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

AMEREN MISSOURI'S REPLY TO INTERVENORS' RESPONSE

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") and in reply to *Intervenors Labadie Environmental Organization and Sierra Club's Response to Ameren's Objections and Motion to Strike* ("Intervenors' Response") states as follows:

Hearsay

Intervenors do not deny that a large number of the exhibits to which Ameren Missouri lodged a hearsay objection are indeed hearsay. Nor do Intervenors deny that hearsay is a fundamental rule of evidence that must be followed by the Commission, and that it would be error for the Commission to admit and rely upon hearsay evidence in the face of Ameren Missouri's objections on that basis.[1] Consequently, all or that part of the following exhibits listed below are clearly inadmissible because they are hearsay:

- Exhibit C (all of the documents are hearsay except *UE's Construction Permit Application to MDNR* and *EPA's Coal Combustion Waste Damage Case Assessment.*[2] The Tenessee Valley Authority ("TVA") document is also hearsay,

[1] *See* Ameren Missouri's *Objections and Motion to Strike Certain Exhibits, Etc.* dated August 1, 2013 ("Ameren Missouri's Objections"), bottom of p. 8 to top of p. 10.
[2] As Intervenors point out (and as we had conceded to Intervenors as reflected in Exhibit 1 to Intervenor's Response), aside from relevance (discussed below), the "remarkably broad" reach

but not objectionable on that basis under the *Rodriguez* case, discussed below. However, the TVA document is still irrelevant and should not be admitted as we address below)

- Exhibit D (all hearsay)
- Exhibit E (all hearsay except Mr. Trimmer's notes)
- Exhibit G (all hearsay except Ms. Bollman's statement and the *EPA's Next Steps for Areas Designations for Sulfur Dioxide* document)
- Exhibit H (all hearsay, except under *Rodriguez* the hearsay objection to the Federal Emergency Management Agency document is overcome – we will discuss one page from Exhibit H, further below)
- Exhibit I (all hearsay except Ameren Missouri's Missouri Operating Permit)
- Exhibit J (the *New York Times* blog is hearsay)
- Exhibit K (all hearsay)
- Exhibit M (the *Post-Dispatch* article is hearsay)
- Exhibit N (all hearsay)
- Exhibit Q (the *In Harms Way* … document is hearsay)
- Exhibit R (all hearsay)

Intervenors attempt to avoid exclusion of these exhibits or portions thereof by arguing that they show the state of mind of a particular witness or "what the witness believed." But what these individuals *believe* to be true about coal ash, coal-fired power plants, and groundwater contamination is not relevant to any question before the Commission. For example, a witness

---

of Section 490.220, RSMo., as discussed in *State ex rel. Rodriguez v. Suzuki*, 996 S.W.2d 47 (Mo. 1999), overcomes the hearsay objection to the EPA document.

may read viewpoints expressed by groups like the Environmental Integrity Project or Earthjustice, and they may come to believe that those groups are right.[3] That belief may lead the witness to fear a landfill, or a nuclear power plant, or a transmission line, or coal trains delivering coal to a power plant. That a particular individual or even a group of them have fears is not relevant to the decision the Commission must make in this case, and thus those fears – purportedly reflected in their state of mind – don't render these hearsay documents admissible.

Despite this, Intervenors cite three cases in an attempt to overcome the clear hearsay problems with the above-cited exhibits, *State of Missouri v. Beck*, 673 S.W.2d 122 (Mo. App. E.D. 1984), *Tauvar v. American Family Mut. Ins. Co.*, 269 S.W3d 436 (Mo. App. W.D. 2008) and *Replogle v. Replogle,* 350 S.W.2d 735 (Mo. 1961). All three cases are inapposite because they all involve application of the state-of-mind exception to the hearsay rule where an element of the cause of action required proof of the state of mind of one of the litigants.

Beck was a defendant's appeal of a criminal conviction for receiving stolen property. One element of the crime was the defendant's knowledge that the property was in fact stolen. Consequently, in order to convict the defendant the State had to prove knowledge, making the defendant's knowledge a key issue in the case. On appeal, one of the defendant's contentions was that the trial court erred in excluding a defense witness's testimony that the person who had delivered the allegedly stolen property to the defendant had stated to the defendant that it came from an estate sale. Finding that the hearsay testimony was not offered to prove that the property did come from an estate sale, but rather, that it was offered to support defendant's claim that he

[3] As an example, Exhibit C includes documents from those groups. Both of them are not-for-profit environmental advocacy groups who are certainly entitled to their views. That does not mean that every article they write becomes admissible through testimony of lay witnesses at a local public hearing, or even a formal evidentiary hearing, before the Commission.

had no knowledge that it was stolen, the court ruled that the hearsay testimony fit the state of mind exception to the hearsay rule, and was thus admissible on the essential issue under the criminal charge of the defendant's knowledge.

