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

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| In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a Utility Waste Landfill and Related Facilities at its Labadie Energy Center. | ) ) ) ) ) ) ) | **Case No. EA-2012-0281** |

## STAFF'S INITIAL BRIEF

Respectfully submitted,

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## Table of Contents

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## STAFF'S INITIAL POST-HEARING BRIEF

## INTRODUCTION

Union Electric Company, d/b/a Ameren Missouri, is seeking a certificate of convenience and necessity for a utility waste landfill to be sited on 813 acres of land abutting Ameren Missouri's existing 2.4 GW Labadie Energy Center for the purpose of storing coal ash generated by that energy center. For the reasons stated in its position statements, opening statement and in this brief, Staff recommends that, conditioned on Ameren Missouri obtaining from the Missouri Department of Natural Resources both a utility waste landfill construction permit and a land disturbance permit for the proposed Labadie utility waste landfill before it exercises the rights the certificate of convenience and necessity allows it to exercise,[1] the Commission should grant Ameren Missouri a certificate of convenience and necessity for the landfill. Staff further recommends that the Commission order Ameren Missouri to notify the Commission when the

[1] Whether or not made contingencies of the certificate, Ameren Missouri will require both the utility waste landfill construction permit and the land disturbance permit for the landfill before it lawfully can begin constructing the landfill. If the Commission grants Ameren Missouri a certificate of convenience and necessity for the proposed utility waste landfill, but Ameren Missouri has not exercised that certificate within two years of when the Commission granted it, it will lapse. § 393.170.3, RSMo. Since, like Cass County, Franklin County is a noncharter first class county, a Commission certificate of convenience and necessity may exempt the proposed landfill from having to comply with Franklin County planning and zoning. § 64.235, RSMo.; *StopAquila.Org. v. Aquila, Inc*., 180 S.W.3d 24 (Mo. App. 2005).

contingencies are met by filing copies of the permits in this case and include in its order granting the certificate of convenience and necessity a statement that the grant of the certificate of convenience and necessity is not a determination of the ratemaking treatment of the costs associated with the utility waste landfill.

## ARGUMENT

Staff's argument, like its position statements, follows the order of the issues as set out in the joint pleading the parties filed on March 7, 2014.

***1. Does the evidence establish that the utility waste landfill for which Ameren Missouri is seeking a certificate of convenience and necessity ("CCN") is necessary or convenient for the public service?***

As Staff related in its position statements, Missouri appellate courts (the Missouri Supreme Court) first addressed certificates of convenience and necessity in 1930 when the Commission brought a lawsuit against Kansas City Power & Light Company for building a new transmission line that interfered with telephone service over an existing telephone line without having first obtained a certificate of convenience and necessity from the Commission.[2] In its opinion, the Missouri Supreme Court said:

> A reasonable construction of the Public Service Commission Act forces the conclusion that it was the intention of the Legislature to clothe the commission with exclusive authority to determine whether or not the furnishing of electricity to a given town or community is a public necessity or necessary for public convenience, and, if so, to prescribe safe, efficient, and adequate property, equipment, and appliances in order to furnish adequate service at reasonable rates and at the same time safeguard the lives and property of the general public, those using the electricity, and those engaged in the manufacture and distribution thereof.

[2] *Public Service Commission v. Kansas City Power & Light Company*, 325 Mo. 1217; 31 S.W.2d 67 (Mo. Banc 1930).

> If, as appellant contends, an electrical corporation which has a certificate of convenience and necessity to operate its plant in a given town or community might extend its lines to and furnish other communities with electricity without a certificate or authority from the commission, the purpose of the statute would be defeated. Under such a construction of the statute the commission would have no opportunity to determine whether or not public convenience and necessity demanded the use of electricity in the community to which the line was extended, and no opportunity to prescribe the safe and efficient construction of said extension or determine whether or not appellant was financially able to construct, equip, and operate such extension and furnish adequate service at reasonable rates in the new community, without crippling the service in the community where the commission had theretofore authorized it to operate.[3]

Missouri courts have explained, "The term 'necessity' does not mean 'essential' or 'absolutely indispensable,' but that an additional service would be an improvement justifying its cost."[4] In 1994 in the case *In Re Tartan Energy*, GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994), the Commission distilled into five factors what it had considered in prior cases when deciding whether to grant certificates of convenience and necessity. Those five factors are:

- Whether there is a need for the facilities and service;
- Whether the applicant is qualified to own, operate, control and manage the facilities and provide the service;
- Whether the applicant has the financial ability for the undertaking;
- Whether the proposal is economically feasible; and
- Whether the facilities and service promote the public interest.

