BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

MOTION TO STRIKE TESTIMONY OF ROBERT C. DOWNS

Comes now the Staff of the Missouri Public Service Commission (Staff) and requests that the Missouri Public Service Commission (Commission) strike as inappropriate for the reasons set forth below the direct, rebuttal and surrebuttal testimony, and evidentiary record of appearance (cross-examination, questions from the Bench and redirect) of Union Electric Company, d/b/a AmerenUE witness University of Missouri - Kansas City Law School Professor Robert C. Downs. The Staff's motion is based on the law set out in this Motion. Even though the Staff will more than adequately address Professor Downs' testimony, the Staff believes that it has an obligation to make this Motion because it is correct thing to do, and for the Staff not to do so, among other things, would encourage parties to routinely file the testimony of law professors and other attorneys on legal issues before the Commission. In support of the Staff's Motion, the Staff states as follows:

1. Staff counsel commented in the Staff's Prehearing Brief that Professor Downs' testimony is inappropriate. The Staff noted in Staff's Prehearing Brief that the Missouri Western District Court of Appeals held in *Wulfing v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 133, 153 (Mo. App. W.D. 1992) "[i]t is the rule that the opinion of an expert on issues of law is not admissible. *Young v. Wheelock,* 333 Mo. 992, 64 S.W.2d 950, 957[24, 25] (1933)."

2. In opening statement on the EEInc. issue, undersigned Staff counsel stated that although the Staff moved the Commission to exclude Professor Downs' testimony from the case, the Staff proposed that Professor Downs be permitted to take the witness stand and stand cross-examination and questions from the Bench, the parties brief the Staff's motion and the Commission take the Staff's motion with the case. Counsel for AmerenUE requested that the Staff file a formal Motion to which AmerenUE would respond, the Staff agreed to do so and the Commission decided to proceed in this manner.

3. The matter of the appropriateness of Professor Downs' testimony occurred to undersigned Staff counsel before the Staff's deposition of Professor Downs but the matter of the appropriateness of testimony on the law arose in the Staff's deposition of Professor Downs in the context of the federal government's prosecution of David C. Wittig, former President, Chief Executive Officer, and Chairmen of the Board of Westar Energy, Inc. Professor Downs' curriculum vitae, produced in response to the Subpoena Duces Tecum attached to the Notice of Deposition of Professor Downs, indicated that Professor Downs had been engaged for the defense of Mr. Wittig, a matter of which the Staff was otherwise aware. At the deposition the following colloquy occurred on this matter:

> Q. [Dottheim]. I notice in your curriculum vitae that you handed to me where you've got listed in the latter pages the expert witness matters that you've appeared on or in cases in which you've, if I'm reading this correctly, consulted. I noticed on the very last page the last item you have United States via [sic] David Wittig, et al.
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> Could you provide some information respecting your activities in that case?
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> A. [Downs]. I was called but did not testify as a witness on behalf of David Wittig to discuss the matter in which corporation boards act and the kind of authority that they grant to management. There were a number of issues. You may be aware that he was accused in a criminal case of excessive salaries and some other things. I was not -- I did not testify, but I was called on his behalf.

> Q. Is there any reason why you did not testify?
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> A. Yes. The judge didn't want a law professor on behalf of David Wittig and said so.
>
> Q. Okay. And there's been some recent activity in that --
>
> A. Yes. His conviction was overturned partly because she didn't let me testify, I think.
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> Q. Your activity in that case, which you weren't permitted to testify, was your activity in that litigation designed to maximize shareholder value?
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> A. My activity was to provide information about how boards of directors act. I gave no opinion and would not have given an opinion about whether David Wittig's particular behavior did or didn't comply. I was there to provide the standard. That's what that was about.

Even if one would solely consider Professor Downs' discussion of the Wittig case, Professor Downs' testimony in the instant case goes far beyond merely providing a standard.

