IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

STATE EX REL. CASS COUNTY, MISSOURI	)	
	)	
	)	
Relator,	)	
v.	)	Case No. 06-CA-CV-01698
	)	
PUBLIC SERVICE COMMISSION FOR THE STATE OF MISSOURI,	)	
	)	
	)	
	)	
Respondent.	)	

STOPAQUILA.ORG's BRIEF IN SUPPORT OF WRIT

~~CONFIDENTIAL~~ PUBLIC VERSION

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BRIEF

I. INTRODUCTION

There are now two questions the Circuit Court will have to rule on in litigation pending in Cass County. First, did the PSC err? (It did.) Second, regardless, does Aquila need some kind of consent from the County that it did not get? (Yes.)

The case should be a simple case. Aquila did not get consent from Cass County. One of the controlling statutes in this case is RSMO 393.170, and it requires that Aquila get consent from Cass County. In pertinent part, it states:

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. (Case law has interpreted "municipal authorities" to mean the county when dealing with land outside of a city.) (Emphasis added.)

Aquila must get the permission of the PSC pre-construction, but before it can apply to the PSC, it must get the consent of the county (which did not occur). In any event, Aquila would not have received permission from anyone if it had applied before it constructed its South Harper Peaking Facility and substations. The case(s) have been skewed by the fact that the facilities were built, despite the injunction, and the PSC for whatever reason cannot seem to bring itself to order the dismantling of a facility already built. However, we must keep in mind that the analysis should be, whether the permission would have been given if applications were made pre-construction. Indeed, the purpose of the bond on appeal was in effect to suspend time, meaning that if Aquila lost, we would revert back to the condition we were in before the bond was put in place.

II. THE FACTS - APPROVAL WOULD NOT HAVE BEEN GIVEN TO AQUILA IF IT HAD ASKED FOR PERMISSION BEFORE CONSTRUCTION

A. POLLUTION.

Harold Stanley is an engineer with 33 years of experience working with power plants. He testified that the 3 combustion turbines (CTs) of the South Harper peaking facility (SHPF) are permitted to operate at over 422,000 brake horsepower and are permitted to emit over 500 pounds per hour of pollutants into the atmosphere. Exhibit 25, Exhibit 26, page 5, Transcript Vol. 8 p. 1274 According to the emissions reports for 2005 filed by Aquila with the Missouri Department of Natural Resources, using actual emissions measurements, when the 3 CTs are running, the 3 aggregated emit a little over 500 pounds per hour of pollutants. Exhibits 25 p. 57, 26, 79. 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. Stanley, Exhibit 25 p. 61 line 18 to p. 62 line 6, 26, p. 6 line 6 to p. 9 line 16, and Exhibit 25. Aquila claims compatibility with the Southern Star compressor. The compressor utilizes up to 5,647 horsepower. The SHPF uses up to 422,000 horsepower. The compressor is permitted to emit up to 22.4 pounds per hour of pollutants. This is dwarfed by the over 500 pounds per hour that SHPF actually emits when the 3 CTs are operating. Exhibits 25 p. 57, 26 p. 5, 79, Transcript Vol. 8 p. 1274, Vol 5 p. 581to 595.

Witnesses said at the public hearings that the compressor was hardly noticed before Aquila began construction of the SHPF. For example, see March 30, 2006, public hearing, testimony of Frank Dillon [who lives across the street from the SHPF and the compressor].

START OF HIGHLY CONFIDENTIAL.

END OF HIGHLY CONFIDENTIAL.

According to the report of the Environmental Protection Agency, Exhibit 29, there is a problem with fine particles, which are known as PM2.5, and with ozone. The research on PM2.5 has been done over the last several years. The EPA stated regarding PM2.5:

> **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.)**

Transcript Vol. 8 p. 1278 line 21.

The EPA report stated that problems due to PM2.5 include lung disease, decreased lung function, asthma attacks and certain cardiovascular problems. (Exhibit 29 at page 4571, Transcript Vol. 8 p. 1278 to p. 1279.) The EPA states that electric generating units are a major source of SO2 and NOX, both of which contribute to PM2.5 production.

The EPA report also states that electric generating units contribute to ozone problems. Ozone is produced after the emissions leave the exhaust stacks. Outside, the emissions react to natural conditions, including sunlight.[1] 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. Children, active adults and people with respiratory problems are unusually

[1] Therefore, the pollution is worse outside the stacks than inside the stacks.

sensitive to ozone. (Exhibit 29, at page 4571, column 3, Transcript Vol. 8 p. 1279 to p. 1280.)

The EPA has determined 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 this report are those units that use fossil fuels; this includes combustion turbines. Natural gas is a fossil fuel. (Exhibit 29, at page 4609, column 3, Transcript Vol. 5, p. 599 to p. 601.)

The EPA states that the formation of ozone increases with temperature and sunlight and that this is one reason ozone levels are higher during the summer. The EPA also states that increased electric generation in the summer to supply power for air conditioning can increase NOX production and summer time conditions that result in episodes of large scale stagnation promote the buildup of direct emissions and pollutants. (Exhibit 29 at page 4575, column 1, Transcript Vol. 8 p. 1281 to 1282.) The increase in pollution in the summer coincides with the stagnant summer weather conditions, which causes a further increase in health problems. The proper way to handle such a problem is to put peaking facilities in areas zoned for power plants, away from residential areas.

CONFIDENTIAL:

Exhibit 80.) End of confidential.

In the Clean Air Task Force Report, Exhibit 30, it states that for ozone, even at low concentrations, health problems can be triggered. Report at 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.

In a statement offered by StopAquila which the PSC refused to let into evidence, Jerry Boehm, employee of Aquila, admitted that Calpine employee Michael Blaha made a valid point that the Aries facility (a combined cycle plant) could be said to be more efficient in operation than the SHPF (a simple cycle plant). Exhibit 37. [Offer of proof.]

B. NOISE.

After construction of the SHPF, a noise study should have been done with all three turbines (CTs) operating. Instead, Aquila did a noise study (Exhibit 76) with only **one** of the combustion turbines operating. Transcript Vol. 5 p. 587. According to the study (by ATCO), with only one turbine operating, the noise level on site near the turbine was 112 dBA. Transcript Vol. 5 p. 591 line 11. At the home of Harold Stanley, 3,690 feet away from the turbine, the noise level got up to 64 dBA during the day time and up to 59 dBA at night time. Transcript Vol. 5 p. 589 line 12 to p. 590 line 2. At the home of Frank Dillon, 1,190 feet from the turbine, the noise level got up to 64 dBA during the day time and 56 dBA at night time. Transcript Vol. 5 p. 587 line 23. At the unoccupied new home referred to as R2, 1,955 feet away from the turbine, the noise level got up to 55 dBA during the day time and 57 dBA at night time. Exhibit 76, p. 7, table 3.2. The readings with **one** turbine operating were similar at other points. Exhibit 76, p. 7, table 3.2.

The noise levels for **one** CT exceeded the level that is forbidden by the Cass County Noise Ordinance. Transcript Vol. 5 p. 589 line 12. The noise ordinance prohibits noise over 60 dBA during the day and 55 dBA at night. It is obvious why Aquila did not conduct the post-construction noise study with more than one CT running. Since **one** CT produces noise at the level of 112 dBA, two CTs or three CTs will be

louder. Aquila plans to run three CTs at the present time. In fact, Aquila has plans (or at least had plans) to put in a total of six CTs.[2]

C. VIEW AND INCOMPATABILITY WITH THE AREA.

Land Planner Bruce Peshoff spent considerable time reviewing this matter and viewed the site. He stated that the SHPF is not compatible with the surrounding area.

The SHPF has 70 foot stacks. There is nothing comparable in the area. Aquila has planted some small trees, but this does not obscure the view. Photographs show that the sight of the SHPF is out of character for the area. Exhibits 93, 94. Prior to the time that Aquila constructed the SHPF, the area had developed into a residential area, with upscale homes along the two lane roads southwest of the city of Peculiar. The homes were there before the SHPF was put in. The development of homes has now stopped due to the SHPF.

Highly confidential.

End of confidential.

The SHPF, with three CTs operating, produces 422,000 brake horsepower and produces up to over 500 pounds of pollutants per hour. With only one CT the noise ordinance is exceeded. If expanded to six CTs, the facility will be able to produce over 800,000 brake horsepower, over 1000 pounds of pollutants per hour, and the noise will be unbelievable.

[2] Exhibit 34, engineering drawings, show pads for three more CTs.

D. PROPERTY VALUES.

A stark example of the nose dive in property values is shown in the case of two homes near the SHPF purchased by Aquila. **CONFIDENTIAL:**

End of confidential.

E. AQUILA HAS NOT PROVEN NEED.

Staff of the PSC expressed the concern that Aquila was focusing too heavily on natural gas as a resource for the generation of electricity. The Staff indicated that Aquila needed more base load facilities (i.e., coal powered facilities) and that it had too much peaking. 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. Aquila's own analysis determined that building a facility with 3 CTs was not the least cost option. Transcript Vol. 3 p. 259 line 19 to p. 260 line 13, Transcript Vol. 5 p. 664 line 20 to p. 665 line 4

CONFIDENTIAL.:

Vol. 12, at page 1745. End of confidential.

Exhibit 38, dated 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

CONFIDENTIAL. In Exhibit 39

End of confidential.

No matter how you analyze it, Aquila did not do what was best or what would save the most money for customers. It built with three CTs because that is what its subsidiary had, and it wanted to help its subsidiary and it wanted to get the CTs already owned into the rate base.

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. Before exiting Aries in 2003, Aries was 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. 58 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 (of the 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 kV source near Peculiar, Missouri. Transcript Vol. 5 p. 470 line 23 to p. 471 line 2. Mr. Caspary also seemed to indicate that there was sufficient capacity that we could do without the SHPF. Transcript Vol. 5 p. 473 line 6 to p. 478 line 5.

Calpine made an offer to Aquila on June 16, 2004. Exhibit 36. This was seven months before Aquila began pouring concrete for the SHPF site. Exhibit 40. (The amount that would be saved by that offer was deemed by the PSC to be confidential.)

Despite saying publicly that it did not or could not enter into a contract with Calpine to buy power from the Aries plant, **Aquila in fact entered into a contract in October 2005 for one year (therefore running until September 2006) to buy 200 MW from Calpine.** After Calpine delivers that 200 MW to Aquila, its Aries plant has another 385 MW available in capacity. Even if the SHPF were shut down, there is more than enough capacity in Cass County, in Aquila's system, and in the Southwest Power Pool.

The application should have been denied by the PSC for the factual reasons set out above. The CTs should instead be located in an area that is proper for industrial and for power plants.

F. FACTS REGARDING ZONING APPLICATIONS AND COUNTY INVOLVEMENT.

Richard Green, Jr., stated to the shareholders of Aquila 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.)

Aquila applied for county zoning for the building of Aries in 1999. Transcript Vol. 10 p. 1439 line 17-24.

In 2002, when Aquila sought to expand by placing the same 3 CTs next to Aries, it applied for consnet from the County. The County agreed in writing to allow Aquila to place these 3 CTs next to the Aries plant. (The Aries plant was already properly zoned for a power plant.) See Exhibit 81, Transcript Vol. 10 p. 1439 line 25, p. 1440 line 1-10.

In June 2004, Aquila sought a special use permit from the County to place the same 3 CTs at the proposed Camp Branch facility. 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 it). Transcript Vol. 3 p. 347 line 8-11

On September 29, 2004, Aquila filed for a special use permit from the County for the Peculiar Substation. Transcript Vol 3. p. 390 line 5-6.

Aquila's application for a special use permit from the County for the substation was scheduled to be heard by the County on **October 25, 2004**. Transcript Vol. 3 p. 416 lines 15-19.

In Exhibit 41, Page 8, a document prepared by Aquila to apply for a special use permit in June 2004, Aquila states that **it will secure all appropriate state permits and will be operated at all times in accordance with all state and local ordinances**. Transcript Vol. 3 p. 346 line 4-5.

In the lease between the City of Peculiar and Aquila dated in December 2004, Aquila states that it represents to the City that **Aquila will comply in all material respects with all presently applicable zoning ordinances**, to the best of its knowledge. See Exhibit 96, at Page 5. Transcript Vol. 8 p. 1176 line 20-25, p. 1177 line 1.

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

Aquila indicated it would apply for zoning from the City of Peculiar for the SHPF. Transcript Vol. 8 p. 1176 line 20 to line 25, p. 1177 line 1 to line 2. That fell through when the City decided on **October 23, 2004**, to not annex. Aquila still had

ample time to apply for rezoning or a SUP from the County, but instead Aquila decided sometime after October 23, 2004, to create an argument that it did not have to comply with County zoning. Transcript Vol. 3 p. 423 line 18 to line 25, p. 424 line 1 to line 4. The reason for this was simply because Aquila had three CTs, acquired by its subsidiary, and it wanted to get the three CTs in operation somewhere by July 2005. Transcript Vol. 8 p. 1195 line 2 to line 12, Vol. 3 p. 327 line 2 to line 10, p. 374 line 14. This was a self-imposed deadline. Aquila could have actually saved money by buying power from Calpine (Aries). Vol. 4 p. 286 to p. 287, Exhibit 35HC.

The location was not important to Aquila. Transcript Vol. 8 p. 1181 line 19 to line 25, p. 1182 line 1 to line 25. The best interests of its customers or of others was clearly not important to Aquila.[3] The only thing that was important to Aquila was to try to get the 3 CTs in operation somewhere and try to get them into its rate base, knowing that the PSC would likely give it whatever it wanted. It was also important to Aquila to try to get a bond issue from Peculiar so it could use the bond money to pay **itself** or its subsidiary for the CTs. Transcript Vol. 8 p. 1157 line 10 to line 25, p. 1158 line 1 to line 25, p. 1159 line 1 to line 13. The brash mayor of Peculiar indicated that he could accomplish that. Transcript Vol. 8 p. 1258 line 23, p. 1259 line 1. He testified that he didn't care about the people that were effected. Vol. 8 p. 1241 line 24 to line 25, p. 1242 line 1, p. 1248 line 13 to line 25, p. 1249 line 1, p. 1250 line 7 to line 25, p. 1251 line 1 to line 6. The attorneys (paid for by Aquila) told the mayor that it could be done without a vote of the people. Transcript Vol. 8 p. 1258 line 7-11. ("Slam dunk" is how Aquila referred to it in Exhibit 51. Transcript Vol. 3 p. 379 line 1 to line 5, Vol. 8 p.

[3] But remember that the PSC Staff had recommended against more peaking and urged that Aquila acquire more base.

1185 line 5 to line12) (The Court of Appeals later ruled in 2005 that the effort of the City to issue bonds to finance the SHPF was void. StopAquila.org v. City of Peculiar. Transcript Vol. 8 p. 1160 line 8-10. This case is pending before the Missouri Supreme Court, with oral arguments scheduled for September 6, 2006.)

On November 14, 2004, StopAquila.org filed suit to seek an injunction against Aquila. Transcript Vol. 3 p. 217 line 8-10.

Five days later, 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 a suit to seek an injunction. Transcript Vol. 3 p. 231 line 8. A hearing was held on January 5 and 6, 2005, and the Circuit Court announced its judgment orally on January 6, 2005.

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.

The PSC Staff did not tell Aquila whether to proceed or not proceed with construction after the issuance of the injunction. Transcript Vol. 11 p. 1727 line 18 to p. 1728 line 18, p. 1755 line 1 to line 24.

At the hearing on January 5, 2005, Warren Wood testified that the PSC did not have the authority to site power plants and does 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.

In a letter drafted by Warren Wood in November 2004 to Nanette Trout, on PSC letterhead, he wrote that the PSC does 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.

Having declared that it cannot stop Aquila from picking a location to build a power plant, the PSC Staff have now done a complete about-face and now take the position that the PSC should craft a one-time rule, applicable only to Aquila, and only in this case, that would allow Aquila to keep the facilities. Transcript Vol. 7 p. 827 line 6 to line 10, p. 887 line 4 to p. 888 line 23, Vol. 3 p. 980 line 17 to p. 981 line 5, p. 989 line 8 to p. 990 line 12.

If an entity announces in advance that it cannot stop someone from building in a particular location, that entity has relinquished any claim to be able to control land use. Transcript Vol. 10 p. 1499 line 12-23.

Aquila stated in a press release dated January 4, 2006, that "(Aquila) 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. Despite this statement, Aquila later said it would only file with the PSC.[4]

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

G. THE AUDIT.

In case number EO-2006-0356, on March 16, 2006, the Office of Public Counsel filed a motion for a management audit of Aquila, Inc. It alleged mismanagement. The

[4] With these same three CTs, Aquila 1.) asked for and received from the County consent to put them next to Aries (then Aquila did not place them there), 2.) Aquila asked the planning board for consent to put them at Camp Branch, which request was withdrawn by Aquila after a 6-0 vote of the board, 3.) Aquila applied to the County for a special use permit for the substation that was to be connected to them, 4.) Aquila indicated it would apply to the City for zoning, and 5.) Aquila announced in January 2006 that it would apply to the County for zoning for the SHPF.

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." StopAquila appendix, Exhibit C, at page 3.

The PSC ordered a management audit on June 13, 2006. While the PSC had issued an order in late May 2006 "permitting" Aquila to build the plant at South Harper, it stated in its June 13, 2006, order that Staff of the PSC shall investigate certain past decisions of Aquila, including those involving "the South Harper generating facility" and "decisions involving the Aries plant." Exhibit D, at pages 1 and 2. This order requiring an audit was agreed to by Davis, Gaw and Clayton, while Murray and Appling dissented. As for commissioner Davis, he simultaneously voted to permit the SHPF (a 3-2 vote) while also voting to investigate the propriety of building it (a 3-2 vote).

H. PSC INVOLVEMENT.

In a letter drafted by Warren Wood in November 2004 to Nanette Trout, on PSC letterhead, Wood wrote that the PSC does not have the authority to tell a utility where to not build a power plant. Attachment to Exhibit 1.

PSC commissioner Linn Appling met with Aquila employees and toured the site for the SHPF on January 14, 2005. Exhibit 40, page 3. This was less than two weeks after the Circuit Court entered its injunction. After meeting with Appling, Aquila filed

its first application with the PSC (EA-2005-0248) to get a ruling that it did not need a permit to construct the SHPF.

In Case Number EA-2005-0248, entitled "In the Matter of the Application of Aquila....," commissioner Jeff Davis wrote in May 2005:

> (Referring to the decision of Aquila to build the SHPF)... [T]he next rate case will be the proper venue for the parties to raise all the issues including, but not limited to, whether the construction of this plant was prudent and whether the company should be penalized for poor management. (StopAquila appendix, Exhibit B.)

In the present case, PSC employee 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. He said the reason why this case was being treated differently than others was because this plant is already built. Vol. 7, p. 981.

PSC employee Wood testified that if he had a zoning matter, he would go to the County. Vol. 7, p. 997 lines 22-25.

> Q. [I] you wanted to look at a zoning matter, would you go in Cass County – 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.) (Emphasis added.)

Christopher Reitz, counsel for Aquila, told Judge Dandurand in a hearing in case number CV104-1443CC in January 2006 that the PSC wanted the South Harper Peaking Facility. This raises the question of whether assurances had been given to Aquila by the PSC regarding the SHPF prior to the time that case number EA-2006-0309 was filed.

III. HOW THE PSC ERRED.

A. THE PUBLIC SERVICE COMMISSION HAS FAILED TO AFFORD DUE PROCESS TO THE PARTIES BY ITS ACTIONS.

The PSC has denied due process to StopAquila and others in one or more of the following regards:

A. The PSC's Staff proposed ad hoc rules, which Staff said would apply to this case only, and/or which were never before published.

B. These ad hoc rules were not revealed to StopAquila or others before rebuttal testimony was filed. They were revealed during the hearing.

C. These ad hoc rules were drafted with a view to determine, after the fact, whether the PSC could say the decision of Aquila was reasonable.

D. The PSC took the burden off of Aquila and placed the burden on the intervenors to prove that the plant and substation should be dismantled.

E. Rules of practice and procedure and/or rules regarding the presentation of evidence were changed on short notice. This included the action of the PSC in sending out notice approximately one week before the hearing that the parties would commence with cross-examination, which meant that no

one would be permitted to present evidence that was not prefiled. This notice was sent after the deadlines for filing prefiled testimony.

F. The PSC applied the rules inconsistently, allowing Aquila and Staff to introduce hearsay while declining to allow opponents to do the same.

G. Various commissioners were absent from hearings for long periods of time and on some occasions out of town during the hearings. Commissioner Murray was absent from the room for all but a couple of hours of the evidentiary hearings. Commissioner Davis was out of town, in Caruthersville, during the first two days of hearings. Some commissioners failed to give due consideration to the facts and the law before casting their vote.

H. The same commissioners of the PSC in an earlier hearing involving the same parties bearing docket number EA-2005-0248 started a hearing and then in the middle of cross-examination of an Aquila witness by Cass County, and before opponents of Aquila could present any of their witnesses or any of their evidence, decided that it had heard enough and issued its order giving Aquila what it had requested (that is, that its ancient certificates were all it needed). Three of the commissioners who voted to terminate that hearing before evidence could be presented are the same three commissioners who ruled in favor of Aquila in the present case. These commissioners had already made up their minds before the hearing in this case began.

I. Commissioner Murray asked whether the County and its citizens could be penalized if there was a shortage of electric power. Vol 7, p. 843 to p. 844. The comments of this commissioner that suggest that the County somehow should be punished is evidence of a bias against the County and its citizens.

J. In the Report and Order the PSC stated that the "activities of the County were inexplicable." Report and Order at page 33, line 13. It is not inexplicable. The County was seeking to enforce the law. This is indicative of a bias against the County and its citizens.

K. The three commissioners had discussed and had decided how they would rule before the parties filed post-hearing proposed findings of fact and conclusions of law and before they had time to review the extensive record and the over one hundred exhibits.

L. The commissioners met with Staff attorneys to discuss the case without any notice to attorneys representing other parties.

