BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area	**)** **)** **)** **)** **)**	**Case No. ER-2007-0002**

OPPOSITION OF UNION ELECTRIC COMPANY D/B/A AMERENUE
TO STAFF MOTION TO STRIKE TESTIMONY OF ROBERT C. DOWNS

Union Electric Company d/b/a AmerenUE ("AmerenUE") respectfully submits this Opposition to the Motion of the Staff of the Missouri Public Service Commission to strike the testimony of Prof. Robert C. Downs of the University of Missouri-Kansas City School of Law and requests that the Motion be denied.

PRELIMINARY STATEMENT

The testimony of Prof. Downs concerns one key element of an adjustment proposed by the Staff as a result of the expiration of a long-term purchase power contract (the Power Supply Agreement or "PSA") between AmerenUE and EEInc. EEInc. has been given authority by the Federal Energy Regulatory Commission ("FERC") to sell its power at a market-based rate, and has declined to continue to sell power to AmerenUE at the cost-based rate used in the now-expired PSA. Staff claims that it was imprudent for AmerenUE not to secure a continuation of the cost-based arrangement with EEInc., and has proposed that AmerenUE's revenue requirement be reduced by reducing AmerenUE's purchase power expense as if the contract with EEInc. was still in existence.

A necessary element in Staff's argument for this adjustment is that AmerenUE had the legal power or right to compel EEInc. to sell its power to AmerenUE at a below-market rate. AmerenUE contends that, due to the separate corporate existence of EEInc. and the well-

established fiduciary duties of EEInc.'s directors to act in the best interest of EEInc., it did not have such a right or power. The dispute triggered by the Staff's proposed adjustment thus focuses on a specific, technical legal question concerning corporate governance.

The testimony of the Staff witnesses in support of this adjustment necessarily and explicitly puts this legal question at issue; their adjustment depends on a specific answer to this question. Having opened the door to this legal issue, and having offered opinions on it through witnesses not qualified to do so, the Staff now wishes to deprive the Commission of the competing testimony of Prof. Downs, the only witness who *is* competent to address the issue. No principle of law or fairness justifies such a perverse result. Moreover, both the rules governing Commission proceedings and judicial proceedings do not support the rigid, blanket exclusion of legal testimony claimed by the Staff's Motion. Rather, the narrow, but important, legal issue at the foundation of the proposed EEInc. adjustment is precisely the kind of issue where the testimony of an expert with "specialized knowledge," like Prof. Downs, is well-recognized to be appropriate.[1] In the end, if legal opinion testimony from Prof. Downs is found to be inappropriate, and his testimony is stricken, all the legal opinions offered by the Staff (and any other witness) on the EEInc. issue are equally inappropriate and should be stricken as well.

ARGUMENT

1. Because the Staff has opened the door to testimony concerning the legal rights and powers of AmerenUE regarding the actions of EEInc., it would be improper and unfair to strike the testimony of Prof. Downs.

According to the Staff, the EEInc. issue is "fundamentally" a "prudence question."[2] Staff concedes that it is *not* imprudent for a utility not to do something it does not have the legal right

[1] *See* MO. REV. STAT. § 490.065 (2000).
[2] Exh. 237, p.11, l. 11-15 (Schallenberg Feb. 5 Surrebuttal).

or power to do.[3] "So the bottom line [on the EEInc. adjustment] is, the key issue that separates [the Staff and AmerenUE] is that Ameren's view is that it did not have the legal right to command EEInc. to continue the PSA and [the Staff] believe[s] it does."[4] Thus, though Staff may say the EEInc. issue is fundamentally a "prudence issue," the fact is that it is fundamentally a legal issue, and Staff's position depends on Staff's legal argument that AmerenUE can and should compel EEInc. to sell power to AmerenUE at below-market rates.

