IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

STATE EX REL. CASS COUNTY, MISSOURI	)	
	)	
Relator,	)	
	)	
v.	)	Case No. 06CA-CV01698
	)	
PUBLIC SERVICE COMMISSION FOR THE STATE OF MISSOURI,	)	
	)	
Respondent.	)	

JUDGMENT ON WRIT OF CERTIORARI OR REVIEW

On the 8th day of September, 2006, this Court heard arguments in connection with its Writ of Certiorari or Review issued June 6, 2006 for the purpose of inquiring into and determining the reasonableness and lawfulness of a Report and Order ("Order") issued by the Public Service Commission for the State of Missouri ("Commission") on May 23, 2006. Relator Cass County, Missouri ("Cass County") appeared by and through its counsel of record Cindy Reams Martin and Mark W. Comley. Cass County Attorney, Debra L. Moore, was also present. Respondent Commission appeared by and through its counsel of record Nathan Williams. Intervenor Aquila, Inc. ("Aquila") appeared by and through its counsel of record J. Dale Youngs and James C. Swearengen. Intervenor StopAquila.org ("StopAquila") appeared by and through its counsel of record Gerard D. Eftink. Intervenors Frank Dillon, Kimberly Miller, James and Linda Doll, Kendra and Randy Cooper, Gary and Cheryle Crabtree and Allan and Shirley Bockelman (collectively, the "Individual Intervenors") appeared by and through their counsel, John B. Coffman. Based on the written and oral arguments of counsel, and after a review of the relevant portions of the record, including those portions of the record the parties have

specifically requested this Court review, the Court makes the following findings of fact and conclusions of law, and enters the following judgment:

FINDINGS OF FACT

This Court's Jurisdiction and Venue

1. Relator Cass County is a first class non-charter county of the State of Missouri. **[Order, p. 2]**

2. Respondent Commission is an administrative agency of the State of Missouri with duties, power and authority as prescribed by law, and in particular the authority to regulate electric companies pursuant to the provisions of Chapters 386 and 393, RSMo. (2000).[1] Respondent's principal office is located in Jefferson City, Cole County, Missouri.

3. On January 25, 2006, Aquila, a public utility under the regulatory jurisdiction of the Commission, filed an application ("Application") for a Certificate of Convenience and Necessity ("CCN") authorizing Aquila to acquire, own, construct, operate, maintain, and otherwise control its South Harper Plant and Peculiar Substation (hereinafter, from time to time referred to collectively as the "Facilities") in Cass County, Missouri. Aquila's Application further requested such other orders and findings as are appropriate under the circumstances. **[Order, p. 2; p. 3 ¶ 2; pgs. 7-8 ¶ 25]**

4. When Aquila filed its Application, the Facilities had already been constructed, and had been operating since approximately June or July 2005. **[Order, p. 2; pgs. 6-7 ¶ 22; p. 22 ¶ 86]**

5. Aquila's Application was filed following the December 20, 2005 opinion issued by the Missouri Court of Appeals for the Western District ("Court of Appeals") in *Cass County v. Aquila*, 180 S.W.3d 24 (Mo.App. 2005) ("Opinion" or "*Cass County*").

[1] All statutory references are to RSMO (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

6. The Opinion followed Aquila's appeal from the January 11, 2005 entry of a judgment ("Judgment") in the civil action styled *Cass County, Missouri v. Aquila, Inc.*, filed in Cass County, Missouri, Case No. CV104-1443CC ("Injunction Proceedings").

7. The Judgment permanently enjoined Aquila from constructing and operating the South Harper Plant and the Peculiar Substation. The Judgment ordered Aquila to dismantle any improvements thereafter constructed which were inconsistent with agricultural zoning. *Cass County*, 180 S.W.3d at 28-29.

8. Aquila posted an appeal bond that suspended the affect of the Judgment pending appeal. Aquila thereafter constructed the Facilities pending its appeal of the Judgment. *Cass County*, 180 S.W.3d at 29.

9. The Opinion affirmed the Judgment permanently enjoining Aquila from constructing the Facilities. *Cass County*, 180 S.W.3d at 41.

10. Following the Opinion, the Judgment was stayed by the trial court in the Injunction Proceedings pending disposition of Aquila's Application. **[Order, p. 8 ¶ 26]**

11. On March 20, 2006 and on March 30, 2006, the Commission conducted public hearings on Aquila's Application in Harrisonville, Cass County, Missouri. **[Order, p. 8 ¶ 28]**

12. The Commission held evidentiary hearings on Aquila's Application in Jefferson City, Missouri on April 26, 27 and 28, 2006 and May 1, 3 and 4, 2006. **[Order, p. 8 ¶ 30]**

13. On May 23, 2006, the Commission entered its Order. The Order was joined by three of the five Commissioners, and reflected that a dissenting opinion would be issued by the remaining two Commissioners. **[Order, p. 60]**

14. On May 30, 2006 Cass County filed its Application for Rehearing of the Order.

15. On June 1, 2006, the Commission entered an order denying Cass County's Application for Rehearing.

16. On June 2, 2006, Cass County filed its Petition for Writ of Certiorari or Review, as provided by Section 386.510 for the purpose of having the reasonableness and lawfulness of the Order inquired into and determined by this Court.

17. On June 6, 2006, this Court issued its Writ of Certiorari or Review.

18. This Court subsequently granted Motions for Leave to Intervene filed by Aquila, StopAquila, the Individual Intervenors and the Office of Public Counsel.

19. On September 15, 2006, Commissioners Gaw and Clayton issued their dissenting opinion ("Dissent").

The Issues Before the Court for Review

20. Pursuant to an agreed Scheduling Order, Cass County, StopAquila and the Individual Intervenors filed briefs outlining their issues with respect to the lawfulness and reasonableness of the Order. Responsive briefs were filed by the Commission and Aquila. Reply Briefs were thereafter filed by the parties opposing the Order.

21. On September 8, 2006, the parties argued the reasonableness and lawfulness of the Order.

22. During the extensive arguments of counsel, Intervenors StopAquila and the Individual Intervenors elected, without prejudice to other rights or claims they may have, and without stipulating to the reasonableness of the Order, to withdraw from this Court's consideration all issues raised in their respective briefs which would have required this Court to inquire into and determine the reasonableness of the Order based upon the record as a whole.

23. Thus, the issues that remain for determination relate to the lawfulness of the Order, and to the reasonableness of the Order, though only with respect to a narrow concern raised by Cass County about the appropriateness of the conditions imposed by the Commission's Order on the CCN's it awarded Aquila for the Facilities.

The Statutory Authority Identified by the Commission for the Relief Awarded Aquila:

24. The Commission's Order awarded the following relief to Aquila:

> "1. Aquila, Inc., is granted a waiver from the requirement of 4 CSR 240-3.105(1)(B)2.
>
> 2. Under Section 393.140 and/or Section 393.170, RSMo, Aquila is hereby specifically authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage public improvements consisting of electric power production and related facilities, including three (3) 105 MW natural gas fired combustion turbines, and an associated transmission substation, as well as all facilities, structures, fixtures, transformers, breakers, installations, and equipment related thereto at the following described location in Cass County, Missouri:
>
> > The Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-Nine (29), and the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32) containing approximately 74 acres at or near the intersection of 243rd Street and Harper Road.
>
> 3. Under Section 393.140 and/or Section 393.170, RSMo, Aquila is hereby specifically authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage public improvements consisting of an electric transmission substation together with any and all other facilities, structures, fixtures, equipment and installations related thereto at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW1/4) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW ¼ a distance of 2,508.18 feet more or less to the South line of said NW ¼; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning containing approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road.

4. The construction of the Facilities by Aquila is hereby specifically authorized, permitted, approved, ratified, and confirmed.

5. The ownership, operation, control, and management of the Facilities by Aquila on a prospective basis is hereby specifically authorized and permitted.

6. As conditions on the grants of authority provided for in ordered paragraph 2 above: (a) roads on the site must be worked on at least weekly to repair any ruts or holes, and dust abatement measures must be adopted for unpaved roads; (b) sound abatement measures must be fully utilized and maintained (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer); (c) emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood; (d) security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort; (e) security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would have an impact on the surrounding area; (f) no construction or modification of the existing South Harper Facility shall be done in preparation for adding any generating unit(s) to the site before obtaining a certificate of convenience and necessity from the Commission to add the unit(s); and (g) emissions from the South Harper Facility affecting air quality must comply with all federal and state permit requirements.

7. All pending motions are denied.

8. This Report and Order shall become effective on May 31, 2006.

9. This case may be closed on June 1, 2006."

[Order, pgs. 58-60] The disputes over the lawfulness and reasonableness of the Order involve the relief awarded Aquila by the Commission in paragraphs 2, 3, 4, 5 and 6.

25. In paragraph 2 of the relief awarded by the Commission, Aquila was awarded a CCN for the South Harper Plant. **[Order, p. 58]** The tract legally described in paragraph 2 is in unincorporated Cass County, and is zoned agricultural. **[Exh. 89 p. 1-1]**; *Cass County*, 180 S.W.3d at 26, 28, 29, 40.

26. In paragraph 3 of the relief awarded by the Commission, Aquila was awarded a CCN for the Peculiar Substation. **[Order, pgs. 58-59]** The tract legally described in paragraph 3 is in unincorporated Cass County, and is zoned agricultural. **[Exh. 90 p. 1-1]**; *Cass County*, 180 S.W.3d at 26, 28, 29, 40.

27. Cass County, StopAquila, and the Individual Intervenors object to the lawfulness of the relief awarded by the Commission in paragraphs 2, 3, 4 and 5. **[Order, pgs. 58-59 ¶¶ 2, 3, 4, 5]**

28. The Commission specified that the statutory authority on which it relied to award the relief described in paragraphs 2 and 3 was Section 393.140(1)(2) and/or Section 393.170. **[Order, p. 58 ¶¶ 2, 3; p. 25]**

29. The Commission did not specify the statutory authority on which it relied to award the relief described in paragraphs 4 and 5, though earlier discussion in the Order indicates the Commission was relying on its authority described in Section 393.140(1)(2) and/or Section 393.170. **[Order, p. 59 ¶¶ 4, 5; p. 35]** Counsel for the Commission and for Aquila confirmed

during oral arguments that these are the statutes which the Commission claims extend it the authority to order the relief awarded Aquila.

30. Cass County objects to the reasonableness of the conditions imposed by the Commission on the CCN awarded for the South Harper Plant as described in paragraph 6, **[Order, p. 59 ¶ 6]** and to the reasonableness of the Commission's failure to impose any conditions on the CCN awarded for the Peculiar Substation.

31. The Commission did not specify the statutory authority on which it relied to impose the conditions described in paragraph 6, though earlier discussion in the Order indicates the Commission was relying on its authority as described in Section 393.170.3. **[Order, p. 59-60, ¶ 6; p. 51]**

CONCLUSIONS OF LAW

I. Subject Matter Jurisdiction/Venue.

Cass County filed an Application for Rehearing from the Commission's Order. The Application for Rehearing was denied on June 1, 2006. Cass County's Petition for Writ of Certiorari or Review was timely filed within thirty days of the denial of the Application for Rehearing. Public hearings on Aquila's Application occurred not only in Cole County, but also in Cass County. The issues presented for review by Cass County, StopAquila and the Individual Intervenors are within the scope of the issues raised, and thus preserved, by said parties in their Applications for Rehearing filed before the Commission. Thus, this Court has subject matter jurisdiction over these proceedings and venue is proper in Cass County, Missouri. Section 386.500.2; Section 386.510; *State ex rel. Case v. Seehorn*, 223 S.W.664 (Mo. banc. 1920).

II. Standard of Review.

Section 386.510 permits review by the circuit court of orders of the Commission for the purpose of having the reasonableness or lawfulness of the order inquired into or determined. "Upon the hearing the circuit court shall enter judgment either affirming or setting aside the order of the Commission under review. . . , The court may, in its discretion, remand any cause which is reversed by it to the Commission for further action." Section 386.510.

This Court's review of the Commission's Order is thus limited to determining whether the Order is lawful and reasonable. *State ex rel. Office of the Public Counsel v. Public Serv. Comm'n*, 938 S.W.2d 339, 341 (Mo.App. W.D. 1997), citing *State ex rel. City of West Plains v. Public Serv. Comm'n*, 310 S.W.2d 925, 933 (Mo. banc. 1958). The first step of this two prong test is to determine whether the Commission's Order is lawful. *Deaconess Manor Association v.*

Public Service Commission of State of Missouri, 994 S.W.2d 602, 609 (Mo.App. W.D. 1999), citing *State ex rel. Consumers Council, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc. 1979). "Questions of lawfulness turn on whether the Commission's orders or decisions are statutorily authorized." *State ex rel. Conner v. Public Serv. Comm'n*, 703 S.W.2d 577, 579 (Mo.App. 1986), quoting *State ex rel. Marco Sales v. Public Serv. Comm'n*, 685 S.W.2d 216, 218 (Mo.App. 1984). On the issue of statutory authorization or lawfulness, the Court on review exercises independent judgment and does not defer to the Commission. *Deaconess*, 994 S.W.2d at 609, citing *Friendship Village v. Public Serv. Comm'n*, 907 S.W.2d 339, 348 (Mo.App. W.D. 1995).

The second step of the two prong test is to determine whether the Commission's Order is reasonable. *Deaconess*, 994 S.W.2d at 611, citing *State ex rel. Consumers Council, Inc.*, 585 S.W.2d at 41. "Questions of reasonableness turn on whether there is competent and substantial evidence upon the whole record to support them." *State ex rel. Conner*, 703 S.W.2d at 579, quoting *State ex rel. Marco Sales*, 685 S.W.2d at 218. "Substantial evidence is competent evidence which, if true, has a probative force on the issue." *Deaconess*, 994 S.W.2d at 611, citing *State ex rel. Utility Consumers Council of Missouri v. Public Serv. Comm'n*, 562 S.W.2d 688, 692 (Mo.App. E.D. 1978). An order of the commission will be reversed only when it is clearly contrary to the overwhelming weight of the evidence. *Deaconess*, 994 S.W.2d at 611, citing *Friendship Village*, 907 S.W.2d at 345. Further, if the Commission acted arbitrarily, capriciously, or unreasonably, the reviewing court will reverse. *State ex rel. Midwest Gas Users' Assoc. v. Public Serv. Comm'n*, 976 S.W.2d 485, 491 (Mo. App. 1998).

Cass County and the Commission agree that the ultimate effect of the Order on the

Judgment in the Injunction Proceedings would have been beyond the Commission's jurisdiction to determine, was not determined by the Commission's Order, and is thus beyond this Court's appropriate scope of review. **[Cass County's Brief, pgs. 4-5; Commission's Brief, p. 7]** Thus, this Court will not draw any conclusions regarding the effect of the Order on the Judgment, as such findings or conclusions would not be relevant to a determination of the lawfulness or reasonableness of the Order. The ultimate effect of the Order on the Judgment remains a matter to be determined by the trial court in the Injunction Proceedings. [2]

III. The Lawfulness of the Commission's Order.

Cass County, StopAquila and the Individual Intervenors have raised two objections to the Order's lawfulness. First, Cass County, StopAquila and the Individual Intervenors argue that the Commission exceeded its statutory jurisdiction and authority when it awarded Aquila CCN's and other orders authorizing construction and operation of the South Harper Plant and the Peculiar Substation after construction of the Facilities was complete. **[Order, pgs. 58-59 ¶¶ 2, 3, 4, 5]** In response, the Commission contends that it was statutorily authorized by Section 393.140(1)(2) and/or Section 393.170 to award CCN's and other orders authorizing construction and operation of the Facilities, though their construction was complete and the Facilities had already been operating for nearly a year. **[Order pgs. 58-59 ¶¶ 2, 3, 4, 5; p. 35]**

Second, Cass County, StopAquila and the Individual Intervenors argue that even if the Commission is presumed to possess the statutory authority to award post-construction CCN's or other orders for the Facilities, the Commission exceeded its statutory jurisdiction and authority by acting as a zoning authority when it evaluated, interpreted and applied Cass County's zoning

[2] The trial court in the Injunction Proceedings retains jurisdiction over the Judgment for the purpose of dissolving or modifying the Judgment's permanent injunction in the event of "changed circumstances." *Tweedell v. Town of Normandy*, 581 S.W.2d 438, 440 (Mo.App. E.D. 1979).

ordinance and master plan to support awarding site specific CCN's for the Facilities. **[Order, pgs. 58-59 ¶¶ 2, 3, 4, 5]** Cass County argues that the only way the Commission could have "considered zoning" within the bounds of its statutory authority was to respect zoning, as directed by the Court of Appeals in its Opinion, thus harmonizing the rights of local governing bodies to regulate the location of plants with the Commission's authority to determine that a plant is needed. In response, the Commission contends that it was statutorily authorized by either Section 393.140(1)(2) and/or Section 393.170 to evaluate, interpret and apply Cass County's zoning ordinance and master plan, and to award site specific CCN's for the Facilities. The Commission also contends that when the Opinion directed the Commission to consider zoning, it intended the Commission to weigh zoning against the many other factors the Commission examines to determine whether proposed facilities are "necessary and convenient for the public service" under Section 393.170.3. **[Order, pgs. 28-29, 55]**

Both of these issues turn on whether the relief awarded Aquila by the Commission was statutorily authorized, and thus on whether the Order was lawful. This Court will not, therefore, extend deference to the Commission's conclusion that the disputed relief it awarded Aquila in its Order was authorized by Section 393.170 and/or Section 393.140(1)(2), but will exercise independent judgment to determine whether the Commission exceeded its statutory authority.

A. Did the Commission have the statutory authority under Section 393.170 or Section 393.140(1)(2) to award Aquila CCN's and/or other orders permitting construction and operation of the Facilities after they were built.

The Commission is a creature of statute. Its powers, therefore, are limited to those conferred by statute. *State ex rel. City of West Plains v. Public Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc. 1958). Though the Commission's authority to regulate public utilities is significant, it is not unlimited. "In all things [the Commission] acts by virtue of the legislative

authority with which is clothed, and necessarily within the limits of the legislative power; for the stream cannot rise above its source nor the creature above its creator." *Cass County*, 180 S.W.3d at 34-35, citing *Missouri Valley Realty Co. v. Cupples Station Light, Heat & Power Co.*, 199 S.W.2d 151, 153 (Mo. banc. 1917). This Court must determine whether Section 393.170 or Section 393.140(1)(2) authorized the Commission to award Aquila post-construction CCN's or other orders permitting construction and operation of the Facilities.

Section 393.170

Section 393.170 provides:

> "1. No gas corporation, electrical corporation, water corporation or sewer corporation **shall begin construction** of a gas plant, electric plant, water system or sewer system **without first having obtained the permission and approval of the commission.**
>
> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
>
> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall **after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.** Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void." [Emphasis added]

This statute has long been recognized as the source of the Commission's statutory authority to issue CCN's to utilities. "The authority to issue CCN's 'emanates from two classified sources. Subsection 1 [of Section 393.170] requires 'authority' to construct an electric plant. Subsection

2 [of Section 393.170] requires 'authority' for an established company to serve a territory by means of an existing plant.'" *Cass County*, 180 S.W.3d at 33, citing *State ex rel. Harline v. Public Service Commission*, 343 S.W.3d 177, 185 (Mo.App. 1960).

Though the source of the Commission's authority to issue CCN's has not been disputed, disagreement over whether a utility possessing a Section 393.170.2 "area certificate" must return to the Commission to secure a Section 393.170.1 "plant certificate" before building a plant within its certificated area was at the heart of the dispute which lead to the Judgment and to the Opinion. An understanding of that dispute and of the Court of Appeal's resolution of that dispute is relevant to determining the Commission's authority under Section 393.170.

Aquila commenced construction of the Facilities on land located in unincorporated Cass County that was zoned agricultural. *Cass County*, 180 S.W.3d at 28. Aquila did not secure contemporaneous Section 393.170.1 CCN's from the Commission authorizing the Facilities' construction. Aquila also refused to comply with Section 64.235, a statute among the scheme of zoning statutes set forth in Chapter 64, which applies to first class non-charter counties such as Cass County. Section 64.235 requires Cass County's planning board to approve a proposed development's consistency with Cass County's master plan prior to construction.[3] Section 64.235 describes an exemption from this requirement if a proposed development has been

[3] Section 64.235 reads:

> From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefore to the planning board, nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission after public hearing in the manner provided by section 64.231.

"specifically authorized or permitted by a certificate of public convenience or necessity or order issued by the Public Service Commission, or by permit of the county commission after public hearing in the manner provided by Section 64.231." Aquila claimed the orders and/or CCN's it (or its predecessors) had already secured from the Commission, including the "area certificate" its predecessor received from the Commission in 1938, constituted "specific authority" from the Commission to construct the Facilities under Section 393.170.1. *Cass County*, 180 S.W.3d at 27, 29. Aquila thus claimed it was exempt from Section 64.235. *Id.*

The Judgment concluded that the orders and CCN's Aquila already possessed did not constitute "specific authority" to construct the Facilities as intended by Section 64.235, and, therefore, that Aquila was not exempt from Section 64.235. *Id.* at 28. Construction of the Facilities was permanently enjoined, and improvements then or thereafter existing that were inconsistent with agricultural zoning were ordered dismantled. *Id.* at 28-29. Aquila posted an appeal bond to suspend the permanent injunction pending appeal. *Id.* at 29. By the time the Opinion was issued on December 20, 2005, the Facilities were constructed and had been operating for nearly six months. **[Order, p. 2; pgs. 6-7 ¶ 22; p. 22 ¶ 86]**

The Opinion affirmed that the area certificates possessed by Aquila did not equate with the "specific authority" required for the construction of the Facilities under Section 393.170 to secure exemption from Section 64.235.[4] *Id.* at 34, 39-40. Specifically, the Opinion noted "the certificates and orders herein only give Aquila the general authority to construct, operate and maintain electric plants throughout its service territory. ***They do not give Aquila the authority to build this particular facility in an agricultural district in Cass County.***" *Id.* at 40. [Emphasis added] The Opinion thus identified Section 393.170 as the only means by which Aquila could

[4] The Opinion also observed that Section 64.255, which describes a first class non-charter county's authority to adopt and enforce zoning regulation provides no exemption for developments proposed by public utilities, whether or not specifically authorized by the Commission. *Cass County*, 180 S.W.3d at 32, n. 8.

have secured the "specific authority" for the Facilities to qualify for an exemption from the obligation to comply with Section 64.235, and correspondingly affirmed that the Commission's authority to issue CCN's that "specifically authorize" the construction of plants as to permit exemption from Section 64.235 emanates from Section 393.170.

The Court acknowledges the strength of Aquila's argument claiming that this is a case of first impression in the State of Missouri, and that the cases cited by Aquila stand for the proposition that the Public Service Commission had the authority to approve the South Harper plant and the Peculiar substation **AFTER** completion of construction. Those decisions are *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270 (Colo. Banc 2000) and *Williston Basin Interstate Pipeline Co. v. Wyoming Public Service Commission*, 996 P.2d 663 (Wyo. 2000).

In *City of Boulder*, the utility entered into a contract with General Electric for the manufacture of replacement turbine blades as a part of the utility's plans to upgrade a power plant. *Id.* at 1273. The utility filed an application for approval under section 40-5-101(1) of the Colorado Revised Statutes, Colorado's nearly identical counterpart to section 393.170.1. Section 40-5-101(1) reads:

> No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

Id. Notably, like Aquila's 2005 application to the Missouri Commission, the utility in *City of Boulder* requested a certificate or, in the alternative, a determination by the PUC that no certificate was required. *Id.* An administrative law judge hearing the application concluded that a certificate was not required, a recommendation subject to the PUC's final review. Prior to the PUC's final determination, the utility completed the upgrade project. *Id.* at 1274.

After the utility had completed the upgrade, the PUC reversed the ALJ's determination, concluding instead that a certificate *was* required for the now-completed project. However, after finding that the upgrade would serve the public interest, the PUC retroactively approved the project. *Id.* In the appeal from that decision, the City of Boulder and other intervenors argued, among other things, that the PUC lacked the authority to retroactively grant a certificate for a project that was already constructed claiming, as the County argues here, that the statute required the utility to get pre-construction approval. *Id.*

The Colorado Supreme Court rejected this claim and instead agreed with the PUC's argument that the statute requiring utilities to seek PUC approval only imposes obligations on utilities, not limitations on the PUC's broad authority. *Id.* While the court observed that utilities and the PUC were not free to ignore the requirements of that section, and the utility would be taking a risk that the PUC would later determine that its investment in the facility was not authorized, it recognized the PUC's "considerable discretion" in such a circumstance "to fashion a remedy that benefits the public interest." *Id.* at 1278. The court thus concluded that, as long as the PUC determined that the issuance of a retroactive certificate would serve the public interest, it had the authority to do so, and the Colorado counterpart to section 393.170.1 did not prohibit such an action. *Id.* at 1276.

Similarly, the Wyoming Supreme Court took up this issue when it considered the Wyoming Public Service Commission's retroactive approval of the construction of a public utility's facilities in *Williston Basin Interstate Pipeline Co. v. Wyo. Pub. Serv. Comm'n*, 996 P.2d 663 (Wyo. 2000). In *Williston*, a gas utility constructed a natural gas pipeline. The company built the pipeline without first seeking approval from the Commission as required by Wyo. Stat. Ann. § 37-2-205(a), Wyoming's counterpart to section 393.170.1. *Id.* at 666, which is virtually

identical to section 393.170.1, section 37-2-205(a) reads: "No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." In rejecting a competing pipeline's claim that the Commission's retroactive grant of authority of the pipeline was unlawful, the Wyoming court noted that section 37-2-205(a) does not require the Commission to reject untimely applications, and held that "if an untimely application is acceptable in all other respects, the PSC may grant it and may impose sanctions or not, at its discretion." *Id.* at 667.

While not being bound by decisions from the courts of the States of Colorado and Wyomoing in the first instance, (and for the record only this Court disagrees with the conclusions reached by Colorado and Wyoming. They appear to be driven by practicality rather than a fair interpretation of the plain language of the statutes) Aquila's argument ignores one very important case precedent in Missouri. Aquila's argument would seem to request this Court to ignore the law established in this State by the Missouri Court of Appeals for the Western District in the case of *Cass County v. Aquila,* 180 S.W.3d 24 (Mo.App. 2005).

Considerable attention was devoted by the Court of Appeals to the authority the legislature extended the Commission under Section 393.170. After analyzing the plain language of Section 393.170, and discussing the public policies served by its terms, the Court of Appeals concluded that Section 393.170.1 requires a utility to secure a CCN "specifically authorizing" the construction of a plant ***prior*** to, and contemporaneous with, its construction, even if the plant is to be constructed within the utility's certificated area. *Cass County*, 180 S.W.3d at 32-40. Critical to this case, the Court of Appeals also concluded that Section 393.170.1 and Section 393.170.3 combine to limit the Commission's authority to issue CCN's "specifically

authorizing" the construction of a plant to the period ***preceding*** the plant's construction. The Opinion states:

> "... examining the language of Section 393.170 in its entirety, we believe that the legislature, which clearly and unambiguously addresses electric plants in subsection 1, ***did not give the Commission authority*** to grant a CCN for the ***construction*** of an electric plant without conducting a public hearing that is more or less contemporaneous with the ***request to construct such facility.*** Subsection 3 requires a hearing to determine if 'such ***construction*** . . . is necessary or convenient for the public service.'"

Cass County, 180 S.W.3d at 34. [Emphasis added] The hearing required by Section 393.170.3 to determine whether a plant is "necessary or convenient" ***must occur before the proposed plant is constructed.*** The Opinion states "because subsection 3 [referring to Section 393.170.3] further imposes a finding of necessity and convenience 'after due hearing' for 'such construction,' we believe that the ***legislature wanted the Commission to conduct hearings whenever new construction is proposed.***" *Cass County*, 180 S.W.3d at 39. [Emphasis added] The Opinion also states:

> "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.*** There is nothing in the law or logic that would support a contrary interpretation."

Cass County, 180 S.W.3d at 37. [Emphasis added]

Because Aquila had not secured Section 393.170 CCN's from the Commission for the Facilities prior to, and contemporaneous with, their proposed construction, Aquila was not exempt from the obligation to comply with Section 64.235. *Cass County*, 180 S.W.3d at 34. The Court of Appeals thus affirmed the Judgment "permanently enjoining" Aquila from building the South Harper Plant and the Peculiar Substation. . . ." *Cass County*, 180 S.W.3d at 41.

Following the Opinion, Aquila filed its Application with the Commission, seeking post-construction CCN's and other orders permitting construction and operation of the Facilities. Despite the Opinion, the Commission awarded Aquila CCN's and other orders permitting and ratifying construction of the already built Facilities. **[Order, pgs. 58-59, ¶¶ 2, 3, 4]** The Commission claims its orders were authorized because although Section 393.170 restrains utilities, obligating them to secure a CCN before constructing a plant, Section 393.170 does not correspondingly limit the authority of the Commission to issue CCN's to the period preceding construction of a plant. **[Order, pgs. 34-35]** This assertion is patently incorrect. The Opinion clearly concluded that Section 393.170(1) and (3), read together, reflect a legislative intent to ***limit the Commission's authority*** to issue CCN's to the period ***preceding*** the construction of a power plant. *Cass County*, 180 S.W.3d at 34, 37, 39. This Court concludes that the Commission exceeded its statutory authority under Section 393.170, and in the process defied the Opinion's affirmation of the Judgment permanently enjoining the Facilities' construction, by issuing a CCN and other orders authorizing the construction of the Facilities though they were already built.[5]

The Commission can not excuse its defiance by claiming the Opinion exempted the Facilities from the effect of its holdings. Though the Court of Appeals did restrict the Opinion's reach to facilities where objecting litigants had "preserved the precise issue addressed" in the

[5] The Commission claims in its Order that it has previously issued a post-construction CCN, citing *Mo. Power & Light Co.*, 18 Mo. P.S.C. (N.S.) 116, 120 (1973). **[Order, p. 35]** The Commission observes that in this decision, it was noted that no complaints concerning noise had been voiced by any nearby residents, and concluded that this "implies that the combustion turbine was operating before the Commission issued its report and order." **[Order, p. 35]** The Commission has clearly taken the reference to "no noise complaints" out of context. In the decision, the Commission specifically notes that the application it is considering "requests authority under Section 393.170 . . . ***and proposes*** to construct . . . a combustion turbine generating unit ***to be installed*** . . . ." *Mo. Power & Light Co.*, 118 Mo. P.S.C. at 116. The decision goes on to describe how various exhibits admitted by the utility applicant show "the location and relationship of the ***proposed*** generating unit with applicant's electric transmission system. *Id.* Finally, the decision notes that the proposed generating unit is "***planned*** to be available for service by June, 1974 . . . ." a full year after the decision. *Id.* Ironically, this same case is favorably cited in the Opinion for the Commission's acknowledgment that the Commission should take cognizance of – and respect – local zoning. *Cass County*, 180 S.W.3d at 30, citing *Mo. Power & Light Co.*, 118 Mo. P.S.C. at 120. In any event, even presuming the Commission issued a post-construction CCN in *Mo. Power & Light Co.*, it would have done so without statutory authority.

Opinion, *Id.* at 39, the South Harper Plant and the Peculiar Substation are obviously facilities, in fact THE Facilities, where the "precise issue addressed" in the Opinion was preserved. In fact, immediately preceding its discussion of the "restricted" reach of its Opinion, the Court of Appeals, after concluding that the Commission must issue a CCN specifically authorizing a plant before the plant is constructed, noted "if Aquila is dissatisfied with such interpretation, it is free to seek a statutory change, and there are a variety of statutory models available for our legislature's consideration." *Id.* This reflects an obvious intention that Aquila and the Facilities were to be bound by the Opinion. Had the Court of Appeals intended to spare the Facilities from its interpretation of Section 393.170, it would clearly have stated as much. Instead, the Opinion unequivocally affirmed the Judgment "permanently enjoining" the Facilities from being constructed—a determination that is inconsistent with relieving the Facilities from the effect of the Opinion's interpretation of Section 393.170.

