

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 28th day of
August, 2013.

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,)	<u>File No. EA-2012-0281</u>
Operate, Maintain, and Otherwise Control and)	
Manage a Utility Waste Landfill and Related Facilities)	
At its Labadie Energy Center.)	

ORDER REGARDING OBJECTIONS AND MOTION TO STRIKE

Issue Date: August 28, 2013

Effective Date: August 28, 2013

On August 1, 2013, Union Electric Company d/b/a Ameren Missouri filed objections and a motion to strike certain documents that were offered into evidence by members of the public at the local public hearings held on June 25 in Union, Missouri and July 10 in Washington, Missouri. Labadie Environmental Organization (LEO) and Sierra Club responded to Ameren Missouri's objections and motion to strike on August 19. Ameren Missouri replied to that response on August 21.

The parties and the Commission anticipated that witnesses at the local public hearing would offer documents and testimony to which Ameren Missouri might object. In an effort to avoid the disruption, confusion, and anger that might result if Ameren Missouri were to extensively cross-examine members of the public at the local public hearings, the parties agreed, at a conference held on June 19, that Ameren Missouri could reserve its objections to such testimony and could submit those objections in writing after the local

public hearings. The parties also agreed that LEO and Sierra Club, as well as the other parties, would be allowed an opportunity to supply additional foundation for such testimony and documents in response to Ameren Missouri's written objections.

As anticipated, many of the witnesses at the local public hearings offered one or more documents into evidence along with their testimony. Among the documents offered were newspaper articles and research reports about various environmental, health, and safety issues concerning the disposal of coal ash generated by coal-fired electric generating plants. Ameren Missouri objects to the admission into evidence of certain of those documents and asks that those documents be struck from the record for one or more of the following reasons: the documents are hearsay; there is a lack of foundation for their admission; and they are not relevant to any issue before the Commission.

Hearsay is broadly defined as any out-of-court statement offered for the truth of the matter asserted.¹ The problem with hearsay is that the person who made the statement, or, in this case, wrote the article, cannot be cross-examined by the other parties. Since the author cannot be questioned, there is no way for the other parties to test the truthfulness of the hearsay statements. For that reason, in general, hearsay to which another party objects is not admitted into evidence and is not considered competent and substantial evidence upon which the Commission can base its decision.² All of the documents to which Ameren Missouri objects are hearsay in that the author of the documents was not at the local public hearing and cannot be cross-examined.

However, determining that the documents are hearsay does not necessarily mean they must be excluded from evidence. There are many exceptions to the hearsay rule that

¹ *State v. Winfrey*, 337 S.W.3d 1 (Mo. banc 2011)

² *State ex rel. Marco Sales, Inc. v. Public Serv. Com'n*, 685 S.W.2d 216 (Mo. App. W.D. 1984).

allow hearsay documents and testimony to be admitted into evidence where a foundation has been established showing that the document falls within one of the exceptions. In general, those exceptions to the hearsay rule are allowed where there is some other reason to believe that a hearsay document can be relied upon as truthful, even if its author is not subject to cross-examination. One such exception to the hearsay rule is for documents created by governmental agencies.

In Missouri, section 490.220, RSMo 2000 provides that all public records of the United States and sister states are evidence in Missouri proceedings if properly certified by the custodian of those records. Missouri's courts have declared that such documents are to be admitted as evidence, even if they would otherwise be excluded as hearsay.³ Ameren Missouri has conceded that such governmental documents are an exception to the hearsay rule and has withdrawn its hearsay objection to those documents.

However, many of the documents to whose admission Ameren Missouri objects were not created by a governmental body. Instead, they are newspaper articles, written by a reporter, or studies prepared and published by non-governmental entities or individuals. Those documents are hearsay and cannot be admitted into evidence unless they fall under some other exception to the hearsay rule.

LEO and Sierra Club attempt to assert other exceptions to the hearsay rule for the non-governmental documents. First, they argue that a March 25, 2010 letter from Ameren Services, a subsidiary of Ameren Corporation, to the Illinois Environmental Protection Agency, about ash pond closures at AmerenUE's Venice Plant, is an admission against interest. The Commission finds that the letter is an admission against Ameren's interest and therefore does not need to be excluded from evidence as hearsay. Ameren Missouri

³ *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, (Mo. 1999).

also challenges the relevance of that document and that portion of the objection will be addressed later in this order.

Second, expert witnesses are, in some circumstances, allowed to rely on hearsay documents as the basis for their own expert opinion.⁴ However, while the members of the public who provided testimony at the local public hearings are well informed citizens who have attempted to educate themselves and their neighbors about what they believe to be the dangers associated with the disposal of coal ash, no foundation was laid to establish that they are experts qualified to offer an expert opinion within the meaning of Section 490.065, RSMo 2000.

Third, LEO and Sierra Club argue that the documents the members of the public submitted along with their testimony should be admitted as an exception to the hearsay rule to show the witness' state of mind, meaning the basis for what the witnesses believed when they testified. No doubt the submitted news stories and studies would explain why the witnesses testified as they did, and documents that establish a witness' state of mind may be admitted as an exception to the hearsay rule. However, that exception applies only when a witness' state of mind is an element that must be proved in the case. So, for example, in a suit over title to a piece of land, a witness was allowed to testify about a hearsay statement by a third party to prove that he occupied the land by claim of right, a necessary element in a claim of adverse possession.⁵ The state of mind of the members of the public who testified at the local public hearings is not an element that any party must prove in this case. Therefore, the state of mind exception does not apply.

⁴ *Peterson v. National Carriers, Inc.*, 972 S.W.2d 349 (Mo. App. W.D. 1998).

⁵ *Replogle v. Replogle*, 350 S.W.2d 735 (Mo. 1961).

Furthermore, the state of mind exception only allows the hearsay into evidence to prove the witnesses state of mind. It does not allow the hearsay into evidence to prove the truth of the matters asserted in the hearsay document.⁶ Since the witnesses state of mind is not an element of this case, no legitimate purpose could be served by using the state of mind exception to admit the hearsay documents into evidence.

The non-governmental newspaper stories and research reports to which Ameren Missouri has objected are hearsay and do not fall within any exception to the hearsay rule. On that basis the Commission must exclude them from evidence. A listing of the exhibits to be excluded from evidence will be set forth in the ordered paragraphs.

Ameren Missouri also challenges the admission of the documents on the basis of relevance. The Commission will address the question of relevance only for those documents not already excluded as hearsay. A document is relevant evidence only if it tends to prove or disprove a fact in issue or corroborates other relevant evidence.⁷ So, to determine whether the challenged documents are relevant, the Commission must first determine what the issues are in this case.

Ameren Missouri has asked the Commission to grant it a certificate of convenience and necessity to expand the boundaries of its Labadie Energy Center to allow space to construct an expanded coal ash landfill. When considering whether to grant a certificate of convenience and necessity, the Commission considers five factors, sometimes known as the Tartan Energy standard.⁸ Those five factors are:

⁶ *Tauver v. American Family Mut. Ins. Co.*, 269 S.W.3d 436 (Mo. App. W.D. 2008).

⁷ *Roorda v. City of Arnold*, 142 S.W.3d 786 (Mo. App. W.D. 2004).

⁸ *In the Matter of the Application of Tartan Energy Company, LLC, d/b/a Southern Missouri Gas Company*, 3 Mo P.S.C. 3d 173 (1994).

- Is there a need for the proposed service?
- Is the applicant qualified to provide the proposed service?
- Does the applicant have the financial ability to provide the service?
- Is the proposal financially feasible?
- Does the proposed service promote the public interest?

LEO and Sierra Club argue that the challenged documents address three of the five factors: whether Ameren Missouri is qualified to own the landfill; whether the proposal is economically feasible; and whether the proposed landfill in the proposed location is in the public interest.

Ameren Missouri counters that the challenged documents mostly address the impact of the facility on the environment and that protection of the environment is not the principal concern of the Public Service Commission. Instead, the legislature has charged the Missouri Department of Natural Resources with primary responsibility to address those environmental concerns. Therefore, Ameren Missouri argues, the documents that address environmental concerns are not relevant to this proceeding before the Public Service Commission and should be excluded from evidence.

The Commission does not have primary responsibility to ensure that Ameren Missouri's plans for expanding its coal ash landfill comply with environmental protection requirements. But, the Commission does have a responsibility to determine whether Ameren Missouri's proposal is "necessary or convenient for the public service"⁹ That responsibility entails a broad grant of authority to examine many issues, including environmental questions. Even if the Commission ultimately decides that it should defer to

⁹ Section 393.170, RSMo 2000.

the Department of Natural Resources' expertise on environmental questions, evidence concerning such questions is relevant to this proceeding. The Commission will not strike any offered documents on that broad basis.

Ameren Missouri also challenges the relevance of certain documents on a more particular basis. The Commission will address those objections in turn.

Ameren Missouri challenges one of the studies submitted as Exhibit C. That document is a report from the Office of the Inspector General of the Tennessee Valley Authority (TVA). Since it is a report of a governmental agency, Ameren Missouri does not object to this document as hearsay. However, it does argue that the document is not relevant to any issue in this case as it concerns a different utility, operating different power plants, in different states.

The TVA report concerns that organization's groundwater monitoring practices at various ash disposal areas and concludes that the TVA has not complied with all requirements regarding such monitoring. The report does not specifically address practices at Ameren Missouri's ash disposal sites, but it does address the basis for concern about groundwater monitoring at the Labadie site. The Commission finds that the TVA report is relevant to this case and will deny Ameren Missouri's request to strike that document.