Tauver was a vexatious refusal to pay lawsuit against an insurance company. One of the elements of a vexatious refusal to pay claim is to prove that the insurer acted vexatiously and denied the claim without reasonable cause. Section 375.296, RSMo.; *Tauver,* 269 S.W.3d at 439. Consequently, the insurance company in that case was allowed to admit, as an exception to the hearsay rule, reports from a doctor that indicated that the plaintiff did not need some of the treatment the plaintiff claimed the insurer should pay for. The reports, though hearsay, showed that the insurer did not intend to harass the plaintiff or to deny paying the claim without reasonable cause. That lack of intent was directly relevant to an essential element of the plaintiff's vexatious refusal to pay claim, which allowed the hearsay statement to fit within the state-of-mind exception.

Replogle is similar. It involved the question of whether one brother in possession of some land had superior title to it as against his brother via adverse possession. One element of the adverse possession claim was the intention of the first brother to assert ownership of the property under a claim of right. Consequently, the court ruled that it was proper to allow the first brother to testify as to what he was told about the effect of prior probate proceedings (the land in question had been owned by their father) because what he was told tended to establish that he was possessing the land under a claim of right. The statements were not offered to prove that what he was told was true, but rather, were offered to prove he believed that what he was told gave him a right to possession – that belief was, as noted, an essential element at issue in the case, which allowed the hearsay statement to fit within the state-of-mind exception.

The same cannot be said about the hearsay documents listed above. They are inadmissible, they cannot be relied upon by the Commission, and under the fundamental rules of evidence that bind the Commission, they cannot be admitted. Moreover, if hearsay documents could be admitted on the basis of the subjective effect they have on the state of mind of a lay witness, every hearsay document would be admissible on that basis and the evidentiary rule prohibiting hearsay documents would become a nullity.

Relevance

The documents discussed in the Hearsay section above are inadmissible hearsay, and it therefore it does not matter whether they are relevant or not. There are certain other documents, however, that could be admitted under the *Rodriguez* case unless the documents are irrelevant. We address those documents here.

As discussed in Ameren Missouri's Objections, the requirement that irrelevant evidence be excluded is a fundamental rule of evidence, which is expressly codified in Section 536.070(8) RSMo., which Intervenors agree applies to this case. To be relevant, the proffered evidence must tend to either prove or disprove any fact in issue or corroborate other relevant evidence bearing on the *principal* issues before the Commission. *In the Matter of the Joint Application of Great Plains Energy Inc., et al., for Approval of the Merger of Aquila, Inc.,* 2008 Mo. PSC LEXIS 820 at *6 (Case No. EM-2007-0374, August 5, 2008).

In deciding whether to grant a certificate of convenience and necessity ("CCN"), the "principal issues" before the Commission pertain to economic feasibility, the need for the utility waste landfill, and financing; protection of environment is not, however, a principal concern of the Commission, but that of the agency legislatively charged with that role—the Missouri Department of Natural Resources ("MDNR"). *See State ex rel. Util. Consumers Council of Mo.,*

Inc. v. Pub. Serv. Comm'n, 562 S.W.2d 688, 698-99 (Mo. App. E.D. 1978) (upon review of grant of CCN for construction of the Callaway nuclear plant, court affirming finding by Commission that the issue of safety was not an issue to be decided by the Commission: "[t]he considerations of the Commission do not attempt to protect the citizens of Missouri against radiation hazards." To the contrary, the "Commission must determine whether it will issue its certificate of convenience and necessity. To arrive at its determination, the Commission must find that the nuclear facility is adequate to meet the needs of the public and is economical when compared with alternative sources of energy.").[4]

Consequently, Intervenors' citation to the general definition of relevance (evidence that tends to prove or disprove a fact in issue) completely ignores the specific, on-point authority cited above that demonstrates that in a CCN case a fact in issue is not the degree of protection of the environment or, as in the Callaway case, whether Missourians were adequately protected from the hazards posed by a nuclear power plant – at least those are not facts at issue in a CCN case when the General Assembly or the Congress has *delegated authority over those matters to another, specific government agency,* as here (the Missouri Department of Natural Resources). That Intervenors want this case to be about protection of the environment and want to include all kinds of documents into the record regarding that issue does not make the documents relevant as a matter of law.