M. Staff worked with Aquila before the hearing to prepare its evidence.

N. Commissioner Appling indicated that his view of his vote in favor of the Report was a confirmation of the PSC's (past) practice, including that the previous certificates given to Aquila gave it the authority it needed (despite the fact this was clearly rejected by the Court of Appeals) and that the Report confirmed the substance of the letter dated November 4, 2004, sent by the PSC to Nanette Trout (that letter from the PSC stated that the PSC could <u>not</u> tell Aquila where to not build a plant). (StopAquila

appendix Exhibit A.) This indicates a rejection by that commissioner of the ruling of the Court of Appeals in this very case and an acceptance of the view that the PSC cannot tell Aquila where to build or not build.

J. In a concurring opinion filed on May 19, 2005, in Case Number EA-2005-0248, entitled "In the Matter of the Application of Aquila....," commissioner Davis indicated that a hearing on a request for authority to build this power plant was not the place for complaints from citizens; he also seemed to say that the question of the prudence of building the plant was also not properly to be considered in a hearing on a request for authority to build. In his concurring opinion in that case, commissioner Davis wrote:

> In conclusion, this case was not the proper venue for the questions raised in the *ex parte* pleadings and the testimony at the local public hearing, but the next rate case will be the proper venue for the parties to raise all the issues including, but not limited to, whether the construction of this plant was prudent and whether the company should be penalized for poor management. (This statement by Commissioner Davis was also captured in a footnote in the Court of Appeals decision.) . (StopAquila appendix, Exhibit B.)

According, this commissioner on the record, before the present case began, seemed to be saying that the question of whether it was prudent to

build a plant was not properly to be considered in a case in which the utility applies for a certificate to build that power plant.

K. The fact that no preconstruction hearings were held before the PSC or the County Commission means due process was denied.[5] No amount of post-construction hearings will make up for it, as the three majority commissioners could not get over the fact that the SHPF was already built.

L. The issuance of a retroactive approval is contrary to the statute and is a denial of due process.

M. The three commissioners ruled that the rights of the people nearby (including my clients) were **subservient** to the rights of others. This is a denial of due process and equal protection.

N. Combining the statements of the PSC that a.) it believes it cannot stop the utility from building, b.) that it thinks Cass County cannot stop the utility from building, and c.) that the rights of the people nearby are **subservient**, the PSC ruling would necessarily result in a new rule that gives utilities unfettered discretion to build anything anywhere they want. That is precisely what the Courts in this case said was the wrong approach.

B. THE REPORT AND ORDER MISINTERPRETS AND MISAPPLIES THE LAW, INCLUDING THE DECISION OF THE COURT OF APPEALS AND THE STATUTES (CHAPTER 64 AND CHAPTER 393).

In the Court of Appeals case the Court made the following comments which are either ignored, misapplied, misconstrued or misquoted by the PSC in its 3-2 Report and Order:

[5] The only hearing that could possibly be said to be a pre-construction hearing was held before the Circuit Court, which issued an injunction.

While it is true that the Commission has extensive regulatory powers over public utilities, **the legislature has given it no zoning authority**, nor does Aquila cite any specific statutory provision giving the Commission this authority. See Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973)[6] (regarding the **location** of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states, "**In short, we emphasize we 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.**"). It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, **a municipality may regulate the location of public utility installations.**" 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986). While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because facility **location** has particularly local implications, it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant. See generally St. Louis County v. City of

[6] It should be noted that this is the case that the Report and Order blatantly misconstrues. See pages ___, below.

Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact **location** and that public interest is best served in requiring it be done in accordance with **county zoning laws**). See also State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934, 938 (1951) (upholding validity of county rezoning to accommodate electric power plant construction).

Aquila further relies on Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo.1973) (Crestwood I), and cases in other states for the proposition that local regulation of public utilities is not allowed. This case, however, is not about local regulation; rather, the case involves the interplay between statutes enacted by the legislature and how to harmonize police powers possessed both by local government and public utilities. ***

FN8. The non-charter first class county statutory provision that parallels 64.090 and 64.620 in placing limitations on county commission zoning authority is section 64.255, and it does not include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions. ***

... [W]e believe that if we were to extend Harline as urged by Aquila, we would effectively be giving electric companies in the state carte blanche to build wherever and whenever they wish *** By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, **including county zoning**, can be considered in public hearings before the first spadeful of soil is disturbed. ***

[T]here is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant. *** See, e.g., St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant, court concludes that **charter county's zoning ordinance restricting plant's location is lawful restriction**, stating, "the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county,[7] and **the public interest is best served in requiring it to be done in accordance with the zoning laws.**").

The overriding public policy from the county's perspective is that it should have some authority over the placement of these facilities

[7] Of course, that is the same as the present case, where nothing gives the PSC or Aquila the right to select the location in the face of a County zoning program.

> so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. As the circuit court stated so eloquently, "to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants.... **The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.**"

Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. 2005)(also referred to as StopAquila.org v. Aquila)(Emphasis added).

At page 34, the PSC Report first states that the PSC is no less capable than Cass County to consider land use concerns. Then the Report goes even further and states that the PSC is the "**preferred authority**" to handle land use concerns. (Page 34, paragraph 2.) These statements by the PSC are remarkably wrong, since the Court of Appeals in this very case stated that no statutes give any zoning authority to the PSC.[8] In declaring itself to be the preferred authority for zoning, the PSC is clearly acting contrary to the law.

The PSC then collaterally attacks the zoning ordinances and procedures of Cass County. As an agency with no zoning power, it has no authority that would authorize it

[8] Of course, the last prior pronouncement of the PSC before this case on the issue of zoning was Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973), in which the PSC said that it requires utilities to demonstrate compliance with local zoning before constructing a power plant.

to collaterally attack the zoning ordinances of a County.[9] The Report and Order is based on false premises and erroneous interpretations of law.

The Circuit Court's injunction issued in January 2005 required that Aquila comply with the ordinances of Cass County. Now, the PSC has purported to decide that Aquila does not have to comply with the ordinances of Cass County. The PSC has no such power. The Courts have already ruled that Aquila must comply with the ordinances. The PSC cannot disregard that.

The PSC then went on to declare the rights of the people who are most affected to be **subservient**. This is error.

The Report attempts to judicially construe RSMO 393.170, declaring that it would be "nonsensical" to require that before the PSC can give specific approval for the facilities, Aquila must show that it has obtained local zoning approval. (Page 37, paragraph 2.) In other words, the PSC believes it would be nonsense to follow the law. RSMO 393.170 states that before a utility can get a certificate it must show to the PSC that it has obtained the consent of the municipality. The Supreme Court, as well as the PSC itself, have said that the county is a "municipality" under this statute. In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941), State v. Burton, 379 S.W.2d 593 (Mo. 1964) Additionally, the PSC itself has stated that a utility is required to get local zoning before it seeks a certificate to authorize it to build a power plant. In the Matter of the Application of Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116. This is based on the language of 393.170, which plainly requires local consent as a prerequisite.

[9] Cass County's zoning authority comes from Chapter 64, which includes 64.285, which is entitled "Zoning regulations to **supersede** other laws or restrictions, when (noncharter first class counties)." (Emphasis added.)

RSMO 393.170 wisely provides that the applicant must show to the PSC that it has consent from the local government **before** it gets a certificate. This includes a certificate to build a power plant. The PSC does not have the power to waive this requirement.

The PSC's actions in this very case – supporting a utility that promises to comply with zoning then does not, allowing a utility to build a power plant next to residences, retroactively approving the plant, declaring people's rights to be **subservient**, disregarding the Courts, and attacking a local government's zoning program - demonstrate the wisdom of the legislature in requiring that the utility get local consent first. Aquila did not get the requisite consent.

Despite the fact that the Courts in the present case held that the 1917 consent of Cass for Aquila to put up transmission lines did not give it the authority to build a power plant, the PSC goes back to that same rejected argument. (Page 39.) The PSC expands on the 1917 consent, in violation of RSMO 393.190, which prohibits the PSC from expanding on a local franchise. This is error.

The Report claims that the Court of Appeals "expressly stated that Aquila could still seek authority to operate the already built facilities." (Page 41.) Not true. The decision of the Court of Appeals expressly said that a.) the PSC had no zoning authority, b.) that authority to construct must be gained through hearings (plural) where zoning is considered,[10] c.) that the "exemption" that might be available is some kind of exemption regarding submitting to the **county planning board**, d.) that there is no exemption from

[10] Query how, when the Court of Appeals says that a.) hearings must be held before construction where zoning shall be considered and b.) that the PSC has no zoning authority, the PSC could interpret this to mean that the Court said the PSC had zoning power, and further that it was the "preferred" zoning authority and could trump the County. This is a case where the PSC built false premise on top of false premise.

the zoning power that the **County Commission** has under 64.255, and e.) that there is nothing in the statute that precludes a county from exercising its zoning authority, if any,[11] over the location of a power plant. The Court said a lot of things, but **it did in any way suggest that the PSC could "trump" the County Commission.**

At page 42, the Report claims that the so-called "exemption" (a word that does not even appear in 64.235) is an exemption not merely from the planning board but rather from all of the zoning power of the County (the word "zoning" also does not appear in 64.235). There is no citation to anything for this statement. In fact, the Court of Appeals said the opposite. The Court made a point of saying that there is **no exemption** from the power granted to the county commission in 64.255. See Footnote 8 to the Court of Appeals decision. Therefore, while the Court of Appeals said there was no exemption from the County Commission, the PSC Report claims there was a total exemption from the County Commission. This is an error by the PSC.

The PSC takes the position that the Court of Appeals said Aquila could either go to the County or to the PSC. That canard has been repeated several times by Aquila and by Staff, but it still is untrue. The Court of Appeals never said that.

Aquila knew that it had to seek County approval. **Aquila stated in a press release dated January 4, 2006, that "(Aquila) 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.

[11] The Court said "if any" because some Counties have no zoning programs. Some Counties for what ever reason have decided to not regulate land use through a zoning program.

The PSC started this affair by stating that it did not have the power to tell Aquila to not build the plant in a chosen location.[12] See letter from PSC to Nanette Trout, attached to Exhibit 1. After that statement, the action was started by StopAquila.org to seek an injunction. The County likewise filed suit. PSC employee Warren Wood confirmed at the January 2005 hearing before the Circuit Court that the PSC believed it did not have the authority to stop Aquila from constructing.

After the Court of Appeals decision, the PSC changed its story. Amazingly, it now says it is the "preferred authority" on zoning. At page 47, the Report states that "Mr. Wood was not locked into a conclusion that the plant should stay..." That is convenient to say now, but the truth is that Mr. Wood wrote the letter that said (back in November 2004) that the PSC could **not** tell Aquila to not build the plant at that location.

The PSC cannot claim to have the power to tell a utility whether it can build in a particular location when it already declared it cannot stop a utility from building in a particular location. The PSC has put itself in a box. The PSC has effectively removed itself from the decision making role on zoning (even assuming it ever had a role). The County must be the one that decides zoning issues.

Reviewing the concurring opinion written by Commissioner Davis in EA-2005-0248 (quoted above in part III) and the concurring opinion of Commissioner Appling in the present case, we see that at least these two commissioners have expressed views that are consistent with the idea that the PSC cannot tell utilities where to not build their plants. Commissioner Appling makes it clear that he believes the PSC decided to analyze the case as follows: the burden is on the opponents of Aquila to prove that there are

[12] That is fine, but the PSC cannot declare that the County is powerless to tell a utility where to not build a power plant.

compelling reasons to tear down the plant. See StopAquila appendix, exhibit A. This is a failure on the part of commissioner Appling to follow the law. (It also shows that he and the others thought they were not deciding whether it should be constructed, but rather were deciding whether it should be torn down.) Since Appling has declared that he put the burden on the wrong parties, the vote of commissioner Appling must be voided. If the Courts void the vote of commissioner Appling, then we have a 2-2 tie before the PSC.

