

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 7th day of
December, 2011.

In the Matter of the Application of Union Electric)	
Company d/b/a Ameren Missouri for Authority to)	
Sell and Repurchase Coal and Lease Property)	<u>File No. EO-2012-0146</u>

**ORDER REGARDING APPLICATION FOR APPROVAL OF THE SALE
OF COAL FOR REFINEMENT AND THE LEASE OF PROPERTY AT THE
RUSH ISLAND PLANT**

Issue Date: December 7, 2011

Effective Date: December 14, 2011

Background

On November 9, 2011, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") submitted an application to sell coal and lease a small portion of its property at the Rush Island Power Plant as part of a program to utilize refined coal in order to lower costs and reduce emissions. The coal would be sold to Buffington Partners, LLC ("BP"), an affiliate of Coal Emission Reduction Technologies, L.L.C. ("CERT"), starting in December 2011 and continuing for 10 years. BP will refine the coal using a proprietary process (known as Chem-Mod) designed to reduce emissions from the coal and then sell the coal back to Ameren Missouri at the same price for use at the plant. If approved, Ameren Missouri would lease a small portion of its plant site to BP so that BP can place its coal refinement facilities on the site.

Ameren Missouri also seeks expedited treatment to take advantage of favorable tax credits, which are available if BP's refining process is in service by December 31, 2011.

Ameren Missouri requests a Commission decision be issued no later than December 20, 2011. Additionally, Ameren Missouri seeks a waiver of the 60-day notice of filing requirement in Commission Rule 4 CSR 240-4.020(2), applying to case filings where the case “is likely to be a contested case.”

The Commission issued notice, set an intervention deadline and scheduled an On-the-Record Proceeding to allow an expedited investigation into Ameren Missouri’s request. The Missouri Industrial Energy Consumers, Barnes-Jewish Hospital, Kansas City Power and Light Company and KCP&L Greater Missouri Operations Company were granted intervention. The On-the-Record Proceeding was convened on November 28, 2011. At this proceeding, the Commission adduced the testimony of: (1) Mark Birk, Ameren Missouri’s Vice-President of Power Operations; (2) Robert Neff, Ameren Missouri’s Director of Coal Supply; and (3) Leah Schaatt, a principle of BP and CERT, the vendor designing, constructing and operating the facilities for the coal refinement.

Jurisdiction and Discretionary Authority

Ameren Missouri’s application is within the Commission’s jurisdiction to decide pursuant to Section 393.190, RSMo 2000. Because no law requires a hearing on this application this is a non-contested case.¹ Non-contested cases do not require formal proceedings or hearings before the Commission,² and as such, there is no contested case

¹ Section 536.010(4), RSMo Supp. 2010, defines a “contested case” as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.”

² “The term “hearing” presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... ‘Hearing’ involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... “ The term has been held synonymous with ‘opportunity to be heard’. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm’n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989). The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. *Id.*

evidentiary record.³ Being a non-contested case, the Commission “acts on discretion or on evidence not formally adduced and preserved.”⁴ The competent and substantial evidence standard of Article V, Section 18, Mo. Const., does not apply to administrative cases in which a hearing is not required by law.⁵ Consequently, the Commission will exercise its discretion based upon the verified pleadings and limited, uncontroverted testimony adduced at the On-the-Record Proceeding. There is no requirement for the Commission to make findings of fact when it exercises its discretion in a non-contested case.⁶

Legal Standard for Approval

Section 393.190.1 provides, in pertinent part:

No . . . , electrical corporation, . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

³ *Sapp v. City of St. Louis*, 320 S.W.3d 159, 163 (Mo. App. 2010). “The key to the classification of a case as contested or noncontested is the requirement of a hearing. The term “hearing,” as used in section 536.010(4) means a proceeding at which a ‘measure of procedural formality’ is followed. Procedural formalities in contested cases generally include: notice of the issues (section 536.067); oral evidence taken upon oath or affirmation and the cross-examination of witnesses (section 536.070); the making of a record (section 536.070); adherence to evidentiary rules (section 536.070); and written decisions including findings of fact and conclusions of law (section 536.090).” (Internal citations omitted). *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 507 (Mo. banc 2009). Being a non-contested case, there is no evidence, no record, and no written and separately stated findings of fact. *State ex rel. Public Counsel v. Public Service Comm’n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006); Section 536.090. The decision reached by the Commission is totally a matter of the exercise of its discretion. *Id.* In a non-contested case, judicial review is restricted to determining only whether or not the Commission abused its discretion in denying a hearing (if a hearing was denied) and whether or not the commission’s order was lawful. *Id.*

⁴ *Public Counsel*, 210 S.W.3d at 353.

⁵ *Id.* Moreover, Ameren Missouri is the only party holding a substantive right that could be affected by this decision. Thus, no other party has a substantive due process right requiring a pre-deprivation evidentiary hearing. Utility customers have no vested property rights in utility rates that are protected by the Fifth and Fourteenth Amendments. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 -32 (Mo. banc 1975).

⁶ *Id.* at 355.

Section 393.190.1 does not set a standard for the approval of a proposed transfer of assets; however, the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 395 (Mo. 1934) determined the standard for the PSC's approval was whether the transfer “would be detrimental to the public.”⁷ This standard does not require the demonstration of the transaction benefiting the public, only that the transaction is not a detriment to the public.⁸ This standard is also codified in Commission Rule 4 CSR 240-3.310(1)(D), which requires that applicants seeking approval to transfer assets include in their applications “[t]he reasons the proposed sale of assets is not detrimental to the public interest.”

Analysis⁹

The transactions associated with Ameren Missouri’s proposed coal sale involve four agreements: (1) Lease and License Agreement; (2) Refined Coal Sales Agreement; (3) Feedstock Supply Agreement and (4) an Option Agreement for Purchase of Membership Interest (“Option Agreement”). The primary driver for this proposed program is based on Internal Revenue Code Section 45 which authorizes a tax credit for “refined coal” that when burned produces reduced emissions. Refining coal provides significant tax benefits to the owners of the refined coal facilities for the first 10 years of operation.

Refined coal is defined by the Internal Revenue Service (“IRS”) Code as coal that has been treated such that when burned to produce steam, generates at least a 20%

⁷ *City of St. Louis*, 73 S.W.2d at 395 and 400. This case involved a merger subject to approval by the PSC under § 5195, RSMo 1929, a predecessor to § 393.190. See also *State ex rel. AG Processing, Inc. v. Public Service Comm’n of State*, 120 S.W.3d 732, 735 (Mo. banc 2003) and *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

⁸ *Id.*

reduction in nitrogen oxide (“NOx”) emissions and at least a 40% reduction in either sulfur dioxide (“SO2”) or mercury emissions. In order to comply with the Internal Revenue Code, the coal must be sold to BP, treated, and then bought back by Ameren Missouri. BP has successfully completed testing using Rush Island coal feedstock in a pilot scale combustion facility, demonstrating that the refined coal qualifies for the tax credits.

BP will be responsible for demonstrating the emissions reductions to satisfy Internal Revenue Code standards, and for all costs associated with the process including the cost of refinement equipment, labor, materials, and testing. Testing of the refined coal is required every 6 months or whenever the fuel is changed. BP bears 100% of the cost of emissions reductions testing and 100% of the risk that the sorbents applied to the raw coal feedstock in the facility will generate the required emissions reductions. Ameren Missouri has no responsibilities or liabilities regarding the testing or the ultimate achievement of emissions reductions.

Ameren Missouri has received permission to conduct testing of the refined coal from the Missouri Department of Natural Resources (“MDNR”) Air Pollution Control Program at the Rush Island Plant. BP has submitted an air permitting applicability determination request to the MDNR asking confirmation that the project is exempt from construction permitting due to *de minimis* emissions from the equipment. Ameren Missouri also needs to seek permission from the MDNR Air Pollution Control Program to continue use of the refined coal after the test period has concluded. However, since all pollutants are expected

⁹ The Commission’s factual summary of the transactions involved in Ameren Missouri coal sale and lease agreement is based upon the uncontroverted testimony of Ameren Missouri’s witnesses and Staff’s investigation. See Transcript and Exhibits 1 through 5.

to have emissions below de minimis levels, approval for continued use of refined coal is expected.

Ameren Missouri, as the host utility, will receive per-ton payments for refined coal in coal handling and licensing fees from BP over a ten year period, as well as a monthly lease payment for the property that BP is leasing at the plant site. Ameren Missouri will pay no capital or other costs for the installation of the facilities, or any operating costs associated with the Chem-Mod process. It is expected that this program will produce significant annual revenues for coal used at the Rush Island Plant.

The primary benefit to Ameren Missouri and its customers is reduced operating costs through the fees charged by Ameren Missouri to BP. These lower plant expenses will be reflected in Ameren Missouri's future rate cases. For rate treatment, the lease payment will be treated as an expense offset at the applicable plant. Additional operating cost savings are expected through reduced additive costs when the United States Environmental Protection Agency's ("USEPA") Maximum Achievable Control Technology ("MACT") rule, which is expected to require mercury emissions reductions, takes effect.

In addition to lower base rates, Ameren Missouri customers will also benefit from lower emissions associated with burning refined coal. In addition to the emission benefits, BP believes operational benefits associated with the Chem-Mod process include improved performance of fly ash as a cement replacement in concrete mixes, reduced scale formation on boiler tubes, and improved heat rate; however, Ameren Missouri will not be able to quantify any such potential benefits until the refined coal project is in full operation.

Ameren Missouri has the right to suspend refined coal usage if detrimental impacts are observed. In fact, Ameren Missouri can suspend operation at any time if in its sole

judgment the refined coal causes operational problems. BP's structures will not interfere with delivery of coal to Ameren Missouri's energy centers for electric generation, and in the event that BP's facility is out of service Ameren Missouri's operation will continue normally.

The only possible detriment associated with these transactions is that due to the use of mercury capture additives, the fly ash will no longer be marketable to the cement kilns. However, fly ash is not expected to be marketable in 2015 or 2016 due to the proposed MACT mercury capture requirements, and as previously noted, it can still be used as a cement replacement.

Decision

Based on the Commission's independent and impartial review of the filings, testimony and exhibits, the Commission determines that Ameren Missouri's proposed sale of the coal and lease of property will benefit the public since the coal will be environmentally improved by the Chem-Mod process and the emissions at the Rush Island Power Plant will be reduced by the treatment process. Additionally, payments made by BP to Ameren Missouri will offset plant operations and maintenance expenses to the benefit of Ameren Missouri's customers. Ameren Missouri's proposed coal sale and lease agreement, as conditioned in the numbered paragraphs below, is not detrimental to the public interest and the Commission will approve it.

Due to the deadline requiring the refining process to be operational at the end of this calendar year, the Commission finds good cause to grant Ameren Missouri's motion for expedited treatment of its application. Because this is a non-contested case, the Commission need not grant Ameren Missouri a waiver of the 60-day notice of filing

requirement in Commission Rule 4 CSR 240-4.020(2), as that rule only applies to cases that are likely to become contested cases.

THE COMMISSION ORDERS THAT:

1. Union Electric Company d/b/a Ameren Missouri's motion for expedited treatment is granted.

2. Union Electric Company d/b/a Ameren Missouri's application is approved subject to the following conditions:

- a.) No ratemaking determination is being made in this order relative to the sale of coal and the lease of a portion of the property of Ameren Missouri at the Rush Island Plant over a ten-year period.
- b.) No ratemaking determination is being made in this order regarding the exclusion of the per-ton handling and license fee in the Company's FAC.
- c.) Ameren Missouri shall notify the Commission at least 30 days prior to exercising the Option Agreement for Purchase of Membership Interest.
- d.) Prior to exercising the Option Agreement for Purchase of Membership Interest, and as soon as practical once the decision is made to take the action, Ameren Missouri shall make a presentation to the Commission and the parties to this case explaining their decision to exercise this Option.
- e.) Should Ameren Missouri exercise the Option Agreement for Purchase of Membership Interest it shall identify any assets it acquires from that agreement, including, but not limited to, any tax credits.
- f.) Ameren Missouri shall not sell, transfer or encumber any tax credits it may receive as a result of exercising the Option Agreement for Purchase of Membership Interest. The phrase "sell, transfer or encumber" encompasses the term "assignment" as used in the Option Agreement.
- g.) If Ameren Missouri decides to suspend, terminate or otherwise modify the terms of the four (4) agreements contained in the Direct Testimony of Company witness Robert K. Neff, the Company will notify the Commission and the parties of the changes by filing a notice with the Commission as soon as practical, once the decision has been made to take the action.

3. Ameren Missouri is authorized to take any and all lawful actions that may be

reasonably necessary and incidental to executing the agreements for the coal sale and lease of property and any actions necessary and incidental in performance of their obligations under the approved agreements.

4. This order shall become effective on December 14, 2011.
5. This file may be closed on December 15, 2011

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Davis, Jarrett and
Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge