

**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.<sup>1</sup> )

**MOTION TO STRIKE SURREBUTTAL TESTIMONY**  
**OF ROBERT D. JACKSON**

Ameren Transmission Company of Illinois (“ATXI”), pursuant to Mo. R. Civ. Proc. 55.27(e) and 4 CSR 240-2.080(4), moves to strike and exclude the surrebuttal testimony of Robert D. Jackson in its entirety or, alternatively, that portion of it that is identified as addressing the issue of “Public Interest,” as well as the schedules attached thereto. Mr. Jackson lacks any subject matter knowledge related to the issue and is not an expert in these areas, and his opinions lack foundation or support. To the extent his opinions are simply a reiteration of the positions of Neighbors United or others, they constitute either legal argument that properly belongs in a pleading or a brief, or inadmissible hearsay, or both. Furthermore, Mr. Jackson lacks any foundation or personal knowledge of the multiple affidavits attached as Schedules 1-5<sup>2</sup>; and such schedules in their entirety are inadmissible hearsay. In addition, Mr. Jackson offers opinions as to legal standards that he is unqualified to make. Accordingly, ATXI moves the Public Service Commission (“PSC”) to strike the surrebuttal testimony and deny its admission into the evidentiary record.

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<sup>1</sup> 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.

<sup>2</sup> As for Schedule 6, the listing of public hearing testimonies are irrelevant to Mr. Jackson’s testimony and are in any event already a part of the record.

## **I. Background**

Robert D. Jackson (“Mr. Jackson”) filed surrebuttal testimony consisting of four (4) pages on November 16, 2015. On the cover page of that testimony, sponsored by Neighbors United Against Ameren’s Power Line (“Neighbors”), the issues addressed in his testimony were identified as “Public Interest, Farming Implications.” Attached to his surrebuttal testimony he attached six schedules. Five of those schedules consist of affidavits purporting to be from farmers and ranchers opposed to the project. The sixth schedule includes selected passages from local public hearings that were held as part of this proceeding. The deposition of Mr. Jackson was taken on January 12, 2016.

## **II. Argument**

### **A. Mr. Jackson is not an Expert on the Tartan Criteria, including on the Public Interest, and is not Qualified to Express Opinions in that Area.**

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). In fact the Commission’s own regulation at 4 C.S.R. 240-2.130(1) adopts particular rules of evidence found at Mo. Rev. Stat. § 536.070.

The standards for admission of expert testimony constitute one of those fundamental rules of evidence in administrative proceedings such that expert testimony must meet the standards for admissibility set out in Mo. Rev. Stat. § 490.065. *McDonagh*, 123 S.W.3d at 154-155. This statute expressly allows opinion testimony only from experts in the relevant area established as such by proper foundation, and requires a showing that facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert's testimony. *McDonagh*, 123 S.W.3d at 156, citing Mo. Rev. Stat.

§ 490.065.3. That foundation must be laid in order for a witness to be qualified as an expert under section 490.065.3

“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 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). “To 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 an expert's testimony is mere conjecture and speculation, it does not constitute substantive, probative evidence on which a jury could find ultimate facts and liability.” *Mueller v. Bauer*, 54 S.W.3d 853 (1953).

In his surrebuttal testimony, Mr. Jackson creates the impression that he is not only aware of the *Tartan* criteria typically used by the Commission to determine whether a CCN application should be approved, but that ATXI has not met that criteria either in its application or through the conditions that Staff witness, Mr. Dan Beck, has included within his rebuttal testimony. The following excerpts from his surrebuttal illustrate his argument:

**Q. What is the purpose of your surrebuttal testimony?**

A. First, let me begin by stating that it remains Neighbors Uniteds' position that this line is unnecessary and not in the public interest. As such, the required Tartan Criteria are not met and the Commission should deny ATXI's application.

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<sup>3</sup> 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). *Labadie*, 2013 Mo. PSC LEXIS 896 at \*6.

\* \* \*

**Q. Does Staff believe that ATXI has met the Tartan criteria?**

A. No, they do not. As stated in Beck's rebuttal testimony at page 5, line 23, through page 6, lines 1-3:

**Q. In Staff's opinion, has ATXI met the Tartan criteria?**

A. No. However, Staff in its Rebuttal Testimony, has addressed the Tartan criteria and explains that with the appropriate conditions, the Application is sufficient to address the criteria.

\* \* \*

**Q. In your expert opinion, are these added conditions sufficient to now make ATXI's Application now meet the Tartan criteria.**

A. No, they are not.

See Jackson Surrebuttal at 1:20-23; 2:6-12, 14-16.

However, at his deposition, Mr. Jackson demonstrated a fundamental lack of knowledge as to whether the *Tartan* criteria *even exist*, much less the specifics of them.:

**Q. Could you describe for me the Tartan criteria and how that's applied by the Public Service Commission of Missouri?**

MS. HERNANDEZ: Objection; calls for a legal conclusion. I'm just noting my objection. It calls for a legal conclusion, but you may answer the question<sup>4</sup>.

A. I'm not sure I know what that is.

BY MR. ROSENCRANTS:

**Q. Okay. What are the Tartan criteria?**

A. I do not know.

**Q. How many Tartan criteria are there?**

A. I have no idea.<sup>5</sup>

January 12, 2016 Depo. of Robert Jackson at 55:14-56:1.

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<sup>4</sup> ATXI would agree with Neighbors United counsel that Mr. Jackson's opinions relative to the *Tartan* criteria are an effort to render a legal conclusion, which he is unqualified to make as he has no legal experience or background to render such opinions, or to adopt the opinions of others. As discussed in Section II C, this attempt supports our additional argument in favor of ATXI's Motion to Strike. The Neighbors' counsel's objection is ironic, in that Mr. Jackson's testimony, as quoted earlier, purports to draw the very legal conclusion that counsel's objection suggests he should never express; Neighbors' counsel is right on this point.

<sup>5</sup> It should also be noted that despite the fact that Mr. Jackson described that the purpose of his surrebuttal testimony was to address the conditions to the Commission's granting ATXI a Certificate of Convenience and Necessity that Staff witness Mr. Beck, included in his rebuttal testimony, Mr. Jackson initially denied at his deposition that he had even reviewed Mr. Beck's rebuttal. See Jackson Surrebuttal at 2:1-5; see January 12, 2016 Depo. of Robert Jackson at 23:21-24:1.

**B. Mr. Jackson's Surrebuttal and the Schedules Attached Thereto Rely Upon Inadmissible Hearsay.**

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.

Mr. Jackson's surrebuttal is replete with hearsay. In addition to his restatement of the legal position of Neighbors United<sup>6</sup> (discussed below), his surrebuttal testimony includes the following hearsay statements because he simply repeats what other experts in the case have said:

The surrebuttal testimony of expert witness Bill Powers will also discuss why the line is unnecessary. \* \* \*

**Q. Does Staff believe that ATXI has met the Tartan criteria?**

A. No, they do not. As stated in Mr. Beck's rebuttal testimony at page 5, line 23, 8 through page 6, lines 1-3:

**Q. In Staff's opinion, has ATXI met the Tartan criteria?**

A. No. However, Staff in its Rebuttal Testimony, has addressed the Tartan criteria and explains that with the appropriate conditions, the Application is sufficient to address the criteria.

\* \* \*

Again, Neighbors United's position is that this project is unnecessary as explained in the testimony of Bill Powers.

See Jackson Surrebuttal at 1:23-2:1; 2:6-12, 16-19, 3:23-4:2.

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, 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 notion 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

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<sup>6</sup> Based upon the response to ATXI DR-2 dated November 9, 2015, it does not appear that Mr. Jackson is a member of Neighbors United.

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).

Similarly, the schedules attached to Mr. Jackson's surrebuttal testimony are inadmissible hearsay. As evidenced by the surrebuttal testimony, Schedules 1-5 are based solely upon conversations between Neighbors United members (a group that Mr. Jackson is not a member of) and "affected landowners":

Approximately 378 parcels will be affected if the Commission approves ATXI's Application. Neighbors United has had the extensive opportunity to speak with the affected landowners to determine exactly how their farming and ranching operations will be impacted. Attached as Schedules 1 through 5 are affidavits from farmers and ranchers across the five counties (Marion, Knox, Shelby, Adair and Schuyler) that ATXI has proposed constructing the transmission line across.

*See Jackson Surrebuttal at 2:21-26 (emphasis added).*

Mr. Jackson's deposition testimony is clear that despite indicating that he reviewed the affidavits, he had performed no diligence into facts set forth therein at the time he filed his surrebuttal.

