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

OBJECTIONS AND MOTION TO STRIKE CERTAIN EXHIBITS, AND MOTION FOR LEAVE TO FILE SURREBUTTAL TESTIMONY AND TO RESCHEDULE THE EVIDENTIARY HEARINGS

Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") hereby files its objections to certain inadmissible exhibits that were offered at local public hearings, moves the Public Service Commission ("Commission") to strike those exhibits, and moves for leave to file surrebuttal testimony in response to new issues raised by those testifying at the local public hearings that should have been included in rebuttal testimony filed by Intervenors, and to reschedule the evidentiary hearings.

Background

To bear its burden in filing testimony to support its request for a Certificate of Convenience and Necessity ("CCN"), Ameren Missouri filed the direct testimony of Craig J. Giesmann [Item No. 30[1]], in accordance with the procedural schedule adopted by the Commission [Item No. 20]. As required by the Commission's rules[2] and the Order Adopting Procedural Schedule (March 19, 2013) [Item No. 20 at ¶ 2(A)] ("Procedural Order"), Mr.

[1] References to an "Item No." are references to the Commission's docket sheet in EFIS. Hyperlinks to all documents are included herein. Hyperlinks to LEXIS are also included to cases and regulations cited herein.
[2] 4 CSR 240-2.130(7)(C).

Giesman testified about the need for the facility, alternatives considered, and the suitability of the site both geologically and topographically, including that the site had been approved by the Missouri Department of Natural Resources ("MDNR"). He also testified regarding its design and planned construction, why it is needed, and testified that both in terms of operation and development costs it would minimize the impact on ratepayers (i.e., it was the lowest cost option). On the same day Ameren Missouri filed Mr. Giesmann's testimony, intervenors Labadie Environmental Organization, Inc. and Sierra Club (hereinafter collectively referred to as "Intervenors") filed a Certification of Charles H. Norris [Item No. 31], who is a geologist and principal in the firm Geo-Hydro, Inc. which indicated that Mr. Norris was working as an expert on behalf of Intervenors. Mr. Norris had appeared and testified before the Franklin County Commission on behalf of Intervenor LEO in opposition to the zoning amendments adopted by Franklin County, providing his expert opinions about various aspects of the disposal of coal combustion products, including relating to groundwater issues, etc. When the time came for all non-Ameren Missouri parties to file rebuttal testimony, however, only Commission Staff filed rebuttal testimony [Item Nos. 33, 34]; Intervenors filed no rebuttal testimony.

Hinting at what was to occur at the local public hearings, Ms. Lipeles, attorney for Intervenors, inquired at a conference with Judge Woodruff on June 19, 2013, whether those testifying at the local public hearing could bring documents to submit to the Commission [Item No. 41 at p. 22] and what the evidentiary standard would be for the admissibility of those documents [Item No. 41 at p. 23]. In response to Ms. Lipeles' suggestion that "everything come in" [*Id.*], the undersigned attorney for Ameren Missouri raised the concern that the local public hearing would be used to admit into the record "all kinds of documents about groundwater and coal ash and all things that maybe purport to make points about science and contamination"

which would lead "to the briefing stage of this case and all these things are being cited as evidence in opposition to the application" [Item No. 41 at pp. 25-26].

While the undersigned counsel for Ameren Missouri did not "want to turn this into a big evidentiary fight,"[3] the concern was expressed that admission of these documents would be unfairly prejudicial to Ameren Missouri and violative of the Commission's rules and due process because public hearings are

> . . . not supposed to be an opportunity for parties to the case to sort of circumvent the prefiled – the requirement to prefile testimony and that things be offered and then cross-examination at the evidentiary hearing take place.

[Item No. 41 at pp. 27-28; 29]. Responding to this concern, Ms. Lipeles confirmed this indeed was the Intervenors' plan:

> Yeah. I mean, their direct was so thin that ***we decided we were going to attack it by other than filing prefiled testimony***. There are people that live in this community that have been aware of Ameren's proposal since it was announced in the fall of 2009 and have educated themselves a lot, ***and they're not experts***, but they're educated neighbors, and they have a lot of concerns and they've done a lot of homework. And this public hearing is an opportunity for them to get their concerns out and ***that's really what our clients are about in this***.

[Item No. 41 at p. 30] (emphasis added). A subsequent news article, which quoted LEO's president, confirmed what Ms. Lipeles said two days earlier: "A local environmental group is preparing to present its case against a coal-ash landfill during an upcoming Missouri Public Service Commission hearing" [Item No. 36 at p. 4].

And that is exactly what happened at the two local public hearings. At the first local public hearing on June 25, 2013, which began at 7:24 p.m. and ended 18 minutes

[3] In order to minimize disruption of the local public hearing and to preserve time at the hearing, it was agreed among the parties and the judge that Ameren Missouri need not object to documents at the local public hearing and would not waive objections by failing to do so, but rather could submit written objections for consideration by the Commission.

before midnight, 24 lay witnesses testified live and one witness submitted her testimony in writing [*see generally,* Item No. 45]. Nearly all of these witnesses were members of LEO or the Sierra Club. In the 14 exhibits submitted to the Commission during this hearing, witnesses sought to introduce 17 technical and/or scientific studies and reports in addition to various news articles regarding alleged environmental pollution or contamination from ash ponds and various documents related to an Illinois EPA matter involving ash ponds (not utility waste landfills) [*see* Item Nos. 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 62, 63, and 65]. Because not everyone could testify during the first hearing, a second local public hearing was held on July 10, 2013 [Item No. 68], at which testimony was taken from 15 witnesses (three of whom had already testified on June 25) and two more scientific studies and one document relating to an environmental enforcement action were offered into evidence [Item Nos. 72, 73, 74]. During both local public hearings, witnesses freely testified as to the contents of these scientific studies and news articles.

As the foregoing demonstrates and as discussed further *infra*, Intervenors, though they clearly "reject" and "disagree . . . [with]" the Company's direct case, have failed to comply with the express requirement of 4 CSR 240-2.130(7)(C), which requires a party that rejects or disagrees with the moving party's direct case to include *all* of its testimony explaining why in its pre-filed rebuttal testimony. As a consequence, due process requires that Ameren Missouri be afforded the ability to file surrebuttal testimony and make the witnesses filing the same available for cross-examination by the parties and Commissioners at the evidentiary hearing addressing what is effectively Intervenors' rebuttal testimony, which will also aid the Commission by answering the myriad of "questions" the Intervenors have raised.

Issue

The issue raised by these motions is this:

> Where Intervenors have used the testimony of lay witnesses at the public hearing to circumvent the Commission's requirements that Intervenors prefile rebuttal testimony and comply with the fundamental rules of evidence, how can the Commission ensure due process is afforded Ameren Missouri and that the Commission has a full record on which to base its decision?

Motion to Strike or Deny Admission of Certain Exhibits

Intervenors' attempt to circumvent several fundamental rules of evidence by offering numerous documents through lay witnesses at the local public hearings should not be tolerated. While it is true this Commission is not bound by the technical rules of evidence, it is still bound by the fundamental rules of evidence:

> Cases brought before administrative agencies generally are less formal and structured than are civil proceedings in the circuit courts. That does not mean that evidentiary rules developed in civil cases have no application to administrative actions, however. To the contrary, the legislature has specifically directed that many evidentiary principles developed in civil actions be applied in administrative ones, including those regarding privilege, judicial notice, admission of writings and documents, depositions and so forth.

State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 154 (Mo. 2003). In fact, the Commission's own regulation at 4 C.S.R. 240-2.130(1) adopts particular rules of evidence found at Mo. Rev. Stat. § 536.070.

A. Fundamental Rules of Evidence Govern the Admissibility of Exhibits Offered at the Public Hearings.

1. Relevance

One of these fundamental rules of evidence is the exclusion of irrelevant evidence. Mo. Rev. Stat. § 536.070(8) ("Irrelevant and unduly repetitious evidence shall be excluded."). 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 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]

The same is true here. The Missouri Department of Natural Resources has the authority to decide whether to permit the proposed utility landfill, to decide if the site is an appropriate location for a utility waste landfill, and to decide if its design, construction and operation are sufficient to be protective of human health and the environment. These are not the principal considerations of the Commission.

2. Proper Foundation

[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 [Item No. 16].

Another fundamental rule of evidence applicable before the Commission is the necessity of laying a proper foundation for the admissibility of writings, documents and records. *See, e.g, Smith et al. v. Morton et al.*, 890 S.W.2d 403, 406 (Mo. App. E.D. 1995) (Confirming that in an administrative proceeding a proper foundation is required even though the technical rules of evidence do not apply); *McDonagh*, 123 S.W.3d at 153 (While recognizing that technical rules of evidence do not apply in administrative proceedings, the Supreme Court also stated that experts could only testify if a proper foundation were laid and that Section 490.065 applied in an administrative proceeding). Proper foundation requires authentication of the document sought to be admitted. *Collins v. West Plains Mem. Hosp.*, 735 S.W.2d 404, 407 (Mo. App. S.D. 1987). In terms of receiving expert testimony, including admission to the record of hearsay as the basis of the expert's opinion, proper foundation also requires compliance with all of the foundational elements of Section 490.065

The Commission, as required by the fundamental rule of evidence requiring a proper foundation, has frequently rejected the admission into evidence of documents for which the proper foundation had not been laid. *See, e.g., In the Matter of the Application by Aquila, Inc., for Authority to Assign, Transfer, Mortgage or Encumber Its Franchise, Works or System*, 2003 Mo. PSC LEXIS 1558 at *2 (Case NO. EF-2003-0465, December 4, 2003) (rejecting Staff request to admit SEC10-Q filing and documents evidencing sale of collateral where no foundation could be laid for exhibits); *In the Matter of Union Electric Co. of St. Louis, Mo., for Authority to File Tariffs Increasing Rates for Electric Service*, 1983 Mo. PSC LEXIS 19 at *10 (Case No. ER-1983-0163, October 21, 1983) (rejecting utility's request to admit Proposition I campaign literature where no foundation laid to identify authors or to describe their connection with Proposition I); *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase*

Rates for Gas Service, 2000 Mo. PSC LEXIS 1186 at *3 (Case No. GR-1998-0140, August 10, 2000) (denying admission of IRS letter ruling because, among other grounds, no foundation had been laid for its admission).

The requirement that proper foundation be laid before a document is admitted into evidence equally applies to scientific studies and reports:

The requirement that a witness be able to lay the proper foundation for scientific studies or surveys is reflected in Section 536.070(11):

> The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility.

Mo. Rev. Stat. § 536.070(11). Within § 536.070(11), the witness must testify as to the accuracy of the statistical examination, study, audit, compilation of figures or survey before it can be admitted into evidence. *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 87-88 (Mo. 1960); *In the matter of the Application of Ill. Central Gulf R.R. Co.*, 1982 Mo. PSC LEXIS 51 at *35 (Case No. RS-80-321, January 22, 1982). None of the lay witnesses who offered the exhibits addressed below have the ability to meet these foundational requirements.

3. Bar Against Hearsay

The bar against the admission of hearsay evidence over objection is also a fundamental rule of evidence before the Commission. *Lee v. Missouri Am. Water Co.*, 2009 Mo. PSC LEXIS

430 at *2-*3 (Case No. WC-2009-0277, May 19, 2009). This is because the value of hearsay evidence depends on the *declarant's* credibility evaluated under cross-examination; where there is no opportunity for the declarant to be cross-examined, that determination cannot be made. *Id.* Because the right to cross-examination of opposing witnesses is a fundamental due process right, hearsay evidence must be excluded upon objection to its admission. *In the Matter of the Application of Keith Mallory for a Certificate of Convenience and Necessity to Haul Mobile Homes*, 1982 Mo. PSC LEXIS 20 at *7 (Case No. T-48,374, September 20, 1982). Where there is an objection made, hearsay evidence does not rise to the level of "competent and substantial evidence" upon which the Commission can base its decision. *State ex rel. Marco Sales, Inc. v. Pub. Serv. Comm'n*, 685 S.W.2d 216, 220 (Mo. App. W.D. 1984); *State ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949). Reliance on such information would therefore constitute error by the Commission.

Application of this fundamental rule of evidence by the Commission has resulted in the exclusion of an affidavit that merely relayed what the affiant learned from another person (*McFarlin v. KCPL&L Greater Mo. Operations Co.*, 2013 Mo. PSC LEXIS 311 at *5-*6 (Case No. EC-2013-0024, March 21, 2013)); exclusion of website pages, as well as testimony from an unrelated public hearing (*Lee*, 2009 Mo. PSC LEXIS 430 at *2-*3); exclusion of anonymous letters (*In the Matter of the Joint Application of Great Plains Energy Inc., KCP&L Co., and Aquila, Inc., for Approval of the Merger of Aquila, Inc.*, 2008 Mo. PSC LEXIS 693 at *26 (Case No. EM-2007-0374, July 1, 2008); and exclusion of letters from various witnesses who were not present to testify at hearing (*In the Matter of the Application of Keith Mallory*, 1982 Mo. PSC LEXIS at *6-*7). It is equally true that where the information in them is offered for the truth of the matter asserted, newspaper articles or clippings also constitute inadmissible hearsay. *Wessel*

v. Wessel, 953 S.W.2d 630, 631 (Mo. App. S.D. 1997) citing *Thoroughbred Ford, Inc. v. Ford Motor Co.*, 908 S.W.2d 719, 736 (Mo. App. W.D. 1995); *McDowell v. LaFayette Co. Comm'n*, 802 S.W.2d 162, 166 (Mo. App. W.D. 1990).

4. Standards for Expert Testimony

Finally, as noted earlier, the standards for admission of expert testimony constitute a fundamental rule of evidence in administrative proceedings such that expert testimony must meet the standards for admissibility set out in Mo. Rev. Stat. § 490.065. *McDonagh*, 123 S.W.3d at 154-155. This statute expressly allows opinion testimony only from experts in the relevant area established as such by proper foundation, and requires a showing that facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert's testimony. 123 S.W.3d at 156, *citing* Mo. Rev. Stat. § 490.065.3. Where an expert merely acts as a conduit for another expert's opinion by testifying as to opinions contained in documents he or she has reviewed, however, such testimony is hearsay and inadmissible. *Bruflat v. Mister Guy, Inc*., 933 S.W.2d 829, 833 (Mo. App. W.D. 1996); *State ex rel. Missouri Hwy. & Transp. Comm'n v. Modern Tractor & Supply Co.*, 839 S.W.2d 642, 655 (Mo. App. S.D. 1992).

It is equally important to note that even where an expert relies upon documents containing facts and data of a type reasonably relied on by experts in the field in forming his or her opinions, the underlying documents are not admissible absent proper foundation. *Wilson v. ANR Freight Sys., Inc.*, 892 S.W.2d 658, 664-65 (Mo. App. W.D. 1994). This is because the books or publications are often hearsay evidence of matters concerning which living witnesses could be called to testify. *Longshore v. City of St. Louis*, 699 S.W.2d 16, 18 (Mo. App. E.D. 1985).

B. Certain Exhibits Offered at the Public Hearings Do Not Meet these Fundamental Rules of Evidence.

Many of the exhibits offered by those testifying at the two public hearings fail to meet the fundamental rules of evidence and, therefore, are not admissible as evidence in this proceeding.

1. Exhibit C

Exhibit C [Item No. 48], introduced by witness Petra Haynes [Item No. 45 at pp. 23-24], consists of the following documents:

- "Coal Combustion Waste Damage Case Assessments" (U.S. E.P.A. Office of Solid Waste; July 9, 2007);
- "Out of Control: Mounting Damages from Coal Ash Waste Sites" (Environmental Integrity Project and Earthjustice; February 24, 2010);
- "In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans And Their Environment" (Environmental Integrity Project, Earthjustice and Sierra Club; August 26, 2010)[5];
- "Risky Business – Coal Ash Threatens America's Groundwater Resources at 19 More Sites" (Environmental Integrity Project; October 31, 2011);
- "Forty-Nine Coal-Fired Plants Acknowledge Groundwater Contamination in Response to EPA Collection Data" (Environmental Integrity Project; April 2012);
- "Final Report – Inspection 2009 – 12991 – TVA's Groundwater Monitoring at Coal Combustion Products Disposal Areas" (Office of Inspector General; June 21, 2011); and
- "State of Failure – How States Fail to Protect Our Health and Drinking Water from Toxic Coal Ash" (Earthjustice and Appalachian Mountain Advocates; August 2011).

Ms. Haynes, who has no expert qualifications, testified she had not prepared any of these documents but had obtained them from various sources – mostly from the internet; further, she testified that neither she nor LEO had any first-hand knowledge about the investigation methods,

[5] Witness Celeste Nohl-Smith also introduced a portion of this document (the cover page and pp. 51-55 of the document) in her testimony [Item No. 45 at p. 134] as part of Exhibit Q [Item No. 62]. Ms. Nohl-Smith was unable to provide any other qualification or foundation for the document [Item No. 45 at pp. 129-136]; as such, that portion of Exhibit Q is inadmissible and should be stricken from the record.

analysis, or data-gathering methods performed by the authors of the studies [Item No. 45 at pp. 25-28].

Exhibit C, comprised of various scientific studies or purported scientific studies, is not admissible in this proceeding because these documents are irrelevant to the issues before this Commission, no proper foundation has been laid for their admission, and the documents constitute hearsay testimony of which Ameren Missouri is deprived of the opportunity to cross-examine the authors (i.e, the declarants) of those studies to test their reliability or to even test whether the authors themselves would duly qualify as experts. Ameren Missouri objects to Exhibit C on these bases, and it should be stricken from the record.

2. Exhibit D

Exhibit D [Item No. 49], introduced at public hearing by retired American History teacher Susan Cunningham [Item No. 45 at pp. 30-36], is comprised of the following news articles:

- "Ameren Coal Ash Uses Mine Field Near St. Genevieve" (www.stltoday.com, March 31, 2013);
- "Illinois AG Says Ameren Weekly Disposed of Coal Ash" (www.stltoday.com, February 7, 2013); and
- "Shareholders Push for Ameren to Cut Ties to ALEC" (PR Watch, June 25, 2013).

Ms. Cunningham, who is not an expert, did not know of the contents of these newspaper articles; she only knew what she read in these news articles, which she obtained from an internet search. [Item No. 45 at pp. 30-35].

Exhibit D is not admissible at hearing because it is comprised solely of hearsay, as well as hearsay within hearsay, and lacks a proper foundation. In addition, the topics of these articles – coal ash pond issues of a different corporation in Illinois, coal ash disposal from Ameren Missouri's Rush Island plant, and shareholder pressure on various unrelated companies to stop

funding ALEC – are wholly irrelevant to the issues now before the Commission. Ameren Missouri objects to Exhibit D on these bases, and it should be stricken from the record.

3. Exhibit E

Exhibit E [Item No. 50], introduced by witness Ron Trimmer [Item No. 45 at pp. 43-50], at the public hearing on April 25, 2013, contains the following inadmissible documents:

- How Much Do Health Impacts from Fossil Fuel Electricity Cost the U.S. Economy?" (Justin Gerdes; Forbes; April 8, 2013); and
- "Meredosia – Arsenic and Old Lace Bottled Water" (excerpt from Risky Business; Environmental Integrity Project; December 12, 2011).

Mr. Trimmer, a member of Intervenor Sierra Club, has a Ph.D. in education and who works as a geologist for the Department of Defense, did not testify he had first-hand knowledge of the information in these articles or that he had any expertise in the topics of these articles [Item No. 45 at pp. 43-50].

