

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 4th day of
January, 2012.

In the Matter of the Application of Union Electric
Company d/b/a Ameren Missouri for Authority to
Exchange SO₂ Emissions Allowances for NO_x
Emissions Allowances

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File No. EO-2012-0158

ORDER CONDITIONALLY APPROVING APPLICATION

Issue Date: January 4, 2012

Effective Date: January 14, 2012

Background

On November 22, 2011,¹ Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") submitted an application seeking authority from the Commission for:

(1) a one-time exchange of 1,050 surplus sulfur dioxide ("SO₂") emission allowances for 500 annual nitrogen oxide ("NO_x") emission allowances; an amount sufficient to comply with the requirements of the United States Environmental Protection Agency's ("EPA") Cross-State Air Pollution Rule ("CSAPR"), which takes effect January 1, 2012; and

(2) authorization to defer to Account 254, Other Regulatory Liabilities, the revenues associated with the SO₂ portion of the proposed exchange of emissions allowances and to amortize the deferred amounts concurrently with the Company's use of the acquired NO_x allowances.

The Commission directed notice, set a deadline for responses and a deadline for a recommendation from its Staff. On December 23, Staff filed its recommendation. Staff recommended approval of the application subject to certain conditions. No party opposed Staff's recommendation and Ameren Missouri agreed to Staff's proposed conditions.

¹ All calendar dates throughout this order refer to the year 2011 unless otherwise noted.

Jurisdiction and Discretionary Authority

Because Ameren Missouri's application involves a transfer of assets, it is within the Commission's jurisdiction to decide pursuant to Section 393.190, RSMo 2000. Because no law requires a hearing on this application this is a non-contested case.² Non-contested cases do not require formal proceedings or hearings before the Commission,³ and as such, there is no contested case evidentiary record.⁴ Being a non-contested case, the Commission "acts on discretion or on evidence not formally adduced and preserved."⁵ The competent and substantial evidence standard of Article V, Section 18, Mo. Const., does not apply to administrative cases in which a hearing is not required by law.⁶ Consequently, the Commission will exercise its discretion based upon the verified pleadings. There is no

² Section 536.010(4), RSMo Supp. 2010, defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

³ "The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... " The term has been held synonymous with 'opportunity to be heard'. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989). The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. *Id.*

⁴ *Sapp v. City of St. Louis*, 320 S.W.3d 159, 163 (Mo. App. 2010). "The key to the classification of a case as contested or noncontested is the requirement of a hearing. The term "hearing," as used in section 536.010(4) means a proceeding at which a 'measure of procedural formality' is followed. Procedural formalities in contested cases generally include: notice of the issues (section 536.067); oral evidence taken upon oath or affirmation and the cross-examination of witnesses (section 536.070); the making of a record (section 536.070); adherence to evidentiary rules (section 536.070); and written decisions including findings of fact and conclusions of law (section 536.090)." (Internal citations omitted). *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 507 (Mo. banc 2009). Being a non-contested case, there is no evidence, no record, and no written and separately stated findings of fact. *State ex rel. Public Counsel v. Public Service Comm'n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006); Section 536.090. The decision reached by the Commission is totally a matter of the exercise of its discretion. *Id.* In a non-contested case, judicial review is restricted to determining only whether or not the Commission abused its discretion in denying a hearing (if a hearing was denied) and whether or not the commission's order was lawful. *Id.*

⁵ *Public Counsel*, 210 S.W.3d at 353.

⁶ *Id.* Moreover, Ameren Missouri is the only party holding a substantive right that could be affected by this decision. Thus, no other party has a substantive due process right requiring a pre-deprivation evidentiary hearing. Utility customers have no vested property rights in utility rates that are protected by the Fifth and Fourteenth Amendments. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 -32 (Mo. banc 1975).

requirement for the Commission to make findings of fact when it exercises its discretion in a non-contested case.⁷

Legal Standard for Approval

Section 393.190.1 provides, in pertinent part:

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 or public utility, without having first secured from the commission an order authorizing it so to do.

Section 393.190.1 does not set a standard for the approval of a proposed transfer of assets; however, the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 395 (Mo. 1934) determined the standard for the PSC's approval was whether the transfer “would be detrimental to the public.”⁸ This standard does not require the demonstration of the transaction benefiting the public, only that the transaction is not a detriment to the public.⁹ This standard is also codified in Commission Rule 4 CSR 240-3.310(1)(D), which requires that applicants seeking approval to transfer assets include in their applications “[t]he reasons the proposed sale of assets is not detrimental to the public interest.”

⁷ *Id.* at 355.

⁸ *City of St. Louis*, 73 S.W.2d at 395 and 400. This case involved a merger subject to approval by the PSC under § 5195, RSMo 1929, a predecessor to § 393.190. See also *State ex rel. AG Processing, Inc. v. Public Service Comm'n of State*, 120 S.W.3d 732, 735 (Mo. banc 2003) and *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

Analysis

Under the EPA's Cross-State Air Pollution Rule ("CSAPR") Ameren Missouri has received 108,672 vintage 2012 SO₂ allowances and 23,261 vintage 2012 annual NO_x allowances based on the emissions characteristics of its generating facilities. Ameren Missouri will use these allowances to comply, in whole or in part, with the emissions restrictions prescribed by CSAPR; however, it currently believes its initial grant of SO₂ allowances will greatly exceed its 2012 CSAPR compliance requirements and its initial grant of annual NO_x allowances will barely cover what it will need to comply with that aspect of CSAPR. To provide a prudent margin of annual NO_x allowances, Ameren Missouri believes it should acquire additional allowances for 2012.

CSAPR allows utilities that have excess SO₂ and NO_x allowances to sell those allowances. Instead of a cash transaction, Ameren Missouri seeks authority for a one-time trade or exchange one thousand fifty (1,050) of the Company's excess 2012 SO₂ allowances- which represents approximately one percent (1%) of its total allocation of such allowances - for five-hundred (500) 2012 annual NO_x allowances. Ameren Missouri believes that this is the most efficient and cost-effective way to ensure that it has sufficient SO₂ and NO_x allowances to remain in compliance with CSAPR requirements.

Additionally, Ameren Missouri seeks authority to defer to Account 254, Other Regulatory Liabilities, all revenues associated with the SO₂ allowances portion of the exchange and to amortize the amounts deferred to that account concurrently with the Company's utilization of the acquired NO_x allowances. The net cost of all SO₂ and NO_x allowances is part of the formula used to calculate rate changes under the Company's

⁹ *Id.*

approved fuel adjustment clause ("FAC") tariff. Because the exchange of allowances proposed in this application will not involve an exchange of cash, if Ameren Missouri is granted the deferral authority it seeks in this application amortizations will be made from Account 254 and the net cost of an acquired annual NOx allowance will flow through the FAC in the accumulation period during which the allowance is used. Matching revenues and expenses associated with the exchange of allowances in this manner will ensure that the proposed exchange will have no effect on the Company's FAC-related rates and also that those rates reflect as closely as possible Ameren Missouri's actual net fuel costs.¹⁰

Staff states that based on Ameren Missouri estimates, the exchange of SO₂ emissions allowances for annual NOX emissions allowances would reduce its excess SO₂ allowances by less than 5% while decreasing its estimated need for additional annual NOX allowances by approximately 27%.¹¹ Staff also agrees that the accounting treatment Ameren Missouri seeks will result in this non-cash transaction having no effect on the revenues and expenses flowing through its FAC, i.e., it will neither increase nor decrease Ameren Missouri's FAC charge. Staff recommends that the Commission conditionally approve Ameren Missouri's application. Ameren Missouri responded to Staff's recommendation agreeing to the conditions.

Decision

Based on the Commission's independent and impartial review of the filings, the Commission determines that Ameren Missouri's proposed exchange of SO₂ emissions

¹⁰ Procedures already in place to monitor the operation of the FAC, i.e., routine reviews of proposed rate changes, annual true-ups, and periodic prudence reviews - will allow the Commission, the Staff, and other interested parties to monitor and review both the timing and amount of disbursements from the deferred account to ensure that they comply with the authority granted by the Commission in this case.

allowances for annual NOX emissions allowance is not detrimental to the public interest and the Commission will approve it subject to the conditions recommended by Staff and accepted by Ameren Missouri.

THE COMMISSION ORDERS THAT:

1. Union Electric Company d/b/a Ameren Missouri's application is approved subject to the following conditions:

- a.) approval of this transaction and accounting treatment sought in Ameren Missouri's application is not determinative of any future ratemaking;
- b.) approval of this transaction and accounting treatment does not bind anyone from challenging any aspect of the prudence of the transaction;
- c.) approval is granted only for the limited transfer requested in Ameren Missouri's application; and,
- d.) Ameren Missouri shall request authorization from the Commission prior to closing any other transactions to sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber any CSAPR SO₂, seasonal NO_x, or annual NO_x emission allowance(s).

2. This order shall become effective January 14, 2012.

3. This file shall close on January 15, 2012.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Jarrett, Kenney, and
Stoll, CC., concur;
Davis, C., abstains.

Harold Stearley, Deputy Chief Regulatory
Law Judge

¹¹ The exact amount of SO₂ and annual NOX allowances Ameren Missouri will need for 2012 will not be known until early 2013.