

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 17th  
day of March, 1993.

Application of Union Electric Company for )  
waiver from decommissioning trust funds ) Case No. EO-93-198  
rule for good cause shown. )

ORDER GRANTING WAIVER FROM COMPLIANCE  
WITH CERTAIN PROVISIONS OF 4 CSR 240-20.070

On December 18, 1992, Union Electric Company (UE) filed an Application for Waiver from Decommissioning Trust Funds Rule for Good Cause Shown. At present, electrical corporations which own or operate nuclear generating units whose costs are borne by Missouri rate payers are required to collect and invest monies to be used for future nuclear decommissioning activities, i.e., for costs expended in connection with the retirement of the nuclear generating units. Rules 4 CSR 240-20.070 (4)(E) and (4)(F) currently provide restrictions on the type of investments which may be made with respect to the decommissioning trust funds, including the incorporation of federal restrictions found in the Internal Revenue Code. The Energy Policy Act of 1992, Pub. L. No. 102-486, signed into law on October 24, 1992, lifted the existing federal restrictions effective January 1, 1993. In part in response to the federal legislation, the Commission is in the process of adopting amendments to Rule 4 CSR 240-20.070.

The purpose of the waiver request is to allow UE to take advantage of the repeal of the federal investment restrictions, which are effective January 1, 1993, until such time as the forthcoming amendments to the Missouri state rule have completed the state rulemaking process, and the amended state rule is in effect. The waiver is sought pursuant to 4 CSR 240-20.070 (17), which provides that the Commission may waive any provision of Rule 4 CSR 240-20.070 for good cause shown, upon proper application and after due notice and hearing. On

January 6, 1993, the Commission issued its Order and Notice, and Order Setting Prehearing Conference. In its order, the Commission gave notice of its order to certain specified individuals and entities, and set a deadline for applications to intervene. The Commission received no requests for intervention. On February 16, 1993, the Commission's Staff filed a Memorandum recommending approval of the application for waiver. The requirement for a hearing has been met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. When no hearing is requested the Commission may allow an applicant to file its evidence in support of its application by verified statement. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no hearing has been requested in this case, the Commission concludes that no hearing is necessary, and will base its decision upon the verified statement of UE and Staff's Memorandum.

Section 1917 of the Energy Policy Act of 1992 repealed the "Black Lung" investment restrictions as specified in the Internal Revenue Code, Section 468A. The "Black Lung" investment restrictions only permitted investments in: (1) public debt securities of the United States; (2) obligations of a state or local government not in default as to principle or interest; and (3) time or demand deposits in banks or insured credit unions located in the United States. Investment in taxable bonds and equity securities was not allowed. All of the above specific investment restrictions have been removed on the federal level. However, the Staff of the Commission maintains that some investment restrictions on decommissioning trust assets are appropriate, and to that end sponsored a workshop on November 6, 1992 to determine what changes to Rule 4 CSR 240-20.070 would be appropriate. Participants in the workshop included, among others, UE and the Office of the Public Counsel. Subsequent discussions concerning proposed changes in the state rule also took place. The most current version of Staff's

specific proposed changes to Rule 4 CSR 240-20.070 which are the subject matter of this application are contained in Attachment A attached hereto and incorporated herein by reference.

As indicated by Staff, the proposed changes to the state rule provide decommissioning trust funds with a great deal more latitude than the present state rule, which incorporates the prior federal restrictions, while still maintaining adequate safeguards with respect to the type of investments which may be made. The prior federal "Black Lung" investment restrictions generally resulted in decommissioning trust funds earning a relatively low rate of return. This in turn would require a greater amount of annual customer contribution than a higher rate of return would to achieve the same level of funding, all other things being equal.