From a utility operations standpoint, each of those factors is met.

[3] *Id.* at 325 Mo. 1225; 31 S.W.2d 70.
[4] *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593 (Mo. App. 1993) citing *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d , 216, 219 (Mo. App. 1973).

## Need

The need for the proposed Labadie utility waste landfill is supported by the record. As a public utility subject to the jurisdiction of the Commission, Ameren Missouri provides retail electric service to about 1.2 million Missourians.[5] Being a public utility, Ameren Missouri is obligated to provide safe and adequate (includes reliable) service to each of them.[6] To carry out that obligation Ameren Missouri owns generating capacity aggregating to 10.5 gigawatts (GW), of which its Labadie Energy Center constitutes 2.4 GW (about 23%).[7]

Ameren Missouri's Labadie Energy Center is Ameren Missouri's largest generating plant, its lowest cost coal-fired plant and its fourth lowest cost plant per MWh generated (after Callaway, Keokuk and Osage).[8] Ameren Missouri runs the Labadie Energy Center to generate electricity, unless there are operational issues.[9] In the process of generating electricity at its Labadie Energy Center Ameren Missouri burns coal which produces coal combustion byproducts, commonly called "coal ash" or "coal combustion residuals."[10] On average, each year, Ameren Missouri generates approximately 460,000 cubic yards (550,000 tons) of coal ash at its Labadie Energy Center.[11] Ameren Missouri estimates that if it installs a limestone-based wet flue gas desulphurization system at its Labadie Energy Center it will generate an additional

[5] Ex. 108, Stipulations, ¶¶ 2,3; Ex. 107, Ameren 2013 10-K, p. 85.
[6] Ex. 108, Stipulations, ¶ 7; *State ex rel. Ozark Electric Cooperative v. Public Service Commission*, 527 S.W.2d 390, 394 (Mo. App. 1975).
[7] Ex. 108, Stipulations, ¶ 8; Tr. 99, ll. 20-22; Tr. 100, l. 24 – Tr. 101, l. 1; Ameren 2013 10-K, p. 24.
[8] Tr. 98, l. 24 – Tr. 100, l. 19; Ameren 2013 10-K, p. 24.
[9] Ex. 108, Stipulations, ¶ 13.
[10] Tr. 101, ll. 2-11; Ex. 108, Stipulations, ¶ 11.
[11] Ex. 108, Stipulations, ¶ 14.

approximately 140,000 tons of coal ash there annually, *i.e.*, the Labadie Energy Center will then create about 690,000 tons of coal ash per year.[12]

If disposed of within Missouri, coal ash must be deposited at existing sites or in Missouri Department of Natural Resources permitted solid waste disposal facilities or areas.[13] Ameren Missouri estimates that by 2016 its existing ash impoundments at the Labadie Energy Center will be filled to capacity and, therefore, unavailable for storing additional coal ash.[14]

Coal ash transportation costs increase as the distance the coal ash is transported increases.[15] Transporting coal ash from the Labadie Energy Center would require capital expenditures of millions of dollars for onsite temporary storage, pug milling and loading facilities.[16]

From a utility operations standpoint, building and operating a utility waste landfill as close to its Labadie Energy Center as it practically can for the purpose of storing the coal ash generated by that energy center is "necessary" within the meaning of the Public Service Commission Act. As Staff pointed out in its position statements, the benefit of shutting the Labadie Energy Center down to avoid having to dispose of coal ash is far outweighed by the value of the low cost electricity it generates—only Ameren Missouri's nuclear (Callaway Energy Center) and hydro centers (Keokuk and Osage Energy Centers) are lower cost—and its contribution to Ameren Missouri's total system generating capacity—about 2.4 of 10.5 GW (about 23%). Because electricity from the

