Ameren Services

One Ameren Plaza
1901 Chouteau Avenue
PO Box 66149
St. Louis, MO 63166-6149
314.621.3222

314.554.2237
314.554.4014 (fax)
JJCOOK@AMEREN.COM

FILED

JUN 2 1999

Missouri Public
Service Commission

June 2, 1999

VIA HAND DELIVERY

Ameren

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
P. O. Box 360
Jefferson City, MO 65102

Re: MPSC Case No. EM-96-149
UE/CIPSCO Merger

Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in the above matter please find an original and fourteen (14) copies of its Motion to Strike the Surrebuttal Testimony of Robert E. Schallenberg, or in the Alternative, to Admit Into the Record the Statement of Kenneth J. Rademan.

This pleading was originally filed in MPSC Case No. EO-96-14, and pursuant to an agreement made at the hearing in that matter on June 1, 1999, the pleading is also being filed in MPSC Case No. EM-96-149.

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Very truly yours,

James J. Cook /sr

James J. Cook
Managing Associate General Counsel

JJC/bb
Enclosure(s)
cc: All Parties of Record

MISSOURI PUBLIC SERVICE COMMISSION
Docket No. EM-96-149
Service List

John B. Coffman
Office of Public Counsel
301 West High Street, Room 250
Jefferson City, Missouri 65101

Maurice Brubaker
Brubaker & Associates, Inc.
1215 Fern Ridge Parkway, Suite 208
Post Office Box 412000
St. Louis, Missouri 63141-2000

Robert C. Johnson
720 Olive Street, 27th Floor
St. Louis, Missouri 63101

Steven Dottheim
Missouri Public Service Commission
301 W. High Street
P.O. Box 360
Jefferson City, MO 65102

Daryl Hylton
Asst. Attorney General
P.O. Box 176
Jefferson City, MO 65102

Paul DeFord
Lathrop & Norquist
2600 Mutual Benefit Life Bldg.
2345 Grand Avenue
Kansas City, MO 64108-2684

William Riggins
Kansas City Power & Light Co.
1201 Walnut St.
Kansas City, MO 64106-2124

Brent Stewart
Stewart & Keevil
1001 Cherry Street, Suite 302
Columbia, Missouri 65201

James C. Swearengen / Paul Boudeau
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, Missouri 65102-0456

Michael Pendergast
Thomas Byrne
Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, Missouri 63101

Gary W. Duffy / Sandra Morgan
Brydon, Swearengen & England, P.C.
P. O. Box 456
Jefferson City, Missouri 65102-0456

Diana Schmidt
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102

James M. Fischer
101 W. McCarty Street
Suite 215
Jefferson City, MO 65101

Robin E. Fulton
Schnapp, Fulton, Fall,
McNamara & Silvey, L.L.C.
135 E. Main Street
P. O. Box 151
Fredericktown, MO 63645-0151

Marilyn Teitelbaum
Schuchat, Cook & Werner
The Shell Building
1221 Locust Street
St. Louis, Missouri 63103

Michael A. Datillo
Business Manager
Local 1455 IBEW
5570 Fyler Avenue
St. Louis, MO 63139

Daniel F. Miller
Business Represenative
Local Union No. 702 IBEW
106 North Monroe Street
West Frankfort, IL 62896

James R. Berger
Assistant Business Manager
Local Union NO. 309 IBEW
2000 Mall Street, Route 157
Collinsville, IL 62234-1897

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) the Transfer of Certain Assets, Real Estate, Leased Property, Easements) and Contractual Agreements to Central Illinois Public Service Company; and (3) in Connection Therewith, Certain Other Related Transactions	Case No. EM-96-149

MOTION TO STRIKE THE SURREBUTTAL TESTIMONY OF ROBERT E. SCHALLENBERG, OR IN THE ALTERNATIVE, TO ADMIT INTO THE RECORD THE STATEMENT OF KENNETH J. RADEMAN

COMES NOW, Union Electric Company ("Union Electric") and hereby moves to strike the Surrebuttal Testimony of Robert E. Schallenberg ("Testimony") and exclude Mr. Schallenberg as a witness, or, in the alternative, to admit into the record the appended Statement of Kenneth J. Rademan. Each of these avenues will serve to remedy the unfairness and prejudice caused by Mr. Schallenberg's testimony, which raises alleged "facts" that are not relevant to any material issue in the current proceedings, which Mr. Schallenberg admits he had no personal knowledge of, and which had not previously been disclosed in any direct testimony filed in this case.

