

**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,	)	File No. EA-2012-0281
Operate, Maintain and Otherwise Control and Manage	)	
A Utility Waste Landfill and Related Facilities at its	)	
Labadie Energy Center	)	

**MOTION OF INTERVENORS LABADIE ENVIRONMENTAL ORGANIZATION AND  
SIERRA CLUB TO DISMISS FOR LACK OF JURISDICTION**

1. Intervenor Labadie Environmental Organization (LEO) and Sierra Club (together, “Intervenors”), pursuant to 4 CSR 240-2.116(4), move to dismiss the application of Union Electric d/b/a Ameren Missouri (“Ameren”) for a Certificate of Convenience and Necessity (“CCN”) to construct and operate a utility waste landfill at its Labadie power plant. Ameren’s application, filed January 24, 2013, seeks to “expand the boundaries of its Labadie Energy Center, so that it can construct and operate a utility waste landfill.” Appl. of Union Elec. Co. d/b/a Ameren Mo. for a Certificate of Public Convenience and Necessity, introduction. (hereinafter “Appl.”) The proposed landfill would let Ameren deposit the “coal combustion products”<sup>1</sup> (coal ash) it generates at its Labadie power plant on land nearby the plant site. Appl., ¶¶3-7.

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<sup>1</sup> Coal combustion products (also known as coal combustion residuals (“CCRs”) or coal ash) are wastes generated from the burning of coal. According to the U.S. Environmental Protection Agency (“EPA”), “[t]he contaminants of most environmental concern in CCRs are antimony, arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, silver and thallium.” EPA, Disposal of Coal Combustion Residuals from Electric Utilities, Proposed Rule, 75 Fed. Reg. 35128, 35138 (June 21, 2010).

2. The Public Service Commission (the “Commission” or “PSC”), as a regulatory body delegated specific authority by the General Assembly, does not have jurisdiction to grant a CCN for a utility waste landfill. The Public Service Commission Law (“PSC Law”) and its attendant regulations do not mention landfills or utility waste disposal in any way. Nor can a utility waste landfill be shoehorned into the definitions of “electric plant” or “electrical production facility” to bestow jurisdiction. See §§ 393.170; 386.020(14) RSMo.; 4 CSR 240-3.105(1)(A), (B). Because the Commission lacks jurisdiction, Ameren’s application should be dismissed.

## **I. THE COMMISSION DOES NOT HAVE THE POWER TO GRANT A CCN FOR A UTILITY WASTE LANDFILL.**

### **A. The Powers of the Commission are Limited to Those Expressly Conferred by Statute. No Statute has Expressly Conferred upon the Commission the Power to Grant a Certificate for a Utility Waste Landfill.**

3. The Commission is a creature of statute—specifically, the PSC Law, found in sections 386 through 394 of the Missouri Revised Statutes. Its powers are limited to those “expressly conferred upon it by the statutes and reasonably incidental thereto.” *State ex rel. Kan. City Transit, Inc. v. Pub. Serv. Comm’n*, 406 S.W. 2d 5 (Mo. banc 1966), *State ex rel. Harline v. Pub. Serv. Comm’n*, 343 S.W.2d 177 (Mo. App. 1960), RSMo. §386.040. In the absence of a statute or regulation authorizing it to act, the Commission has no authority: “[n]either convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute.” *State ex rel. Mo. Cable Telecomms. Ass’n v. Mo. Pub. Serv. Comm’n.*, 929 S.W.2d 768, 772 (Mo. App. 1996).

4. Both the PSC statute and its regulations are completely silent on the topic of utility waste landfills. There is no provision authorizing the Commission to grant permission and approval for the construction of a utility waste landfill.

5. While the Commission has “all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter,” §386.040 RSMo., the PSC Law in general and the CCN requirements in particular were not intended to ensure that electric utilities dispose of their coal waste correctly or efficiently. The law was designed to remedy the cut-throat competition that would result were utilities to compete with each other for customers, especially since the public would ultimately bear the costs of such competition. *State ex rel. Union Elec. Light & Power Co. v. Pub. Serv. Comm’n*, 62 S.W.2d, 742, 745 (Mo. 1933). Likewise, the Commission bears responsibility for ensuring that a utility does not abuse its monopoly power and that it serves its customers fairly. *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 34 (Mo. App. 2005) (purpose of requiring a CCN is to “regulate rates that would give the utility a fair rate of return and preclude it from imposing monopoly prices on taxpayers”).

6. These purposes are not advanced by issuance of a CCN for a utility waste landfill. The landfill’s construction would not add a new competitor to the electricity market and thereby place customers at risk of harmful competition. It would not add new territory to Ameren’s service area, and would not increase Ameren’s existing electricity production. Approval of this sort of building project—a utility waste landfill—was far from the minds of the legislators who gave the Commission its authority to issue certificates and is far beyond the scope of those powers. The Commission should dismiss the Application.

**B. Utility Waste Landfills are Not “Electric Plants” as Defined in RSMo. §§393.170 and 386.020(14).**

7. The PSC Law does require Commission pre-approval before an electric utility undertakes some projects. Section §393.170 states that “no ... electrical corporation ... shall begin construction of a[n] ... electric plant ... without first having obtained the permission and

approval of the commission.” Thus, to construct an *electric plant*, a utility must obtain the permission and approval of the Commission, which is done through the CCN process.

8. However, utility waste landfills do not fall within the statute’s definition of “electric plant.” The definition of “electric plant” includes

all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power. RSMo. §386.020(14).

Utility waste landfills are not used to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power. Nor are they used in connection with the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power. Rather, utility waste landfills are used as a site for the *disposal* of *waste* generated from the combustion of coal and other fossil fuels. *See* 10 CSR 80-11.010. The disposal of waste is a separate function from the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power. It does not add even one kilowatt to the electric utility’s generating capacity or provide any power to a customer.

9. This case would be no different if Ameren wanted to construct and operate a landfill for the disposal of ordinary garbage produced at the plant in the course of its operations. If Ameren wanted to bury its trash in a typical solid-waste landfill on-site instead of having a third party haul it away, this would not make such a landfill an “electric plant.” Although this garbage would also be generated in the course of Ameren’s electricity production operations, disposing of ordinary garbage does not produce electricity, and thus, there would be no need for a CCN to construct and operate such a landfill.

10. Utility waste landfills are not an inherent part of an electric plant. To the extent that disposal is needed, utility waste landfills need not be located on the site of the electricity generation. Utilities may construct and operate a utility waste landfill on the site of their electric plant, but they do not have to; rather, they may transport their waste to a utility waste landfill at another site. In fact, the utility need not even own or operate a utility waste landfill itself – it may contract for the disposal of its waste with the third-party owner and operator of a utility waste landfill. Indeed, Ameren considered disposing of its waste in an offsite location owned and operated by a third party instead of constructing and operating its own utility waste landfill, Appl., ¶6, and still plans to dispose of its coal ash offsite if it is unable to build the proposed utility waste landfill. Appl., ¶11.

**C. Utility Waste Landfills are Not “Electrical Production Facilities” Within the Meaning of 4 CSR 240-3.105.**

11. Likewise, no Missouri regulation, which would delineate the Commission’s powers “reasonably incidental” to the statute, gives it authority to grant a CCN for a utility waste landfill. 4 CSR 240-3.105 describes the only situations where the Commission has power to grant a CCN: (1) when the utility expands its customer base into a service area that is new to the utility; or (2) when the utility builds new electrical transmission lines, gas transmission lines or electrical production facilities. 4 CSR 240-3.105(1)(A)-(B).

12. The construction of a utility waste landfill is neither the same as nor even tangentially related to the expansion of a service area. Ameren will not serve new customers or expand its geographical reach as a result of the landfill’s construction. Further, the construction of a utility waste landfill is not contemplated when considering the construction of an electrical or gas transmission line .

13. Ameren may argue that it needs a CCN for the proposed utility waste landfill because the landfill would be part of an “electrical production facility.” Its Application states that it wishes to expand the boundaries of its Labadie power plant site so that it can construct and operate the proposed utility waste landfill and “conduct other plant related operations at the site.”<sup>2</sup> Appl., introduction. While the Labadie power plant is certainly an “electrical production facility,” the place where the waste generated by that electrical production is disposed of is not.

14. Utility waste landfills are simply not within the meaning of “electrical production facilities.” Because “electrical production facilities” is not defined within the rules or statutes governing the PSC, the plain language meaning of the term governs. *See State ex rel. Office of Pub. Counsel v. Mo. Pub. Serv. Comm’n*, 331 S.W.3d 677, 688 (Mo. App. 2011) (“absent a statutory definition, the ‘primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute’”), quoting *State ex rel. White Family P’ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. 2008) (en banc). This same principle of construction should be applied to terms used in the regulations as well. *Dep’t of Soc. Servs., Div. of Med. Servs. v. Senior Citizens Nursing Home Dist. of Ray Co.*, 224 S.W.3d 1, 10 (Mo. App. W.D. 2007). Under this well-trodden approach, electrical production facilities are facilities that produce electricity. Utility waste landfills do not produce electricity. Rather, they are used for the disposal of waste which is created when coal is burned. The *disposal* of this waste into a utility waste landfill does not *produce* electricity.

15. It is, of course, possible to produce electricity without a utility waste landfill, as Ameren acknowledges. Accordingly, a utility waste landfill is not an electrical production

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<sup>2</sup> Ameren’s application makes reference to its plans to conduct “other plant related operations.” Those unspecified functions may or may not be part of an electrical production facility, but they cannot convert the otherwise unrelated utility waste landfill into an electrical production facility.

facility or an inherent part of one—it is a facility for the disposal of waste that may or may not be located at the site of an electrical production facility and that may or may not be operated by the utility itself.

## **II. THE COMMISSION HAS NEVER BEFORE GRANTED A CCN FOR A UTILITY WASTE LANDFILL.**

16. Based on Intervenor’s review of on-line records over the last 35 years, it appears that the PSC has neither been asked to nor ever granted a CCN for the construction of a utility waste landfill. For example, Kansas City Power and Light Company (“KCP&L”) opened its Montrose power plant fly ash landfill in 1987. There is no corresponding CCN proceeding at the Commission for this landfill that Intervenor has been able to locate. Similarly, KCP&L began construction of its Iatan utility waste landfill in 2007 without obtaining a CCN at that time or thereafter. This is further evidence that the regulations do not require a CCN for a utility waste landfill and that such a grant is beyond its powers.

17. Ameren knows this as well. Beginning approximately 2008, Ameren constructed a utility waste landfill on land adjacent to its Sioux power plant. The Commission did not grant it a CCN prior to construction. In fact, Ameren never even applied for a CCN. This isn’t because Ameren is a scofflaw. It did apply for and obtain a zoning amendment and conditional use permit from the St. Charles County Planning and Zoning Commission. St. Charles County, Mo. Ordinance 06-074 (May 30, 2006). It applied for and received a solid waste facility license from the St. Charles County Department of Community Health and the Environment. It applied for and received a Solid Waste Disposal Area Construction Permit from the Missouri Department of Natural Resources (“DNR”). In addition to these approvals, the Waste Facility Plan for St. Charles County prepared for Ameren by its project engineering team lists among the documents

Ameren submitted in connection with the construction of its utility waste landfill: a Dam Safety Permit from DNR, a Floodplain Development Permit from St. Charles County, a Land Disturbance Permit from St. Charles County, and an NPDES Permit. *See* Gredell Engineering Resources, Inc., Appendix A: List of Previously Submitted Documents, Waste Facility Plan for St. Charles County, Sioux Power Plant Utility Waste Landfill, St. Charles County, Missouri, Prepared for AmerenUE, 2 (April 2010), attached as Exhibit 1. After construction, Ameren received landfill operating permits from both DNR and from St. Charles County, but there was no CCN among the multitude of permits and other authorizations Ameren applied for and received.

18. Even more to the point, Ameren did not originally contemplate a CCN for its proposed Labadie landfill. In its publicity materials related to its proposed construction of a utility waste landfill at its Labadie power plant, Ameren outlined the process it would complete before it could construct the proposed utility waste landfill. According to Ameren's materials, it would obtain from DNR's Solid Waste Management Program a Preliminary Site Investigation, a Detailed Site Investigation, a Construction Permit, and an Operating Permit. From Franklin County, Ameren would obtain a Land Use Permit, a Floodplain Development Permit, a Land Disturbance Permit, and an Operating Permit. Ameren further stated it would obtain a Wetlands Permit from the U.S. Army Corps of Engineers, and additional Air, Water, and Land Disturbance Permits from DNR throughout the project. AmerenUE, *Labadie Workshop Documents*, <http://www.ameren.com/sites/aue/source/AboutUs/Documents/LabadieWorkshop.pdf>, attached as Exhibit 2. But nowhere in this list does Ameren mention seeking or obtaining a CCN from the Commission. Ameren apparently did not think it needed the Commission's approval as it was planning the proposed landfill, sought Franklin County zoning changes to accommodate the



proposed landfill, and pursued the landfill construction permit application process with DNR.

Ameren did not file the CCN application until more than three years after notifying the public of its proposal to build the landfill.

19. Ameren now states that it must obtain a CCN because the proposed utility waste landfill is planned for land acquired since the 1966 issuance of the CCN for the construction of the Labadie plant itself. See Opposition to Application for Intervention at ¶¶ 11-12, 15. It relies on *StopAquila* and *State ex rel. Cass County v. Public Service Commission*, 259, S.W.3d 544 (Mo. App. 2008) to argue that the Commission must preapprove any new construction on land not specifically described in one of its existing CCN's.

20. *StopAquila* requires an electric utility to obtain a CCN before constructing an electric plant, even if the new plant will be located in a service area for which the utility already has a CCN. *StopAquila*, 180 S.W.2d at 37. This makes sense under the PSC statute, which quite plainly requires Commission approval of new electric plant construction apart from the certification of a utility's service area. RSMo. §393.170.1.<sup>3</sup> *StopAquila*, just like the statute it construes, does not discuss the construction of anything other than an electric plant.

21. The same is true of *Cass County*. The court considered there whether the Commission was permitted to grant *post hoc* approval of the construction of an electric plant and concluded that the statute's plain language required Commission approval of the construction of an electric plant "before the first spadeful of soil is disturbed." 259 S.W.3d at 549. Although the utility argued that the Commission's general powers of supervision over utilities might trump the language of the section requiring a CCN, the court rejected that argument, holding that for

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<sup>3</sup> It also made sense given the facts of *StopAquila*: Aquila claimed an exemption from local zoning laws so that without Commission approval, it could have constructed a massive power plant without any significant regulatory oversight. *Id.* at 37.

purposes of granting a CCN, the Commission must look only to §393.170. *Id.* at 551 (noting that the more specific and detailed statute takes precedence over a general statute treating the same subject).

22. Under both cases, if Ameren wanted to build a new electric plant on any property, a new CCN would certainly be required. However, because Ameren wants to build a landfill instead, and a landfill is not an electric plant, the Commission cannot hear Ameren's application for a landfill CCN.

### **III. THE LEGISLATURE HAS EXPRESSLY GIVEN THE DEPARTMENT OF NATURAL RESOURCES POWER TO GRANT PERMITS FOR THE CONSTRUCTION AND OPERATION OF UTILITY WASTE LANDFILLS.**

23. The Missouri legislature has expressly given the Department of Natural Resources ("DNR") power to grant permits for the construction and operation of utility waste landfills. DNR has a comprehensive set of regulations for the construction and operation of such landfills. If the Commission were to also take on the duty of regulating landfill construction and operation, the duplicative effort could lead to confusing, contradictory, and dilatory requirements.

24. In contrast to the silence in the PSC Law and regulations on this issue, the state's Solid Waste Management Law and implementing regulations expressly require an entity proposing to construct and operate a solid waste disposal area, of which a utility waste landfill is one type, to obtain permits from DNR. A utility waste landfill is defined by statute as "*a solid waste disposal area* used for fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels." RSMo. §260.200. (emphasis added). Because a utility waste landfill is a "solid waste disposal area," in order to construct and operate a utility waste landfill, a permit from DNR is required:

It shall be unlawful for any person to operate a solid waste processing facility or *solid waste disposal area* of a solid waste management system without first

obtaining an operating permit from the department. It shall be unlawful for any person to construct a solid waste processing facility or solid waste disposal area without first obtaining a construction permit from the department pursuant to this section. RSMo. §260.205. (emphasis added).

The statute also requires, as a condition of construction, that the landfill be located at a geologically and hydrologically sound site and that the landfill's builder demonstrate its financial capacity. RSMo. § 260.205(4), (5). In contrast, the PSC statute does not authorize the Commission to preapprove plans for the construction of a utility waste landfill (or any other type of landfill) nor does it detail the requirements for a safely constructed, financially secure, and well-run landfill.

25. Likewise, DNR's regulations, in contrast to those of the PSC, prescribe the requirements for the design and operation of utility waste landfills. These regulations specifically include the definitions for utility waste and utility waste landfill. 10 CSR 80-2.010(118), (119). The regulations also address the interests of the general public in safety, health, and avoiding nuisances. 10 CSR 80-11.010(1). DNR looks at the geological and hydrological safety and adequacy of the site on which the landfill is located (10 CSR 80-2.015; 10 CSR 80-11.010(4)), requires extensive financial security from the landfill's builder (10 CSR 80-2.030(4)(B) and (D)), and prescribes specific design elements to insure the adequacy of the landfill's construction (10 CSR 80-11.010(5), (6) and (7)). In stark contrast, the PSC's regulations are silent on these important issues. As discussed above, this case would be no different if Ameren wanted to construct and operate an ordinary landfill. The PSC has no regulations pertaining to any type of landfill at all. That the proposed landfill is a utility waste landfill, rather than an ordinary solid waste landfill, makes no difference. DNR, rather than the PSC, has extensive regulations covering each type of landfill.

26. The construction and operation of landfills is not part of the Commission's statutory mission. The Commission has expertise in approving the construction of new electric plants, including the financial ramifications of construction. It has expertise in determining the public's need for additional electric power and in regulating competition between utilities. But these types of concerns are not at issue when evaluating the construction and operation of a utility waste landfill. Landfill operators do not compete with each other for service areas. The types of concerns that arise when overseeing landfill construction and operation are those in which DNR has its area of expertise.

27. The dangers of unchecked expansion that concerned the *Stop Aquila* court are not present here. The court in *StopAquila* worried that if either a CCN or local zoning hearing were not required for a utility's construction of a new electric plant, it "would effectively be giving electric companies in the state carte blanche to build wherever and whenever they wish, subject only to the limits of their service territories and the control of environmental regulation, without any other government oversight." *Id.* at 37. There is no danger of that happening here as the lengthy list of permitting authorities to which Ameren has or intends to apply for approval demonstrates. *See supra* ¶¶17-18. Moreover, DNR's scrutiny of landfill construction plans cannot simply be dismissed so lightly. It extends to every aspect of the landfill's location and construction, considering such factors as the landfill's financial capability to operate and maintain the landfill over its useful life.

28. The purpose of the Commission's CCN process is to determine what is necessary and convenient, based on power demand and the competing financial interests of utility shareholders and rate payers. These purposes are unrelated to the construction and operation of utility waste landfills. There are no dangers of utilities charging monopoly rates based on their

construction and operation of utility waste landfills. Nor does the determination of whether more electricity is needed in the area require PSC approval of landfills, particularly because, unlike an electric plant, the utility need not even operate the landfill itself.

29. As Ameren acknowledges, “the Commission’s interest and duty is primarily directed to the interests of regulated utility ratepayers in terms of their utility service.” Suggestions in Opposition to Application for Intervention at ¶6. This interest and duty does not include regulation of landfills. Although the Commission may on occasion consider a need for “adequate facilities” *State ex rel. Ozark Elec. Coop. v. Pub. Serv. Comm’n*, 527 S.W.2d 390, 394 (Mo. App. 1975), in order to ensure that ratepayers receive reliable service, when considering whether to grant an application for CCN, its scrutiny is limited by statute to a consideration of the safety and adequacy of the proposed electric plant. The Commission’s regulatory powers do not extend to regulating the adequacy of landfills or of waste disposal in general, neither of which generates electricity or supplies it to customers. Utilities may simply send their waste to an existing site on land owned by an unrelated party—surely the Commission would not propose to evaluate the adequacy and safety of such site.

## **V. CONCLUSION**

30. The statutes and regulations make clear that the PSC does not have jurisdiction to issue a CCN for the construction of a utility waste landfill. For the reasons stated above, Labadie Environmental Organization and Sierra Club respectfully request the Commission to dismiss Ameren’s Application For A Certificate of Public Convenience and Necessity for failure to state a claim for which relief may be granted.

Respectfully submitted,

LABADIE ENVIRONMENTAL ORGANIZATION  
SIERRA CLUB

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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was sent via email on March 25, 2013, to all parties of record.

/s/ Lauren D. Grady