Over the life of the fund, according to Staff's research and analysis, even a small increase in the rate of return could result in a large reduction of necessary customer contributions to the fund. Equities, including common stocks and municipal bonds, provide good after-tax return potential for nuclear decommissioning investments. For example, Staff conducted an analysis using the annual compound growth rate for total returns over the time period from 1986 through 1991 for the Standard & Poor 500 Index, 15.36 percent, and an intermediate government bond index, 9.40 percent. Utilizing these numbers, Staff projected earning levels with and without the "Black Lung" investment restrictions, and estimated that the weighted after-tax projected return on investment (net of fees) would be 8.55 percent under the "Black Lung" investment restrictions, and 10.08 percent without the "Black Lung" investment restrictions. Staff then calculated UE's Missouri annual trust fund deposit requirement based on a weighted after-tax projected return on investment (net of fees) of 10.08 percent, where "Black Lung" investment restrictions have been removed, which showed an annual deposit requirement of \$2,925,785.93. With the "Black Lung"

investment restrictions intact, Staff's analysis showed an annual deposit requirement of \$6,214,183.82. Thus, removal of the "Black Lung" restrictions would result in an annual deposit reduction of \$3,288,397.89 [\$6,214,183.82 (required annual deposit with "Black Lung" restrictions) minus \$2,925,785.93 (required annual deposit without "Black Lung" restrictions) equals \$3,288,397.89]. Over the life of the decommissioning trust fund, the total reduction in required deposits would equal \$104,817,682. As a result, Staff believes that it would be beneficial to UE's customers to remove the "Black Lung" investment restrictions that are currently contained in Rule 4 CSR 240-20.070.

In addition to lifting the "Black Lung" restrictions on decommissioning trust fund investments, Section 1917 of the Energy Policy Act of 1992 also reduces the federal income tax rate collected on taxable investment earnings of decommissioning trusts from the regular corporate federal income tax rate of 34 percent, to 22 percent for the taxable years beginning with 1994, and 20 percent for the taxable years beginning after December 31, 1995. This lowering of the federal income tax rate encourages investments in taxable securities, and will help produce higher after-tax earnings. The lower federal income tax rate (20 percent) was utilized in Staff's calculation of the 10.08 percent weighted after-tax projected return on investment (net of fees) where "Black Lung" investment restrictions have been removed.

It is Staff's position that the primary objective of the decommissioning trust fund is protection of principal and maximizing asset quality, while earning a reasonable after-tax return on investment. Removing the "Black Lung" investment restrictions will allow a broader range of permissible investments and better investment performance potential, while keeping the "Black Lung" investment restrictions in place would result in funds earning unnecessarily low returns and therefore causing UE's customers unnecessarily higher rates. Staff concludes that the projected higher after-tax returns

outweigh the increased risks associated with the "Black Lung" investment restrictions being removed.

Staff states that "Black Lung" type of investments may still play an important role in decommissioning trust funds, as the proposed changes to the state rule require that a utility's total book value of investments in equity securities in all of its decommissioning trusts shall not exceed 65 percent of the trust funds' book value, therefore a minimum of 35 percent of the trust assets must be held in taxable or tax-exempt bonds and non-common stock investments. Staff also cautions that it is the responsibility of UE and its investment managers to maintain a well diversified portfolio and minimize diversifiable (unsystematic) risk of the assets held in the portfolio to ensure the availability of the funds for decommissioning purposes, and, as the time for actual decommissioning draws near, to ensure the portfolio asset allocation mix be altered to cause a higher percentage of funds to be invested in more conservative investments such as "Black Lung" type of investments.

As the trustee or investment managers are compensated based upon performance and may be replaced for poor fund performance, there is an incentive to ensure that the fund performs well and maintains as high a market value as possible given the decommissioning trust investment guidelines. Staff also notes that UE or its trustee is required to file quarterly and annual trust account reports with the Commission pursuant to Rules 4 CSR 240-20.070(5) and (6), and the Staff will continue to monitor UE's decommissioning trust fund asset allocations and earnings level.

In its application UE apparently inadvertently quoted from an earlier version of Staff's proposed changes to Rule 4 CSR 240-20.070 (4)(E)(3), which contained minor wording differences from the most current version of Staff's proposed changes, as found in Attachment A attached hereto and incorporated

herein by reference. Staff contacted a representative of UE, who indicated that Staff's proposed amendment is acceptable to UE.

The Commission has reviewed the application of UE, Staff's proposed amendments to Rules 4 CSR 240-20.070(4)(E) and (4)(F), and the recommendation of Staff, and determines that UE should be granted a waiver from compliance with the current versions of Rules 4 CSR 240-20.070(4)(E) and (4)(F), and be subject instead to the restrictions contained in Staff's proposed amendments to Rules 4 CSR 240-20.070(4)(E) and (4)(F) attached hereto as Attachment A and incorporated herein by reference. The Commission is of the opinion that allowing UE to take advantage of the changes in federal law until such time as amendments may be made to the provisions of Rule 4 CSR 240-20.070 dealing with investment restrictions will permit UE to have the opportunity to earn higher after-tax returns on its investments which in turn would reduce the amount of necessary future customer contributions. The Commission further finds that the proposed revisions to Rule 4 CSR 240-20.070 provide investment restrictions which are adequate safeguards to the preservation of principal for funds held in decommissioning trusts, while allowing the funds to earn a reasonable after-tax return. The Commission deems the opportunity to decrease the level of customer contributions while maintaining the same funding level to be in the interest of customers and of the residents of the state of Missouri as a whole. Thus, the Commission finds that good cause exists for UE's waiver request, and that the waiver will not be detrimental to customers or to the public interest.

**IT IS THEREFORE ORDERED:**

1. That Union Electric Company be hereby granted a waiver from compliance with the provision of Rules 4 CSR 240-20.070 (4)(E) and (4)(F) from the effective date of this order until the effective date of any amendment to Rule 4 CSR 240-20.070, subject to the investment restrictions contained in Attachment A attached hereto and incorporated herein by reference.

2. That Union Electric Company is ordered hereby to continue to comply with all other provisions of Rule 4 CSR 240-20.070 currently in effect.

3. That this order shall become effective on March 30, 1993.

BY THE COMMISSION

*Brent Stewart*

Brent Stewart  
Executive Secretary

(S E A L)

McClure, Chm., Mueller, Rauch,  
and Perkins, CC., Concur.  
Kincheloe, C., Absent.

NUCLEAR DECOMMISSIONING TRUST FUND  
INVESTMENT RESTRICTIONS APPLICABLE TO  
UNION ELECTRIC COMPANY PER WAIVER GRANTED  
IN CASE NO. EO-93-198

(4)(E) The trustee or investment manager(s) shall invest the tax-qualified trust assets and nontax-qualified trust assets only in assets that are prudent investments for assets held in trust and in a manner designed to maximize the after-tax return on funds invested, consistent with the conservation of the principal, subject to the limitations specified as follows:

1. The trustee and investment manager(s) shall not invest any portion of the tax-qualified or nontax-qualified trusts' funds in the securities or assets of the following:
  - a. any owner or operator of a nuclear power plant;
  - b. any index fund, mutual fund or pooled fund in which more than fifteen percent (15%) of the assets are issued by owners or operators of nuclear power plants;
  - c. any affiliated company of the utility; or
  - d. the trustee or investment managers' company or affiliated companies (This limitation does not include time or demand deposits offered through the trustee or investment managers' affiliated banking operations.);
2. The nontax-qualified trust shall be subject to the prohibitions against self-dealing applicable to the tax-qualified trust as specified in the Internal Revenue Code; and

3. The utility's total book value of investments in equity securities in all of its decommissioning trusts shall not exceed sixty-five percent (65%) of the trust funds' book value; and

(4)(F) All income earned by a trust's funds shall become a part of that trust's funds.

Attachment A-2