These two documents contained in Exhibit E are inadmissible because no proper foundation was laid, and they constitute hearsay and hearsay within hearsay. Ameren Missouri objects to Exhibit E on these bases, and it should be stricken from the record.

4. Exhibit F

Former educator Lloyd Klinedinst introduced Exhibit F [Item No. 51] at public hearing [Item No. 45 at p. 56]; Exhibit F contains the following inadmissible documents:

- June 27, 2012 Violation Notice from Illinois EPA re: Coffeen Generating Station;
- February 13, 2013 Notice of Intent to Pursue Legal Action from Illinois EPA re: Coffeen Generating Station;
- June 27, 2012 Violation Notice from Illinois EPA re: Grand Tower Generating Station;
- February 13, 2013 Notice of Intent to Pursue Legal Action from Illinois EPA re: Grand Tower Generating Station;
- June 27, 2012 Violation Notice from Illinois EPA re: Meredosia Generating Station;
- June 27, 2012 Violation Notice from Illinois EPA re: Newton Generating Station;
- August 14, 2012 Violation Notices - Grand Tower, Newton, Coffeen, and Meredosia; and
- August 14, 2012 Letter from Ameren to Illinois EPA re: Violation Notices for Grand Tower, Newton, Coffeen, and Meredosia.

Mr. Klinedinst, whose educational background is in media, language, and French, is a member of LEO; Mr. Klinedinst acknowledged he possessed no expertise in environmental matters himself, but testified that members of LEO collect data from articles and reports by experts [Item No. 45 at p. 58].

Documents contained in Exhibit F are inadmissible because they constitute hearsay and no foundation was laid for their admissibility; indeed, Mr. Klinedinst does not pretend to have any first-hand knowledge or expertise regarding environmental matters in Illinois involving ash ponds operated by an affiliate of Ameren Missouri. Importantly, these documents also do not overcome the first hurdle of admissibility—relevance. These documents relate to contamination at ash ponds in Illinois; in no way do they relate to the issues before the Commission; moreover, even if environmental safety was a primary concern of the Commission, neither the witness's testimony nor the documents he seeks to admit into evidence relate to any material issue surrounding the construction and operation of the utility waste landfill proposed by Ameren Missouri. Accordingly, Ameren Missouri objects to Exhibit F on these bases, and it should be stricken from the record.

5. Exhibit G

Mr. Klinedinst's wife, Barbara Bollman, introduced Exhibit G [Item No. 52] at the public hearing [Item No. 45 at p. 64]. Exhibit G contains the following inadmissible documents:

- "Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard" (February 6, 2013) (www.epa.gov/airquality/sulfurdioxide/pdfs/20130207SO2StrategyPaper.pdf); and
- "State Pressed to Monitor SO2 Pollution Near Coal Plants" (www.stltoday.com; June 28, 2012).

Ms. Bollman did not testify she had any first-hand knowledge of the matters contained in these hearsay documents and is not an expert in the areas addressed by the documents; nor did she

provide any other foundation for their admissibility [Item No. 45 at pp. 59-64]. The news article and the paper she printed off of the internet relate to purported air pollution issues, which are wholly irrelevant to whether a utility waste landfill is in the public interest; accordingly, Ameren Missouri objects on these bases to Exhibit G, and it should be stricken from the record.

6. Exhibit H

Ann Schwetye introduced Exhibit H [Item No. 53] at the public hearing on June 25, 2013 [Item No. 45 at pp. 72-73]. Exhibit H contains the following inadmissible documents:

- "National Flood Policy Challenges – Levees: The Double-Edged Sword" (Ass'n of State FloodPlain Managers, April 17, 2007);
- "Difference Between Flood Plain and Flood Way" (YouTube video; date unknown);
- "So, You Live Behind a Levee!" (Am. Soc. Of Civil Eng., 2010);
- "Fact Sheet – Living Behind Levees" (FEMA, January 2008);
- "Floodway and Flood Hazard Areas at the Proposed Site" [Satellite Map] (Washington Univ. Interdisciplinary Environ. Clinic, date unknown);
- "Earthquake Hazards Map of the St. Louis, Missouri Metro Area" (unknown); and
- "Flood Risk at Labadie Bottoms, Franklin County, Missouri" (Robert E. Criss, December 9, 2010).

Ms. Schwetye, who was a planner in an architectural firm she owned with her husband and who currently operates a building information management firm, provided no credentials in her testimony that would qualify her as an expert on floodways or earthquakes; particularly, she admitted she did not have any specialized education or training or experience in engineering, geology, or hydrogeology, and could only offer her *assumptions* as to the type of information upon which an engineer designing a landfill would rely [Item No. 45 at pp. 65-77]. Moreover, Ms. Schwetye did not claim to have any first-hand knowledge related to the information she presented to the Commission in Exhibit H; for example, Ms. Schwetye found the YouTube video after an internet search. *Id.*

There is no basis for the admission of the documents and YouTube video Ms. Schwetye offered in Exhibit H. Each is irrelevant to the issues before the Commission, and many of them

address the effect of levees on rivers rather than construction in a floodplain or floodway. Without first-hand knowledge of the preparation, analysis, or facts in any of the documents or video, Ms. Schwetye cannot lay the proper foundation for admission of these exhibits—even those prepared by the environmental clinic directed by LEO's attorney, Ms. Lipeles, or by an alleged expert at Washington University who himself is of course not subject to cross-examination about his paper. Finally, each of the documents and the video amount to nothing more than hearsay, and their admission would deprive Ameren Missouri of the ability to test the credibility of the sources of the information contained therein, thereby depriving Ameren Missouri of its due process rights. Therefore, Ameren Missouri objects to the documents and video in Exhibit H, and it should be stricken from the record.

7. Exhibit I

Christine Alt, a former educator, introduced Exhibit I [Item No. 54] at the public hearing [Item No. 45 at pp. 82-84], which contained the following inadmissible documents:

- "Ameren Coal Ash Used as Mine Fill Near St. Genevieve" (www.stltoday.com, March 31, 2013);
- "Leaks from the Ameren Toxic Waste Pond in Labadie Stirs Fears" (www.stltoday.com, September 1, 2011)[6]; and
- "EPA Settlement Raises Questions About Coal Ash in Missouri" (www.stltoday.com, May 31, 2013).

Ms. Alt admitted she had no background in hydrology, law, geology, or biology; rather, she qualified herself as a speaker because she was an educator and she is a mother [Item No. 45 at p. 78]. In addition, Ms. Alt did not testify as to any personal, first-hand knowledge of the

[6] This same article was introduced by LEO board member Gerry Friedman at the public hearing [Item No. 45 at pp. 103-109] as part of Exhibit M [Item No. 58]. The objections to its admission through Ms. Alt also apply to bar its admission through Ms. Friedman – the news article is inadmissible hearsay, lacks foundation, and is irrelevant to the construction and operation of a utility waste landfill at the Labadie plant.

information in the three news articles and, as such, lay the necessary foundation for the admission of these news articles. Even if proper foundation were laid (it was not) for these news articles, they are irrelevant to the issues that are before the Commission and within the Commission's authority to remedy.

That these news articles (containing, for example, quotes from Ms. Lipeles and an attorney for Earthjustice) are inadmissible hearsay is obvious; there being no exception to the hearsay rule to allow their admission. As such, Ameren Missouri objects to Exhibit I on these bases and it should be stricken from the record.

8. Exhibit J

Labadie resident Ron Matheny offered into evidence at the public hearing in Union, Missouri [Item No. 45 at p. 87] Exhibit J [Item No. 55], which contains the following inadmissible document:

- "Green – A Blog About Energy and the Environment: Twilight of the Coal Era?" (green.blogs.nytimes.com, June 14, 2010).

Mr. Matheny proposed in his testimony that Ameren Missouri convert two of the four boilers at the Labadie plant to natural gas, and in support for this argument, offered a blog he had printed off of the internet about other utilities doing the same thing [Item No. 45 at p. 87].

This article is simply irrelevant. Whether the Commission should grant a CCN to increase the Labadie plant's borders so that it may construct a utility waste landfill does not in any way present an issue to the Commission as to whether Ameren Missouri should switch to natural gas. Moreover, the article is hearsay and Mr. Matheny offered no first-hand knowledge of the facts contained therein nor did he hold himself out as an expert in coal plant conversion. Ameren Missouri objects to Exhibit I on the foregoing bases, and it should be stricken from the record.

9. Exhibit K

Dr. Jerry Friedman, a retired pediatrician and clinical pediatrics professor, introduced Exhibit K [Item No. 56] in the public hearing on June 25, 2013 [Item No. 45 at pp. 90-93]. Exhibit K is comprised of two inadmissible documents:

- "Health Effects Associated with Coal Combustion Residues" (compiled by R. Gregory Evans, Ph.D., M.P.H.; undated); and
- "Coal Ash: The Toxic Threat to Our Health and Environment" (Physicians for Social Responsibility and EarthJustice; Barbara Gottlieb with Steven G. Gilbert, Ph.D., DABT, and Lisa Gollin Evans; September 2010).

Although Dr. Friedman would likely qualify as an expert in pediatrics, he did not offer any testimony regarding his education, training or experience that would qualify him as an expert in toxicology or on the effects of coal ash stored on-site at a power plant on health or the environment [Item No. 45 at pp. 90-94]. This is obvious in the fact that Exhibit K includes articles containing the expert opinions of those other than Dr. Friedman. Merely adopting the expert opinions of others is not proper expert opinion testimony, nor does it make the documents containing those expert opinions admissible. *Bruflat* 933 S.W.2d at 833; *Modern Tractor & Supply Co.*, 839 S.W.2d at 655.

Although this Commission is not charged with protecting the environment (thereby making these documents irrelevant to any issue in the case), Dr. Friedman has not—indeed, cannot—lay the proper foundation so these documents would be properly admissible as evidence in this action. Although they may contain the expert opinions of others (even expert opinions presumably about Labadie), they constitute nothing more than hearsay here, and Dr. Friedman cannot be used by intervenors to gain the admission of this purported expert testimony outside the normal procedures of the Commission and beyond the ability of Ameren Missouri to cross-

examine those purported experts who authored them. Simply put, Exhibit K is inadmissible for the foregoing reasons and should be stricken from the record.

10. Exhibit N

Former LEO board member Richard Haynes introduced Exhibit N [Item No. 59] at the public hearing [Item No. 45 at pp. 110-117], and Exhibit N is comprised of the following inadmissible document:

- "Net Loss: Comparing the Cost of Pollution vs. the Value of Electricity from 51 Coal-Fired Plants" (Environmental Integrity Project; June 2012).

Although a research chemist at Monsanto for 30 years, Mr. Haynes relied on this background to talk about sulfur dioxide and sponsored Exhibit N, a study performed by an environmental group on the cost of sulfur dioxide emissions [Item No. 45 at pp. 110-116], rather than any issue related to the utility waste landfill at Labadie. While it has been a familiar refrain regarding many of the exhibits offered at the public hearing by LEO members that they are irrelevant to any issue before this Commission, it is no less true regarding Exhibit N.

Even if sulfur dioxide emissions were relevant to any issue in this proceeding, Mr. Haynes failed to provide testimony that would lay the foundation for admissibility of Exhibit N. At most, Mr. Haynes merely adopts the purported expert opinions in Exhibit N, and this does not remove Exhibit N from classification as inadmissible hearsay testimony. For these reasons Ameren Missouri objects to Exhibit N, and it should be stricken from the record.

11. Exhibit Q

Active in LEO since its inception, Celeste Nohl-Smith offered Exhibit Q [Item No. 62] at the public hearing [Item No. 45 at pp. 128, 134]. Exhibit Q contains the following inadmissible documents:

- "In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans And Their Environment" (Environmental Integrity Project, Earthjustice and Sierra Club; August 26, 2010) (selected portions only)[7]; and
- March 25, 2010 letter to Illinois EPA from Ameren regarding "Ash Pond Closures at AmerenUE's Venice Plant.

Although she is a nurse, Ms. Nohl-Smith provided no testimony that would qualify her as an expert or otherwise would constitute a proper foundation for any document in Exhibit Q [Item No. 45 at pp. 127-136].

The letter to the Illinois EPA is hearsay and cannot constitute an admission against interest to avoid the hearsay bar because the statements made therein were not made by anyone authorized to speak on behalf of Ameren Missouri; indeed, they could not as they relate to environmental issues in Illinois and not to any material issue in this proceeding. With no relevance to this proceeding nor foundational basis for the admission of Exhibit Q, Ameren Missouri objects to it and it should be stricken from the record in this case.

12. Exhibit R

Retired IBM marketing manager John George introduced Exhibit R [Item No. 63] at the Union, Missouri, public hearing [Item No. 45 at pp. 149, 151]. Exhibit R contains the following inadmissible document:

- "Potential Contamination of Domestic Wells in the Labadie Bottoms, Franklin County, Missouri" (Robert E. Criss, December 9, 2010).

As an active member of LEO, Mr. George has met the author of this purported study; in fact, Dr. Criss actually performed a study of Mr. George's well back in 2007 [Item No. 45 at pp. 150-153]. Nonetheless, Mr. George had nothing to do with the study performed by Dr. Criss and

[7] A complete copy of this document was also submitted at hearing by Ms. Haynes as part of Exhibit C [Item No. 48], and Ameren Missouri refers the Commission to its earlier discussion regarding why the study is inadmissible. Motion at pp. 9-10 and n.2 at p. 9, *supra*.

included in Exhibit R; Mr. George, who has no education, training or experience in engineering, hydrology or toxicology, obtained the study from LEO and asserted he did not know whether LEO had engaged Dr. Criss for the study. *Id.*

This is yet another instance in which LEO is improperly attempting to insert into the evidentiary record in this case expert testimony without the testimony of the expert himself but through a lay witness outside the Commission's rules which required LEO (and Sierra Club) to include in their rebuttal testimony (which they consciously chose not to file) "*all* testimony which explains why a party rejects, *disagrees* or proposes an alternative to the moving party's direct case." 4 CSR 240-2.130(7)(C) (emphasis added). Mr. George provided no foundation for the exhibit, nor can he as he is not an expert in hydrology or have any first-hand knowledge of how the study was performed. The report by Dr. Criss in Exhibit R is nothing more than inadmissible hearsay on matters outside the issues properly before this Commission authored by a witness not subject to cross-examination. For these reasons Ameren Missouri objects to Exhibit R, and it should be stricken from the record.

13. Exhibit T

Janet Dittrich, a founding member of LEO, introduced Exhibit T [Item No. 65] at the first public hearing in this case [Item No. 45 at pp. 157-163]. Exhibit T contains the following inadmissible documents:

- "Inhalation of Fugitive Dust – A Screening Assessment of the Risks Posed by Coal Combustion Wastes Landfills" (portions) (U.S. E.P.A., May 2010); and
- January 26, 2010 Letter from U.S. E.P.A., Region VII, to Warner Baxter re: Notice of Violation under Section 113(a)(1) of the Clean Air Act."

Although she testified regarding her concerns about air quality related to ash waste landfills, Ms. Dittrich, a science teacher at a private school, did not provide testimony which would qualify her as an expert on these issues; instead, she adopted the opinions expressed in the portions of the

EPA report in Exhibit T without providing testimony as to the foundation for the report itself [Item No. 45 at pp. 157-163]. The selected portions of the report[8] offered by Ms. Dittrich are inadmissible hearsay.

In addition, the Notice of Violation she also included in Exhibit T is inadmissible. The document is without foundation and is vague as to the specific violations alleged against Ameren Missouri at the different sites mentioned in the letter [*see* Item No. 65]. As such, the probative value of the letter is slight. Because it is not this Commission's duty (but MDNR's) to ensure the safety of the environment in the operation of the utility waste landfill, neither the letter nor the EPA study in Exhibit T is relevant to any material issue in this proceed. For these reasons, Ameren Missouri objects to Exhibit T and it should be stricken from the record.

14. Exhibit AA

At the second public hearing [Item No. 68 at pp. 23, 25] LEO member Adrian Hutton introduced Exhibit AA [Item No. 72], comprised of the following inadmissible document:

- "Leaching Methods Applied to the Characterization of Coal Utilization By-Products" (National Energy Technology Laboratory, U.S. D.O.E.; Ann G. Kim; undated).

While Mr. Hutton is credentialed as a chemical engineer and has worked for Monsanto and Waste Management, he did not provide testimony which would qualify him as an expert on leaching methods and their relationship to coal ash byproducts; rather, Mr. Hutton's testimony was primarily aimed at his belief that Ameren Missouri had not sufficiently considered alternatives to constructing a utility waste landfill and, though unfamiliar with the detailed site

[8] Ms. Dittrich later offered a complete version of this same EPA report as Exhibit BB [Item 73] when she returned to the second public hearing [Item No. 68 at p. 43]. Even though the EPA report was offered complete as Exhibit BB, it remains inadmissible for the same reasons that Exhibit T is inadmissible. Likewise, we object to Exhibit BB and it should be stricken from the record.

investigation submitted to and accepted by the Missouri DNR, or the specifics of the actual landfill proposal, his concern was the engineering was insufficient for the landfill and that the site was not properly selected [Item No. 68 at pp. 16-31].

Even if Mr. Hutton was qualified to testify as an expert, he cannot rely on a hearsay report merely to adopt the expert opinions in that report as his own testimony—but that is just what he does [Item No. 68 at pp. 21-22]. Moreover, Mr. Hutton expressed no first-hand knowledge of the study, how it was performed, or of the analysis used; as such, he cannot provide the proper foundation for its admissibility. Finally, while the study may be relevant for MDNR's consideration, it is not relevant to any material issue before this Commission. For these reasons, Ameren Missouri objects to Exhibit AA and it should be stricken from the record.

15. Exhibit CC

At the second public hearing [Item No. 68 at p. 46], Joseph Grohs submitted as Exhibit CC [Item No. 74] the following inadmissible document:

- Administrative Order on Consent: *In the Matter of Rotary Drilling Supply, Inc.*, Docket No. RCRA-07-2012-0028 (U.S. E.P.A. - Region VII, March 29, 2013).

Although Mr. Grohs, a former city councilman and mayor in Festus, Missouri, sought to introduce Exhibit CC, he has no first-hand knowledge of the matter contained therein: Mr. Grohs admits he was totally unaware of the matter or even of the pollution concerns at the Rotary Drilling site; moreover, when questioned about the case, Mr. Grohs could not provide a specific answer [Item No. 68 at pp. 47, 49]. As such, Exhibit CC lacks foundation.

Exhibit CC, which is inadmissible because it is nothing other than hearsay testimony, is also not at all relevant to this proceeding. Rotary Drilling apparently owned property and disposed of 140,000 tons of coal combustion residue and various other wastes at the site onto wetlands in the area and a small tributary; moreover, the wastes were not disposed in a formal

landfill but were simply dumped in a wetlands area [Item No. 74 at pp. 1-7]. These facts, about which Mr. Groh has no personal knowledge, have no relevance to the proper disposal of coal ash in a landfill designed according to EPA and MDNR regulation. Absent any relevance to the material issues in this case and for the other reasons cited above, Ameren Missouri objects to Exhibit CC and it should be stricken from the record in this case.

Relief Sought

Not only have Intervenors attempted to bypass this Commission's rules which require them to make their case in pre-filed testimony,[9] Intervenors are attempting to bypass the fundamental rules of evidence which bind all who practice before the Commission by using lay witnesses[10] to insert into the evidentiary record hearsay evidence which has no foundation and which is irrelevant to the issues in this proceeding. To allow consideration of these inadmissible documents would prevent Ameren Missouri it fundamental due process right to a fair and just hearing on its Application.