BACKGROUND

Mr. Schallenberg has not filed any direct testimony in this case. The purpose of his Surrebuttal Testimony purportedly was to respond to the testimony of Mr. Donald Brandt and Mr. Warner Baxter that the Staff's proposed adjustments violate the Experimental Alternative Regulation Plan ("EARP"). Testimony at 4(line 20) – 5(line 1). However, the basis for his response to this testimony is his opinion that the Union Electric EARP incorporated the monitoring practices of the Staff under a totally different alternative rate plan, that established in the Southwestern Bell Incentive Regulatory

163

Experiment ("SBIRE") case. See, e.g., id. at 5(line 10) – 9(line 7).

This testimony introduces several new, and quite sweeping, contentions into the case. First, Mr. Schallenberg claims that something he calls the Staff's "SBIRE monitoring practices" were incorporated into the Union Electric EARP even though the text of the EARP does not even hint at such a provision. Indeed, the "SBIRE monitoring practices" to which Mr. Schallenberg refers are not even written in the SBIRE itself, but appear to be simply the Staff's understanding of the scope of its monitoring rights under the SBIRE.

In addition, in making his claimed link between the SBIRE and Union Electric's EARP, Mr. Schallenberg essentially contends that the scope of "monitoring" that was set out in the SBIRE is the same as monitoring under the EARP. In that regard, he understands these "monitoring practices" under the SBIRE to include a sweeping power of the Staff to seek adjustments of the calculation of a company's earnings, adjustments that add to or contradict the explicit provisions for those calculations in the SBIRE. *Under the Union Electric EARP, by contrast, "monitoring" has a more natural* and common sense meaning, to wit, the disclosure of information by Union Electric concerning its operations and calculations of earnings so that the other parties to the EARP can ensure that Union Electric is faithfully complying with its terms. The substantive provisions governing the calculation of earnings are not part of "monitoring" in the EARP, but are set out in the Reconciliation Procedure set out in Attachment C to the EARP. Nothing in the EARP monitoring provisions gives the Staff the power to override or change the terms of the Reconciliation Procedure.

Finally, Mr. Schallenberg makes these claims about some oral understanding that modifies the written terms of the Union Electric EARP even though he did not participate in the negotiations of the EARP and has admitted that he never discussed the subject with any involved person from Union Electric.

The appropriate remedy under the law is to strike Mr. Schallenberg's Surrebuttal Testimony and exclude him as a witness in this case. In the alternative, we propose that the Commission admit into the record the attached Statement of Kenneth J. Rademan. Mr. Rademan was the Staff's Director of the Utility Services Division when both the first and second EARP's were negotiated. Indeed, he was the lead member of the Staff in negotiating those agreements. Mr. Rademan's Statement – offered instead of testimony since he is unavailable to appear at the hearing of this matter -- sets out his understanding of what the Staff negotiated and what the Commission accepted in the Union Electric EARP. Mr. Rademan's perspective in particular has great probative significance – even independent of the need to remedy Mr. Schallenberg's testimony -- since he was the lead Staff negotiator of the EARP and his understanding of what he negotiated is as a result highly relevant and material to the issues in this case.

ARGUMENT

I. THE PORTIONS OF MR. SCHALLENBERG'S TESTIMONY THAT ARE BASED ON HIS PERSONAL KNOWLEDGE DEAL EXCLUSIVELY WITH MATTERS THAT ARE IRRELEVANT AND IMMATERIAL TO THE PRESENT PROCEEDINGS.

If portions of Mr. Schallenberg's testimony are irrelevant, they cannot be allowed into the record of these proceedings. The applicable statute prohibits the inclusion of irrelevant

evidence in the record of an administrative proceeding. Mo. Stat. Ann. § 536.070(8) ("Irrelevant . . . evidence shall be excluded."). Even if no objection is heard, a hearing officer must exclude irrelevant testimony. Eastern Star Missionary Baptist Church v. Director, Missouri State Div. of Family Servs., 632 S.W.2d 503, 505 (Mo. App. 1982).

