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

POST-HEARING REPLY BRIEF OF AMEREN MISSOURI

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri"), by and through counsel, and, for its post-hearing reply brief, states as follows:

INTRODUCTION

The essence of the dispute that the Commission is being asked to resolve in order to grant Ameren Missouri's request for a certificate of convenience and necessity ("CCN") to construct the proposed utility waste landfill ("UWL") at the Labadie plant can be summarized by two simple questions:

***First,* is the proposed UWL appropriate for this site?**

***Second,* can Ameren Missouri be trusted to construct and operate the UWL?**

Of course, the Intervenors' visceral response to both questions is "No!" The support for their answer, however, rests on emotion and innuendo and not science or logic. Indeed, Intervenors have offered no evidence that would compel the Commission to reach a conclusion any different from the Missouri Department of Natural Resources ("MDNR") or Franklin County regarding Ameren Missouri's proposed UWL at Labadie.[1] Instead, the competent and substantial evidence

[1] Intervenors have argued their points quite thoroughly to the Franklin County Commission and to MDNR, both of whom have already determined that the site of the proposed UWL is

that the Commission heard convincingly demonstrates that yes, a CCN should be granted to Ameren Missouri to construct and operate the UWL as designed and where sited.

ARGUMENT

I. Commission deference to MDNR's decision-making authority over environmental matters is appropriate in this case.

Despite the way in which Intervenors have framed the issue, it is not so much whether the Commission ***has*** authority to consider public health and safety concerns in its decision-making, but whether the Commission ***should*** exercise this authority in this case to independently evaluate and determine Intervenors' environmental concerns which are within the purview and expertise of MDNR and which have been and continue to be evaluated by MDNR in the permitting process. Intervenors have presented no reason why the Commission should undertake its own scientific and technical analysis to second-guess MDNR's review and determinations regarding the siting, design and operation of the UWL.

In urging the Commission to take on the role of environmental regulator, Intervenors first argue that it is common-place for the Commission to exercise its authority over environmental issues as a "complement" to MDNR's own authority over protection of human health and the environment. *Intervenors' Post-Hearing Brief* at 3. The examples cited by Intervenors, however, demonstrate that this contention is not true. To the contrary, when the Commission has considered environmental issues, the Commission's authority was not directed at determining whether a utility has, in the first instance, complied with environmental rules and regulations but

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appropriate. (Exh. 2, Giesmann Surrebuttal, 4:18-6:8; 9:3-12 Schedules CJG-S9, CJG-S11, CJG-S14; Exh. 4, Giesmann Supplemental, Schedule CJG-ST1 at Appendix F) If Ameren Missouri isn't qualified and capable of constructing and operating the UWL then MDNR will not grant it the required Construction Permit, the receipt of which Ameren Missouri has already agreed is an appropriate condition for the Commission to include in its order approving the requested CCN.

instead was direct toward compelling the utility's compliance with MDNR's environmental rules and regulations—***as evaluated and determined by MDNR***. *See In re Hickory Hills Water & Sewer Co*., 2006 Mo. PSC LEXIS 755 at *3 (June 15, 2006) (rate case in which MDNR, a party to the action, filed a statement with Commission alleging that sewer operation was in significant non-compliance with MDNR regulations); *In re Stoddard Co. Sewer Co*., Case No. SO-2008-0289, Report and Order at 5. (Oct. 23, 2008) (EFIS Item No. 68) (in request to transfer assets and for interim rate increase, Commission directed MDNR to file compliance report "indicating whether Stoddard County was in compliance with DNR's requirements regarding the provision of sewer service"). There is nothing unusual about either decision—the Commission relies on and defers to MDNR's determination as to the utility's compliance with MDNR regulation, and the Commission requires that these utilities comply with environmental laws as MDNR interprets and applies them. In neither case,[2] however, did the Commission actually undertake its own evaluation as to whether the utility was in compliance with MDNR requirements.[3]

Another Commission decision that Intervenors rely upon to support their argument that the Commission should conduct its own evaluation as to the appropriateness of siting of the

[2] Intervenors reliance on *Staff v. Hurricane Deck Holding Co*., 2006 Mo. PSC LEXIS 1136 (Aug. 31, 2006), is inapposite to its argument that the Commission independently exercises authority over environmental matters. In this complaint case, the issue was whether respondents were operating a water and sewer utility without proper authority, as they did not possess a CCN from the Commission or a permit from MDNR. The Commission did not independently evaluate environmental compliance with MDNR regulations governing such utilities.

