

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Ameren Transmission)
Company of Illinois for Other Relief or, in the Alternative,)
a Certificate of Public Convenience and Necessity)
Authorizing it to Construct, Install, Own, Operate,) File No. EA-2015-0146
Maintain and Otherwise Control and Manage a)
345,000-volt Electric Transmission Line from Palmyra,)
Missouri, to the Iowa Border and Associated Substation)
Near Kirksville, Missouri.¹)

**ATXI’S OBJECTION/MOTION TO STRIKE PORTIONS OF THE PRE-FILED
TESTIMONY OF NEIGHBORS UNITED WITNESS WILLIAM POWERS, P.E.**

COMES NOW Ameren Transmission Company of Illinois (“ATXI”), and for its objection to/motion to strike portions of the pre-filed rebuttal and surrebuttal testimonies filed by William Powers, P.E., states as follows:

Argument

A. Applicable Law Governing Pertinent Provisions of Mr. Powers’ Testimonies.

While it is true this Commission is not bound by the technical rules of evidence, it is still bound by the fundamental rules of evidence. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154 (Mo. 2003).

Where a witness is offered as an expert on a particular topic, additional foundation must be laid before that witness’ testimony can be admitted: “[t]o lay a proper foundation for the testimony of an expert witness, the proponent must show that the witness has sufficient expertise and acquaintance with the incident involved to testify as an expert.” *State v. Watling*, 211 S.W.3d 202, 208 (Mo. App. S.D. 2007), *citing State v. Watt*, 884 S.W.2d 413, 415 (Mo. App. E.D. 1994). Where “scientific, technical or other specialized knowledge” is offered, § 490.065.1, RSMO. (2000) requires that the witness be qualified by “knowledge, skill,

¹ The project for which the CCN is sought in this case also includes a 161,000-volt line connecting to the associated substation to allow interconnection with the existing transmission system in the area.

experience, training, or education” *in the area* in which expert opinions are offered. Otherwise, the proffered expert’s testimony is nothing more than “mere conjecture and speculation,” and “does not constitute substantive, probative evidence.” *Mueller v. Bauer*, 54 S.W.3d 652, 657 (Mo. App. E.D. 2001), *citing Gaddy v. Skelly Oil Co.*, 364 Mo. 143, 259 S.W.2d 844, 853 (1953). Finally, § 490.065.3 also requires that the underlying facts or data relied upon by the expert in forming an opinion “must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.”

The bar against the admission of hearsay evidence over objection is also a fundamental rule of evidence before the Commission. *Lee v. Missouri Am. Water Co.*, 2009 Mo. PSC LEXIS 430 at *2-*3 (Order Denying Evidentiary Motions Without Prejudice) (Case No. WC-2009-0277, May 19, 2009). This is because the value of hearsay evidence depends on the *declarant’s* credibility evaluated under cross-examination; where there is no opportunity for the declarant to be cross-examined, that determination cannot be made. *Id.*; *see also In the Matter of the Application of Union Electric Co., d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage a Utility Waste Landfill and Related Facilities at its Labadie Energy Center*, 2013 Mo. PSC LEXIS 896 at *2-*3 (Order Regarding Objections and Motion to Strike) (Case No. EA-2012-0281, August 28, 2013). Because the right to cross-examination of opposing witnesses is a fundamental due process right, hearsay evidence must be excluded upon objection to its admission. *In the Matter of the Application of Keith Mallory for a Certificate of Convenience and Necessity to Haul Mobile Homes*, 1982 Mo. PSC LEXIS 20 at *7 (Report and Order) (Case No. T-48,374, September 20, 1982). Where there is an objection made, hearsay evidence does not rise to the level of "competent and substantial

evidence" upon which the Commission can base its decision. *State ex rel. Marco Sales, Inc. v. Pub. Serv. Comm'n*, 685 S.W.2d 216, 220 (Mo. App. W.D. 1984); *State ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949). Reliance on such information would therefore constitute error by the Commission.

Application of this fundamental rule of evidence by the Commission has resulted in the exclusion of an affidavit that merely relayed what the affiant learned from another person (*McFarlin v. KCPL&L Greater Mo. Operations Co.*, 2013 Mo. PSC LEXIS 311 at *5-*6 (Order Regarding Motion for Summary Determination) (Case No. EC-2013-0024, March 21, 2013)); exclusion of website pages, as well as testimony from an unrelated public hearing (*Lee*, 2009 Mo. PSC LEXIS 430 at *2-*3); exclusion of anonymous letters (*In the Matter of the Joint Application of Great Plains Energy Inc., KCP&L Co., and Aquila, Inc., for Approval of the Merger of Aquila, Inc.*, 2008 Mo. PSC LEXIS 693 at *26 (Report and Order) (Case No. EM-2007-0374, July 1, 2008)); exclusion of letters from various witnesses who were not present to testify at hearing (*In the Matter of the Application of Keith Mallory*, 1982 Mo. PSC LEXIS at *6-*7); and studies prepared and published by non-governmental entities or individuals (*Labadie*, 2013 Mo. PSC LEXIS 896 at *10).

Where an expert merely acts as a conduit for another expert's opinion by testifying as to opinions contained in documents he or she has reviewed, however, such testimony is hearsay and inadmissible. *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 833 (Mo. App. W.D. 1996); *State ex rel. Missouri Hwy. & Transp. Comm'n v. Modern Tractor & Supply Co.*, 839 S.W.2d 642, 655 (Mo. App. S.D. 1992). Particularly relevant to this motion is the legal principle that an expert witness, though entitled to rely on hearsay evidence in forming his opinions as long as the proper foundation is laid, cannot simply consult and merely summarize the contents of hearsay sources

without applying that expertise; in that instance, he is merely a “hearsay witness” whose testimony is inadmissible. *See Graves v. Atchison-Holt Elec. Coop.*, 886 S.W.2d 1, 7 (Mo. App. W.D. 1994) (survey and results presented by expert were inadmissible hearsay because they were not offered to support expert’s opinion but as independent substantive evidence on an issue in the case); *State v. Bybee*, 254 S.W.3d 115, 118 (Mo. App. W.D. 2008) (admission of accident reconstructionist’s testimony that defendant was the driver of the car involved in an accident was improperly admitted hearsay where the officer was simply relying on hearsay statements from witnesses to the accident).

B. Mr. Powers is Not an Expert in All Subjects About Which He Purports to Testify.

Mr. Powers is a Mechanical Engineer with significant experience in many areas of the electric industry. *See* Schedule PE-02 to Mr. Powers’ rebuttal testimony (Mr. Powers’ Resume). Consequently, while ATXI does not agree with a great many of Mr. Powers’ contentions and opinions in this case, it does not challenge that he meets the minimum requirements necessary to provide expert testimony in many of the areas about which he has proffered pre-filed testimony.²

However, that Mr. Powers may qualify as an expert in many areas does not mean that he is an expert on everything. There are several areas about which Mr. Powers purports to testify about which he is either not an expert at all, or where he is merely a hearsay witness acting as a conduit for information from other experts.

² As ATXI’s pre-filed testimony demonstrates, Mr. Powers’ knowledge and experience respecting the planning and operation of electric transmission lines is limited, but ATXI agrees that this goes to the weight, not the admissibility, of his opinions in that area.

C. Mr. Powers is not an Expert Regarding Endangered or Threatened Species or Land-Use-Related Environmental Requirements, and Thus is not Qualified to Express Opinions in those Areas. Related Schedules Attached to his Testimony are Inadmissible Hearsay.

At the very end of his rebuttal testimony, Mr. Powers asserts that there are alternatives to the proposed project that would have less environmental impact. As support for this statement, he references in a footnote his schedule PE-38, which is a collection of selected correspondence from various agencies relating to bats and other species and conservation easements all of which relate to land-use related environmental issues. Nothing in Mr. Powers' pre-filed testimony or any of his schedules (including his resume) provides any foundation whatsoever to establish that Mr. Powers has specialized knowledge in these areas. In fact, his extensive resume, which lists dozens of projects and publications, indicates that none of his education, training or experience have provided him any specialized knowledge in these areas.

Mr. Powers admits he does not possess such specialized knowledge:

Q. Are you a wildlife biologist?

A. I'm not.

Q. Are you a forester?

A. No.

Q. Have you ever conducted a wetlands delineation study?

A. I have not.

Q. Have you ever conducted an endangered species assessment in connection with a project, like a transmission line project?

A. No.

Q. And I maybe should -- maybe I should expand that to a threatened species assessment.

You haven't conducted a threatened species assessment either. Is that true?

A. I have not.

Q. I assume you haven't taken any college coursework or any particular specialized classroom or seminar instruction in wildlife biology or forestry, those kinds of things. Is that true?

A. I actually did take a college course in forestry.

Q. Okay. When you got your master's degree?

No. It was an undergraduate.

Q. Okay. An entry-level class in forestry?

A. That is correct.

Q. Are you an expert on -- and I never pronounce this word right, but -- birds, iparian (sic) species or habitat? Are you an expert on that -- in those areas?

A. I'm not.

Q. What about an expert on bats or bat habitat?

A. No.³

Mr. Powers' pre-filed testimony, together with his admissions in deposition, establish that he is proffering what amount to lay opinions in these areas and that he is attempting to dump hearsay documents into the record in support thereof in direct contravention of the foundational requirements of section 490.065. The mere fact that government employees directed correspondence to ATXI does not mean the correspondence is admissible in this case. The authors of that correspondence will not appear, the correspondence is hearsay, and Mr. Powers can't act as a conduit for the information. *Mister Guy*, 933 S.W.2d at 833; *Modern Tractor & Supply Co.*, 839 S.W.2d at 655. Neither ATXI nor any other party can question the authors of these hearsay documents about their content, or provide any context, because they are not witnesses, and in fact can't even meaningfully cross-examine Mr. Powers about them because he is not an expert as to their subject matter. The documents must therefore be excluded. *Application of Keith Mallory*, *supra* (upon objection, hearsay must be excluded); *Marco Sales*, *supra* (hearsay is not competent and substantial evidence).

Mr. Powers continues his injection of hearsay into this case by attaching dozens of pages (Schedules PE-44 to PE-48) of journal articles (also primarily about bats and bat habitat) to his surrebuttal testimony. Mr. Powers did not write or contribute to any of these articles, nor does he base any expert opinions on their content (nor could he – he's not an expert). Instead, he

³ Powers Deposition, Tr. p. 29, l. 5 to p. 30, l. 11 (Dec. 15, 2015). Taking an entry-level forestry class decades ago in college does not make anyone an expert in the subject of that class.

attaches them under the guise of support for his statement that there could be costs not considered by the Staff in its rebuttal testimony.⁴ However, Mr. Powers has no expertise by which he can do anything other than speculate about the nature, existence or magnitude of such costs. Mr. Powers can't opine about what ATXI may or may not have to do relating to bats, or how bats may or may not be impacted by the project. If he did possess specialized knowledge in this area, then he would be qualified to opine and the string of articles he attaches might (if they actually formed the basis for his opinion), be admissible to show that basis. He does not, and the documents are inadmissible hearsay. Likewise, his testimony as to these topics amounts to nothing more than opinions of others. Mr. Powers can't be a conduit for *their* materials and, upon this objection, these hearsay materials must not be admitted as the authorities cited above indicate.

Consequently, these schedules and the surrebuttal testimony arising from them is inadmissible, both because they reflect what here is lay testimony about which Mr. Powers has no personal knowledge, and because they are either based on hearsay or are hearsay.⁵

⁴ Powers Surrebuttal, p. 11, l. 7-9.

⁵ Moreover, lines 13 to 19 on page 11 of his surrebuttal testimony are objectionable and should be stricken for another, independent reason as well. According to the Commission's rules, rebuttal testimony is required to include "all testimony why a party rejects, disagrees or proposes an alternative to the moving party's direct case." 4 CSR 240-2.130(7)(B). ATXI provided extensive evidence about the economic feasibility of the project as part of its direct case, and specifically addressed the project cost estimate. Mr. Powers claims (see lines 3-7 on page 11 of his surrebuttal testimony) that his testimony on page 11 relates to the economic feasibility (cost-benefits) of the project. Clearly, as evidenced by his rebuttal schedule 38, the Neighbors and Mr. Powers were fully aware of issues relating to species and conservation easements before rebuttal testimony was filed, yet they have waited until surrebuttal testimony to for the first time propose a specific condition in the event the Commission approves the Company's application in this case. By sand-bagging on this issue, they deprive ATXI of the opportunity to respond, which is precisely why the Commission's rules require that *all* testimony respecting an alternative to the direct case be included in rebuttal testimony. The condition advocated by Mr. Powers is clearly an alternative proposal to the one filed by ATXI; that is, the proposal is to not make the CCN effective until this new condition is satisfied, whereas the Company's application was for approval of the CCN without any such condition. Mr. Powers' condition – his alternative – was required to be proposed as part of the Neighbors' rebuttal case. For this additional reason, lines 13 to 19 on page 11 of Mr. Powers' surrebuttal testimony should be stricken.

Based on the foregoing, the following portions of Mr. Powers' pre-filed rebuttal and surrebuttal testimonies pertaining to the environmental issues are objectionable and must not be admitted:

- Mr. Powers' rebuttal testimony at pages 43-44, and his rebuttal schedule PE-38;
- Mr. Powers' surrebuttal testimony starting with the word "Additional" at line 7, page 11 to line 12, and his surrebuttal schedules PE-43 – 48; and
- Mr. Powers' surrebuttal testimony page 11, lines 13 to 19.

D. Mr. Powers' Inclusion of Sierra Club Witness Tim Woolf's Pre-filed Testimony in Ameren Missouri's MEEIA 2 Case is Improper Because it Too is Inadmissible Hearsay.

At page 5, lines 3-7 of Mr. Powers' surrebuttal testimony, he alleges that the fact that Ameren Missouri did not propose to implement demand response as part of its MEEIA Cycle 2 plan is "controversial." As support he attaches the rebuttal testimony of Sierra Club witness Tim Woolf from that case. Here, too, Mr. Powers is simply attempting to act as a conduit for another expert's opinion. In this case, Mr. Woolf's testimony is rank hearsay. Mr. Woolf of course will not be here to stand cross-examination about it. At least as important is the fact that Mr. Powers knows nothing about the facts cited by Mr. Woolf or the bases for Mr. Woolf's testimony, and the fact that there is not even one mention of, or reference to, demand response in Mr. Woolf's testimony,⁶ also making it entirely irrelevant:

Q. Is it your testimony that Mr. Wolf testified in the MEEIA 2 case that Ameren Missouri should have included demand response programs in its MEEIA plan and didn't, or is it your testimony that Mr. Wolf was talking about other energy efficiency programs, not demand response? Do you know?

⁶ As the excerpt below indicates, Mr. Powers could not definitively say whether Mr. Woolf's testimony addressed demand response, but as the Commission can readily see by reading it, it clearly does not.

A. I don't recall him explicitly calling out demand response programs.

Q. In fact, he doesn't mention demand response programs at all, does he?

A. That may be the case. I'd have to review his testimony to confirm it.

Q. Whatever Mr. Wolf said, you don't know whether or not he was criticizing Ameren Missouri for not having included demand response programs in its MEEIA program, do you?

A. I'd have to double-check. I mean, I don't, in being asked now, recall that he explicitly addressed demand response programs in his testimony.⁷

Q. You don't know whether he was talking about demand response at all, do you?

A. No, I don't know if he included that.⁸

Q. I think what you said -- the only reference -- and we can find it. But the only reference to Mr. Wolf's testimony was something about Mr. Wolf's testimony shows Ameren Missouri's efforts with respect to energy efficiency are -- remain controversial. Do you remember that?

A. I do.

Q. Now, let's just look at it so I don't misstate what you said.

And I believe it's on page 5 of your surrebuttal, lines 3 to 7. Do you -- are you there?

A. I am.

Q. You say, "The justifications offered by Ameren Missouri in the 2014 IRP for retrenchment of demand-side management programs are controversial." And then you go on to say, "as explained in Mr. Wolf's testimony." Right?

A. Correct.

Q. But you don't know whether or not Ameren

⁷ Powers Deposition, Tr. p. 111, l. 5 to 23,

⁸ *Id.* p. 113, l. 1-3.

Missouri's exclusion of demand response in its MEEIA program is controversial or not?

A. That's a fair statement.

Q. And you don't even say in your surrebuttal that you agree with Mr. Wolf's testimony or that you have knowledge of the basis of his testimony. You simply cite it to show -- the point you're making is there's some controversy about the energy efficiency programs that Ameren Missouri did or did not propose. Right? That's all you cite it for. Isn't that true?

A. That is correct.⁹

* * *

Q. Just because Mr. Wolf said A, B, and C doesn't mean necessarily that A, B, and C is true. Isn't that fair?

A. Fair statement.¹⁰

* * *

Q. You didn't independently verify the various facts and the figures that Mr. Wolf cited to in his testimony. Is that fair?

A. No. That is fair.

Q. It's fair?

A. Yes, it is fair. I did not.¹¹

In summary, Mr. Powers can't act as a conduit to admit the pre-filed testimony of another witness who is not a witness in this case. The testimony is hearsay, and it is not competent and substantial evidence. *Cf.* Case No. ER-2010-0036 (Ameren Missouri's 2010 general rate case), where two parties asked the Commission to take official notice of pre-filed testimony from a different Ameren Missouri case of a witness that was not a witness in the case at bar. There, Judge Woodruff properly ruled that the pre-filed testimony from a different witness in a different case was inadmissible. *See* Tr., Vol. 28, p. 2159, ll. 2-6 (ER-2010-0036).

⁹ *Id.*, p. 114, l. 14 to p. 114, l. 18.

¹⁰ *Id.*, p. 116, l. 4-7.

¹¹ *Id.*, p. 261, l. 14-19.

Based on the foregoing, the following portions of Mr. Powers' pre-filed surrebuttal testimony pertaining to comments arising from Mr. Woolf's testimony must not be admitted:

- Page 4, line 21 (starting with the phrase "The justifications") through page 5, line 2, and schedule PE-41.

WHEREFORE, ATXI objects to the following portions of Mr. Powers' pre-filed rebuttal and surrebuttal testimonies and schedules:

- Mr. Powers' rebuttal testimony at pages 43-44, and his rebuttal schedule PE-38;
- Mr. Powers' surrebuttal testimony starting with the word "Additional" at line 7, page 11 to line 12, and his surrebuttal schedules PE-43 – 48;
- Mr. Powers' surrebuttal testimony page 11, lines 13 to 19; and
- Page 4, line 21 (starting with the phrase "The justifications") through page 5, line 2, and schedule PE-41.

and requests that the Commission order them stricken and that they not be admitted into the evidentiary record in this case.

Respectfully submitted,

/s/ James B. Lowery

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Objection/Motion to Strike has been e-mailed, this 21st day of January, 2016, to counsel for all parties of record.

/s/ James B. Lowery

**An Attorney for Ameren Transmission
Company of Illinois**