

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

THE CONLON GROUP, INC.,

Complainant,

v.

AMERENUE,

Respondent.

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Case No. EC-2001-443

**RESPONDENT AMERENUE'S RESPONSE TO OBJECTIONS TO
AND MOTION TO STRIKE HEARSAY CONTAINED IN THE
AFFIDAVIT REBUTTAL TESTIMONY FILED BY AMERENUE WITNESSES**

Comes now respondent, AmerenUE, and for its Response to Objections to and Motion to Strike Hearsay Contained in the Affidavit Rebuttal Testimony filed by AmerenUE Witnesses ("Objections") states as follows:

1. In its Objections, complainant sets out six excerpts from AmerenUE's Rebuttal Testimony which it contends constitute inadmissible hearsay. As will be seen, there is no basis for these excerpts to be stricken from AmerenUE's Rebuttal testimony at this time.

2. Hearsay is defined as an out of court statement of another person offered to prove the truth of the matter asserted in the out of court statement. See, e.g., IMR Corporation v. Hemphill, 926 S.W.2d 542, 545 (Mo. App. E.D. 1995). A review of the excerpts set out in the Objections reveals that they do not meet this definition:

- a. The excerpt in paragraph 4(a) is not offered for the truth of the matter asserted but instead to indicate Mr. Lefler's state of mind with respect to his position on complainant's request that its letter of credit be applied to its bills.

- b. The excerpt in paragraph 4(b) does not contain an out of court statement.
- c. The excerpt in paragraph 4(c) does not contain an out of court statement.
- d. The excerpt in paragraph 4(d) does not contain an out of court statement.
- e. The excerpt in paragraph 4(e) does not contain an out of court statement.
- f. Mr. Cooper's testimony is based on statements made in the Direct Testimony of Mark Finney (p. 3, lines 20-22), which complainant has offered into evidence.

3. Moreover, the excerpts in paragraphs 4(b), (c) and (d) relate to statements made by Don Burke, a former AmerenUE employee. Mr. Burke is deceased. (Rebuttal Testimony of Frank P. Lefler, p. 2, lines 13-18) The Direct Testimony of complainant is replete with statements purportedly made by Mr. Burke in connection with the issues raised in complainant's Complaint. To the extent the excerpts set out in paragraphs (4)(b), (c) and (d) constitute hearsay, they are nonetheless admissible as Mr. Burke, as an agent of AmerenUE, was a party to the various transactions and occurrences about which complainant complains. As complainant, an "adverse party," has voluntarily testified at length as to its dealings with Mr. Burke, and about what Mr. Burke purportedly said, AmerenUE's rebuttal testimony as to what Mr. Burke said is admissible. See, e.g., In re Estate of Mueller, 933 S.W.2d 283, 296 (Mo.App. E.D. 1996).

4. Finally, as complainant admits, technical rules of evidence are not controlling in administrative hearings. The excerpts cited by complainant should and can nonetheless be considered by the Commission so long as the decision of the Commission is otherwise based on competent and substantial evidence in the record.

5. As the testimony cited by complainant does not constitute hearsay, there is no merit to complainant's Objections. Moreover, since there is no absolute prohibition to hearsay in these proceedings, complainant's Objections are premature at best.

WHEREFORE, AmerenUE respectfully requests that complainant's Objections be overruled and that the testimony cited by complainant in its Objections be admitted into evidence when and if it is offered into evidence at the hearing of this matter.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent AmerenUE's Response to Objections to and Motion to Strike Hearsay Contained in the Affidavit Rebuttal Testimony Filed by AmerenUE Witnesses was mailed, first class postage pre-paid this 22nd day of April 2002 to Paul H. Gardner, Goller, Gardner & Feather, P.C., 131 E. High Street, Jefferson City, MO 65101, Attorneys for Claimant, Lera Shemwell, Associate General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102 and Office of Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102.

Michael A. Vitale /sh