BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service.	)))	**Case No. ER-2010-0036**

AMERENUE'S MOTION TO DENY THE REQUEST BY AARP AND CONSUMERS COUNCIL OF MISSOURI FOR ADMINISTRATIVE NOTICE OF PREVIOUS TESTIMONIAL EXHIBITS

AARP and Consumers Council of Missouri have requested that this Commission take official notice of previous testimonial exhibits from AmerenUE's 2007 rate case for the purpose of submitting testimony in response to this Commission's February 17, 2010 Order regarding the appropriateness of the 95 percent pass-through provision in AmerenUE's current fuel adjustment clause (FAC). The request of AARP and Consumers Council of Missouri is improper for the following reasons and should be denied.

1. While this Commission May Take Official Notice of Facts, it is Improper for this Commission to Take Official Notice of the Proffered Opinion Testimony.

The request by AARP and Consumers Council of Missouri asks, in essence, that this Commission take official notice that the opinion testimony by an expert witness who testified in a 2007 rate case is factually true. The Commission simply cannot grant this request because its authority to take administrative notice is limited to facts, and excludes opinions.

Under § 536.070(6) RSMo. 2000, the Public Service Commission may take "official notice of all matters of which the courts take judicial notice." "Judicial notice" has been defined as "the cognizance of certain ***facts*** which judges and jurors may properly take and act upon without proof because they already know them." Wolf v. Mallinckrodt Chem. Works, 81 S.W.2d 323, 332 (Mo. 1934) (emphasis added). Judicial notice of a fact creates ***prima facie***

evidence that the fact is true; in other words, it allows a court to dispense with proof of certain facts. *See* English v. Old Am. Ins. Co., 426 S.W.2d 33, 41 (Mo. 1968).

Consequently, it is only facts—and not opinion testimony like that which is offered here—of which this Commission may take official notice. *See* In the Matter of Community Optional Service Tariffs of Chariton Valley Telephone Corp., 30 Mo.P.S.C. 528 at *6 (April 26, 1991) ("The Commission is of the opinion and concludes that the doctrine of judicial notice is limited to facts."); *see also* In the Matter of Missouri Gas Energy, 2009 WL 4700622 (Mo.P.S.C. December 2, 2009) ("The statements in the Cards are not the type of facts courts judicially notice. The statements are not matters of common knowledge or facts capable of ready and accurate determination.")

Moreover, even if the proffered opinion testimony contained some facts embedded within the opinions which this Commission could officially notice, movants have failed to identify what those particular facts are. In Chariton Valley, the Commission also denied the request for official notice because the movant requesting that official notice be taken had failed to identify the specific facts found in the documents of which it proposed that the Commission take official notice. 30 Mo.P.S.C. at *6. In addition, even though judicial or official notice may extend to facts in other Commission proceedings, it extends only to those proceedings that are sufficiently interwoven or interdependent. Environmental Utilities, LLC v. Pub. Serv. Comm'n, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007). As discussed more fully below, the 2007 rate case is not sufficiently interwoven or interdependent with the current rate case so as to make any of the unidentified "facts" in that testimony appropriate for official notice in this case.

As a result, the request to officially notice the opinion testimony from AmerenUE's 2007 rate case must be denied. To allow otherwise would require this Commission to accept as true fact the proffered opinion testimony in an unrelated case and look no further for proof.

2. The Proffered Opinion Testimony Constitutes Inadmissible Hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Lauck v. Price, 289 S.W.3d 694, 698 (Mo. App. E.D. 2009). In the usual course of hearings of the Commission, pre-filed testimony is entered into and adopted by the sponsoring witness who appears at the Commission hearing and testifies under oath. Once adopted, the testimony is not hearsay but is admitted as if the same testimony was given before the Commission. In this instance, AARP and Consumers Council of Missouri seek to introduce into the record opinion testimony from a 2007 rate case as competent evidence on the issue now before the Commission: the propriety of AmerenUE's ***current*** fuel adjustment clause and, more particularly, the 95 percent pass-through mechanism. *See* February 17, 2010 Order.

Movants want to do this without the adoption of this testimony by the sponsoring witness, thereby depriving the parties of cross-examination of that testimony as it relates to the issues before this Commission. As this Commission has previously stated, the inability to cross-examine declarants making hearsay statements is a primary reason such testimony is not allowed:

> The problem with hearsay is that, like any testimony, its value depends on the declarant's credibility. Credibility is ordinarily subject to evaluation under cross-examination, so when cross examination is not available, such credibility evaluation is usually impossible.