Intervenors attempt to re-cast the issue, claiming it's not about environmental protection, but rather is about Ameren Missouri's "qualifications" to operate the proposed landfill. But the

[4] For a more complete discussion regarding the issues properly before the Commission on Ameren Missouri's request for a CCN at the Labadie plant, see *Suggestions of Union Electric Company d/b/a Ameren Missouri Opposing Application to Intervene by Labadie Environmental Organization and Sierra Club* at pp. 4-9.

reason they claim Ameren Missouri is not qualified to operate it is because of their claim that the environment will not be protected. That brings us full circle: *that* issue is not relevant, except before MDNR.

The following documents, which are not excluded as hearsay, are irrelevant under these standards and should not be admitted:

- TVA Report in Exhibit C
- Exhibits T and BB (Exhibit BB is a complete copy of an United States Environmental Protection Agency ("EPA") document included in Exhibit T (which contained an excerpt from that EPA document). Exhibit T also includes a letter from the EPA regarding alleged violations of the Clean Air Act, which have nothing to do with ash disposal.
- Exhibit H (purportedly modified MDNR map)
- Exhibit CC

We address each of these below.

The TVA Report in Exhibit C deals with whether a different entity (TVA) properly monitored groundwater at different power plants located in different states. Even if one assumes they did not and even if the report is highly critical of TVA, what does that have to do with a dry ash landfill to be constructed in compliance with the proposed EPA regulations and operated by Ameren Missouri? Nothing. The TVA Report is irrelevant and inadmissible.

The EPA draft document “Inhalation of Fugitive Dust” (Exhibit BB and a portion as part of Exhibit T) relies on certain assumptions regarding the construction of a utility waste landfill ("UWL") to analyze whether fugitive emissions form a dry ash landfill would violate the National Ambient Air Quality Standards (NAAQS) for particulate matter. No witness has

offered (or can offer) testimony to place this discussion in context of the proposed UWL at Labadie—e.g., how the assumptions regarding the landfill structure in the study compare with the actual design of the Labadie landfill, how the particular environmental assumptions relied upon by EPA compare to the site's environmental factors, etc. Absent any context, the Commission is left only to speculate as to the relationship between the assumptions and qualified conclusions of the study and the actual design of the Labadie UWL. The very slight probative value of this study is far outweighed by the prejudicial effect of speculatively applying the conclusion in that study to the Labadie UWL.

Exhibit T also contains a cover letter that the Environmental Protection Agency sent to Warner Baxter in January 2010 regarding alleged violations of "pre-construction permitting and Title V requirements of the Clean Air Act and Missouri State Implementation Plan" at the Labadie, Meramec, Rush Island and Sioux Energy Centers. What the specific violations are is anybody's guess—the actual Notices of Violation ("NOVs") is not included with the cover letter. The lay witness sponsoring the exhibit provided only a very general description of what he believes the nature of the NOVs to be but failed to provide any testimony as to the particular alleged violations or the status of those allegations. *Transcript of June 25, 2013 Local Public Hearing* at pp. 160-161. Again, the Commission is left to speculate as to the nature of the alleged violations and, whether any violations were in fact proven at any of the four plants. Even more speculative is what relationship these NOVs have with the proposed UWL. As it now stands, the very low probative value of a cover letter from the EPA is outweighed by the prejudicial effect of admitting such vague and general allegations for use against Ameren Missouri, especially where there is no showing that the alleged violations are related in any way to the proposed UWL.

Exhibit F consists of four letters from the Illinois EPA regarding groundwater monitoring results as coal ash impoundments operated by Ameren Energy Resources Corporation ("AER") in Illinois. As the Commission is well-aware, AER is a separate merchant-generation company the shares of which are owned by Ameren Missouri's sole shareholder, Ameren Corporation. Ameren Missouri's generation operations are run by Ameren Missouri's Power Operations Services organization, headquartered in Sunset Hills, Missouri. AER's generation assets are not owned by Ameren Missouri, nor do the same personnel manage or operate them. AER's dealings with the Illinois EPA over impoundments where coal ash is stored in a wet state are simply irrelevant to the storage of dry, solid ash in a utility waste landfill in Missouri, to be owned and operated by a different entity under different management, according the regulatory requirements of a different agency, the MDNR.