[3] In another case cited as support for Intervenors' argument, the Commission hired an independent civil engineering firm to evaluate the physical condition of the Stoddard County Sewer Company's facilities so that it could "render a decision regarding the Applicants' requests for approval of the transfer of assets and approval of the interim rate increase." *In re Stoddard Co. Sewer Co.*, Report and Order at 10. (EFIS Item No. 68). The engineers evaluated the costs of repairs and maintenance of the system to assist the Commission in determining an appropriate repair and maintenance expense for ratemaking purposes only; when the Commission evaluated the company's provision of safe and adequate service, it relied upon ***MDNR's*** Statement of Compliance. *Id.* at 100-104.

proposed UWL, irrespective of any MDNR determination, is *In re Empire Dist. Elec. Co.*, 1977 Mo. PSC LEXIS 33 (Feb. 25, 1977). In that case, Empire sought a CCN to build a 90-megawatt oil-fired internal combustion plant, and had initially proposed that the plant be constructed in an area beside the Explorer Pipeline and which was also a floodplain. Intervenors in that case were neighboring landowners who objected to the construction of the plant in a floodplain. After the hearing but before an order issued, Empire amended its application to propose that the plant be situated at an alternative site, which was not a floodplain and which was the "lowest cost combustion turbine site." *Id.* at *11.

The *Empire* CCN case does not provide support for Intervenors' position here, however. First, there is nothing in the Commission's order to indicate that MDNR (or any other state or federal agency or county commission) had any role in evaluating the siting of the proposed plant in a floodplain. Moreover, the Commission itself declared that it did not have to decide the issues "respecting the occupation of the flood plain by the facilities" because Empire had voluntarily submitted an alternative site which was "without measurable economic penalty" to Empire's customers, noting:

> Such issues may be faced subsequently should Empire seek to place the coal-fired base load units in the flood plain at the same general location. In view of our subsequent conclusion, it becomes unnecessary to deal with these issues in this proceeding.

1977 Mo. PSC LEXIS 33 at *12-*13, *14. Again, the issue for this Commission is not whether it has the authority to evaluate environmental issues with regard to siting of a facility, but whether it should do so when another state agency charged with making those very same determinations has concluded that a particular site is suitable and protective of the environment, as MDNR has done in this case. It should not.

II. The proposed UWL is appropriate for the Labadie site.

For Intervenors, whether there is a "need" for the proposed UWL is an extremely narrow question. They contend that Ameren Missouri had to somehow prove that there is a need for the proposed UWL "at the proposed location." *Intervenors' Post-Hearing Brief* at 5-22. From this narrow (and faulty) premise, they then contend that Ameren Missouri didn't meet its burden of proof, primarily because Ameren Missouri didn't conclusively evaluate alternative sites and because of the "inherent risks" of the Labadie site. *Id.* Aside from the fact that a showing of need under the *Tartan* factors has never been defined so narrowly as to focus on the issue of siting to the exclusion of whether the proposed addition is necessary for the utility to provide utility service[4] (as Intervenors propose here), the sum and substance of Intervenors' opposition is that a UWL should not be placed in the Labadie Bottoms simply because it is a floodplain and in a seismic impact zone. This argument not only demands that this Commission ignore the express authority for placing a UWL in such a location, it also demands that the Commission ignore the fact that the UWL itself is specifically designed to address the risks associated with the location.

By regulation, the placement of a UWL in a floodplain and/or a seismic impact zone is expressly contemplated. Under the "Site Selection" portion of the regulation governing the design and operation of UWLs in Missouri, placement in a floodplain is clearly contemplated:

> Owners/operators of proposed utility waste landfills, located in one hundred (100)-year floodplains shall demonstrate to the department that the utility waste landfill will not restrict the flow on the one-hundred (100)-year flood, reduce the

[4] Even where the siting of a facility in a floodplain is challenged by area landowners, the Commission did not conflate the issue of siting with the issue of whether a need exists for the proposed addition. *See In re Empire Dist. Elec. Co.*, 1977 Mo. PSC LEXIS 33 at *13 (Feb. 25, 1977) (concluding that the electric load on Empire's system was increasing and it was necessary for Empire to construct and operate the proposed facility as a source of generation if Empire was to have sufficient system capacity to meet the requirement of the public in its service area).

> temporary water storage capacity of the floodplain, or result in washout of waste so as to pose a hazard to public health or the environment.

10 C.S.R. 80-11.010(4)(B)1. So, too, is siting it in a seismic zone: "[p]roposed utility waste landfills located in the seismic impact zone shall not be located within two hundred feet (200') of a fault that has had a displacement in Holocene time unless . . . ." 10 C.S.R. 80-11.010(4)(B)3. The placement of a UWL in these areas is explicitly provided for by regulation,[5] provided certain conditions are met. What Intervenors want this Commission to do is to disregard MDNR's regulations that allow UWLs in these areas and instead adopt its own prohibition. While energy policy may well be within this Commission's authority, the enactment of environmental regulatory policy—particularly where it would be inconsistent with the environmental regulatory policy already adopted by the state's chief regulatory agency, MDNR—is not.[6] Denying Ameren Missouri a CCN for the UWL at Labadie simply because it is located within a floodplain and seismic zone—irrespective of a design that addresses those site-specific conditions—is plain wrong.

[5] The proposed United States Environmental Protection Agency ("EPA") rules for coal combustion residue landfills also allow these landfills to be sited in seismic impact zones and floodplains, provided certain conditions are met. 75 *Fed. Reg*. 35128, 35240-35242 (June 21, 2010). Moreover, as the case law cited in our Initial Brief demonstrates, there is no requirement that a utility prove that there are no other alternatives to a particular project. To the contrary, Ameren Missouri need only show that the proposed UWL is important enough to justify its expense to ratepayers: "[i]f it is of sufficient importance to warrant the expense of making it, it *is a public necessity*" within the meaning of the Public Service Commission Law. *State ex rel. Mo., Kan. & Okla. Coach Lines*, 179 S.W.2d 132, 136 (Mo. App. W.D. 1944) (emphasis added).

[6] Nor should this Commission substitute its judgment for that of Franklin County regarding development within a floodplain. As this Commission is aware, Franklin County, acting on the authority given it pursuant to § 64.170, RSMo., and § 64.850, RSMo., has already determined that development of the UWL in the floodplain is appropriate. (Exh. 2, Giesmann Surrebuttal, Schedule CJG-S14) To the extent the Intervenors' objections are that the UWL should not be located within a flood plain, that administrative decision has been made, and the Commission lacks legal authority to overturn that decision.

So is denying a CCN because Ameren Missouri hasn't conducted a specific-enough evaluation of other sites to please Intervenors. It is important to remember that the primary thrust of Intervenors' argument on this point is that it is "likely" that Ameren Missouri could have found a site that didn't have the substantial "weaknesses" that the Labadie site has. *Intervenors' Post-Hearing Brief* at 11. In other words, because there ***might*** be another site out there, this Commission should refuse to let Ameren Missouri construct the UWL in a floodplain and seismic zone. This is the same argument as before—Intervenors are asking the Commission to adopt, in contravention to MDNR's rule and EPA's proposed rule, its own policy that would automatically prohibit the placement of UWLs in these areas. And it is still plain wrong.

Even if the Commission entertains the idea that it should deny the CCN because there may be other more appropriate sites, Intervenors have failed to provide the Commission with competent or substantial evidence upon which the Commission can rely to conclude that there are more appropriate sites. Instead, the "evidence" offered by Intervenors—the maps that witness Charles Norris pulled from the internet and his testimony that finding other sites is "straightforward," "easily accomplished" and that they are "readily" available[7]—is not evidence of much of anything. Mr. Norris admits he did not identify a single, alternative site and that he did not perform a site specific study for any alternative site. (Tr. Vol. 6, 518:3-15). This is not substantive testimony that other sites ***are*** available; in fact, it is nothing more than speculation that other sites ***might be*** available. Having shown that the regulations specifically envision the placement of a UWL in a floodplain and in a seismic zone (and, accordingly, no *per se* rule

[7] For clarification purposes, the page references to Mr. Norris' testimony used by Intervenors are those typed at the bottom of each page of the exhibit and not the original page numbers of the pre-filed testimony. In its initial post-hearing brief and in this brief, Ameren Missouri used the original page numbers of the pre-filed testimony where it references that testimony.

against doing so), the issue isn't what other sites might be available, but whether ***this*** site is appropriate and economically feasible.

And what of Ameren Missouri's analysis of the options for storing CCRs from its Labadie Energy Center and its ultimate determination that Labadie was the best option? Intervenors fault Ameren Missouri because its analysis of coal ash placement alternatives was not limited to a comparison between other sites and Labadie and because Ameren Missouri failed to analyze "site-specific conditions" at the Labadie site—these purported failures being attributed to the fact that the decision "had already been made." *Intervenors' Post-Hearing Brief* at 6-9. The criticism that Ameren Missouri's "holistic" review of the disposal needs for all Ameren Missouri coal-fired power plants cannot be relied upon in its evaluation of the Labadie site is unreasonable, as is the assertion that site-specific conditions were not considered.

It is true that the Reitz & Jens 2004 study, found in Exhibit 341 HC, analyzed the feasibility of developing UWLs for the disposal of coal ash produced by all four Ameren Missouri's coal-fired plants—Labadie, Rush Island, Meramec, and Sioux. But it is also true that it analyzed "landfilling the ash in separate landfills for each power plant, as well as a single UWL to accept wastes from all four power plants." (Exh. 341 HC at 2) With regard to siting considerations, the study noted the following:

- Recognizing the fact that there was both an increased awareness and willingness on the part of the public to fight "public nuisances," which would likely include a UWL, ***the best siting location is adjacent to a power plant*** that is generating ash that will be disposed of in the UWL, and the second best alternative is near another existing public nuisance, such as another landfill, heavy industrialized areas, and abandoned quarries. (Exh. 341 HC at 4-5)

- A third alternative—but "one that is becoming increasingly difficult"—is to site the UWL as far away from developed areas as possible, although to do so "***may have other environmental impacts and increase transportation costs.***" (Exh. 341 HC at 5) (emphasis added)
- UWL sites must be evaluated individually to weigh the pros and cons of each site, and site-specific design criteria are best evaluated by Professional Engineers and Geologists experienced in landfill design. (Exh. 341 HC at 5).
- Regardless of Ameren Missouri's desire to place a UWL in a particular location, the approval of MDNR and the local entity having jurisdiction over land use is required in order for a UWL to be placed in a certain location. (Exh. 341 HC at 4)

The Reitz & Jens report concluded in 2004 that transporting ash away from the coal plant for disposal in a UWL, whether owned by Ameren Missouri or by a third-party, was likely to be a more expensive option than constructing a UWL next to the plant itself. (Exh. 341 HC at 1, 7, 8-9, 13) Ameren Missouri's initial decision to propose that the UWL be sited next to the Labadie Energy Center makes perfect sense in light of these considerations.

While it continued to investigate options for the disposal of coal ash from its other coal-fired generating plants, Ameren Missouri determined after the 2004 study that a UWL adjacent to the Labadie Energy Center footprint was a good choice, assuming that the detailed studies that would have to be done confirmed that the site was suitable. (Tr. Vol. 5 147:1-148:22; 150:1-10) Following the Reitz & Jens feasibility study in 2004, Ameren Missouri first began to acquire land at the proposed Labadie site in 2007 and began the process with MDNR in 2008 to conduct

a preliminary site investigation.[8] (Tr. Vol. 5 at 146:2-20) As the Reitz & Jens study identified in 2004 and as Mr. Craig Giesmann stated in his testimony—the suitability of the site for a UWL would be subject to evaluation and approval by both MDNR and by the local entity having jurisdiction (in this case, Franklin County).

Intervenors dramatically argue that Ameren Missouri decided to "wing it" by never investigating the strengths and weaknesses of the Labadie site before the site was selected. *Intervenors' Post-Hearing Brief* at 2. This is where they miss the proverbial forest for the trees. What is relevant here is not whether Ameren Missouri did an initial "screening" of the site for possible concerns back in 2004, but whether an in-depth, scientific analysis of the suitability of the site has been performed and whether, in fact, the site was found suitable based upon that analysis. ***This has been done.*** The permitting process is a multi-year process which begins with a Preliminary Site Investigation[9] and is followed by a Detailed Site Investigation,[10] which are rigorous site assessment and investigation requirements; before a permit application can be submitted, MDNR technical staff—consisting of geologists, engineers and other professionals who understand geology, hydrology and engineering—must determine that the proposed site meets regulatory requirements such that the site is determined to have "suitable geologic and hydrologic characteristics for development of an environmentally sound solid waste disposal area." (Exh. 5, Putrich Surrebuttal, 5:6-13; 23:2-24:23) It is quite telling that Mr. Norris,