Consistent with this view, Staff has offered its opinion that AmerenUE had a legal right to continue the PSA.[5] In the Staff's opinion, AmerenUE could have, and should have, exercised this legal right by directing the EEInc. directors who are affiliated with Ameren Corporation or one of its subsidiaries[6] to vote to sell EEInc.'s power to AmerenUE at a below-market price.[7] No competing legal duty, in the Staff's view, would prevent the EEInc. directors from obeying this direction. Furthermore, Staff offered its opinion that the EEInc. Bylaws support this claimed legal right of AmerenUE to below-market power from EEInc.[8] One Staff witness went on to offer his opinion, expressly disagreeing with that of FERC, to the effect that the fact that a customer pays rates based on the cost of a particular asset entitles that customer to share in the gain on the subsequent sale of that asset.[9]

Given such testimony, it is fair to say that the Staff "opened up the subject and are not now in a position to complain of the testimony offered by" AmerenUE.[10] Indeed, it is well-

[3] Tr., p. 2705, l. 19-22 (Mr. Meyer); p. 2786, l. 2-4 (Mr. Schallenberg).
[4] *Id.*, p. 2786-87, l. 24-3 (Mr. Schallenberg).
[5] Exh. 103, p. 20-21, l. 22-4 (Schallenberg Deposition).
[6] The Commission must also not lose sight of the fact that Ameren Corporation owns no shares in EEInc., and that AmerenUE owns a minority of the shares (40%).. Staff and others do their best to blur these facts in the hope that the Commission will disregard the law and the separateness of these entities in deciding the EEInc. issue.
[7] *Id.*, p. 26, l. 13-20; Tr., p. 2784-85, l. 2-18 (Mr. Schallenberg).
[8] *See* Exh. 236, p. 21-22, l. 22-24 (Schallenberg Jan. Rebuttal); Tr., p. 2776, l. 4-11; 2782-83, l. 23-14 (Mr. Schallenberg)
[9] Tr., p. 2723-24 , l. 1-16 (Mr. Meyer).
[10] *Corley v. Andrews,* 349 S.W.2d 395, 403 (Mo. Ct. App. 1961).

established that evidence offered by one party can "open the door" to evidence from the adversary contesting the first party's evidence.[11] This rule arises from the recognition that unfair prejudice would result if the first party's evidence was allowed to go unrefuted.[12]

Importantly here, this principle has "opened the door" to the admission of expert legal opinion. In *United States v. Garber,*[13] the central issue, in a prosecution for tax evasion, was whether the sale of body parts resulted in taxable income. Outside the presence of the jury, the court heard testimony from legal experts on the issue, but refused to admit these opinions in evidence that went to the jury on the ground that the question of whether this income was taxable was a question of law for the court, not the jury, to decide.[14] Nevertheless, an Internal Revenue Service agent, testifying as an expert in "accounting and taxation," offered his opinion that this income was taxable.[15] The trial court did not allow a defense expert to offer responsive testimony showing that, due to the vagueness of the law on what was a cutting-edge issue, this conclusion of taxability was so debatable as to preclude any willful intent by the defendant to violate the tax laws.[16] The Fifth Circuit reversed, holding that "the trial court's evidentiary rulings excluding defendant's proffered expert testimony … prejudicially deprived the defendant of a valid theory of her defense."[17]

The posture of the EEInc. issue for purposes of the Staff's Motion strikingly reflects many of the circumstances of *Garber*. The prosecution witness there offered a legal opinion that opened the door for a competing expert opinion even though he was not testifying as a legal expert. So too here, Mr. Schallenberg, the main Staff witness on the EEInc. adjustment,

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[11] *See, e.g., Nelson v. Waxman*, 9 S.W.3d 601, 605 (Mo. 2000); MCCORMICK ON EVIDENCE, § 57 (2d ed. 1972).
[12] *See, e.g., Westcott v. Crinklow*, 68 F.3d 1073, 1077-78 (8th Cir. 1995); *United States v. Baird*, 29 F.3d 647, 653-54 (D.C.Cir. 1994).
[13] 607 F.2d 92 (5th Cir. 1979).
[14] *Id.* at 95.
[15] *Id.*
[16] *Id.* at 96.
[17] *Id.* at 97.

acknowledges that he is not competent to offer legal opinions "as an attorney,"[18] but still has answered legal questions throughout his career.[19] He claims to offer his opinion on "prudence," not on the law,[20] and, very much like the prosecution witness in *Garber,* claims to do so only as an "accountant."[21] Here, like *Garber,* regardless of how the witness might describe his expertise, the substance of Mr. Schallenberg's opinion was an interpretation of the law:

