

**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 Authority to Sell and	)	Case No. EO-2012-0146
Repurchase Coal and Lease Property.	)	

**RESPONSE TO ORDER DIRECTING FILING**

**COMES NOW** Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and states as follows:

1. On November 9, 2011, Ameren Missouri filed an application seeking authority pursuant to Section 393.190.1 RSMo. 2000 to sell coal and lease a small parcel of land at its Rush Island Plant in order to facilitate a program to utilize refined coal in order to lower costs and reduce emissions from the plant. The Company requested expedited treatment of this application, because implementation of the program was contingent on the coal refinement process being in operation before January 1, 2012.

2. The Commission held an on-the-record proceeding on November 28, 2011. During the proceeding, questions arose regarding an option agreement that was one of several contracts underlying the transaction. The option, if exercised at some future date, would allow Ameren Missouri to become an equity owner in the coal refiner. Ameren Missouri agreed that it would notify the Commission and the parties prior to exercising the option. However, some parties and Commissioners questioned whether Ameren Missouri should be required to obtain Commission approval (a) prior to exercising the option (if it chose to exercise the option at some future date), and (b) prior to transferring any tax credits that might flow to Ameren Missouri as a result of exercising the option. In its order issued November 28, 2011, the Commission directed the parties to brief these issues no later than December 5, 2011.

3. Before briefing the two issues requested by the Commission, a threshold issue must be addressed—whether the Commission has the legal authority to rule on these issues in this proceeding. Ameren Missouri believes that it does not. The Commission is not a court. It cannot issue declaratory orders to guide parties in future proceedings—in fact, it has no power to declare or enforce any principle of law or equity. *State ex rel. Utility Consumers Counsel v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979). This means that this Commission lacks the authority to declare that a future Commission would (or would not) have jurisdiction over Ameren Missouri’s exercise of the option. Moreover, future Commissions are not bound by the doctrine of *stare decisis* to follow any decision this Commission may make concerning the regulatory consequences of future actions that Ameren Missouri might take. *State ex rel. GTE North v. Public Service Commission*, 835 S.W.2d 356, 371 (Mo. App. 1992). Ameren Missouri is not proposing to exercise the option or transfer any tax credits in this proceeding, and it presently has no ability to do so, since the first option period does not begin until August 15, 2013. Even courts cannot issue declaratory rulings unless there is an existing, justiciable controversy before them; here, there is not. *See, e.g., City of Jackson v. Heritage Savings & Loan Ass’n et. al.*, 639 S.W.2d 142 (Mo. App. E.D. 1982). In that case, the Court of Appeals held that the trial court lacked authority to issue a declaratory judgment regarding whether a state statute allowed the city to make deposits in certain institutions where the facts showed that no particular institution requesting to act as a depository had that request denied, and there was an absence of any allegation of legal challenge by anyone to the ordinance or the deposit practices of the city. As the Court of Appeals stated “a mere difference of opinion or disagreement or argument on a legal question does not afford adequate ground for invoking judicial power.” *Id.* at 144. Moreover, there is no justiciable controversy if the judgment “would not settle actual legal rights.” *Id.* Given that at most there may be a “difference of opinion” in

this case, and given that a statement by this Commission today would not settle that difference because such a statement cannot bind a future Commission, there is no justiciable controversy. Even a court couldn't issue a declaration of the law on these facts – certainly the Commission cannot do so. If and when Ameren Missouri chooses to exercise the option and/or transfer tax credits, the issue of the Commission's jurisdiction over such transactions will be ripe for decision and the Commission can resolve that issue at that point, subject to later *de novo* review by the courts.

