

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

In the Matter of Union Electric Company d/b/a)
Ameren Missouri’s Filing to Implement Regulatory)
Changes in Furtherance of Energy Efficiency as)
Allowed by MEEIA.)
Case No. EO-2012-0142

**PUBLIC COUNSEL’S RESPONSE TO AMEREN MISSOURI’S MOTION IN LIMINE
OR TO STRIKE TESTIMONY**

COMES NOW the Office of the Public Counsel (“Public Counsel”) and respectfully responds to Union Electric Company d/b/a Ameren Missouri’s (“Ameren Missouri” or “Company”) motion in limine or to strike testimony:

1. On December 30, 2014, Ameren Missouri filed its motion in limine or to strike testimony.¹ In its motion, the Company requests that certain portions of the pre-filed testimony of the Office of the Public Counsel’s expert witness Dr. Geoff Marke be excluded as inadmissible hearsay. Public Counsel requests that the Commission deny the Company’s request on the basis that the portions of testimony are not hearsay in that they are not offered to prove the truth of the matter asserted therein.

2. The references and testimony that Ameren Missouri seeks to exclude are statements from learned treatises, pamphlets, periodicals and other authoritative materials relied on by Dr. Marke in forming the opinions expressed in his direct, rebuttal, and surrebuttal testimony.²

3. As the Company correctly states in its motion, an expert witness “...may testify concerning the ‘ultimate issue’ in the case so long as the facts relied upon or data upon which the

¹ Doc. No. 250.

² Notably, the Company does not contest the reliability of the authoritative materials, likely because its own witness used and cited many of the same materials or same sources in his own testimony.

expert opinion is based are ‘reasonably’ reliable.”³ In Missouri, a witness may testify as an expert when, by reason of education, experience, or training, the witness possesses superior knowledge to that of the average juror on the subject matter of the testimony.⁴ Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.⁵

4. Here, the testimony challenged consists exclusively of substantiating citations and associated hyperlinks offered for ease of reference, as well as Dr. Marke’s bibliography of consulted works.⁶ These citations serve the purpose of proving the work undertaken by Dr. Marke to form the basis for his opinions. The challenged bits of testimony are “the facts or data ... upon which an expert bases an opinion or inference...” provided to show that the opinions Dr. Marke offered are “...of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject...” as allowed by statute.⁷

5. In the “concluding remark” section of the Company’s motion, counsel for Ameren Missouri offers that “...Dr. Marke has not actually undertaken any of the studies or reports upon which he relies to prove up or quantify the so-called ‘rebound effect’ or to establish any of the other points he purports to make throughout the three rounds of his prepared testimony.”⁸ Contrary to the implication of the Company’s counsel that he is required to do so, Dr. Marke is not required to have conducted studies in order to form his expert opinions.⁹ The expert need

³ Doc. No. 250 at 2.

⁴ Mo. Rev. Stat. § 490.065.1 (2000 & Supp. 2013).

⁵ *Id.*

⁶ Many of the footnotes the Company puts in question merely refer back to the testimony of its own witness, or refer to works that the Company’s own witness uses for the same purpose in his testimony.

⁷ Mo. Rev. Stat. § 490.065.3.

⁸ Doc. No. 250 at 6.

⁹ The Missouri Court of Appeals has explained that Mo. Rev. Stat. § 490.065 does not require experts personally to conduct tests in order to qualify as experts in the case. *See Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97, 111 (Mo. App. W.D. 2006) (citing *State ex rel. K.R. v. Brashear*, 841 S.W.2d 754, 758 (Mo. App E.D. 1992)).

only rely on facts "of a type reasonably relied upon by experts in the field."¹⁰ That is precisely what Dr. Marke did.

6. In explaining Mo. Rev. Stat. § 490.065, the Western District of the Missouri Court of Appeals has held that "... it recognizes the generally accepted principle that an expert necessarily acquires his knowledge and expertise from many sources, some of which are inadmissible hearsay. Merely because an expert relied on information and opinions of others does not automatically disqualify his testimony. As long as such sources serve only as a background for his opinion and are not offered as independent substantive evidence . . . he should not be precluded from testifying."¹¹

7. Public Counsel's expert, Dr. Marke, has pre-filed testimony in this case containing his expert opinions and recommendations to the Commission. In developing his opinions, Dr. Marke relied on a variety of authoritative source materials. Within the testimony, Dr. Marke includes citations and references to the sources he relied on in making his ultimate recommendations, not as proof of the underlying fact, but in order to substantiate the work undertaken by him to form his opinions.