4. A review of *U.S. v. Lake*, 472 F.3d 1247 (10th Cir. 2007), the case to which Professor Downs referred, does not indicate that Mr. Wittig's conviction was partly overturned because the trial judge did not let Professor Downs testify. There is no mention of Professor Downs or of the trial judge's ruling regarding Professor Downs in the Tenth Circuit's opinion reversing Mr. Wittig's and Douglas T. Lake's (formerly Executive Vice President and Chief Strategic Officer of Westar Energy, Inc.) convictions for wire-fraud, money-laundering, circumvention of internal controls and conspiracy. The opinion states that all counts of the indictment depended on proving the efforts of Messrs. Wittig and Lake to conceal from the U.S. Securities and Exchange Commission (SEC) their personal use of corporate aircraft, and the attempt to prove concealment was flawed because the prosecution produced no evidence that Messrs. Wittig and Lake failed to comply with SEC regulations and the jury was never instructed regarding the SEC's reporting requirements. 472 F.3d at 1249-50.

5. Regarding the wire-fraud charges, the Tenth Circuit held that the federal government failed to present evidence from which the jury could infer beyond a reasonable doubt that any of the reports wired to the SEC were false, fraudulent, or misleading. The laundering charges required proof of wire-fraud. The federal government conceded that reversal of the wire-fraud counts would require reversal of the money-laundering convictions. Thus, the court reversed the money-laundering convictions. 472 F.3d at 1260.

6. All but one of the circumvention of internal controls counts charged circumvention by failure to report personal use of corporate aircraft on annual Director and Officer (D & O) questionnaires that requested the recipients to disclose all compensation they had received for a particular year, including all personal benefits. The issue for trial was whether Wittig's and Lake's failure to report such personal use on the D & O questionnaires was with the requisite intent. 472 F.3d at 1261. Regulation S-K required disclosure of an executive's personal use of corporate aircraft if the additional cost to the corporation exceeded a threshold cost. The prosecution offered no substantial proof that the threshold additional cost was ever exceeded by either Wittig or Lake. Thus, there was no evidence that Wittig's and Lake's failure to disclose information ever caused a material omission in SEC reports. Moreover, their failure to disclose information was not dispositive of their intent. 472 F.3d at 1262.

7. The Tenth Circuit held that the jury was not fairly informed of what the SEC required because Messrs. Wittig and Lake requested the trial court to instruct the jury on what disclosure was required by the SEC, but the trial court denied the request. 472 F.3d at 1262-63. The Tenth Circuit held this refusal by the trial court to instruct the jury was reversible error. There is no mention of Professor Downs in the decision. To the contrary, the Court states that it is ordinarily improper to have a witness testify regarding what the applicable law is:

> To respond to the government's arguments, the defendants requested the district court to instruct the jury on what disclosure was required by the SEC. The court denied the request. In the context of this case, we hold that this refusal was reversible error. When a defendant's defense is so dependent on an understanding of an applicable law, the court has a duty to instruct the jury on that law, rather than requiring the jury to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument. Indeed, it is ordinarily improper to have a witness testify regarding what the applicable law is; it is the trial judge's duty to inform the jury on the matter. *See Specht v. Jensen,* 853 F.2d 805, 807-08 (10th Cir.1988) (en banc); *United States v. Vreeken,* 803 F.2d 1085, 1091 (10th Cir.1986). It was error for the district court to abdicate its responsibility in this regard and let opposing counsel argue their competing theories, especially when the defendants' view of the law was the correct one. Accordingly, the convictions for failure to complete properly the D & O forms must be set aside.
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> We further hold that the remaining circumvention conviction must also be reversed. That conviction rested on Mr. Wittig's directive to an auditor not to audit the corporation's flight logs and his refusal to provide the logs to her. We of course are in no position to assess Mr. Wittig's intent, and we readily acknowledge that he may have intended to circumvent Westar's internal controls by forbidding the audit. But we doubt that the jury could fairly appraise Mr. Wittig's *mens rea* without being properly informed of the governing law. We have concluded that the district court's failure to instruct the jury on the SEC's regulations constituted error. The government bears the burden of showing that this error was harmless with regard to the remaining circumvention count. Yet it has not even argued harmless error to this court.

472 F.3d at 1263.

8. The Court also set aside the conspiracy convictions on the basis that the jury could not accurately evaluate the conspiracy allegations without being informed regarding what was required to be in the SEC filings. 472 F.3d at 1263. Finally, Wittig and Lake argued that the trial judge displayed such bias that that she should not be permitted to preside at any trial on remand. The Court held that the trial judge's rulings did not display a disqualifying bias. 472 F.3d at 1267.

9. The decision in *Specht v. Jensen,* 853 F.2d 805 (10th Cir. banc 1988) referred to above in *U.S. v. Lake* is informative. The case was before the Tenth Circuit on rehearing *en banc*

on the sole issue of whether Federal Rule of Evidence 702 would permit an attorney, called as an expert witness, to state his views of the law which governed the verdict and to state an opinion whether the defendant's conduct violated that law. The Court held that the testimony was beyond the scope of the rule and thus inadmissible. 853 F.2d at 806. The Court held that harm is evident in at least two ways:

> . . . While other experts may aid a jury by rendering opinions on ultimate issues, our system reserves to the trial judge the role of adjudicating the law for the benefit of the jury. When an attorney is allowed to usurp that function, harm is manifest in at least two ways.
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> First, as articulated in *Marx & Co. v. Diners' Club, Inc.,* the jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title "expert," is more knowledgeable than the judge in a given area of the law. *Marx,* 550 F.2d at 512. Indeed, in this case, the expert's knowledge and experience was made known to the jury by both the court and counsel in a manner which gave his testimony an aura of trustworthiness and reliability. Thus, there is a substantial danger the jury simply adopted the expert's conclusions rather than making its own decision. Notwithstanding any subsequent disclaimers by the witness that the court's instructions would govern, a practical and experienced view of the trial world strongly suggests the jury's deliberation was unduly prejudiced by the expert's testimony. [footnote omitted].
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> Second, testimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process. If one side is allowed the right to call an attorney to define and apply the law, one can reasonably expect the other side to do the same. Given the proclivity of our brothers and sisters at the bar, it can be expected that both legal experts will differ over the principles applicable to the case. The potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court, *see United States v. Curtis,* 782 F.2d 593, 599 (6th Cir.1986); *United States v. Ingredient Technology Corp.,* 698 F.2d 88, 97 (2d Cir.1983). We therefore conclude the expert's testimony on the ultimate issues of law was not harmless as contended by the dissent.

853 S.W.2d at 808-09.

10. As the Staff noted in Staff's Prehearing Brief, the Tenth Circuit Court of Appeals stated in *United States v. Vreeken*, 803 F.2d 1085 (10th Cir. 1986, cited in *U.S. v. Lake*, as follows:

> . . . As a general rule, questions of law are the subject of the court's instructions and not the subject of expert testimony. *United States v. Ingredient Technology Corp.,* 698 F.2d 88, 97 (2d Cir.), *cert. denied,* 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983); *see also United States v. Jensen,* 608 F.2d 1349, 1356 (10th Cir. 1979) ("an expert witness cannot state legal conclusions by applying law to the facts").

11. Another case of note is *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557 (7th Cir. 2003). In the *Good Shepherd* case Good Shepherd Manor Foundation, Inc., Good Shepherd Manor Group Homes, Inc., and Good Shepherd Manor, Inc. (collectively "Good Shepherd") owned property on which Good Shepherd provided group housing and related services for developmentally disabled adults. Good Shepherd subsequently purchased an additional lot to provide additional group housing. Good Shepherd applied to the City for water and sewage permits. The City requested that Good Shepherd extend the water lines on its property to the northern border of Good Shepherd's land to provide service to a lot that was owned by a religious organization. Good Shepherd contended that the water lines were to be extended on the condition that the religious organization would pay for the expense of extending the lines. Good Shepherd and the religious organization were not able to reach agreement about payment of the costs, so the lines were not extended. After learning that the lines had not been extended, the City turned off the water to the additional Good Shepherd group homes. Therefore, Good Shepherd was not able to obtain occupancy permits for the additional group homes. Good Shepherd brought suit against the City alleging violations of the Fair Housing Amendments Act, the Americans with Disabilities Act, the Rehabilitation Act and the Constitution. A jury trial followed. The trial court ruled that (1) Good Shepherd could not present a theory of failure to reasonably accommodate, (2) Good Shepherd's expert witness, who was a law professor and worked in urban planning, could not testify and (3) the district court

erred in rejecting two of Good Shepherd's proposed jury instructions. The jury found in favor of the City. Good Shepherd appealed. 323 F.3d at 559-61, 564.

12. Regarding the trial court's ruling excluding the testimony of the law professor, the Seventh Circuit held that trial court had correctly ruled on this matter:

> The district court ruled that Susan Connor, Good Shepherd's expert witness who is a law professor and who works in urban planning, could not testify. We review the district court's decision to exclude expert testimony for an abuse of discretion. *United States v. Crotteau, 218 F.3d 826, 831 (7th Cir. 2000)*. The proffered testimony was largely on purely legal matters and made up solely of legal conclusions, such as conclusions that the city's actions violated the FHAA. The district court correctly ruled that expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible. *United States v. Sinclair,* 74 F.3d 753, 757 n. 1 (7th Cir.1996). . . .

323 F.3d at 564.

13. The Staff would cite two law review articles: *The Impropriety OF Expert Witness Testimony On The Law*, Thomas E. Baker, 40 U. Kan. L. Rev. 325 (1992) and *Expert Legal Testimony*, 97 Harv. L. Rev. 797 (1984). While noting that it remains black-letter law that expert legal testimony is not permissible, the Harvard Law Review Note commented that "[t]he problems involved in the use of expert legal testimony can be resolved by the sensible standards developed for other forms of expert testimony, in conjunction with procedural safeguards that address the special concerns raised by legal testimony." 97 Harv. L. Rev. at 813-14, 797. The Kansas Law Review article did not concur that "sensible standards" and "procedural safeguards" can address the special concerns raised by legal testimony and found strong basis for continuation of the black-letter law that expert legal testimony is not permissible. The Kansas Law Review article noted that (1) the Federal Rules of Evidence 403 and 702 only permit expert testimony on issues of fact, and not on issues of law, (2) if the judge requires assistance in determining the law, there are traditional resources, such as briefs, supplemental memoranda of

law, and oral argument by the parties, in addition to legal research by the judge himself/herself or by the judge's legal law clerk (a.k.a. in the parlance of the Missouri Commission, the Commissioner's "personal advisor"), and (3) there are additional concerns that reliance on legal expert witnesses can exacerbate resource inequalities that might exist between/among parties or can result in a confusing "battle of experts" when the litigants are evenly matched financially. 40 U. Kan. L. Rev. at 337-38, 362-4. (It should not be forgotten that AmerenUE's Prehearing Brief filed on March 6, 2007 contains an extensive discussion of the law, as viewed by AmerenUE, including citation to Missouri and Illinois cases. Although the Commission has retained outside legal counsel to assist it in matters pending before federal agencies and on limited and unique matters, the Staff has not retained legal counsel to submit testimony on the law in Commission cases. The Staff, through the Commission, does not have the fiscal/financial resources to routinely to do so even if the submission of such testimony were appropriate.)

14. It is clear from Professor Downs' own testimony that he is being offered by AmerenUE to provide testimony on the law not on the facts as viewed by AmerenUE and as such his testimony is not appropriate and should not be received into evidence. The Staff would note that (a) Professor Downs' states in his Direct Testimony, "I am not an expert in public utility regulatory law," (p. 6, line 22) and (b) EEInc., a closely held Illinois corporation, prior to ever becoming an exempt wholesale generator (EWG), was a public utility within the meaning of the Illinois Public Utilities Act and was certificated as a public utility in Illinois. EEInc. is now an EWG, under the Public Utility Holding Company Act of 2005 (Section 1262(6) of the Energy Policy Act of 2005) and is defined as "any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B), and exclusively in the business of owning or operating, all or part of one or

more eligible facilities and selling electric energy at wholesale." Thus, the matter at hand continues to be a regulatory matter.

15. Even the limited excerpts of Professor Downs' testimony that follow clearly show that the Staff's Motion is squarely within the bounds of the law cited by the Staff for excluding Professor Downs testimony:

> **Deposition Of Downs January 26, 2007 After Downs' Direct Testimony Filed But Before Downs' Rebuttal And Surrebuttal Testimonies Filed:**
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> A. [Downs]. . . . I'm not the fact person.
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> Q. [Dottheim]. Who is the fact person?
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> A. I have no idea who is involved in this. Sounds like quite a cast of characters, as I understand it.
>
> Q. Would you characterize yourself as being the law person?
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> A. I'm one of them. I don't know if there are others. I'm certainly the one that is supposed to talk about what the fiduciary duties are of directors and their obligations to the corporations and so on. I try, and I think I did, limit my direct testimony to those kind of issues. (Ex. 259, Downs Deposition, p. 23; Ex. 266, Downs Errata Sheets).
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> Q. [Micheel]. Now, you testified earlier today that you are not a fact witness in this case, is that correct?
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> A. [Downs]. That's true. (Ex. 259, Downs Deposition, p. 83; Ex. 266, Downs Errata Sheets).
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> **Evidentiary Hearing Before The Missouri Commission March 20, 2007:**
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> Q. [Micheel]. Mr. Downs, you're not an expert in regulatory law; isn't that correct?
>
> A. [Downs]. That's true. That's not my area of expertise.
>
> Q. And you're not offering any expert testimony with respect to regulatory law here today; is that correct?

A. That's true.

Q. Is it correct, also that you're not a fact witness, you don't consider yourself a fact witness in this case?

A. That's also true.

Q. And so you're just providing expert testimony on what you believe the law is, is that correct, with respect to corporate boards?

A. I believe that's true. It is also true that some of the comment in my direct testimony, rebuttal testimony and surrebuttal testimony probably expands upon that a little bit. (Vol. 25, Tr. 2359, line 14 – Tr. 2360, line 6).

Downs' Direct Testimony:

A. . . . OPC's position flies directly in the face of the binding legal obligation of EEInc.'s Board to maximize the value of the stock held by EEInc. shareholders. Consequently, it would be improper for EEInc. to sell power to at cost to one of its shareholders or anyone else when it can sell power at higher market prices. (p. 4, line 20 – p. 5, line 2).

A. . . . Where, as here, shareholders have made an investment – AmerenUE's investment in EEInc. stock – EEInc.'s Board as a matter of law owes shareholders, including AmerenUE, a fiduciary duty to maximize the value of that stock. That is very fundamental and basic tenet of corporate law in virtually all jurisdictions, including Illinois where EEInc. is incorporated. *See, e.g., Graham v. Mimms*, 111 Ill.App.3d 759, 444 N.E.2d 549 (Ill.App. 1982). Directors do not owe that duty to third parties, including Missouri retail ratepayers, which seems to be the premise of OPC's position. (p. 7, lines 16-23; Vol. 25, Tr. 2357, lines 15-20).

A. OPC's position apparently reflects OPC's belief that Ameren Corporation and its affiliates should improperly and unlawfully manipulate the operations of EEInc. by exerting its influence as an employer of some of EEInc.'s Board members to acquire EEInc.'s Board to in turn force EEInc. to sell 40% of the power from EEInc. to AmerenUE at cost.

Q. Why is such an action, as you put it, improper and unlawful?

A. Because such an action would fly directly in the face of the most basic principles of corporate governance embodied in the law. Indeed, any such action

by the Board would be a direct and unlawful violation of the fiduciary duty I spoke of earlier. . . . (p. 9, 1ines 10-17).