[9] As noted, under Commission rules they were required to file "*all* testimony which explains why they reject or disagree with Ameren Missouri's direct case.

[10] No doubt Intervenors will argue that these witnesses, though members of LEO or the Sierra Club, testified on their own behalf and not on behalf of LEO [*see, e.g.*, Item No. 68 at p. 74: Ms. Lipeles: "Ms. Haynes, you're speaking on behalf of yourself and not on behalf of LEO even though you're a member of LEO, is that correct?"]. Even though this point was not made by witnesses until the second local public hearing [*see, e.g.*, Item No. 45 at pp. 14-15, 19 (Ms. Haynes testifying about the formation of LEO and its efforts opposing the landfill, and offering as evidence information LEO had collected)] and after Ms. Lipeles sought to allow admission of the exhibits offered by witnesses into the record but preclude questioning of these witnesses about their affiliation with LEO [Item Nos. 37 and 39], whether they testified on their own behalf or not is irrelevant to the inadmissibility of the exhibits offered. The exhibits are still inadmissible. Indeed, Ms. Lipele's judicially admitted that these witnesses are not experts. [Item No. 41 at p. 30].

Motion for Leave to File Surrebuttal Testimony

In keeping with the long-standing procedure set out in the Commission's rules, Judge Woodruff ordered the parties in this case to comply with certain procedural requirements, specifically including the following:

> Testimony shall be prefiled as defined in Commission Rule 4 CSR 240-2.130. ***All parties must comply with this rule***, including the requirement that testimony be filed on line-numbered pages.

Procedural Order [Item No. 20 at ¶ 2(A)] (emphasis added). As the Commission has noted a multitude of times, "[t]he practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing." *See, e.g.*, *Southwestern Bell Tele. Co.'s Complaint Against Mid-Missouri Tele. Co. for Blocking Southwestern Bell's 800 MaxiMizer Traffic*, 2000 Mo. PSC LEXIS 351 at *2 (Case No. TC-2000-325, March 3, 2000); *In the Matter of the Tariff Filing of Laclede Gas Co.*, 2002 Mo. PSC LEXIS 1199 at *2 (Case No. GT-2003-0032, August 29, 2002). Indeed, due process "includes knowing the opponent's claims, hearing the evidence submitted, confronting and cross examining witnesses, and submitting one's own witnesses." *State ex rel. Util. Consumers Council*, 562 S.W.2d at 694.

Accordingly, issues to be considered by the Commission during hearing should be raised in a party's pre-filed testimony. *In the Matter of an Investigation into Whether Ratepayers are Being Held Harmless from the Taum Sauk Disaster*, 2007 Mo. PSC LEXIS 1530 at *5 (Case No. ER-2008-015, December 26, 2007). In those instances where a party raises an issue after the pre-filing of testimony—even at the hearing itself, the other parties are afforded a reasonable

opportunity to present additional evidence on the issue. *Id.*, *citing* 4 CSR 240-2.130(8).[11] This is in accordance with ensuring that the applicant's due process rights are not violated.

Intervenors have sidestepped this Commission's rules by using the testimony of lay witnesses to make their rebuttal case in opposing Ameren Missouri's request for a CCN, and this is true even apart from all of the inadmissible hearsay offered by Intervenors through the inadmissible exhibits they introduced at the public hearings. As noted earlier, this is not a case where random members of the general public showed-up and testified about their individualized views at a local public hearing, as Ms. Lipele's statements ("***we decided we were going to attack it by other than filing prefiled testimony***" and "this public hearing is an opportunity for them to get their concerns out and ***that's really what our clients are about in this"***) demonstrate. LEO and its members are Ms. Lipele's clients. LEO intervened in this case, which brought with it both the rights *and obligations* of a party to the case. LEO has a "science committee" that sought out much of the hearsay documents they seek to rely upon in this case. *See, e.g.*, Item No. 45 at p. 26, l. 4-6; p. 104, l. 16-20. They, or experts on their behalf (who could have relied upon hearsay documents as a basis for their expert opinions if the foundational requirements of Section 490.065 were met), could have and should have filed rebuttal testimony – they chose not to. Had they done so discovery could have been conducted respecting the witnesses and preparation to cross-examine them – both by the other parties and the Commissioners – could have been completed. As the Commission has stated, it is not "sound public policy to allow parties to engage in tactical legal manipulation of cases." *In re: Joint Application of Great Plains Energy et al.*, 2008 Mo. PSC LEXIS 820 at *17-*18 (Case No. EM-2007-0374 August 5, 2008). Here there has not only been manipulation, but there has been manipulation in direct violation of the

[11] The provision of the rule has since been re-numbered as subsection (10).

Commission's rules and long-established processes, including the attempted littering of the record with hearsay documents not used as a basis for any proper expert opinion.

Through their organized efforts to rebut Ameren's direct case, Intervenors have raised issues including (1) environmental issues related to ash ponds operated by operating subsidiaries of Ameren Corporation in Illinois meant that Ameren Missouri could not be trusted to operate a utility waste landfill at Labadie, (2) that the design and engineering of the landfill was insufficient to prevent toxic chemicals from escaping the landfill and polluting the environment, (3) that the site is unsuitable for a utility waste landfill and (4) that drinking water wells in the area would be contaminated by toxic chemicals escaping into the groundwater.

Specifically, the following witnesses at the public hearing raised concerns regarding the environmental issues related to ash ponds operated by operating subsidiaries of Ameren Corporation in Illinois:

- Petra Haynes [Item No. 45 at p. 17]: asserting that Illinois requires groundwater monitoring around utility ash ponds;
- Susan Cunningham [Item No. 45 at p. 32]: characterizing complaint filed by Illinois Attorney General against Ameren Energy Resources arising from coal ash disposal at Duck Creek plant;
- Ron Trimmer [Item No. 45 at pp. 43-44]: asserting that Ameren in Illinois is not capable of managing coal ash responsibly as demonstrated by "Risky Business" study;
- Lloyd Klinedinst [Item No. 45 at p. 53]: testifying that the Illinois EPA has cited Ameren in Illinois with four notices of violation and that the Illinois Attorney General has issued four notices of intent to pursue legal action;
- Christine Alt [Item No. 45 at pp. 80-81]: asserting that Ameren Illinois has proven that it cannot manage coal ash;
- Celeste Nohl-Smith [Item No. 45 at p. 130]: discussing Venice, Illinois ash pond contamination;
- John George [Item No. 45 at pp. 147-148]: asserting that Illinois EPA requires groundwater monitoring of coal ash disposal sites and that Illinois groundwater has been contaminated by coal ash;
- Gregg Aubuchon [Item No. 68 at pp. 8-9]: asserting that Ameren is "getting out of" Illinois because it didn't plan on cleaning up its landfills; and

- Stuart Keating [Item No. 68 at p. 65]: asserting that Ameren is currently under investigation by the EPA for several illegal dumping sites in Illinois.

