



SCHOOL OF LAW

Civil Justice Clinic
Interdisciplinary Environmental Clinic

June 21, 2013

Hon. Morris Woodruff
Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, P.O. Box 260
Jefferson City, MO 65102

Filed in EFIS and sent via e-mail

Re: File No. EA-2012-0281, Ameren's Application for Certificate of Public Convenience and Necessity Regarding Proposed Labadie Coal Ash Landfill

Dear Judge Woodruff:

Mr. Lowery's letter of today attempts to re-argue the issues discussed and resolved at your on-the-record Conference two days ago in Jefferson City, in which all parties participated and had the opportunity to raise and discuss their concerns regarding the June 25 local public hearing in the above-referenced matter. We object on procedural and substantive grounds to the suggestions set forth in Mr. Lowery's letter on behalf of Ameren.

One of the items discussed and agreed to at the Conference is that all parties will have an opportunity to make presentations at the outset of the hearing. It was understood by all that this part of the hearing would not be on the record. I stated that representatives of the Labadie Environmental Organization ("LEO") and the Sierra Club would make such presentations. Ms. Schuba's statements quoted in the local *Missourian* newspaper simply reiterate that fact. We are not responsible for the manner in which the *Missourian* wrote its story, and it is surprising that Mr. Lowery puts great stock in the story after the understandings expressed by counsel at the June 19 Conference.

Mr. Lowery now proposes two rules that are inconsistent with the procedures agreed to at the June 19 Conference, and would substantially undermine the value of the public hearing.

1. Requiring Speakers to State Affiliations

While I do not know who precisely will attend the local public hearing on June 25, I do know that Ameren's proposal to bury coal ash in the Missouri River floodplain and floodway, in an earthquake zone, next to the Labadie plant is of grave concern to the community locally and regionally. Everyone in Franklin County within miles of the plant relies on groundwater for their drinking water, and much of the St. Louis area draws its drinking water from the Missouri River. When Ameren announced its proposed landfill some four years ago, local citizens began

educating themselves about the proposal and have learned much about the risks posed to themselves and their families. At the initial scheduling conference, we requested a local public hearing so that this very concerned citizenry could voice their concerns. True to its tradition of welcoming public input, the Commission included a local public hearing in its Order Adopting Procedural Schedule and subsequently issued an Order scheduling the June 25 hearing. No mention was made of the local public hearing being limited to only some members of the affected public.

Mr. Lowery's letter suggests that speakers be required to state whether they are "in any way affiliated with" LEO, the Sierra Club, or their counsel in this case, the Washington University Environmental Clinic. That suggestion is excessively broad, the information is irrelevant, and requiring speakers to provide that information would chill public participation and violate their Constitutional right to freedom of association.

The phrase "in any way affiliated with" is extraordinarily broad. My neighbor is active in LEO? I went to a LEO meeting? My brother-in-law's cousin signed a LEO petition? Depending on the circumstances, it could also violate the attorney-client privilege to ask a speaker whether they have any affiliation with the Clinic.

There is no need to try to refine the phrase because the underlying information is irrelevant. A public hearing is designed to provide an opportunity for local residents who may not be able to participate in a hearing in Jefferson City to express their views, and for the Commission to hear the concerns of local residents. Whether or not members of the public have any affiliation with, or membership in, LEO or the Sierra Club is not relevant to their right to speak at a public hearing to express their concerns regarding Ameren's proposed landfill. We are not aware of any governing precedent that requires members of the public who happen to be members of organizations participating in PSC proceedings to identify their organizational membership when speaking at public hearing. For example, when AARP participates in a rate case, members of the public who speak at the public hearings are not, to our knowledge, asked to state whether they are AARP members or in any way affiliated with AARP.¹

Requiring speakers to state their affiliation with or membership in LEO or the Sierra Club could chill public participation in the hearing and violate the Constitutional freedom of association. It is well-settled that both an organization and its members have a First Amendment right (binding on states through the Fourteenth Amendment) to freedom of association and that this right allows the group to keep members' identities private. *NAACP v. Alabama*, 357 U.S. 449, 459-60 (1958). This is particularly compelling in this case, where local residents have already experienced harassment based on ties to LEO. *See, e.g., NAACP*, 357 U.S. at 462. Disclosure of not just membership in but affiliation with an organization as a condition of testifying at a public

¹ If Ameren is seeking membership information to try to strike or exclude testimony from members of LEO and the Sierra Club, then we would strenuously object. LEO and Sierra Club are making presentations in the off-the-record, preliminary portion of the hearing, and the organizations are not planning to present testimony during the on-the-record portion of the hearing. We do not concede, however, that the organizations are legally precluded from speaking during the on-the-record portion of the hearing and respectfully reserve the right to raise the issue if Ameren attempts to exclude members' testimony based solely on the speaker's membership in LEO or the Sierra Club.

hearing is an intrusive inquiry that could chill public participation in the June 25 hearing. Cf. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2010) (refusing to require disclosure of communications and other information of supporters of a ballot initiative because it would chill political participation). That would undermine and is inconsistent with the Public Service Commission's strong tradition of inviting members of the public to provide input on decisions that will affect them.

We strongly oppose and urge the rejection of Ameren's proposal to require speakers to state their affiliations with LEO, Sierra Club, and the Clinic.

2. Declining to Accept Any Documents into Evidence at the Hearing

After considerable discussion at the June 19 conference, agreement was reached that all tendered documents would be taken into evidence at the local hearing, subject to Ameren's right to move at a later time to strike the documents and our right at that later time to establish the documents' admissibility. Mr. Lowery's letter of today attempts unilaterally to upend that agreement. Instead, he suggests that no document offered by a member of the public be taken into evidence at the hearing, but that the documents merely be marked for identification.

This approach is condescending and insulting to the public. It would send a message to the public that its participation is not valued, and that its efforts to become informed about and comment upon the risks posed by Ameren's proposal are considered sub-par. And it would mark a significant departure from prior Commission practice.

The Commission is a sophisticated trier of fact and has ample experience in weighing the evidentiary value of a wide range of documents. There is no valid justification for departing from the agreement reached on June 19 to allow documents submitted by the public into evidence, subject to the right to make evidentiary rulings at a later time.

We respectfully request that the June 25 local public hearing proceed as agreed to at the June 19 Conference, and that Ameren's attempt to re-write the procedures be rejected.

Sincerely yours,



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cc: Commissioners