> Q. Well, you're testifying as to the legal right of AmerenUE to require EEInc. to sell its power at below fair market rates. Correct?
>
> A. I'm not talking about – I'm not doing this as an attorney. I'm doing this as a CPA.
>
> Q. I know. Regardless of what you're doing it as, though, in your testimony you're saying that there is such a legal right on the part of Ameren. Correct?
>
> A. There is a right of Ameren to have kept that capacity and energy on a cost basis, that's correct.
>
> Q. And that is a legal right. Correct?
>
> A. Yes, I believe it's legal.[22]

Another similarity to *Garber* concerns the theme woven through the Staff's EEInc. testimony that AmerenUE in some sinisterly deliberate way did not even investigate whether EEInc. would sell its power at a below-market price after the PSA expired.[23] While the evidence before the Commission contradicts this claim, for purposes of this Motion, this implication of "willful" imprudence by AmerenUE echoes the element of willfulness required for tax evasion in *Garber.* Here, as in *Garber,* the opinion of Prof. Downs that AmerenUE legally could not have

[18] Exh. 103, p. 7, l. 21-24 (Schallenberg Deposition).
[19] *Id.* at p. 7-8, l. 25-15.
[20] Exh. 237, p. 11-12, l. 12-6 (Schallenberg Feb. Surrebuttal).
[21] Exh. 103, p. 22, l. 5-7 (Schallenberg Deposition).
[22] *Id.* at p. 22, l. 8-19.
[23] *See, e.g.,* Tr., p. 2762, l. 18-20 (Mr. Schallenberg).

done anything to compel the directors of EEInc. to sell power below market serves in part to rebut this claim of bad intentions by AmerenUE.

In sum, by proposing this adjustment, and in their testimony supporting it, the Staff has opened the door to opinion evidence concerning AmerenUE's legal powers vis-à-vis EEInc., and Prof. Downs'testimony should be admitted.[24]

2. There is no basis to strike the testimony of Prof. Downs under the rules of evidence.

Missouri law provides that:

> (1) In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. (2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[25]

The Missouri Supreme Court has recently held that this statute "guide[s] the admission of expert testimony" in Missouri administrative proceedings.[26] On its face, the specialized knowledge offered by Prof. Downs on a technical, often complicated, and (based on the Staff's blithe claims about what AmerenUE could do regarding EEInc.) counter-intuitive matter such as the fiduciary duty of corporate directors squarely fits within this rule.

To be sure, courts still manifest caution with respect to admitting legal opinion testimony as a general matter, but that caution arises from the specific dynamics of jury trials that do not apply in the context of Commission proceedings, as the cases cited by the Staff illustrate. Those

[24] Paralleling the principle of "opening the door," is the doctrine of curative admissibility. Under this doctrine, if one party introduces inadmissible evidence, "the opposing party may introduce otherwise inadmissible evidence of its own to rebut or explain inferences raised by the first party's evidence." *State v. Hemby*, 63 S.W.3d 265, 269 (Mo.Ct.App. 2001) (quoting *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. 1999)). Thus, even if the Staff's testimony was inadmissible and Prof. Downs' testimony is likewise considered inadmissible, this Motion should be denied.

[25] MO. REV. STAT. § 490.065 (2000).

[26] *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003).

dynamics relied upon in those cases involve the special legal knowledge of the judge, the duty of the judge to instruct the jury on the law, and the ability of the jury to apply the law to the evidence, which are not implicated here.[27]

Here, the Commission's deliberations can be affirmatively aided by the testimony of Prof. Downs; the Commission has no role of instructing anyone else on the law; and the Commission itself is the final decision-maker in this case. Thus the testimony of Prof. Downs simply does not raise any of the concerns that animated the courts in the cases cited by the Staff. Indeed, the fact pointed out by the Staff, that Prof. Downs does not claim to be a regulatory expert, Motion at 9-10, cuts against its Motion, as he has testified concerning only one element of the Staff's EEInc. adjustment, and does not purport to instruct the Commission on the broader regulatory matters before it.[28]

Moreover, even in the context of court proceedings, reflecting the flexible approach set out in the statute quoted above, legal opinion testimony is often admitted. In fact, in one of the cases relied upon by the Staff, such legal opinion evidence -- testimony by a securities lawyer about the procedures and practices involved in making filings with the SEC -- was allowed.[29] Similarly, in *George Weis Co., Inc. v. Dwyer*, an attorney/expert witness was permitted to testify

