

**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)

Motion to Strike Testimony of Jason Haxton

Ameren Transmission Company of Illinois (“ATXI”) hereby moves the Public Service Commission (“PSC”) to strike the pre-filed testimony of Jason Haxton² or otherwise deny its admission in its entirety or, alternatively, of certain opinions offered therein.

Argument

A. Law Governing the Admission of Mr. Haxton’s Testimony

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). Perhaps the most fundamental of rule of evidence to apply to the admission of testimony is the requirement that the witness have personal knowledge:

As a rule, the testimony of a witness must be based upon personal knowledge. If the testimony of a witness, read as a whole, conclusively demonstrates that whatever he may have said with respect to the issue

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.

² The *Rebuttal Testimony of Jaxon Haxton* was filed with the Commission as EFIS Item No. 56.

under investigation was a mere guess on his part ..., his testimony on the issue cannot be regarded as having any probative value.”

State v. Howell, 143 S.W.3d 747, 750 (Mo. W.D. App. 2004).

And where that 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” knowledge is offered, Mo. Rev. Stat. § 490.065.1 requires that the witness be qualified by “knowledge, skill, 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, section 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 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. Haxton’s Testimony Should be Excluded Because it Fails to Meet Fundamental Evidentiary Requirements

Mr. Haxton’s testimony, directed at the following purported issues in this proceeding: “Public Interest, Project Impact on Local Communities, Family Farm Lands,”³ deals primarily with what he believes the impacts of the transmission line on the “community, in particular, the Amish and Mennonite religious communities.”⁴ Lacking relevant education and specialized training,⁵ having conducted no professional research in this area, and not making any claim that he is Amish or Mennonite himself or that he is an expert in the religious practices of either group, Mr. Haxton offers no particular expertise on this topic other than the following:

I have lived in Greentop, Missouri, in Schuyler County since early 1986. In 1990, I ran for the position of Greentop Mayor and was elected. After my term as Mayor, I continued to be consulted by the Greentop Council and active in our region. I work closely with the Amish and Mennonite religious communities that have settled in Schuyler County and Adair County. Due to my living in and professional involvement in this area, I have knowledge and experiences with the issues that affect the communities that live here.

³ *Rebuttal Testimony of Jason Haxton* at 1 [EFIS Item No. 56].

⁴ *Id.* at 2:13-16.

⁵ Mr. Haxton has a B.A. in Advertising, an M.A. in Guidance and Counseling, and an honorary Doctorate in “international programing and exhibits in health history.” *Haxton Rebuttal* at 2:8-12.

Haxton Rebuttal at 2:2-7. Simply put, Mr. Haxton has lived in the area for several years, knows Amish and Mennonite people⁶, and has regular contact with them.⁷ If this is all it takes to qualify someone to be an expert on the impacts of the transmission line on the Amish and Mennonite communities, practically anyone residing near these communities would be qualified to speak on the impacts of the transmission line on these communities. Mr. Haxton does not qualify as an expert on any of the issues for which he is designated to speak. Further, Mr. Haxton has demonstrated no qualifications to demonstrate his expertise on the religious practices of Amish or Mennonite families or that he even has personal knowledge of those types of practices common in the area. Simply put, he has no expertise that will assist the trier of fact.

Relying only on hearsay, Mr. Haxton's testimony almost entirely functions as a conduit of the reported feelings and beliefs of those in the Amish and Mennonite communities and not as expert opinion testimony:

- “I learned from the Amish Elders and Bishops that when an Amish Community grows too large a grouping will pool their money and look for a region with good cheap farmland.” *Haxton Rebuttal* at 3:5-6.
- “They have asked that I speak on their behalf and that I can best represent them as an advocate.... From communications they have shared, they have a strong belief that the Project will cause stray voltage that will cause adverse health impacts and harm their simple farming lifestyle. *Haxton Rebuttal* at 5:17-21.
- “Further, several Amish community members that settled here left their previous Indiana homes because of a 430,000 volt transmission line. They are personally aware of the devastating impact that the Mark Twain

⁶ Mr. Haxton, in fact, has been “friends with Amish Bishops” and the pastor of the Mennonite community for some time. *Haxton Rebuttal* at 3:17-19.

⁷ *Id.* at 4:1-2.

Transmission Project will have on their investment in the land and on the Amish community itself.” *Haxton Rebuttal* at 6:1-4.

- **“Q. Has the Amish community shared with you what they will do if the Project comes through their community? A.** Yes. Some members of the Amish community have stated that if the Project is allowed to cross their land they will feel the need to relocate. This is a community that is cautious of modernization. This Project will cut their community property through the middle.” *Haxton Rebuttal* at 6:5-9.
- **“Q. With permission to speak on the Amish and Mennonite communities’ behalf, what are you asking the Commission to do? A.** On behalf of these communities, I am asking the Commission to be sensitive to the cultural realities of these groups. Should the Commission allow ATXI to build the Mark Twain Zachary State Line Route down the middle of the Amish community, it would severely burden the religious practice of the Amish and Shekinah Mennonite communities in non-trivial and substantial ways. Perhaps it will even drive them off their land, which in the case of these communities, is their church.” *Haxton Rebuttal* at 6:10-17.