If this Report stands, the language of 64.235 will be greatly expanded beyond what the Legislature intended. The language of 64.235 is that (referring to the requirement that an application be made to the **planning board**): 'nor shall anything interfere with such development as may have been specifically authorized or permitted (by the County Commission or the PSC).' This statute applies to the planning board and the requirement of presenting plans to the planning board. It indicates that the County Commission and the PSC can make certain specifications to the planning board, with which the planning board cannot "interfere." The County Commission and the planning board are two different entities, as the statute indicates the planning board cannot interfere with a project already authorized by the County Commission. The statute contemplates that perhaps a project may have already been approved by the County Commission and the PSC, so in that event there is no need to go back to the planning board.[13] **64.235 gives to the PSC no more authority than it gives to the County Commission.** Additionally, 64.235 is consistent with 393.170, as 393.170 requires that the utility first get the consent of the County and then the consent of the PSC to build a

[13] RSMO 393.170 provides that for a utility to get a permit from the PSC to build a power plant, the utility must first show to the PSC that it has the consent of the municipality (i.e., the County).

power plant. Since consent of both the County and the PSC are required, the two are in essence treated as equals, with both necessarily having a say.

The Report would erroneously seek to rewrite 64.235 a.) to apply it to the **County Commission**, b.) to apply it across the board to **all aspects of County zoning**, c.) to broadly expand on the term "interfere" to create a rule that any effort by the County (no matter how reasonable) to regulate any placement of a power plant is "interference,"[14] d.) to allow for retroactivity, e.) to elevate the PSC to a super zoning board; the Report would further rewrite other statutes by a.) deleting from 64.285 the statement of the Legislature that county zoning authority **supersedes** other authority and b.) deleting the requirement of 393.170 that the utility must get **prior** consent of the county to build. The PSC cannot do these things.

Retroactivity is illegal. The PSC simply does not have the power to issue a retroactive certificate. Not only is retroactivity in violation of the statutes, it violates due process and equal protection.

The record in this case further demonstrates why it would be a mistake to give zoning power to the PSC. The PSC:

1.) Said that "it won't impose a zoning requirement on Aquila" (page 51),

2.) indicated that it won't address the question of loss of value of surrounding property (page 49 –50),

3.) issued orders that attempt to keep confidential the amount that Aquila would have actually saved by entering into a proposed contract with Calpine, the fact

[14] Obviously the Court of Appeals did not consider it "interference" for a County Commission to tell a utility where to put a power plant. The opinion spoke approvingly of the authority of a County to regulation location. The Court of Appeals decision must mean that it is not "interference" under 64.235 if a County Commission exercises its zoning power. See footnote 8 to Court of Appeals decision.

that Aquila needed more base and did not need more peaking, and the amount of loss of value of homes near the SHPF,

4.) stated that it thinks a power plant is "consistent" with the homes in the area (page 57 line 6),

5.) stated that it will not require Aquila to file plans and specifications even though they are required by the regulations (page 57),

6.) stated that the rights of the people nearby are **subservient** (page 28, lines 5-9), and

7.) stated that it does not believe that there is any requirement that its evaluation be the functional equivalent of a hearing on a zoning application (page 29).

The fact that the PSC has decided the rights of the people near the plant are "subservient" to the rights of others is the antithesis of land use planning. The role of the PSC is antithetical to it having any land use authority. There is no authority for the view that the rights of those nearby are subservient. If it takes the view that the rights of the people next to a power plant are subservient, then it will never be able to stop a power plant from being built anywhere. That is because no matter what spot is chosen for a power plant, the PSC under this rule would always say the rights of the people at that spot are subservient. The PSC has proven that it is incompetent to serve as a zoning authority.

Any Judge should now ask himself/herself: Do you want this PSC to have the power to adjudicate your rights?

C. THE REPORT AND ORDER MISSTATES THE HOLDINGS OF PRIOR CASES INCLUDING THE IMPORTANT CASE OF MISSOURI POWER & LIGHT.

D. THE PSC FAILS TO FOLLOW ITS OWN PRECEDENTS AND FAILS TO EXPLAIN WHY.

The Report and Order at page 35 discusses the important case of Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973). Because of the importance of this decision, a full copy is found as Exhibit E of StopAquila's Appendix.

However, the Report ignores the language from Mo. Power & Light that was quoted with approval by the Court of Appeals, which was:

> "**In short, we emphasize we 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.**"

Nor does the Report note other important language found in Mo. Power & Light. Specifically, in that case the PSC had declared:

> We (the PSC) should also state that 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. **In short, we emphasize we 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.

***

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.)

The Court of Appeals built the logic of its decision on the assumption that the Mo. Power & Light case would be followed by the PSC. The Court of Appeals assumed that the PSC will continue to require a utility to get consent from the County before turning to the PSC for the consent required by 393.170. After all, this is what Mo. Power & Light said.

Instead of trying to honestly distinguish this case (which it cannot do) or frankly explain why it is not following it, the PSC in its Report relies on falsehoods. Ignoring the language of the Court of Appeals, the statute and the Mo. Power & Light case, the Report takes the position that the PSC does not have to require that the utility first get consent from the County.

Then the Report (at page 35) falsely claims that in Mo. Power & Light the PSC gave **retroactive** approval to the construction of a combustion turbine. This is false. In Mo. Power & Light. The applicant had first obtained proper zoning, then went to the PSC, and the PSC even commented in its decision that the applicant had already met the PSC requirement that it comply with local zoning before it begins construction. See quote above. The applicant in Mo. Power & Light.filed its application with the PSC

in early 1973. The PSC then held hearings in the Spring and Summer of 1973. Then the order was issued in mid-1973. In that order the PSC stated that the proposed plant was scheduled to be completed in the Summer of 1974. While the facts were that the utility in Mo. 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 make the false claim that in Mo. Power & Light the PSC gave retroactive approval. .

The PSC of course does not explain why it fails to follow the PSC requirement that that the applicant prove to it that it has complied with local zoning **before** it begins construction of its plant.

In the present case, the PSC by a 3-2 vote breaks from the prior ruling and constructs a brand new rule, that is, that the PSC has the power to allow a utility to build a power plant without the consent of the local government.

After months of researching, no one has found any prior decision of the PSC where the PSC held that a County had no zoning power over the building of a power plant.

At pages 31- 32, the Report discusses Kansas City Power & Light v. Jenkins, 648 S.W.2d 555 (Mo. App. 1983) and Union Electric v. Saale, 377 S.W.2d 427 (Mo. 1964). The Report claims these cases stand for the proposition that a utility is exempt from zoning. In truth, in Kansas City Power & Light , the applicant did apply for rezoning and did receive such zoning approval from the county. Both Kansas City Power & Light and Saale were cases that involved condemnation. They were appeals of Circuit Court decisions involving condemnation awards. Regarding Saale, we note that

Union Electric traditionally complied with zoning in the St. Louis area.[15] Since both Kansas City Power & Light and Saale were cases involving condemnation, in both cases, the language quoted in the Report is dicta. Regarding the Kansas City Power & Light, the very language quoted at page 31 of the Report and Order states that the applicant sought zoning and received zoning. It is incomprehensible how the PSC could say that a condemnation case in which the Court in dicta said the applicant sought and received zoning is precedent for the idea that zoning was not required.

We should be able to balance the interests of supplying power with the interests of the people who are bearing the brunt. We have in the past had rules to balance these interests. Until now, the rule had been that the utility must comply with local zoning and must demonstrate this to the PSC **before** it begins building. The efforts of the PSC to change the rules (and then, to do it retroactively in the present case) must be overturned.

E. THE REPORT VIOLATES DUE PROCESS AND EQUAL PROTECTION BY DECLARING THE RIGHTS OF CERTAIN CITIZENS TO BE SUBSRVIENT TO THE RIGHTS OF OTHERS.

The Report states that the rights of people nearby the SHPF are subservient to the rights of the public.

The Report also stated that the PSC did not believe that there is any requirement that its evaluation be the functional equivalent of a hearing on a zoning application (page 29).

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[15] See cases discussed at pages 62-67, infra., which include cases in which Union Electric got zoning approval.

The Report treats the people nearby differently than other people, affording them less in the way of due process. The Report does not afford equal protection to the rights of people nearby.

The Report does not even afford a pre-construction hearing to the people nearby. The statute requires a hearing before the first spade full of dirt is disturbed. 373.170. The Report discards that requirement. A hearing after the plant is constructed, in which the PSC tells the people nearby that their rights are subservient, violates due process and equal protection.

Why does the PSC declare that the people nearby are subservient? It does not give an explanation. No explanation can be given.

The PSC failed to note that the statutes were designed to give to the people nearby considerable rights. The Legislature intended that the people nearby have more rights than the people far away, as evidenced by the requirement that local consent be gained prior to building (393.170), the fact that there is no exemption from County zoning (64.255 and footnote 8 to the Court of Appeals decision), the fact that County zoning is said to **supersede** other laws (64.285), and the fact that the people in the County have the right to file suit to seek enforcement of the zoning regulations (64.295). But of course the PSC does not address these statutes.

In any event, it is wrong and contrary to the law for the PSC to declare that the people nearby are subservient. It is error to deny due process to the people. It is error to treat them differently than other people.

F. THE VOTES OF THREE COMMISISONERS SHOULD BE SCRUTINIZED BECAUSE OF THEIR STATEMENTS AND THEIR ACTIONS.

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. It is at least a questionable practice for a person who may have to make a decision on a matter to visit one of the parties and tour the site before the application is filed. Appling should have recused himself. (This visit was not revealed by Appling but rather by Exhibit 40 when it was introduced after the hearing began.)

In his concurring opinion, filed on May 23, 2006, Commissioner Appling 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. *** (StopAquila appendix, Exhibit A.)

In his concurring opinion written in 2005 in case number EA-2005-0248, involving the same parties and the same plant, Commissioner Davis wrote:

> In conclusion, this case was not the proper venue for the questions raised in the *ex parte* pleadings and the testimony at the local public hearing, but the next rate case will be the proper venue for the parties to raise all the issues including, but not limited to, whether the construction of this plant was prudent and whether the company should be penalized for poor management.

In the present case, in the hearings, Commissioner Murray asked if Cass County could be penalized for trying to be involved in deciding where a power plant is to be located.

These are the three commissioners who voted in favor of the Report and Order. Commissioner Appling revealed the reasons why his vote was in error.[16] It is clear from reading the concurring opinion of Commissioner Appling that he was saying that:

a.) he thinks the PSC Report of May 23, 2006, rightly rejected what the Court of Appeals said, and that the PSC is going back to the way he (erroneously thinks) the PSC did things before the Court of Appeals decision,

[16] Since he visited with Aquila and toured on January 14, 2005, he may have felt a kinship to Aquila and the project which resulted in a bias in favor of not dismantling the project.

b.) he thinks the Court of Appeals decided that in fact Aquila was exempt from "zoning,"

c.) he thinks the Court of Appeals held that Aquila could choose to go "either" to the PSC or to the County, and

d.) he placed the burden of persuasion on the opponents of Aquila to provide "compelling" reasons to dismantle the plant.

On (a), Appling is 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 they believed was done before.[17] The three commissioner majority of the PSC apparently think they can reject what the Court of Appeals wrote. The Courts cannot permit these commissioners to reject a decision of the Court of Appeals.

Commissioner Appling is wrong on (b), as is already discussed above.

On (c), he is wrong, because the Court of Appeals did **not** say that Aquila had the choice of either going to the PSC or to the County.

On (d), Appling believes the burden of proof is on the opponents to prove "compelling" reasons. This is similar to a juror writing to the judge to brag that he put the burden on the defendant in a criminal case. The burden is supposed to be on Aquila, the applicant, to prove that it should get a certificate. Commissioner Appling's concurring opinion proves that his vote must be disregarded.

Appling's writing seems to indicate that the other two commissioners in the majority agreed with him. Appling wrote: "I agree with the majority that ...

[17] The PSC commissioners would be wrong if they thought the PSC had ever in the past held that a County could not exercise zoning power over location of a power plant. No such decision has been found. Before now, it appears the PSC had always indicated that the utility has to comply with local zoning for power plants.

there is no compelling reason to deny the company's request for a certificate of convenience and necessity." (StopAquila appendix, Exhibit A.) This clearly means that Appling believes the three commissioners put the burden of proof on the opponents of Aquila. Further, it means the burden of proof was to prove by compelling reasons, a heavy burden. The Report should be set aside for a.) putting the burden on the wrong parties and b.) in any event, imposing such a heavy burden.

Commissioner Davis' writing from 2005 shows that he had decided that a proceeding on an application for authority brought by Aquila for this very plant is not the right forum for questions about the "propriety" of building that plant in the first place. He says a rate case is the right place. Wrong. In a rate case the PSC is not deciding location. Commissioner Davis' analysis is wrong.

Davis asked if the PSC could require that Aquila set aside a fund of money to compensate people who lived nearby. Commissioner Davis asked Attorney John Coffman on the record how much money Aquila should be required to set aside to satisfy nearby landowners. Transcript of May 4, 2006, Volume 11, Page 1777 Line 6, and Page 1787 Line 17 to Page 1789 Line 5. This is evidence that commissioner Davis at least contemplated the notion that Aquila's conduct was wrongful.

Then commissioner Davis voted on June 13, 2006, in favor of ordering a management audit of Aquila that would investigate, among other things, the decision to build the plant at South Harper and the decisions of Aquila relating to the Aries plant. It is inconsistent for Davis to declare simultaneously that a.) the decisions regarding the SHPF were correct, and b.) the propriety of the decision to build SHPF must be

investigated. This is the same commissioner who asked if a fund could be set up with a requirement that Aquila place a large sum of money in it to pay the people who lived near the SHPF. The best explanation is that Davis believed Aquila engaged in wrongful conduct, but that the PSC simply cannot refuse to let Aquila construct the SHPF. .

Commissioner Murray's comment made during the hearing was evidence that she wanted to punish Cass County and its citizens. This shows her prejudice against those that stand up for what is right.

We submit that what commissioner Appling wrote means that he, Davis and Murray took the view that the SHPF must stand unless opponents proved compelling reasons to dismantle it. They necessarily based their votes on an erroneous position. This error requires that the decision be overturned. It would be dangerous if the Courts allow to stand as precedent a decision that means that a power company can build a power plant anywhere without permission and will be allowed to get away with it unless the opponents prove compelling reasons, to the PSC, why it should be torn down.

The votes of these three commissioners must be disregarded.

G. THE PSC ERRS IN APPROVING THE SHPF IN THIS CASE WHILE AT THE SAME TIME ORDERING AN AUDIT OF THE PROPRIETY OF THE DECISION MADE BY AQUILA TO BUILD THE SHPF.

In case number EO-2006-0356, the Office of Public Counsel filed a motion on March 16, 2006, to conduct a management audit of Aquila, Inc., alleging mis-management, stating among other things that "[p]erhaps 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." Exhibit C, StopAquila's appendix, at page 3.

Responding to this, the PSC then ordered a management audit, on June 13, 2006, requiring that Staff of the PSC investigate certain decisions of Aquila, including "the South Harper generating facility" and "decisions involving the Aries plant." StopAquila appendix Exhibit D at pages 1 and 2. The Staff was ordered to report to the PSC by October 2006.

This reveals the error in the decision in the present case. The investigation of the propriety of the decision to build at South Harper must be determined before Aquila is permitted to build at that location. The PSC is supposed to determine its issues relating to building a power plant before the construction of the power plant begins, not after.

The PSC knew there were allegations of impropriety when it issued its order retroactively permitting the building of the plant in late May 2006. Before the PSC issued its order permitting the plant, the PSC had heard arguments about the request for this management audit. The PSC knew when it issued the Report in the present case that it was going to issue an order requiring the audit. StopAquila appendix, Exhibit D. It is error for the PSC to approve the propriety of building the plant and then at the same time order an investigation into the alleged impropriety of the building of the very same plant.

I. PUBLIC SERVICE COMMISSION HAS IMPROPERLY ATTEMPTED TO ELEVATE ITSELF TO THE LEVEL OF A COURT BY MAKING PRONOUNCEMENTS ABOUT LEGAL MATTERS OUTSIDE OF ITS JURISDICITION.

In many ways, as already discussed above, the PSC in its Report has attempted to elevate itself to the position of a Court of Law. It has attempted to:

a.) Interpret RSMO Chapter 64.

b.) Declare that it is the superior authority, over the county, on county zoning

c.) Declare that Aquila has an exemption from **all** county control

d.) Declare that the zoning of Cass County is deficient

e.) Disagree with the Court of Appeals

f.) Declare that it can issue **retroactive** approval when the statute forbids it

g.) Declare that the rights of those nearest the SHPF are **subservient** to the rights of others.

These are all matters for which the PSC does not have jurisdiction. The PSC Report and Order goes far beyond its jurisdiction.

J. THE FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

There are numerous errors in the findings, including but not limited to the following:

1. In paragraph 33, the findings state that Aquila decided to not enter into a contract with Calpine because the contract with Calpine offered **higher** prices. Absolutely wrong. Confidential: The truth is that the confidential evidence introduced at the hearing showed that the offer from Calpine would have

. See Transcript Volume 4, Page 287 Line 4. End of Confidential testimony. Further, the evidence was that the plan adopted by Aquila was not the "least

cost option." Clearly, the confidential evidence showed that the best option for ratepayers would have been for Aquila to enter into a contract with Calpine instead of constructing the SHPF and substation. Of course, Aquila did then enter into a contract with Calpine, in September 2005, but for only 200 MW. The Report fails to note this.

Aquila could have entered into a contract for more capacity. Aquila could have taken the offer from Calpine that would have saved more money, which it could have put in place in June 2005 (instead of waiting until September 2005).

2. In paragraph 36, the findings state that Aquila used the suggestions of Staff for guidance for its self-build plan. Wrong. The evidence was that Staff had told Aquila it had too much peaking and not enough base and intermediate load. Charts done by Aquila showed that Aquila had substantially less than it needed for base and had more peaking than it needed. Exhibits 38 The last chart was dated in June 2004. Staff also told Aquila that it needed to plan for the long term and that it needed to make plans to add base load. Aquila ignored these statements from Staff. Confidential: The Exhibit 82HC. End of confidential. Aquila built exactly what Staff said it did not need (peaking).

3. In paragraph 43, the findings state there is a public need for the Facilities. No citations to the records are made. The questions were whether there was a need for a peaking plant, and whether this site was proper. There was no showing of a need for a peaking plant, let alone one at South Harper. There was evidence that there is already another plant sitting in a properly zoned area in Cass County (Aries) that has a capacity of over 580 MW; that Aquila needed more base and less peaking; that the existing plant (Aries) provided what it needed; that peaking is more expensive to operate per hour than

base or intermediate; that the price of gas had risen substantially; that the increase in the cost of gas will likely be passed on to ratepayers; that Calpine had offered a contract that would have saved a great deal of money; and that in fact Aquila entered into a contract in September 2005 with Aquila to supply power to Aquila.

4. At paragraphs 65 through 70, the PSC makes a collateral attack on Cass County zoning. The statements contained therein are of little or no significance. The fact was that no one had any doubt about the zoning designation for the ground where the SHPF is located. It agreed by the parties that it was zoned agricultural and the areas across the street were zoned residential. The criticisms of the PSC had to do with other areas in Cass County that were irrelevant to this case. If a city boundary for Pleasant Hill has changed and is not recorded promptly on the large county zoning map, that is of no importance for the present case. City boundaries change all the time. Zoning changes occur over time. Counties have had to switch to computerized systems to keep track of changes of this nature. As Bruce Peshoff testified, Cass County also keeps textual records of all this, in addition to the maps. If there is any doubt, one simply refers to the textual records. Aquila, with all its lawyers, through almost two years of legal wrangling and hearings, never once contended that the area was zoned other than agricultural. If the logic of the PSC Report were adopted, then the zoning maps of all counties in the state would be considered defective.

5. At paragraph 71 and 77, and pages 48 – 51, and at other points, the Report claims that there is no nuisance, no environmental violations, no noise problems, no health concerns. The evidence was to the contrary. The evidence was that property values for two houses bought and then sold by Aquila had tremendous losses of value

(Exhibits 91HC and 92HC); that the noise study commissioned by Aquila with only one turbine operating showed that it had a dBA level that was 112 near the turbine (Exhibit 76), and the noise levels at residences were recorded as being over the County ordinance limit; that the noise level would have been higher if two or three of the turbines were operating; that Aquila had already filed two excess emissions reports in the short period that the SHPF had been operated (Exhibits 77 and 78); and that the level of pollutants coming out in terms of pounds per hour was thirty times that of the supposedly "comparable" pumping station and equivalent to 1,000 running diesel pick up trucks (Exhibits 25, 26, 79). There were photographs that showed how the 70 foot high tacks were unsightly. Exhibits 93, 94.

StopAquila.org prefiled a statement by Calpine employee Michael Blaha in which Blaha said the Aries plant polluted less than the SHPF and was more efficient than the SHPF. Aquila employee Jerry Boehm then pre-filed a statement with the PSC in which he seemed to admit that Michael Blaha made a valid point about the Aries facility (a combined cycle plant) being more efficient in operation than the SHPF (a simple cycle plant), but tried to explain away the differences. The statement by Blaha had been filed in a previous case involving Aquila. With Jerry Boehm on the stand, StopAquila's attorney asked him about the statement that Boehm made in which he addressed the issues raised by Blaha. The PSC ruled that StopAquila could not ask Mr. Boehm questions about his statement and refused to admit into evidence the statement by Boehm. Exhibit 37. StopAquila made an offer of proof regarding Exhibit 37. This ruling by the PSC stopped inquiry into the statements by Boehm (and the Blaha statement to which he referred) regarding whether the combined cycle (Aries) was less polluting than the

simple cycle (SHPF). The questioning of Boehm about his own statement should have been admitted. Questions about the previous statement by Blaha should have been permitted, as the statement was admitted in a prior case involving Aquila and this very same power plant; since all hearsay offered by Aquila was allowed into evidence, the hearsay evidence of opponents should have been allowed. Since Aquila employee Boehm seemed to say in Exhibit 37 that there was validity to the point that Blaha had made about the Aries plant being more efficient, the PSC should have allowed the parties to explore this point regarding pollution and efficiency. Instead, the PSC protected Aquila by cutting off inquiry.

