

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

In the Matter of the Application of)
Union Electric Company for Authority)
To Continue the Transfer of)
Functional Control of Its Transmission)
System to the Midwest Independent)
Transmission System Operator, Inc.)

Case No. EO-2011-0128

AMEREN MISSOURI’S RENEWAL OF OBJECTION AND MOTION TO STRIKE

COME NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or the “Company”), by and through counsel, and hereby renews its objection to Exhibit 18 and moves that it be stricken from the evidentiary record in this case. In support of its objection and motion, Ameren Missouri states as follows:

1. During his cross-examination of Company witness Ajay Arora, counsel for OPC offered into evidence Exhibit 18, which consisted entirely of the deposition testimony of OPC witness Ryan Kind. *Tr., Vol. II*, at 106:17-107:25. OPC’s purported reason for offering Exhibit 18 was to “put into context” Mr. Kind’s admissions of a party-opponent. Those admissions had been included by Mr. Arora in his pre-filed supplemental surrebuttal testimony, which had been filed in surrebuttal to Mr. Kind’s supplemental rebuttal testimony filed regarding, among other things, the Non-Unanimous Stipulation and Agreement in this case that was filed on November 17, 2011.¹ *Id.* at 107:21-108:17.

2. Despite counsel for the Company’s timely objection that Exhibit 18 was inadmissible hearsay² and Judge Woodruff’s admission that it “probably is hearsay,” Judge Woodruff

¹ It should be noted that Mr. Kind waited approximately two and one-half months to file “supplemental rebuttal” regarding the Stipulation.

² Hearsay is an out-of-court statement of another offered to prove the truth of the matter asserted in the statement; generally, courts exclude hearsay unless the testimony falls within an exception to the hearsay rule. *Bynote v. Nat’l Super Markets*, 891 S.W.2d 117, 120 (Mo. 1995). No applicable exception applies here.

admitted Exhibit 18 on the ground that the Commission was not “bound by the technical rules of evidence.” *Id.* at 110:6-19. The basis for the admission of Exhibit 18 was incorrect, it was error to admit Exhibit 18, and the Commission cannot rely on Exhibit 18 in its report and order.

3. While Section 386.410.1, RSMo., provides that the Commission is “not be bound by the technical rules of evidence,” hearsay is not a technical rule of evidence, but is instead a fundamental rule of evidence. *See State of Missouri ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949) (in rejecting the reliance on hearsay in an administrative hearing, the court reasoned that “[t]he fact that technical rules of evidence do not control has been considered to permit of leading questions and other informalities but not to abrogate the fundamental rules of evidence.”); *accord Dickinson v. Luekenhoff*, 598 S.W.2d 560, 563 (Mo. App. W.D. 1980) (“It is obvious that most administrative hearings are conducted in an atmosphere much less formal than proceedings before the courts. Such proceedings, however, are bound by basic evidentiary limits”). The hearsay rule is not a mere “informality.” Indeed, it is one of the most basic and fundamental rules of evidence known to the law.

4. The importance of enforcing the rule disallowing the admission of hearsay testimony is that, as Judge Somerville remarked in *State ex rel. Marco Sales, Inc. v. Pub. Serv. Comm’n*, 685 S.W.2d 216, 220 (Mo. App. W.D. 1984), the “[c]ases are legion that hearsay evidence does not rise to the level of ‘competent and substantial evidence’ within the ambit of Mo. Const. Art. V, § 18.”³ Because hearsay evidence is not competent and substantial evidence

³ Section 18, Article V, of the Constitution of Missouri, provides in relevant part:

All final decisions, findings, rules and orders of any administrative * * * body * * * which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

and an objection was interposed as to its admission,⁴ it was error to admit Exhibit 18, and this Commission may not rely upon it in reaching its determination in this cause.

WHEREFORE, the Company hereby renews its objection to Exhibit 18, and moves that it be stricken from the evidentiary record in this case.

Dated: March 9, 2012.

Respectfully submitted,

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The *DeWeese* and *Dickinson* courts both cite the proposition that hearsay evidence does not constitute “competent and substantial evidence” necessary for the finding of fact by a commission. *DeWeese*, 221 S.W.2d at 209; *Dickinson*, 598 S.W.2d at 563.

⁴ Where there is no objection to hearsay evidence and it is properly admitted, however, such evidence may be relied upon. *State ex rel. GS Tech. Operating Co., Inc. v. Pub. Serv. Comm’n*, 116 S.W.3d 680, 690 (Mo. App. W.D. 2003). Here, there was a timely and proper objection.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record to this case, on this 9th day of March, 2012.

/s/James B. Lowery
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