BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service	)))	Case No. ER-2008-0318

BRIEF OF MISSOURI COALITION FOR THE ENVIRONMENT AND MISSOURIANS FOR SAFE ENERGY

Missouri Coalition for the Environment (MCE) and Missourians for Safe Energy (MSE) intervened by leave of the Commission solely on the issue of the Callaway 2 COLA costs.

EVIDENCE

On July 28, 2008, UE filed with the Nuclear Regulatory Commission an 8,000-page combined Construction and Operating License Application (COLA) to build a second unit at the Callaway nuclear plant (Transcript (T.) 1348). UE has spent $45,987,000 on the COLA to date (Supp. Testimony of Gary Weiss, Exh. 11, p. 8), though Mr. Lowery represented that this is approximately a $5 million rate base item (T. 1276).

A final decision to build Callaway 2 will probably not be made till late 2011 (T. 252). The project faces many uncertainties, including the company's perceived necessity to obtain legislative repeal of the Proposition 1 no-CWIP law (T. 131–2), financing, NRC certification of the EPR design, carbon legislation, need for capacity, and prudence (Rebuttal testimony of Ryan Kind, Exh. 404 NP, pp. 11–13; T. 1319).

UE shifted the COLA expenses from the CWIP account to plant in service with

the intention of earning a return on, but not of, these costs (Direct Testimony of Gary Weiss, Exh. 10, p.10; T. 1299). Mr. Weiss "assumed" that if the plant is not built the costs will be refunded to ratepayers with interest, though of course that would not reimburse customers who are no longer on the system at that time (T.1301–3).

Staff took issue with this accounting treatment for the reasons that future plant cannot be included in cost of service and that § 393.135, RSMo (Prop 1) requires that these expenses be excluded from recovery until the plant "is fully operational and used for service" (Surrebuttal Testimony of Steve Rackers, Exh. 202 NP, pp. 4–5; T. 1372).

UE offered several justifications for its proposed rate treatment:

(1) The COLA is an asset that has value in itself and can be sold on the market (T. 128–9, 256, 1319).

(2) The COLA represents prudent planning, like an IRP (T. 129–30). However, IRP costs are treated as operating expenses, not rate base items (T. 1314–5).

(3) The COLA expenditures are prudent since they make possible hundreds of millions of dollars in tax credits that will benefit ratepayers. (Surrebuttal testimony of Ajay Arora, Exh. 24 NP, pp. 30–1).

ISSUES

I

The COLA costs are not recoverable in rates until the plant is fully operational and used for service.

§ 393.135 is plain and broad in its terms:

Any charge made or demanded by an electrical corporation for service, or in

> connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or *any other cost associated with owning, operating, maintaining, or financing* any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited. (Emphasis added.)

"The manifest purpose of Proposition One was to make the utility wait until completion of new construction before including the cost in its rate base, or otherwise recovering its expenditures." *Union Electric v. PSC,* 687 S.W.2d 162, 166 (Mo.banc 1985). Whatever discretion the Commission has to treat some expense items differently from others "must be effectuated in compliance with all of the statutes governing the PSC and with the purpose behind those statutes." *UCCM v. PSC,* 585 S.W.2d 41, 52–3 (Mo. Banc 1979).

Even before Prop 1, courts held that "customers' contributions in aid of construction must be deducted from rate base." *UCCM v. PSC,* 606 S.W.2d 222, 225 (Mo.App. WD 1980). Under Prop 1, "interest, property taxes, pensions and other costs charged to construction…are not permitted, for rate-making purposes, to be 'flowed through' to the ratepayer as incurred. Sec. 393.135, RSMo 1978, prohibits the company from earning any return upon facilities before they are actually placed in service. They are added to the cost of the production facilities, then amortized over the life of the facility, beginning when the facility is placed in service." *Id.* at 226.

"[A] utility's accounting procedures cannot dictate ratemaking policies." *Empire District Electric v. PSC,* 714 S.W.2d 623, 625 (Mo.App. SD 1986).

COLA expenses are certainly a "cost associated with owning, operating…or

financing" a Callaway 2 unit. They are clearly not part of cost in service. § 393.135 does not care if the costs were prudently incurred; that is a decision for the next rate case after (and if) the plant goes into service. The statute makes no exception for prudence nor for the possibility that the COLA has some separate value as a salable asset.

The analogy with IRP is flawed. The filing of the COLA went beyond resource planning and into the execution of a plan to build a specific plant. It is a cost of constructing, owning, operating and financing the plant within the terms of § 393.135. UE cannot call this a mere planning exercise while claiming at the same time that it has created a marketable asset.

