No. SC_____

IN THE SUPREME COURT OF MISSOURI

UNION ELECTRIC COMPANY, d/b/a AMEREN MISSOURI,

Appellant,

v.

CHRISTOPHER ESTES, ASSESSOR OF COLE COUNTY, MISSOURI

Respondent.

RESPONDENT'S APPLICATION FOR TRANSFER

Respondent Estes seeks transfer pursuant to Rule 83.04 because this appeal presents at least three questions of general interest and importance:

1. Does a specific basis for appeal to the State Tax Commission replace the Commission's general mandate to determine "true value in money" with limited authority to consider and act upon the alleged error?
2. Are assessors and the Commission bound to a two-part, original-cost-less-depreciation method for calculating the value of natural gas distribution property because that method is found in an online form?
3. Does mandating an original-cost-less-depreciation method for valuation only for natural gas distribution property create a constitutionally impermissible subclass of property?

Note regarding original jurisdiction

When appellant Union Electric, d/b/a Ameren Missouri, sought review in this Court (No. SC95925), Ameren indicated that the case involved the construction of §§ 137.320 and 138.430, RSMo. This Court *sua sponte* transferred the appeal, citing *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997). But *Alumax* addressed a "law that raises revenue only within a single political subdivision for the benefit of that political subdivision at the direction of the legislative body or the voters of the political subdivision." *Id.* at 911; (*see* Mo. Const. Art. V, § 3). Though most property tax goes to political subdivisions, a portion is imposed for state purposes and remitted to the State by county collectors. *See* Mo. Cont. Art. III, § 38(b); §§ 136.010, 209.130, RSMo. So, statutes that address the procedure and standards used by assessors and the Commission to determine actual value are "*state* revenue laws," the holding in *Alumax* is inapposite, and Ameren sought review in the right court.[1]

[1] That would not be true as to many appeals from the Commission. Most merely present factual questions that require the application but not the construction of revenue laws. *See Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788 (Mo. App. W.D., 1999) (court of appeals has jurisdiction to apply previously construed law to a set of facts).

Background

Ameren filed 16 appeals with the Commission regarding 2013 assessments of gas distribution property. In each, Ameren complained of a "depreciation discrepancy" in the assessment method.

On October 20, 2015, the Commission issued a Decision and Order in the consolidated appeals. The Commission found that Ameren failed to present evidence that its assessments were unlawful, unfair, and improper, and failed to present evidence of the "true value in money" of its property.

Ameren sought review in all 16 counties. So far, the eight circuit judges who have ruled have upheld the Commission.[2] Among them was the Cole County Circuit Court in this case, No. 15AC-CC00529.

The Missouri Court of Appeals, Western District, reversed the Cole County Circuit Court. It let Ameren limit the scope of inquiry by the

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[2] *Union Electric v Elfrink,* No. 15BO-CC00032 (Bollinger Cir., Oct. 16, 2016); *Union Electric v Tibbs,* No. 15BT-CV02468 (Butler Cir., Jun. 28, 2016); *Union Electric v Adams,* No. 15CG-CC00291 (Cape Girardeau Cir., Sep. 6, 2016); *Union Electric v McCutcheon,* No. 15HD-CC00127 (Howard Cir., Feb. 10, 2017); *Union Electric v Bishop,* No. 15L6-CC00154 (Lincoln Cir., Feb. 6, 2017); *Union Electric v Prior,* No. 15PI-CC00065 (Pike Cir., Dec. 5, 2016); *Union Electric v Ruhl,* No. 15RL-CV00286 (Ralls Cir., Mar. 1, 2016).

Commission in Ameren's appeal to the issue of "depreciation discrepancy," required the assessor and the Commission to use the original-cost-less-depreciation method, and endorsed the application of depreciation percentages derived from the IRS tables to the original cost of the asset in order to determine the Ameren property's "true value in money."[3]

True value in money for ad valorem taxation is fair market value. *St. Joe Minerals Corp v State Tax Comm'n*, 854 S.W.2d 526, 529 (Mo. App. E.D. 1993). Three primary appraisal approaches are used to estimate a property's fair market value: the cost approach, the sales comparison approach, and the income approach. *E.g.*, *id.*; *Aspenhof Corp v State Tax Comm'n*, 789 SW2d 867, 869 (Mo. App. E.D. 1990); *Quincy Soybean Company, Inc. v Lowe*, 773 SW2d 503, 504 (Mo. App. E.D. 1989); and *State ex rel. State Highway Comm'n v Southern Dev. Co.*, 509 SW2d 18, 27 (Mo. 1974).

The cost approach is widely used in ad valorem taxation. A cost approach analysis consists of examining the value influence of appreciation

[3] The Eastern and Southern Districts have recently followed the Western District precedent—though they have phrased their rationales and specific relief somewhat differently. *Union Electric v. Adams*, No. ED105477 (Nov. 7, 2017); *Union Electric v. Elfrink*, SD34933 (Oct. 31, 2017). This week, petitions for rehearing and applications for transfer will be filed in each.

from time of original cost to the effective date of appraisal, and analyzing the value influence of depreciation caused by deterioration and obsolescence.

Appreciation in value is typically measured by estimating reproduction cost or replacement cost.

> Reproduction cost is the estimated cost to construct, as of the effective appraisal date, an exact duplicate or replica of the building being appraised, insofar as possible, using the same materials, construction standards, design, layout, and quality of workmanship, and embodying all of the deficiencies superadequacies and obsolescence of the subject improvements.
>
> Replacement cost is the estimated cost to construct, as of the effective appraisal date, a substitute for the building being appraised using contemporary materials, standards, design, and layout. When this cost basis is used, some existing obsolescence in the property may be cured. Replacement cost may be the only alternative if reproduction cost cannot be estimated.

THE APPRAISAL OF REAL ESTATE (14th Ed., 2013), 569 and 570. *See also* THE DICTIONARY OF REAL ESTATE APPRAISAL (6th Ed. 2015), 198.

Depreciation in property valuation is an estimate of the negative value influence caused by deterioration and obsolescence. It exists in three basic

forms: physical deterioration, functional obsolescence, and external obsolescence. THE APPRAISAL OF REAL ESTATE (14th Ed., 2013), 601.

"IRS Bulletin 946, Modified Accelerated Cost Recovery System Depreciation," referenced by the Court of Appeals (Slip op. at 39), is book depreciation. Book depreciation is not the same as market depreciation.

> The book depreciation for the improvements on a parcel of real estate is based on historical cost or another previously established figure that has no relation to current market value. Moreover, book depreciation is based on a formula designed for tax purposes.

THE APPRAISAL OF REAL ESTATE (14th Ed., 2013), 487.

Questions of General Interest and Importance

1. **Does a specific basis for appeal to the State Tax Commission replace the Commission's general mandate to determine "true value in money" with limited authority to consider and act upon the alleged error?**

The Cole County Assessor, the Cole County Board of Equalization, and ultimately the Commission were assigned the task described by Ameren in its Jurisdictional Statement in SC95925: to determine "the true value in money of Appellant's natural gas pipeline property in Cole County." But

drawing from the statute that defines permissible bases for appeal to the Commission, the Court of Appeals barred the Commission on remand in this case from fully performing that task.

The Court of Appeals pointed out, correctly, that § 138.430.1, RSMo., "identifies four distinct grounds on which a taxpayer may rely to challenge an assessment or valuation." Slip op. at 18. Because Ameren invoked one of those, "the method or formula used in determining the valuation of such property," Ameren's complaint was cognizable under § 138.430. According to Ameren, the assessor's "method or formula" was erroneous because he failed to consider depreciation. *See* Slip op. at 19.

But the ultimate question before the Commission was not merely whether the assessor made an error in choosing a "the method or formula." The Commission must not just "investigate such appeal"; it must "correct any assessment or valuation." § 138.430.1, RSMo. The Commission thus must correct the assessment to reflect "*true value* in money."

Here, the Court of Appeals narrowed the question before the Commission because "Ameren's appeal challenged only the 'method or formula used in determining the valuation' of its property, and more specifically, that depreciation per Commission guidelines was not allowed by the assessors in determining 'Market value.'" Slip op. at 19. And though the Court of Appeals purported to remand for a new inquiry into the "true value in money of

Ameren's real property in service in Cole County as of January 1, 2013," the Court permitted the Commission to do so *only* by "determining the amount of depreciation to be deducted from $523,252,400," *i.e.*, from Ameren's self-reported original asset cost (not the replacement or reproduction cost). Slip op. at 41. The Court provided no factual basis for barring the Commission from considering other factors that affect "true value"—such as *appreciation* of property values.

