" authority to the County or to only be a "prior consent regarding land use" authority, the fact remains that there is some kind of prior consent requirement stated in 393.170.2. Normally, when it comes to the building of power plants, we would expect that a utility had already received a consent from the County that would suffice as consent under 393.170.2 before it turns to the PSC for a permit to construct a power plant. That was not the case here.

In the present case, a.) Aquila had not received prior consent from the local government or from anyone to build this power plant, Opinion, at 26, 28, 36-38, b.) as the Opinion said, the consent that Cass County had given to Aquila was only consent to put in poles and transmission lines, and c.) Cass County had even secured an injunction against the construction of the SHPF and the Substation.

Transcript, Vol. 3, p. 231 line 8.[1]

In this case, we have to consider both subsection 2 and subsection 1 of RSMO 393.170.[2]

The suggestion of StopAquila that there is a broad role for the County is supported by a review of the statutes and the case law.

The Public Service Commission Laws (RSMO Chapters 393 and 386) require that utilities comply with all laws. RSMO 386.570.1 sets out penalties that are supposed to be imposed if a utility fails to comply with any law. The last clause of RSMO 386.320.1 says the PSC shall supervise utilities "with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements." (Emphasis added.) RSMO 393.140(5) states that for safety upgrades, the PSC may prescribe the equipment that the utility thereafter will use "in compliance with the provisions of law and of their franchises and charters."

Nothing in the PSC Law (Chapter 393 and Chapter 386) states that the PSC

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[1] We can ask, "Was the injunction meaningless?" Allowing the PSC to retroactively permit construction of a plant that was built after its construction was enjoined would mean that the injunction is meaningless and would also mean that any "prior consent" requirement is meaningless.

[2] At minimum, the prior consent language found in both 393.170.2 and 393.170.1 should be considered on the issue of whether the Order can be retroactive.

has authority to decide the location of power plants. Furthermore, there is nothing in Chapter 393 or 386 that states that the PSC can override local government land use decisions on location of power plants. To the contrary, the PSC Law states that the utility shall comply with "all laws" and "all franchises and charters." Instead of the PSC having authority to supersede a County's decision on zoning, the PSC Law seems to require that the PSC insist that the utility must comply with the requirements of the County for building power plants.

By comparison, the statutes on county land use controls for first class noncharter counties grant to the County authority over the location of buildings. RSMO 64.255 states that the County Commission has the power to regulate and restrict the location of buildings. RSMO 64.281 authorizes the County to regulate the use of buildings, structures and land. On the matter of setting higher standards or requiring more restrictive use of land, RSMO 64.285 indicates the County Commission's zoning power supersedes other statutes. The intent of the Legislature appears to be that a.) for location, and b.) for more restrictive use of land, the County has substantial power. This is in contrast to the PSC Law, which does not anywhere mention authority over location of buildings.

RSMO 393.010 and 229.100 contain provisions that give control to local government over placement of lines and conductors. Obviously, there are lines and conductors in and around the SHPF. StopAquila asserts that likewise in 393.170, subparts 1 and 2, we see the intent of the Legislature that the electric company must get the consent of the local government. Since statutes give

authority to the local government over the location of electric lines and conductors (393.010 and 229.100), give the County authority over location of buildings (64.255), and state that the power of a first class noncharter county to impose a more restrictive use of land supersedes other law (64.285), it is consistent that the Legislature would give to the County authority over the location of buildings that contain high voltage conductors and power plants.

Power plants are different from transmission lines. Transmission lines need to go to every customer. Power plants can be placed many miles away and many miles apart and there is no reason why they can't all be placed in industrial zones. Traditionally, we have placed power plants away from residential areas. Local government can clearly control the placement of power plants without interfering with the provision of power to customers.

The PSC points to language in RSMO 64.235. This statute does not mention "power plants," nor does it mention the "location" of buildings. RSMO 64.235 states that the "county planning board" may not "interfere" with certain things. 64.235 makes little or no attempt to define those certain things. A key word is the word "interfere," but this section does not define interference. On the following questions, 64.235 leaves resolution to other statutes: a.) the question of the relative authority of the County Commission compared to that of the PSC, and b.) the definition of interference.

64.235 limits the authority of the county planning board to "interfere" with decisions of the County Commission. It also limits its authority to "interfere" with

specific orders of the PSC. This statute obviously distinguishes between the county planning board and the County Commission. The PSC Law does not state that the PSC has authority to dictate the location of a power plant. The PSC has stated that it does not tell utilities where to not build power plants.[3] A decision of either the county planning board or County Commission cannot be said to "interfere" with the PSC on this matter when the PSC itself says it does not have the authority to dictate location of power plants.

If the General Assembly had intended that the local government and local people (the "locals") would have no say in the location of power plants, it would have said so. It has never said that. There is a pattern in the law that provides that the locals have control over a.) matters involving power plants and b.) the location of buildings. See RSMO 64.255; 64.281; 64.285; 71.530; 88.770; 393.170; 393.010; 229.100; Constitution Article VI Sections 23(a), 26(e), 27 and 27(a).

Footnote 8 in Cass County v. Aquila (the "Opinion"), supra, said there is no exemption from the application of 64.255. (Opinion at 32.) 64.255 gives authority to the County Commission over buildings. (The Opinion also declared that the statutes do not give zoning power to the PSC. Opinion at 30.)

