

**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 )

Case No.: EA-2012-0281

CONCURRING OPINION OF CHAIRMAN ROBERT S. KENNEY

I concur in the Report and Order granting Ameren a certificate of convenience and necessity (CCN) because, applying the five *Tartan Energy*<sup>1</sup> elements, Ameren has met its burden of proving that the utility waste landfill (UWL) it proposes to build is "necessary or convenient for the public service."<sup>2</sup> I write separately, however, to address four points that are of particular note.

First, the Commission unequivocally has the authority to consider environmental and public health concerns in analyzing whether to issue a CCN, irrespective of the involvement of another state agency. Second, the Labadie Environmental Organization's concerns are not unfounded; they are, in fact, valid concerns that merit consideration. Third, I would have preferred to have seen proof of insurance covering the very specific risk of locating a UWL in a 100-year flood plain that is prone to seismic activity. Fourth, I want to emphasize that, while this Commission cannot bind a future Commission, future requests to recover remediation costs should be viewed with extraordinary care.

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<sup>1</sup> *In the Matter of the Application of Tartan Energy Co., L.C., d/b/a Southern Mo. Gas Co.*, 3 Mo. P.S.C. 3d 173, 177 (September 16, 1994), *citing*, *In the Matter of the Application of Intercon Gas, Inc.*, 30 Mo. P.S.C. 554 (June 28, 1991), *aff'd*, *State ex rel Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593 (Mo. Ct. App. 1993).

<sup>2</sup> Mo. Rev. Stat. § 393.170.3 (2010).

## **Introduction**

The five standards announced in *Tartan Energy* were met in this case. Ameren will be burning coal to produce electricity. The byproducts must be stored somewhere. There is a need for the service. Ameren, by virtue of its experience and expertise as a provider of electric service, is qualified to provide the service. Ameren has shown that it has the financial ability to run the UWL and it is economically feasible. Finally, the necessary disposal of the inevitably produced coal combustion residuals is in the public interest. But the public interest analysis, in my estimation, does not end simply with an announcement that the utility has satisfied the other four standards.

## **Discussion**

### **I.     The Commission May Appropriately Consider Public Health and Environmental Concerns in its Analysis**

The fifth factor requires an affirmative determination that the UWL is in the public interest. Part of the public interest analysis necessarily embraces an examination of the public health and environmental implications of locating the UWL in a 100-year flood plain and a seismic impact zone. The evidence supports the conclusion that the proposed UWL will be built in conformance with state and federal environmental standards. The evidence further demonstrates that the UWL will be built in such a way as to minimize its susceptibility to earthquake damage. And the evidence shows that the UWL will be constructed such that the potential for ground water contamination is mitigated. The Missouri Department of Natural Resources (DNR) has an extensive review process and has determined that the site is suitable for the UWL.

During the evidentiary hearing there were assertions that with DNR playing such a significant role in the permitting process, there was no role for this Commission to play in analyzing public health and environmental impacts. I disagree. As economic regulators, the Commission's analysis of the public health and environmental concerns will necessarily be different than that of the enforcers of environmental laws. Public health and environmental concerns have economic consequences. It is appropriate then, even obligatory, that this Commission, as economic regulators, undertake an appropriate consideration of the possible public health and environmental concerns, and the economic consequences flowing from those concerns, when rendering our decision as to whether locating a UWL in a 100-year flood plain and a seismic impact zone is in the public interest.<sup>3</sup>

## II. The Labadie Environmental Organization's Concerns Are Valid and Merit Consideration

The Labadie Environmental Organization (LEO) was formed for the purpose of providing a vehicle for citizens living near the proposed UWL to advocate their concerns before public governmental bodies. Its concerns were advanced and heard during the local public hearings and the evidentiary hearing in this case. Contamination of one's potable drinking water supply is not to be taken lightly or dismissed summarily. Given recent coal ash spills in Kingston, Tennessee and Eden, North Carolina,<sup>4</sup> given some of the testimony regarding the operations of Ameren's affiliate, Ameren Energy Resources, in Illinois, given the location of the UWL in a 100-year flood plain, and given its location in a seismic impact zone, LEO's concerns are readily understandable.

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<sup>3</sup> See also, Section 393.140 (2), which instructs that the Commission shall "have power to orders such reasonable improvements as will best promote the public interest [and] *preserve the public health . . .*" Mo. Rev. Stat. § 393.140 (2) (2010) (emphasis added).

<sup>4</sup> Importantly, the coal ash ponds in Tennessee and North Carolina are qualitatively different from the proposed UWL here.

But even giving due consideration to LEO's concerns, Ameren's testimony demonstrates that the proposed UWL is designed to mitigate those concerns. The coal ash here will not remain wet; it will dry into what was described as a concrete-like substance, rendering it safe from erosion in the event of a flood. Additionally, this concrete-like substance is unlikely to be damaged during a seismic event. Further still, the UWL's design mitigates the possibility of groundwater contamination with an impermeable two-foot thick liner covered by an additional geomembrane liner. Finally, Ameren agreed to additional groundwater monitoring.

### III. Proof of Insurance Should Be Provided

Even with all of the safeguards in place, accidents can happen. That is why I would have preferred to have seen proof of an insurance policy or rider that guards against the specific risks of locating a UWL in a 100-year flood plain and seismic impact zone. While there was testimony, and the Report and Order notes<sup>5</sup>, that Ameren is insured for certain risks, it was not clear that it is insured for the specific risks peculiar to this case.<sup>6</sup>

### IV. Possible Future Remediation Costs Should Be Closely Scrutinized

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<sup>5</sup> See Report and Order, page 24.

<sup>6</sup> See, e.g., Tr. Vol. 5, pages 198-99. When asked whether Ameren had insurance specifically covering the risk of seismic events, Ameren witness Craig J. Giesmann responded as follows: "You know, I'm not real certain on that, Commissioner. I know we are self-insured to a certain extent and then we do have supplementary insurance after that. And the specifics of that, for example, flooding and seismic, I don't know if there's riders." *Id.* at 198-99.

In response to further questioning about the existence of insurance covering the risk of seismic events and of being located in a 100-year flood plain, Mr. Geismann further testified as follows:

I would certainly expect so. And I guess what leads me to believe that is that I do know that our director of insurance has made site -- site visits with our insurers to the various ash ponds. So should we build this, I would expect the same thing to happen. So yes.

*Id.* at 199.

This testimony does not definitively establish the existence of the particular type of insurance that would cover the risk of locating a UWL in a 100-year flood plain or in a seismic impact zone.

In the event there is, in fact, insurance coverage for an event causally related to a UWL located in a 100-year flood plain or to seismic activity, ratepayers would, ostensibly, be protected against bearing the costs associated with any such event. But if there is no such insurance, or the costs are so great as to exceed the policy limits, ratepayers should not have to unreasonably bear the burden.

While it is true that this Commission cannot bind a future Commission, we can certainly provide guidance. As the Report and Order notes, Ameren has given assurances throughout the course of this case (in its application, in local public hearings, in the evidentiary hearing), that the UWL is safe, that concerns about groundwater contamination are unfounded. This Commission is issuing a CCN because the evidence supports Ameren's assurances and assertions. In the event, however, that potable water is contaminated because of a seismic event, a failure of the lining, or a flood, a future Commission would be well advised to look to this case for guidance.

The Commission writes Reports and Orders because that is the Commission's statutory charge. I write this concurrence for posterity. I hope a future Commission would read it and would be encouraged to closely scrutinize a request to recover in rates remediation costs attributable to a failure of this UWL caused by flood or earthquake.

## **Conclusion**

While I support the issuance of a CCN, the environmental and public health concerns were significant enough to give me pause. Where drinking water is concerned, the stakes are high. And while Ameren has satisfied the five elements the Commission previously set out in *Tartan Energy*, it is important to affirm the appropriateness of taking into account environmental and public health concerns as a part of our public interest analysis, irrespective of another state

agency's analysis. Further, LEO, comprising as it does citizens who would be profoundly affected by any failure of the UWL, raised valid concerns that merit consideration. Because of these valid concerns, I would have preferred to see proof of insurance covering the risks peculiar to this case. Finally, should there be future remediation costs because of a flood or seismic event, I trust a future Commission will look skeptically on any request to recover those costs in rates.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Robert S. Kenney". The signature is written in dark ink and is positioned above a horizontal line.

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Robert S. Kenney  
Chairman

Dated at Jefferson City, Missouri  
On this 2<sup>nd</sup> day of July 2014.