Ameren Missouri challenges the admission of Exhibit F, which is a group of letters from the Illinois Environmental Protection Agency to an Ameren affiliate concerning groundwater contamination problems at coal ash disposal sites associated with Ameren's operations in Illinois. The Commission finds that these documents are relevant to the question of whether Ameren Missouri is qualified to operate a coal ash disposal site in Missouri. The Commission will deny Ameren Missouri's request to strike the exhibit.

Ameren Missouri challenges one of the documents offered as Exhibit G. That document was taken from the EPA's website and concerns that federal agency's efforts to reduce levels of sulfur dioxide (SO₂) air pollution. There is no indication that Ameren Missouri's proposal to expand its coal ash landfill is directly connected to SO₂ levels except for the tangential connection that a shutdown of the Labadie plant would affect SO₂ pollution. That is not a sufficient connection to make the document relevant to this proceeding. The Commission will grant Ameren Missouri's motion to strike this portion of Exhibit G.

Ameren Missouri challenges the relevance of one of the documents offered as Exhibit H. That document is a portion of an Earthquake Hazards Map prepared by the Missouri Department of Natural Resources. Ameren Missouri does not challenge the foundation for admission of the document, but does challenge its relevance. The document purports to show that the Labadie plant and the proposed coal ash landfill is within an area that has a potential for liquefaction in the event of an earthquake. That is relevant to the question of whether the siting of the landfill is in the public interest. The Commission will deny Ameren Missouri's motion to strike this portion of Exhibit H.

Ameren Missouri challenges the relevance of Exhibit Q, which is a letter from Ameren Services, an affiliate of Ameren Missouri, to the Illinois Environmental Protection Agency regarding ash pond closures at AmerenUE's Venice Plant. The Commission previously found that this letter should not be excluded as hearsay. The Commission also finds that it is relevant to the question of whether Ameren Missouri is qualified to operate a coal ash landfill. The Commission will deny Ameren Missouri's motion to strike Exhibit Q.

Ameren Missouri challenges the relevance of a notice of violation letter from the United States EPA that was admitted as part of Exhibit T. The January 26, 2010 letter notifies AmerenUE of alleged violations of the Clean Air Act. The letter does not indicate any connection to the disposal of coal ash, but it is relevant to the broader question of Ameren Missouri's ability to operate electric plant while remaining in compliance with environmental protection requirements. The Commission will deny Ameren Missouri's motion to strike that document.

Ameren Missouri also challenges the relevance of another document admitted as part of Exhibit T and as Exhibit BB. (The document admitted as part of Exhibit T is a portion of the large document subsequently admitted as Exhibit BB.) The document is a draft report prepared by the U.S. EPA concerning the risks posed by coal combustion waste landfills. The Commission finds that this document is relevant to the question of whether Ameren Missouri's proposal is in the public interest. The Commission will deny the motion to strike Exhibit BB and the challenged portion of Exhibit T.

Ameren Missouri challenges the relevance of an Administrative Consent Order issued by the U.S. EPA in the matter of Rotary Drilling Supply, Inc. that was admitted as Exhibit CC. The document concerns the improper disposal of 140,000 tons of coal ash in a wetland by Rotary Drilling Supply, Inc. The Commission finds that the consent order is not relevant to any issue in this case and will grant Ameren Missouri's motion to strike that document.

THE COMMISSION ORDERS THAT:

1. Ameren Missouri's objection to certain documents received into evidence at the local public hearings is sustained in part and the following documents are struck from evidence:

Exhibit C;

Forty-Nine Coal-Fired Plants Acknowledge Groundwater Contamination

Risky Business

Out of Control

In Harm's Way

Toxic Waters Run Deep

State of Failure

Exhibit D;

Exhibit E;

Newspaper articles

Exhibit G;

Newspaper articles

EPA document on SO₂

Exhibit H;

Exhibit I;

Newspaper article

Exhibit J;

Newspaper article

Exhibit K;

Exhibit N;

Exhibit Q;

In Harm's Way

Exhibit R;

Study by Criss

Exhibit AA;

and

Exhibit CC.

Those portions of these exhibits that were not challenged by Ameren Missouri are not struck from evidence.

2. Ameren Missouri's objection to certain documents received into evidence at the local public hearings is denied in part and the following documents are not struck from evidence:

Exhibit C;

Coal Combustion Waste Damage Case Assessments

TVA Inspection Report

Exhibit F;

Exhibit H;

Earthquake Hazards Map

Living Behind Levees Fact Sheet

Exhibit Q;

Illinois EPA letter

Exhibit T;

EPA Notice of Violation

and

Exhibit BB (and excerpt in Exhibit T).

3. This order shall become effective upon issuance.



BY THE COMMISSION

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge