

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 19th day of  
April, 2007.

In the Matter of Union Electric Company d/b/a	)	
AmerenUE's Tariffs Increasing Rates for Electric	)	<b><u>Case No. ER-2007-0002</u></b>
Service Provided to Customers in the Company's	)	Tariff No. YE-2007-0007
Missouri Service Area	)	

**ORDER DENYING STAFF'S MOTION TO STRIKE THE TESTIMONY OF  
ROBERT C. DOWNS**

Issue Date: April 19, 2007

Effective Date: April 19, 2007

On April 6, 2007, the Commission's Staff filed a motion asking the Commission to strike the prefiled direct, rebuttal and surrebuttal testimony of Professor Robert C. Downs, whose testimony was offered by Union Electric Company, d/b/a AmerenUE. Since Professor Downs was questioned at the March hearing, Staff also asks that his testimony be struck from the transcript of the hearing. On April 9, the Commission ordered that any party wishing to respond to Staff's motion do so no later than Noon on April 13. AmerenUE filed a timely response on April 13. No other party has responded.

Professor Downs is a law professor at the University of Missouri-Kansas City School of Law and the testimony that he offered relates to the fiduciary duty owed by officers and directors of corporations to the corporations they serve. In particular, Professor Downs testified about the duty of the board of directors of EEInc. to maximize the value of the

stock of that corporation. Professor Downs offered testimony as a legal expert and did not claim any particular knowledge of the facts of this case.

Staff contends that Professor Downs should not be allowed to offer an expert legal opinion on the issues before the Commission. According to Staff, the evaluation of legal issues should be left to the Commission as the ultimate adjudicator of the applicable law. Instead of hearing the expert legal opinion of Professor Downs, Staff contends, the Commission should simply hear the parties' arguments on those legal issues through their briefs.

AmerenUE opposes Staff's motion to strike Professor Downs' testimony. According to AmerenUE, neither the Missouri rules of evidence, nor the Commission's rules and procedures, require that the testimony be struck. Furthermore, AmerenUE contends that Professor Downs' legal opinion testimony is appropriate as a response to the testimony offered by witnesses for Staff and other parties that offered non-expert legal opinions on the legal obligations of the board of directors of EEInc.

The Commission generally agrees with Staff that expert legal opinion testimony is unnecessary in cases before the Commission. There is no reason why such opinions cannot be argued and supported in the legal briefs of the parties. However, no rule compels the Commission to strike the legal opinion testimony that has been offered. On the contrary, Section 386.410, RSMo 2000, indicates that the Commission is not bound by the technical rules of evidence.

The court decisions that Staff cites in support of its motion hold that legal opinion testimony should not be admitted because of its potential to confuse a jury. Obviously, jury

confusion is not a problem in this case because it will be decided by the Commission, not a jury. Staff does not cite any other reason to strike the testimony.

If Staff, or another party, had moved to strike Downs' direct testimony shortly after it was filed at the start of this case on July 5, 2006, the Commission might have granted such motion. However, Staff waited until it filed its prehearing brief on the eve of the hearing to even suggest that Downs' testimony might be inappropriate. It did not actually make an oral motion to strike that testimony until after Downs had completed his testimony before the Commission. That delay had consequences.

At this late point, the Commission cannot strike Downs' testimony without seriously disturbing the record. Downs filed his direct testimony at the beginning of this case, before any other party filed testimony. Contrary to AmerenUE's suggestion, it was thus Downs' testimony that opened the door to the filing of legal opinion testimony by other parties. During the course of this hearing, that legal opinion testimony has been offered and received into evidence without objection. If the Commission were to now strike Downs' expert legal opinion, it would also need to strike the legal opinion testimony that other parties offered to counter Downs' opinions. To do otherwise might imperil the due process rights of AmerenUE.

The Commission does not intend to search through the record to expunge all traces of legal opinion testimony when there is no compelling reason to do so. Instead, the Commission will deny Staff's motion to strike and will leave the record undisturbed, confident in the belief that the Commission will be able to sort out factual testimony, expert testimony, and legal opinion testimony to reach an appropriate decision without undue confusion.

When AmerenUE offered Downs' testimony into evidence during the course of the hearing, the presiding officer deferred ruling on the admissibility of that testimony until the Commission ruled on Staff's motion to strike. With that question having been decided, the Commission will admit exhibits 44, 45, and 46 into evidence.

**IT IS ORDERED THAT:**

1. Staff's Motion to Strike Testimony of Robert C. Downs is denied.
2. Exhibit No. 44, the Direct Testimony of Robert C. Downs, Exhibit No. 45, the Rebuttal Testimony of Robert C. Downs, and Exhibit No. 46, the Surrebuttal Testimony of Robert C. Downs, are admitted into evidence.
3. This order shall become effective on April 19, 2007.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge