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

SUGGESTIONS OF UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI, OPPOSING MOTION TO DISMISS FOR LACK OF JURISDICTION BY INTERVENORS LABADIE ENVIRONMENTAL ORGANIZATION AND THE SIERRA CLUB

Having intervened in this action, Labadie Environmental Organization (LEO) and the Sierra Club (collectively, the Intervenors), two citizens' groups that have been vociferous in their opposition to Ameren Missouri's proposal to construct a utility waste landfill, now seek the dismissal of Ameren Missouri's request for a certificate of public convenience and necessity (CCN) to expand the existing "footprint" of its Labadie Energy Center. Rather than focus on the issue raised by Ameren Missouri's application, LEO and the Sierra Club appear to want to make their opposition to the landfill this Commission's issue. Their attempt is an inappropriate and unnecessary distraction. Because this Commission has jurisdiction over Ameren Missouri's request to expand its plant boundaries and Ameren Missouri is required to obtain the Commission's approval of the request, the motion to dismiss filed by LEO and the Sierra Club should be denied.

I. LEO and the Sierra Club misapprehend the basis for Ameren Missouri's request for a CCN.

LEO and the Sierra Club seek dismissal on the ground that the Commission is not authorized to award a CCN for a utility waste landfill. While it may be true that the Commission does not issue CCN's for the myriad of individual assets that *comprise* a power plant, this was

not, in any event, Ameren Missouri's request. Rather, Ameren Missouri's Application for a Certificate of Public Convenience and Necessity quite clearly states that its request was based on the need to enlarge the physical boundaries of its current plant because the original plant CCN issued in 1966 does not encompass the area needed for a new plant component – the utility waste landfill:

> By this Application Ameren Missouri is requesting a certificate of public convenience and necessity ***to expand the boundaries of its Labadie Energy Center to include additional land immediately adjacent to the existing plant site***. The additional land is needed at this time so that the Company can construct and operate a utility waste landfill ("UWL") to replace the plant's existing waste impoundments (commonly referred to as ash ponds), which are nearing capacity. The additional land consists of approximately 813 acres, which will be used at this time for the proposed UWL and thereafter for other plant operations as needed.

Application of Union Electric Company d/b/a Ameren Missouri for a Certificate of Public Convenience and Necessity at ¶ 3 (emphasis added); *see also* Application at Prayer for Relief ("WHEREFORE, Ameren Missouri respectfully requests that the Commission make and enter its Report and Order granting the Company's request for a certificate of public convenience and necessity to expand the boundaries of the Labadie Energy Center to include the land described on Exhibit A hereto.").

Despite the clarity of Ameren Missouri's request, LEO and the Sierra Club mischaracterized this request as an application for a CCN "to construct and operate a utility waste landfill at its Labadie Energy Center for the disposal of coal ash" in their intervention application. Application to Intervene at ¶ 3. They have steadfastly held to this mischaracterization in the instant motion. *See, e.g.*, Intervenors' Motion to Dismiss at ¶¶ 2, 19 (arguing the Commission does not have jurisdiction to grant a CCN "for a utility waste landfill" and characterizing Ameren Missouri's understanding of the law to require the preapproval of

Commission of "any new construction on land not specifically described in one of its existing CCN's").

The continued mischaracterization of this action in their motion to dismiss might be excusable had Ameren Missouri accepted this characterization in responding to the Intervenors' motion to intervene; it did not. Instead, Ameren Missouri *again* stated the basis for its request for a CCN in its suggestions opposing their intervention, explicitly and directly:

> To be clear: Ameren Missouri filed its application not because this Commission is required to consider anew land use issues already decided by the local zoning authority or environmental issues properly before the MDNR, ***but simply because its existing certificate does not encompass the 813 acres of land on which the 166-acre landfill will be constructed.*** Ameren Missouri therefore reads *StopAquila* and a later case involving the same power plant, *State ex rel. Cass County et al. v. Public Serv. Comm'n and Aquila, Inc.*, 259 S.W.3d 544 (Mo. App. W.D. 2008), to perhaps suggest that ***it request Commission permission to enlarge the contiguous outboundary of the already-certificated Labadie Plant.*** There can be no dispute that under *StopAquila* there would have been no requirement for Ameren Missouri to come to the Commission for permission to build the landfill (or otherwise improve the power plant) were the construction to take place ***within the legal description of the Commission's 1966 Report and Order issuing the original CCN for the Labadie Plant***, but that was not the case here. ***That Ameren Missouri needs a certificate to expand the plant's area*** does not give LEO and the Sierra Club license to inject into this proceeding land use issues already addressed by Franklin County or environmental issues that are being addressed by MDNR.

Suggestions of Union Electric Company d/b/a Ameren Missouri Opposing Application to Intervene by Labadie Environmental Organization and Sierra Club at ¶ 15 (emphasis added); *see also* Suggestions at ¶ 16 (". . . the substance of the land use issues involved in zoning issues or environmental issues involved at MDNR are not within the scope of the Commission's consideration of a CCN application . . . ."[1]).

[1] This likely would explain the reason that the "PSC statute and its regulations are completely silent on the topic of utility waste landfills" and why "the PSC has neither been asked to nor ever granted a CCN for the construction of a utility waste landfill." Intervenors' Motion to Dismiss at ¶¶ 4, 16. This would also explain why Ameren Missouri did not apply for a CCN when it constructed a utility waste landfill within at its Sioux Energy Center—a point raised by the

Given this clarity, the fact that LEO and the Sierra Club continue to misinterpret Ameren Missouri's request for a CCN to be solely a request that this Commission approve the operation of a utility waste landfill, the footprint of which sits on only part of the area that Ameren Missouri seeks to add to is plant boundaries, appears to be intentional. This Commission should not be taken in by the attempt by LEO and the Sierra Club to derail this docket and deprive Ameren Missouri of a CCN that other parties in the future may argue was necessary for operation of the landfill, per *StopAquila* and *Cass County*, *infra*.

II. The Commission has the jurisdictional authority to grant Ameren Missouri's request for a CCN to expand its plant boundaries.

Even though Ameren Missouri's request for a CCN is based upon its desire to obtain the Commission's approval to expand its plant boundaries at Labadie, Ameren Missouri believed it necessary in its Application to describe its need for the additional acreage—to "construct and operate a utility waste landfill and conduct other plant-related operations at the site." *See, e.g.*, Application at *Introduction*. Why? So the Commission would understand why the additional acreage constituted part of the Labadie "electric plant", why it is necessary for public convenience[2] and why the request needed a timely resolution. It would be an odd and incomplete request indeed for a utility to request a

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Intervenors [Intervenors' Motion to Dismiss at ¶ 17] but apparently not understood by them to suggest that Ameren Missouri might have a *different* reason for requesting a CCN in this instance—to extend the physical borders of its plant (the Sioux landfill was constructed withini the footprint covered by Sioux's existing CCN). To the argument made by LEO and the Sierra Club that this Commission lacks authority to grant an operating permit for a utility waste landfill, Ameren Missouri wholeheartedly agrees; however, that is not the substance of Ameren Missouri's request.

[2] Where Commission approval is sought under Section 393.170 RSMo., the applicant must show that the "construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service." Section 393.170.3. How else could such a showing be made without discussing the asset(s) for which the additional acreage is needed?

CCN to expand the boundary of its power plant without including a prominent discussion of why the expansion is being requested.

Ameren Missouri understands the law set out in *StopAquila.Org and Cass County v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. W.D. 2005), and in *State ex rel. Cass County, et al. v. Public Serv. Comm'n and Aquila, Inc.*, 259 S.W3d 544 (Mo. App. W.D. 2008), to recognize the Commission's authority to give its permission and approval to enlarge the boundary of the already-certificated and currently-operating Labadie Energy Center. Indeed, Section 393.170.1, RSMo[3] warns that Ameren Missouri shall not begin construction of an "electric plant . . . without first having obtained the permission and approval of the commission." The Intervenors acknowledge the Commission's jurisdiction to approve a CCN in this circumstance. Intervenors' Motion to Dismiss at ¶ 7. Given that the court decisions referenced above make it clear that a utility cannot obtain this approval after-the-fact, Ameren Missouri believes it prudent and appropriate to obtain Commission approval even though it is not constructing an entirely new electric plant.

LEO and the Sierra Club argue at length that because a utility waste landfill is not an "electric plant" it is therefore not the proper subject of a CCN request. They argue that because a utility waste landfill does not directly add "even one kilowatt to the electric utility's generating capacity or provide power to a customer," it cannot be an "electric plant" as defined by statute. Intervenors' Motion to Dismiss at ¶ 8. Not only is this an absurdly narrow view of the statutory language, it belies common sense.

The definition of "electric plant" in the applicable Missouri statute is not so narrowly restricted to include only a turbine or generator at a plant that provides

[3] All statutory references are to RSMo (2000).

electricity to the public; rather, it includes: *"**all** real estate, fixtures* and personal property operated, controlled, owned, used or to be used or ***in connection with or to facilitate*** the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power . . . ." Section 386.020(14) (emphasis added). The Legislature used broad language in this statutory definition, and this language indicates its intent to allow for a broad interpretation of that definition. *See, e.g., Videon Corp. v. Public Serv. Comm'n*, 369 S.W.2d 264 (Mo. App. W.D. 1963) (affirming the Commission's interpretation that a printed telephone directory fell within statutory definition of "telephone line" because it "facilitate[d] the business of affording telephonic communication" as provided in statute). Similarly, a utility waste landfill "facilitates" the production of electricity so as to fall within the definition of "electric plant" for which a CCN may be awarded. Moreover, even if the telephone directory had not "facilitated" telephonic communication and even if the utility waste landfill did not "facilitate" power generation, both items most certainly are "used in connection with" providing the utility service at issue. To argue otherwise borders on absurdity. *See, e.g., State v. Nash*, 339 S.W.3d 500, 508 (Mo. banc 2011) (Recognizing the longstanding rule of statutory construction that statutes are not to be interpreted in ways that lead to unreasonable or absurd results).

Common sense also dictates that the statutory definition of electric plant is not to be narrowly read to exclude disposal of the waste generated in producing electricity, as LEO and the Sierra Club argue. After all, the statutory definition does not explicitly include smoke stacks, boilers, or buildings at electric generating stations; but each is used "in connection with or to facilitate" the production of electricity by the Labadie Plant.

Simple common sense tells us that electricity could not be produced without all kinds of things that don't literally produce electrons.

To argue that a utility waste landfill should not be considered part of an electric plant because it does not generate capacity or provide electricity to a customer also overlooks the very obvious fact that the generation of electricity at a coal plant inherently and necessarily produces waste. On this point LEO and the Sierra Club also make arguments bordering on absurdity. They claim that the Company does "not have to" build a landfill, claiming that the Company could simply transport the ash offsite. The Company may not literally need the wastewater treatment plants located at the Labadie, Rush Island and Sioux Energy Centers either,[4] but because they facilitate the generation of power and are far more economical than lining up a string of tanker trucks to haul sewage and other wastewater away night and day the wastewater treatment plants exist, and are in rate base for rate setting purposes.[5] The same can be said of the landfill at Sioux that takes slurry from the scrubbers (and which is also permitted by the Missouri Department of Natural Resources (MDNR)) in that some other way to dispose of the slurry could literally be found. Do LEO and the Sierra Club seriously contend that these items are not part of the power plants? The bottom line is that a utility waste landfill – like the existing ash ponds at Labadie; like the wastewater treatment plants at Labadie, Rush Island and Sioux; like Sioux's landfill that takes slurry from the scrubbers – will

[4] The Meramec Energy Center is located next door to the Metropolitan St. Louis Sewer District's treatment plant, and thus is connected directly thereto.

[5] In the case of Sioux, the wastewater treatment plant takes wastewater directly from the scrubbers, which could not operate without water and which could not operate if there was not a mechanism to treat and dispose of the water. Like a utility waste landfill, the wastewater treatment plants operate under separate permits from the MDNR.

obviously be used "in connection with or facilitate" the production of electricity at the Labadie Plant, and thus, it is obviously part of the plant itself.

Ameren Missouri's intended use of the addition to the Labadie Plant is relevant only to support a finding by this Commission that expansion of the plant's boundaries is necessary or convenient to serve the public interest—a necessary showing for an award of a CCN under Section 393.170. *State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n*, 527 S.W.2d 390, 392 (Mo. App. W.D. 1975). The Intervenors are actually correct to argue that the Legislature gave the MDNR the power to grant construction and operation permits for the utility waste landfill planned for Labadie, but they very incorrectly ascribe to Ameren Missouri the intention of having this Commission perform that same function. Intervenors' Motion to Dismiss at Part III. This is not Ameren Missouri's request. Indeed, the fact that LEO's and the Sierra Club's issues do not belong in this case, as argued by Ameren Missouri's Suggestions opposing their intervention, is evidenced by the fact that MDNR has been delegated construction and operating oversight over the proposed landfill. To repeat: the question for this Commission is whether expanding the plant boundary so that a landfill can be built is necessary or convenient for the public service.[6]

When Ameren Missouri's request for a CCN is seen for what it is—a request to expand the boundaries of an existing electric plant, the motion to dismiss filed by LEO

[6] Lest LEO and the Sierra Club claim that the landfill (or wastewater treatment plant, etc.) are not absolutely necessary in every instance, it should be noted that "necessary or convenient" in this context does not mean absolutely necessary. *State ex rel. Missouri, Kansas & Oklahoma Coach Lines, Inc. et al. v. Public Serv. Comm'n*, 179 S.W.2d 132, 136 (Mo. App. K.C. 1944). (Necessity does not require that the improvement be "essential or absolutely indispensable." * * * "Inconvenience may be so great as to amount to necessity."); *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. K.C. 1973) ("If it [the proposed improvement] is of sufficient importance to warrant the expense of making [building] it, it is a public necessity" (emphasis added).).

and the Sierra Club amounts to nothing more than an attack on a straw man rather than on any substantive issue now before this Commission. Consequently, this Commission should deny the motion to dismiss filed by Intervenors LEO and the Sierra Club.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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