Proposition One: Who Pays the Costs for Abandoned Ships

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PROPOSITION ONE: WHO PAYS THE COSTS FOR ABANDONED SHIPS?

State ex rel. Union Electric Company v. Public Service Commission

Any reasonable man whose promise was to pay the captain of a ship "if the ship arrives in port before July 15" would be very surprised to find that this condition does not cover the situation wherein the ship never arrives.

Missouri voters, too, might be surprised at the decision of the Missouri Supreme Court in State ex rel. Union Electric Company v. Public Service Commission. In 1976, voters enacted Proposition One, a state statute which bars electric utility charges based on construction costs of a facility before it is fully operational. In 1985, the supreme court held that the costs of abandoned construction may be recovered from electric utility customers notwithstanding Proposition One.

1. 687 S.W.2d 162 (Mo. 1985) (en banc). Subsequent to the supreme court's decision in Union Electric, the Commission denied recovery of the Company's cancellation costs a second time. The Commission decision held that the cancellation costs were extraordinary expenses which the Commission could allow or disallow in its discretion. In disallowing the costs, the Commission considered whether ratepayers or shareholders should absorb the costs of abandoned construction. The Commission concluded that the shareholders investing in the Company should bear the risk, and in this case the costs, of abandoned construction. The Company has appealed this second denial of recovery of costs associated with Calloway II. The case was still pending in Cole County circuit court at the time of publication. MISSOURI PUBLIC SERVICE COMMISSION, PSC NEWS (March 28, 1986).

2. Brief for Respondent, Missouri Public Service Commission at 13, Union Electric, 687 S.W.2d 162 (No. 66014).

3. 687 S.W.2d 162.

4. Proposition One was approved by Missouri voters in the November 2, 1976, general election. The tally was 1,132,664 "yes" votes and 663,486 "no" votes. The ballot title read:
   Proposition No. 1 — Proposed by Initiative Petition-Prohibits charges for electricity based on cost of construction in progress upon any existing or new facility or based on cost associated with owning, operating, maintaining, or financing property of an electrical corporation before operational and used for service. Any such charge being made on the effective date of this law is permitted for 90 days after the effective date of the law.


5. Union Electric, 687 S.W.2d at 168.
It is unlikely that the voters, who in 1976 did not want to be billed for a plant under construction, would want to pay for cancelled construction a decade later. But that was not the supreme court’s legitimate concern in Union Electric. Its inquiry was voter intent in 1976 rather than public opinion in 1985. The task was not to divine what voters might have said had they thought about the possibility of abandoned construction. Rather, the task was to determine what voters had said in enacting Proposition One.

This Note will examine the Union Electric decision with particular emphasis on the tools of construction used and ignored by the supreme court in construing a voter-enacted statute. In the process, the Note will also give attention to the treatment of abandoned plant costs in other jurisdictions.

Callaway II was the abandoned construction project that tested the scope of Proposition One. Callaway II was one of two nuclear power plants to be built in central Missouri by Union Electric Company (“Company”). The Missouri Public Service Commission (“Commission”) granted authority to build the plants in 1975.\(^6\) Six years later the Company, citing slackening demand for electricity and the high cost of borrowed funds for construction, cancelled work on Callaway II.\(^7\) The Company applied to the Commission for permission to recover costs of its cancelled power plant from its customers. The Commission denied the request, explaining that recovery of costs of Callaway II was barred as a matter of law by Proposition One.\(^8\) The Commission’s order was affirmed by the Cole County Circuit Court.\(^9\)

The Company appealed the matter to the supreme court, invoking the court’s exclusive appellate jurisdiction in cases challenging the validity of statutes.\(^10\) The supreme court granted review because the Company, in ad-

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6. Mo. Rev. Stat. § 393.170 (1978) provides that an electrical corporation must receive Commission approval prior to construction of a generating facility:

1. No . . . electric corporation . . . shall begin construction of an electric plant . . . without first having obtained the permission and approval of the commission.

2. . . .

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction . . . is necessary or convenient for the public service.

Id.

7. Union Electric, 687 S.W.2d at 164.

8. Re Union Electric Co., 57 P.U.R. 4th 169, 177 (1984) (“Pursuant to § 393.135, RSMo 1978, the commission is prohibited from including the cost of a cancelled electric plant in an electric company’s cost of service.”).

9. Union Electric, 687 S.W.2d at 164.

10. Article V, section 3 of the Missouri constitution reads, in relevant part:

“The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the constitution of this state . . . .
dition to questioning the Commission's interpretation of Proposition One, also challenged its constitutionality. While the supreme court ultimately decided Union Electric without reaching the constitutional issues, it retained jurisdiction. Respondents were the Commission, the Public Counsel for the State of Missouri ("Public Counsel"), and the Missouri Public Interest Research Group ("MOPIRG").

The decision in Union Electric turned on the supreme court's reading of the language of Proposition One. Finding no explicit reference to abandoned construction, the supreme court concluded that Proposition One did not alter the established practice of permitting recovery of abandoned plant costs.

Proposition One, enacted as a statute, reads in part as follows:

393.135 — Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, the court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court." Mo. Const. art. V, § 3.

11. Union Electric Company's challenges to the construction and validity of Proposition One were, in relevant part, as follows:

Point I - The circuit court improperly held that Proposition [One] prevents an electric utility from recovering the costs of a cancelled electric plant through rates because Proposition One does not apply to recovery of cancelled plant costs; it only prevents a utility from including construction work in progress (CWIP) in rate base.

Point II - The circuit court erred in holding that the commission decision did not constitute a violation of appellant's right to due process because there was no evidence or finding that appellant was imprudent in deciding either to build or to cancel the Callaway 2 plant; in the absence of any showing of management imprudence a utility has a constitutional right to recover expenditures made for its ratepayers.

Point III - The circuit court erred in holding that the Commission decision did not constitute a violation of appellant's right to equal protection under the law because Proposition [One], as interpreted, would preclude the recovery of the cost of a cancelled project by an electric utility, while allowing other types of utilities in the state to recover similar costs under the same circumstances.

Brief for Appellant at 10, 12, 14, Union Electric, 687 S.W.2d 162 (No. 66014).

12. 687 S.W.2d at 165.

13. The Public Counsel is an appointed state official. "He may represent and protect the interests of the public in any proceeding before or appeal from the public service commission." Mo. Rev. Stat. § 386.710(2) (1978). MOPIRG is a private consumer advocacy organization.
or financing any property before it is fully operational and used for service, is unjust and unreasonable and is prohibited.¹⁴

The issues in *Union Electric* centered on the wording of the two clauses italicized above.

The basic rule of statutory interpretation is to seek the intention of the legislature or, in this case, the voters. All other canons of construction are subservient to it. Whenever possible, the intent should be ascertained from the language of the statute itself. The words are to be given their plain, ordinary meaning. If this initial inquiry clearly reveals the statute's meaning, a court may go no further in construing a statute.¹⁵

A court's first task, then, is to determine whether the statutory language is clear or ambiguous. Words are ambiguous only if they are susceptible to more than one meaning in the context in which they are used.¹⁶

The supreme court found Proposition One ambiguous insofar as its applicability to cancelled construction projects. It found no terms like "canceled" or "abandoned" or "uncompleted" in Proposition One.¹⁷ In contrast, the supreme court pointed to a New Hampshire statute which had been interpreted to bar recovery of abandoned plant costs. The supreme court considered Proposition One less clear than the New Hampshire statute. While the two statutes are substantially similar, the New Hampshire statute refers to construction work not being completed: "[a]t no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed."¹⁸

The supreme court rejected the respondents' contentions that either clause of Proposition One, standing alone, barred recovery of abandoned plant costs. The Public Counsel and MOPIRG maintained the first clause barred

14. *Id.* § 393.135 (emphasis added).
17. *Union Electric*, 687 S.W.2d at 166.

Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rate or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

*Id.*
recovery with its prohibition against recovery of costs "based on the costs of construction in progress upon any existing or new facility of the electrical corporation." The respondents argued that the so-called "cancellation costs" which the Company sought to recover were, in fact, costs of construction work in progress. Such costs, they urged, were not recoverable simply because the Company chose to characterize them as cancellation costs. The costs were the same, before and after cancellation, and were therefore prohibited as costs of construction in progress by the first clause of Proposition One. For support, the respondents turned to another case dealing with abandoned plant cost recovery, In re Public Service Co. of New Hampshire. There the New Hampshire Supreme Court turned aside suggestions that a statutory prohibition against cost recovery for uncompleted "construction work" did not apply to abandoned construction. The respondents' contentions on this point were properly rejected in Union Electric. Words in a statute are to be read for their plain and ordinary meaning. Proposition One's first clause refers only to "construction work in progress." It is irrefutable that there is no construction "in progress" after a plant is cancelled. The respondents' reliance on the New Hampshire decision was misplaced as well in this context. The New Hampshire Supreme Court dealt with language referring simply to "construction work" rather than "construction in progress." Indeed, the New Hampshire court emphasized its logic might not hold true for "construction in progress." The supreme court, then, correctly found abandoned construction to be outside the definition of "construction in progress" in the first clause of Proposition One.

The supreme court also rejected the respondents' arguments that recovery of cancellation costs was barred by the second clause of Proposition One. The respondents described the second clause's denial of recovery of "any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service" as a "catch-all" provision designed to be "lawyer proof." They said cancellation costs inev-

19. Union Electric, 687 S.W.2d at 165.
20. Id. at 167.
22. Id. at 54, 480 A.2d at 25 ("[I]t carries no suggestion that it refers to uncompleted construction work only before, but not after, abandonment.").
23. See supra note 15 and accompanying text.
24. In re Public Service Co., 125 N.H. at 53, 480 A.2d at 25 ("[T]he company could still argue that prohibitions dealing with 'construction work in progress' could apply only during the period when the work was 'in progress' and would not apply after the work had been abandoned.").
25. Some assumptions have necessarily been made here and elsewhere concerning the supreme court's analysis in Union Electric. Many of the arguments advanced by the parties' briefs were not directly addressed in the Union Electric decision.
26. Brief for Respondent, Missouri Public Service Commission at 10, Union Electric, 687 S.W.2d 162 (No. 66014).
itably fell within the scope of “any costs.” Such costs, by the terms of Proposition One, could not be recovered before the facility is “fully operational and used for service.” Since an abandoned plant will by definition never be completed or used for service, Proposition One prohibited recovery of the costs incurred prior to plant cancellation. The Public Counsel and MOPIRG again directed the supreme court to In re Public Service Company of New Hampshire: “Construction work on an abandoned plant is construction work that is ‘not completed.’”

The supreme court read the second clause much more narrowly. It read it as no more than an extension of the first clause. “So read, we believe that it is designed to cover adhesions to the costs of construction, such as interest on borrowed funds, and not to relate to abandoned construction.” The supreme court suggested the word “before” in the second clause necessarily implied that there will be an “after” when the plant is operational and costs may be recovered. That implication comports with a reading of Proposition One as a matter of cost deferral. It runs contrary to the application of Proposition One to abandoned projects resulting in forfeiture of construction costs. The supreme court also returned to the language of the New Hampshire statute absent from Proposition One: if Proposition One clearly barred cost recovery for abandoned plants, why did an otherwise substantially similar New Hampshire law expressly refer to uncompleted work? The supreme court answered, “The legislature of that state apparently considered the language significant.”

The supreme court’s narrow reading of Proposition One’s second clause seems strained and is unconvincing. Looking at Proposition One as a whole, there is no apparent justification for limiting the scope of the second clause to that of the first clause. The supreme court has previously recognized that grammatical order and the selection of associated words is indicative of the natural significance of the words used. The word “or” separates the two clauses of Proposition One; it is a disjunctive particle delineating two types of costs prohibited by Proposition One.

There is a presumption against idle verbiage or superfluous language when construing a statute. The supreme court’s reading violated that canon

27. 125 N.H. at 53, 480 A.2d at 25.
28. Union Electric, 687 S.W.2d at 167.
29. Id. at 167-68.
30. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. 1982) (en banc); Boone
County Court v. State, 631 S.W.2d 321, 324 (Mo. 1982) (en banc); State ex rel.
Danforth v. Cason, 507 S.W.2d 405, 408-09 (Mo. 1973) (en banc).
31. Boone County Court, 631 S.W.2d at 325 (“The disjunctive, word ‘or’,
ordinarily indicates an alternative and generally corresponds to the word ‘either’.”
) (quoting Council Plaza Redev. Corp., 439 S.W.2d 526, 532 (Mo. 1969) (en banc)).
32. Graves v. Little Tarkio Drainage Dist. No. 1, 345 Mo. 557, 569, 134
S.W.2d 70, 78 (1939) (“It is an elementary and cardinal rule of construction that
effect must be given, if possible, to every word, clause, sentence, paragraph, and
of construction. It found a prohibition against recovery of construction costs in progress in the first clause, and merely repeated the prohibition with broader language in the second clause. Confining the second clause to simply "covering adhesions" in the bar on recovery of costs of construction in progress is duplicative. The first clause, standing alone, says all that needs to be said regarding those costs.

The implication the supreme court draws from the word "before" seems strained as well. While one might anticipate an "after," that expectation does not carry with it an implied waiver of the condition precedent if the "after" doesn't come. The mother who tells her child there will be no more candy until the youngster brushes her teeth will not hand over the candy upon the child's announcement that she has abandoned the practice for life. A statute should not be construed so as to lead to an absurd result.33

Additionally, the supreme court's reference to the additional language in the New Hampshire statute which it said was absent from Proposition One does not advance its conclusion. The two statutes are similar, but not identical. If the additional language noted by the supreme court was stricken from the New Hampshire statute, the two enactments would not be mirror images of one another. All prohibitions in the New Hampshire law, except the sentence cited by the supreme court, refer directly to the costs of construction in progress.34 It is therefore not surprising that the New Hampshire legislature considered an additional reference to "construction work" (without the adjective phrase "in progress") significant. Nor is it surprising that the New Hampshire Supreme Court would rely heavily on that sentence in barring the recovery of costs associated with abandoned construction. In contrast to the New Hampshire language, Proposition One refers to costs of construction in progress only in the first clause; the second clause goes much further taking in "any costs" associated with an electric facility before it goes on line. Put another way, while the two statutes have the same effect, they reach that end by different routes. The language cited by the supreme court in the New Hampshire law was critical in In re Public Service Company, but would only be repetitive if added to Proposition One. Missouri's statute covers the same ground in its second clause. The supreme court's further observation that the New Hampshire court considered its own statute different from Proposition One only underscores the pitfalls of comparing the two statutes piecemeal.

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33. State ex rel. Zoological Park Subdistrict v. Jordan, 521 S.W.2d 369, 372 (Mo. 1975); State ex rel. Stern Bros. v. Stilley, 337 S.W.2d 934, 939 (Mo. 1960).

34. See supra note 18 and accompanying text.
The supreme court is also inaccurate in saying that the New Hampshire court considered its own statute clearer than Proposition One on the issue of abandonment costs. The New Hampshire Supreme Court concluded it did not need to look at other statutes in construing its own because the latter was unambiguous. The New Hampshire Supreme Court did not comment on the clarity of Proposition One.

The supreme court's conclusion that Proposition One was ambiguous regarding abandoned plant costs appears to have resulted from an inordinately high standard of clarity imposed by the court. Words whose natural application would lead to the conclusion that abandoned plant costs could not be recovered failed to meet that standard. Only a statute including words like "abandoned" or "cancelled" or their synonyms would have met the supreme court's requirement of "explicit language."

The supreme court's rationale for imposing a heightened standard of clarity might be found midway through its discussion of the merits in Union Electric. It appears only after a review of established regulatory practices, the events surrounding Proposition One's enactment, possible reasons for its enactment, and substantial problems that might accompany its application to abandoned plant costs. After reviewing the factors above (but before analyzing the statutory language), the supreme court wrote:

We do not suggest for a moment that the wisdom of Proposition One is any concern of ours. We must apply the statute enacted by the voters unless persuaded that it is unconstitutional. But, in construing the statute, it is not inappropriate to look at the possible effects of alternative constructions, and to read the statute in the context of the established pattern of utility regulation. We should hesitate to mandate a result not explicitly required by the language if invidious consequences may result.35

Only then did the supreme court turn to the language of Proposition One and find it insufficiently explicit regarding cancelled construction costs. If the discussion in Union Electric paralleled the supreme court's thought process, it is fair to suggest that the cart was put before the horse. As noted earlier, the first step in construing a statute is to look at the statutory language. A court may look further only if that initial inquiry reveals ambiguity. The St. Louis Court of Appeals repeated the familiar axiom in the context of statutes enacted by a public vote in Missourians for Honest Elections v. Missouri Elections Commission:36

While the rules of statutory construction are well known, in ascertaining the meaning of a law, we must look to the express language of the Act irrespective of what was intended. The rational meaning of the express language of the Act must be given effect. The primary rule of statutory construction

35. Union Electric, 687 S.W.2d at 167.
36. 536 S.W.2d 766 (Mo. Ct. App. 1976).
is to seek and ascertain the intent of the lawmaker, but this intent is ascer-
tained from the words used. We have no right to read into an act an intent
c contrary to the phraseology.37

The court in Union Electric apparently weighed extrinsic matters before mak-
ing what should have been the initial inquiry into the words of Proposition
One.

While consideration of extrinsic matters appeared prominently in Union
Electric, the supreme court’s rationale in using those aids was less obvious.
The supreme court cited few canons of construction or supporting authorities
for much of its analysis, so correlating its discussion with established rules
of interpretation will necessarily involve some conjecture.

The supreme court began its analysis by reviewing the theory of utility
regulation. It noted the dual, sometimes conflicting goals of protecting con-
sumers from unconscionable rates while assuring utilities a fair rate of return
on prudent investments. The supreme court also noted that the Company
had initially received permission from the Commission to build Callaway II
in accordance with established regulatory practice. The importance the su-
preme court attached to this review of regulatory practice was revealed when
it announced in its holding that Proposition One does not apply to abandoned
construction costs: “We base our conclusion on the established practice of
allowing such charges, absent a statutory command to the contrary . . . .”38

Why was established regulatory practice so influential a factor? None
of the parties argued that anything but Proposition One blocked recovery of
cancelled construction costs. The supreme court’s pronouncement that estab-
lished regulatory practice would allow recovery seems unnecessary since no
one contended otherwise. Perhaps the supreme court’s discussion can be
explained as an attempt to harmonize its construction of Proposition One
with the bulk of regulatory practice, thereby lending weight to its inter-
pretation. Missouri case law recognizes the value of harmonizing questionable
language with the overall tenor of related provisions as a tool of construc-
tion.39 However, the reliability of such a guide in ascertaining intent was
questionable in Union Electric. The language at issue was adopted by a
statewide vote many years after most of the related statutes were enacted by
the General Assembly. Any assumption that the voters in enacting Propo-
sition One sought continuity with earlier provisions seems ill-advised. The
supreme court itself acknowledged that the enactment of Proposition One,
even if viewed as applicable only to costs of construction in progress, rep-

37. Id. at 775.
38. Union Electric, 687 S.W.2d at 168 (emphasis added).
39. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. 1982) (en banc) (“[T]his
court must give due regard to the primary objectives of the provision under scrutiny
as viewed in harmony with all related provisions, considered as a whole.”).
resented a break with what had gone before. In sum, the supreme court's recitation of the tenets of established regulatory practice yielded few clues to voter intent in enacting Proposition One.

After its review of regulatory practice, the supreme court turned to a discussion of the events contemporaneous with the enactment of Proposition One. That is in accordance with Missouri case law which has repeatedly recognized the value of the history of an enactment in discerning its intent. In Union Electric, the examination of events preceding the enactment of Proposition One led the supreme court to conclude that its "manifest purpose" was to outlaw cost recovery of construction in progress. Thus, Proposition One's supporters were concerned with deferral of electric charges rather than their forfeiture.

As support for this interpretation, the supreme court noted that the Commission had approved inclusion of the costs of construction in progress in utility charges for the first time just months before the enactment of Proposition One. It also found a great deal of discussion in regulatory decisions concerning treatment of costs of construction in progress, but little case law regarding abandoned construction costs. "There are substantial indications that Proposition One was primarily concerned with timing, and that the possibility of abandonment was not present in the thoughts of the sponsors or of the voters."

The discussion in Union Electric illustrates the difficulties attendant with discerning the intent of voter-enacted legislation through legislative history. The history is hard to pin down. There are no legislative committee reports. There are no recorded votes in which lawmakers offered refining amendments to hone the law's effect. The lawmakers are not gathered in one chamber, but are spread across the state. Particularly in the context of voter-enacted legislation, legislative history as a guide to legislative intent is only as useful as the history is complete. For example, the Union Electric court points to the 1976 Commission order allowing recovery of the costs of construction in progress but fails to note that the same order mentions that abandoned construction was among the issues discussed. Moreover, some history was

40. Union Electric, 687 S.W.2d at 166 ("As soon as the Callaway project was authorized Union Electric sought to include an allowance for construction work in progress on Callaway I and II in its rate structure and was allowed by the Commission to do so. Proposition One changed all this.") (emphasis added) (footnote omitted).
41. Id.
42. Drey v. McNary, 529 S.W.2d 403, 410 (Mo. 1975) (en banc); State ex rel. Zoological Park Subdistrict v. Jordan, 521 S.W.2d 369, 372 (Mo. 1975); City of St. Louis v. Pope, 344 Mo. 479, 126 S.W.2d 1201, 1209 (1938) (en banc).
43. Union Electric, 687 S.W.2d at 166.
44. 20 Mo. Public Service Comm'n (N.S.) 395, 404 (1975).
UCCM [Utility Consumers Council of Missouri] also asserts a substantial

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not examined or at least not mentioned by the supreme court in *Union Electric*.

The Commission and the Public Counsel urged the supreme court to examine the official ballot title presented to voters on November 2, 1976. A ballot title is drafted by the Attorney General who is required by statute to state the purpose of the proposal fairly and accurately. The official ballot title is a potentially invaluable guide to voter intent. It is the last explanation of the measure read by voters before they vote "yes" or "no." Other jurisdictions have recognized its potential. The *Union Electric* decision never discusses Proposition One's ballot title, not even to discount its usefulness. Perhaps the supreme court considered its lack of utility self-evident. The ballot title was similar to the language of Proposition One itself, and, like it, failed to include terms like "abandoned" or "cancelled" construction.

The *Union Electric* decision includes no reference to another interpretive tool which the supreme court itself has previously recognized: "The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." The Company argued that use of this canon would support its assertion that Proposition One did not apply to abandoned construction. The Company referred the supreme court to a 1978 Commission order allowing recovery of costs associated with the cancelled construction of two coal-fired units. Recovery was sought several months after Proposition One's enactment. The Commission order authorizing re-

number of Union Electric Company's current ratepayers, who would be paying a rate of return on plant not in service if CWIP is allowed, will not be customers of Union Electric when the nuclear facilities come online, because of death, or mobility of the population. It is also suggested the Callaway facility may never be used for generation of electricity because of lack of the required licenses, or abandonment of the project by the Company because of other problems.

*Id.* (emphasis added).


46. Mo. Rev. Stat. § 126.081 (1978) was in effect in 1976 and read, in pertinent part:

[T]he attorney general shall provide and return to the secretary of state an official ballot title for the proposed measure. The official ballot title shall express the purpose of the proposed measure . . . . The official ballot title shall be a true and impartial statement of the purposes of the proposed measure in language not intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

*Id.*


48. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. 1972) (en banc).

covery was issued over a year after the effective date of Proposition One.

The respondents could only lamely argue that the 1978 Commission order was in error, and was distinguishable because none of the parties in the earlier case had raised the issue. Left unsaid was that two of the respondents in Union Electric participated in the earlier case. Given the attention focused on the enactment of Proposition One, it seems unlikely that the parties in the earlier case overlooked the then-new law. That leaves the conclusion that in 1978 neither the Commission nor the parties involved considered Proposition One applicable to abandoned plant costs. Yet the supreme court never acknowledged this apparently strong argument by the Company in Union Electric. The supreme court might have considered it a two-edged sword since the present Commission read the statute as applicable to abandoned construction. In effect, the 1978 Commission order and the Commission order on appeal in Union Electric might have balanced each other out.

An additional reason for the supreme court’s lack of enthusiasm for this interpretative tool might be found in the rationale underlying the device. The judiciary’s deference is grounded in the notion that the agency is better equipped to interpret laws and statutes within its area of specialized knowledge and insights. In Union Electric, the supreme court might have considered itself equally competent in interpreting Proposition One. The task required no specialized knowledge unique to utility regulators. Rather, the question of whether Proposition One, as a matter of law, barred recovery of abandoned plant costs, fell within the court’s area of proficiency. However, given the supreme court’s reliance on established regulatory practice in Union Electric, it seems contradictory for the court to give no weight to the Commission’s reading of Proposition One.

Any discussion of the campaigns and representations made to voters prior to the public vote on Proposition One is also absent from the Union Electric decision. The supreme court might have been following case law which regards such evidence to be of dubious value and unpersuasive in determining voter intent. The roots of this hostility toward this form of

50. Commissioner Leah Brock McCartney dissented from the decision allowing recovery. Brief for Respondent, Missouri Public Counsel Office at 18, Union Electric, 687 S.W.2d 162 (No. 66014).


52. St. Louis County v. State Highway Comm’n, 409 S.W.2d 149, 152 (Mo. 1966).

[It] has been specifically held that statements and representations made before an election held to vote on a constitutional amendment authorizing a bond issue for highway purposes are neither conclusive nor persuasive evidence on the courts when called on to construe a particular proposition adopted. This principle would apply to any legislative enactment.

Id. (citation omitted).
extrinsic aids can be traced to *State ex rel. Russell v. State Highway Commission*. There the court noted that recorded debates of constitutional conventions are of little help in determining the voters' intent in ratifying ambiguous provisions. The *Russell* court then extended the antipathy to representations made before a public vote: "If this be true of public discussions by the people's chosen delegates in convention assembled, how much more should it be true of representations made here and there at large over the state by private individuals and organizations in advocacy of a cause at an election."

It might be appropriate to re-examine this hostility toward representations made before a vote. The *Russell* court stopped short of endorsing a blanket rule that such representations should be disregarded in every case. It simply considered the representations made in the case before it un persuasive. More important, the world and the state have grown smaller in the decades since the *Russell* decision. Until recently the message may well have changed from town to town. Today sophisticated campaigns with modern technology at their disposal can reach voters with the same message so that the electorate is responding to the same stimuli when going to the polls. In many cases the representations made would be at least as reliable in discerning voter intent as more favored interpretive tools. A number of jurisdictions recognize such representations as helpful in determining voter intent.

Certainly pre-election representations would not always be helpful in construing voter-enacted statutes. Some messages are so abbreviated or distorted that they can have little influence on the electorate and thus are of little consequence in determining voter intent. At the same time, vigorously debated issues can frame the choices before voters in a way few other tools of construction can. Whether the representations are helpful in construing a statute should be a question of fact for a court. They should not be rejected in blind adherence to earlier case law.

What would have been the value of such evidence in *Union Electric?* The Company argued that newspaper accounts describing Proposition One clearly established that its basic thrust was the deferral of recovery of the costs of construction in progress. The respondents pointed to paragraphs in the Company's exhibits suggesting that abandonment was at least a peripheral concern. The supreme court might have at least considered whether the concern over abandonment was pervasive enough in pre-election debate to have influenced the thinking of the electorate. The fact that deferral of recovery

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53. 328 Mo. 942, 42 S.W.2d 196 (1931) (en banc).
54. *Id.* at 961, 42 S.W.2d at 202.
of the costs of construction in progress was a primary motive would not have precluded a conclusion that voters also had abandoned construction in mind when enacting Proposition One. The respondents did not deny that the statute applied to costs of construction in progress. They simply maintained that it also addressed abandoned construction costs.

The supreme court's analysis of the events surrounding the enactment of Proposition One also failed to draw upon the court's personal knowledge of those events. Case law supports a court's use of its own knowledge in construing statutory language. "Courts are not supposed to be blinded bats. Of current history courts take judicial knowledge. What all know the courts must judicially know." It is true that other more objective aids of construction might generally prove to be more convincing and reliable measures of voter intent. However, a court's personal knowledge arguably has a place in the milieu of factors considered.

Construction of statutes by their historical context can only be helped by more knowledge of that history. Proposition One's passage was relatively recent history at the time of the Union Electric decision. It was not a parochial issue, but a statewide vote attracting a fair amount of public debate. It would have been appropriate for the supreme court to rely on its own knowledge of the issues debated a decade before.

After its discussion of the history surrounding the enactment of Proposition One, the supreme court turned to an enumeration of reasons why voters might have wanted to defer the recovery of the costs of construction in progress until completion of a facility. It concluded the reasons listed had no application when construction is abandoned. The enumeration was apparently the product of pure judicial conjecture, unaided by any recognized canon of construction. The supreme court offers no basis for the listing other than noting that "[r]easons for requiring deferral can be easily perceived." Thus the supreme court which had ignored a number of recognized interpretive devices offered by the parties turned to speculation in ascertaining

57. The supreme court in Union Electric listed three reasons why voters might have wanted deferral of recovery of the costs of construction in progress: (1) If construction charges are assessed in advance persons who will never have the benefit of the completed facilities such as those who die or move before the facility goes on line will have to bear a part of the cost. (2) It has been demonstrated that the costs of both Callaway projects were substantially underestimated. If reimbursement is deferred until the facility is on line the Commission may have more effective continuing control. (3) If the utility must wait until construction is completed to obtain reimbursement or return, it may be impelled to complete necessary construction more expeditiously.
687 S.W.2d at 166.
58. Id.
voter intent. Some of the reasons listed might have easily been grounded in a recognized canon of construction. Yet presented in Union Electric as apparently nothing more than a product of speculation, they lose their force. Worse, the supreme court acknowledged that its enumeration might be far from complete. Whatever persuasive power the listing held was dissipated by an acknowledgement that other reasons might exist.

It takes no great leap of logic to suggest that the unnamed reasons might have been applicable to both deferral and denial of cost recovery. Indeed, MOPIRG offered a rationale broad enough to encompass both objectives: risk-shifting. MOPIRG argued that risk-shifting would be served by forbidding customer charges on cancelled construction as well as those under construction. Whether MOPIRG's risk-shifting rationale was anything more than its own speculation is not the point here. Rather, it serves to illustrate the "slippery slope" the supreme court is on when it invites speculation concerning voter intent. Any number of rationales could be offered for either side of the issue. The supreme court was correct in conceding that its enumeration was not exhaustive. It could never be complete. It is as infinite as the imagination of the parties.

The supreme court concluded its consideration of extrinsic matters by discussing "substantial problems" which might ensue if Proposition One was applied to abandoned construction:

Electric utilities will be reluctant to embark on new construction projects, or with long-range plans, if the prospect of forfeiture looms. Investors will hesitate to stake their money in venture with a controlled return and substantial risk of loss. A utility might be impelled to complete an uneconomic project if it otherwise faced total loss of a substantial investment.

It is unclear why the supreme court discussed these policy considerations if it was searching for voter intent to clarify the language of Proposition One. No authority was offered for the proposition that a court may deviate from voter intent in construing a statute when it considers that intent imprudent. Perhaps it was offered as the basis for the heightened standard of explicitness by which the court measured Proposition One. Again, the supreme court appears to be in uncharted waters. One man's "substantial problems" are another's substantial benefits. Why, for example, should electric utilities be anything but cautious in pursuing multi-million dollar projects? Why shouldn't investors hesitate? When a project cannot attract

59. Brief for Respondent, Missouri Public Service Commission at 20, Union Electric, 687 S.W.2d 162 (No. 66014) ("Voters pulling those levers for Proposition [One] were not thinking as lawyers or accountants but as consumers concerned about one simple concept — consumers should not be charged for the building of new power plants until those plants begin providing service to the general public.").

60. Union Electric, 687 S.W.2d at 166.
investment, perhaps that says more about the imprudence of a particular project than it does about the laws affecting that investment.

Compare the supreme court’s policy concerns to those of the Supreme Court of Ohio in Office of Consumers’ Counsel v. Public Utilities Commission.61 The Ohio court held that its utility regulators exceeded their statutory authority in allowing recovery of abandoned plant costs. Confronted with arguments that its reading of the statutes would threaten utility investment, the Ohio court responded that its task was to interpret the law and that the risk of forfeiture was not its proper concern.62 Responding to suggestions that utilities might complete imprudent projects to avoid the forfeiture mandated by abandonment, the Ohio court wrote:

> We are confident that if any utility managers who might be tempted to act as the commission suggests are aware that the commission, pursuant to its statutory responsibilities, is vigorously scrutinizing all proposed and in-progress construction projects, these managers will decide whether or not to abandon a particular project according to the their best and most prudent business judgment.63

This is not to suggest that the Ohio court’s wisdom is superior to that of the Union Electric court. It is offered to illustrate that what constitutes a “substantial problem” is a wholly subjective determination. One court’s concerns are derided elsewhere. More critically, such policy considerations do nothing to advance the court’s essential task of construing a statute to give effect to voter intent.

The supreme court’s holding in Union Electric that Proposition One does not prohibit recovery by electric utilities of abandoned plant costs was the result of an artificially high standard of clarity. That standard apparently resulted from the supreme court’s consideration of extrinsic matters before turning to the language of Proposition One. In so doing, the supreme court reversed the well-established procedure of looking to statutory language first, and relying on extrinsic matters only if the language is ambiguous. Extrinsic evidence the supreme court considered, and some which it did not consider, supported its ultimate holding. However,

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62. Id. at 167, 423 N.E.2d at 829.
63. Id.

If, as has been argued, these are parlous times for the utilities industry, and if, therefore, in order to attract and retain investment capital, utility companies must not only be granted a fair and reasonable rate of return pursuant to statute but must also be assured the return of capital investment in failed projects that would otherwise not be recoverable under the ratemaking formula, then the commission and the utilities should petition the General Assembly to enact changes in the ratemaking structure so as to provide this extra modicum of protection for the investors.

Id.
extrinsic evidence ignored in *Union Electric* might have established plant abandonment as at least a peripheral concern of voters in enacting Proposition One.

Placing proposed legislation on the ballot through initiative petition and enacting it by public vote is an extraordinary way of making law. It is often a last resort when voters decide they must do for themselves what their elected representatives will not do for them. It represents at least in part a loss of faith in the legislative process. When a court is asked to construe a voter-enacted statute it should approach the task gingerly, mindful of the process by which it was enacted. Reasons for a court's interpretations, well-grounded in supporting authority, should be carefully set down. The *Union Electric* decision is arguably supported by the established rules of statutory construction. It is unfortunate that the supreme court did not more closely adhere to them in interpreting Proposition One, for it runs the risk of further public disillusionment.

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