Evidence is relevant only "if it tends to prove or disprove a fact in issue or corroborates relevant evidence surrounding the main issue." State ex rel. American Tel. & Tel. Co. v. Public Serv. Comm'n, 701 S.W.2d 745, 754 (Mo. App. 1985); accord Kendrick v. Board of Police Comm'rs, 945 S.W.2d 649, 655 (Mo. App. 1997). Mr. Schallenberg's testimony about SBIRE negotiations and monitoring practices has no tendency to prove or disprove a fact in issue here, nor does it even corroborate relevant evidence about an issue in these proceedings. It is irrelevant and must be excluded.[1]

Mr. Schallenberg testifies that he was personally involved in the negotiations that led up to the SBIRE and in monitoring the progress of that plan. See Testimony at page 5(lines 11 to 18). The problem with this portion of Mr. Schallenberg's testimony lies in the simple fact that the Southwestern Bell plan is not at issue in the current proceedings. And neither Mr. Schallenberg nor any other witness has supplied any reason to believe that evidence about the SBIRE negotiations, or about subsequent practices under the SBIRE, bears on any material issue in the present proceedings. In particular there has been no showing that the persons who negotiated the Union Electric EARP on behalf of the company had any knowledge at all about the SBIRE negotiations or about monitoring practices under that plan.

---

[1] The information that Mr. Schallenberg gives about his personal background is presumably based on his personal knowledge, too, see Testimony at 1-4, but these facts are also irrelevant if the Commission allows the remainder of Mr. Schallenberg's testimony to be stricken.

A number of years ago the Missouri Supreme Court faced an analogous set of facts. A railroad, sued for its motorman's negligent failure to avoid colliding with a dog and thereby derailing his motorcar, offered testimony about "the conduct of the dog . . . on prior occasions." Lloyd v. Alton R. Co., 175 S.W.2d 819, 825 (1943). The point was to show that the dog did not ordinarily run in front of railroad motorcars and that the dog therefore gave the motorman no reason to slacken his speed. But, as the Court observed, the motorman "did not know about . . . [the dog's] prior acts of caution." Id. (emphasis added). *The evidence was irrelevant.*

Here, too, knowledge is the missing element. Just as the motorman lacked knowledge of the dog's history of caution, UE's negotiators lacked knowledge of events that purportedly occurred during the negotiation of SBIRE. And they lacked knowledge of the monitoring program that Staff allegedly implemented under SBIRE.

They could not have intended to incorporate the features of SBIRE in EARP. Just as the dog's history was irrelevant in Lloyd, so too, is the history of SBIRE irrelevant to the resolution of any issues concerning EARP. The testimony about SBIRE must therefore be stricken.

II. THE REMAINDER OF MR. SCHALLENBERG'S TESTIMONY CAN ONLY BE BASED ON HEARSAY OR ON CONJECTURE, OPINION, CONCLUSION, AND SURMISE, AND NOT ON PERSONAL KNOWLEDGE.

Mr. Schallenberg freely and repeatedly admits in the course of his Deposition that he lacks personal knowledge of most of the ostensible facts that he asserts in his testimony.[2] Testifying without personal knowledge, Schallenberg could only purport to

[2] Mr. Schallenberg's personal knowledge of the SBIRE negotiations, agreement, and monitoring practices do

know those facts because someone told him about them or because he surmised that they "must" be true. His assertions, in other words, consist either of hearsay or of conjecture, opinion, conclusion, and surmise.

A. To the extent that Mr. Schallenberg relies on what he heard from others, in place of personal knowledge, his testimony is inadmissible hearsay.

The Commission conducts its hearings under informal procedures. See Mo. Stat. Ann. § 386.410. The "technical rules of evidence do not control" in administrative proceedings. State ex rel. Bond v. Simmons, 299 S.W.2d 540, 545 (Mo. App. 1957); accord Speer v. City of Joplin, 839 S.W.2d 359, 360 (Mo. App. 1992). But section 386.410 does not give the Commission "unlimited discretion to conduct its hearings in any possible manner." State ex rel. Fischer v. Public Serv. Comm'n, 645 S.W.2d 39, 42 (Mo. App. 1983). The "fundamental rules of evidence" still apply. State ex rel. De Weese v. Morris, 221 S.W.2d 206, 209 (Mo. 1949); accord Speer, 839 S.W.2d at 360; Bond, 299 S.W.2d at 545.

Among the fundamental rules of evidence is the one against hearsay. See De Weese, 221 S.W.2d at 209; Speer, 839 S.W.2d at 360; Bond, 299 S.W.2d at 545. Upon judicial review, a court can affirm an agency order only if it is supported by "competent and substantial evidence" in the record of the agency's proceedings. Mo. Const. art. V, § 18; see also Speer, 839 S.W.2d at 360. If admitted notwithstanding an objection, hearsay testimony does not qualify as substantial evidence in support of an agency order.

---

not qualify him to testify about the negotiation or terms of the EARP agreement. In analogous circumstances, the Missouri Supreme Court held inadmissible testimony in which a party "did not offer to prove by [a police officer's testimony] that the one accident of which [the officer] had some personal knowledge had previously occurred, but that about four or five accidents had occurred, and [the officer's] knowledge concerning the other accidents was purely hearsay." Paige v. Missouri Pac. R. Co., 323 S.W.2d 753, 756 (1959).