Exhibit H purports to be an enlargement of an MDNR map of earthquake event potential in the St. Louis metropolitan area. We concede that there exists a proper foundation for the actual map certified as a business record in Exhibit 2 to *Intervenors' Response*, but that does not establish a foundation for what purports to be a blown-up version that contains topographic features and notes that are not part of the original. Intervenors concede that none of the local public hearing witnesses sponsoring the disputed exhibits are experts. *Intervenors' Response*, p. 16. There has been no showing that this page from Exhibit H is a fair depiction of the location of the Labadie Energy Center, and no context has been provided for this portion of a map. And as we have pointed out, MDNR, whose regulations required not only a Preliminary Site Investigation but also a Detailed Site Investigation for the landfill most certainly can and undoubtedly will take into account whatever of its own information it believes relevant to the structural integrity of the proposed utility waste landfill. Those are relevant considerations

before MDNR; not before this Commission. The purported enlarged map in Exhibit H is irrelevant in this case.

Exhibit CC is an Administrative Order approving a settlement between the EPA and a company unaffiliated with Ameren Missouri. The sponsoring witness, Mr. Grohs, has no first-hand knowledge about the subject matter of the order. According to the order, Rotary Drilling contracted with another company unaffiliated with Ameren Missouri, Kleinschmidt Trucking, Inc., to use ash that Ameren Missouri had lawfully sold to Kleinschmidt as part of Ameren Missouri's beneficial reuse program. That Rotary Drilling obtained it from Kleinschmidt and (allegedly) disposed of it improperly has nothing to do with Ameren Missouri's proposed operation of a dry ash landfill. Indeed, what point the sponsoring witness (Mr. Grohs) was trying to make is unclear, unless one assume that he was trying to somehow impugn Ameren Missouri's operations on account of what Rotary Drilling may or may not have done. Imagine if Ameren Missouri had provided ash to Franklin County for winter traction control (which it has done), or to a cement company for road construction (which it has also done), and either of them instead drove the truck to the local municipal waste landfill and dumped the ash there. Is that relevant to the public convenience and necessity for a utility waste landfill at the Labadie Plant? Of course not. Exhibit CC is irrelevant and inadmissible.

Conclusion

Under *Rodriguez*, a number of documents that would otherwise be inadmissible due to lack of foundation and because they are hearsay can nonetheless be admitted, ***if relevant***. We have withdrawn our objections on those bases to a number of them, as described hereinabove. There remain, however, many other documents which constitute hearsay which do not fall within any applicable exception, and are therefore not admissible for that reason alone, notwithstanding

the irrelevance of many of those documents. Finally, even where the hearsay objection to several of the exhibits does not lie under *Rodriguez,* Ameren Missouri has explained why they are inadmissible due to their irrelevance to any issue in this proceeding. Ameren Missouri moves this Commission for its order rejecting the admission into evidence the proffered exhibits which contain inadmissible hearsay and which contain matters irrelevant to this proceeding.

Respectfully submitted,

/s/ James B. Lowery
James B. Lowery MBN#40503
Michael R. Tripp MBN#41535
Smith Lewis, LLP
111 S. Ninth Street, Ste. 200
P.O. Box 918
Columbia, MO 65205
Telephone: (573) 443-3141
Fax: (573) 442-6686
Email: lowery@smithlewis.com
tripp@smithlewis.com

Thomas M. Byrne MBN#33340
Director - Assistant General Counsel
Ameren Services Company
1901 Chouteau Ave.
P.O. Box 66149
St. Louis, MO 63166-6149
Telephone: (314) 554-2514
Facsimile: (314) 554-4014
E-Mail: AmerenMOService@ameren.com

ATTORNEYS FOR
UNION ELECTRIC COMPANY
d/b/a AMEREN MISSOURI

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served via e-mail to the following on August 21, 2013:

Nathan Williams
Jennifer Hernandez
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360
staffcounselservice@psc.mo.gov

Lewis R. Mills
Missouri Office of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230
opcservice@ded.mo.gov

Elizabeth J. Hubertz
Lauren Grady
Maxine I. Lipeles
Interdisciplinary Environmental Clinic at
Washington University School of Law
1 Brookings Drive, Campus Box 1120
St. Louis, MO 63130
ejhubertz@wulaw.wustl.edu
milipele@wulaw.wustl.edu

/s/ James B. Lowery
James B. Lowery