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[3] The PSC stated that it did not have the authority to tell Aquila where to not build. Tr. Vol. 7 p. 756 line 20, p. 757 line 1, Vol. 5 p. 716, Vol. 7 p. 730 to page 751.

On location of buildings, 64.255, 64.281 and 64.285 grant substantial powers to the County. By comparison, 64.235, and the provisions of the PSC Law, relied on by the PSC, are vague about the question of whether the PSC has any authority over the location of buildings. Administrative agencies possess only those powers expressly conferred or necessarily implied by statute. Bodenhausen v. Missouri Bd. of Registration for the Healing Arts, 900 S.W.2d 621, 622 (Mo.banc 1995).

The view of the law put forward by StopAquila is certainly consistent with the PSC report and order in the case of In re Missouri Power & Light, 18 Mo. PSC (N.S.) 116 (1973). See full copy at A-61. This PSC order was also discussed and relied upon by the Opinion. In Missouri Power & Light, the PSC stated that the PSC requires that the applicant must show to the PSC that it has complied with local requirements before it submits its application to the PSC to build a power plant. A-64 line 7. The PSC recognized in Missouri Power & Light that the intent of the law was that the locals are given a say on the location of a power plant. A-64 lines 4 – 9.

If we look at this as a face off between the Zoning Statutes and the PSC Law, the Zoning Statutes win as to *location of buildings*. The PSC Law says there must be compliance with all laws and with the franchise, while the Zoning Statutes that apply to Cass say that when it comes to requiring higher standards for land use, zoning laws supersede other laws. RSMO 64.285. Both the Zoning Statutes and the PSC Law seem to point to the conclusion that the local zoning is

controlling on location of buildings.

On the question of how broad is the authority of local government over utilities, further review of the law is instructive. In In the matter of the complaint of Missouri Valley Realty Company v. Cupples Station Light, Heat and Power Company et al., 2 Mo. P.S.C. 1, 6 (1914), the PSC itself stated:

> **Consent of the municipality is always required as a condition precedent** to the granting of permission and approval by this Commission ... (emphasis added).

RSMO 393.190 indicates that the PSC cannot enlarge on the rights given in the franchise or the permit:

> 393.190. ***
>
> 1. *** The permission and approval of the commission to the exercise of a franchise or permit under this chapter . . . shall not be construed to revive or validate any lapsed or invalid franchise or permit, **or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit**, or to waive any forfeiture. (Emphasis added.)

In State v. Burton, 379 S.W.2d 593 (Mo. 1964) the Court said:

> ... **the authority which the Commission confers must be in accord with the "franchise" which the county grants.** *** [T]he certificate of the Commission cannot enlarge the authority thereby conferred. ***

> The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and **municipal consent**. State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394 *** (Emphasis added.)

The case law early on made a distinction between the authority of the PSC and the authority of the city or county. In State ex rel Electric Co. of Missouri v. Atkinson, 204 S.W. 897 (Mo. banc 1918), the Court indicated that the statute empowers the PSC to issue a certificate of convenience and necessity to an electric company or to refuse it, but it does not empower the PSC to adjudicate the question of the validity of the franchise.

In State ex. inf. Shartel v. Missouri Utilities Company, 331 Mo. 337, 53 S.W.2d 394 (Mo. banc 1932), the Court said:

> Of the nature and scope of the certificate of convenience and necessity referred to in the above section, Judge McQuillin, himself a distinguished former member of the Public Service Commission of Missouri, says in his work on Municipal Corporations (2 Ed.) section 1768, vol. 4. page 703: "Before action on the application for such a certificate, provision is made for a hearing thereon, and the commission after such hearing may issue the certificate or refuse to issue the same or may grant the application in whole or in part, and usually may attach to the exercise of the rights granted by the certificate, such terms and

conditions as in its judgment the public convenience and necessity may require. "**It is not intended by this requirement to substitute a commission for the local or municipal authorities, when by the constitution and laws of the particular jurisdiction the consent of such local authorities is necessary before the grant of a franchise could be complete, because the constitution and laws contemplated that such local or municipal authorities shall have power to impose such reasonable conditions as the convenience and necessity of the locality may require, and with such conditions for the exercise of the franchise a commission has no concern. Therefore, it (the PSC) cannot demand that the local authorities add to or take from the conditions upon which they were willing to consent**. The State, however by its commission, has power to say that no franchise shall be acquired or exercised unless it is necessary or convenient for the public service; and hence by virtue of such statutory grant of authority it may impose upon a corporation or individual before such a franchise can be exercised the obligation of satisfying the commission that the construction of the proposed plant for public service, or the exercise of the franchise or privilege thereunder is necessary or convenient for the public service. This is the single question presented to such commission. *** (Emphasis added.)

In In the matter of Ozark Utilities Company, 26 Mo. P.S.C. 635 (1944), the electric utility received a franchise from the city and a certificate from the PSC. The PSC stated that the statutes did not give the PSC the power to approve or disapprove the municipal franchise, and did not give the PSC the power "to entertain any issue respecting the municipal franchise."

In Union Electric v. Public Service Commission, 770 S.W.2d 283 (Mo. App. W.D. 1989), the Court said:

> The statutory scheme at Section 393.170.2, RSMO 1986 establishes **two layers of oversight** by providing that the rights and privileges granted by a franchise may not be exercised without first having obtained Commission approval. A Commission certificate becomes an additional condition imposed by the State on the exercise of a privilege which a **municipality or county may give or refuse** under its delegated police power. (Emphasis added.)

The above cases indicate that a.) there are distinct roles for the PSC and the local government, b.) the PSC cannot expand on the franchise or consent given by the local government, and c.) the PSC cannot rule on matters entrusted by law to the local government. The above cases support a conclusion that the PSC cannot override the decisions of the County on the matter of location of a power plant.

Retroactivity is even more wrong-headed when the PSC attempts to permit an activity that was not only conducted in violation of zoning ordinances, but also in contravention of an injunction.

In response to the assertions made by StopAquila that Aquila must comply with RSMO 393.170.2 in this application, the PSC says (at page 39 of the Order, L.F. 45) that 393.170.2 only applies to "applications for area certificates" and does not apply to "applications under subsection 1." The reasons given by the PSC are not persuasive. The PSC cites to State ex rel. Union Electric v. Public Service Commission, 770 S.W.2d 283 (Mo. App. 1989). However, neither that case nor, to our knowledge, any other case[4] has ever ruled that a utility does not have to comply with subpart 2 at some point in time when seeking to build a power plant.

The PSC majority appears to believe the last sentence of the Opinion granted it some new authority to for the first time issue a retroactive order to build. The Dissent is more likely correct when it said:

> When the Western District stated that Aquila could pursue continued operations of the plant, it seems probable that the Court was not suggesting that such permission could be granted by the Commission to override County zoning; rather, it was referring to Aquila seeking permission from Cass County for a variance from zoning requirements. (Dissent,

[4] Missouri Power & Light, supra, was consistent with our view, as it stated that the utility must show that it has complied with local government requirements before construction. Cass County v. Aquila, supra, appeared to assume the PSC would follow Missouri Power & Light. See Opinion at page 30.

L.F. 210, lines 20 – 23.)

Aquila seemed to too understand this, when it initially stated in the days immediately after the Opinion was handed down that it would apply to Cass County. Exhibits 87, 88. Then it changed its mind and rolled the dice, deciding to seek permission only from the PSC. To this day, Aquila has not received consent from the County.

To sum up on Point I: Prior to building, Aquila did not have the necessary authority to build this facility in an agricultural district in Cass County. Opinion at 39. A utility must have consent from the local government before the first spade full of dirt is disturbed. Opinion at 34, 36 – 38, RSMO 393.170.2. The utility must have consent from the PSC before it begins construction. 393.170.1. The utility must comply with zoning for its power plant. The PSC cannot override local zoning for a power plant. The PSC cannot ignore an injunction. The PSC cannot act as a Court of Law.

Until the issuance of the Order by a 3-2 majority of the PSC in the present case, our history was that the PSC insisted on compliance with all local government requirements in the placement of power plants. See In re Missouri Power & Light, 18 Mo. PSC (N.S.) 116 (1973), which is exactly on point. Full copy at A-61, copy also found at L.F. 198. The PSC in the present case would reject years of prior decisions, twist the Opinion of the Court of Appeals, distort the statute and flout the injunction, for only one reason, and that is to try to save Aquila from the cost of dismantling and moving the SHPF.

The PSC acted without authority in issuing the retroactive permit to construct. The PSC Order is unlawful and unreasonable and should be set aside.

POINT II.

THE ORDER OF THE PSC GRANTING THE CERTIFICATE REQUESTED BY AQUILA IS IN ERROR BECAUSE THE ORDER IS UNLAWFUL, UNREASONABLE, ARBITRARY, CAPRICIOUS, INVOLVED UNLAWFUL PROCEDURES, WAS AN ABUSE OF DISCRETION AND/OR VIOLATED DUE PROCESS AND EQUAL PROTECTION RIGHTS OF THE MEMBERS OF STOPAQUILA.ORG IN THAT IT DECLARED THE RIGHTS OF THE NEARBY CITIZENS TO BE SUBSERVIENT TO THE RIGHTS OF OTHERS, PLACED THE BURDEN OF PROOF ON OPPONENTS OF AQUILA, FAILED TO FOLLOW THE LAW, DEVELOPED NEW RULES OR RULES TO APPLY FOR THIS CASE ONLY AND IGNORED EVIDENCE.

STANDARD OF REVIEW. On review the court is authorized to determine whether the agency action is unsupported by competent and substantial evidence upon the whole record, is unconstitutional, in excess of statutory authority, otherwise unauthorized by law, involved unlawful procedure, is arbitrary, capricious or unreasonable, or involves an abuse of discretion. Lederer v. State, Dept. of Social Serv., 825 S.W.2d 858 (Mo.App.W.D. 1992).

RSMO 386.540.4 states that "[t]he general laws relating to appeals to the supreme court and the court of appeals in this state shall, so far as applicable and not in conflict with the provisions of this chapter, apply to appeals taken under the provisions of this chapter." Therefore, RSMO 536.140 should also apply.

Under RSMO 536.140, the inquiry of the Court shall extend to a determination of whether the action of the PSC was:

1. in violation of constitutional provisions,
2. in excess of statutory authority, ***
4. is, for other reason, unauthorized by law,
5. is made upon unlawful procedure,
6. is arbitrary, capricious or unreasonable, or
7. involves an abuse of discretion.

ARGUMENT. The Missouri Constitution Article V, Section 1, provides that the judicial power of the state shall be vested solely in the courts, and thus, agencies may not exercise the judicial power of the state. Courts alone have the power to say what the law is. Lederer v. State, Dept. of Social Serv., 825 S.W.2d 858 (Mo.App.W.D. 1992). Administrative agencies have only those powers expressly conferred or necessarily implied. Board of Education, City of St. Louis v. State, 47 S.W.3d 366 (Mo.banc 2001). State agencies have no power to declare any principle of law or equity. State Tax Commission of Missouri v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo.banc 1982).

The right to due process is afforded by Missouri Constitution Article I, Section 10. The right of equal protection is afforded by Article I, Section 2.

The PSC Order erroneously declared that the rights of people nearby the SHPF are "subservient" to the rights of the public. (L.F. 34, lines 5-9. Copy also found at A-1, A-28, lines 5-9.)

The Legislature intended that the people nearby have considerable rights, as evidenced by the requirement that local "consent" be gained prior to issuance of certificates (see discussion under Point I, above), the fact that there is no exemption from County Commission zoning authority (64.255 and footnote 8 to the Opinion, at 32), the fact that County zoning is said to "supersede" other laws (RSMO 64.285), and the fact that the people in the County have the right to file suit to seek enforcement of the zoning regulations (RSMO 64.295).

In any event, it is unlawful for the PSC to declare that the people nearby are "subservient." L.F. 28. The PSC cannot declare the law. Courts alone have the power to say what the law is. Lederer v. State, Dept. of Social Serv., supra.

The PSC considered letters written by people who lived away from the site.[5] Those letters were said by the PSC to support the building of the SHPF. The PSC ignored the evidence that the vast majority of the people who lived within two miles were strongly opposed to the building of a power plant near

[5] The bulk of the electricity generated goes to Jackson County. Transcript Vol. 7, page 981, 995.

them. It was demonstrated that the people present at the public hearing who wrote letters in support of the SHPF did not live close by. L.F. 27, Public Hearing of March 30, 2006, Vol. 3, page 33 through 44, transcript Vol. 8, page 1302 through page 1303, Exhibit 28. It is a truism that a person who lives several miles away will be pleased that the power plant is built near someone else's home. It is a violation of due process and equal protection to declare that the rights of the people living near the power plant are "subservient" to the rights of the people who live far away. Mo. Constitution Article I, Section 10, Article I, Section 2.

The PSC Order stated that the PSC is no less capable than Cass County to consider land use concerns. L.F. 40, or A-34. Amazingly, then the Order went even further and stated that the PSC is the "preferred authority" to handle land use concerns. (L.F. 40, or A-34, paragraph 2.) These statements by the PSC are clearly wrong. First and foremost, we note that the Opinion stated that no statutes give zoning authority to the PSC. Opinion at 30. With no zoning authority, the PSC is wrong in declaring itself to be the preferred zoning authority.

Within two weeks of the time the Circuit Court entered its injunction in January 2005, Commissioner Linn Appling met with Aquila employees and toured the site of the SHPF. Exhibit 40, page 3. A person who may have to make a decision on a matter should not be visiting one of the parties ex parte about the matter in litigation. Commissioner Appling should have recused himself. (This visit was not revealed by Appling. StopAquila did not know of this visit until after Exhibit 40 was introduced into evidence at the PSC hearing. Exhibit 40 lists the

visit.) The right to a fair hearing was violated by his involvement.

In his concurring opinion, filed on May 23, 2006, Commissioner Appling then wrote:

> In my opinion, this order confirms the Commission's standard practice and affirmations, including: the Public Service Commission's November 5, 2004 letter advising Nanette L. Trout that Aquila, Inc.'s existing certificates of convenience and necessity conferred the authority needed to build generation in its existing service territory; the Commission's April 7, 2005 order clarifying the adequacy of Aquila's certificate authority (EA-2005-0248); and decades of similar findings made by our predecessors. *** As this order notes, the Western District's Opinion found that Aquila ... is exempt from Cass County zoning and that it had the option to seek specific authority from either Cass County or the Commission. Aquila chose to come here. The Commission made its decision. *** I agree with the majority that ... there is no compelling reason to deny the company's request for a certificate of convenience and necessity. *** (L.F. 186-187.)

Commissioner Appling was one of the majority in the 3-2 decision. In the above writing he revealed reasons why his vote was in error and suggests reasons why the other two Commissioners in the majority were wrong in their analysis. Commissioner Appling was wrong in:

1.) Indicating that he thinks the history of the PSC is replete with

authority for allowing a power plant to build wherever it wants,

2.) stating that the Opinion decided that in fact Aquila was exempt from zoning,

3.) stating that the Opinion held that Aquila could choose to go "either" to the PSC or to the County, and

4.) stating that he and the majority properly placed the burden of proof on the opponents of Aquila to prove "compelling" reasons why the retroactive approval should not be given to Aquila.