8. The Commission is entitled see the basis on which Dr. Marke makes his ultimate recommendation, as are the other parties. In fact, pertinent to expert testimony, § 490.065.3, "requires the trial judge to look beyond the expert's testimony that his or her reliance on certain facts and data are reasonable due to the general standard of the expert's field."¹² The trial judge must then ensure that the facts and data are otherwise reasonably reliable and "it is only in those cases where the source upon which the expert relies for opinion is so slight as to be

¹⁰ Mo. Rev. Stat. § 490.065.3.

¹¹ *Peterson v. National Carriers*, 972 S.W.2d 349, 354 (Mo. Ct. W.D. 1998) (citing *State v. Delmar Gardens of Chesterfield*, 872 S.W.2d 178, 182 (Mo. App. E.D 1994)).

¹² *Goddard v. State*, 144 S.W.3d 848, 854 (Mo. App. S.D. 2004).

fundamentally unsupported, that the finder of fact may not receive the opinion.”¹³ Dr. Marke need not provide only his recommendation. In fact, to do so would deprive the Commission and other parties of the opportunity to verify and test Dr. Marke’s work.

9. That many of the source materials cited by Dr. Marke are also recognized as authoritative or generally accepted within the energy efficiency profession is not disputed by the other experts in this case. Ameren Missouri’s witness Mr. Richard Voytas testified, in his December 16, 2014, deposition, that he had relied on several of the same sources in testimony in this case or others.

Q. Have you relied on any of the work of ACEEE in this case?

A. In my testimony I think I’ve referred to ACEEE either on my own or in response to other testimonies.

....

Q. Have you relied on the, any work of the National Action Plan For Energy Efficiency in any other case?

A. For cases that were -- for prior IRP cases, the 2011 IRP case, and the, the MEEIA Cycle 1 case. I can’t think of specifics, but I believe I probably referred to the National Action Plan in both of those dockets.

Further, the witness of the Staff of the Missouri Public Service Commission (“Staff”) Mr. John Rogers, stated within his December 12, 2014, deposition that he had, in this or other cases, relied on some of the same sources as relied on by Dr. Marke. For other sources, he stated that they were generally accepted within the energy efficiency profession.

Q. To your knowledge, is the work of ACEEE generally accepted within the profession of energy efficiency?

A. Generally accepted? Yes.

....

¹³ *Id.*

Q. Have you relied on any work of ACEEE in this case?

A. I relied on ACEEE in my surrebuttal testimony in this case, which was for the MEEIA application, the original application. So it was the surrebuttal testimony in 2012. Without checking, I may have referenced some other definitions. I don't recall in the change –

Q. In the recent filings --

A. -- change request case or not.

....

Q. In your opinion, is the National Action Plan for Energy Efficiency an authoritative organization within the energy efficiency community?

A. It's generally accepted.

....

Q. And what is RAP?

A. Regulatory Assistance Project.

Q. Is the Regulatory Assistance Project an organization?

A. Yes.

Q. And is that one that's generally viewed as authoritative within the energy efficiency community?

A. Yes.

A copy of the relevant portions of Mr. Voytas' and Mr. Rogers' deposition transcripts including these exchanges are attached as **Exhibit 1** (Mr. Voytas) and **Exhibit 2** (Mr. Rogers).

10. These statements by the Company and Staff experts show that the materials relied on by Dr. Marke in forming his opinions are of the nature reasonably relied on by experts in the field. Contrast that exchange with the inquiry of counsel for Ameren Missouri cited by the Company's motion. The Company's counsel attempts to use Dr. Marke's statements regarding

his own testimony as purported proof that the bits of testimony they challenge are inadmissible hearsay.¹⁴

11. First, a careful reading of the answers to the questions actually asked leaves the reader with the impression that the quoted passage is not a model of clarity. However, even if the Company's interpretation nears accuracy, Dr. Marke's characterization of the purpose for which his testimony is offered is not determinative under the rules of evidence. A non-lawyer's lay observation about the permissible use of his or her testimony is not authoritative; counsel will tender evidence for admission and the Commission ultimately will determine its permissible use. Moreover, unlike a jury, this Commission is populated with sophisticated professionals eminently capable of understanding for what purpose a given piece of evidence is admitted. The fact remains that the references and testimony were relied on by Dr. Marke when forming his expert opinions in this case. Whatever strained observations he might be deemed to have made in the quoted passage about how the Commission might view his source material does not change that fact.

12. For the forgoing reasons, the references and testimony of Dr. Marke challenged by Ameren Missouri are properly admissible.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission to DENY Ameren Missouri's motion in limine or to strike testimony.

Respectfully,

¹⁴ Doc. No. 250 at 4-5. Please note that the deposition is yet un-presented to the witness for signature.