**Q. Did you talk with any of the individuals who prepared these affidavits prior to attaching them to your surrebuttal testimony?**

A. No. I have not talked to them.

**Q. So you have no independent knowledge of whether the assertions in any one of those affidavits is accurate or not?**

A. That's correct.

Exclusion of these schedules from evidentiary consideration is consistent with Commission precedent, including a situation involving 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)). Other similar examples include 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).

Again, none of the individuals who supplied affidavits (in Schedules 1-5) are parties to this proceeding. ATXI cannot question the authors of the hearsay documents about their content, or provide any context, because they are not witnesses and are not available for cross examination.

Because Mr. Jackson has laid no foundation and demonstrated no personal knowledge in support of his surrebuttal, he is not entitled to rely on hearsay evidence in forming his opinions. He fits into the category (described above) of a witness merely summarizing the contents of hearsay sources without applying that expertise; he is merely a “hearsay witness” whose testimony is inadmissible.

**C. Mr. Jackson’s Surrebuttal Testimony Contains Legal Opinions and Conclusions Beyond His Expertise.**

At his deposition, Mr. Jackson did not purport to have any experience with either the Court system or the Commission.



**Q. Have you ever been involved with the -- with the court system, worked with judges or worked with court personnel?**

A. No.

**Q. Have you ever worked for or on behalf of the Public Service Commission of Missouri?**

A. No.

Nevertheless his surrebuttal contains numerous examples of legal opinions or conclusions, most of which are unqualified presumptions based upon hearsay. Those examples include each of his references to conclusions that the ATXI line is unnecessary and not in the public interest as those terms are applied using the *Tartan* criteria, which were discussed in more detail above. These conclusions, which are unsupported, go to the ultimate issue in the proceeding which Mr. Jackson actually states toward the conclusion of his surrebuttal:

It remains *our* position that the Commission should not grant ATXI's application because ATXI has not met their burden to meet all of the Tartan criteria.

*See* Jackson Surrebuttal at 4:5-6.

This isn't testimony. Instead, it's a statement of Neighbors' position on a legal question: Has ATXI met its burden? Neighbors can make such statements in its pleadings and briefs. Mr. Jackson can't "testify" about them.

In addition, Mr. Jackson attempts to adopt a legal opinion which was previously addressed by the Commission in its Ruling on the Motion to Dismiss filed by Neighbors United:

A. Based on discussions with our counsel, I understand that any infringement by ATXI on our farming and ranching operations is a violation of the recent Constitutional amendment, Article 1, Section 35 of the Missouri Constitution.

*See* Jackson Surrebuttal at 3:16-18.

Such an opinion, whether it defers to Neighbor's counsel, or is made by a witness, isn't testimony; it's legal argument – it has no place in surrebuttal testimony and should be stricken.

### III. Relief Sought

Because his surrebuttal testimony lacks foundation, consists of inadmissible hearsay, is based upon legal conclusions which he is unqualified to make, and invades the province of the Regulatory Law Judge and the Commission, the Commission should strike the surrebuttal testimony of Robert Jackson in its entirety, or in the alternative strike all surrebuttal testimony after page 1 line 19, and prevent Mr. Jackson or any other witness from presenting such testimony or otherwise entering it into evidence at hearing. In addition, because Schedules 1 to 5 (attached to the surrebuttal) are inadmissible hearsay, they should also be excluded in their entirety, and neither Mr. Jackson nor any other witness should be precluded from presenting such testimony or otherwise entering it into evidence at hearing.

Respectfully submitted,

/s/ Jeffrey K. Rosencrants

Jeffrey K. Rosencrants, Mo. Bar #67605

Senior Corporate Counsel

Ameren Services Company

One Ameren Plaza

1901 Chouteau Avenue

P.O. Box 66149 (MC 1310)

St. Louis, MO 63166-6149

(T) (314) 554-3955

(F) (314) 554-4014

[Rosencrants@ameren.com](mailto:Rosencrants@ameren.com)

James B. Lowery, Mo. Bar #40503

Michael R. Tripp, Mo. Bar #41535

SMITH LEWIS, LLP

P.O. Box 918

Columbia, MO 65205-0918

(T) 573-443-3141

(F) 573-442-6686

[lowery@smithlewis.com](mailto:lowery@smithlewis.com)

[tripp@smithlewis.com](mailto:tripp@smithlewis.com)

*Attorneys for Ameren Transmission Company of  
Illinois*

**CERTIFICATE OF SERVICE**

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

*/s/ Jeffrey K. Rosencrants* \_\_\_\_\_  
**An Attorney for Ameren Transmission  
Company of Illinois**