In none of these instances—indeed, at no place in his direct testimony—does Mr. Haxton offer any qualified expert opinion; instead, Mr. Haxton admits that he is only serving as a conduit for the unidentified “members” of the Amish and Mennonite communities. As it is offered for the truth of the matter asserted, it is hearsay testimony for which no exception to the hearsay rule authorizes its admissibility. In fact, such testimony is akin to the excluded affidavits in *McFarlin v. KCPL&L Greater Mo. Operations Co.* and the excluded letters from various witnesses who were not present to testify at hearing *In the Matter of the Application of Keith Mallory*, both cases cited above. If the rule prohibiting hearsay evidence means anything, it must mean that Mr. Haxton cannot offer testimony that simply relays the thoughts and beliefs of unnamed

persons with whom he has conversed.⁸ Such evidence is not “otherwise reasonably reliable” as required by section 490.065.3. Even if Mr. Haxton had a particular expertise in Amish and Mennonite affairs and the impact of transmission lines on those affairs, where he consults and merely summarizes the contents of hearsay sources without applying that expertise, he is merely a “hearsay witness” whose testimony in its entirety—specifically including *Schedule JH-01* and *Schedule JH-02*—is inadmissible under *Graves* and *Bybee*, cited above. Because Mr. Haxton is not qualified as an expert in any area relevant to this proceeding and because he is merely a hearsay witness, his testimony in its entirety is inadmissible in this proceeding.

Alternatively, the following distinct portions of Mr. Haxton’s testimony are inadmissible for the following reasons:

Page/Line	Testimony	Objection
3:5-9	I learned from the Amish Elders and Bishops that when an Amish Community grows too large a grouping will pool their money and look for a region with cheap farmland. Typically they will consider 3-4 different areas not letting their land preference intentions be known until the final contract is signed to prevent land prices from increasing before the purchase.	Hearsay Irrelevant Lack of Foundation.
3:19-23 <i>Schedule JH-01</i> <i>Schedule JH-02</i>	The combined total population for these two groups is 459 people covering a stretch of land approximately 13.5 miles in length along Highway 63—areas of the proposed Ameren Zachary State Line. Please see my Schedules JH-01 and JH-02 for information on these religious communities that I have gathered directly from the population within the last two months, beginning August 26, 2015.	Hearsay Lack of Foundation

⁸ Here, Mr. Haxton doesn’t even parrot the opinions of other experts—testimony prohibited under the *Brufat* and *Tractor & Supply Co.* cases; instead, he purports to relay opinions of unnamed members of the Amish and Mennonite communities—testimony that is even further outside the boundaries of admissible evidence.

5:7-12	<p>Q. Please explain how the Amish conduct church and community meetings.</p> <p>A. The Amish hold their bi-weekly church meetings within their homes—so virtually every Amish home is a church and used 2-3 times in a year for church services and community meetings. After church the youth (unmarried) hold activities, called singing into the night. Running a 340,000 volt power line through the many Amish farmsteads is akin to taking the power line through dozens of churches.</p>	Lack of Foundation Hearsay
5:13-6:4	<p>Q. Will the Amish and Mennonites personally speak out on the Mark Twain Transmission Project?</p> <p>A. No, not on their own. As pacifists, the Amish and Mennonite communities have shared with me and the local media that they will not act out or speak against the Mark Twain Transmission Project and will pray on it. They have asked that I speak on their behalf and that I can best represent them as an advocate. Because of their beliefs, they feel they can do nothing to stop this action in their communities. From communications they have shared, they have a strong belief that the Project will cause stray voltage that will cause adverse health impacts and harm their simple farming lifestyle. Their lifestyle is inseparable from their religious practice. Everything about the use of electricity and this Project runs directly counter to the principle of environmental justice as it would burden their religious practice, which is their way of life. Further, several Amish community members that settled here left their previous Indiana homes because of a 430,000 volt transmission line. They are personally aware of the devastating impact that the Mark Twain Transmission Project will have on their investment in the land and on the Amish community itself.</p>	Hearsay Lack of Foundation
6:5-9	<p>Q. Has the Amish community shared with you what they will do if the Project comes through their community?</p> <p>A. Yes. Some members of the Amish</p>	Hearsay Lack of Foundation

	community have stated if the Project is allowed to cross their land they will feel the need to relocate. This is a community that is cautious of modernization. This Project will cut their community property through the middle.	
6:10-17	<p>Q. With permission to speak on the Amish and Mennonite communities' behalf, what are you asking the Commission to do?</p> <p>A. On behalf of these communities, I am asking the Commission to be sensitive to the cultural realities of these groups. Should the Commission allow ATXI to build the Mark Twain Zachary State Line Route down the middle of the Amish community, it would severely burden the religious practice of the Amish and Shekinah Mennonite communities in non-trivial and substantial ways. Perhaps it will even drive them off their land, which in the case of these communities, is their church.</p>	Hearsay Lack of Foundation Speculation

Relief Sought

For the foregoing reasons, the Commission should strike or refuse to admit the *Direct Testimony of Jason Haxton* in its entirety or, alternatively, strike or refuse to admit those inadmissible portions set out above, including *Schedule JH-01* and *Schedule JH-02*.

Respectfully submitted,

/s/ Michael R. Tripp

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the public version of the foregoing *Motion to Strike the Testimony of Jason Haxton* has been e-mailed, this 20th day of January, 2016, to counsel for all parties of record.

/s/ Michael R. Tripp
**An Attorney for Ameren Transmission
Company of Illinois**