

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

Office of the Public Counsel,
an agency of the State of Missouri,
COMPLAINANT

v.

Central Jefferson County Utilities, Inc.,
RESPONDENT

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) **Case No. WC-2007-0038**
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**OFFICE OF THE PUBLIC COUNSEL'S SUGGESTIONS IN OPPOSITION
TO CENTRAL JEFFERSON COUNTY UTILITIES, INC.'S OBJECTION
TO AND MOTION IN LIMINE CONCERNING THE DIRECT TESTIMONY
OF TED ROBERTSON**

Introduction

The Office of the Public Counsel (Public Counsel) asks the Public Service Commission (Commission) to overrule Central Jefferson County Utilities, Inc.'s (Central Jefferson) Objection to and Motion In Limine Concerning the Direct Testimony of Ted Robertson. In the guise of a motion to strike testimony based on the sufficiency of the information relied upon by Public Counsel expert witness Mr. Robertson, Central Jefferson seeks a Commission determination on the credibility and evidentiary weight that the Commission should give Public Counsel expert witness' prefiled testimony prior to the overearnings complaint case hearing. The motion tries to distort the real issues by framing the Commission's discretion to make factual determinations and findings on a witness' credibility as a legal question on admissibility of the expert witness' testimony.

In light of the clear status of the Missouri law differentiating admissibility and credibility criteria for expert opinion, Public Counsel suggests to the Commission that at best the Company's motion is premature as it seeks to litigate credibility prior to the

actual offer of the prefiled testimony at hearing; and at worse, it is a frivolous motion without a good faith basis under Missouri law apparently brought at this time to divert the resources and energy of the Public Counsel in the preparation for the upcoming hearing.

Facts

Mr. Ted Robertson filed direct testimony on October 2, 2006 on behalf of the Office of the Public Counsel as a Public Utility Accountant III. In that testimony, Mr. Robertson identified his position with Public Counsel and recounted his educational background, qualifications, as well as relevant history of testimony filed before the Commission. Mr. Robertson is well acquainted with the issues, the necessary information and the correct methodologies that must be brought to bear in determining the issue of overearning of a public utility in the State of Missouri.

In his direct testimony, Mr. Robertson stated his reliance on the Exhibit Manipulation System (“EMS”) accounting schedules and workpapers developed by the Missouri Public Service Commission Staff (Staff) during their audit of Central Jefferson in Tracking File Case No. QS-2006-0003. Mr. Robertson attached the Staff EMS accounting schedules for both the water and sewer operations to his direct testimony. Mr. Robertson stated that these documents were something he, as a Public Utility Accountant, would normally prepare in doing analysis of overearnings. Mr. Robertson also stated that the EMS accounting schedules and audit workpapers were something other Public Utility Accountants would normally prepare in doing analysis of overearnings. Mr. Robertson stated that it was his understanding the documents were based on Central Jefferson’s own records. Mr. Robertson stated that he found the documents to be reliable for the purpose

of doing analysis of overearnings and that he had no reason to believe the documents did not reflect the current financial situation of Central Jefferson.

Argument

A. Mr. Robertson's testimony and opinions are admissible pursuant to RSMo §490.065 (2000).

A fair reading of Mr. Robertson's testimony demonstrates that under RSMo §490.065 (2000) his testimony is admissible and Central Jefferson's motion is without merit. The Commission should deny Central Jefferson's motion because under the standards in RSMo §490.065, Mr. Robertson's testimony and his expert opinions are admissible in this case in that:

- (1) Mr. Robertson has information and knowledge which will assist the Commission to determine the alleged overearnings issue in this case;
- (2) Mr. Robertson has demonstrated that he has knowledge, skill, experience, training and education sufficient to allow him to testify as to his opinion;
- (3) Mr. Robertson's prefiled testimony identifies the facts and data upon which he based his opinion and demonstrates that it is of a type reasonably relied upon by other experts in the field; and
- (4) Mr. Robertson's testimony shows that the facts and data and resources he relied upon to base his opinion are otherwise reasonably reliable.

The Missouri Supreme Court in *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 SW3d 146 (Mo banc 2003) has left no doubt that the standard for the admission of expert testimony in civil and administrative cases is governed by RSMo §490.065. RSMo §490.065.1 states that an expert may testify as to an opinion on matters of scientific, technical or other specialized knowledge which will assist the trier of fact to

understand the evidence or to determine a fact in issue. “The test for admissibility of an expert opinion is whether the expert has knowledge from education or experience which will aid the trier of fact.” *State v. Hart*, 805 S.W.2d 234, 238 (Mo. App.1991).

Mr. Robertson has a Bachelor of Science Degree in Accounting and has obtained a Certified Public Accountant (“CPA”) certification from the State of Missouri. His responsibilities as a Public Utility Accountant include performing audits and examination of the books and records of public utilities within the State of Missouri. The subject matter of Mr. Robertson’s testimony included an analysis of the appropriate level of revenues to be recovered from ratepayers by a regulated public utility based on an audit of the company’s own financial records. There can be no question that the subject matter of Mr. Robertson’s testimony falls within the scope of specialized knowledge that will assist the Commission to understand the financial evidence and to determine the allegation of overearning issue in this case. Therefore, Mr. Robertson’s testimony meets the requirements of Section 490.065.1, RSMo.

