

**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)	

**REPLY OF INTERVENORS LABADIE ENVIRONMENTAL ORGANIZATION AND
THE SIERRA CLUB TO SUGGESTIONS OF UNION ELECTRIC COMPANY d/b/a
AMEREN MISSOURI, OPPOSING MOTION TO DISMISS FOR LACK OF
JURISDICTION AND TO THE STAFF’S RESPONSE TO MOTION TO DISMISS**

Intervenors Labadie Environmental Organization (“LEO”) and Sierra Club respond as follows to the 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 (“Ameren Suggestions Opposing Motion to Dismiss”) and to the Staff’s Response to Motion to Dismiss. Ameren’s plans to expand the footprint of its power plant are inextricably bound up with its plan to use the new land to construct a utility waste landfill. Because this landfill is not an electric plant or an electrical production facility, even in the wake of *StopAquila* and *Cass County*, the Commission lacks jurisdiction over this matter.

I. Ameren Seeks a CCN to Construct and Operate a Utility Waste Landfill

1. Ameren’s argument is based on a distinction without a difference; it claims its Application should be reviewed solely as a request to expand the Labadie plant’s boundaries, attempting to downplay the fact that the sole reason for this expansion is to construct and operate a large utility waste landfill. The expansion of Labadie’s borders and the construction and

operation of the utility waste landfill are inextricably intertwined, and the Commission cannot separate one from the other in this proceeding. Ameren wants the Commission to examine the convenience and necessity of its construction and operation of a utility waste landfill on newly purchased land adjacent to its currently operating power plant, as evinced by the following examples:

- In paragraph 3 of its application, Ameren explained that it was acquiring the additional land ***“so that the Company can construct and operate a utility waste landfill (“UWL”) to replace the plant’s existing waste impoundments . . .*** 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.” Appl. of Union Electric Company d/b/a Ameren Missouri for a Certificate of Convenience and Necessity at 3 (emphasis added) (hereinafter “Appl.”).¹
- Likewise, the prayer for relief in Ameren’s application clearly states that it seeks “permission and approval and a certificate of public convenience and necessity (“CCN”) to expand the boundaries of its Labadie Energy Center, ***so that it can construct and operate a utility waste landfill*** and conduct other plant related operations at the site.” Appl. at 1 (emphasis added).

¹ Although Ameren tacks on the phrase “other plant operations as needed,” *id.*, these “operations” are not described with any specificity in Ameren’s Application, or Ameren’s Suggestions Opposing Motion to Intervene, or Suggestions Opposing Motion to Dismiss. Moreover, the “as needed” nature of these “operations,” and the fact that they are apparently to take place after the construction of the UWL, makes it clear that Ameren in reality has no other plans for the expanded site other than the construction and operation of the proposed utility waste landfill.

- Ameren’s Suggestions in Opposition to the Motion to Intervene were no less clear: In the first paragraph, Ameren describes the purpose of its Application: “to expand the boundaries of its Labadie Energy Center (which operates under an existing CCN) *so that it can construct and operate a utility waste landfill . . .*” Suggestions Opposing Application to Intervene, ¶ 1 (emphasis added). It later describes the issue central to this case: “the issue is whether Ameren Missouri needs this landfill to dispose of the coal combustion products produced by Labadie Energy Center. . . .” *Id.*, ¶ 10.
- The Staff also acknowledges that Ameren’s Application seeks a CCN for a utility waste landfill. Staff’s Response to Motion to Dismiss, ¶ 1 (describing the Application as “Ameren Missouri’s . . . application for a certificate of convenience and necessity (“CCN”) *regarding a utility waste landfill* at its Labadie Energy Center. . . .”) (emphasis added).

II. A Utility Waste Landfill is Not Within the Statutory Definition of an Electric Plant

2. Both the Staff and Ameren argue that a utility waste landfill falls within the statutory definition of “electric plant” and is thus within the jurisdiction of the Commission. Ameren Suggestions Opposing Motion to Dismiss at 4-8; Staff Response, ¶¶ 2-3. They are incorrect.

3. The statutory definition of “electric plant” is broad, but not unlimited. The definition of “electric plant” has never been construed to encompass a landfill. Although the definition includes “real estate, fixtures and personal property” used to “facilitate” or “in connection with” the generation of electricity, RSMo. 386.020(14), this language could not have been meant to be so broad as to include landfills, which are only used for the disposal of waste. The Staff notes that “[t]he production of electricity through fossil fuel combustion cannot be

separated from the production of utility waste. . . .” Staff’s Response to Motion to Dismiss, ¶ 2. While Ameren’s production of electricity does produce utility waste, the production of utility waste and the disposal of utility waste can be separated. For example, if a third party was going to construct and operate a utility waste landfill separate from a power plant, surely a CCN would not be required. Moreover, Ameren cites *Videon Corp. v. Public Serv. Comm’n*, 369 S.W.2d 264 (Mo. App. 1963), noting that the PSC had jurisdiction over a telephone directory because the directory facilitated communication by telephone. Ameren neglects to mention that *Videon* was superseded by statute and the Commission no longer has jurisdiction over such a tenuously related item. See *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo. App. 1995).

4. The PSC rule that interprets the definition of “electric plant” in RSMo. 386.020(14) is 4 CSR 240-3.105. This rule describes the only two situations where the Commission has power to grant a CCN: for a service area; and for transmission lines or electrical production facilities. 4 CSR 240-3.105(1)(A)-(B). Landfills are conspicuously absent from this short, yet comprehensive, list. The Commission cannot simply ignore its own interpretation of its statute, an interpretation that does not include utility waste landfills within the definition of either “electric plant” or “electrical production facility.”

5. Although generating electricity from coal produces waste, the disposal of this waste onsite is not an inherent part of electricity production. An onsite utility waste landfill is not an inherent part of an electric plant or electrical production facility, as evidenced by the fact that waste generated from coal combustion can be disposed of offsite. Ameren considers this idea to “border[] on absurdity” in its Suggestions Opposing Motion to Dismiss. *Id.* at 7. Yet before submitting its Application, Ameren apparently considered this very same idea: “[t]he Company

also considered the option of transporting Labadie CCPs to a licensed landfill owned and operated by a third party.” Appl., ¶ 6. Moreover, Ameren states that if it is unable to construct and operate the proposed utility waste landfill, it will dispose of its waste in an offsite facility owned by a third party. Appl., ¶ 11. Its decision to construct and operate its own utility waste landfill instead of paying a third party to do so does not transform waste disposal activities into power generation. Nor does it extend the definition of “electric plant” or “electrical production facility” to encompass a landfill.

III. The PSC’s Jurisdiction Does Not Include Granting CCNs for Landfills

6. Staff argues that “evaluating a utility’s operations relating to the waste they produce is directly related to the Commission’s mission in one very simple way: cost.” Staff’s Response to Motion to Dismiss, ¶ 6. Intervenor’s do not dispute that the Commission might be able to consider landfill cost issues during a ratemaking proceeding or other proceeding to determine the utility’s ability to dispose of its assets.² But both of those kinds of proceedings are different from issuing a *CCN* to allow a utility to determine whether a proposed landfill is necessary and convenient in the first place.

7. Ameren states: “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. . . .” *Id.* at 4, fn.1. In other words, Ameren admits that the Commission lacks authority to grant an operating permit for a utility waste landfill, while

² As pointed out by the Staff, the Commission found it had jurisdiction to consider whether an electric utility could trade SO_x and NO_x emissions credits under the authority of RSMo. § 393.190.1 which requires approval of certain sales of assets. Staff Response at 2-3 & n.1. But the Commission’s considerations there in construing a different statute do not shed light on the scope of the *CCN* procedures at issue here.

simultaneously asking the Commission to grant a CCN allowing Ameren to expand its boundaries for the express purpose of constructing and operating a utility waste landfill. While a CCN does not use the word “permit,” it involves the PSC granting permission for Ameren to expand its boundaries so that it can build and operate a utility waste landfill. Again, Ameren’s argument relies on a distinction without a difference.

8. The legislature has not given the Commission jurisdiction to issue a CCN for a landfill, which is made clear by the fact that it has expressly given responsibility to issue construction permits for landfills to the Missouri Department of Natural Resources. The Commission has no powers except those granted by legislature. Therefore, since the legislature has not given the Commission jurisdiction to issue permits for landfills, the Commission does not have jurisdiction to issue permits for landfills.

IV. Neither *StopAquila* nor *Cass County* Require Ameren to Obtain a CCN for a Landfill

9. Ameren claims that the CCN it seeks is required under *StopAquila.org v. Aquila*, 180 S.W.3d 24 (Mo. App. 2005) and *State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544 (Mo. App. 2008). The Staff, while less certain, accepts that Ameren’s concerns about those cases may be understandable. Staff’s Response to Motion to Dismiss, ¶ 5. However understandable, Ameren is incorrect.

10. Both *StopAquila* and *Cass County* involve the construction of an electric power plant. There was no doubt about it in either decision: what Aquila wanted to construct would be used for the generation of power and was squarely within the definition of both the statute and the regulations. *Cass County*, 258 S.W.3d at 546 (“multi-million dollar power plant”); *StopAquila*, 180 S.W.3d at 28 & n.3 (“A peaking plant is designed to generate electricity ...” and

the proposed plant would “generate 315 MW of electricity with three 105-MW turbines ...”).

This present case involves the construction and operation of a utility waste landfill, which, as discussed above, is not an electric plant.³

³ Aquila’s subsequent filings before the Commission also illustrate the bounds of the definition of “electric plant.” In *StopAquila*, Aquila also proposed to build a substation “which would allow the power plant’s overflow to flow to a higher adjacent voltage.” *StopAquila*, 180 S.W.3d at 28 n.4. After the Missouri Court of Appeals clarified Aquila’s need for a CCN prior to building its power plant, and apparently included the substation within the ambit of its decision, Aquila returned to the Commission for a CCN each time it proposed to build a new substation. *In re Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage Electrical Distribution Substation and Related Facilities ... (Near the City of Raymore,)* EA 2006-0499 (filed Jun. 23, 2006); *In re Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage Electrical Distribution Substation and Related Facilities ... (Near the City of Osceola)*; EA 2006-500 (filed Jun. 23, 2006); *In re Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage Electrical Distribution Substation and Related Facilities in Clay County*, EA 2007-0244 (filed Dec. 28, 2006); *In re Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage Electrical Distribution Substation and Related Facilities in Benton County*, EA 2007-0245 (filed Dec. 28, 2006). Three of these cases were settled, but on August 28, 2007, in EA 2007-0245, the Commission found that an electric utility did not need a new CCN before constructing a substation when it already had a CCN that allowed it to supply power and build power lines in the same geographic area. It dismissed the application. The Circuit Court of Cole County affirmed this order on April 15, 2008. That decision was in turn appealed to the Missouri Court of Appeals, but the appeal was voluntarily dismissed on August 19, 2008. Even though construction of a substation was apparently considered by the *StopAquila* court to be within the scope of its order requiring pre-construction CCNs, the Commission nonetheless determined that construction of a substation was not the kind of expansion that was sufficiently related to the construction of a new power plant as to require a new CCN, and found that it was already covered by the applicant’s existing line certificate.

11. Although Ameren wants to expand the boundaries of its Labadie plant, this alone is insufficient to require the grant of a CCN. A look at alternative uses of the expanded site is telling. For example, if Ameren wanted to expand its Labadie plant to construct a solar farm on its newly acquired 813 acres, this clearly would require a CCN, as a solar farm is obviously an electric plant. On the other hand, if Ameren wanted to expand its plant to construct an employee parking lot, this would not require a CCN, even though it could be argued that the parking lot is used “in connection with” the generation of electricity. After all, many if not all of Ameren’s employees—who are essential to electricity production—drive to work, and they must have a place to park. If they do not have a place to park, they cannot drive to work, and electricity cannot be produced. Yet not even Ameren would make the argument that, under *StopAquila* and *Cass County*, a CCN is required for a parking lot. In reality, as with a utility waste landfill, a CCN would of course be unnecessary, as CCNs are required only for electric plants.

12. When Ameren Missouri’s request for a CCN is seen for what it is—a request to construct and operate a utility waste landfill—it is clear that the PSC lacks jurisdiction over Ameren’s Application. Therefore, Labadie Environmental Organization and the Sierra Club again respectfully request that the Commission 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
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was sent via email on April 16, 2013, to all parties of record.

/s/ Lauren D. Grady