Youngman v. Doerhoff, 890 S.W.2d 330, 337 (Mo. App. 1994); accord Speer, 839 S.W.2d at 360; Downs v. Personnel Advisory Bd., 671 S.W.2d 12, 15 (Mo. App. 1984). Administrative findings based on hearsay can, indeed, result in reversal upon review. See Youngman, 890 S.W.2d at 337; Downs, 671 S.W.2d at 15; De Weese, 221 S.W.2d at 208-09. For that reason, the Commission should not allow hearsay testimony to enter into its deliberations.

1. Mr. Schallenberg's apparent reliance on the assertions of others violates the hearsay rule.

The hearsay rule holds that "a witness may not narrate supposed facts told to him by another, when such evidence is offered to prove the fact thus asserted." State ex rel. State Highway Comm'n v. Kimmell, 435 S.W.2d 354, 357 (Mo. 1968); accord State ex rel. Missouri Highway and Transp. Comm'n v. Buys, 909 S.W.2d 735, 738 (Mo. App. 1995). The rules of evidence consider hearsay statements to be unreliable and thus inadmissible because the original "statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor. . . ." Id.

Mr. Schallenberg admits in his Deposition that he did not participate in the negotiations with Union Electric Company that culminated in EARP or in its extension.[3] He has no personal knowledge. Yet he has testified at length about the EARP negotiations

---

[3] See Deposition at 14(line 22) – 15(line 7):

> Q: I take it ... that you did not participate in the negotiations for either the first or second EARP for Union Electric?
> A: Not directly with UE. ...
> Q: ... So you never spoke with Don Brandt or Warner Baxter about the EARP directly at that time?
> A: I never spoke to Don Brandt. ... I never spoke to [Warner Baxter], but I'm not sure he was there.

(Copies of the deposition pages cited in the motion are appended to this motion.)

and the agreement that resulted from them. To the extent that he bases his allegations on verbal or written reports of others, his testimony "narrate[s] supposed facts told to him by another." Large parts of his testimony are therefore hearsay.[4]

2. None of the exceptions to the hearsay rule justifies the admission of Mr. Schallenberg's hearsay testimony.

"[E]xceptions to the general prohibition against hearsay may apply when circumstances conspire to assure the trustworthiness of the declarant's statement despite the absence of cross-examination, the oath, and the fact finder's ability to observe the declarant's demeanor." IMR Corp. v. Hemphill, 926 S.W.2d 542, 545 (Mo. App. 1996). But most of Mr. Schallenberg's hearsay testimony does not qualify for an exception. To the extent that he gained his purported understanding of EARP in conversations or meetings with his colleagues on the Commission's staff, he bases his testimony on assertions voiced without benefit of cross-examination, without administration of an oath, and outside the Commission's observation. No special circumstances call for an exception to the hearsay rule, and none applies.

There are two exceptions, though, that at least arguably apply to other portions of Mr. Schallenberg's testimony, but the evidence is still inadmissible notwithstanding the possible exceptions. First, some of Mr. Schallenberg's testimony seemingly relies on official documents of the Commission. See Testimony at 7 (line 27) - 8 (line 10); 12 (lines

[4] One particular aspect of Mr. Schallenberg's testimony deserves at least parenthetical comment. He avers that he "was consulted and questioned by Staff directly involved in the EARP's negotiation." Testimony at 5 (lines 19 – 20). This alleged communication is, of course, a verbal act: Its "significance . . . is solely in the fact that it was made, no issue is raised as to the truth of the matter asserted, and the offered statement is not hearsay." Buys, 909 S.W.2d at 738. The fact of the communication suggests that the Staff negotiators took some interest in the history of SBIRE. But the fact is irrelevant because there is no evidence that they communicated their supposed understanding of SBIRE to UE's negotiators or that UE's negotiators agreed to incorporate the features of SBIRE in EARP.

10 - 21). Such documents are, after all, by statute admissible into the record. See Mo. Stat. Ann. § 536.070(5). But the same section of the same statute affirmatively requires that "[r]ecords and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record. . . ." Id.