[12] Tr. 102, ll. 7-15.
[13] §§ 260.200-345, RSMo., in particular §§ 260.210 and 260.205.
[14] Ex. 1, Ameren Missouri witness Giesmann Direct, p. 2, l. 13 – p. 4, l. 8.
[15] Tr. 102, ll. 3-6; Tr. 200, l. 15 – Tr. 203, l. 14; Ex. 100, Staff witness Cassidy Rebuttal, p. 4, l. 9 – p. 5, l. 2 and Sch. 3, pp. 7, 10 and 11 of 11; Ameren Missouri witness Giesmann Surrebuttal, p. 13, l. 20 – p. 15, l. 17 and Sch. CJG-S20HC; Tr. 199, l. 22 – Tr. 213, l. 14.
[16] Tr. 219, l. 3 – Tr. 220, l. 21.

Labadie Energy Center is needed, disposal of the coal ash the Labadie Energy Center produces is needed. The proposed Labadie utility waste landfill will satisfy that need.

**Qualifications**

In part, the opposition to Ameren Missouri's certificate of convenience and necessity for the proposed Labadie utility waste landfill is based on Ameren Missouri's and its affiliates' histories of operating ash ponds in Missouri and Illinois. While those histories are significant, assessing Ameren Missouri's qualifications to operate the proposed Labadie utility waste landfill falls squarely within the Missouri Department of Natural Resources' state-wide regulatory authority over the operators of utility waste landfills.[17] With regard to deference to the Missouri Department of Natural Resources, the *StopAquila.Org v. Aquila, Inc*., 180 S.W.3d 24 (Mo. App. 2005), case Staff counsel quoted from during opening statement is instructive. There, when deciding whether the Commission had preempted Cass County's zoning, the court, pages 29-30, stated:

> 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 Aquila cite any specific statutory provision giving the Commission this authority. *See* *Mo. Power & Light Co.*, 18 Mo. P.S.C. (N.S.) 116, 120 (1973) (***regarding the location of a power plant near a residential subdivision, Commission remarks on fact that location was already designated as an industrial area and states, "In short, we emphasize we should take cognizance of-and respect-the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning."***) (Emphasis added). It has been said as well, "[a]bsent a state statute or court decision which pre-empt[s] all regulation of public utilities or prohibit[s] municipal

[17] §§ 260.200-345, RSMo., in particular §260.205.

regulation thereof, a municipality may regulate the location of public utility installations." 2 Robert M. Anderson, American Law of Zoning 3d §12.33 (1986).

While uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function, because facility location has particularly local implications, it is arguable that in the absence of any law to the contrary, local governing bodies should have the authority to regulate where a public utility builds a power plant. *See generally* *St. Louis County v. City of Manchester,* 360 S.W.2d 638, 642 (Mo. banc 1962) (finding that statute on which city relied regarding construction of sewage treatment plant did not give city right to select its exact location and that public interest is best served in requiring it be done in accordance with county zoning laws). *See also* *State ex rel. Christopher v. Matthews,* 362 Mo. 242, 240 S.W.2d 934, 938 (1951) (upholding validity of county rezoning to accommodate electric power plant construction).

Aquila further relies on *Union Electric Co. v. City of Crestwood,* 499 S.W.2d 480 (Mo.1973) (*Crestwood I*), and cases in other states for the proposition that local regulation of public utilities is not allowed. This case, however, is not about local regulation; rather, the case involves the interplay between statutes enacted by the legislature and how to harmonize police powers possessed both by local government and public utilities. Moreover, *Crestwood I* was not about a county's zoning authority; the issue was whether a city could prohibit above-ground transmission lines and thereby impose significant expenses on a utility in derogation of the Commission's regulatory authority. *Id.* at 483. Similarly, *Union Electric Co. v. City of Crestwood,* 562 S.W.2d 344 (Mo. banc 1978) (*Crestwood II*), which also involved transmission lines, called into question the authority of a municipality to interfere with a public utility's use of a private right-of-way to place high voltage lines that would deliver electric energy to several parts of the utility's system in the St. Louis metropolitan area. The court in *Crestwood II* determined that the application of a local zoning ordinance to the "intercity transmission" of high voltage electricity invaded the area of regulation and control vested in the Commission. *Id.* at 346. The court did not rule that the application of a zoning ordinance to the siting of a power plant invaded the Commission's area of regulation and control. Hence, the case provides no guidance for the issues raised herein.