Though the Opinion concluded that the Commission has no authority to issue CCN's or other orders permitting *construction* of the Facilities *after* they are built, the Opinion, in *dicta*, seemed to suggest that Aquila might yet be able to secure relief that would permit the illegally constructed Facilities to continue operating, thus sparing the Facilities from the Judgment's mandate that they be dismantled. In the final sentences of the Opinion, the Court of Appeals affirmed the Judgment enjoining construction of the Facilities, then added:

> "For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and the Peculiar substation in violation of Cass County's zoning law without first obtaining approval from the county commission or the Public Service Commission. ***In so ruling, however, we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue to operate, albeit with whatever conditions are deemed appropriate.***

Cass County, 180 S.W.3d at 41. [Emphasis added] The Opinion thus distinguished between the illegal ***construction*** of the Facilities (which was enjoined due to Aquila's violation of Cass County's zoning laws), and the Facilities' possible continued ***operation*** despite their illegal construction.

The Commission ignored this distinction. The Commission concluded that the Court of Appeals intended by its final sentences to permit Aquila to secure the necessary permission to ***construct and operate*** the Facilities from the Commission under Section 393.170, even though the Facilities had already been constructed. **[Order, pgs. 40-41]** The Commission interpreted the Court of Appeals' affirmation of the Judgment due to Aquila's failure to secure the advance approval it needed to earn exemption from Section 64.235 from "either the county commission or the Commission" as an instruction that Aquila could seek post-construction authority to operate the illegally constructed Facilities from "either the county commission or the Commission." **[Opinion, pgs. 40-41; Dissent, p. 7]**

The Commission's interpretation of the final sentences of the Opinion is erroneous. The next to the last sentence of the Opinion confirmed that it is too late for Aquila to earn an exemption from Section 64.235 of Cass County's zoning laws, because Aquila failed to secure approval for the Facilities from "either the county commission or the Commission" ***before the Facilities were constructed.*** **[Dissent, pgs. 7-8]** The next to the last sentence of the Opinion does not suggest that Aquila can still earn an exemption from Section 64.235 by securing ***post-construction*** permission to construct and operate the Facilities from "either the county commission or the Commission." In fact, such an interpretation would be patently inconsistent with the Court of Appeals' affirmation of the Judgment. As noted in the Dissent:

> "The permission to operate the facility as discussed by the Western District is different from permission to construct pursuant to Section 393.170.1. The

> Western District declared that Aquila failed to secure the necessary permission to construct the plant from the County or the Commission. Thus the Western District found that the trial court's injunction would stand. It is from this finding by the Court that without such permission from the Commission or Cass County, the plant would be subject to being dismantled."

[Dissent, p. 7]

This Court concludes that the Opinion's final sentences did not extend the Commission authority under Section 393.170 to remediate the illegal construction of the Facilities by issuing post-construction CCN's or other orders authorizing construction and operation of the Facilities. Moreover, the Opinion's final sentences could not have extended the Commission such authority. The Court of Appeals had already identified Section 393.170 as ***the*** source for the Commission's statutory authority to "specifically authorize" power plants as to afford an exemption from Section 64.235, and had already noted that the legislature intended that such authority could ***only*** be exercised by the Commission ***before a plant is constructed***. The Court of Appeals is presumed to know that its authority did not extend to rewriting Section 393.170 for the purpose of extending the Commission the one time right to issue Aquila post-construction CCN's. *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002) ("courts do not have the authority to read into a statute a legislative intent that is contrary to is plain and ordinary meaning. [citation omitted] . . . This Court, under the guise of discerning legislative intent, cannot rewrite the statute.") As a matter of law, the final sentences of the Opinion cannot be interpreted to extend the Commission authority under Section 393.170 to award CCN's or other orders authorizing construction and/or operation of the Facilities after they have been built.

This Court is mindful that the final sentence of the Opinion, though *dicta*, is not without meaning. However, the sentence does not assure that Aquila can or will be able to secure the necessary authority to continue operating its illegally constructed Facilities, and certainly makes

no mention that such authority is available from the Commission.[6] *Cass County*, 180 S.W.3d at 41. The Court of Appeals had already concluded that the Facilities required Section 393.170 CCN's before they were constructed, and that CCN's could not be secured for the Facilities post-construction. The Court of Appeals had already concluded that in the absence of Section 393.170 CCN's, the Facilities were not exempt from Cass County's zoning authority described in Section 64.235. The last sentence of the Opinion did not modify these conclusions. Since the dismantling order in the Judgment (which was affirmed by the Opinion) was a result of Aquila's failure to abide by Cass County's zoning laws, this Court believes that the Court of Appeals was fairly suggesting by its final sentence that any relief Aquila might secure to continue operating the Facilities (and to avoid dismantling the Facilities) would have to come, ***if at all***, from Cass County, perhaps by way of a use variance from its zoning requirements. **[Dissent, p. 7]** Alternatively, the Court might have been suggesting that Aquila could seek relief from the legislature. *Cass County*, 180 S.W.3d at 31. In any case, the final sentence of the Opinion does not extend the Commission authority under Section 393.170 to issue post-construction CCN's or other orders authorizing construction and operation of the Facilities under Section 393.170.

This Court concludes that the Commission did not have the statutory authority under Section 393.170 to award Aquila post-construction CCN's or other orders authorizing construction and operation of the Facilities, and that the Order is, therefore, unlawful.

Section 393.140(1)(2)

Perhaps cognizant of the Opinion's interpretation of Section 393.170, the Commission also claims that the CCN's and other orders it issued permitting construction and operation of the Facilities after they were built were statutorily authorized by Section 393.140(1) (2). **[Order, pgs. 25, 58-59]** Those sub-sections provide:

[6] See Dissent, p. 7.

"The Commission shall:

(1) Have ***general supervision of all*** gas corporations, ***electrical corporations***, water corporations and sewer corporations ***having authority*** under any special or general law or under any charter or franchise ***to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose*** of furnishing or distributing water or gas or ***of furnishing or transmitting electricity for light, heat or power***, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, ***and all gas plants, electric plants***, water systems and sewer systems ***owned, leased or operated by any*** gas corporation, ***electrical corporation***, water corporation, or sewer corporation.

(2) Investigate and ascertain, from time to time, the quality of gas or water supplied and sewer service furnished by persons and corporations, ***examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying*** gas or ***electricity for light, heat or power and in transmitting the same***, and in supplying and distributing water for any purpose whatsoever, and in furnishing a sewer system, ***and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such*** gas, ***electricity***, water, or sewer system, ***and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of*** gas corporations, ***electrical corporations***, water corporations, and sewer corporations.

[Emhasis added]

The Opinion did not identify Section 393.140 as a source of statutory authority pursuant to which the Commission could issue CCN's or other orders "specifically authorizing" the construction of a plant, whether before or after the plant has been built. The Opinion did not identify Section 393.140 as a means of securing exemption from the obligation to comply with Section 64.235. Instead, the Court of Appeals noted that the authority to issue CCN's emanates from Section 393.170, *Cass County*, 180 S.W.3d at 33, citing *State ex rel. Harline v. Public Service Commission*, 343 S.W.3d 177, 185 (Mo.App. 1960), and that only a Section 393.170

CCN procured from the Commission before a plant is constructed could relieve a utility of the obligation to comply with Section 64.235. *Cass County*, 180 S.W.3d at 34; **[Dissent, p. 5]** This observation alone renders suspect the Commission's reliance on Section 393.140(1)(2) as the source for its authority to issue post-construction CCN's or other orders authorizing construction and operation of the Facilities. A fair reading of Section 393.140(1)(2) confirms that the Commission's reliance on this statute for authority for its Order is misplaced.

Section 393.140(1) extends the Commission ***general supervisory*** authority over utilities having authority to install infrastructure for the purpose of furnishing or transmitting electricity, and over electric plants owned, leased or operated by an electric corporation. No mention is made in Section 393.140(1) of any authority to issue CCN's or other orders authorizing the construction of plants at all, let alone to remediate illegally constructed facilities or to authorize the operation of illegally constructed facilities. This Court does not believe that the legislature intended the Commission's power to exercise "general supervision" over electric utilities to include the authority to issue CCN's or other orders for the purpose of remediating a utility's illegal construction activities.

As the Commission is a creature of statute, "its powers are limited to those conferred by statute, ***either expressly or by clear implication as necessary*** to carry out the powers specifically granted." *State ex rel. Util. Consumers Council, Etc. v. Public Serv. Comm'n.*, 585 S.W.2d 41, 49 (Mo. banc 1979). [Emphasis added] The authority to supervise utilities is expressly stated in Section 393.140(1). The authority to issue CCN's or other orders permitting construction and operation of illegally constructed Facilities is not expressly stated in Section 393.140(1), and is not a power included within that statute by "clear implication as necessary to carry out the power" to supervise utilities. The Commission "can only exercise such powers as are expressly

conferred on it; and the statute conferring such powers, to authorize action thereunder, should clearly define their limits. Nothing should be left to inference or seek refuge in implication or the exercise of discretion." *State ex rel. v. Public Serv. Comm'n*, 192 S.W. 958, 962 (Mo. 1917), cited with approval by *City of Columbia v. State Public Serv. Comm'n*, 43 S.W.2d 813, 815 (Mo. 1931); see *State ex rel. Midwest Gas Users' Ass'n v. Public Serv. Comm'n*, 976 S.W.2d 470, 477 (Mo.App. W.D. 1998)(Though the legislature has "set out only the basic rules governing the Commission's regulation of . . . utilities, and has left the details of that regulation to the Commission . . . the alternative methods of regulation adopted by the Commission must still fit within the parameters established by Section 393 and related statutes.")

This Court concludes that the Commission's supervisory powers under Section 393.140(1) did not include the authority to issue CCN's or other orders authorizing the construction and operation of the Facilities after they were constructed in violation of Section 393.170.

Section 393.140(2) extends the Commission the express authority to "examine and investigate the methods employed . . . in manufacturing, distributing and supplying . . . electricity . . . and have power to order such reasonable improvements as will promote the public interest . . . and protect those using such . . . electricity . . ." As with Section 393.140(1), no mention is made in Section 393.140(2) of any authority to issue CCN's or other orders to authorize construction of plants at all, let alone to remediate illegally constructed facilities or to authorize operation of illegally constructed facilities.