By requiring the documents themselves to be placed in the record, the statute ratifies "an elementary principle of the law of evidence." Dockery v. Mannisi, 636 S.W.2d 372, 375 (Mo. App. 1982). That principle holds "that the best evidence of which the case in its nature is susceptible and which is within the power of the party to produce, or is capable of being produced, must always be produced in proof of every disputed fact." Id. More specifically, where "the operative terms of substantive written documents" are at issue, the proof should come from the writing itself, not from witness testimony. Chevalier v. Director of Revenue, 928 S.W.2d 388, 392 (Mo. App. 1996). Applying the rule, this Commission excluded affidavit testimony about the contents of an Interstate Commerce Commission order, a decision that the court approved because "such order of the [ICC] would be the proper method of proving [its contents]; not some employee's interpretation thereof." State ex rel. Missouri Pac. Freight Transp. Co. v. Public Serv. Comm'n, 312 S.W.2d 363, 367 (Mo. App. 1958). The Commission should apply the same principle to exclude these portions of Mr. Schallenberg's testimony.

A second hearsay exception that arguably applies, is that of an "admission[] against a party's interest," meaning "any statement made by a party which is inconsistent with [its] contentions in the case." American Tel. & Tel., 701 S.W.2d at 754-55. In his testimony, Mr. Schallenberg cites a UE proposal in which the company referred to its proposed EARP as

"loosely based in concept on the Southwestern Bell plan." Testimony at 6 (lines 8 –12). But this is not really an admission because the quoted statement is entirely consistent with UE's "contentions in the case." UE does not contend that it never heard of SBIRE, only that the EARP was modeled on the SBIRE's sharing grid. UE has never claimed that the EARP adopted all the specific features of SBIRE, or, in particular, that the EARP adopted its "monitoring procedures". Indeed, there is no contested issue in these proceedings on which the ostensible admission has any bearing at all. The statement is simply irrelevant.

In sum, none of the exceptions to the hearsay rule overcomes the inadmissibility of Mr. Schallenberg's hearsay testimony. The testimony should be stricken from the record.

B. To the extent that Mr. Schallenberg relies on conjecture, opinion, conclusion, and surmise, his testimony is equally inadmissible.

Some of Mr. Schallenberg's assertions do not stem from communications he received from other members of the Commission's staff. They instead represent conjecture, surmise, opinion, and conclusions drawn from personal perceptions and beliefs that his testimony leaves undisclosed. In the law of evidence, such "conclusions may not be substituted for the proof of facts." American Tel. & Tel., 701 S.W.2d at 755.

Opinions of a lay witness are admissible only where "the fact in issue is open to the senses." Beuttenmuller v. Vess Bottling Co., 447 S.W.2d 519, 526 (Mo. 1969) (internal quotes omitted). At the outer perimeter of permissibility, the opinion testimony may not extend "beyond the scope of the personal knowledge and understanding of the declarant." Bowls v. Scarborough, 950 S.W.2d 691, 702 (Mo. App. 1997). When a witness ventures farther into the realm of opinion, his testimony becomes "a mere guess," which lacks "any probative value." Cummings v. Tepsco Tenn. Pipe and Supply Corp., 632 S.W.2d 498, 500

(Mo. App. 1982); see also Downs, 671 S.W.2d at 16 ("the rankest form of speculation, conjecture and surmise"). Moreover, as a matter of contract law, the questions of "[w]hether a contract [has been] made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties." Gateway Exteriors, Inc. v. Suntide Homes, Inc., 882 S.W.2d 275, 279 (Mo. App. 1994); accord L.B. v. State Comm. of Psychologists, 912 S.W.2d 611, 617 (Mo. App. 1995). Even less does it depend on the conjecture, opinion, conclusions, surmise, or supposition of a bystander like Mr. Schallenberg.

Where a witness has neither personal knowledge nor hearsay knowledge of alleged facts, as is true of Mr. Schallenberg in some particulars, his testimony about those supposed facts must be based on "mere speculation, guess and conclusions." Kees v. Canada Dry Ginger Ale, Inc., 199 S.W.2d 76, 78 (Mo. App. 1947). Because he could not possibly have had personal knowledge of the fact, a shopkeeper "should not have been permitted to testify that [certain soda] bottles were not tampered with while in his [self-service] store. . . ." Id. Similarly, because Mr. Schallenberg by his own admission played no role in the negotiation of EARP, he should not be permitted to insert his "mere speculation, guess and conclusions" about the EARP agreement into the record of these proceedings. See, e.g., Deposition at 22(line 25) – 23(line1) ("I don't have personal knowledge of the level and knowledge of UE."); 26(lines 1-2) ("I don't have any knowledge that UE has reviewed any of this material [attached to this Surrebuttal Testimony].").