[8] The fact that Ameren Missouri was pursuing investigation of the suitability of the Labadie site with MDNR in 2008 explains why there was no separate slide analyzing Labadie's initial strengths and weaknesses as a site in the PowerPoint presentation found in Exhibit 341 HC. (Tr. Vol. 5 192:3-193:25; 200:2-14)

[9] The Preliminary Site Investigation for the Labadie site is Schedule 8 to Exhibit 2, Mr. Giesmann's Surrebuttal Testimony.

[10] The Detailed Site Investigation for the Labadie site is Schedule 10 to Exhibit 2, Mr. Giesmann's Surrebuttal Testimony.

Intervenors' only witness, does not identify a single piece of data or information that Ameren Missouri provided to MDNR in either document that he contests or finds deficient.

Based upon the extensive scientific information and analysis before it, MDNR has determined that the site is suitable for the proposed UWL. (Exh. 2, Giesmann Surrebuttal, Schedules 9 and 11) In light of the extensive scientific and engineering analysis that Ameren Missouri conducted to determine the appropriateness of the site for the proposed UWL and MDNR's subsequent approval of the site, Intervenors' complaint that there is not a separate page in a PowerPoint presentation or that there is not a line item in a spreadsheet for Labadie in the 2008 analysis of alternatives is nothing more than an attempt to divert the Commission away from the real issues.

Intervenors also poke at Ameren Missouri's decision to site the UWL at Labadie by arguing that consideration of the site does not include the true costs associated with the site's inherent risks such that any comparison with off-site alternatives cannot be relied upon. *Intervenors' Post-Hearing Brief* at 10-11. Again, Intervenors must be redirected to the real issue: it is not whether a detailed cost comparison was performed in 2004 but whether the proposed Labadie site is economically feasible as this Commission is to judge it. Although Intervenors argue that the feasibility analysis performed by Reitz & Jens in 2004 used only "generalized costs" to conclude that an on-site UWL was more economic than transporting the coal ash off-site,[11] the irony of this criticism is that their own witness—who performed no quantitative analysis himself—admits that he could point to nothing that would contradict Mr. Giesmann's testimony that the costs associated with the transport of coal ash are substantial, and if transported to the site of his choosing, these costs would be significant. (Tr. Vol. 6 522:18-523:6)

[11] The study, referenced earlier in this brief, is found in Exhibit 341 HC.

Ameren Missouri was right, then, to rely on the initial Reitz & Jens analysis (which confirms a common sense understanding of costs) as it proceeded with the scientific analysis of the site required by the MDNR permitting process.[12]

Intervenors have persisted in their attempt to suggest—without offering any economic analysis whatsoever[13]—that the particular risks of the Labadie site must mean that the site is not as economical as other (unidentified) sites where these risks are not present. When presented with an economic analysis confirming that the construction and operation of the proposed UWL at Labadie is, in fact, far more economical than other alternatives,[14] Intervenors impugn this analysis as being "manufactured"[15] without eliciting any testimony whatsoever at the hearing that would call Mr. Giesmann's analysis into question in any way. And Staff auditor John Cassidy, who has decades of experience in evaluating financial information including costs

[12] Intervenors' thrown-in comment that rail costs shown in the Reitz & Jens materials were less than one-half of trucking costs (*Intervenors' Initial Brief* at 22) misleads and lacks context. This one reference to rail costs did not consider the significant capital investments that would be required both at any offsite landfill and at the Labadie Plant itself. (Exh. 3, Giesmann Sur-Surrebuttal, 14:1-21) Mr. Giesmann testified that at the Labadie Plant alone, the additional capital costs would be more than $100 million, which is more than the entire cost of the UWL when all four cells are built. *Id.*

[13] Mr. Norris admits that he has not quantified the additional construction costs required by bringing in off-site clay to the site and that has no data to dispute Mr. Giesmann's testimony that these costs are included. (Tr. Vol. 6 482:16-483:18) Mr. Norris admits that he has not quantified the repair costs he opines would be associated with operating the UWL at Labadie. (Tr. Vol. 6 496:23-497:7) Mr. Norris admits that he has not quantified the closure and post-closure costs he claims that Ameren Missouri omitted. (Tr. Vol. 6 504:22-505:4)

[14] The table appearing on page 18 of Mr. Giesmann's Surrebuttal Testimony (Exh. 2) demonstrates that disposal of coal ash at the Labadie site is approximately $100 million less expensive than transporting it off-site and half as expensive as transporting the coal ash to a commercial landfill. As Mr. Giesmann repeatedly explained at hearing, the construction cost of the proposed UWL specifically takes into account the costs of constructing the UWL to meet the standards required by the site-specific conditions. (See, e.g., Tr. Vol. 5 195:9-196:2; 197:10-20)

[15] See *Intervenors' Post-Hearing Brief* at 9 n.7. Mr. Norris grudgingly admits that the design of the proposed UWL takes into account the specific hazards at the Labadie site. (Tr. Vol. 6 497:2-22)

utilities incur to construct infrastructure, agreed that Mr. Giesmann's estimated revenue requirements for the various alternatives was reasonably accurate. (Tr. Vol. 6 412:22 – 413:3) While Intervenors may believe that this type of rhetoric possesses persuasive powers, rhetoric alone does not constitute competent and substantive evidence. And rhetoric is all that Intervenors have to offer this Commission.

The final attack that Intervenors lodge on the feasibility of the site is their argument that Ameren Missouri's feasibility analysis fails to include the cost of addressing contamination at the site that "may very well be" caused by ash ponds at the site, as well as costs to remediate the supposed contamination "that could occur" at the site. *Intervenors' Post-Hearing Brief* at 11-20.[16] Ameren Missouri has already addressed the many problems with Intervenors' argument that contamination "may" be occurring at the site, and it directs the Commission to that response—based upon the actual scientific evidence heard by the Commission. See *Ameren Missouri's Initial Post-Hearing Brief* at 22-26.

One additional point that should be made, however, regards the Intervenors' use of their argument that contamination may be occurring at the site to not only argue that Ameren Missouri is unqualified to operate the UWL, but that the cost of remediating any of this supposedly "likely" contamination at the site should be included in the economic feasibility study of the site. *Intervenors' Post-Hearing Brief* at 11-15. This makes no sense—the two issues are unconnected. Whether the proposed UWL is sited at Labadie or at some unidentified location 165 miles away, Ameren Missouri will be required to undertake "whatever steps our environmental regulators

[16] Though their brief suggests there is no doubt that contamination is threatening the drinking water supplies of area residents, Intervenors actually come clean in the last section of their brief to admit they don't have evidence of this when they argue that even if there is contamination, no one knows where it is headed. *Intervenors' Post-Hearing Brief* at 24.

require" with regard to the ash ponds, and it will do so. (Exh. 3, Giesmann Sur-Surrebuttal at 7:1-9) If corrective action is ever required at the site, Ameren Missouri will bear the cost of that remediation regardless of the UWL's location. Put another way, any costs associated with the closure of the existing ash ponds are not costs associated with the proposed UWL, although it serves Intervenors purposes to conflate the issue of monitoring and closure of the existing ash ponds with the construction of the UWL as if they were.

While corrective action costs related to the ash ponds (should they ever be required) are not at all relevant, the only instance in which environmental remediation costs ***might*** properly be relevant to the economic feasibility analysis of siting the UWL at Labadie would be if there were known and quantifiable risks to the environment from the design proposed for the UWL; in fact, Intervenors actually make this argument. The flavor of Intervenors' argument is that the specific site hazards at Labadie necessarily means that the Labadie site is more costly than others; as previously pointed out, this rather simplistic argument avoids the fact that, as Mr. Norris acknowledges,[17] the UWL design takes those risks into account. Intervenors do attempt, however, to make a specific criticism of the UWL design; they argue that because there may be intermittent contact of the clay liner of the UWL with groundwater,[18] there is an "enhanced risk"

[17] Mr. Norris admits that Ameren Missouri took into account the site-specific hazards related to flooding and seismic activity when it designed the UWL, and that he had offered no criticism of Ameren Missouri's design, which, for example, included a protective berm at a height exceeding the 500-year flood level and exceeding the seismic design standards set by MDNR to a 2,500-year recurrence interval. (Tr. Vol. 5, 235:5-236:24; Tr. Vol. 6, 497:8-498:15; 520:25-521:11)

