

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

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,	)	File No. EA-2012-0281
Operate, Maintain, and Otherwise Control and	)	
Manage a Utility Waste Landfill and Related Facilities	)	
At its Labadie Energy Center.	)	

**INTERVENORS' MOTION FOR CLARIFICATION AND/OR RECONSIDERATION  
AND APPLICATION FOR REHEARING**

Intervenors Labadie Environmental Organization and Sierra Club (“Intervenors”) move for clarification and/or reconsideration of the last sentence of the Findings of Fact, paragraph 27, of the Commission’s Report and Order issued in this case on July 2, 2014. In the alternative, Intervenors apply pursuant to § 386.500, R.S.Mo. and 4 CSR 240-2.160 for rehearing on that sentence. In support of this motion and application, Intervenors state as follows:

**A. Introduction**

1. The Commission’s Report and Order grants to Union Electric Company d/b/a Ameren Missouri (“Ameren”) a certificate of public convenience and necessity (“the Certificate”) to expand the boundaries of its Labadie Energy Center where it plans to build a utility waste landfill (“UWL”).

2. This motion and application request that the Commission delete the last sentence of paragraph 27 in the Findings of Fact section of the Report and Order. The sentence immediately before it states: “The liner is designed to be two feet above the natural maximum groundwater level, except where there are leachate collection sumps...” The sentence at issue then states: “This design complies with Missouri Department of Natural Resources (MDNR) and proposed federal environmental regulations.”

3. The Commission should remove that sentence, or conduct a rehearing on it, because it is not supported by competent facts in the record and is not essential to the Commission's decision and order granting the Certificate.

**B. MDNR Has Not Yet Determined Whether the Design of the Landfill's Liner Complies with Its Regulations.**

4. The Report and Order accurately states, in paragraphs 28 and 52, that MDNR made *site suitability* determinations in the context of a Preliminary Site Investigation and a Detailed Site Investigation.

5. In contrast, MDNR has not yet made a decision as to whether the *design* of the landfill, including its liner, complies with state regulations.

6. MDNR divides the landfill approval process into two steps. The first involves an investigation of the site and a determination as to whether there are inherent defects in the site that make it unsuitable for a landfill. 10 CSR 80-2.015. If the site passes the suitability analysis, as MDNR determined it did in this case, then the applicant submits a construction permit application to describe the proposed design of the landfill in light of the site conditions identified by the site investigation. 10 CSR 80-2.020 and 10 CSR 80-11.010.

7. The design of Ameren's proposed Labadie landfill and the placement of the liner are described in Ameren's Construction Permit Application. Ex. 4, Revised Construction Permit Application, Dec. 11, 2013; liner design described in Report and Appendices J and Z.

8. MDNR has not yet made a final decision on that Application.

9. Whether the design of the liner in relation to the groundwater complies with MDNR regulations is a technical determination. The Report and Order (p. 21) states that while the Commission will consider environmental and public health impacts as part of the public interest evaluation, it will defer to MDNR's technical expertise.

10. Having not yet decided whether or under what conditions to grant Ameren's construction permit application, MDNR has not yet exercised its technical expertise with respect to whether the designer of the liner complies with MDNR's regulations.

11. The only evidence cited for the statement at issue does not, in fact, support the statement. The sentence cites the Sur-Surrebuttal Testimony of Steven Putrich, P.E., page 2, lines 3-7. That testimony by Mr. Putrich, an engineer, claims to state "how MDNR applies its rules." However, there is no MDNR rule comparable to the proposed federal rule that is the focus of his testimony. While the proposed federal rule requires two feet of separation between the base of the landfill and the upper limit of the natural water table,<sup>1</sup> there is no two-foot separation requirement in MDNR's regulations.<sup>2</sup>

12. It is unreasonable for the Commission to state that the design of the proposed UWL complies with MDNR regulations when MDNR has yet to make its own determination as to whether the landfill's design complies with MDNR's requirements, and the landfill design requirement noted by the Commission in paragraph 27 (i.e., the two-foot separation requirement in the proposed federal regulations) is not part of MDNR's regulations.

**C. The Record Does Not Support the Statement that Ameren's Liner Design Complies With Proposed Federal Regulations.**

13. In paragraph 27, the Commission found that "[t]he liner is designed to be two feet above the natural maximum groundwater level, except where there are leachate collection sumps. ..." It followed that statement with the conclusion that "This design complies with ... proposed federal environmental regulations."

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<sup>1</sup> EPA, Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35128, 35241 (June 21, 2010) (proposed 40 CFR 257.60).

<sup>2</sup> See 10 CSR 80-11.010.

14. The proposed federal environmental regulations referenced in paragraph 27 state as follows:

New CCR [coal combustion residuals] landfills . . . must be constructed with a base that is located at least two feet above the upper limit of the natural water table.

EPA, Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35128, 35241 (June 21, 2010) (proposed 40 CFR 257.60).

15. The Commission’s finding that that the liner design complies with the proposed federal regulations, requiring two feet of separation between the liner and the upper limit of the groundwater, is premised on the belief expressed by Mr. Putrich that the two-foot requirement does not apply to the portion of the liner below the landfill’s sumps. See paragraph 27, footnote 17, citing Mr. Putrich’s testimony as the only support for this statement.

16. This finding, which is actually a legal conclusion, is contrary to law. The text of the proposed federal regulation offers no hint of any exception to the two-foot separation requirement for the portion of the liner below the sumps – or anywhere else. Mr. Putrich conceded that the proposed rule has no express exemption for the portion of the liner below the sumps. Ex. 6, page 2, lines 4-5.

17. Mr. Putrich, an engineer, offered no support for his opinion (Ex. 6, page 2, line 5) that, notwithstanding the EPA’s silence, the agency somehow intended to create an exemption for the portion of the liner below the sumps.

18. The fact that the EPA’s proposed regulation makes no express exemption for the portion of the liner at the sumps means that none exists. Courts and agencies are not to imply exemptions where the plain language creates none. *Jefferson County Pharmaceutical Ass’n v. Abbott Laboratories*, 460 U.S. 150, 157 (1983); *Anani v. Griep*, 406 S.W.3d 479, 482 (Mo. App. 2013) (“[p]rovisions not plainly written in the law, or necessarily implied from what is written, should

not be added by a court under the guise of construction to accomplish an end the court deems beneficial,” quoting *Harrison v. MFA Mutual Ins. Co.*, 607 S.W.2d 137, 143 (Mo. banc 1980)).

19. The EPA’s proposed regulation is unambiguous, and provides for no exceptions to the requirement that there be at least two feet between the bottom of the landfill’s liner and the top of the groundwater. Thus, neither the Commission nor the courts may read an exemption into the plain language of the proposed regulation.

20. Further, Ameren admits that the sumps are an integral part of the landfill. MDNR regulations provide: “If the base of the landfill liner will be in contact with groundwater, the applicant shall demonstrate to the department’s satisfaction that the groundwater will not adversely impact the liner.” 10 CSR 80-11.010(4)(B)(6). Because Ameren determined that the liner at the sumps will be “in intermittent contact with groundwater,” it submitted a demonstration to MDNR in its Construction Permit Application under the quoted regulation. Ameren explained as follows its understanding that the sumps are an “integral” part of the landfill:

The bottom of the clay liner in the lowest sumps will probably be in intermittent contact with the ground water. In accordance with 10 CSR 80-11.010(1), this document has been prepared to demonstrate that the groundwater intermittent contact will not adversely impact the compacted clay liner in the sumps, per 10 CSR 80-11.010(4)(B)(6), based upon the interpretation that this regulation is applicable to the sumps because they are integral with the cells.

Ex. 4, Appendix Z, p. 2 (emphasis supplied).

21. Given that the federal regulations are still in proposed form and it is unknown what the final regulations will provide, and that the federal regulations are not mentioned in the Decision or Order portions of the Report and Order, the statement in the last sentence of Finding of Fact

paragraph 27 regarding compliance with the proposed federal regulations was not essential to the Commission's decision and order herein.

22. Because nothing in the record or in the plain language of the proposed rule supports the conclusion that the sumps are not part of the base of the landfill, and because Ameren itself has acknowledged that the sumps are an integral part of the base of the landfill, the final sentence of paragraph 27 in the Findings of Fact should be deleted.

WHEREFORE, Intervenors respectfully move the Commission to clarify and/or reconsider its Report and Order by removing the last sentence of paragraph 27 ("This design complies with Missouri Department of Natural Resources (MDNR) and proposed federal environmental regulations."), or in the alternative to grant a rehearing thereon.

Respectfully submitted,

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Attorneys for Intervenors Labadie Environmental  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document was sent via email on July 16, 2014, to all parties of record.

/s/ Maxine I. Lipeles