The Commission contended at oral argument that the phrase "and have power to order such reasonable improvements" extends the Commission the power to order utilities to construct plants. The Commission's argued interpretation of Section 393.140(2) ignores that the phrase

"and have power to order such reasonable improvements" modifies the earlier language in the statute relating to the Commission's authority to examine and investigate the methods employed in manufacturing, distributing and supplying electricity. Thus, the proper construction of Section 393.140(2) has the legislature bestowing upon the Commission the power to examine and investigate methods employed by utilities to manufacture, distribute and supply electricity, and the corollary power to order utilities to make improvements ***in the manner in which they engage in such activities*** as to protect the "public interest . . . and those using such . . . electricity." Section 393.140(2) cannot be reasonably construed to confer upon the Commission, expressly, or by necessary implication, the power to order utilities to build plants they are unwilling to build.[7]

Even if the phrase "and have power to order such improvements as will best promote the public interest" could be construed to permit the Commission to order a utility ***to build*** a plant, such power would necessarily be exercised prospectively by the Commission, as the Commission would not need to order a utility to build a plant it has already voluntarily constructed. Since the Facilities were already constructed before Aquila sought authority for their construction from the Commission, any prospective authority the Commission might have under Section 393.140(2) to order that a plant be constructed has no application to the facts of this case. In short, the Commission's Order does not involve the exercise of Section 393.140(2) authority, even if one affords that statute the interpretation argued by the Commission.

This Court concludes that the Commission's powers to "examine and investigate" under Section 393.140(2) did not include the authority to issue CCN's or other orders authorizing the

[7] This Court notes the Commission offered no examples of cases where the Commission has successfully employed Section 393.140(2) to order the construction of a plant a utility was otherwise unwilling to construct. "[I]t must be kept in mind that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." *State v. Public Serv. Comm'n.*, 406 S.W.2d 5, 11 (Mo. banc 1966).

construction and operation of the Facilities after they were constructed in violation of Section 393.170.

Even if the provisions of Section 393.140(1)(2) could be read broadly to permit the Commission, under the guise of supervision, examination or inspection, to issue remedial orders, the express withdrawal of such authority as relates to the subject of authorizing the construction of plants by the more specific provisions of Section 393.170 would control. *State ex rel. Equality Sav. & Building Assoc. v. Brown*, 68 S.W.2d 55, 58-59 (Mo. 1934) (general and specific statute addressing similar subject should be harmonized, if possible, but if inconsistent, the specific statute will control). The Commission cannot rely on the general supervisory powers it has been extended by the legislature under Section 393.140 to overcome or ignore limitations on its powers otherwise described by the legislature in Chapter 393. "Section 393.140 sets out the general powers of the Commission. While this statute gives the PSC general supervisory powers over electric utilities . . . it gives the PSC broad discretion only within the circumference of the powers conferred on it by the legislature . . . ." *State ex rel. Utility Consumers Council*, 585 S.W.2d at 55-56 (Commission's general supervisory powers under Section 393.140 could not be relied on by the Commission to modify the procedure the legislature directed the Commission to follow for setting rates as described in Section 393.270.) Similarly, the Commission cannot rely on its supervisory powers under Section 393.140 to alter the legislative limits imposed on its authority in Section 393.170.

The Commission's desire to "spare" the Facilities from the Judgment resulted in the Commission entering an unlawful Order retroactively authorizing Aquila's illegally constructed

Facilities.[8] The Commission claims its powers under Section 393.140(1)(2) are intended to be broad and remedial, a view it supports by reference to Section 386.250 and Section 386.610. **[Order, pgs. 24-25]** Section 386.250 provides, in pertinent part:

> "The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same . . ."

[Emphasis added]. Section 386.610 provides, in pertinent part:

> "[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

[Emphasis added] However broad the powers of the Commission, they are not unlimited, and certainly do not include the authority to ignore or overcome the law. *Cass County*, 180 S.W.3d at 39 ("To the extent that the Commission attempted to establish a contrary interpretation [of Section 393.170] in 1980, giving the Commission authority it does not have . . . it clearly erred.") "Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the Commission is authorized by statute." *State ex rel. Kansas City v. Public Serv. Comm'n*, 257 S.W. 462 (Mo. banc 1923); *State ex rel. Utility Consumer's Council*, 585 S.W.2d at 49. If the Commission is permitted to rely on Section 393.140 to find the authority to do that which Section 393.170 and the Opinion expressly prohibit, both Section 393.170 and the Opinion will be rendered *meaningless*. Utilities could,

[8] This Court notes the Order is not the Commission's first attempt to spare the Facilities from the Judgment through the issuance of an unlawful order. On April 7, 2005, less than three months after the Judgment was entered, the Commission entered its report and order in Case No. EA-2005-0248 wherein it concluded, in direct defiance of the Judgment, that the CCN's and other orders already in Aquila's possession were all the authority Aquila needed under Section 393.170 to construct the Facilities. That report and order was appealed by Cass County, and the appeal was stayed pending the outcome of Aquila's appeal of the Judgment. After the Opinion was issued, the Commission withdrew the April 7, 2005 report and order, as it was obviously rendered unlawful by the Opinion's holdings. **[Order, p. 6 ¶ 21]** *Cass County*, 180 S.W.3d at 27, n.2.

notwithstanding the plain language of Section 393.170, defy the obligation to secure a CCN in advance of constructing a plant, and the Commission could, notwithstanding the limits on its authority to do so in Section 393.170, remediate the illegal conduct by awarding a post-construction CCN authorizing construction and operation of the plant. Under this scenario, the important public policies addressed by the Opinion would be thwarted, as utilities would be permitted to construct plants wherever they want, and as local concerns, including zoning, would not be considered before the first spadeful of dirt is turned. Cass County, 180 S.W.3d at 37. The legislature *could not* have intended this result.

This Court concludes that the Commission did not have statutory authority under Section 393.140(1)(2) to award Aquila post-construction CCN's or orders authorizing construction and operation of the Facilities, and that the Order is, therefore, unlawful.

B. Did the Commission exceed its statutory authority by acting as a zoning authority when it awarded Aquila CCN's or other orders that specifically approved the sites on which the Facilities are located, and in so doing, did the Commission unlawfully fail to consider Cass County zoning in the manner required by the Opinion.

The CCN's and other orders the Commission awarded Aquila were site-specific in that they approved the precise locations of the Facilities, **[Order, pgs. 58-59 ¶¶ 2, 3, 4, 5]** relief that had been requested by Aquila in its Application. **[Order, pgs. 7-8 ¶ 25]** To support an award of site-specific CCN's, the Commission evaluated, interpreted and applied Cass County's zoning ordinance and master plan, and concluded the Facilities were sited in locations that were consistent with Cass County's land use regulatory scheme. **[Order, pgs. 11-21, 33-34]** Thus, there is a second issue to be inquired into and determined by this Court with respect to the lawfulness of the Order. If the Commission overcomes the hurdle of demonstrating that it possessed the statutory jurisdiction and authority to award Aquila post-construction CCN's or

other orders for the Facilities, the Commission must overcome the hurdle of demonstrating that it possessed the statutory jurisdiction and authority to evaluate, interpret and apply Cass County's zoning ordinance and master plan for the purpose of awarding "site specific" CCN's. The Commission contends in evaluating Cass County's zoning ordinance and master plan to determine if the Facilities are properly sited, it has "considered zoning" in the manner anticipated by the Opinion. *Cass County,* 180 S.W.3d at 37-38. Thus, this Court must also evaluate what the Court of Appeals intended by its directive that zoning must be considered by either the County or the Commission, and, correspondingly, whether the Commission's Order reflects that it has "considered zoning" in the manner required by the Opinion.

This Court is not determining (and has not been asked to determine) the reasonableness of the Commission's findings that the Facilities are located at sites that are consistent with the Commission's interpretation and application of Cass County's zoning ordinance and master plan. Instead, the Court is determining whether the Commission acted as a zoning authority in excess of its statutory authority, and whether the Commission "considered zoning" in the manner required by the Opinion when it weighed zoning as a factor to be considered in determining whether a plant is "necessary and convenient for the public service," issues that go to the lawfulness of the Order. If the Commission unlawfully acted as a zoning authority in excess of its statutory authority, and if the Commission failed to "consider zoning" in a manner required by the Opinion, then the Order is unlawful, and it is immaterial whether the record as a whole would support the Commission's conclusions about the propriety of the Facilities' locations.

The Opinion's Directive that Zoning Must be Considered

In response to Aquila's claim that it could construct the Facilities without securing either Cass County approval under Section 64.235 or a contemporaneous CCN from the Commission,

the Court of Appeals ruled that a utility must secure a CCN before it builds a plant, *Cass County*, 180 S.W.3d at 32-40, and that zoning must be considered with respect to where a plant is located. The Opinion stated:

> ". . . the legislature intended that a public hearing related to the construction of each particular electric plant, take place in the months before construction begins, **so that current conditions, concerns and issues *including zoning* can be considered, *whether that hearing is conducted by the County or the Commission*.**"

Cass County, 180 S.W.3d at 37-38. [Emphasis added] The Opinion thus identified two conditions which must be satisfied before a plant is constructed. A CCN must be secured (which can only be awarded by the Commission under Section 393.170), and zoning must be considered (by either the Commission or the appropriate county or municipality where the plant is proposed to be constructed).

By permitting zoning to be considered by either the Commission or the County, the Court of Appeals necessarily envisioned two scenarios. First, a utility could elect to submit a plant's proposed location to the appropriate local authority for zoning consideration. The utility would, in this scenario, also be required to apply to the Commission for a determination that the plant is "necessary and convenient for the public service," the standard for securing a CCN pursuant to Section 393.170.3. Under this scenario, the Commission's decision whether to award a CCN would be determined independently from the local authority's decision whether to approve zoning, though both approvals would be required before the plant could be lawfully constructed. Under the second scenario envisioned by the Opinion, a utility could elect to bypass local zoning authority, opting to submit whether the plant is "necessary and convenient for the public service," and the "consideration of zoning" to the Commission.

Aquila's Application followed the second scenario. The battle between Cass County and the Commission centers around what the Opinion intended when it directed that either the County or the Commission must "consider zoning," and around whether the Commission "considered zoning" within the bounds of its statutory authority.

The Commission's Response to the Opinion

In response to the Opinion, the record reflects that the Commission, in considering Aquila's Application, took evidence and heard testimony from numerous witnesses over several days regarding Cass County's zoning ordinance and master plan. **[Order, pgs. 2-3, 34]** The Commission even heard the testimony of competing expert witnesses with respect to complex land use planning principals, and with respect to the propriety of the Facilities' locations given Cass County's zoning ordinance and master plan. **[Exh. 14, 23, 24]** The Commission heard testimony from the Commission's Staff about a new "ten-step process" Staff recommended as the standard for determining whether Aquila had acted reasonably in selecting the sites for the Facilities. **[Order, pgs. 43-47]** This "ten-step process" was first introduced to the parties opposing the Application in Staff member Warren Woods' pre-filed rebuttal testimony. **[Order, pgs. 43-47; Dissent, pgs. 9, 12-13; Exh. 19]** The proceedings on Aquila's Application were conducted on an expedited basis, and were clearly fashioned so that the Commission could reach a final determination before May 31, 2006, the date to which the trial court in the Injunction Proceedings had extended the stay of the Judgment ordering that the Facilities be dismantled. **[Record, 000494-000495; Dissent, p. 13]** Though the parties opposing the Application had filed pre-hearing motions seeking, among other things, guidance from the Commission about how it intended to "consider zoning" in light of the Opinion's directive, **[Record, 000291-000355,**

000507-000531] the Commission denied all pre-hearing motions, [Record, 000844-000854] and did not advise the parties in advance of, or even during the proceedings, what standard it would employ to "consider zoning." [Order, pgs. 43-47; Dissent, pgs. 12-13] In fact, the Commission did not advise the parties that it was adopting the Staff's recommended "ten-step process" until the Order was issued. [Dissent, p. 13] As noted by the Dissent, this "created an arguably unfair proceeding for which the parties opposing Staff's position most certainly found difficult to prepare." [Dissent, p. 13] Though the parties opposing the Application objected to the Commission's authority to evaluate, interpret and apply Cass County's zoning ordinance and master plan for the purpose of determining whether the Facilities were constructed in areas that would have been permitted by Cass County, when it became obvious the Commission intended to do so over these objections, the parties were necessarily required to introduce evidence they felt mitigated awarding site-specific CCN's for the Facilities.

From all of this testimony and evidence, and after deciding to adopt the Staff's recommended "ten-step process" for determining whether Aquila had acted reasonably in selecting the sites for the Facilities, the Commission concluded that "the sites of the Facilities are compatible with surrounding land area." [Order, p. 57] The Commission also concluded that "it is no less capable than Cass County to consider land use concerns." [Order, p. 34] The Commission then awarded the site specific CCN's and other orders for the Facilities Aquila had requested. [Order, pgs. 58-59 ¶¶ 2, 3, 4, 5]

The Commission's Authority to "Consider Zoning"

The Court of Appeals ruled in the Opinion that the legislature has extended the Commission *no zoning authority*. *Cass County*, 180 S.W.3d at 30. The Opinion states: "[w]hile 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." *Cass County*, 180 S.W.3d at 30; citing *Mo. Power & Light Co.*, 18 Mo. P.S.C. (N.S.) at 120. Thus, as a matter of law, this Court concludes that Section 393.140(1)(2) and Section 393.170, the statutes on which the Commission relies to claim authority to enter the Order, do not extend the Commission zoning authority.

The Commission has long agreed that it has no statutory zoning authority, and, therefore, that it cannot regulate where a public utility builds a power plant.[9] The Commission conceded in the brief it filed in this proceeding that "zoning statutes impose restrictions on how land may be used; in contrast, the orders and certificates the commission has issued as to siting merely authorize where Aquila ***may*** build the South Harper Plant and Peculiar Substation." **[Commission's Brief at p. 18]** [Emphasis added] The Commission thus acknowledges the material difference between "zoning authority" and the Commission's authority to issue CCN's. Correspondingly, the Commission acknowledges that it has no statutory authority to tell a utility where it can not build power plants, the essence of "zoning authority."

Similarly, the Commission acknowledged in its brief that it possesses no statutory authority to interpret Section 64.235, or other statutes within Chapter 64, the statutes which serve as the legislature's extension of police powers to counties to regulate land use, and which serve as the enabling statutes by which counties adopt zoning ordinances and master plans, and the procedural mechanisms by which to interpret, apply and enforce same. **[Commission's Brief at p. 7]**

[9] The Commission's recognition that it lacks zoning or siting authority was not a result of the Commission's misinterpretation of *Harline*. The Commission's erroneous interpretation of *Harline* involved the Commission's mistaken belief that *Harline* relieved utilities of the obligation to seek a specific CCN authorizing construction of a plant within the utility's certificated area. That misconception is distinguishable from the Commission's understanding that when it does issue CCN's for plant, it can not tell the utility where not to build. The Court of Appeals in the Opinion "corrected" the Commission's misunderstanding of *Harline*. In contrast, the Opinion reaffirmed the Commission's understanding that it has no zoning or siting authority.

It is, therefore, undisputed that the Commission possesses no statutory "zoning authority." Thus, when the Opinion directed that either the County or the Commission must "consider zoning," the Court of Appeals could not have intended that the Commission act as a "zoning authority," and could not have intended the Commission to exercise the zoning authority legislatively extended to local governing bodies. If this Court concludes that the Commission exercised "zoning authority" when it interpreted, evaluated and applied Cass County's zoning ordinance and master plan to support a finding that the Facilities were properly sited in accordance with those land use regulations, and to support awarding site specific CCN's for the Facilities, then this Court will be required to conclude that the Commission acted in excess of its statutory jurisdiction and authority and that the Order is unlawful.

Did the Commission act as a Zoning Authority

Zoning is "the regulation . . . of the use of land within the community, and of the buildings and structures which may be located thereon, in accordance with a general plan and for the purposes set forth in the enabling statute." 1 Rathkopf's The Law of Zoning and Planning § 1:3 (4th ed.). ***Zoning acts authorize municipalities to*** pass ordinances, which designate the boundaries for districts and which ***define the allowable land uses in such districts.*** Board of Zoning Adjustments (Appeals) were created to review specific applications of the zoning ordinances." *Matthew v. Smith,* 707 S.W.2d 411, 412-413 (Mo. 1986). [Emphasis added] Zoning statues are recognized, therefore, as a power delegated to municipalities from the state police power. *Heidrich v. Lee's Summit,* 916 S.W.2d 242, 248 (Mo.App. W.D. 1996). ***The exercise of zoning power is, therefore, a legislative function.*** *Id.*

"Zoning authority" necessarily refers to the authority to exercise the powers conferred by the legislature to regulate land use through the adoption of zoning ordinances, master plans and

procedures for the interpretation, application and enforcement of same. In Missouri, the enabling statutes extending zoning authority to counties are found in Chapter 64. Within that Chapter, Sections 64.211-64.295 address the zoning authority extended to first class non-charter counties such as Cass County. These statutes authorize Cass County to exercise zoning authority.

The Order reflects the Commission engaged in activities that fall within the scope of the zoning authority extended Cass County under Sections 64.211-64.295. For example, the Commission evaluated "the appropriateness of the Facilities in their respective locations," accepting "extensive briefing, argument, and written and live testimony" on the subject. **[Order, p. 11 ¶ 45]** The Commission considered the studies performed by Aquila's consultant, Sega, with respect to the siting of the Facilities. **[Order, pgs. 12-14 ¶¶ 47, 51, 52, 53, 54]** The Commission engaged in a "comparison of land use near the Facilities," and drew conclusions regarding the site where the South Harper Plant had been constructed as compared to where other power plants had been constructed. **[Order, p. 15 ¶ 60]** The Commission made findings about the interplay between Cass County's Comprehensive Plan (master plan) and its zoning ordinance, and found that "if applications for zoning changes are in accordance with the Comprehensive Plan, they are presumed to be reasonable." **[Order, pgs. 15-16 ¶ 63]** The Commission undertook to evaluate and interpret Cass County's Comprehensive Plan and zoning ordinance and the various amendments to same, and drew conclusions with respect to which version of the Comprehensive Plan should "control," with respect to whether the zoning ordinance was consistent with the Comprehensive Plan, and with respect to whether the Facilities were constructed in areas that are compatible with the Comprehensive Plan and other regulations (such as noise regulations) governing development that had been enacted by Cass County. **[Order, pgs. 16-21 ¶¶ 64-84]** Though the Commission made specific findings of fact with

respect to the tracts where the Facilities were constructed, and with respect to Cass County's Comprehensive Plan's treatment of those sites, the Commission carefully sidestepped making a finding about how the sites were zoned.[10] **[Order, pgs. 4-5 ¶¶ 11-17]** However, the Commission interpreted Sections 64.231 and 64.261, and "questioned" the enforceability of Cass County's zoning ordinance. **[Order, p. 33]** The Commission engaged in this "evaluation" despite its concession that it possesses no statutory authority to interpret statutes within Chapter 64. **[Commission's Brief at p. 7]** Though the Commission claims that it stopped short of concluding, as a matter of law, that Cass County's zoning ordinance was unenforceable, **[Order, p. 33]** the Commission gave practical effect to such a conclusion when it justified not deferring to Cass County's zoning ordinance in determining to site the Facilities at their existing locations because of the Commission's "concerns" about the enforceability of the zoning ordinance. **[Order, p. 33]**

The Commission ultimately concluded that it was "no less capable than Cass County to consider land use concerns." **[Order, p. 34]** Consistent with this view of its "authority," the Commission determined that the Facilities were sufficiently consistent with Cass County's zoning ordinance and applicable (as determined by the Commission) master plan to warrant approving the uses at their existing locations. **[Order, p. 57]** The Commission thus exercised the precise "authority" that Cass County is authorized to exercise under Sections 64.211-64.295—***it determined allowable land uses in certain districts within Cass County.*** *Matthew v. Smith,* 707 S.W.2d at 412-413. These same types of decisions, when made as they are every day

[10] The Commission observed that Cass County contends the Facilities are located on sites that are zoned agricultural **[Order, p. 17 ¶ 70]**, but that the Staff could not independently determine if this was true. **[Order, p. 46]** The Commission apparently ignored the fact that Aquila admitted that the Facilities were constructed on land that is zoned agricultural. **[Exh. 89 p. 1-1, 90 p. 1-1]** In any case, the Commission avoided making a finding that the sites where the Facilities were constructed were not agriculturally zoned. Such a finding would have defied the Opinion, which on several occasions observed that the Facilities had been constructed on land in unincorporated Cass County that is zoned agricultural. *Cass County,* 180 S.W. 3d at 26, 28, 29, 40.

by local zoning boards, are reviewed by appellate courts as ***legislative actions*** (i.e. the proper exercise of the police powers conferred on the local zoning authority by the legislature) which may only be reversed if the zoning authority has acted arbitrarily and unreasonably. *Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71, 76-77 (Mo.App. W.D. 1991). If such determinations when made by local zoning authorities are ***legislative actions***, than such determinations when made by the Commission are ***legislative actions***, and represent the exercise of "zoning authority." As the Commission possessed no "zoning authority," its determinations were made in excess of its statutory authority.