UE repeats that it has not decided to build Callaway 2. This is true only in the sense that any project can be derailed by adverse events. § 393.135 exempts no preliminary stage in the construction of a new facility; once costs are incurred, they must await the in-service date before they can be recovered.

UE complains that it never recovered the costs of the original, abandoned Callaway 2 (T. 1287–93). However, § 393.135 does not prevent recovery of the costs of an abandoned plant. *UE v. PSC*, 687 S.W.2d at 166–8. The Commission's decision on that occasion was discretionary, not the result of any statutory impediment. *UE v. PSC*, 765 S.W.2d 618, 622–3 (Mo.App. WD 1988). If history should repeat itself, the company will have the opportunity to approach the Commission again.

Mr. Weiss testified that UE seeks only a return on, not of, the COLA fees (T. 1299). But Prop 1 forbids any charge "based on" construction in progress or a charge of "any other cost" associated with plant not yet in service.

There was some discussion of plant for future use being allowable in rate base under limited circumstances. Commission policy, according to Mr. Mills, excluded such treatment outside the test year. Mr. Weiss recalled instances of specific projects intended for use within five years being included in rate base, but these were limited to T&D rights of way and substation land (T. 1303–8). Whatever exceptions may exist do not apply here.

The COLA expenses simply cannot be rationalized as any form of cost of service distinct from a completed Callaway 2. They are consequently barred from recovery at this time by § 393.135.

II

UE may not recover charges associated with Callaway 2 before the Commission has granted a certificate of convenience and necessity.

MCE and MSE in their Late-filed Application to Intervene and in their Position Statement questioned UE's right to recover costs of Callaway 2 before the Commission determines that construction of the plant is justified by public convenience and necessity. Although a certificate of convenience and necessity (CCN) is the subject of a separate proceeding, both that proceeding and a rate case are essential to protect the public. A CCN balances the interests of ratepayers and investors in advance, while a rate case operates post hoc. *Cass County v. PSC*, 259 S.W.2d 544, 549-50 (Mo.App. WD 2008). No return of or on Callaway 2 expenses should be allowed in the absence of a CCN.

"No…electrical corporation…shall begin construction of a[n]…electric plant…without first having obtained the permission and approval of the commission." §

393.170.1, RSMo. Permission and approval take the form of a CCN issued after "due hearing." § 393.170.3. This is required even if the proposed plant is in the utility's existing service area. *Cass County*, 259 S.W.2d at 549 fn. 6.

The authority to issue CCNs for nuclear plants is not preempted by federal regulation. *UCCM v. PSC*, 562 S.W.2d 688, 698 (Mo.App. ED 1978). "[T]he 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." *Id.*, fn. 18. No such findings have been made; no cost recovery should be allowed without them.

A CCN was issued for Callaway in 1975 in Case No. 18,117, but it is now clear that a CCN must be "more or less contemporaneous with the request to construct such a facility." *StopAquila.Org v. Aquila, Inc.*, 180 S.W.2d 24, 34 (Mo.App. WD 2005). Furthermore, UE already exercised its authority under that CCN to construct a first Callaway 2 and exhausted its authority when it abandoned that plant.

MCE and MSE realize that § 393.170 specifies no earliest or latest date for opening a docket and that any construction work on Callaway 2 is still a ways off. But it is clear that the future existence of the plant must be more than speculative and that the Public Service Law never intended for property not used and useful to be put into rate base. *UE v. PSC*, 765 S.W.2d at 622.

The CCN process is not unrelated to this rate case. In the words of another utility commission, "It is reasonable to infer that he who pays the bills should have the right to determine whether he needs to buy before he has to pay." Decision No. 88005, 82 CPUC 775, 1977 WL 42796 (Cal. P.U.C. 1977), p. 11. "This makes good sense and reflects the

legislature's advocacy of a certification process before the expenditure of huge sums of money in construction, which might create a major financial problem for the utilities, the ratepayers, and this Commission." *Id.*, p. 12.

A CCN certifies that the plant is at least close to becoming a physical reality, and is a prerequisite to putting plant costs into rate base.

CONCLUSION

WHEREFORE, MCE and MSE respectfully request the Public Service Commission to deny recovery of any costs related to the Callaway 2 COLA as cost of service or otherwise, and to instruct Union Electric to apply for and obtain a certificate of convenience and necessity before it ventures to request any such recovery.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was sent by email on this 8th day of January, 2009, to all parties of record.

/s/Henry B. Robertson
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