

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

**THE OFFICE OF THE PUBLIC COUNSEL’S LIMITED
MOTION FOR RECONSIDERATION**

COMES NOW the Office of the Public Counsel (Public Counsel) and for its Limited Motion for Reconsideration asks the Commission to reconsider its decision in the July 2, 2014, Report and Order that the imposition of a condition that Ameren Missouri provide evidence of financial responsibility to remediate damage and contamination caused by the landfill is unnecessary.¹ This Motion does not question the Commission’s overall grant of Ameren Missouri’s application for a Certificate of Convenience and Necessity to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill at that location. It only asks the Commission to add a condition to require Ameren Missouri to provide proof that (1) Ameren Missouri is adequately self-insured to protect against the specific risks associated with the proposed coal ash landfill; and (2) Ameren Missouri actually has supplemental insurance specifically designed to cover those specific risks.

A. Introduction

In making a determination on the questions before it, the Commission’s decision must be based on competent and substantial evidence:

¹ Report & Order, pg. 16.

The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the “purpose of having the reasonableness or lawfulness” of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is “authorized by law” **and whether the action is “supported by competent and substantial evidence upon the whole record.”** Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase “authorized by law.”²

The evidence that the Commission admits and makes the basis of its decision must have probative value and the lack of evidence cannot be overcome merely by the expertise of the Commission:

The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission’s orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. ***But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission’s expertise.***³

B. The Finding That The Imposition Of A Condition That Ameren Provide Evidence Of Financial Responsibility To Remediate Damage And Contamination Caused By The Landfill Is Unnecessary Is Not Supported By Competent And Substantial Evidence

An issue before the Commission was a request by the Sierra Club and Labadie Environmental Organization, Inc. (LEO) that the Commission impose the following condition on any Certificate of Convenience and Necessity for the proposed coal ash landfill:

² *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).

³ *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).

Ameren must provide evidence of financial responsibility to remediate damage to, and contamination caused by, the landfill after the formal post-closure period addressed by DNR regulations.⁴

In its decision not to impose the condition, the Commission in its Report and Order stated:

The Commission believes this is a legitimate concern that directly implicates one of the Commission's key responsibilities: protecting Missouri ratepayers from excessive costs. While the Commission recognizes the potential risk of storing coal ash in a coal ash landfill or by transporting it via truck, barge, or rail, **Ameren Missouri states that it is self-insured and carries supplemental insurance specifically designed to protect against the potential risks associated with coal ash landfills. Thus, imposition of this condition is not necessary.**⁵

However, there is no evidentiary proof in the record that: (1) Ameren Missouri is adequately self-insured to protect against the specific risks associated with the proposed coal ash landfill; or (2) Ameren Missouri actually has supplemental insurance specifically designed to cover those specific risks. Therefore, the Commission should reconsider its decision that the imposition of a condition that Ameren Missouri provide evidence of financial responsibility to remediate damage and contamination caused by the landfill is unnecessary.

As the Commission correctly notes, when evaluating applications for a Certificate of Convenience and Necessity, a key criteria in the Tartan Energy Standards is the determination of whether or not the proposed facility is economically feasible.⁶ Insurance is a concept which was developed to help companies and individuals manage the cost of risk. Discrete statements of being aware of a risk are not sufficient to provide financial protection. Under the idea of an insurance tower of risk, if two claims are unrelated, then two limits of liability (basically two separate towers of insurance) are triggered; but if the claims are related, then only a single limit of liability (one tower of insurance) applies. While landfills in general and coal ash landfills in

⁴ Report & Order, pg. 24.

⁵ Id., (emphasis added).

⁶ Report & Order, pg. 6, *citing In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, Report and Order, 3 Mo P.S.C. 3d 173, 177 (September 16, 1994).

particular, have their own inherent physical and environmental risks, the coal ash landfill proposed by Ameren Missouri has several additional risks that must be taken into account.

The Commission itself notes that the proposed coal ash landfill is within the 100-year flood plain, and is within a seismic impact, or earthquake, zone.⁷ The Commission also notes concerns that the high groundwater table under the proposed coal ash landfill could lead to contamination of the groundwater.⁸ So, additional financial risk for Ameren Missouri is present for this particular proposed coal ash landfill as compared to the very same coal ash landfill proposed to be built at a location that is not within a 100-year flood plain, a seismic zone and an area with a high groundwater table. The question is whether Ameren Missouri has adequately prepared for this additional risk so as to protect both the company and ultimately its ratepayers.

In the Report and Order the Commission states:

51. Ameren Missouri is self-insured and has supplementary insurance against specific risks associated with its different types of plants, including those with a coal ash landfill.⁹

This seems to indicate that the Commission questioned the financial risk of this project but assumed that Ameren Missouri has a sufficient tower of insurance by being adequately self-insured and having supplemental insurance to sufficiently alleviate that risk. However, the only citation to the record provided by the Commission in the Report and Order on the issue of insurance is to cite “Transcript, Page 198, Lines 15-24, Page 199, Lines 12-21.” in Footnote 54.¹⁰ Those pages in the transcript of the evidentiary hearing pertain to a set of questions by Chairman Kenney to Ameren Missouri witness Mr. Craig Giesmann regarding cataclysmic events:

Q. Is essentially what you're saying is those types of events are built into the design of the facility?

⁷ Report & Order, pg. 8, *citing* Putrich Surrebuttal, Ex. 5, Pages 5-9.

⁸ Report & Order, pg. 7.

⁹ Report & Order, pg. 16; *citing* Transcript, Page 198, Lines 15-24, Page 199, Lines 12-21.

¹⁰ Report & Order, pg. 16.

A. That's correct.

Q. Do you insure against those events?

A. Meaning taking out insurance on those?

Q. Yes.

Like do you have specific seismic event insurance? Is there some company that would write a policy for seismic events since you're in a fault area, a fault zone?

A. You know, I'm not real certain on that, Commissioner. I know we are self-insured to a certain extent and then we do have supplementary insurance after that. And the specifics of that, for example, flooding and seismic, I don't know if there's riders. I know in my own house there are riders.

Q. I'll give you an example. There were insurance policies to cover Taum Sauk. Right?

A. Right.

Q. That was -- actually we've talked about Taum Sauk. So there were specific policies in place to cover that event.

And I'm assuming, if I recall correctly, that there were policies that were peculiar to the specific risks that were peculiar to Taum Sauk.

So I would wonder then, would there be similar policies in place to insure against the specific risks associated with being near a fault line, in a floodplain for a utility waste landfill?

A. I would certainly expect so.

And I guess what leads me to believe that is that I do know that our director of insurance has made site -- site visits with our insurers to the various ash ponds. So should we build this, I would expect the same thing to happen. So yes.¹¹

Looking at this rather short section of testimony, it is quite clear that the witness had a basic knowledge that Ameren Missouri is self-insured, but provided no evidence this self-insurance is sufficient to cover the costs of a cataclysmic event relating to the proposed coal ash landfill. For example, the witness's statements that Ameren Missouri is self-insured "to a certain extent" provides no indication of how much self-insurance Ameren Missouri would be able to

¹¹ Report & Order, pg. 198-199.

provide without a resulting harm to the financial stability of the company. Therefore, there is no evidentiary proof that Ameren Missouri is adequately self-insured to protect against the specific risks associated with the proposed coal ash landfill. Additionally, the witness's statement that because there were supplemental insurance policies in place to cover the specific risks of Taum Sauk he "would expect the same thing to happen" for the proposed coal ash landfill provides absolutely no evidentiary proof that Ameren Missouri actually has supplemental insurance specifically designed to cover the risks associated with the proposed coal ash landfill.

Chairman Kenney, who asked the questions of the witness, certainly seems to have not been convinced. In his Concurring Opinion attached to the Report and Order, Chairman Kenney states the following:

III. Proof of Insurance Should Be Provided

Even with all of the safeguards in place, accidents can happen. That is why I would have preferred to have seen proof of an insurance policy or rider that guards against the specific risks of locating a UWL in a 100-year flood plain and seismic impact zone. While there was testimony, and the Report and Order notes, that Ameren is insured for certain risks, it was not clear that it is insured for the specific risks peculiar to this case.¹²

In a footnote citation to the transcript Chairman Kenney also states: "This testimony does not definitively establish the existence of the particular type of insurance that would cover the risk of locating a UWL [utility waste landfill] in a 100-year flood plain or in a seismic impact zone."¹³

In the July 2, 2014, Agenda meeting of the Commissioners, Chairman Kenney voiced his concern over the lack of proof of financial responsibility to remediate damage and contamination caused by the landfill. During the discussion, it was clear that Commissioner Hall also shared Chairman Kenney's concern. Therefore, it seems neither Chairman Kenney nor Commissioner Hall found comfort that Ameren Missouri had proven that its self-insurance would be adequate

¹² Concurring Opinion of Chairman Robert S. Kenney, pg. 4.

¹³ Concurring Opinion of Chairman Robert S. Kenney, pg. 4, Footnote 6.

to cover the specific risks associated with the proposed coal ash landfill or that there were additional supplemental policies to help alleviate those risks.

Mr. Giesmann's statements in this case that he "would expect the same thing to happen" for the proposed coal ash landfill as happened for Taum Sauk should in fact provide no comfort for the Commission. A closer review of the evidentiary record in the cases regarding Taum Sauk shows the Commission has every reason to be concerned. The compounding layers of risk and the strain of that risk becoming reality on Ameren Missouri and potentially on its ratepayers can easily be seen in the recent Taum Sauk disaster. In the Initial Incident Report on Taum Sauk, the Staff of the Missouri Public Service Commission (Staff) stated:

In future rate cases, the Commission's Staff must be vigilant to ensure that no costs related to the Taum Sauk incident are passed on to ratepayers, directly or indirectly. Given the large costs incurred by UE due to the incident, and in light of Ameren's perilous financial outlook in Illinois, the motivation to pass some of these costs on in rates is great. In its 10-K, filed with the SEC, Ameren stated:

To the extent that UE needs to purchase power because of the unavailability of the Taum Sauk facility, there is the risk that UE will not be permitted to recover these additional costs from ratepayers if such a request is made. The Taum Sauk incident is expected to reduce Ameren's and UE's 2007 pretax earnings by \$15 million to \$20 million as a result of higher-cost sources of power, reduced interchange sales, and increased expenses, net of insurance reimbursement for replacement power costs.

*Ameren's Form 10-K, for the fiscal year ended December 31, 2006, SEC website, p. 19. Additionally, when the Taum Sauk plant is rebuilt, appropriate accounting treatment will be necessary to protect the ratepayers.*¹⁴

This shows that, despite Ameren Missouri being self-insured and apparently having supplemental insurance at that time, a serious point of concern was that it would not be enough

¹⁴ PSC Case No. ES-2007-0474, *In the Matter of an Investigation Into an Incident in December 2005 at the Taum Sauk Pumped Storage Project Owned and Operated by the Union Electric Company, doing business as AmerenUE*, Staff's Initial Incident Report, October 24, 2007, pg. 72, EFIS Item No. 86.

and Ameren Missouri would find it necessary to attempt to move costs related to the Taum Sauk disaster to its customers.

And in fact, whether or not it was attempting to pass on costs related to the Taum Sauk disaster to the ratepayers has been at issue throughout Ameren Missouri's subsequent rate cases¹⁵ and even in a case Public Counsel filed specifically asking the Commission to investigate whether ratepayers were being held harmless from the Taum Sauk disaster.¹⁶ Ameren Missouri's experience with Taum Sauk should not provide comfort and instead should feed the Commission's desire to require proof that Ameren Missouri is sufficiently self-insured to cover the specific risks associated with the proposed coal ash landfill as well as proof that there are additional supplemental policies to help alleviate those risks.

As a result, the Commission can and should require Ameren Missouri to provide proof that it has the financial capability to incur additional risk presented by the proposed landfill and to pay the costs associated with any catastrophic failure of the facility should the risk become reality. It would be reasonable for the Commission to require proof that (1) Ameren Missouri is adequately self-insured to protect against the specific risks associated with the proposed coal ash landfill; and (2) Ameren Missouri actually has supplemental insurance specifically designed to cover those specific risks. Requiring such proof would not necessitate the taking of additional testimony and would not affect the Commission's overall grant of Ameren Missouri's application for a certificate of convenience and necessity to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill at that location.