[18] While Intervenors baldly assert that the liner does not meet the 2-foot separation rule found in Franklin County's ordinance and EPA's proposed regulations (*Intervenors' Post-Hearing Brief* at 17), they fail to explain why the letter from Franklin County's independent registered engineer is incorrect when it concludes that the proposed UWL ***does*** meet Franklin County's requirements. *See* Exh. 4, Giesmann Supplemental, Schedule CJG-ST1 at Appendix F, December 4, 2013 Letter from Andrews Engineering, Inc.

of contamination of the groundwater upon which local residents rely. *Intervenors' Post-Hearing Brief* at 18. Intervenors cite to no evidence from the record, however, to support either claim. In fact, the evidence in the record demonstrates exactly the opposite—that the UWL liner and leachate collection system will protect the environment from a release of coal ash constituents.[19]

The point is that while repeating certain claims (in this case, that area landowners' drinking wells will be contaminated because the UWL liner is defective or because of other design flaws) often enough may lead some people to believe such claims, mere repetition still doesn't make the claims truthful. There is absolutely no rational basis[20] for the claim that these drinking water wells will be contaminated by coal ash—even if these constituents did contaminate the alluvial aquifer. As a result, there is nothing to suggest that the proposed UWL design presents a known and quantifiable risk of contamination.

It is the evidence and not emotion upon which the Commission is allowed to base its order regarding Ameren Missouri's request for a CCN. And the evidence is that Ameren

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Intervenors also falsely imply that Ameren Missouri's own witness Steven Putrich agreed that the design of the proposed UWL did not comply with the 2-foot separation requirement by citing his response to a question from the Presiding Judge regarding the cost of raising the UWL base—not because it didn't meet regulatory requirements, but because it was not "as high as Sierra Club would like it to be." (Tr. Vol. 5, 270:13-23) Intervenors know full well that it was Mr. Putrich's testimony that the proposed UWL meets the 2-foot separation requirement. (Exh. 6, Putrich Sur-Surrebuttal, 1:12-4:9; 5:17-21; Tr. Vol. 5, 272:1-18)

[19] For an extensive discussion of the evidence regarding the design of the UWL liner and its ability to protect the environment from an environmental release, see *Ameren Missouri's Initial Post-Hearing Brief* at 15-18. Intervenors' witness Mr. Norris acknowledged that Ameren Missouri had demonstrated in its construction permit application [Exh. 4, Giesmann Supplemental, Schedule CJG-ST1 at Appendix Z] that intermittent contact between the liner and the groundwater would not impact the liner's design, function or performance. (Tr. Vol. 6, 485:1-15)

[20] Why this is can be found at pages 20-21of *Ameren Missouri's Initial Post-Hearing Brief*. The Commission will recall that area drinking water wells do not draw water from the alluvial aquifer but from the distinct bedrock aquifer through wells that are upgradient of the area of the proposed UWL. Even Mr. Norris refused to offer the opinion that the drinking water wells of area residents would be contaminated by coal ash constituents. (Tr. Vol. 6 548:5-10)

Missouri chose a site that will cost ratepayers at least $100 million less than any other alternative (due primarily to the significant transportation costs Ameren Missouri will avoid by locating the UWL at Labadie) and has designed the facility based on the specific conditions that exist at the site. The evidence is clear, it is convincing, and it is compelling: the Labadie site is an appropriate site for the proposed UWL.

III. Ameren Missouri is qualified to construct and operate the proposed UWL.

The indictment issued by Intervenors against Ameren Missouri's qualification to construct and operate the proposed UWL is that Ameren Missouri will "ignore problems until forced to confront them by state regulators," and the similar-sounding charge that Ameren Missouri "will not undertake any remedial action unless compelled to do so." *Intervenors' Post-Hearing Brief* at 22-23. For support, Intervenors point to Ameren Missouri's "track record" with the ash ponds at Labadie, plants of its former affiliate in Illinois, [21] and its Sioux plant in Missouri. *Id.* at 22-28. Ameren Missouri has already demonstrated the problems with Intervenors' reliance on the speculative and unreliable evidence regarding the ash ponds at Labadie,[22] and—to the extent that it has any relevance to the proposed Labadie UWL—has discussed the events in Illinois involving Ameren Missouri's former affiliate and the measures taken by that affiliate in establishing closure standards for ash ponds in Illinois.[23]

Intervenors' final argument is that Ameren Missouri's operation of a wet ash UWL at Sioux (its dry UWL had just been placed into service at the time of the hearing) cannot be relied upon as evidence of Ameren Missouri's ability to operate a dry ash UWL at Labadie. This type

[21] Ameren Missouri did have one coal plant in Illinois, the Venice Plant. The ash ponds at that site have been closed in accordance with Illinois EPA requirements. (Exh. 9, King Surrebuttal, 25:9-26:6)
[22] See *Ameren Missouri's Initial Post-Hearing Brief* at 22-26.
[23] See *Ameren Missouri's Initial Post-Hearing Brief* at 26-28.

of circular reasoning—that prior experience operating a planned addition or upgrade to a utility plant is required to show that the utility is qualified to obtain a CCN allowing the planned addition or upgrade—admittedly works in Intervenors' favor. The problem, of course, is the obvious lack of logic in such a circular proposition. How would a utility ever go about qualifying itself for a CCN when it seeks to add a new technology or process it has not previously utilized?[24] Furthermore, Intervenors offer no evidence to support its charge here that Ameren Missouri ignored problems at the Sioux plant until it was forced to confront them by MDNR or that Ameren Missouri did not undertake any remedial action until it was compelled to do so by MDNR. What it does point to is a letter from MDNR stating that arsenic levels in one of the monitoring wells at Sioux caused it to consider "this an area of concern."[25] (Exh. 358 at 3) This is hardly damning evidence that Ameren Missouri ignores environmental problems.

If Intervenors' argument that Ameren Missouri is not qualified to operate a UWL at Labadie because of what Intervenors argue is a "spotty" environmental record prevails, then Ameren Missouri is not qualified to operate a UWL anywhere. It is the Intervenors' argument on this point that is "spotty," however, and it cannot be relied upon as competent and substantial evidence that Ameren Missouri is not qualified to operate the proposed UWL. Environmental compliance is important, and Ameren Missouri—like all utilities that operate coal-fired generation units in Missouri—is faced with complex environmental compliance issues. In this

[24] Ameren Missouri had never constructed and operated a wet flue gas desulfurization unit (a scrubber) until it installed one at the Sioux Plant (at a cost of more than $600 million) in 2010, but a review of the Commission's own records would show that its operation has been just fine. The same can be said of the landfill gas generating facility in Maryland Heights, and a myriad of other new technologies constructed by Ameren Missouri over its many decades of operation.
[25] The full context of the fact that an elevated level of arsenic was found in one monitoring well at Sioux is not before this Commission; as even Mr. Norris admitted, the presence of arsenic in the Missouri River alluvium would be expected. (Tr. Vol. 6, 537:20-23)

instance, however, MDNR, the state agency charged with protecting the environment,[26] has reviewed the suitability of the UWL site and has reviewed Ameren Missouri's proposed UWL design. The Commission should trust MDNR to do its job and issue Ameren Missouri a CCN conditioned upon Ameren Missouri receiving an approved permit from that agency.

CONCLUSION

The competent and substantial evidence in this case points to only one conclusion. Ameren Missouri's request to expand the boundaries of the Labadie Energy Center in order to allow it to construct and operate a UWL should be granted, conditioned on Ameren Missouri obtaining and providing to the Commission the Construction Permit and the Land Disturbance Permit from MDNR before it proceeds to construct the UWL. In addition, Ameren Missouri agrees that it is appropriate to include a condition specifying that the Commission's granting of the CCN does not predetermine ratemaking treatment of the costs associated with the UWL.

As we noted in our Initial Brief, it is important that the Commission act promptly to render its decision in this case so that Ameren Missouri can begin construction soon (Ameren Missouri hopes to begin construction by June 15). Beginning construction in that timeframe is necessary to ensure that the facility is in operation by the time it will be needed in 2016. (Exh. 2, Giesmann Surrebuttal, 22:10-12)

[26] As previously noted, MDNR is also the state agency upon whom the Commission regularly relies upon for determination as to a utility's compliance with environmental laws. *Supra* at 2-4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served via e-mail to the following on May 21, 2014:

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