There was no factual basis in the record for concluding that the only factors logically relevant to the "true value" of Ameren's Cole County assets were original cost and of depreciation. That means the Court's limitation must have been derived from law—presumably from § 137.430(1), RSMo. Taken to its logical conclusion, the Court of Appeals' interpretation of that statute allows a taxpayer to control the scope of inquiry in an assessment appeal and hampers the Commission's power to determine the appealed property's true value in money to ensure uniformity in taxation. That interferes with the powers and duties of a quasi-judicial agency to administer the state's property tax. And it violates the well-established rule that courts cannot substitute their discretion for the discretion vested in the Commission. *See* § 563.140(5), RSMo.; *Koplar v State Tax Comm'n*, 321 S.W.2d 686, 697 (Mo. 1959); *Drey v State Tax Comm'n*, 345 S.W.2d 228, 236 (Mo. 1961).

The interpretation of § 138.430, RSMo., and the Court of Appeals' decision that courts can interfere with the Commission's discretion are important to all property taxpayers who may invoke the Commission's authority—and to those who benefit from property tax revenue.

2. Are assessors and the Commission bound to a two-part, original-cost-less-depreciation method for calculating the true value in money of natural gas distribution property because that method is found in a "guide to assist the assessor in gathering of data" posted on the Commission's website?

An alternative reading of the Court of Appeals decision is that the Commission is bound, and thus the limitation on remand is justified, by a Commission rule, or something akin to a rule, that "requires" (a word used more than a dozen times in the opinion) the use of the two-part, original-cost-less-depreciation method. That "requirement" is attributed to "the 2013 form" that the Court attached as Appendix A.

But the form does not "require" anything. The instructions on the form expressly state otherwise:

> The following forms were prepared as a guide to assist the assessor in gathering of data. Please note that these forms are not a requirement, but merely represent a guide to types of

information to be gathered to assess natural gas distribution companies.

Slip op. Appendix A, p. STCR01781.

And the form is not a rule, with force and effect of law. The Commission has rulemaking authority. § 137.023, RSMo. And it has promulgated rules. *See* 12 CSR Division 30. But the Form referenced by the Court of Appeals is not found in those rules. And despite the Court of Appeals' statement (made without citing support, *see* Slip op. at 3), the form was not "promulgated" as a rule by the Commission.

Whether assessors and boards of equalization are now *required* to gather information using a form placed on the Commission website, *and then* to assess natural gas distribution property based solely on the information provided by the taxpayer completing the form (original cost), adjusted by depreciation under a federal income tax formula reflected on the form, is another question of general interest to taxpayers—and to those who receive tax funds. The monetary significance is shown here: assessing the Ameren property using only the information and factors on Form A reduces property taxes paid by Ameren in Cole County alone by about $600,000 per year.

And the broader question of whether forms and guidance posted on the Commission website have now become "requirements" (c*f. United Pharmacal*

Co. v. Bd. of Pharmacy, 159 S.W.3d 361 (Mo. 2005)) is of importance to assessors, boards of equalization, and taxpayers throughout the state.

3. Does the imposition of an original-cost-less-depreciation method just to natural gas distribution property create a constitutionally impermissible subclass of property?

The Missouri Constitution classifies property subject to ad valorem taxation into three subclasses: class (1) residential; class (2) agricultural and horticultural; and class (3) utility, industrial, commercial, railroad, and all other property not included in subclass (1) and (2). Mo. Const. Art. X, § 4(b). Property in these subclasses may not be "further divided." *Id.*

The Court of Appeals ordered remand to the Commission, which must reverse its Decision and Order and determine only an amount of depreciation to be deducted from Ameren's gas distribution properties' original cost in Cole County (which the Court of Appeals incorrectly labels as "market value determined by the assessor," slip op. at 41). That order differentiates natural gas distribution property from all other types of property. As to natural gas distribution property, there is now a single, two-part method of valuation, original-cost-less-depreciation, regardless of whether the result of that method actually results in "true value."

Constitutionally, it does not matter whether that classification was made by the Court through its holding, or administratively by posting on the Commission's website a form for gathering information. The result is the same: there is, according to the Court of Appeals, a category of property entitled to a unique valuation method. Whether constitutionally impermissible subclasses can be created by mandating a particular valuation method and whether the Commission or the Court of Appeals has created such a subclass are questions of general interest to property taxpayers and to those who receive tax funds.

CONCLUSION

For the reasons stated above, the Court should transfer this appeal from the Court of Appeals, Western District.

Respectfully submitted:

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Certificate of Service

Pursuant to Rules 81.006 and 43.01, a copy of the Application for Transfer and the attachments thereto is being served via electronic mail on November 14, 2017, to:

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