4. Setting aside this threshold issue, the first issue that the Commission requested that the parties provide legal analysis on is as follows: “Is Ameren Missouri required to obtain Commission approval prior to exercising the Option Agreement for Purchase of Membership Interest By and Between Buffington Holdings (B), L.L.C. and Union Electric Company d/b/a Ameren Missouri Relating to Buffington Partner, L.L.C. (‘Option Agreement’)?” The answer to this question is no. The Commission is an agency of limited jurisdiction possessing only the powers specifically delegated to it by statute, and those reasonably incidental thereto. Section 386.250(7) RSMo.; *State ex rel. and to Use of Kansas City Power & Light Company v. Buzard* 168 S.W.2d 1044, 1046 (Mo. 1943). There is no explicit or implicit authority in any Missouri statute which would grant the Commission power to pre-approve the exercise of an option of this kind. Whether the Company should exercise an option like this is a management decision, and the case law is clear that the Commission is not empowered to manage the utilities it regulates. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181-182 (Mo. App. W.D. 1960). In fact, utilities make decisions to exercise various options every day—options to purchase real estate, or options relative to the purchase of fuel or hedging instruments, for example. Ameren Missouri is not aware of any case in which the Commission has “managed” by pre-approval a utility's decision to exercise or decline to exercise an option of any kind. Of

course, after the fact the Commission is empowered to review the prudence of a utility's decision to exercise, or decline to exercise an option, and if the utility has acted imprudently to the detriment of customers the Commission can make adjustments to rates to protect customers from the financial impact of that imprudence. But there is simply no statutory authority for the to require the Company to seek pre-approval of a management decision of this type.

5. The second question that the Commission asked the parties to provide legal analysis on is "Are tax credits, that could flow to Ameren Missouri as a result of exercising the Option Agreement, assets subject to the Commission's regulatory authority, and does any transfer of these assets require Commission approval?" The answer to this question is also no. Section 393.190.1 RSMo. 2000 provides:

No...electrical corporation...shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person, public utility, without having first secured from the commission an order authorizing it to do so.

This statute does not apply to the tax credits that might be generated by Ameren Missouri's decision to exercise the option granted by the Option Agreement because (a) the tax credits do not constitute part of Ameren Missouri's "franchise, works or system," and (b) because they are not "necessary or useful in the performance of its duties to the public." The statute requires assets to meet both of these tests for the Commission to have authority to pre-approve their transfer or encumbrance; the tax credits meet neither test. First of all, tax credits are clearly not a franchise, which is a right granted by a government agency to use public roads and streets to construct and maintain electric facilities to provide service (e.g., a municipal franchise). They are also not "works or system," as these words connote physical facilities, such as poles, wires, substations and generating stations. *See, e.g., United States Gypsum, Inc. v. Indiana Gas Co.,*

*Inc.*, 735 N.E.2d 190, 801-02 (Ind. 2000), construing a similar Indiana statute in a manner such that a utility's "works or system" is limited to physical assets used by the utility to provide service, something that is far different from a right under the Internal Revenue Code to offset a dollar amount of taxes on a tax return. The Commission has extended the reach of "works or system" in Section 393.190.1 to apply to one non-physical asset: emissions allowances. But in approving Kansas City Power & Light Company's application to sell sulfur dioxide ("SO<sub>2</sub>") emissions allowances the Commission explained the unique characteristics of emissions allowances which make them, in the Commission's mind at least, part of the utility's "system."

The U.S. Congress has mandated that KCPL meet emissions standards. Those standards are based upon KCPL's steam-electric generating units. To enable KCPL to meet the emission limits, Congress created emission allowances *which attach to each generating unit*. These emission allowances have been made an integral part of KCPL's generating facilities and, thus, an integral part of its generating system. KCPL *must utilize these allowances* in meeting its obligations under the CAAA and in meeting its obligations to its Missouri ratepayers. The Commission finds that emission allowances are necessary and useful in the performance of KCPL's duties to the public and are part of KCPL's "system," and any sale or transfer of these allowances is void without prior Commission approval. *Re: Kansas City Power & Light Company*, Case No. EO-92-250, *Order Establishing Jurisdiction and Clean Air Act Workshops*, 144 P.U.R. 4<sup>th</sup> 416 (Mo. P.S.C. 1992) (emphasis added).

The tax credits at issue here are not similar to the SO<sub>2</sub> emissions allowances which the Commission addressed in *KCPL*. The tax credits, although generated as a consequence of the burning of refined coal at the Rush Island plant, are not attached to a particular generating unit in the same way that emissions allowances are attached to a generating unit. They don't have to be utilized in order to run the unit. They are not needed in order for Ameren Missouri to perform its duties to the public. They don't substitute for physical facilities like emissions allowances arguably substitute for the construction of pollution control equipment. In short, they cannot be fairly characterized as part of a utility's "system."

Some parties may argue that Section 393.190.1 is broad enough to encompass anything of value that a utility might have and that it might choose to use in conducting its business. However, the Commission has quite properly rejected such a broad interpretation of the statute. In *RE: Southern Union's Gas Supply Dept.*, Case No GO-2003-0354, *Order Closing Case*, 200 WL 1842460 (August 5, 2004) the Commission Staff argued that the term “franchise, works and system” in Section 393.190.1 encompassed MGE’s personnel, and that “the assembled experience and trained workforce” could not be transferred without Commission pre-approval. The Commission quite properly rejected this attempt to expand the parameters of Section 393.190.1, stating that this statute only requires “...a utility to obtain this Commission’s approval before consummating a transaction in which it sells *property used to serve customers.*” *Id.* (emphasis added). There are numerous examples of important assets that are not part of a utility’s franchise, works and system which are regularly transferred by a utility with no Commission pre-approval. Perhaps the best example is cash—utilities’ management must spend (transfer) hundreds of millions of dollars of cash each year to keep the lights on and the gas and water flowing with no Commission pre-approval. Even though it is needed for the utility to operate its business cash is simply not part of the utility’s franchise, works or system, and the transfer of cash is management’s prerogative. Of course, the Commission does have the power to protect customers from the financial consequences of any imprudence on the part of the utility, but there is no approval required under Section 393.190.1 prior to transferring cash. The same is true with regard to tax credits. They are simply not part of a utility’s franchise, works or system, and so no preapproval is required prior to their transfer or encumbrance.<sup>1</sup>

---

<sup>1</sup> It is worth noting that the Commission’s affiliate transaction rules would apply to the transfer of any asset, including tax credits, to an affiliate of Ameren Missouri. This is because the affiliate transaction rules apply to all *assets*, which is broader than the *subset* of a utility’s assets

6. One final issue raised at the hearing is whether the Commission could condition the grant of authority requested by Ameren Missouri on requiring the Company to request Commission authorization prior to entering into the option agreement or transferring tax credits, even if such authorization would not otherwise be required by Section 393.190.1. The answer to that question is also no. The Commission has no power to do indirectly (by imposing a condition on a transfer of assets) that which it has no power to do directly. The Commission cannot expand the jurisdiction granted to it by the Legislature simply by imposing conditions on transactions that it does have the authority to approve. If the Commission could do that there would effectively be no limits on its jurisdiction. Such a construction of the Commission's authority would directly contradict the courts' consistent admonition that the Commission is a body of *limited* jurisdiction. *Buzard, supra*, 168 S.W.2d at 1046.

7. The question for the Commission to decide is simply whether the transfer proposed in this case is detrimental to the public interest. Ameren Missouri believes it clearly is not; the benefits to the public from cleaner air and the benefits to Ameren Missouri and its customers of materially lower operating costs at the Rush Island plant make this transaction beneficial whether Ameren Missouri exercises the option or not, and whether Ameren Missouri transfers any tax credits it may receive or not. It is not necessary for the Commission to require additional conditions to make this transaction not detrimental to the public, or to withhold its permission altogether on the grounds that it can conceive conditions that it believes would make this transaction even more beneficial to the public than it already is. If a later decision to exercise the option is imprudent and harms customers, or if a later decision to transfer tax credits is imprudent and harms customers, then the Commission possesses the authority to take

---

over which the Commission has authority under Section 393.190.1; i.e., those parts of its franchise, works and system necessary or useful in the provision of service to the public.

appropriate action to protect customers from that harm. *That* is the authority the Commission possesses regarding those future decisions.