As the discussion in Point I, above, shows, there was certainly not a history of the law allowing utilities to build power plants anywhere they wanted despite local government objection. (The best example of how wrong Appling is on the history is Missouri Power & Light, A-61, or L.F. 198. On the matter of the location of power plants, the PSC had previously required compliance with local zoning.)

Commissioner Appling appears to be saying that the three commissioners have decided they don't agree with what the Court of Appeals wrote and they desire to go back to what he (erroneously) believed was done before. This is evidence that the three commissioner majority of the PSC attempted to reject the Court of Appeals' Opinion.

While Appling's writing indicates he thought the Opinion declared that Aquila was exempt from County zoning, in fact the Opinion decided that the Circuit Court correctly granted the injunction (against construction on that site)

sought by the County. Obviously Appling is wrong, because if the Opinion had found Aquila exempt, it would not have upheld the injunction.

Commissioner Appling says that the Opinion held that Aquila could pick whether to go to the PSC or to go to the County. The Opinion did not specifically say this. This is an interpretation made by the majority of the PSC. StopAquila urges this interpretation is in error and that the Opinion envisioned that Aquila would comply with both the PSC and the County. The Opinion said that a.) the PSC had no zoning power, b.) that there was no exemption from the zoning authority of the County Commissioners, and c.) that zoning matters should be addressed before the first spade full of dirt is disturbed. Since only the County has zoning authority, this means that hearings on zoning matters must be conducted by the County. Opinion at page 30, page 32 (footnote 8), pages 34 - 41. (In any event, even if the Opinion was saying that a utility could pick and choose whether to go to the PSC alone, the fact remains that under any view, the PSC must at least insist that Aquila comply with the County on zoning matters.)[6]

The fact that the majority put the burden of proof on opponents of Aquila was not only indicated by Appling, but was also stated by Commissioners Clayton

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[6] The language used by the Opinion makes sense when you consider that a utility may have chosen to build in an area already zoned for a utility and already have any and all the consents needed from the local government, so in that situation there would be no reason to go to a hearing in front of the local government.

and Gaw in their Dissent. They wrote in footnote 13 that the majority put the burden of proof on opponents of Aquila. L.F. 215. Therefore, we have three of the five Commissioners saying that the burden of proof was placed on opponents by the majority. They would know, as they were involved in the discussions.

The burden of proof must be on the applicant who seeks a grant, not on the parties opposing the grant. It is the applicant who is seeking permission to change the status quo. Putting in a power plant is a dramatic change. Common sense and the law are violated if the PSC says the power plant can be built at a location chosen by the utility unless opponents can prove compelling reasons why it should not be built there. (And in our case the PSC did not find an injunction to be a compelling reason.)

The PSC itself has said in different types of cases that the burden of persuasion or the burden of proof is on an applicant. In In Re Research Medical Center, 1993 WL 449453 (Mo. P.S.C.), Case number TA-92-113, the PSC said:

> As with any adversarial or contested matter which comes before the Commission, the burden of persuasion rests upon the applicant and every such application must be judged on its own individual merit.

See also, In Re United Cities Gas Company, 1995 WL 769947 (Mo.P.S.C.), Case No. GR-95-160 (PSC stated that the burden of proof was on the applicant).

By placing the burden of proof on opponents of the applicant, the Order violated the constitutional rights of the people nearby, was arbitrary and capricious, violated the law, was made upon unlawful procedure, and was an abuse of discretion. The PSC does not have the authority to declare the law. Courts alone have the power to say what the law is. Lederer v. State, Dept. of Social Serv., supra. The Court should declare that the burden of proof must be on the utility.

The position of Commissioner Davis was that the PSC would not try to stop Aquila from building but rather should address the propriety after it was built. L.F. 188. This was shown by the fact that a.) he voted on June 13, 2006, in favor of ordering a management audit of Aquila that would investigate the decision by Aquila to build the SHPF, while b.) almost simultaneously voting to approve the retroactive application of Aquila to construct the SHPF. (Commissioner Davis voted with the majority in both cases.) L.F. 6, L.F. 195.

The position of Commissioner Davis was discussed and criticized by the Court of Appeals in Footnote 12 to the Opinion:

> Footnote 12. Of interest in this regard is Commissioner Jeff Davis's concurring opinion to the Commission's April 7, 2005, order clarifying Aquila's authority under existing certificates. He discusses the many ex parte complaints filed by Cass County residents about the lack of a company response to their concerns, the heavy-handed approach Aquila took to security issues, and the prudence of building the plant at

all. Commissioner Davis invites those affected by the plant to renew their concerns and warns Aquila that its decisions and behavior will be considered in its next rate case. **Had the Commission held a hearing in the months before this plant was constructed, as required by section 393.170.1, the plant's neighbors and Cass County would have had the opportunity to express their concerns in a timely manner without muddying the waters of a future rate case.** (Opinion at footnote 12.) (Emphasis added.) (A copy of the writing of Commissioner Davis in question is found at L.F. 188.)

Under the language of the Opinion, above, the statute (393.170), and common sense, the proper course must be to address the propriety of building the plant before construction begins. The PSC rejected this.