Another issue raised by the following witnesses for Intervenors at the public hearings was that the design and engineering of the landfill was insufficient to prevent toxic chemicals from escaping the landfill and polluting the environment:

- Ann Schwetye [Item No. 45 at pp. 68-70]: asserting flooding or an earthquake could compromise the landfill structure and cause environmental pollution and whether the structures are adequate to mitigate environmental consequences;
- Kay Genovese [Item No. 45 at p. 102]: asserting that the landfill will sit on top of groundwater and that the plastic liner will not prevent toxic materials from escaping into the environment;
- Celeste Nohl-Smith [Item No. 45 at p. 131]: questioning whether the landfill design was adequate because "DNR had to come back and instruct them that we need more;"
- Ruth Campbell [Item No. 68 at p. 13]: asserting that a "thin plastic type barrier" would not prevent waste from leaking from the landfill;
- Adrian Hutton [Item No. 68 at pp. 18-21]: asserting that there was "too little understanding of the engineering facts and details of this proposed or alternate project designs," questioning the adequacy of the design to prevent "toxic wastes" from escaping the landfill, and raising concerns about the "last minute engineering recommendations" made to the landfill design;
- John Hollowich [Item No. 68 at pp. 33-34]: raising his concerns about the impact of natural disasters on the landfill, including the impact of an earthquake related to the New Madrid fault on the landfill;
- Lisa Venezia [Item No. 68 at pp. 57-59]: positing that the coal ash residue was now more toxic and raising concerns about the placement of this ash in a landfill located in a floodplain that is earthquake susceptible;
- Stuart Keating [Item No. 68 at pp. 65-66]: raising concerns about potential cleanup costs "when, not if" something goes wrong with the landfill; and
- Petra Haynes [Item No. 68 at pp. 68-70]: asserting that plastic liners break and questioning whether the concrete design would be effective.

And even though there was no live expert testimony regarding the actual hydrological connection between groundwater at the proposed site and neighboring wells, the following witnesses testified of a fear that their drinking water wells would become contaminated by the utility waste landfill:

- Dianna Haynes [Item No. 45 at pp. 7-10]: asserting that drinking water sources in the area would be polluted by the utility waste landfill;
- Petra Haynes [Item No. 45 at pp. 16-17, 21]: asserting that area residents rely on groundwater to supply their drinking water and discussing concern of toxic coal waste contamination given that the groundwater table is so high;
- Gerry Friedman [Item No. 45 at p. 110]: raising her concern that the drinking water well on her property will be contaminated by coal ash residue;
- Richard Haynes [Item No. 45 at pp. 111, 118]: asserting that the groundwater in this part of the state is underpinned by a large, fresh water aquifer, and his concern that fresh water in his well would not last;
- John George [Item No. 45 at pp. 147-149]: asserting that there were a lot of wells around the Labadie plant and that they will become contaminated because of the landfill and the rising groundwater level;
- Adrian Hutton [Item No. 68 at p. 22]: raising the concern that his family's drinking water well would be impacted by the hazardous and toxic materials;
- Jan Brennan [Item No. 68 at pp. 36-37]: questioning whether the landfill should be constructed in a floodplain "sitting on top of groundwater," and the impact on the aquifers that provide drinking water to area residents; and
- Kathryn Krueger [Item No. 68 at pp. 62-64]: testifying that the toxic nature of coal ash residue, even with minimal exposure to the residue, poses a health risk to the population as it leaches into the environment.

Had Intervenors followed Commission rules and raised these issues in pre-filed rebuttal testimony, Ameren Missouri would have filed surrebuttal testimony addressing these issues and answering these questions so that (a) Ameren Missouri, in accordance with its due process rights and its burden of proof on the Application at issue here, would have a full and fair opportunity to address any concerns raised by those filing rebuttal; and (b) the Commission would have a full record upon which to decide Ameren Missouri's request and upon which it could decide if the myriad of concerns now raised are valid or invalid, or are or are not within the Commission's power and authority to address. Instead, Intervenors made the tactical decision to raise these issues after their prefiled testimony was due in this case, leaving (in accordance with the original procedural schedule) no pre-filed testimony for Ameren Missouri (or Staff for that matter) to surrebut. This effectively deprived Ameren Missouri of the ability to respond to the new issues

they have raised, and it effectively deprives without further order of the Commission the Commission from having these issues addressed so that the Commission can make a fair and, importantly, informed decision on the pending Application.

Relief Requested

Ameren Missouri requests that it be given leave to file surrebuttal testimony (and that the Staff and OPC be given leave to file testimony in response to the local public hearing testimony as well, if desired) in response to these issues raised in what effectively was Intervenors' rebuttal testimony on or before August 30, 2013, so that the Commission may have the benefit of a full record on which to decide these matters and so that Ameren Missouri may be accorded its due process rights. Granting Ameren Missouri leave will put the parties in the position they should have been in had LEO and Sierra Club properly filed rebuttal testimony as the Procedural Order and the Commission's rules required because, effectively, their local public hearing testimony will be treated as rebuttal testimony and Ameren Missouri, as the moving party with the burden of proof in this case, will have been given a fair opportunity to respond.

Although not required by due process, given that this circumstance is one of Intervenors' own making, Ameren Missouri recognizes that Intervenors may require some additional time to review the surrebuttal testimony and to prepare for hearing (and that the Commissioners also may require some additional time to do so). Consequently, Ameren Missouri suggests that the evidentiary hearings currently scheduled to occur September 23-25, 2013, be rescheduled to October 14-16, 2013.[12] Ameren Missouri also requests that the Procedural Order be further

[12] If counsel for a party has hard conflicts on those dates, the Commission's hearing calendar in October is such that the Company is sure the parties can work out mutually agreeable dates in October. In order to not impinge on the Commission's time for deliberation, and given that it is not expected the MDNR will issue its decision on the required MDNR permit until February 7,

amended to provide for initial briefs to be due on November 12, 2013, and reply briefs due December 6, 2013.

Respectfully submitted,

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2014, Ameren Missouri also hereby amends its original request for a decision by December 31, 2013, and now requests that the Commission render its decision by January 31, 2014.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served via e-mail to the following on August 1, 2013:

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