

**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) Case No. EO-2012-0142
Efficiency as Allowed by MEEIA.)

MOTION IN LIMINE OR TO STRIKE TESTIMONY

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren” or the “Company”), by and through the undersigned counsel, and moves this Commission for an order excluding or striking portions of the prepared Direct, Rebuttal, and Surrebuttal Testimony of Dr. Geoffrey Marke. In support thereof, Ameren Missouri states as follows:

Introduction

1. On October 22, 2014, the Office of the Public Counsel, (“OPC”) caused to be filed the prepared Direct Testimony of Geoffrey Marke. Thereafter, on November 17, 2014, and December 3, 2014, respectively, OPC filed the prepared Rebuttal and Surrebuttal Testimony of Dr. Marke. In those filings, Dr. Marke addresses numerous topics. Ameren contends that substantial portions of the testimony of Dr. Marke, if introduced at the time of the hearing in this case, will constitute impermissible hearsay testimony and, consequently, that it is incompetent and not admissible under applicable evidentiary standards governing hearings held by the Commission.

Applicable Legal/Evidentiary Standards

2. Other than as permitted by its evidence rule (4 CSR 240-2.130), the Commission’s proceedings are governed by the rules of evidence set forth in the Missouri Administrative Procedure and Review Act (the “MAPRA”). *See*, §536.070 RSMo., Additionally, expert testimony must comply with §490.065, RSMo., which requires, generally,

that a witness must be qualified as an expert and may testify concerning the “ultimate issue” in the case so long as the facts relied upon or data upon which the expert opinion is based are “reasonably reliable”. The Commission has looked to this statutory standard in its hearings. *See, State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.2d 376 (Mo. App. W.D. 2005).

3. As is pertinent to this motion, the baseline consideration is that hearsay evidence (i.e., out-of-court statements to prove the truth of the matter asserted) does not qualify as “competent and substantial evidence upon the whole record” as that term is used in §536.140.2(3) RSMo. *State ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949). As such, hearsay statements are inadmissible when a proper objection is made and preserved. *State v. Shurn*, 866 S.W.2d 447, 457-58 (Mo. banc 1993); *Concord Publishing House v. Director of Revenue*, 916 S.W. 186, 195 (Mo. banc 1996).

4. An exception to this general rule is that a properly qualified expert witness may rely on hearsay in the formation of opinion testimony so long as such sources serve only as background for the opinion and are not offered as substantive evidence. *Peterson v. National Carriers*, 972 S.W.2d 349, 354 (Mo. App. W.D. 1998).¹ The Commission previously has addressed this topic in its Case No. EC-99-553.² In a Report and Order dated July 13, 2000, the Commission made the following findings with regard to §490.065, RSMo:

[A]n expert may rely on hearsay evidence to support an opinion, so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. *State v. Woodworth*, 941 S.W. 679, 698 (Mo. App. W.D. 1997). However, it is

¹ For purposes of this motion it will be assumed, but not admitted, that Dr. Marke is an expert on the subject matter about which he states he will testify.

² *GST Steel v. Kansas City Power and Light Company*.

also true that an expert's reliance upon inadmissible evidence does not thereby somehow transform that evidence into competent and substantive evidence. *Peterson v. National Carries, Inc.*, 972 S.W.2d 349, 354 (Mo. App. W.D. 1998); *State ex rel. Missouri Highway & Transportation Commission v. Delmar Gardens of Chesterfield*, 872 S.W.2d 178, 182 (Mo. App. E.D. 1994); and *see, State ex rel. Missouri Highway & Transportation Commission v. Sturmfels Farm L.P.*, 795 S.W.2d 581, 589-90 (Mo. App. E.D. 1994). Hearsay evidence is not competent and substantial evidence such as can support a finding, conclusion or decision by this Commission. *State ex rel. DeWeese v. Morris*, 359 Mo. 1994, 200-201, 221 S.W.2d 206, 209 (1949).

An expert's opinion testimony is not the proper vehicle by which to introduce into the record as independent, substantive evidence the evidence upon which the expert relied in reaching that opinion. *See, Covington v. Division of Family Services*, 609 S.W.2d 103 (Mo. App. W.D. 1980); *Garrard v. Department of Public Health and Welfare*, 375 S.W.2d 582 (Mo. App. 1964).³

The Commission cannot receive hearsay testimony under the pretense of giving it the weight it is due. Hearsay testimony is incompetent. It is entitled to no weight.

5. The applicable rule of evidence in the MAPRA gives further force to the foregoing principles inasmuch as it states the "results . . . of studies, or of audits . . . or surveys . . ." are admissible **only if** made under the supervision of the witness who is qualified to undertake them. Also, Commission evidence rule 4 CSR 240-2.130(11) requires all exhibits be "tendered" at the time of hearing. The Commission's rule does not permit exhibits and other evidence to be incorporated by general reference.