Engineer Harold Stanley had practical knowledge of power plants. He actually worked for over 30 years in the power plant business. He filed a sworn statement, was deposed under oath, and offered to also testify live by telephone for the commission. The Report downplays his testimony and instead adopts the hearsay letter of two "doctors" who did not testify under oath and did not offer to submit to cross examination. (The parties objected to this as hearsay, but the PSC allowed this hearsay testimony despite the fact there is no exception to the hearsay rule for it.) The parties do not know whether correct information was given by Aquila to the doctors. The parties don't know if these doctors know anything about the operation of power plants. The parties didn't have the opportunity to question their credentials or cross exam them on their reported opinions. One of their "opinions" was that a man could work in the center of the exhaust stack with no problem "if not for the heat." The heat is over 900 degrees. The fact that the "doctors" support their opinion by hypothesizing a man standing in the center of one of the three stacks in a 900 degree environment makes us wonder about the

doctors. By comparison, Harold Stanley testified that the SHPF is substantially incompatible with the area and he discussed the health issues from a practical point of view as a power plant engineer. Exhibits 25 and 26.

The Report at page 51 claims that it is inconclusive whether PM2.5 is emitted from the SHPF. The Environmental Protection Agency report states that PM2.5 is emitted by electric generating units (EGUs), including combustion turbines; that EGUs operate on fossil fuels, which includes gas; and that scientists are concerned about the fine particles (PM2.5) and the other pollutants that come out of EGUs. 69 F.R. No. 20, at pages 4571, 4575, 4584, 4609. The PSC Report claims that "attributing PM2.5 to any one source would be impossible." This statement is untenable. There is no other significant source in the area. Significant amounts of PM2.5 are not coming from the homes or from the farms. It is shown by scientific studies compiled and reported in this EPA Report that PM2.5 comes from electric generating units. The SHPF is one.

The PSC fails to address the real issue regarding PM2.5, which is, as the EPA report says, there is no clear threshold for PM2.5. The PSC Report also fails to mention the problems with ozone. The EPA Report also says ozone is harmful to some people at any level. (Ibid. at Page 4584, column 1.) Ozone is created after the pollutants exit the stacks, so the health hazards actually get worse after the pollutants leave the SHPF. This is ignored by the PSC in its Report.

Confidential:

Exhibit 80HC, page 4. End of Confidential.

When three turbines are operating, the SHPF produces about as much in the way of pollutants as 1,000 running diesel trucks. Exhibits 25, 26. That is not appropriate next to homes.

The Report refuses to address the issues. A power plant should be in an industrial area. People acting through zoning authorities should have the right to designate which areas will be proper for power plants. This plant is not in any way appropriate in or next to a residential area.

6. At paragraph 73, the Report incredibly claims that at no time did Cass County raise any issues about the land during the Peculiar annexation process or during the grading process. This is sophistry. The evidence was the land was acquired by Aquila on October 5, 2004. The Report talks about whether or not Cass gave a grading permit to Aquila. It fails to note that no grading permit is ever required, so there was no reason for any objection on that. There also was no reason for Cass County to say anything during the time that the mayor of Peculiar was intent on annexing the land. It was October 23, 2004, when the City of Peculiar decided to not annex. Aquila dropped its request for a special use permit from the County for the substation in late November 2004. Cass County filed suit promptly on December 1, 2004, before the construction of the buildings even began, and Judge Dandurand announced his injunction on January 6, 2005, before any of the construction of the buildings began. The County then had an expedited appeal and actually had oral arguments before the Court of Appeals by April 2005. While the PSC Report makes the bogus claim that the County sat by, the truth is that the County proceeded with amazing speed.

7. At paragraph 82, the Report states that over 250 local residents signed letters of support. The key is what is considered "local." At the public hearing on March 30, 2006, Ms. Bailey was the person who said she had letters of support for Aquila. Ms. Bailey said that people who signed the letters of support for Aquila were in the crowd. Some stood up. Mr. Eftink then immediately asked that the people who signed letters of support for Aquila 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.

The people who support the SHPF with a few exceptions do not live near the plant. Julie Noonan conducted a survey. She said that maybe a small handful of people near the plant supported the SHPF, and that if we excluded those who got money from Aquila, maybe four people who lived within a mile could be considered supporters of Aquila. Exhibit 28, testimony, _____. By comparison, over 128 adults who live within a two mile radius engaged a lawyer to fight Aquila's application. Many more people close by opposed the plant than supported it. The people who supported the plant with few exceptions lived further away.

For the foregoing reasons the Report and Order is unlawful, unjust, unreasonable or unwarranted and the Report and Order should be set aside. The Report is biased, full of sophistry, and dangerous if not overturned.

III. HOW THE PSC SHOULD HAVE RULED AND HOW THE COURT SHOULD RULE

A. UNDER STATE STATUTES AND CASE LAW, THE COUNTY HAS AUTHORITY OVER AQUILA

1. According to Article IV, Section 1 of the Missouri Constitution, counties are recognized as legal subdivisions of the state.

2. Chapter 64 of the revised Statutes of Missouri was enacted in 1959. **RSMO 64.170 authorizes the county to control the construction of any building.**

3. RSMO 64.231[18] provides that a county may adopt a master plan to coordinate physical development in accordance with present and future needs and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants, and that the plan may include a land use plan, studies and recommendations relative to the locations of buildings and projects.

4. RSMO 64.255 states that the **county commission** shall control the **location** and use of buildings. There are no exceptions to 64.255. Section 64.255 states:

> For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the **county commission** in all counties of the first class not having a charter form of government and not operating a planning or zoning program under the provisions of § 64.800 to 64.905, is hereby empowered to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the **location and use**

[18] Cass adopted a master plant prior to the time Aquila acquired the real estate in question.

of buildings, signs, structures and land for trade, industry, residence, parks or other purposes, including areas for agriculture, forestry and recreation. (Emphasis added.) ***

5. RSMO 64.285 states that zoning regulations are to **supersede** other laws. It says that whenever the county zoning regulations require a more restrictive use of land or impose higher standards than are required by **any other statute**, the provisions of the county zoning requirements shall govern. This full section reads as follows:

> 64.285. **Zoning regulations to supersede** other laws or restrictions, when (noncharter first class counties). —
>
> Whenever the county zoning regulations made under the authority of sections 64.211 to 64.295 require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require greater percentage of lot to be left unoccupied, or require a lower density of population, or require a more restricted use of land, or impose other higher standards than are required in any other statute, local order or regulation, private deed restrictions or private covenants, the provisions of the regulations made under authority of sections 64.211 to 64.295 shall govern.
>
> (L. 1959 S.B. 309 § 15) (Emphasis added.)

There are no exceptions stated in 64.285. This statute expresses an intent of the Legislature that the County Commission's power given to it by 64.255 to regulate the use of land supersedes any other statute which would interfere with such power.

6. In Cass County v. Aquila ("Stopaquila.org"), 180 S.W.3d 24 (W.D. 2005), the Court of Appeals stated that the legislature gave no zoning power to the PSC.

7. In St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo.banc 1962), the Supreme Court had to rule on a dispute between a city and a county, and ruled in favor of the county, declaring that the county had zoning authority over the question of where a sewage disposal plant would be located in the county. The dispute involved a sewage disposal plant. The Supreme Court said:

> We conclude that the zoning ordinances of St. Louis **County** are a lawful restriction upon the **location** of the sewage disposal plant and related facilities which the City of Manchester proposes to construct. (Emphasis added.)

The fact that the Supreme Court recognized that the county had zoning power over the city in a project proposed by the city to be located in the county gives us considerable guidance for our case, where a private company seeks to build a power plant in the county.

8. In L.C. Development Co. v. Lincoln County, 26 S.W.3d 336 (Mo. App. 2000), the county was operating under a different statute, dealing with landfills, but where the statute did not specify that the county could dictate the location of the landfill, the Court inferred that the county had such authority. From a review of the statutes, the Court concluded that the legislature must have intended that the county have the authority to dictate the **location** of the landfill. Lincoln was a third class county. Again, the courts appeared to give considerable power to the county to govern the location of projects.

B. THE UTILITY HAS TO SUBMIT TO REGULATION BY BOTH THE PSC AND THE COUNTY AND THE PSC HAS NO POWER TO INTERFERE WITH COUNTY REQUIREMENTS.

C. THE DUAL AUTHORITY SYSTEM HAS BEEN ESTABLISHED IN MISSOURI FOR MANY YEARS.

1. RSMO 393.010 provides that any corporation supplying electricity shall need the consent of municipal authorities[19] "where located" for such things as laying conductors, under such reasonable regulations as such authorities may prescribe. RSMO 229.100 states that no person, company or corporation shall erect poles for the suspension of electric light, or power poles, or lay conductors or conduits for any purpose, through, on, under or across the public roads or highways of the county without first obtaining assent from the county, and no poles shall be erected or such conductors be laid or maintained except under such reasonable rules as may be prescribed by the county engineer, with the approval of the county commission. Obviously, if the Legislature believed the county should control the erection of poles and the placement of conductors, it must have believed the county should have control over more important matters, including the location of power plants.

2. RSMO 393.170 states that consent of the appropriate municipal authorities is required for an electric plant to be constructed.

[19] As shall be explained in the cases cited below, the County is the "municipal authority." See, for example, In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941),

3. Cass County is the local governmental entity or municipal authority that has zoning authority in this case, as the land lies in the county, outside of any city.

4. 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 (1914), the Public Service Commission stated:

> Consent of the municipality is **always required** as a **condition precedent** to the granting of permission and approval by this Commission ... (Ibid., at page 6)(emphasis added).

5. 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 Supreme 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.[20]

6. In State ex rel. v. Cupples Station L.H. & P. Co., 283 Mo. 115, 223 S.W. 75 (Mo.banc 1920), the City of St. Louis had promulgated zoning ordinances that designated two different kinds of districts, with one being a district in which electric companies had to place transmission lines underground and the other being a district in which electric companies had to place transmission lines above ground. The electric company did not challenge the authority of the local government to exercise this zoning power, even though the local government was actually telling the electric company

[20] In these cases, the Courts referred to a "franchise," but the cases could have just as easily used the word "consent."

whether it had to put its lines underground or overhead in certain areas. The Missouri Supreme Court seemed to have no problem with the idea that local government had such extensive authority over public utilities.