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[27] *See Wulfing v. Kansas City Southern Indus., Inc.*, 842 S.W.2d 133, 153 (Mo.Ct.App. 1992)(noting the "special legal knowledge of the judge" and "the duty of the court to instruct on the law"); *Specht v. Jensen,* 853 F.2d 805, 808 (10th Cir. 1988)(finding that the legal conclusions offered by a witness "allowed the expert to supplant both the court's duty to set forth the law and the jury's ability to apply this law to the evidence"); *Good Shepherd Manor Foundation, Inc. v. City of Momence,* 323 F.3d 557, 564 (7th Cir. 2003)(affirming the exclusion of "expert testimony as to legal conclusions that will determine the outcome of the case"). The remaining case cited by the Staff, *United States v. Vreeken,* 803 F.2d 1085 (10th Cir. 1986) disallowed the proffered expert testimony only because that testimony did not even pass the basic threshold for the admission of opinion testimony, that is, it was irrelevant and the legal issue was simple, not requiring specialized knowledge.

[28] The Staff also seems to imply that Prof. Downs' lack of personal familiarity with the facts is a disability. *See* Motion at 10. That, of course, is not correct. "Usually, an expert witness' opinion testimony is based upon facts that the expert did not personally observe and of which the expert did not have personal knowledge." *Cadco, Inc. v. Fleetwood Enterprises, Inc.*, No. ED87066, 2007 Mo.App. LEXIS 458, *11 (Mo. Ct. App. March 20, 2007).

[29] *Wulfing,* 842 S.W.2d at 153.

as to whether a particular bond could legally be enforced in Missouri.[30] And in *Baldridge v. Lacks*,[31] the court held that it was proper for a licensed attorney to give expert testimony in a legal malpractice action against the attorney who negotiated a marital property settlement as to the applicable standard of care in dissolution cases, the size of the marital estate at the time the client's marriage was dissolved, how marital property is determined and distributed, whether the defendant attorney met the applicable standard of care, and how much the client would have received from the marital estate if the dissolution action had proceeded to trial. The court expressly overruled an objection to the witness's opinion regarding conclusions of law.[32]

Thus even under the Missouri statutory rule governing expert opinion testimony in court, the courts do not apply a rigid and sweeping rule against legal opinion testimony. That body of case law cannot justify striking the testimony of Prof. Downs from these proceedings.[33]

3. Prof. Downs' testimony assists the Commission in fulfilling its statutory responsbilities.

In this ratemaking, the Commission's responsibility is to weigh all disputed issues brought before it and "determine and prescribe just and reasonable rates."[34] It thus has a justice-making role as well as a fact-finding role by statute. Not all of the Commissioners are trained in

[30] 956 S.W.2d 335, 339 (Mo.Ct.App. 1997).
[31] 883 S.W.2d 947 (Mo.Ct.App. 1994).
[32] *Id.* at 955.
[33] Other jurisdictions have allowed opinion testimony by both attorneys and accountants on trust and fiduciary duty issues. *See, e.g., Jacob v. Davis*, 738 A.3d 904 (Md. Ct. App. 1999) (testimony by expert in trust administration that trustees committed serious breach of fiduciary duty regarding estate tax matters); *Mikesell v. Ferrigan*, 1999 WL 33441251 (Mich. Ct. App. 1999) (attorney who was expert in estate planning and estate administration allowed to testify on those issues with dispute about qualifications affecting the weight of his testimony and not its admissibility); *Succession of Hirt*, 612 So.2d 1054 (La. Ct. App. 1993) (allowing testimony by attorneys qualified as experts in successions and estate work proffered by both sides in trust case, as well as testimony by accountant on estate tax liability); and *In re Trust Estate of Kelsey*, 1992 WL 1071382 (Pa. Com. Pl. 1992) (allowing testimony by expert in finance and investments to proffer opinion testimony on propriety to trustee's investments of trust property). In one closely analogous case in Texas, in a court case rather than an administrative proceeding, *Rio Grande Valley Gas Co. v. City of Edinburg*, 59 S.W.3d 199 (Tex. App. 2000), an attorney was allowed to give expert testimony which consisted primarily of interpretation of various corporate documents from a corporate parent and its subsidiaries.
[34] MO.REV.STAT. §§ 393.140 (5), 393.150.2 (2000).