The position of the three PSC Commissioners is in line with the idea stated by PSC employee Warren Wood earlier in the Cass County Court proceedings, that the PSC could not tell Aquila where to not build. Transcript Vol. 7 p. 756 line 20 to line 25, p. 757 line 1 to line 19, attachment to Exhibit 1, Transcript Vol. 5 p. 716, Vol. 7 p. 730 to p. 751, p. 757. This would give a free hand to the utilities to do whatever they desire. Although the majority of the Commissioners may truly believe they should be powerless to tell Aquila where to build or not build a power plant, they are wrong in deciding that they have the authority to tell Cass County that the County is likewise powerless to make decisions about location.

Since the PSC decided that it cannot stop Aquila from picking a location

for a power plant, it is untenable for the PSC to now say that it is the "preferred land use authority." L.F. 40. If an agency announces that it is powerless to stop a utility from picking a location and building there, then it cannot be an authority on land use. A powerless authority is no authority.

The approach of the majority of the PSC would result in utilities being able to build their power plants wherever they want, with no one being able to stop them. The approach by the PSC is to say no one can stop the utility, not even an injunction.

In the Dissent, Gaw and Clayton state that a.) they were concerned about the process employed in this case; b,) that the criteria selected by the Staff was not available to opponents before the hearing; c.) that therefore opponents were hindered in preparing for the hearing; d.) that the expedited schedule created an arguably unfair proceeding; and e.) that the record was simply incomplete for the PSC to make a reasoned decision on the question of whether the SHPF location was the appropriate location for a power plant. L.F. 215-216. These two dissenters said that the new rules were revealed for the first time at the hearing. L.F. 216 line 2. The new "rules" were explained by PSC employee Wood. He testified that these rules were for this case only, and would not be used in any future case. Wood said the reason why this case was handled differently was because the power plant was already constructed. Transcript Vol. 7, pp. 887 to 888, pp. 980 to 981. As the Dissent says, the rules were written simply to save Aquila. L.F. 207, lines 12-14.

The idea of rules that will never be used for any other proceeding, but which were simply created to rule in favor of one litigant, is unlawful and unreasonable. Under RSMO 386.250(6), all proposed rules must be filed with the Secretary of State and published in the Missouri Register. These rules were not. They were created during the litigation. This is a violation of 386.250(6) and of due process and equal protection. The PSC is wrong in thinking it can apply these rules to this one case alone. If allowed to stand, the ruling would have to be applied to all utilities in the future which are similarly situated. All utilities would be allowed to hereafter build power plants anywhere, without *any* prior permission.

The present case is not the kind of case in which it is important to build that power plant at that location. This is not remotely similar to a case where a power plant should be built on particular spot, such as a lake or river. This is a case where Aquila built a power plant two miles outside of a town, in a field, near existing residences. It was not even one of its first choices for location. No evidence was presented that would even suggest that this site was better than any other site. Transcript Vol. 3 p. 343 - 344 line 4, p. 347 - 348 p. 357 -358, p. 365 – 366,. p. 392 – 394, p. 470 – 471, p. 633 – 634, p. 336; Transcript Vol. 5 p. 634 -. 635, 642.

The PSC majority attacked Cass County in its Order. The PSC stated that "[t]he facts . . . call into question the enforceability of Cass County zoning" and that this "weigh[s] against deferring to Cass County for siting the facilities at issue

in this case." L.F. 39 line 3. In other words, the three Commissioners attempted to act as a Court, judging the County's zoning.

The Circuit Court had issued an injunction against Aquila building the SHPF due in part to the fact that Aquila intended to not comply with the County zoning ordinances. Opinion at 28. The Circuit Court enforced County zoning. There is no deficiency with Cass County zoning. See Exhibits 102 (zoning map), 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 119, 120, 121, 122, 123. The PSC cannot adjudicate zoning. Courts alone have the power to say what the law is. Lederer v. State, Dept. of Social Serv, supra, Mo. Constitution, Article V, Section 1.

The Order also violates the due process and equal protection rights of members of StopAquila, violates the law, is arbitrary, capricious, and abuses discretion by twisting the language of (and rejecting) the prior precedent of Missouri Power & Light Co., 18 Mo. P.S.C. (N.S.) 116 (1973). See full copy at A-61 and also at L.F. 198. At page 35 of the Order, the PSC mentions this case. L.F. 41 or A-35. First we should note that the following language from Missouri Power & Light was quoted with approval by the Opinion:

> In short, we emphasize we (the PSC) should take cognizance of--and respect--the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning. (180 S.W.3d 24, at 30.)

The Opinion appeared to craft its decision based on the assumption that this precedent would be followed by the PSC. However, the PSC Order rejected this precedent in its May 23, 2006, Order. L.F. 41, or A-35.

Missouri Power & Light said:

> The applicant has satisfied of all requirements of state and local agencies concerning the construction . . . ***
>
> We (the PSC) should also state parenthetically at this point that we are of the opinion that the citizens, through proper **zoning** ordinances, have already designated the area in question as an industrial area. *** For us to require the Applicant to move the proposed site to the alternative site suggested by the intervenors would be to suggest a location that is not now zoned for industry but is zoned residential. ***
>
> We also find that **the Applicant has met our Public Service Commission requirement that it has complied with municipal requirements before construction of the facility**. (Emphasis added.) (A-62 line 39, A-63 line 54, A-64 lines 1-8.)

There you have it. The PSC declared in Missouri Power & Light, above, that when an application to build a power plant is submitted to the PSC, the PSC requires that the applicant show it has complied with municipal requirements before beginning construction. As we will see below, the PSC did not just reject

this case without valid reason, it also twisted and distorted the facts of this case in an attempt to avoid following it.

Missouri Power & Light is directly on point. In Missouri Power & Light interested parties asked that the PSC issue an order to move the proposed site for a peaking power plant. A-63 line 10, A-64 line 1. The PSC declined to do so, saying that it deferred to the decision of the local **zoning** authority on location. The PSC refused to overrule the local government decision about zoning. A-64 lines 1-8.

The Order (at L.F. 41 or A-35, lines 2 - 7), incredibly, claims that in Missouri Power & Light the PSC gave "retroactive" approval to the construction of the power plant. To see if the PSC is correct, let us review. In Missouri Power & Light, the applicant had first proposed to build in an area properly zoned for a peaking power plant, and the PSC commented in its report and order that the applicant had already met the PSC requirement that it comply with local requirements before it begins construction. A-64 line 7. The applicant in Missouri Power & Light filed its application with the PSC in early 1973. A-61. The PSC held hearings on April 7 and June 5, 1973. A-62 line 15. Then the report and order was issued on July 27, 1973. Ibid., line 7. In that July 1973 order the PSC stated that the proposed plant was scheduled to be completed in the future, by June 1974. A-61 line 44. While the facts were that the utility in Missouri Power & Light got approval from both the local government and from the PSC before it built its power plant, the three commissioner majority in the

present case sign their names to a false claim that in Missouri Power & Light the PSC gave "retroactive approval" to the request for a permit to build a power plant. L.F. 41, lines 1 – 7. The PSC report and order was issued eleven months before the plant was to be completed. It was clearly prospective.

How did the Order erroneously conclude that there was "retroactive approval" for a power plant in Missouri Power & Light? The Order gave reasons. The Order said (at L.F. 41 or A-35, line 4 – 7) that in Missouri Power no residents of Schellridge had complained about noise at the time of the June 5, 1973 hearing. Relying on that statement, the Order said that it will infer that the PSC in Missouri Power must have given a retroactive approval. (L.F. 41 or A-35, lines 6 – 7) The truth is that the Missouri Power report and order said:

> [W]itnesses expressed the concern that if the plant were noisy they would find it objectionable; however, if the noise will be effectively muffled they do not object to the plant's location at the proposed site. A-63 lines 17 - 19.

The report speaks of the future operation of the proposed plant. The report further says that "[I]n the event actual operations as observed after construction do not meet (noise) specifications, this Commission can then take action . . ." A-64 line 10. Throughout, it is speaking of the future. Since the plant was not scheduled to be finished until June 1974, the witnesses in June 1973 could only speak about possible future noise. Due to a desire to do whatever is necessary to

decide in favor of Aquila, the Order (at L.F. 41 or A-35, lines 1 – 7) twists the facts of Missouri Power.

The Order further violates due process and equal protection, is arbitrary and capricious and abuses discretion by twisting evidence. An administrative agency cannot lawfully act in a manner that is arbitrary or capricious. State ex rel. Chicago, Rock Island & Pacific Railroad Company, v. Public Service Commission, 312 S.W.2d 791 (Mo. 1958), State ex rel. Midwest Gas Users' Association v. Public Service Commission, 976 S.W.2d 485 (Mo. App. W.D. 1998), RSMO 536.140. The twisting of evidence is even more troublesome when we consider the fact that the majority of the PSC actually placed the burden on opponents to prove compelling reasons why the certificate should be denied to Aquila. The PSC set the bar very high for opponents, and then made it impossible for opponents to reach it by distorting facts.

In paragraph 36 of the findings (at L.F. 15 or A-9, par. 36), the Order states that Aquila used some of the suggestions of Staff for guidance for its self-build plan. The evidence actually was that before the SHPF was built, Staff had told Aquila it had too much peaking power, and Aquila itself declared before the SHPF was built that it had more peaking than it needed. (SHPF is a peaking facility.) Exhibits 38. See also Exhibit 39 HC. While the PSC Staff before construction began said build more base, Aquila instead built more of what they then said it did not need. Ibid.

In paragraph 33 of its findings (at L.F. 15 or A-9), the Order states that

Aquila decided to not enter into a contract with Calpine because the contract with Calpine offered "higher" prices. Calpine offered lower prices on a one-year deal. Transcript Volume 4, Page 287 Line 4. The truth was, Aquila would have saved substantial money by slowing down and entering into the contract offered to it by Calpine.

At L.F. 24 par. 71, L.F. 26 par. 77, and L.F. 54 – 57, the Order claims that there is no nuisance, no environmental violations, no noise problems, no health concerns. There was considerable evidence to the contrary ignored by the PSC or twisted by the PSC. At L.F. 55 line 14 of the Order, the PSC said that Aquila had purchased four homes and had "already sold two of them for near the purchase price." BEGINNING OF HIGHLY CONFIDENTIAL:

END OF HIGHLY CONFIDENTIAL.

The PSC allowed Aquila to present a noise study which was flawed in that it was done with only one of the three CTs operating (Exhibit 76), while ignoring

that the noise level with only one CT running was still over the County limits (Transcript Vol. 5 p. 587 - 591, Exhibit 76, p. 7, table 3.2.) and also ignoring the testimony from a man who lived across the street that the noise level with three CTs operating was unacceptable (Testimony of Frank Dillon, Pub. Hrg. Vol. 3, p. 53 line 3 to 12).

StopAquila urges that the three Commissioner majority first decided that it wanted to rule in favor of Aquila, then it decided it needed to place the burden of proof on opponents in order to accomplish its goal. The PSC also fashioned new rules that were created for the purpose of finding in favor of Aquila. The majority even went so far as to distort an important precedent (see discussion of Missouri Power & Light, above), attack the County's authority, and act as if it were a Court. The PSC declared that a.) it was now the preferred zoning authority, b.) that it could adjudge that the County's zoning program may be defective, and c.) that it has the authority to issue a retroactive order. L.F. 41, 39. The Dissent says the majority was simply trying to come up with an order that would save the plant. L.F. 207, lines 13 - 14.

The three Commissioner majority pronounced that it gave more than enough process to the citizens in this case. L.F. 40 or A-34, line 15. The PSC pointed to the post-construction hearings held before it. Of course, the first

problem is that the PSC held no hearings before construction.[7] At the time that the interested parties were trying to decide how to proceed, in November 2004, the PSC announced that it could not stop Aquila from constructing at any site that Aquila chose. Transcript Vol. 7, p. 756 to p. 757; Transcript Vol. 5, p. 716, p. 730 to p. 751. When the PSC held a post-construction hearing, it placed the burden on the opponents of Aquila to present compelling reasons why the plant should be dismantled, and dismissed the rights of the neighbors as "subservient," and defied the County and the Court. L.F. 34, L.F. 187. The PSC also adopted new rules to help Aquila. L.F. 216 line 2.

Only a pre-construction hearing will suffice. Only a hearing in front of a tribunal that is fair and impartial will suffice. Only a hearing in front of a tribunal that follows the law will suffice. None of this was provided by the PSC.

Aquila took a risk. The fact that Aquila knew it was taking a risk is shown in the lease entered into with the City of Peculiar in December 2004 for financing for Aquila to build the power plant two miles outside the city limits. That lease says that *if Aquila contests any law or ordinances, it would be at Aquila's cost.* Exhibit 96, page 6. This unusual term in a lease tells us that Aquila knew it was going to have to challenge the existing law. Aquila gambled that it could convince the PSC and/or the Courts to reject Missouri Power & Light, supra, and to

[7] The only hearings on the SHPF that were held before construction were held by the Circuit Court.

denigrate the County zoning authority. Before construction of the power plant buildings began, the Circuit Court enjoined Aquila from continuing. Aquila gambled on overturning the injunction. Aquila's gambit is to blame for putting the PSC in the situation in which three Commissioners would choose to sign off on an Order that twists the facts, distorts the law and issues a novel "retroactive" permit to "begin" building an already constructed power plant.

The Order is defective and should be set aside. The three Commissioner majority of the PSC has demonstrated they cannot ignore politics and they cannot be fair to the members of StopAquila or the County, so there definitely should not be a remand to the PSC of any issues.

CONCLUSION

StopAquila does not believe that Aquila made a case for a need to build a combustion turbine (CT) power plant. However, that does not accurately state the point of this litigation. The precise point is that this power plant should not be at that location. It would not have been built at that location if Aquila had followed the law, which requires it to get permission before beginning construction. Even assuming that the PSC would have given permission to Aquila to build a CT power plant somewhere if it had applied pre-construction, the issue of location a.) must be decided in hearings before construction begins and b.) must be decided by the County. The people must have a say in the matter, and it must be prior to

construction. The proper location would have been away from residences, in an industrial zone. It is abundantly clear that there was no reason why Aquila could not have slowed down and submitted to hearings first. Aquila could have actually saved money by entering into a one year contract with Calpine to buy power. Transcript Volume 4, at page 287 line 4, Exhibits 36, 38, 39 HC, 40. This would have provided more than enough power at a good price to cover more than the time that would be required to conduct preconstruction hearings

StopAquila's members have much at stake. StopAquila opposes the location. Furthermore, the precedent that this case would set, if the PSC Order were to stand, is also extremely important to citizens throughout Missouri.

The PSC Order is unauthorized, unlawful and unreasonable because the PSC cannot issue a retroactive order to build an already constructed power plant. If the Court does not dispose of this case on that ground alone, and goes on to other issues, then we urge that the Order is also invalid for the additional reason that Aquila did not get the consent from the County before beginning construction. RSMO 393.170, subparts 1 and 2. If the Court goes past that, then we urge that the PSC's Order should be set aside for the additional reasons set out in Point II.

The Court should affirm the Judgment of the Circuit Court. The Court should set aside the Order issued by the PSC. There should be no rehearings before the PSC.

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CERTIFICATE PURSUANT TO RULE 84.06

I hereby certify as follows:

1. This brief includes the information required by Rule 55.03;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief contains 15,066 words; and

4. The disk filed herewith containing a copy of this brief has been scanned for viruses and is virus-free.

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I hereby certify that a copy of the above and foregoing was sent by U.S. Mail, postage prepaid, this _____ day of February, 2007, to:

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