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June 21, 2013

Morris Woodruff
Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison St., P.O. Box 260
Jefferson City, MO 65102

Filed in EFIS & Via E-mail

Dear Judge Woodruff:

I have given some of the issues discussed during the June 21 conference more thought, and some additional information has come to my attention.

Attached is an article that just appeared in the *The Missourian* (the local newspaper in Washington, Missouri). It indicates – and I believe Ms. Lipeles's statements during the conference held on June 20 confirm this – that LEO intends to "present its case" during the local public hearing. It appears based on the article that the source of this information is LEO's President, Ms. Patricia Schuba. As discussed below, it is completely improper for an intervenor to present its case through the local public hearing process.

As discussed on-the-record during the conference you held at the Commission on June 19, this case presents a very unique circumstance in terms of the conduct of a local public hearing. While in theory the Company is free to cross-examine every witness as extensively as necessary, in practice doing so would take considerably more time – and would be considerably more disruptive to the local public hearing process – than I am sure the Commission would prefer or has contemplated in scheduling this local public hearing. For example, I do not want to take valuable time away from the hearing to have to review documents to determine if and to what extent they are objectionable, to cross-examine the witnesses about their education, training, and experience, about the source of documents they wish to offer, and about their qualifications to opine about whether the documents are trustworthy and of the type reasonably relied upon by experts. While under Section 490.065, RSMo. a duly qualified expert witnesses can rely upon certain hearsay and certain documents that would otherwise be inadmissible, laypersons cannot. Ms. Lipeles stated the obvious during the June 21 conference; that is, that these folks are not experts. Nor does hearsay constitute competent and substantial evidence, and it would be error for the Commission to rely upon it.

I also believe that human nature being what it is that one could expect that subjecting persons to such questions in a setting like a local public hearing could very well lead to the kind

of "heatedness" that I advised you had occurred at earlier Franklin County proceedings relating to zoning amendment that allows utility waste landfills in Franklin County

The purpose of a local public hearing is to allow members of the *general public*, without them having to travel a long distance, to testify about their concerns or support of a particular utility application, whether it involves a rate case or some other request pending at the Commission. The purpose is not for one or more intervening parties to "present their case" to the Commission in circumvention of the Commission's requirement that all testimony be pre-filed. It is obvious – and Ms. Lipeles all but said this during the June 19 conference – that LEO and Sierra Club made a conscious decision not to file rebuttal testimony in opposition to the Company's application and instead intend to attempt to misuse the local public hearing process to attempt to make a record. They surely know, for the reasons I discuss above, that there are practical problems with the Company or the Staff (which supports the Company's application with minor, reasonable conditions) conducting extensive cross-examination at a local public hearing, and they surely know that such cross-examination would in any event have to be blind cross-examination without the benefit of discovery given their failure to pre-file testimony, as they were required to do.

It's one thing for a member of the general public to come to a rate case local public hearing and supply an article about the utility's executive pay being too high, or about a service outage, or the cost of electric service, etc. Those documents are likely objectionable as hearsay or for other reasons, but they usually are so remotely related to the determination of a revenue requirement in a rate case that we choose to simply allow them to come in without objection. It is quite another thing for an intervenor – through persons affiliated with the intervenor or encouraged by an intervenor to present a case -- to come and attempt to inject into the evidentiary record information and documents that almost certainly will constitute hearsay and which are not being sponsored by a properly qualified expert. It is my belief that the Commission would never allow the Company to dispatch its employees to local public hearings to attempt to provide substantive expert testimony and documents to aid the Company in establishing a revenue requirement in a rate case, or in this case, to submit engineering, geological, or environmental hearsay documents to support the Company's view in this case. Imagine if, as an example, the Missouri Industrial Energy Consumers (MIEC) (which like LEO and the Sierra Club is a not-for-profit corporation), dispatched employees or other representatives of Monsanto or Anheuser Busch to attempt to bolster MIEC's opposition to a Company application pending at the Commission. After all, their employees live and work in the St. Louis area and it would certainly be more convenient for them to come to a local public hearing. It is beyond my imagination to believe that the Commission would allow that kind of misuse of the local public hearing process. The Commission should not allow that kind of misuse of the local public hearing process here.

Ms. Lipeles may respond that I am speculating regarding what LEO/Sierra Club and its supporters intend and it's true, I have no actual knowledge of what is in their collective minds. However, I can reasonably deduce, from their decision not to file rebuttal testimony, from Ms. Lipeles's statements at the conference, and based on articles such as the one attached to this

letter, what they likely intend. And if my deduction is accurate, what they intend is improper, contrary to the purpose of local public hearing, in violation of the Commission's rules, and in violation of the fundamental rules of evidence.

While I am willing to refrain from reviewing in detail and formally objecting to documents they may wish to offer so as to attempt to expedite the hearing process and not consume its time with objections and legal arguments (so long as my ability to object prior to their possible admission into the record is preserved as the parties agreed-to during the conference, with the understanding that Ms. Lipeles could be given the opportunity to lay a foundation for the admission of such documents later), I need to advise the Commission that I may still be required to cross-examine some of the witnesses more extensively than is typical at a local public hearing. I should also point out that as noted earlier, I see no lawful way for hearsay documents (or hearsay testimony for that matter) to be admitted through a layperson.

Based on the foregoing, I suggest and move that your honor adopt the following rules relating to the conduct of the local public hearing:

1. Ask each witness to identify the city in which they currently reside, and to state whether they are in any way affiliated with intervenors LEO or the Sierra Club, or the Washington University Environmental Law Clinic and, if so, how they are affiliated.
2. Advise potential witnesses that if they desire to submit documents that such documents will be marked for identification only at this stage and that they may or may not become part of the record, depending on the Commission's later ruling on any objections that are lodged to their admission.

In summary, it is not the Company's desire to prevent members of the general public from having their opportunity to speak and express their views on the application. Lay testimony from members of the general public is perfectly appropriate at a local public hearing. However, given that testimony does become part of the record, the Company has no choice but to prevent totally incompetent and inadmissible evidence from becoming part of the record, particularly when the pre-filed testimony and evidentiary hearing processes are or likely are being circumvented.

I apologize for not getting this letter to you until today, but prior commitments required me to be out-of-town all day on Thursday, June 20.

Sincerely,

/s/ James B. Lowery

James B. Lowery
Attorney for Ameren Missouri

Cc: Commissioners; Counsel of Record

Environmental Group Prepares For Hearing

Posted: Wednesday, June 19, 2013 5:15 pm

A local environmental group is preparing to present its case against a coal-ash landfill during an upcoming Missouri Public Service Commission hearing.

The Labadie Environmental Organization (LEO) will present information during the PSC hearing Tuesday, June 25, at East Central College, 1964 Prairie Dell Road, Building 12. It starts at 6 p.m.

LEO President Patricia Schuba said she is worried about the landfill being built in a floodplain of the Missouri River.

The group says the landfill poses a public health risk, adding that coal ash contains carcinogens and heavy metals linked to cardiovascular, respiratory and endocrine diseases.

"The site is vulnerable to groundwater contamination as well as periodic flooding that could carry the contaminants into the Missouri River," a LEO news release states. It is a source of drinking water for millions of downstream consumers of water, the release adds.

But Ameren officials have said that the landfill will be safe. It will have a liner and groundwater monitoring system, according to Ameren.

Schuba said she would never trust a utility to do its own groundwater testing.

She suggested that Ameren build the landfill somewhere else, saying it could possibly be cheaper to build outside of a floodplain.

The landfill is expected to meet coal ash disposal needs for about 24 years, and it will be built in several phases, with phase one expected to cost $27 million, Ameren officials have said.

Ameren wants to expand the boundaries of its Labadie power plant by 813 acres to accommodate the landfill.

Not all of the 813 acres will be for the actual landfill. The landfill itself is only planned to be 166 acres, and the area surrounding it would be a buffer, according to Ameren.

The PSC hearing is part of Ameren Missouri's application for a certificate of public convenience and necessity to expand the boundaries of the Labadie Energy Center for the landfill.

The PSC hearing will consist of two parts, said Gregg Ochoa, PSC spokesman.

The first part will be a question-and-answer session in which people can ask questions of Ameren officials and PSC staff. The question-and answer session starts at 6 p.m.

Immediately after, the actual hearing will take place so people can give comments to the PSC members.

Ameren Missouri has asked the PSC to approve its application by Dec. 31 to allow the utility to begin construction of the landfill in 2014.

Formal evidentiary hearings in this case are scheduled for Sept. 23-25 in Room 310 of the Governor Office Building, 200 Madison St., Jefferson City.