legal matters, and even those who are do not necessarily have expertise in the particular corporate governance issues addressed by Prof. Downs. Testimony on the issue of EEInc. has been offered by multiple parties, but the legal principles of fiduciary duties are central to resolution of this issue, and indeed it cannot be resolved without an understanding of fiduciary duty principles. Only Prof. Downs brings the requisite expertise to inform the Commission's deliberations on these matters. Staff's Motion invites the Commission to adopt a posture at war with its fundamental mission. According to the Staff, the Commission must deny itself the benefit of Prof. Downs' expertise, while admitting the opinions of individuals clearly without such expertise. This makes no sense, and only handicaps the Commission in determining just and reasonable rates for AmerenUE.

4. There is no basis to strike the testimony of Prof. Downs under the statutes and regulations governing the proceedings of this Commission.

Another flaw in Staff's Motion is that it ignores the context in which the testimony of Prof. Downs has been admitted. While the basic rules of evidence certainly apply to Commission proceedings, they do not in all respects apply with the same rigor that would be present in a court of law, particularly in the case of a jury trial, and are applied with greater flexibility in Commission proceedings than the Staff's Motion acknowledges. This is both a function of the particular statutes that govern Commission proceedings, and because a Commission proceeding is closely analogous to a bench trial. The only rules governing the receipt of evidence at hearings before the Public Service Commission are contained in §§ 386.410 and 536.070 RSMo (2000) and in 4 CSR 240-2.130.

Section 386.410 RSMo, part of the Public Service Commission statute, states: "[I]n all investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence." The same section authorizes the Commission to adopt rules of

procedure. This more liberal approach to receipt of evidence by the Commission, as compared to court litigation, has been the rule for many decades.[35]

Section 536.070 RSMo, entitled "Evidence—witnesses—objections—judicial notice—affidavits as evidence—transcript," which is part of the Administrative Procedure statute, provides twelve paragraphs of rules regarding receipt of evidence by administrative agencies in contested cases. These rules deal with matters such as regulation of cross-examination, recording of hearings, offering of agency records, taking official notice of agency records, elimination of the "best evidence rule," admissibility of compilations, surveys, and tables, and use of affidavits in place of live testimony. Again, these rules are more liberal regarding receipt of evidence than the technical rules of evidence applicable in court proceedings.

The Public Service Commission's own rules of procedure relevant to receipt of evidence by the Commission are found in 4 CSR 240-2.130. They begin by stating "In any hearing, these rules supplement section 536.070 RSMo." Most of these rules are technical and procedural in nature, on subjects like procedures for pre-filing testimony, legibility, marking of exhibits, etc., and the only limitations to the receipt of testimony found in them are that the evidence offered should be relevant and material and not privileged.

Clearly, the testimony of Prof. Downs is relevant, material, and not privileged. In this context, and given the complexity of the legal issue at the heart of the EEInc. issue, it would be improper to apply a technical bar to the admission of expert testimony on legal issues (which as the cases cited above is often not a bar in any event) in this proceeding in light of the greater flexibility accorded Commission proceedings, including as provided for in section 386.410.

[35] *See State ex rel. Potashnick Truck Service, Inc. v. Public Service Commission*, 129 S.W.2d 69, 74 (Mo.Ct.App. 1939) ("We must not lose sight of the fact that in a proceeding before an administrative board it is not intended that the technical rules of evidence shall be applied with the same force and vigor as in an action brought in a court of law.").

Accordingly, there is no basis to strike his hearing testimony and his prefiled testimonies should be admitted in these proceedings.

CONCLUSION

For the foregoing reasons, the Staff's Motion to strike the testimony of Prof. Downs should be denied. Moreover, Staff's objections to Prof. Downs prefiled testimonies, Exhibits 44, 45, and 46, should be overruled, and those testimonies should be admitted into evidence and made a part of the record of this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition of Union Electric Company d/b/a AmerenUE to Staff Motion to Strike Testimony of Robert C. Downs was served via e-mail, to the following parties on the 13th day of April, 2007.

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