A. . . . Therefore, when presented with the opportunity to sell power at higher market prices versus at lower cost-based rates, the Board has only one course available to it consistent with its fiduciary duties to shareholders – to sell at market. That decision is also in the best interest of AmerenUE's shareholders because if EEInc. maximizes its profits the value of AmerenUE's investment in EEInc. is also maximized. This, in turn, contributes the maximum value to the investment made by AmerenUE's shareholders in AmerenUE itself, which is exactly what the AmerenUE's representatives on EEInc.'s Board are bound to do in their capacities as representatives of AmerenUE.

Q. Would accepting OPC's position violate duties to shareholders?

A. Absolutely. . . . (p. 10, line 19 – p. 11, line 6).

Q. But why should shareholders obtain these benefits versus, for example, AmerenUE's customers?

A. . . . From a corporate governance standpoint, which not surprisingly comports with common sense and fairness, one gets the same answer: it would be a violation of the fiduciary duties of the directors of EEInc. to improperly shift shareholder benefits to which shareholders are legally entitled to customers.
(p. 12, lines 11-18).

Downs' Rebuttal Testimony

A. . . . Sales below fair market value would violate the duty of care because it would not be a rational business decision of the board of directors, and would violate the duty of care because it would not be a rational business decision of the board of directors, and would violate the duty of loyalty, because the directors who sit on the board of EEInc. who are also officers or directors of AmerenUE have a conflict of interest and would be benefiting one entity at the cost of the other. Likewise, if the board of directors of AmerenUE agrees to sell power that is obtained from EEInc., at cost rather than at fair market value (given the existence of a well defined market for the power), it would also be violating its duty to its shareholders. (p. 4, lines 8-15).

A. . . . Nevertheless, it is absolutely clear that the directors of EEInc. have powerful fiduciary duties to EEInc. when they are acting as directors of EEInc. Those fiduciary duties are not reduced to account for their positions with the major shareholder (AmerenUE, or Ameren Energy Resources, an AmerenUE affiliate). The directors may be called upon to wear two hats, but they only wear one hat at a time. It would be legally impermissible for AmerenUE to insist, through coercion or direction of its employee/directors, that EEInc. sell its assets to AmerenUE for less than fair market value. AmerenUE has a similar issue with its own shareholders. Even if it has improperly forced EEInc. to sell its power to AmerenUE for less than fair value, AmerenUE could not properly then transfer that value to customers for less than fair value, absent a commercially reasonable business reason that would benefit the Company and its shareholders. (p. 6, lines 2-12).

A. . . . I believe that EEInc is legally *obligated* to sell its power at fair market value. EEInc. owns that power. The ratepayers do not own that power. The shareholders of EEInc. and their shareholders are entitled to have their corporations make a profit and are entitled to insist that the assets of the corporations not be donated to third parties, without proper business justifications which benefit the corporations and their shareholders. . . . (p. 10, line 19 – p. 11, line 1).

Downs' Surrebuttal Testimony:

A. . . . if any member of EEInc.'s Board of Director's acted at the behest of AmerenUE as these witnesses urge, they would be violating basic legal duties to their corporation.

The basic principles and conclusions of law that govern here are as follows:

- EEInc. is an Illinois corporation distinct from AmerenUE. It is not a division of AmerenUE; it is not bound to serve AmerenUE's interests; and it is not in any other way subordinate to AmerenUE.

- Like all boards of directors, EEInc.'s Board of Directors has the ultimate responsibility for managing the business affairs of EEInc.

- Shareholders are not entitled to manage a corporation in which they own stock.

- Directors have legal duties and obligations that arise from sources of law outside the corporation or the documents creating the corporation and governing its operations, such as by-laws. These other sources of law include statutes and the common law. These other sources of law are

superior to corporate documents. This means, for example, that by-laws cannot override legal duties imposed by statute or the common law.