Lee v. Missouri American Water Co., 2009 WL 1505334 (Mo.P.S.C. May 19, 2009). Without the ability of the parties to this case to cross-examine either declarant of the proposed opinion

testimony as it relates to the current FAC or any alternative FAC proposal, the Commission is deprived of any opportunity to evaluate the credibility of that testimony. Moreover, the inability to cross-examine this witness deprives the parties of the ability to challenge the witnesses' credentials, explore the bases for the opinions expressed in the testimony, and to ask the witnesses about the serious adverse consequences that could result for AmerenUE and its customers from the adoption of the proposal to limit the pass-through to 50 percent. The Commission should not accept testimony on such an important issue when the party presenting the testimony does not appear at the hearing and stand cross-examination regarding his opinions. Although there are a number of exceptions to the general rule that hearsay testimony is inadmissible, this testimony that has been offered does not qualify for any of these exceptions.

Because of these reasons, the proffered opinion testimony is inadmissible hearsay.

3. The Proffered Testimony Should Not be Admitted Because it is Not Relevant to this Proceeding.

In its Order, this Commission requested testimony regarding the appropriateness of AmerenUE's ***current*** fuel adjustment clause—specifically with regard to the current 95 percent pass through mechanism--and whether an alternative pass-through plan should be considered. February 17, 2010 Order at 2. Even if the proffered opinion testimony was not hearsay, it is not relevant to the issues upon which testimony is sought in this rate case, and it should not be admitted.

In the 2007 rate case, AmerenUE requested—but did not receive—a fuel adjustment clause. The testimony of witness Nancy Brockway, who also adopted the testimony of another witness who did not appear at the hearing (Ronald J. Binz), is largely comprised of arguments why each witness believes that a fuel adjustment clause should not be awarded to AmerenUE at all. *See* Surrebuttal Testimony of Nancy Brockway (Exhibit 751) at 4 ("The topics I will address

include (a) whether a Fuel Adjustment Clause is warranted for AmerenUE at this time . . . ."); Direct Testimony of Ronald J. Binz (Exhibit 750) at 5 ("No FAC should be approved for AmerenUE. . . ."). These are not the issues now before the Commission. Evidence is logically relevant if it tends to prove or disprove a particular allegation before the tribunal. State v. Freeman, 269 S.W.3d 422, 427 (Mo. *banc* 2008).

Even in the limited exception where prior sworn testimony of facts is allowed, the issues in the prior case must be "substantially the same" as in the current case. State v. Dixon, 969 S.W.2d 252, 257 (Mo. App. W.D. 1998). Neither the testimony of Brockway nor that of Binz addressed the propriety of a 95 percent pass-through FAC; indeed, there was no existing FAC at the time. The FAC proposed in the 2007 case is not the same as the FAC currently being considered. Consequently, the issues in the 2007 rate case are not substantially similar to the issues in the current case. Stated another way: because the 2007 testimony does not address the specific issues upon which this Commission now seeks testimony, it is not relevant.

While it is true that Binz (who did not appear at the 2007 rate case hearing) offered his opinion at that time that the Commission should approve a 50 percent pass-through FAC for AmerenUE if it believed an FAC was necessary, it is significant to note that Binz's opinion was not based upon any analysis of the now-existing FAC or any of the facts of utility costs and rate recovery that have occurred since his 2006 testimony. It is conceivable that Mr. Binz could have changed his opinions about the FAC in the years since his testimony was filed, but we will never know since he will not appear in this case or be subject to any cross-examination. Consequently, Binz's opinion testimony in the 2007 rate case is wholly irrelevant to the operation of the current FAC or of the appropriateness of a different FAC pass-through arrangement given the current

conditions facing AmerenUE. The issues are simply not substantially similar enough to make the proffered testimony relevant in this action.

Conclusion

AARP and Consumers Council of Missouri have had several opportunities to submit testimony regarding AmerenUE's FAC in this case and they have declined to take advantage of those opportunities. They had nearly five months between July 24, 2009 and December 18, 2009, when all parties had agreed that testimony related to the FAC was required to be filed. They should not now be allowed to put more than three-year-old hearsay opinion testimony into the record, and this is particularly true when the witnesses will not appear at the hearing or be subject to cross-examination by the parties about their opinions. For all of the reasons set forth herein, this Commission should deny the request by AARP and Consumers Council of Missouri to take official notice of previous testimonial exhibits from AmerenUE's 2007 rate case.

Respectfully submitted,

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