7. In Realty & Power Co. v. St. Louis, 282 Mo. 180 (1920), the Court was dealing with a dispute between a city and an electric company. The Plaintiff had installed lines on its own real estate and also on the real estate of others, about twelve years prior to the litigation. The Plaintiff had never received a permit from the City to install these electric transmission lines. The City demanded removal of the lines from its streets. The Supreme Court stated that the legislature did not grant directly to electric companies the right to use the streets. Instead, the legislature gave the authority to municipalities to regulate these electric companies in this regard. In other words, the Court was saying that the grant was from the legislature to the municipality, and the municipality would then decide what kind of grant to make to the utility. The legislature also gave to local government the authority to grant or refuse to grant to utilities the right to use the streets and the power to impose conditions. The Court clearly held that the City had the power to refuse permission to the Plaintiff. The Court also stated that this right of the municipality cannot be lost by "acquiescence." The result was, the City could, and did, tell the power company to remove its transmission lines twelve years after they had been installed. If the Supreme Court says you can't even install transmission lines without municipal consent, how can you build a power plant without municipal consent?

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

9. In State ex rel. City of Sikeston v. Public Service Commission, 336 Mo. 985, 82 S.W.2d 105 (Mo. 1935), the Supreme Court said:

> Furthermore, this court in the ouster case specifically and definitely held that municipal consent is still required, in addition to whatever requirements may be imposed by the commission ... In other words, a certificate of the commission is only, where required, an additional condition imposed by the State to the exercise of a privilege which a municipality may give or refuse ...
>
> *** The commission held that ... the grant of such certificate (by the commission) to an electric corporation is only required an (sic) authorized in case of, "First, the **beginning of construction** of an electric plant; second, the commencing to exercise any right or privilege under any franchise ... (Emphasis added.)

10. In State ex rel. inf. McKittrick v. Ark.-Mo. Power Co., 339 Mo. 15, 93 S.W.2d 887 (Mo.banc 1936), the Supreme Court showed the extent of the power that local government has over electric companies. The Courts ousted the electric company

from the City of Campbell, and the Supreme Court upheld this, saying that the utility had six months to vacate.

11. In State ex inf. McKittrick v. Mo. Utilities Co., 339 Mo. 385, 96 S.W.2d 607 (Mo. 1936), the City of California sought to oust the electric utility. A franchise had been given by the City to the utility. That franchise expired in 1929. The utility requested an extension, but the City refused. The utility argued that the PSC had authority over this matter, that the PSC had given it a certificate, that the PSC certificate gave it additional rights, and that under the PSC certificate it could continue to supply power in the City. The Supreme Court rejected these points. The Court said:

> [W]hen the City limits the life of the franchise granted to twenty years, as it must, and that period expires, the privilege of so using the City's public places comes to an end. The continued use is illegal.

In other words, the grant of a franchise by the local municipality does not end the power of the municipality. The municipality continues to have authority.

The Court said that the franchise was a contract between the utility and the State. The Court declared that as originally made, that contract was to expire in twenty years. As the City did not renew it, that contract expired and the utility then had no rights. The Court held that the certificate issued by the PSC did not lengthen the life of the franchise. The City could oust the utility. The Court gave the utility one month to remove its equipment from the City.

12. In the matter of the application of Southwest Water Company, 25 Mo. P.S.C. 637 (1941), the **water company failed to show that it had received consent**

from Jackson County to place its water lines along and across the roads of the particular area in which it sought to operate. Jackson County refused to give its consent. The water company argued that the county was not a "municipal authority" and therefore it did not have to get the consent of Jackson County. The PSC found that the County was in fact the "proper municipal authority." Jackson County could refuse to grant that franchise.

13. In In the matter of Ozark Utilities Company, Mo. P S. C. 635 (1944), the electric utility received a franchise from the city and a certificate from the PSC. The franchise had a term of ten years. When the franchise expired in 1944, it was renewed between the utility and the city. 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."

The PSC made it clear that it could not interfere with the relationship between the municipality and the utility. The PSC noted the difference between the authority of the PSC and the authority of the municipality. If the municipality did not renew the franchise, of course the certificate issued by the PSC would not authorize the utility to continue in the municipality, according to the PSC. The PSC said:

> [W]e do hold that, absent a revocation by this Commission, it (the certificate issued by the Commission) is good so long as the municipality permits the operation whether by renewal of the basic franchise supporting the certificate, a new franchise, or permissively allowing the operation after the expiration of the franchise. (Ibid. at pages 643 - 641.)(Emphasis added.)

At page 639, the Commission said it would be intolerable for the Commission to be involved in trying to suggest the terms that should be in the franchise between the municipality and the utility.

At page 642, the PSC stated:

> **[I]t will be found that all the legal rights and remedies between the utility corporations and the municipalities, in any controversies between them respecting the franchise and its operations, and apart from our own regulatory powers, must generally be pursued in the courts which have jurisdiction.** (Emphasis added.)

14. In State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934 (Mo. 1951), Union Electric acquired 375 acres of ground in St. Louis County with plans to build a power plant. The County **rezoned** the land for this purpose, so Union Electric could build the power plant there. This was challenged by citizens, and the Court upheld the action of the County in zoning the land so it could be used for a power plant. (Remember, the PSC Report implies that Union Electric was not required to get zoning in the Saale case. Actually, in Matthews, Union Electric did get zoning.)

15. In In the matter of the application of Union Electric Company, 3 Mo.P.S.C. (N. S.) 157 (1951), the PSC indicated that the county court (which is now the **county commission**) had authority over the public utilities. At page 160 the PSC said that the county court constituted the "**proper municipal authority**" as that term is used in the statute when we are dealing with operations in an unincorporated area. The PSC spoke of the franchise between the utility and the county as being in the nature of a contract between the two. (Remember, the PSC Report implies that Union Electric was

not required to get zoning in the Saale case. Actually, in Application of Union Electric Company, Union Electric did get zoning.)

The PSC stated that the police power of the proper municipal authority is **"transcendent."** Ibid. at page 161. Speaking about the police power of the county and the city, and the notion that the utility had a contract right, the Court said:

> While contracts are impervious to impairment by statutes and municipal ordinances, at the same time the police power is **transcendent** over the contract to the extent that the municipality, if it so desires, may provide for the reasonable exercise, in the municipality, of the holder's rights under the pre-existing **county franchise** or one of its own. (Emphasis added.)

The PSC said it was not its province to approve or disapprove a franchise issued by the **county**. The PSC stated that "**its conclusions will not impair or in any manner restrict the right of local municipalities under the law to deal fully with the subject of granting or withholding of local franchises to the utility.**" [21]

16. In State ex rel. Harline v. Public Service Comm., 343 S.W.2d 177 (Mo. App. 1960), the Court of Appeals dealt with a dispute over the extension of power lines proposed by Missouri Public Service Company. This case did not deal with the building of a power plant. The Court noted the important distinction between the running of power lines, which an electric utility can do in its certificated area without getting a further permit from the PSC, and the building of a power plant, which is something entirely different. The analysis of the case is instructive. First, the Court

[21] This is also crucial, as it means the PSC cannot interfere with the right of Cass to deal fully with Aquila.

noted that the opponents contended that the building of a transmission line was the same as the building of a plant. The Court held that there was a difference between the installation of lines and the building of a plant. This case only dealt with the installation of transmission lines. Therefore, the Court did not have to address the question of what would be required in the case of the building of a power plant. The Court said:

> We have no concern here with Sub-section 1 "authority". The 1938 certificate permitted the grantee to serve a territory — not to build a plant. Sub-section 2 "authority" governs our determination. (Emphasis added.)

17. The last in the line of Missouri Supreme Court cases on point for power plants is State v. Burton, 379 S.W.2d 593 (Mo. 1964). In this case the Supreme Court said:

> The necessity and effect of **county court consent**[22] to the utilization by a public utility of county roads and highways in an unincorporated area of a county has regularly been recognized by the Commission itself. In Re Southwest Water Co., 25 Mo. P.S.C. 637, 41 P.U.R. (NS) 127, the Missouri Public Service Commission refused a certificate to a water company which sought to operate in Jackson County. Refusal was based upon the failure of the appellant to show that consent of the Jackson County Court to the use of the county roads and highways had been obtained. In answer to the contention that Section 393.170 does not

[22] The county court is now known as the county commission.

apply in instances where a utility proposed to operate in unincorporated areas of a county, the Commission's report stated:

"An examination of the findings of this Commission for many years back will show that the **Commission has consistently required a showing that the applicant has secured the consent of what is considered proper municipal authority before granting authority** to own, lease, construct, maintain, and operate any water, gas, electric, or telephone system as a public utility. Consent of the city, town, village, the **county court** or the State Highway Commission, depending upon whether the line or system was to be placed within the incorporated city, within the unincorporated area of the county, or along a state highway, **has always been made a condition precedent to the granting of such certificate by this Commission.**" In Re Union Electric Co., 3 Mo. P.S.C. (NS) 157, 160, 88 P.U.R.(NS) 33, the Commission recognized that the permission granted by a county court, pursuant to Section 229.100, RSMo 1959, V.A.M.S., to a public utility to use the county roads is a "county franchise," supplying the consent required by Section 393.170.

If, as stated in Southwest Water Co., supra, the county "franchise" is a condition precedent to the issuance of a certificate by the Commission for an operation involving use of county roads in unincorporated areas of the county, it must follow that the authority which the Commission confers must be in accord with the "franchise" which the county grants. Otherwise, the requirements of Section 393.170, insofar as municipal

consent is concerned, would be practically meaningless. The courts have recognized that the corporate charter and the local franchise provide the fundamental bases for a public utility's operation and that the certificate of the Commission cannot enlarge the authority thereby conferred. In State ex rel. Harline v. Public Service Comm., Mo.App., 343 S.W.2d 177, 181(3), the court stated:

"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, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges." Therefore, although the application of Raytown Water Company did request that the Commission grant it authority to lay its water mains generally throughout Jackson County, the Commission's authority to grant that prayer was necessarily limited by the requirement that the consent of Jackson County be obtained for the use of the county roads for such purpose. (Emphasis added.)

18. In the 1971 case of State ex rel. Union Electric v. Scott, 470 S.W.2d 1 (Mo. App. 1971), we see that Union Electric applied for zoning from the county. (Remember, the PSC Report implies that Union Electric was not required to get zoning in the Saale case. Actually, in Scott, Union Electric did get zoning.)

19. In Union Electric v. Public Service Commission, 770 S.W.2d 283 (Mo. App. W.D. 1989), the county had given a franchise to one electric utility and the city had given a franchise to another electric utility. Later, the city expanded its limits. The court discussed the fact that there was a difference between a certificate issued by the PSC for authority to construct an electrical plant and a certificate issued by the PSC for a utility to serve an area. This is the same distinction made by the Court of Appeals in State ex rel. Harline v. Public Service Comm., Mo.App., 343 S.W.2d 177, and appears to be consistent with the statements of the Supreme Court in State ex rel. City of Sikeston v. Public Service Comm., 82 S.W.2 105 (Mo 1935), discussed above. The 1989 Union Electric Court discussed the type of "franchises" that had been given, to one utility by the city and to the other utility by the county. The Court commented as to how the utilities had to deal with **both** the PSC and the local government:

> 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.)

20. In what appears to be the most recent pronouncement from our Legislature related to this topic, in a 1998 enactment, found at RSMO 393.297, the General Assembly stated:

3. **Missouri has historically . . . allowed political subdivisions to require franchises for these services (electric and gas service)** . . . (Emphasis added.)

21. In the regulations of the Public Service Commission, there is a recognition that the consent of the county may be needed in order for a plant to be built, because the regulations state in pertinent part:

4 CSR 240-3.105. Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity

***

1. **When consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise**, or an affidavit of the applicant that consent has been acquired; and ...

(Emphasis added.)

22. Therefore, the requirement that the utility get both consent from the county and from the PSC is expressed in the statutes, the case law, the PSC decisions, and the regulations of the PSC.

23. Whether the cases spoke of a "privilege," "consent," a "franchise" or "land use controls," we see that the Courts have always give authority to the local government to have control over the utility on matters as important as the location of a

power plant. Part of that comes from 393.170. Part of that comes from the land use statutes. Part of that comes from interpretations made by judges, filling in gaps.

24. The PSC Report would reject all of the above cases which require that the utility submit to control by both local government and the PSC. (We have not found any case in which the PSC said that the a utility does not have to comply with local government in building a power plant.)

D. THE PSC CANNOT EXPAND ON THE CONSENT OR FRANCHISE GIVEN BY THE LOCAL GOVERNMENT.

1. RSMO 393.190 says that the PSC cannot enlarge on the rights given in the franchise or the permit.

> 393.190. Transfer of franchise or property to be approved, procedure — impact of transfer on local tax revenues, information on to be furnished, to whom, procedure. —
>
> 1. No gas corporation, electric corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system … without having first secured from the commission an order authorizing it so to do. *** The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section 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.)

2. 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. *** ...**the 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.)

There is no consent or permit or franchise from the county that would allow Aquila to build a power plant or a substation. The PSC cannot take whatever was given by the county and expand upon it. A grant of authority (given in 1917) to put up poles and string lines is not a grant of authority to build a power plant. If Aquila had asked the County in 1917 if it could build a power plant near to homes, in unincorporated Cass County, there is no reason to think the County would have allowed that. More likely, the County would have required that the utility build its power plant in an area away from homes, and in an area appropriate for power plants. The 1917 grant was not a grant of authority to the utility to build anything anywhere it wants.

E. AQUILA MUST HAVE CONSENT FROM THE LOCAL GOVERNMENT BEFORE IT BEGINS BUILDING ITS POWER PLANT.

1. In Missouri Power & Light Company, 1973 WL 29307 (Mo.P.S.C.), 18 Mo.P.S.C. (N.S.) 116, the applicant sought to put in a peaking plant. The PSC said:

> **The applicant has satisfied all requirements of State and local agencies concerning the construction and operation of the plant.**
>
> ***
>
> We should also state that 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. **In short, we emphasize we 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.**
>
> ***
>
> **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.)

2. 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 stated:

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

3. A "condition precedent" is a condition that has to be satisfied before the next step is to begin. Saying that the consent of the local government is a condition precedent is the same as saying, as the PSC did in Missouri Power & Light, above, that the utility must comply with local requirements **before** it begins construction.

4. This interpretation is based on the language of RSMO 393.170, which sets out the following for an electric plant to be constructed:

> **3. No … corporation …shall begin construction … of a …electric plant …without first having obtained …permission and approval of the commission.**
>
> ***** Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed … showing that (applicant) has received the required consent of the proper municipal authorities.** (Emphasis added.)

5. The above statute indicates that first you have to get the required local "consent," and next you have to get the certificate from the PSC, and both these things have to occur **before** you construct an electric plant. As the case law cited above and RSMO 393.190 indicate, the PSC takes the consent from the local government, and

issues a certificate, but the PSC cannot enlarge on the authority given by the local government or ignore the decisions of the local government. The PSC cannot take a consent to put in lines and turn it into a consent to put in a power plant.

6. In order to build an "electric plant," the consent of the local government must be obtained **before** construction begins. The PSC does not have jurisdiction to act when the applicant has already built its plant.

7. A retroactive permit from the PSC is void.

F. IT IS IMPORTANT THAT THIS CASE NOT SET A PRECEDENT THAT A UTILITY IN MISSOURI CAN BE SAVED FROM ITS IMPROPER CONDUCT BY A LATE FILING WITH THE PSC.

1. It is important that the Courts make the proper decision for precedent. Aquila knew when it began building its power plant that it did not have the needed consent and did not comply with zoning;[23] in fact, Aquila declared that it did not need zoning and that the 1917 franchise that said it can put in poles was all the consent it needed.[24]

2. Aquila would therefore violate the PSC policy that it demonstrate that it complied with all local requirements before it begins building. This is not some kind of flexible policy that can be cast aside. This requirement comes from the statutes,

[23] The suit against Aquila to enforce zoning was filed by StopAquila.org on November 15, 2004.

[24] Aquila is presumed to know the law. It is presumed to know that in Harline the Court said this very same certificate did **not** authorize it to build a plant.

the regulations and the decisions. The PSC should not have violated the law simply to try to save Aquila from its own misguided actions.

3. Aquila's gambit was as follows: if it finishes building a power plant, Aquila thinks no one will make it dismantle it. If the Courts permit this to stand, then the Courts will have given a blessing to such a gambit.

G. WHAT THE INJUNCTION AND THE COURT OF APPEALS' DECISION SAY.

1. The Court of Appeals decision affirmed the injunction. Cass County v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005). The Trial Court indicated that irreparable harm flowed from Aquila's failure to comply with county **ordinances**. A mandatory injunction was issued against Aquila and all acting in concert with it to remove all improvements that are inconsistent with **county zoning**.

2. The PSC does not have the authority to change a Circuit Court judgment.

3. The PSC does not have the authority to issue an order that says that Aquila does not have to get consent required by 393.170 or that Aquila does not have to comply with county ordinances.

4. The requirements of obeying local authority are built into the requirements needed to get a certificate, and this requirement is irrefutable, with our Courts repeatedly saying that the utility has to comply with **both** the local government and with the PSC. No court decision has even held that the utility can get a certificate to

build a power plant without first getting the consent of the local government. No prior PSC report has ever said that a utility can ignore a county.

The Court of Appeals decision can only rule on the issues raised on appeal – which was, in the recent case, whether there were any grounds to uphold the injunction. The decision did not rule on all the questions that have arisen or which may arise in the future in this litigation. The decision certainly does not state that Aquila can ignore the county. The decision simply ruled that the injunction is affirmed.

In interpreting the Court of Appeals decision, we must remember three things: 1.) that the "ruling" of the Court of Appeals decision is limited to the issue that was presented to it on appeal, 2.) discussion by the Court of Appeals on matters that were not raised as an issue on appeal give us guidance, but are not controlling (they may be called *dicta*), and 3.) in any event, when the Court does not say it is overruling a statute, that statute still control.

RSMO 393.170 was not in any way overruled or otherwise diminished by the Court of Appeals' decision. 393.170 still requires that the applicant (Aquila) apply to the PSC **before** it begin construction, and that the applicant show to the PSC that it has the consent of the county **before** it gets its certificate to build the power plant. In fact, in its discussion contained in the decision, the Court of Appeals indicated that the applicant must show to the PSC that it has zoning. For example, the Court of Appeals decision cited with approval to In re Mo Power & Light, 18 Mo. PSC (N.S.) 116 (1973). The Court of Appeals in no way relieved Aquila of the requirement that it show to the PSC that it has received the consent of Cass County.

The Court of Appeals gave us guidance as to how it would rule in the future that the county presently has the authority to regulate the actions of Aquila:

> *While it is true that the Commission has extensive regulatory powers over public utilities,* ***the legislature has given it no zoning authority****, nor does Aquila cite any specific statutory provision giving the Commission this authority. See Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973) (regarding the* ***location*** *of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states,* ***"In short, we emphasize we 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."). It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, a municipality may regulate the location of public utility installations."*** *2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 12.33 (1986). While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because facility* ***location has particularly local implications, it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant.*** *See generally St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact location and that public interest is best served in* ***requiring it be done in accordance with county zoning laws****). See also State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934, 938 (1951) (****upholding validity of county rezoning*** *to accommodate electric power plant construction).*
>
> *Aquila further relies on Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo.1973) (Crestwood I), and cases in other states for the proposition that local regulation of public utilities is not allowed. This case, however, is not about local regulation; rather, the case involves the interplay between statutes enacted by the legislature and how to harmonize police powers possessed both by local government and public utilities. *** (Citing to Crestwood II) The court did not rule that the application of a zoning ordinance to the siting of a power plant invaded the Commission's area of regulation and control. Hence, the case provides no guidance for the issues raised herein. ****

FN8. The non-charter first class county statutory provision that parallels 64.090 and 64.620 in placing limitations on county commission zoning authority is section 64.255, and it does not include a public-utility exemption that is to be applied across the full range of non-charter first class county zoning provisions. ***

... we believe that if we were to extend Harline as urged by Aquila, we would effectively be giving electric companies in the state carte blanche to build wherever and whenever they wish, subject only to the limits of their service territories and the control of environmental regulation, without any other government oversight. *** *By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including* ***county zoning****, can be considered in public hearings* ***before the first spadeful of soil is disturbed****.* ***

While counties may not have the authority to issue franchises as to the construction of power plants, ***there is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant.*** *** *See, e.g., St. Louis County v. City of Manchester, 360 S.W.2d 638, 642 (Mo. banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant,* ***court concludes that charter county's zoning ordinance restricting plant's location is lawful restriction****, stating, "the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county, and the public interest is best served in requiring it to be done in accordance with the zoning laws.").*

The overriding public policy from the county's perspective is that it should have some authority over the placement of these facilities *so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier.* ***As the circuit court stated so eloquently, "to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants****.... The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities." (Emphasis added.)*

Since Aquila had neither the required consent of Cass County nor of the PSC, the only issue in front of the Trial Court and the Court of Appeals was whether Aquila would be enjoined when it had neither. What if Aquila had the consent of the PSC but did not have the consent of the County? That issue was not in front of the Trial Court or the Court of Appeals, so it could not have been decided. However, we see the answer in the statute (393.170) and the case law, including the recent Court of Appeals decision. Aquila must have the consent of both. In fact, it must have the consent of the County first.

You can search in vain in the decision issued by the Court of Appeals, but you will not find any ruling by the Court that would relieve Aquila of the requirement contained in 393.170 that it show that it has the consent of Cass County. The Court of Appeals wrote extensively and approvingly about the County 's desire to have control over location. The Court of Appeals indicated that the PSC had no zoning authority.

The Court of Appeals said that there is nothing in the statute that precludes a county from exercising its authority, if any, over the location of a power plant. Likely the reason that the Court phrased it this way is because some Counties do not have zoning programs. Different classes of Counties operate under different statutes. The Court simply meant by putting in the qualifier ("if any") that its statement might not apply if the County did not have a zoning program. The Court meant that if the County has a zoning program, then nothing in the statute prevents it from exercising authority over location of a power plant.

StopAquila.org believes that consent of the County is required before the PSC can have jurisdiction and that in any event the proper forum for land use issues is a hearing before the County prior to construction. StopAquila.org urges that the power plant not be allowed to remain in the present location, as it is too close to residences.

V. CONCLUSION

The Report and Order of the PSC should be overruled.

In addition, and in any event, the Report and Order of the PSC cannot give Aquila the authority it needs, because Aquila must have consent of the County. It must have consent of both the County and the PSC, gained before it constructs. It does not. Additionally, consent can not be given retroactively. The injunction remains in effect and now Aquila must comply with it.

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