- EEInc.'s Directors, like all corporate directors, have a duty of undivided loyalty to EEInc.

- EEInc.'s Directors, like all corporate directors, have fiduciary duty to EEInc. A fundamental component of that duty is to maximize the profits of the corporation.

- An individual serving on a board of directors can, and often does, "wear two hats." That is, a corporation will often seek as directors individuals experienced in business who are currently employed by, or on the boards of, other corporations. However, such an individual cannot legally wear both hats at the same time. That means that, while acting as a director of one corporation, that individual must act only in the best interests of that corporation, not any other entity in which he may have an interest.

- The power produced by the Joppa Plant is a corporate asset of EEInc.

- Selling its power at a fair market price is a corporate opportunity of EEInc.

- EEInc.'s Board ultimately makes the decision at what price to sell EEInc.'s power.

- Directors cannot legally defer to the wishes of control shareholders to transfer corporate assets to those shareholders at a below fair market price.

- A director's use of corporate assets to further his own goals is a violation of his fiduciary duties. Similarly, a director may not take the corporation's assets to help another corporation in which he has an interest. Thus, EEInc.'s Directors who have some interest in AmerenUE cannot legally vote to sell EEInc.'s power to AmerenUE at a below market price.

- A contract pricing mechanism for the sale of any commodity, including that in the Power Supply Agreement between EEInc. and AmerenUE, does not give the buyer ownership rights of any kind concerning the assets of the seller or that commodity, nor does it create legal entitlements beyond the term of the contract. (p. 2, line 10 – p. 4, line 14).

A. . . . There is nothing in the statements to the Commission in 1952 that rises to the level of a promise, let alone an enforceable promise, that EEInc. would forever continue to sell power to AmerenUE, or that it would forever sell such power at below fair market value. . . . (p. 7, lines 19-22).

A. . . . These EEInc. directors who were affiliated with AmerenUE and Kentucky Utilities were subject to conflicts of interest since they were affiliated with the companies/customers/shareholders who were on the other side of any sale of power from EEInc. to AmerenUE and Kentucky Utilities. Accordingly, their actions as EEInc. directors are not measured by the ordinary business judgment rule. Those actions will be subject to closer scrutiny by the courts and must meet a burden of proof of entire fairness to EEInc. In my opinion, a sale of a corporation's major income producing asset to anyone, including shareholders, for substantially less than its fair market value, could not pass the entire fairness test under circumstances that permitted sales at fair market value. Approval of such an action by a board of directors would violate their fiduciary duties to the corporation.

In addition, if EEInc. had agreed to transfer its valuable assets to its shareholders for less than fair market value, there would be federal and state income tax implications. As between EEInc. and Kentucky Utilities, the Internal Revenue Service could re-cast the transaction and attribute the unpaid value as income to EEInc., thus causing EEInc. to pay income tax on money it did not receive. Also, the benefit received by Kentucky Utilities (undervalued power from EEInc.) could be considered a dividend to Kentucky Utilities. In my opinion, these bad financial and tax consequences, in addition to the other considerations mentioned above, would make it essentially impossible for the directors of EEInc. to justify a sale of its power to Kentucky Utilities for less than fair market value. (p. 16, line 11 – p. 7, line 8).

16. Undersigned counsel notes that this pleading is being filed late on the afternoon of Good Friday. It is not undersigned counsel's intention to deprive AmerenUE an adequate amount of time to respond to this Motion To Strike. Therefore, undersigned counsel is not adverse to AmerenUE receiving a greater amount of time to respond to this pleading than what the Commission's rules might otherwise provide.

WHEREFORE, the Staff requests that the Commission strike as inappropriate for the reasons set forth above the direct, rebuttal and surrebuttal testimony, and evidentiary record of

appearance (cross-examination, questions from the Bench and redirect) of Union Electric Company, d/b/a AmerenUE witness University of Missouri - Kansas City Law School Professor Robert C. Downs.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 6th day of April 2007.

/s/ Steven Dottheim