Rather than independently evaluating Ameren Missouri's qualifications to operate the proposed Labadie utility waste landfill, no matter how tempted it may be to do so, the Public Service Commission should not usurp the Missouri Department of Natural

Resources legislatively delegated authority to assess Ameren Missouri's qualifications to operate the proposed landfill under the broad authority that same legislature granted the Commission by the Public Service Commission Act, and the amendments made thereto since April 1913, *i.e.*, the Commission should defer to and respect the Missouri Department of Natural Resources' authority to assess Ameren Missouri's qualifications to operate the proposed landfill and should not attempt, under the guise of public convenience and necessity, to evaluate Ameren Missouri's qualifications to operate the proposed Labadie utility waste landfill.

**Financial Ability**

Like the other factors, the Commission should view this one with an eye on the impact on Ameren Missouri's ability to provide safe and adequate service. Ameren Missouri plans to finance construction of the proposed Labadie utility waste landfill with treasury funds.[18] Ameren Missouri has access to an $800 million credit facility to ensure short-term liquidity and funding requirements, which effective March 1, 2014, the Commission authorized Ameren Missouri to extend the term of until November 14, 2017, with possible additional two one-year extensions.[19] Effective March 29, 2014, the Commission authorized Ameren Missouri to issue and sell additional long-term debt aggregating up to $350 million.[20] Ameren Missouri has already acquired the land for the site,[21] and anticipates the cost to build the first of the four cells of the landfill to be $27 million.[22] These facts show that Ameren Missouri has

[18] Tr. 103, ll. 16-20.
[19] Tr. 103, l. 21 – Tr. 104, l. 19; Ex. 105.
[20] Ex. 106.
[21] At a total cost of about $6.9 million. Ex. 100, Staff witness Cassidy Rebuttal, p. 2, l. 21 – p. 3, l. 9.
[22] Ex. 1, Ameren Missouri witness Giesmann Direct, p. 5, ll. 12-17; p. 7, ll. 13-15.

sufficient financial resources to construct and operate the proposed Labadie utility waste landfill.

## Feasibility

The evidence shows Ameren Missouri's proposed Labadie utility waste landfill is feasible. Ameren Missouri already owns the land where the Labadie utility waste landfill will be built.[23] As Staff pointed out above in the section of its brief addressing need and in its position statements, the benefit of shutting the Labadie Energy Center down to avoid having to dispose of coal ash is far outweighed by the value of the low cost electricity it generates. The design life of the proposed landfill is about 24 years, which approximately coincides with the projected remaining useful life of the Labadie Energy Center.[24] Ameren Missouri is complying with the local zoning requirements of Franklin County, Missouri.[25] Ameren Missouri is pursuing permits from the Missouri Department of Natural Resources to construct and operate the landfill.[26] As to the feasibility of the proposed Labadie landfill site for a utility waste landfill, that is a matter that falls squarely within the authority of the Missouri Department of Natural Resources,[27] and, like Ameren Missouri's qualifications to operate the proposed landfill, the Commission should defer to and respect the Missouri Department of Natural Resources' authority to assess the feasibility of the site itself and should not attempt to assess, under the guise