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 2nd day of January 2015:

/s/ Tim Opitz

1 A. I don't understand the question.

2 Q. Did you -- have you prepared testimony
3 and filed that in this particular case?

4 A. Yes.

5 Q. And what was it that you filed in
6 particular?

7 MR. TOMC: Objection, relevance. You
8 can answer.

9 THE WITNESS: All right. I filed direct
10 testimony dated July, 2014; I filed subsequent
11 testimony deadline October, 2014. I filed rebuttal
12 testimony dated November 17th, 2014, and I supplied
13 surrebuttal testimony dated December 3rd, 2014.

14 Q (By Mr. Opitz) Are you familiar with the
15 American Council For an Energy Efficient Economy,
16 also known as ACEEE?

17 A. Yes.

18 Q. And in your opinion, is ACEEE an
19 authoritative organization within the energy
20 efficiency community?

21 A. What do you mean by authoritative?

22 Q. That it's an organization that is
23 generally accepted as, generally accepted or relied
24 on by professionals in the energy efficiency
25 industry?

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1 A. Well, it depends. I think ACEEE is
2 recognized as a pro-energy efficiency organization.
3 I think some of their positions have been contested
4 with facts that are relevant, and so I really don't
5 know how to answer your question, I would have to
6 say it depends. I think they are a recognized
7 pro-energy efficiency national organization. I
8 think that's, that's a fact.

9 Q. Have you relied on any of the work of
10 ACEEE in this case?

11 A. In my testimony I think I've referred to
12 ACEEE either on my own or in response to other
13 testimonies.

14 Q. Have you relied on the work of ACEEE in
15 any other case?

16 A. What do you mean relied on?

17 Q. Have you included any references to
18 ACEEE or used them as a source on which to base your
19 conclusions in any other case?

20 A. You know, I'm trying to, to visualize
21 the, the 2012 MEEIA case, and, you know, I, I don't
22 know for a fact, I, I'm sure I referenced ACEEE at
23 least in work papers and that, so I would say I
24 have, I've used them. I've referred to them in
25 other cases.

1 Q. Are you familiar with the National
2 Action Plan For Energy Efficiency?

3 A. Yes.

4 Q. And in your opinion is the National
5 Action Plan For Energy Efficiency an authoritative
6 organization within the energy efficiency community?

7 A. Well, that answer is going to be it
8 depends. National Action Plan For Energy Efficiency
9 was authoritative during their tenure of 2006
10 through 2010. They have since been superceded by
11 the SEE Action Network who have taken that work and
12 built upon it. So is what they wrote in 2006 the
13 most relevant that we have today? I would say no.
14 Were they authoritative in their day? I would say
15 yes.

16 Q. Is -- have you relied on any of the work
17 of the National Action Plan For Energy Efficiency in
18 this case?

19 A. I made references to it.

20 Q. And I guess what was the nature of that
21 reference?

22 A. My recollection is that we were going
23 through the... in this case we were going through
24 the references to market effects that were made in
25 the MEEIA 2012 filing, and one of the references was

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1 by staff witness Michael Stahlman, who had
2 referenced the NAPEE guides for energy efficiency
3 where he found market effects, and I used that
4 reference, I believe, in my testimony.

5 Q. Have you relied on the, any work of the
6 National Action Plan For Energy Efficiency in any
7 other case?

8 A. For cases that were -- for prior IRP
9 cases, the 2011 IRP case, and the, the MEEIA Cycle 1
10 case. I can't think of specifics, but I believe I
11 probably referred to the National Action Plan in
12 both of those dockets.

13 Q. Are you familiar with the Uniform
14 Methods Project?

15 A. Yes, I am.

16 Q. And in your opinion is the Uniform
17 Methods Project an authoritative source within the
18 energy efficiency community?

19 A. Well, it depends. The Uniform Methods
20 Project is relatively new, and the Uniform Methods
21 Project is, is usually different protocols and very
22 specific things are assigned to one consultant firm,
23 and they've got interesting points of view, but I
24 don't know if they're completely vetted. So are
25 they authoritative? I think so. Are they

1 Q (By Mr. Opitz) Mr. Rogers, are you
2 familiar with the American Council for an Energy
3 Efficient Economy --

4 A Yes.

5 Q -- also known as ACEEE?

6 A Yes, I am.

7 Q In your opinion, is the ACEEE an
8 authoritative organization within the energy
9 efficient community?

10 A Authoritative. They have a large staff.
11 They're a non-profit organization with a large
12 staff that's dedicated to promoting energy
13 efficiency economy. And I have great respect for
14 many of their members for what they do.