RSMo §490.065.3 states that the facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing, must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable. An expert’s sources must be reasonable and serve as a sufficient basis of worthiness for reliance. *Wulfin v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 133, 151 (Mo. App. W.D., 1992). The Commission has discretion in deferring to an expert’s assessment of what data is reasonably reliable so long as the exercise of that discretion is consistent with the logic of the circumstances and is not arbitrary or unreasonable. *Whitnell v. State*,

129 SW3d 409, 416-417 (Mo. App. E.D. 2004); *Sanders v Hartville Mill. Co.*, 14 S.W.3d 188, 208 (Mo. App. S.D. 2000). The expert's opinion is admissible unless the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported. *Alcorn v. Union Pacific Railroad Company*, 50 SW 3d 226, 246 (Mo 2001); *State ex rel. Missouri Highway & Transp. Comm'n v. Sturmfels Farm Ltd. Partnership*, 795 S.W.2d 581, 590 (Mo. App.1990). If such testimony lacks even that modicum of weight, then it would not assist the jury "to understand the evidence or to determine a fact in issue" as required by Section 490.065.1. *Wulfing*, 842 S.W.2d 133 at 152.

Questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the trier of fact. *Sanders* 14 S.W.3d 188 at 208. "Any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given, and not its admissibility." *Alcorn*, 50 SW 3d 226 at 246.

Mr. Robertson has detailed the sources and underlying facts that led him to reach his conclusion of overearnings by Central Jefferson. The data and sources that Mr. Robertson relied upon are well recognized sources of financial information and are standard sources of information for use by public utility accountants, including the Staff itself, in a myriad of Commission cases. The facts and information upon which Mr. Robertson relies for his opinion testimony are a type reasonably relied upon by experts in the field to form opinions on the subject of overearnings as required by RSMo §490.065.3. He may not have participated in the preparation of, nor did he have responsibility for, all the information he used as a resource, but that is not required for an expert opinion. Mr. Robertson used sources that are otherwise held by members in the

public utility accounting community as reliable sources. His use of these sources was reasonable and serves as a sufficient basis of worthiness for reliance. Finally, Mr. Robertson's opinion testimony reasonably contains the foundational facts necessary to meet the minimum standards of reliability as a condition of the admissibility of his opinion. The question of whether the facts and data upon which he relied is "otherwise reasonably reliable" and, therefore, complies with Section 490.065.3, is a question left to the independent judgment of the Commission. Therefore, Mr. Robertson's testimony meets the requirements of Section 490.065.3, RSMo as being based on the type of information and knowledge reasonably relied upon by experts on that subject in that field.

Central Jefferson, in pointing to Mr. Robertson's testimony, attempts to confuse the Commission by stating in its motion that "Mr. Robertson's testimony failed to reveal any participation in, or responsibility for, the audit he attempts to present to the Commission." Central Jefferson knows, or should know, that participation in, or responsibility for, the documentation used as a basis for an expert opinion is not a requirement of RSMo §490.065.

Central Jefferson was provided with Mr. Robertson's testimony in October of 2006. Central Jefferson had approximately four months to perform its own audit, give additional information to Staff to update the existing audit or even to request that Staff perform a true-up of the existing audit in preparation for its rebuttal testimony. Central Jefferson has apparently refused to do this. Instead, Central Jefferson makes many conclusions as to allegations that the Staff audit is "preliminary" and "incomplete" and the like. But, those are nothing but the allegations of counsel in a motion, without any present factual or evidentiary basis to demonstrate that these allegations and conclusions

have any accuracy, veracity, or relevance. Even then, such allegations only raise issues of fact that may or may not be proven by the final evidence. The alleged weakness in the factual underpinnings of the Mr. Robertson's opinion goes to the weight that testimony should be given, and not its admissibility.

Conclusion

Under the standards in RSMo §490.065, Mr. Robertson's testimony and his expert opinions are admissible in this case in that:

- (1) Mr. Robertson has information and knowledge which will assist the Commission to determine the alleged overearnings issue in this case;
- (2) Mr. Robertson has demonstrated that he has knowledge, skill, experience, training and education sufficient to allow him to testify as to his opinion;
- (3) Mr. Robertson's prefiled testimony identifies the facts and data upon which he based his opinion and demonstrates that it is of a type reasonably relied upon by other experts in the field; and
- (4) Mr. Robertson's testimony shows that the facts and data and resources he relied upon to base his opinion are otherwise reasonably reliable.

Central Jefferson knows, or should know, that participation in, or responsibility for, the documentation used as a basis for an expert opinion is not a requirement of RSMo §490.065. Central Jefferson's conclusions as to allegations that the Staff audit is "preliminary" and "incomplete" and the like only raise issues of fact that may or may not be proven by the final evidence. The alleged weakness in the factual underpinnings of the Mr. Robertson's opinion goes to the weight that testimony should be given, and not its admissibility.

THEREFORE, since Mr. Robertson's testimony is admissible under RSMo. §490.065 and Central Jefferson's motion in fact raises questions which go to the issue of credibility and the weight of Mr. Robertson's opinion testimony rather than to its admissibility under the standards set forth in RSMo §490.065, the motion should be denied.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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By:_____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 2nd day of February 2007:

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