8. Ameren Missouri understands that the Commission's concerns about the Company exercising the option and transferring the tax credits are motivated by its legitimate desire to make absolutely sure customers are protected. We hope the Commission and the other parties understand that the Company has pursued this transaction and is seeking prompt approval that it can go forward, in a good faith effort to provide long-term benefits to its customers and the general public. It is an opportunity that should not be missed. Moreover, as Ameren Missouri has stated, it has no plans to exercise the option in the Option Agreement today, and in fact it has no right to exercise the option until 2013. As a consequence, to help satisfy the Commission's concerns, the Company is willing to voluntarily accept two conditions to the approval of this application, in addition to those recommended by the Staff. First, as stated during the hearing, the Company is willing to agree to notify the Commission and the parties if it decides to exercise the option prior to exercising the option. Specifically, the Company agrees to provide notification at least 30 days prior to exercising the option. This should allow any party sufficient time to raise any issues, or even file a complaint against the Company, should that be deemed necessary. Second, Ameren Missouri agrees to accept as a condition of the Commission's authority granted herein that it will not sell, transfer or encumber any tax credits it may receive as a result of exercising the option.<sup>2</sup> The Company is hopeful that with these conditions, the Commission will be able to promptly approve this transaction, as requested in the Company's application.

---

<sup>2</sup> Ameren Missouri's voluntary acceptance of these conditions should not be interpreted to mean that the Commission would have the power to impose them in the absence of the Company's agreement.



WHEREFORE, Ameren Missouri respectfully requests that the Commission approve the application it filed in this proceeding, subject to the conditions proposed by the Staff and the additional conditions set forth herein, by no later than December 20, 2011.

Respectfully submitted,

*/s/ Thomas M. Byrne*

---

**Thomas M. Byrne** MBN#33340  
Managing Associate General Counsel  
Ameren Services Company  
1901 Chouteau Ave., MC1310  
P.O. Box 66149  
St. Louis, MO 63166-6149  
Telephone: (314) 554-2514  
Facsimile: (314) 554-4014  
E-Mail: [AmerenMOService@ameren.com](mailto:AmerenMOService@ameren.com)

**James B. Lowery** MBN#40503  
Smith Lewis, LLP  
111 S. Ninth Street, Ste. 200  
P.O. Box 918  
Columbia, MO 65205  
Telephone: (573) 443-3141  
Fax: (573) 442-6686  
Email: [lowery@smithlewis.com](mailto:lowery@smithlewis.com)

**ATTORNEYS FOR  
UNION ELECTRIC COMPANY  
d/b/a AMEREN MISSOURI**

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served on the following parties via electronic mail (e-mail) on this 5th day of December, 2011.

**Missouri Public Service  
Commission**

Office General Counsel  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
GenCounsel@psc.mo.gov

**Missouri Public Service  
Commission**

Nathan Williams  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
Nathan.Williams@psc.mo.gov

**Office of the Public Counsel**

Lewis Mills  
200 Madison Street, Suite 650  
P.O. Box 2230  
Jefferson City, MO 65102  
opcservice@ded.mo.gov

**KCP&L Greater Missouri  
Operations Company**

Roger W Steiner  
1200 Main Street, 16th Floor  
P.O. Box 418679  
Kansas City, MO 64105-9679  
roger.steiner@kcpl.com

**Missouri Industrial Energy  
Consumers**

Diana M Vuylsteke  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102  
dmvuylsteke@bryancave.com

**Barnes-Jewish Hospital**

Lisa C Langeneckert  
600 Washington Avenue, 15th Floor  
St. Louis, MO 63101-1313  
llangeneckert@sandberghoenix.com

**Kansas City Power & Light  
Company**

James M Fischer  
101 Madison Street, Suite 400  
Jefferson City, MO 65101  
jfisherpc@aol.com

**Kansas City Power & Light  
Company**

Roger W Steiner  
1200 Main Street, 16th Floor  
P.O. Box 418679  
Kansas City, MO 64105-9679  
roger.steiner@kcpl.com

**KCP&L Greater Missouri  
Operations Company**

James M Fischer  
101 Madison Street, Suite 400  
Jefferson City, MO 65101  
jfisherpc@aol.com

/s/ Thomas M. Byrne

Thomas M. Byrne