III. CONCLUSION

At bottom, all of Mr. Schallenberg's testimony comprises irrelevant assertions; or hearsay evidence; or conjecture, opinion, conclusion, and surmise. None of it is admissible. The testimony should therefore be stricken in its entirety. In the alternative, the Statement of Kenneth J. Rademan should be admitted into the record, notwithstanding the fact that he is unavailable to appear at the hearing.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

By James J. Cook /sh

James J. Cook, MBE 22697
Managing Associate General Counsel

Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
P. O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
(314) 554-2237
(314) 554-4014 (fax)

OF COUNSEL:

Robert J. Cynkar
Michael W. Kirk
Craig S. Lerner
Cooper, Carvin & Rosenthal
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
202-220-9600
202-220-9601(fax)

DATED: June 2, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class, U.S. mail, postage prepaid, on this 2nd day of June, 1999, to all parties on the attached service list.

James J. Cook /sh

James J. Cook

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) the Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) in Connection Therewith, Certain Other Related Transactions	)	Case No. EM-96-149

STATEMENT OF KENNETH J. RADEMAN

1. I am submitting this Statement because I was intimately involved in the development and negotiation of the experimental alternative rate plan ("EARP") to which the Missouri Public Service Commission, Union Electric Company ("UE"), the Staff of the Commission, the Office of Public Counsel, and others, are parties. The Stipulation and Agreement (the "Agreement") memorializing the EARP is set out in the Report and Order in Case No. ER-95-411 (July 21, 1995). (The Agreement in this case is nearly identical to the one establishing the second EARP, which is set out in the Report and Order in Case No. EM-96-149 (March 4, 1997).) The Agreement embodied a new, progressive approach to the regulation of rates that marked not only a distinctive break with traditional rate regulation that holds much promise for enhancing the Commission's ability to fulfill its current mission under the law, but also constituted a forward-looking mechanism that could smooth the transition to a competitive electric utility market. Because what is at stake in these proceedings are the important policy initiatives embodied in the Agreement and the integrity of the Commission process, but pressing matters in conflict with the hearing schedule prevent me from personally appearing at

that time, I respectfully submit this Statement for the consideration of the Commission. Consistent with this motivation, and the law, I am not being compensated by any party to this proceeding to submit this Statement.

2. In understanding the terms of the Agreement, and what the Commission hoped to achieve by committing itself to it, it is helpful to remember the circumstances created by traditional rate regulation which the Commission faced prior to 1994. Briefly put, the Staff would initiate a complaint case to deal with overearnings by a utility based on a particular historical test year, and the Commission would then order a rate reduction, notwithstanding the protestation of the involved utility that it would immediately need a rate increase as the result of more current data. The utility would then promptly pursue a rate case seeking a rate increase, which the Commission would have to grant based on the cost of service as it was then calculated on the more current historical test year. When the Staff began overearnings reviews of UE and other utilities in 1994, it did not want to repeat such senseless ratemaking.

3. The Southwestern Bell ("SW Bell") case, to which some have already referred in their testimony, was the first case to adopt an alternative regulation plan in this state with a sharing grid by which a company agreed to share its earnings with its customers when those earnings resulted in a return on equity above certain levels. It is that sharing grid mechanism, and not other terms of the SW Bell arrangement, that was the model in the minds of the parties negotiating the UE EARP. No understandings that were not written in the Agreement were part of the UE EARP.

4. The sharing grid mechanism by itself illustrates that the UE EARPs did not involve any concept of inappropriate or excessive earnings that is so familiar in the

context of traditional rate regulation. Instead of reducing rates to reduce excessive earnings 18 months or more after the fact as would be the case under the traditional approach, the EARP establishes an automatic, mechanical procedure – not requiring elaborate regulatory proceedings, but based on an up-front policy judgment of appropriate sharing levels – by which earnings above those levels are shared with customers. In this way the problem of excessive earnings is dealt with much more quickly, and without the regulatory transaction costs, that would be the case under the traditional approach, all to the great benefit of consumers and, I believe, the Commission's ability to fulfill its mission of ensuring safe and reliable utility services, reasonable rates for consumers, and a reasonable return on investment for utilities and their investors.

5. The sharing grid concept also has a forward-looking aspect, anticipating a transition to a competitive electric power market. As mentioned above, the sharing grid was first used as an alternative to traditional ratemaking for a telephone company, a context, unlike that of electric utilities, in which rate setting is not strictly based on the cost of service, but on the value of service. Traditional ratemaking in large measure relies on a determination of the costs of service in evaluating whether a company is overearning, and so should be ordered to reduce rates. The sharing grid avoids the complex calculations needed to identify the often shifting costs of services. Rather, earnings, evaluated in terms of the return on equity, above a certain level are simply shared with customers. If the electric power market is deregulated to inaugurate competition, the pricing of an electric utility's power will be more on a value of service basis, with that value and price being set by the market. As a result, the sharing grid

can be seen as a kind of transitional step toward the fully competitive, unregulated market.