The Commission does not deny that it acted as a "zoning authority," and in fact concedes the point by claiming "the Public Service Commission Act and the exemptions from county zoning found in Chapter 64 ***are legislative recognitions that the Commission is not only capable of examining land use issues associated with Aquila's Application, but is the preferred authority to do so, free from local political restraints.***"[11] **[Order, p. 34]** [Emphasis added] This "preemption" argument was unsuccessfully advanced by Aquila in the Injunction Proceedings. The Court of Appeals rejected the notion that the legislature vested "zoning" powers in the Commission by the provisions in Chapter 64, stating in clear terms:

> "Aquila argues that it is exempt from Cass County's zoning regulations because the Commission has exclusive authority to regulate public utilities. It claims that such preemption is recognized by the plain language of the provisions in Chapter 64, regarding county planning, zoning, and recreation, and in Chapters 386 and 393, setting forth the comprehensive statutory framework for electric utility regulation. While it is true that the Commission has extensive regulatory powers over public utilities, the legislature has given it no zoning authority, nor does

[11] In reaction to "local political restraints" some states' legislatures have created "power plant siting boards" whose function is to sit as the "zoning authority" in lieu of the local governing board, and to determine the proper location for proposed power plants based on factors identified by the enabling legislation. **[See Exh. 23, 24, 115, 128]** *The Missouri legislature has not taken this step.* Even if "local political restraints" make it difficult for utilities in Missouri to secure local zoning authority for a proposed plant's location, it is not for the Commission or this Court to remedy that concern. The legislature would be required to act.

> Aquila cite any specific statutory provision giving the Commission this authority."

Cass County, 180 S.W.3d at 29-30. Thus, the Commission's claim that the legislature has tacitly extended it "zoning authority" through the provisions of Chapter 64 is without merit. The Opinion could not more clearly have confirmed that the Commission possesses no "zoning authority." Nor did the Court of Appeals intend to confer "zoning authority" on the Commission when it directed the Commission to "consider zoning." *Eckenrode v. Director of Revenue*, 994 S.W.2d at 585 citing *Dees v. Mississippi River Field Corp.*, 192 S.W.2d at 640. Rather, the Opinion reflects the Court of Appeals' clear directive that the Commission should "consider zoning" by harmonizing the police powers which permit it to determine ***whether*** a plant is "needed" per the standard described in Section 393.170, with Cass County's equivalent police powers which permit it to regulate ***where*** plants may be permissibly constructed within the county. The Commission failed to comply with this directive.[12]

[12] The Commission's Order cites *Kansas City Power & Light v. Jenkins*, 648 S.W.2d 555 (Mo.App. W.D. 1983) and *Union Elec. Co. v. Saale*, 377 S.W.2d 427 (Mo. 1964), apparently for the proposition that county zoning regulations can not interfere with the construction of a power plant. [Order, pgs. 31-33] *Jenkins* and *Saale* dealt with Section 64.620, which the Commission concedes describes the authority of second and third class counties to adopt and enforce zoning ordinances, and which provides the statute shall not be construed to "authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission." [Order, p. 32, n. 27] The Commission ignores that the corollary to Section 64.620 for first class non-charter counties such as Cass County is Section 64.255, a statute the Court of Appeals expressly noted contains no "public utility exemption that is to be applied across the full range of non-charter first class county zoning provisions." *Cass County*, 180 S.W.3d at 32, n. 8. Thus, the *Jenkins* and *Saale* decisions have no application to this case. However, this Court notes it is likely that the same public policy concerns which caused the Court of Appeals to conclude that the Commission must award CCN's in advance of construction, and must "consider zoning" in the process in order to secure exemption from Section 64.235, would apply equally to a utility's future claim of entitlement to an exemption from Section 64.620.

The Opinion's Intent when it Directed the Commission to "Consider Zoning"

The Court of Appeals articulated the clear public policy underlying its Opinion, and in the process acknowledged the importance of respecting local land use regulatory authority in determining where power plants are constructed:

> "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 aesthesis and to 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 any one other than the department of natural resources, the all mighty 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, 180 S.W.3d at 41. [Emphasis added] Consistent with this public policy, the Court of Appeals ruled that utilities do not have the power to exercise eminent domain to overcome a county's zoning authority. "A public utility's power of eminent domain and a county's power to zone are derived from a legislative grant of authority. Both powers are police powers derived from statute and are without a constitutional basis, thus neither trumps the other, and both powers can be exercised in harmony." *Cass County*, 180 S.W.3d at 41, citing, e.g., *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 642 (Mo. banc. 1962). [Emphasis added]

Evidence that the Court of Appeals' expected local zoning to be respected by the Commission is found in the Court of Appeals' favorable reliance on the Commission's decision in *Mo. Power & Light Co. Cass County*, 180 S.W.3d at 30. In that decision, the Commission, in discussing the location of a power plant near a residential subdivision at a location that had already been designated by local zoning as an industrial area, noted that "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." *Mo. Power & Light Co.*, 18 Mo. P.S.C. (N.S.) 116, 120 (1973). [Emphasis added] Following this reference, the Court of Appeals favorably cited 2 Robert M. Anderson, American Law of Zoning 3rd Section 12.33 (1986) for the proposition that "[a]bsent a state statute or court decision which preempt[s] all regulation of public utilities or prohibit[s] municipal regulation thereof, ***a municipality may regulate the location of public utility installations.***" The Opinion continues:

> "While uniform regulation of utility service territories, rate making and adequacy of customer service is an important state wide 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.**"

Cass County, 180 S.W.3d at 30, citing, generally *St. Louis County v. City of Manchester*, 360 S.W.2d at 642; *State ex rel. Christopher v. Matthews*, 362 Mo. 242, 240 S.W.2d 934, 938 (1951). [Emphasis added]

The Opinion thus consistently distinguished between the regulatory authority of the Commission to determine the need for a plant (i.e., whether a power plant is "necessary and convenient for the public service" as required by Section 393.170), and the authority of local governing bodies to regulate the location of a plant through zoning. The theme that permeates the Opinion is that these competing "powers" can and should be harmonized. As such, the Court of Appeals treated the determination of need for a plant, and the determination of the proper location for a plant as equally important considerations.

Though the Commission lacked zoning authority, the Court of Appeals nonetheless determined that the Commission must "consider zoning" if a utility bypasses securing local zoning approval for a plant's location. **[See discussion, supra, at p. 31]** As previously noted, this Court finds that the Court of Appeals did not, by this directive, extend the Commission

"zoning authority" (i.e. the authority to interpret whether a plant's proposed location is compliant with the local zoning ordinance and master plan, and if not, whether the location would likely be rezoned). The Court of Appeals must have intended by this directive that the Commission respect local zoning. If a plant is proposed at a site that is not properly zoned as to permit such a development, the Commission, in order to harmonize its authority to determine whether a plant is needed with the authority of local governing bodies' to determine where plants can be built, must either refuse to award a requested CCN, or must condition the CCN on the utility securing local zoning approval, a power the Commission has under Section 393.170.3.

This is the only interpretation of the Opinion that is both consistent with the Commission's statutory authority and with the Opinion's theme that competing police powers should be harmonized. This conclusion is reinforced by the Court of Appeals' repeated favorable references to the Missouri Supreme Court decision in *St. Louis County v. City of Manchester*. See *Cass County*, 180 S.W.3d at 30, 34, 41. In *St. Louis County v. City of Manchester*, two governmental entities asserted competing claims with respect to the ability to direct the location of a sewage disposal plant. The City of Manchester had a statutory right to direct that a sewage plant was needed, and to construct a sewage plant anywhere within five miles of its city limits. The location "selected" by the City of Manchester, though within five miles of its city limits, did not comply with St. Louis County's zoning ordinance. The Court concluded "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." *St. Louis County*, 360 S.W.2d at 642.

This decision provides the obvious road map the Court of Appeals expected the Commission to follow in harmonizing its regulatory authority over utilities with the police

powers afforded local governing bodies over land use regulations. The Commission failed to follow this road map. The Commission failed to "consider zoning" in the manner required by the Opinion. The Commission did not harmonize the Commission's right to determine that the Facilities were "necessary and convenient for the public service" with Cass County's right to have some control over where the Facilities should be constructed. Instead, as discussed below, the Commission construed the Opinion's directive that it must "consider zoning" as a license to collapse that consideration into determining whether a plant is "necessary and convenient for the public service," and into a license to issue site-specific CCN's. This necessarily resulted in the Commission employing a process to "consider zoning" that afforded zoning diminished respect and consideration over that which would have been afforded had zoning been considered by the appropriate local governing body prior to the Facilities' construction, and independent of the Commission's determination of "need." When the Opinion ruled that zoning must be considered by the "County or the Commission," it did not authorize such disparate consideration.

The Commission's Collapse of "Zoning" into the Standard for Determining "Need"

The Commission's decision whether to award a CCN to a proposed plant is controlled by the "standard" described in Section 393.170.3:

> "3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is **necessary or convenient for the public service.** The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. . . ."

[Emphasis added] The phrase "necessary or convenient for the public service" is not defined in the statute.

Despite the absence of a statutory definition, the Commission's Order describes what has become the accepted standard to be applied in determining whether a plant is "necessary or convenient for the public service." The standard has five factors:

a. Whether there is a need for the involved facilities and related service;

b. Whether Aquila is qualified to own, operate, control and manage the involved facilities and provide the related service;

c. Whether Aquila has the financial ability for this undertaking;

d. Whether Aquila's proposal is economically feasible; and

e. Whether the involved facilities and related service promotes the public interest.

[Order, pgs. 28, 43] The Commission's Order acknowledges that according to accepted Commission practice, "positive findings with regard to the first four factors will, in most instances, support a finding that an application for a certificate of convenience and necessity ***will promote the public interest,***" the fifth factor. **[Order, p. 29]**

The Commission found that Aquila demonstrated a need for the Facilities and that it had the financial capacity to construct the Facilities, thus satisfying the first four factors. **[Order, pgs. 8-11, ¶¶ 31-43; pgs. 21-22, ¶¶ 85-89]** According to accepted Commission practice, the fifth factor, "promotion of the public interest," ***should, then virtually be presumed.***

Nonetheless, aware that the Opinion had directed that it must "consider zoning," the Commission considered testimony and evidence regarding Cass County's land use plan and zoning ordinance as a part of the evidence it weighed to determine whether Aquila had satisfied the fifth factor—demonstration that the Facilities "promote the public interest." **[Order, p. 29, 33, 43, 55, 57]** The Commission made it clear, however, that in looking at whether a proposed

facility will "promote the public interest," the Commission concerns itself with the "interests of the public as a whole . . not the potential hardship to individuals. The rights of an individual resident with respect to the issuance of a certificate are subservient to the rights of the public as a whole." **[Order, p. 28; see also pgs. 24, 29]** The Commission thus considered Cass County zoning as a part of consideration of a factor that, according to Commission practice, could be outweighed, or presumed to exist, if the first four factors of the standard for securing a CCN are demonstrated by an applicant.

To compound the error, the "ten-step process" developed by Staff, and adopted by the Commission, does not require a utility to comply with local zoning, or to secure local zoning approval. **[Order, pgs. 43-44; Dissent, p. 9]** The "ten-step" process focused only on the decision-making of the utility. **[Order, pgs. 43-44; Dissent, p. 12 n. 13]** Though the "ten-step process" required a utility to show that it has attempted to communicate with "nearby communities and residents to receive feedback on concerns with construction of the planned generation facility in the area," it permitted the utility to ignore those concerns if the utility demonstrates it acted "reasonably" in doing so. **[Order, pgs. 43-44]** The "ten-step process" the Commission adopted relegated zoning and local concerns regarding a plant's proposed location to factors discardable at the utility's election. The Dissent acknowledged this to be unfair, and noted that the lack of guidance "created an arguably unfair proceeding for which the parties opposing Staff's position most certainly found difficult to prepare." **[Dissent, p. 13]** All parties affected by the actions of the Commission had a fundamental right of due process. *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 35-36 (Mo. banc 1975). "All the more insistent is the need, when power has been bestowed so freely (referring to the broad powers with which a public service commission is vested), that the 'inexorable safeguard' . . . of a fair

and open hearing be maintained in its integrity . . . The right to such a hearing is one of the 'rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement . . . ." *Id.* The Commission lacked "guidelines set forth in rules and publicly available documents providing the public, utilities, and interest groups access to information on how difficult decisions on siting are made. The current lack of information and failure to delineate factors to be considered contributes to the lack of trust and confidence that the decision process is fair and open." **[Dissent, p. 13]** This Court agrees with the Dissent.

The practical effect of the Commission's approach to "considering zoning" not only exceeded its statutory authority, but was also in sharp contrast to the Opinion's expressed public policy that municipalities must have some say in the location of power plants; to the Opinion's finding that utilities do not have a power of eminent domain that overrides local zoning authority, and to the Opinion's multiple references to the importance of harmonizing the regulatory authority of the Commission (which does not have zoning authority) with Cass County's authority to regulate the proper location of power plants through zoning. ***There is nothing in the Opinion to support the Commission's view that zoning can be afforded a compromised level of respect and consideration if considered by the Commission.*** The Opinion never mentions or discusses that zoning should be considered as a part of the five factor standard used by the Commission and upheld by the courts[13] for evaluating whether a proposed plant is "necessary and convenient for the public service". The Commission has erroneously used the Opinion as a tool to argue it was given authority to "consider zoning" by treating zoning as one of the many factors to be weighed in assessing whether a plant "promotes the public interest," the fifth factor of the CCN standard. There is no language in the Opinion (and none is cited by

[13] See *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. 1993); *State ex rel. Public Water Supply District No. 8 of Jefferson County*, 600 S.W.2d 147, 156 (Mo.App. 1980).

the Commission) that suggests zoning, if considered by the Commission, should result in less protection of local concerns than if considered by the County.[14]

In short, the Commission claimed to have "considered zoning," but quickly neutralized zoning, a factor worthy of independent consideration according to the Opinion. The Commission collapses it into consideration of the least controlling of five pre-existing factors they already routinely evaluate to determine whether a plant is "necessary and convenient for the public service." The Commission did not "consider zoning" in the manner required by the Opinion.

It is clear to this Court that the practical effect of allowing the Commission to "consider zoning" in the manner that it has in this case will be to allow utilities to build facilities wherever they want, just as Aquila has done. Using the Commission's standard, so long as a utility can establish that it's proposed plant is "needed," concerns with respect to the location of the plant will most assuredly be outweighed.

This Court concludes that the Commission exercised legislative "zoning authority" and thus acted in excess of its statutory authority when it evaluated, interpreted and applied Cass County's zoning ordinance and master plan to justify issuing site-specific CCN's and other orders authorizing construction and operation of the Facilities. This Court also concludes that

[14] The Commission argues that if it is required to "consider zoning" by respecting local zoning, the exemption in Section 64.235 for developments that have been "specifically authorized" by the Commission will be rendered meaningless. At the same time, the Commission argues that it has the authority to interpret and apply Cass County's zoning ordinance and master plan to determine whether the Facilities are located consistently with Cass County's land use regulatory scheme. **[Order, pgs. 34, 57]** The Commission thus concedes it can not ignore zoning. Either the Commission must respect local zoning by requiring a utility to secure local zoning approval as a condition imposed on an awarded CCN, or the Commission has, as the Commission argues, the statutory authority to act as a substitute for the local zoning authority to determine compliance with local zoning ordinances. In either case, the Commission is "considering" local zoning. The Commission's argument that the exemption in Section 64.235 will be rendered meaningless if the Commission is required to "consider zoning" by harmonizing the competing police powers of the Commission and of Cass County is without merit. The Opinion does not stand for the proposition that local zoning can be ignored merely because the Commission believes a plant is "needed" and thus worthy of a Section 393.170 CCN. The Opinion has already addressed the Commission's concern, and has concluded that the exemption in Section 64.235 does not extend the Commission or utilities the right to ignore zoning.

the Commission failed to consider zoning within the bounds of its statutory authority and in the manner required by the Opinion. The Order is, therefore, unlawful.

IV. The Reasonableness of the Conditions Imposed by the Commission on the CCN's Awarded Aquila

Cass County argues that even if the Commission is deemed to have had the statutory authority to issue its Order, the Order is nonetheless unreasonable, and is arbitrary and capricious, in that it failed to impose appropriate conditions on the CCN's awarded Aquila for the Facilities given the circumstances. This issue involves a mixed question of law and fact, as both the Commission's authority to impose conditions on CCN's and the Commission's discretion in determining what conditions to impose must be considered. Thus, this Court must view the evidence in the light most favorable to the Commission. *State ex rel. Coffman v. Public Serv. Comm'n,*121 S.W.3d 534, 541 (Mo.App. W.D. 2003). If this Court believes the Commission acted arbitrarily, capriciously or unreasonably, however, it can reverse. *State ex rel. Midwest Gas Users'*, 976 S.W.2d at 491.

The Commission is empowered by Section 393.170.3 to "impose such conditions as it may deem reasonable and necessary" on a CCN. In addition, the heavily relied on final sentence of the Opinion, though it identified no source for Aquila to secure authority to continue operating the illegally constructed Facilities, provided that such authority, from wherever it might come, should be subject to "whatever conditions are appropriate."

The Commission did impose some conditions on the CCN it awarded for the South Harper Plant. No conditions were imposed on the CCN awarded for the Peculiar Substation. **[Order, pgs. 22-23 ¶ 90, pgs. 59-60 ¶ 60]** The conditions that were imposed on the CCN for the South Harper Plant had been recommended by the Staff. **[Order, pgs. 36-37]** The Commission

acknowledged that the parties opposing the Application had requested the imposition of other conditions on the CCN's awarded Aquila, but refused to impose any of these additional conditions, claiming they would be "contrary to law, unreasonable and unnecessary." **[Order, p. 37]** Specifically, the Commission refused to impose a condition on the CCN's that required Aquila to secure local zoning approval for the Facilities. **[Order, p. 37]** The Commission defended its refusal to impose this condition, claiming "if Aquila has specific Commission approval for the Facilities, the Company is exempt from local zoning under Section 64.235. It would be nonsensical to require that before the Commission can give specific approval for the Facilities, Aquila must show that it has obtained local zoning approval." **[Order, p. 37]**

The Commission's conclusion that post-construction CCN's awarded the Facilities will constitute the "specific authority" for the Facilities necessary to secure exemption from Section 64.235 is in direct opposition to the Opinion which permanently enjoined the Facilities' construction because Aquila had not secured "specific authority" for their construction ***before*** the Facilities were built as would have been required to earn exemption from Section 64.235. The Commission's conclusion ignores the Opinion's directive that competing police powers should be harmonized. **[See discussion, Section I (B), supra]** The Commission should have harmonized its police power to determine that the Facilities were needed with Cass County's police power to determine where the Facilities should be located consistent with zoning. The only practical way the Commission could have accomplished this objective within the bounds of its statutory authority was to have imposed a condition on the CCN's awarded Aquila obligating Aquila to secure local zoning for the already constructed Facilities.

This Court concludes that the Commission's failure to impose a condition on the CCN's awarded Aquila requiring Aquila to secure local zoning approval for the Facilities is unreasonable.

While acknowledging that the following comments clearly do not form the basis for the decision in this case, having given full consideration to the merits of this matter for well in excess of a year now, the Court is moved to make the following observations and remarks.

At least one fact in this case is undisputed. Cass County, western Missouri and eastern Kansas are rapidly growing areas with rapidly expanding energy needs. A power plant and substation such as the one at issue here is no doubt needed, and must be built *somewhere.*

The Court is ever mindful of the fact that if this ruling stands, the result is a monumental waste of funds and resources. Someone will have to pay for it, and the unfortunate reality is that these costs ultimately are passed on to the consumer. What a shame. There are always consequences for decisions. Aquila has consequences for building in the face of the Court's adverse ruling. Cass County has spent many tax dollars standing up for It's beliefs in It's zoning laws.

This is not a criticism of Cass County for the position they have taken in this matter. They have an obligation to their inhabitants to see to it that their zoning laws are enforced, else why enact zoning laws. As this Court indicated earlier, to accept the position of Aquila in this matter Cass County and all other counties in the State, would be stuck with the premise that privately owned public utilities would have the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the all mighty dollar, or supply and demand regarding the location of power plants.

Expedience and efficiency would dictate a ruling in favor of Aquila. Taking the oath to uphold the constitution and the laws of the State of Missouri, efficiency and expediency is not the Court's ultimate consideration. Interpreting and upholding the laws of this State is the duty of the trial court in so far as those laws are not in conflict with the constitution.

If the legislature wants to grant the Public Service Commission the power to retroactively grant approval to utilities to build power plants *after* they are constructed, or if the legislature wants to grant the Commission the power to site power plants *without* county zoning approval, that is certainly within their power.

JUDGMENT

In light of this Court's findings of fact and conclusions of law, the Court:

ORDERS, ADJUDGES AND DECREES that the Commission exceeded its statutory authority in issuing the Order, and the Order is, therefore, unlawful. The Order is set aside.

THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that the Commission's Order unreasonably failed to impose a condition on the CCN's awarded Aquila that would have required Aquila to secure local zoning approval. The Order will not be reversed and remanded due to its unreasonableness, however, as the Order has been declared unlawful and has been set aside.

Joseph P. Dandurand

The Honorable Joseph P. Dandurand

Dated: Oct. 19, 2006