15 Q To your knowledge, is the work of ACEEE
16 generally accepted within the profession of energy
17 efficiency?

18 A Generally accepted? Yes.

19 Q Have you relied on any work of ACEEE in
20 this case?

21 A I relied on ACEEE in my surrebuttal
22 testimony in this case, which was for the MEEIA
23 application, the original application. So it was
24 the surrebuttal testimony in 2012. Without
25 checking, I may have referenced some other

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1 definitions. I don't recall in the change --

2 Q In the recent filings --

3 A -- change request case or not.

4 Q Have you relied on the work of ACEEE in
5 other cases?

6 A I don't believe so. I -- I did -- go back
7 a little bit. The Commission Staff received
8 support from ACEEE as well as from the Regulatory
9 Assistance Project during the rule-making, the
10 Commission rule-making for the MEEIA rules that
11 were -- the Commission promulgated.

12 Q And what -- I guess what kind of support
13 did you receive?

14 A Technical support.

15 Q Technical support?

16 A In particular through the participation of
17 Dr. Dan York -- Dan York during the rule-making
18 process.

19 Q And who is Dr. Dan York?

20 A He is a member of ACEEE who participates
21 in a lot of their research and analysis of utility
22 energy efficiency programs throughout the country.

23 You'll see Dan York's name -- very common
24 to see his name on a lot of white papers and
25 reports that ACEEE publishes related to energy

1 efficiency programs.

2 Q Are the reports that Dr. Dan York produces
3 viewed as authoritative within the energy
4 efficiency community?

5 A They're -- they're valued in the
6 community. I'm not -- I'm not sure what you mean
7 by authoritative have.

8 Q Are they generally accepted within the
9 community?

10 A Generally accepted, yes.

11 Q Are you familiar with the National Action
12 Plan for Energy Efficiency, also known as NAPEE,
13 N-A-P-E-E?

14 A Yes.

15 Q In your opinion, is the National Action
16 Plan for Energy Efficiency an authoritative
17 organization within the energy efficiency
18 community?

19 A It's generally accepted.

20 Q Have you relied on any work of the
21 National Action Plan for Energy Efficiency in this
22 case?

23 A I don't recall specifically. I will say
24 that during the rule-making process for the MEEIA
25 rules that the National -- National Action Plan for

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1 Energy Efficiency was one of the primary sources of
2 information to guide the development of our MEEIA
3 program.

4 Q What information did you receive from the
5 National Action Plan for Energy Efficiency during
6 that time?

7 A Well, for the rule-making?

8 Q Yes.

9 A Okay. We used -- in drafting the rules
10 that were proposed to the Commission, we used -- I
11 don't know verbatim. But we used some of the --
12 the definitions for -- that we used in the -- in
13 the MEEIA rules. Comes to mind some of the cost
14 effectiveness tests.

15 Q Any cost effective necessary test in
16 particular that you got the language from NAPEE?

17 A I don't recall. I mean, there was
18 drafting and redrafting of language through the
19 workshop process for the rule-making.

20 Q Did they have a representative in person
21 there, or were -- were they just reviewing --

22 A NAPEE -- NAPEE was not present.

23 Q -- documents?

24 A NAPEE was not a participant in the
25 rule-making. NAPEE is not an organization.

1 Q How would you characterize NAPEE, then?

2 A NAPEE was a collaborative effort by a
3 broad variety of participants in the energy
4 efficiency field, members from the public
5 utilities, from Public Service Commissions, from
6 some environmental groups, I believe, from -- from
7 organizations like ACEEE and RAP.

8 Q And what is RAP?

9 A Regulatory Assistance Project.

10 Q Is the Regulatory Assistance Project an
11 organization?

12 A Yes.

13 Q And is that one that's generally viewed as
14 authoritative within the energy efficiency
15 community?

16 A Yes.

17 Q Have you used anything from the RAP in any
18 testimony you filed in this case?

19 A I don't recall.

20 Q Are you familiar with the Uniform Methods
21 Project?

22 A Very vaguely.

23 Q What is it?

24 A I -- I can't tell you. I'm -- I'm aware
25 of the Uniform Methods Project, but I don't have

The Board of Directors has the honor to acknowledge the support and cooperation of the stockholders in the successful completion of the year's work.

The financial statement for the year ending December 31, 1954, is attached hereto for the information of the stockholders.

Very truly yours,

W. H. [Name]

The Board of Directors

Secretary

The Board of Directors has the honor to acknowledge the support and cooperation of the stockholders in the successful completion of the year's work.

The financial statement for the year ending December 31, 1954, is attached hereto for the information of the stockholders.

Very truly yours,