[23] Ex. 100, Staff witness Cassidy Rebuttal, p. 2, l. 21 – p. 3, l. 6.
[24] Ex. 1, Ameren Missouri witness Giesmann Direct, p. 5, l. 18 – p. 6, l. 2.
[25] Ex. 4, Ameren Missouri witness Giesmann Supplemental Testimony, p. 3, ll. 3-15 and p. 4, ll. 5-9; Ex. 2, Ameren Missouri witness Giesmann Surrebuttal Testimony, p. 4, l. 22 – p. 5, l. 2 and p. 9, ll. 3-12; Ex. 103, Staff witness Beck Rebuttal Testimony (adopted from Eubanks), p. 5, ll. 6-15; Ex. 104, Staff witness Beck Supplemental Testimony, p. 4, ll. 7-11. As noted in footnote 1, since, like Cass County, Franklin County is a noncharter first class county, a Commission certificate of convenience and necessity may exempt the proposed landfill from having to comply with Franklin County planning and zoning. § 64.235, RSMo.; *StopAquila.Org. v. Aquila, Inc*., 180 S.W.3d 24 (Mo. App. 2005).
[26] Tr. 104, l. 20 – Tr. 105, l. 11; Ex. 4, Ameren Missouri witness Giesmann Supplemental Testimony.
[27] §260.205, RSMo.

of public convenience and necessity, the feasibility of the proposed Labadie utility waste landfill site for use as a utility waste landfill.

**Public Interest**

The opposition to Ameren Missouri's certificate of convenience and necessity for the landfill is centered on environmental concerns about siting the landfill in the floodplain of the Missouri River, the histories of the operations by Ameren Missouri and its affiliates of ash ponds in Missouri and Illinois, and a claim Ameren Missouri's evaluation of alternate sites was inadequate. While the environmental concerns, and Ameren Missouri's and its affiliates' histories of operating ash ponds are significant, they all fall squarely within the Missouri Department of Natural Resources' state-wide regulatory authority over the siting, construction and operation of utility waste landfills; therefore, rather than succumbing to the allure of independently evaluating the environmental concerns and Ameren Missouri's qualifications to operate the landfill under utility operation safety[28] or the guise of public interest, no matter how inviting, the Public Service Commission should, instead, defer to how the Missouri Department of Natural Resources addresses them.

As to the evaluation of alternative sites, the evidence shows that the proposed site is the lowest cost,[29] and no party has demonstrated that it is not. In Staff's view, no one has shown that anything but granting Ameren Missouri a certificate of convenience and necessity for the proposed Labadie utility waste landfill is in the public interest.

[28] The Commission has the authority to require an electric utility "to maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public . . . ." § 386.310.1, RSMo.
[29] Ex. 100, Staff witness Cassidy Rebuttal, p. 4, l. 9 – p. 5, l. 2; Tr. 200, l. 15 – Tr. 203, l. 14.

***2. If the Commission decides to grant the CCN, what conditions, if any, should the Commission impose?***

Because they are both required before Ameren Missouri may lawfully construct and operate the landfill, any certificate of convenience and necessity the Commission grants Ameren Missouri for the Labadie utility waste landfill should be conditioned on Ameren Missouri having obtained permits from the Missouri Department of Natural Resources for both utility waste landfill construction and land disturbance ***before*** Ameren Missouri has the full authority the Commission grants it with the certificate of convenience and necessity. Staff recommends that the Commission order Ameren Missouri to notify the Commission when the contingencies are met by filing copies of the permits in this case and include in its order granting the certificate of convenience and necessity a statement that the grant of the certificate of convenience and necessity is not a determination of the ratemaking treatment of the costs associated with the utility waste landfill.

**CONCLUSION**

For all the foregoing reasons, Staff recommends that, conditioned on Ameren Missouri obtaining from the Missouri Department of Natural Resources both a utility waste landfill construction permit and a land disturbance permit for the proposed Labadie utility waste landfill before it exercises the rights the certificate of convenience and necessity allows it to exercise, the Commission should grant Ameren Missouri a certificate of convenience and necessity for the proposed utility waste landfill to be sited on the 813 acres of land abutting Ameren Missouri's existing 2.4 GW Labadie Energy Center described in Ameren Missouri's application for the purpose of storing coal ash

generated by Ameren Missouri's Labadie Energy Center. Staff further recommends that the Commission order Ameren Missouri to notify the Commission when the contingencies are met by filing copies of the permits in this case and include in its order granting the certificate of convenience and necessity a statement that the grant of the certificate of convenience and necessity is not a determination of the ratemaking treatment of the costs associated with the utility waste landfill.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 30th day of April, 2014.

**/s/ Nathan Williams**