¹⁵ See PSC Case Nos. ER-2007-0002, ER-2008-0318, ER-2010-0036, ER-2011-0028, ER-2012-0166, ER-2014-0258.

¹⁶ PSC Case No. ER-2008-0015, *In the Matter of an Investigation into Whether Ratepayers are being Held Harmless from the Taum Sauk Disaster*.

C. Conclusion

This Motion does not question the Commission's overall grant of Ameren Missouri's application for a certificate of convenience and necessity to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill at that location. However, because it is not supported by competent and substantial evidence, Public Counsel asks the Commission to reconsider its decision that the imposition of a condition that Ameren Missouri provide evidence of financial responsibility to remediate damage and contamination caused by the landfill is unnecessary.

Evidence of Ameren Missouri's financial responsibility to remediate damage and contamination caused by the landfill is most certainly necessary to protect both the company and its ratepayers. The Commission can and should require Ameren Missouri to provide proof that it has the financial capability to incur the additional risk presented by the proposed landfill and to pay the costs associated with any catastrophic failure of the facility should the risk become reality. In determining whether the coal ash landfill is financially feasible, it is reasonable for the Commission to require Ameren Missouri to provide specific and detailed information regarding its tower of insurance coverage, with specific detail outlining the amount of self-insurance and any additional supplemental policies for each specific risk, be that seismic, flood, environmental damage, physical plant damage, etc. Therefore, Public Counsel asks the Commission to require Ameren Missouri to provide proof that (1) Ameren Missouri is adequately self-insured to protect against the specific risks associated with the proposed coal ash landfill; and (2) Ameren Missouri actually has supplemental insurance specifically designed to cover those specific risks.

WHEREFORE, Public Counsel respectfully requests that the Commission grant its limited motion and reconsider its finding that the imposition of a condition that Ameren Missouri

provide evidence of financial responsibility to remediate damage and contamination caused by the landfill is unnecessary. Public Counsel also asks the Commission to require Ameren Missouri to provide proof that (1) Ameren Missouri is adequately self-insured to protect against the specific risks associated with the proposed coal ash landfill; and (2) Ameren Missouri actually has supplemental insurance specifically designed to cover those specific risks.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

By:_____

Christina L. Baker (#58303)

Deputy Public Counsel

P O Box 2230

Jefferson City, MO 65102

(573) 751-5565

(573) 751-5562 FAX

christina.baker@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the parties of record this 16th day of July 2014:

Missouri Public Service Commission
Office General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounsel@psc.mo.gov

Missouri Public Service Commission
Nathan Williams
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Nathan.Williams@psc.mo.gov

Sierra Club
Elizabeth Hubertz
Washington University Law School
Campus Box 1120 1 Brookings Drive
St. Louis, MO 63130
ejhubertz@wulaw.wustl.edu

Sierra Club
Maxine Lipeles
1 Brookings Dr - CB 1120
St. Louis, MO 63130-4899
milipele@wulaw.wustl.edu

Union Electric Company
James B Lowery
111 South Ninth St., Suite 200
P.O. Box 918
Columbia, MO 65205-0918
lowery@smithlewis.com

Union Electric Company
Michael R Tripp
111 S. 9th Street
P.O. Box 918
Columbia, MO 65205-0918
tripp@smithlewis.com

Union Electric Company
Thomas M Byrne
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
AmerenMOService@ameren.com

Labadie Environmental Organization, Inc.
Elizabeth Hubertz
Washington University Law School
Campus Box 1120 1 Brookings Drive
St. Louis, MO 63130
ejhubertz@wulaw.wustl.edu

Labadie Environmental Organization, Inc.
Maxine Lipeles
1 Brookings Dr - CB 1120
St. Louis, MO 63130-4899
milipele@wulaw.wustl.edu

/s/ Christina L. Baker