6. The sharing grid approach has other benefits. Because it does not involve a regulatory authority in essence taking away earnings from a company after the fact, but sets out a sharing plan based on predetermined levels of earnings, it encourages the productivity of a utility's employees. For one simple example, the sharing grid avoids the situation of an employee working hard to increase the earnings of the company, only to see those earnings taken away later because a regulatory authority judged those earnings to be "excessive." Under the grid, the company and its employees know it will share in its increased productivity. Moreover, this increase in productivity can take many forms. For example, a mid-level manager might work extra hours to do a better job, which in turn contributes to the safety and reliability of the electric power provided by the utility. This incentive is one reason why the sharing grid approach is often called sliding scale incentive regulation. And again, such an incentive to encourage productivity is exactly one of the strengths of the market mechanism that traditional rate regulation has not been able to replicate.

7. To achieve these benefits of a sharing grid, there are certain elements of any alternative rate plan that are absolutely crucial. I agree with the following testimony presented by Mark L. Oligschlaeger of the Staff in a 1997 proceeding before the Commission, Case No. ER-97-394:

> Sliding-scale incentive regulation should be thought of as a surrogate for traditional regulation, in that it can lead to rate changes or the issuance of rate credits to customers without the time and personnel needs of a full-blown traditional rate case, and ideally without the same degree of adversarial relationship between the parties. This requires two things: up-front agreement on how earnings should be calculated for

purposes of determinings whether customer sharing is called for, and a high degree of cooperation on discovery so that the Staff and other parties can make their recommendations to the Commission within the truncated time period called for in the past sliding-scale plans used in Missouri....

8. In the UE EARP, this up-front agreement on the calculation of earnings is made unmistakable by the text of the Agreement. Section 3.f.i provides: "The return on common equity for determination of 'sharing' will be calculated by using the methodology set out in Attachment C, Reconciliation Procedure, appended hereto." So as part of the operation of this Plan, after months of detailed negotiations, the parties agreed on a specific "methodology" to calculate earnings, and further set out the actual terms of that methodology – that is, the operation of the agreed-upon methodology – in the Reconciliation Procedure.

9. The Reconciliation Procedure, which is Attachment C to the Agreement, describes the agreed-upon methodology in terms of the calculation and production of an earnings report. The Procedure begins with the Missouri "operating revenues, expenses and average rate base" of UE as of the end of an annual sharing period, which is June 30. These figures, of course, come from UE's books and records. Thus the parties agreed to start the earnings calculation in the most obvious and practical way, with figures that were produced by the accounting methodologies used by UE in its books and records. Of course those accounting methodologies embodied in UE's books and records were not dreamed up by UE for the purposes of the EARP, but are long-established accounting practices that have been shaped not only by the requirements of the accounting profession (set out in the body of generally accepted accounting principles, or "GAAP"), but also by the requirements of this Commission, by

FERC through the Uniform System of Accounts (which in large measure follows GAAP), and by the SEC.

10. The parties did not stop with those figures from UE's books and records. Sections 2.c through 2.f of the Reconciliation Procedure set out no fewer than 19 specific adjustments to be made to those base figures from UE's books and records in preparing the earnings report. Equally important are the traditional ratemaking adjustments that were deliberately excluded by the parties, such as the normalization of the effects of weather or of expenses for injuries and damages, and the annualization of the payroll expense. In the end, this agreed-on accounting for UE's earnings was designed to be a simple, mechanical process – almost like filling out a simple, one-page tax return – that did not involve the cost-by-cost fly-specking of traditional ratemaking. This simplicity intended by the parties is obviously reflected in several aspects of the Agreement, such as the target date of September 1, 1998 set not only for the final credit of the first EARP, but also for the permanent rate reduction, a date only two months after the close of the third sharing period.

11. No provision of the Agreement authorizes any party to unilaterally change this methodology of calculating earnings, either by modifying the adjustments that are set out in the Procedure or by adding new adjustments to it. The parties intended the methodology they agreed to and memorialized in the Agreement to be the actual, settled methodology by which the earnings calculations were to be made under the EARP.

12. It is my understanding that Staff witnesses have claimed that other provisions of the Agreement allow the Staff to propose adjustments not set out in the

Agreement. In the Reconciliation Procedure itself, Section 2.g allows the parties to petition the Commission "for resolution of disputed issues relating to the operation or implementation of this Plan." Nearly identically, Section 3.f.vii of the Agreement gives the parties the right to bring to the Commission "issues which cannot be resolved by them, and which are related to the operation or implementation of the Plan." Clearly, a dispute over the operation or implementation of the Plan can be brought to the Commission for resolution. But that is far from saying that a party has the right to ask the Commission to add obligations to the Plan or changes its operation and implementation in any other way. If the parties agreed to give each other the power to seek such a change in their Agreement, why would we have expended the time and resources to set out the terms of an agreement in the first place? As we said above, the operation and implementation of the Plan with respect to the calculation of earnings is precisely set out in the Reconciliation Procedure, and no term of the Agreement says a party can change the steps of the agreed-upon accounting methodology set out in detail there. If, as the Staff now claims, it has the power to seek an additional adjustment not set out in the Reconciliation Procedure, a power nowhere set out in the Agreement, what is to prevent the Staff from a different exercise of the same power, say to propose a change in the levels of the sharing grid?

13. Another provision of the Agreement that has been mischaracterized by the Staff is Section 3.f.viii, which allows the parties to present to the Commission "concerns" they may have over any "category of cost" involved in the earnings calculation that "has not been included previously in any ratemaking proceeding." In understanding this provision, it must be remembered that the parties devoted months to a very detailed

consideration and negotiation of the Reconciliation Procedure. In the context of our work on that Procedure, all the parties had access to financial materials of all kinds concerning UE's operations and cost of service dating back for decades. In short, at the time of the first EARP, we all knew, or could have known, all the categories of costs that were involved in accounting for UE's earnings. The detailed nature of many of the adjustments set out in the Reconciliation Procedure illustrates the care that everyone put into the development of this Procedure. Section 3.f.viii obviously addresses the arrival on the scene of a new category of costs that had not previously affected UE's earnings. By referring to this new category as one that had not previously been "included" in any ratemaking the parties did not mean that the Commission had to have explicitly ruled on or addressed the category. Clearly, the Commission directly addresses only a few of the categories of costs set out in UE's accounting for its cost of services that is included in a ratemaking proceeding. "Included" in a ratemaking here meant presented in the context of a ratemaking so the category of costs was knowable and had been open to challenge previously, whether or not it in fact had been the subject of a dispute. Equally clearly, our use of the notion of a new "category" of costs means that new forms of costs that are really part of an established category were not within the scope of Section 3.f.viii.

14. The fact that the agreed-upon accounting methodology for the earnings calculation was precisely set out in the Agreement, and the Staff does not have the power to propose changes or additional adjustments now, does not in any way suggest that the Staff does not have the full power under Section 3.e of the Agreement to scrutinize all reports and data concerning the earnings calculations, and if necessary

submit data requests to UE or ask to interview relevant UE personnel. If UE fails to respond to such monitoring efforts, or if UE, in the judgment of the Staff, has failed to follow the accounting methodologies set out in the Reconciliation Procedure, the Staff is free to bring such disputes over the operation of the Plan to the Commission for resolution.

15. Finally, I must underscore what we mentioned above: the Staff's positions in this case profoundly threatens the integrity of the regulatory process by which the Commission must fulfill its important duties. Much of that process is not adversarial, but relies on agreements approved or adopted by the Commission. Regardless of the legal aspects of these arrangements, as a practical matter, the Commission's faithfulness to agreements such as the one at issue here, and the corresponding reliances the parties can place on them, are essential if compromise and agreement, as opposed to evidentiary hearings and litigation, are to remain viable and trusted avenues for the regulatory process.

16. I appreciate the opportunity to submit this Statement to the Commission, and sincerely hope the Commission remains faithful to the vision embraced in the UE EARPs.

Respectfully submitted

/s/ Kenneth J. Rademan
Kenneth J. Rademan

DATED: June 2, 1999

MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) the Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) in Connection Therewith, Certain Other Related Transactions	)	Case No. EM-96-149

AFFIDAVIT OF KENNETH J. RADEMAN

STATE OF MISSOURI)
) SS.
COLE COUNTY)

Kenneth J. Rademan, being first duly sworn on his oath, states:

1. My name is Kenneth J. Rademan. I was previously employed by the Missouri Public Service Commission in the City of Jefferson City, Missouri, as Director of the Utility Services Division.

2. Attached hereto is a document entitled "Statement of Kenneth J. Rademan".

3. I hereby swear and affirm that the Statement is true and correct.

/s/ Kenneth J. Rademan
Affiant

Subscribed and sworn to before me this day of June, 1999.

/s/ Notary Public
Notary Public