The Direct Testimony of Dr. Marke Contains Inadmissible Hearsay Testimony

³ The Commission's Report and Order was reversed and remanded for further findings, not because the legal standard was wrong, but because it was wrongly applied to the facts of the case. *See, State ex rel. GS Technologies v. Public Service Commission*, 116 S.W.3d 680, 690-691 (Mo. App. W.D. 2003). Upon remand, the Commission did not reverse or nullify these holdings regarding the use of hearsay by expert witnesses. *See, Report and Order on Remand*, December 2, 2004.

6. Dr. Marke's Direct Testimony contains numerous incidents of lengthy quotations out of papers and studies. The quotations are offered as proof of a proposition (e.g., that there is a quantifiable phenomenon that he refers to as "the rebound effect"). Additionally, Dr. Marke has offered a lengthy bibliography in his Attachment GM-1, which he refers to as "Background Readings". Attachment GM-1 should be excluded or stricken as incompetent and inadmissible hearsay testimony.

7. There is no question that the source bibliography (Attachment GM-1) is being offered by Dr. Marke as independent substantive testimony for the Commission to read and to use in making its findings in this case. We know this because Dr. Marke testified that this is his objective in his December 19, 2014, deposition taken in anticipation of the hearing in this case.

At that time he stated as follows:

Q. Dr. Marke, page 13 of your direct testimony, at line 14, you state, In further support, I have also included Attachment GM-1, which is a bibliography of 31 papers either produced by reputable institutions or included in peer reviewed academic journals that discuss the importance of accounting for the rebound effect; is that correct?

A. Yes.

Q. Now, is it your intent, Dr. Marke, that the articles and other information that you included in GM-1 are to be evidence in this case that the Commission can consult and rely on in reaching its decision?

A. Those articles were entered into to substantiate that the rebound effect was a real phenomenon.

Q. But, again, what do you intend -- can the Commission read any or all of these articles and --

A. Absolutely.

Q. -- can they rely on the information they get from those articles as evidence in this case?

A. If the Commission was to go ahead and -- I would hope that the Commission looks at each article and forms a valid opinion based off of the collective whole.

A copy of the relevant portion of Dr. Marke's deposition transcript including this exchange is affixed hereto as Exhibit 1.

8. Additionally, the text of Dr. Marke's Direct Testimony is festooned with footnotes which are nothing more than hyperlinks to outside, third-party work product. His purpose for including this material is made clear in footnote number 9 on page 6 which he starts with this telling invitation:

"Time constrained readers can watch the abstract video from research. . . at [hyperlink]."

Again, these materials are being offered by Dr. Marke as independent substantive evidence in this case, as was made clear in his deposition testimony.⁴ This, too, is an impermissible use of such sources under the legal standards governing opinion testimony by experts in Commission cases.

9. It is notable that both Attachment GM-1 and many footnotes are not part of his testimony. As such, he is attempting to offer statements from the research or work of others to buttress his testimony. The following footnotes in Dr. Marke's Direct Testimony are inadmissible hearsay: Nos. 9, 10, 15 (including subparts A-C), 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26.

**The Rebuttal and Surrebuttal Testimony of Dr. Marke
Contains Inadmissible Hearsay Testimony**

10. Although he addresses various assorted topics in his Rebuttal and Surrebuttal Testimony, Dr. Marke continues a pattern of liberally quoting from the work product of others and including large numbers of hyperlinked footnotes, not to support his own research, but, rather, as substantive evidence in this case. The objectionable footnotes in Dr. Marke's

⁴ See, Exhibit 1.

Rebuttal Testimony are Nos. 8, 9, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 36, 40, 41, 43, 46, 52, and 58⁵.

11. The footnotes in Dr. Marke's Surrebuttal Testimony containing hyperlink references to third-party work product and to which Ameren objects are Nos. 4, 5, 6, 14, 17, 18, 19, 21, 26, 27, 28, 34 and 35.

Concluding Remark

12. The bottom line is 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. To the contrary, he has merely aggregated the studies and surveys of others and offers them for the truth of their content. By his own admission, this hearsay is offered as substantive evidence by footnote or by bibliography references and not merely as support for Dr. Marke's own research, work product or opinions. A compendium of others' research may be appropriate form in a college term paper, but it is not competent evidence under the applicable rules of evidence governing the Commission's proceedings. As such, the materials to which Dr. Marke refers are hearsay that cannot be received into evidence.

WHEREFORE, for good cause shown, Ameren Missouri requests that the Commission rule that Dr. Marke's Attachment GM-1 and the footnote references specifically identified in paragraph 9, 10 and 11 above are inadmissible hearsay testimony that they be excluded or stricken for the reasons aforesaid.

⁵ A reference to another YouTube clip.

Respectfully submitted,

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**ATTORNEYS FOR UNION ELECTRIC COMPANY
d/b/a AMEREN MISSOURI**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via electronic mail on this 30th day of December, 2014, to all parties of record in Case No. EO-2012-0142.

/s/ L. Russell Mitten
L. Russell Mitten

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1 Q -- other than for illustrative purposes?

2 A Correct.

3 Q And illustrative of what? The intent of
4 the parties who entered into the Stipulation or
5 something else?

6 A As a working model.

7 Q A working model. But they wouldn't have
8 illustrated anything to you about the intent of the
9 parties who entered into the Stipulation?

10 A Well, I think the intent was made explicit
11 by Statute and Rules.

12 Q Dr. Marke, page 13 of your direct
13 testimony, at line 14, you state, In further
14 support, I have also included Attachment GM-1,
15 which is a bibliography of 31 papers either
16 produced by reputable institutions or included in
17 peer reviewed academic journals that discuss the
18 importance of accounting for the rebound effect; is
19 that correct?

20 A Yes.

21 Q Now, is it your intent, Dr. Marke, that
22 the articles and other information that you
23 included in GM-1 are to be evidence in this case
24 that the Commission can consult and rely on in
25 reaching its decision?

1 A Those articles were entered into to
2 substantiate that the rebound effect was a real
3 phenomenon.

4 Q But, again, what do you intend -- can the
5 Commission read any or all of these articles and --

6 A Absolutely.

7 Q -- can they rely on the information they
8 get from those articles as evidence in this case?

9 A If the Commission was to go ahead and -- I
10 would hope that the Commission looks at each
11 article and forms a valid opinion based off of the
12 collective whole.

13 Q So it was your intention that these be
14 treated as evidence in the case?

15 A I did not want to go ahead and stack the
16 deck, so to speak, and just present information
17 that was one-sided.

18 Q On page 6 of your direct testimony, in
19 Footnote No. 9, you cite a web address and invite
20 time-constrained readers to watch a video that can
21 be found there.

22 A Uh-huh.

23 Q Or, alternatively, to read an academic
24 paper that is the subject of that video; is that
25 correct?

1 A Yes, I do.

2 Q Now, is it your intention that the video
3 and the paper be considered evidence in this case?

4 A Yes.

5 Q Throughout your direct, rebuttal and
6 surrebuttal, you cite in text for footnotes
7 Internet links, articles, papers and books that are
8 not directly used in your testimony. Do you intend
9 that that information be considered evidence in
10 this case?

11 MR. OPITZ: Mr. Mitten, is there a
12 specific number --

13 A I know I did a literature review. But as
14 -- it would -- if you can direct me to something I
15 cited that I didn't quote or substantiate --

16 Q (By Mr. Mitten) Well, let's look at page
17 9 of your direct testimony.

18 A Okay.

19 Q The articles that are cited in Footnote 15
20 and identified as A, B and C, are those to be
21 evidence in the case?

22 A Those are supporting documents to support
23 the table that I provided of Azezedo.

24 Q So that's the only purpose for which
25 they're cited?

1 A Full transparency. Yes.

2 Q If there are any footnotes in your direct,
3 rebuttal or surrebuttal testimonies that cite
4 information that is not specifically included in
5 your testimony, and I cited a couple of them during
6 this deposition, was it your intention that those
7 materials cited in the footnotes be treated by the
8 Commission as evidence in this case?

9 A Outside of the citations just described to
10 me on page 9 of my direct testimony, I can make the
11 overall general statement that if I cited it in my
12 testimony that there was a reason for it.

13 Q Well -- but I'm assuming that there was a
14 reason for the information that you put in the
15 attachment to your direct testimony --

16 A Yes.

17 Q -- and the footnote that referenced the
18 video?

19 A Right.

20 Q Again, if there are other citations
21 elsewhere in your testimony that are not
22 specifically discussed in the body of your
23 testimony, is it your intention that those articles
24 or books or Internet cites or whatever they may be
25 that aren't specifically discussed in your

1 testimony be considered evidence by the Commission
2 in this case?

3 A I believe I've answered this question.

4 Q Well, I'm not sure I'm clear as to the
5 answer. So if you could answer it again, so I am
6 -- I'd appreciate it.

7 A It would help if you had a specific link
8 or cite that you're referring to in this situation.
9 Otherwise, anything that I referenced it was with
10 the intent of the overall support of the
11 conclusions that I drew. I'm hesitant to say any
12 more than that.

13 Q Okay. I'm just about finished, and I
14 would like to ask you some questions about some of
15 the DR responses. Let me hand you several
16 documents.

17 A Are these all the documents?

18 Q They're the ones I'm going to ask
19 questions about. Yes. The first one is the
20 response to Ameren Missouri Data Request 1.3.

21 You have included a number of -- quite a
22 bit of information on this response. All the DR
23 asked for is for you to identify each case in which
24 you functioned as the Lead Policy Analyst while you
25 were employed by either the Missouri Department of