

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

James Dickson and Angela Dickson,)	
)	
Complainants,)	
)	
v.)	<u>File No. EC-2016-0230</u>
)	
KCP&L Greater Missouri Operations)	
Company,)	
)	
Respondent.)	

MOTION TO EXCLUDE SUBMISSIONS

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, for its *Motion to Exclude Submissions* states:

1. Commission Rule 4 CSR 240-2.130 prescribes the rules of evidence in any hearing before the Commission. 4 CSR 240-2.130(13) states that all exhibits will be tendered at the time of hearing.

2. On October 22, 2016, at the hearing on this casefile, complainants James Dickson and Angela Dickson (Complainants) sought admission of several documents and recordings purported to be admissible evidence that were submitted into the case file through EFIS. Tr. 2: 12, l. 1-3. The Complainant had not prepared documents for tender at the hearing. At the hearing, counsel for KCP&L Greater Missouri Operation Company (GMO) objected to admission of the documents and recordings, asserting that said materials were inadmissible hearsay. Tr. 2: 13, l. 12-16. Judge Burton directed the Complainants to file a motion for admission along with their post-hearing brief, pursuant to 4 CSR 240-2.130(16). Tr. 2: 14, l.6-8; 124, l. 2-4.

3. On November 17, 2016, the Complainants submitted the following motions in compliance with the Judge's instructions at the hearing:

- Motion to Admit Rebuttal Evidence to Statement Regarding Fires Associated with KCP&L/GMO Smart Meters
- Motion in Limine to Exclude Testimony of Julie Dragoo
- Motion to Admit Expert Testimony by Barrie Trower for Civil Action #: 3:11-cv-00739-MO for the case *AHM, BY AND THROUGH HER Guardian ad litem and father, David Mark Morrison, and David Mard Morrison, individually v. Portland Public Schools*.
- Motion to admit an article from the *Journal of Chemical Neuroanatomy*
- Motion to enter exhibit entitled *The Seletun Scientific Statement*, Feb. 3, 2011. By the Karolinska Institute Department of Neuroscience.
- Motion to admit BioInitiative 2012 Report including the Updated 2014 Summary to the Public.

4. On November 17, 2016, the Commission issued its order directing the parties to respond to the Complainants' post-hearing motions for admission no later than November 28, 2016.

5. On November 18, 2016, the Complainants submitted the following motions:

- Motion to enter exhibit entitled Article in *Electromagnetic Biology and Medicine*. June 2013. By Samuel Hilham, Washington State Department of Health.
- Motion to enter an exhibit at a weblink <https://youtu.be/7MfiNYzdi24>

6. Pursuant to 4 CSR 240-2.130(17), Staff objects to the Complainants' motions as the submitted documents lack an evidentiary foundation and constitutes inadmissible hearsay.

Evidentiary Foundation

7. In an administrative proceeding, the necessity of laying a proper foundation for the admissibility of writings, documents and records is required even though the technical rules of evidence do not apply. See *Smith et al. v. Morton et al.*, 890 S.W.2d 403, 406 (Mo. App. E.D. 1995), see also *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. 2003). A proper foundation requires authentication of the document sought to be admitted. *Collins v. West Plains Mem. Hosp.*, 735 S.W.2d 404, 407 (Mo. App. S.D. 1987).

8. The Commission has previously rejected the admission of documents into evidence for which the proper foundation had not been laid. See, e.g., *In the Matter of the Application by Aquila, Inc., for Authority to Assign, Transfer, Mortgage or Encumber Its Franchise, Works or System*, EF-2003-0465, EFIS , (Mo. P.S.C. Dec. 4, 2003); *In the Matter of Union Electric Co. of St. Louis, Mo., for Authority to File Tariffs Increasing Rates for Electric Service*, ER-1983-0163 (Mo. P.S.C. Oct. 21, 1983); *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service*, GR-1998-0140 (Mo. P.S.C. Aug. 10, 2000).

9. In this case, the Complainants have not put forth any foundation to identify authors or to describe their connection of the facts to this proceeding for the following exhibits:

- A) "Motion to Admit Rebuttal Evidence to Statement Regarding Fires Associated with KCP&L/GMO Smart Meters."
- B) "Motion to Admit Expert Testimony by Barrie Trower for Civil Action #: 3:11-cv-00739-MO for the case *AHM, BY AND THROUGH HER Guardian ad litem and father, David Mark Morrison, and David Mard Morrison, individually v. Portland Public Schools.*"

C) "Motion to enter exhibit entitled *The Seletun Scientific Statement*, Feb. 3, 2011. By the Karolinska Institute Department of Neuroscience."

D) "Motion to enter an exhibit at a weblink <https://youtu.be/7MfiNYzdi24>."

10. Particular to scientific studies and reports, Section 536.070(11), RSMo, requires a witness to lay the proper foundation for scientific studies or surveys, stating:

The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility.

Pursuant to § 536.070(11), the witness must testify as to the accuracy of the statistical examination, study, audit, compilation of figures or survey before it can be admitted into evidence. *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 87-88 (Mo. 1960); *In the matter of the Application of Ill. Central Gulf R.R. Co.*, RS-80-321 (Mo P.S.C. January 22, 1982). The Complainants are lay witnesses offering the exhibits addressed below and do not have the ability to meet these foundational requirements for the following exhibits:

A) "Motion to enter exhibit entitled Article in *Electromagnetic Biology and Medicine*. June 2013. By Samuel Hilham, Washington State Department of Health."

B) "Motion to admit an article from the *Journal of Chemical Neuroanatomy*."

- C) "Motion to admit BioInitiative 2012 Report including the Updated 2014 Summary to the Public."

Inadmissible Hearsay

11. The Complainants' proffer of newspaper articles, unrelated studies, and a YouTube video should be excluded as such submissions constitutes inadmissible hearsay. As the Commission has stated, "[s]tatements in violation of evidentiary rules do not qualify as competent and substantial evidence" in administrative proceedings when proper objection is made and preserved. *Concord Publ'g House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 195 (Mo. banc 1996). Hearsay, defined as out-of-court statements to prove the truth of the matter asserted, does not qualify as competent and substantial evidence and are inadmissible when a proper objection is made and preserved. See *State ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949); *State v. Shurn*, 866 S.W.2d 447, 457-58 (Mo. banc 1993); *Concord Publishing House v. Director of Revenue*, 916 S.W. 186, 195 (Mo. banc 1996). The Commission explained the rationale behind excluding hearsay as follows:

The problem with hearsay is that the person who made the statement, or, in this case, wrote the article, cannot be cross-examined by the other parties. Since the author cannot be questioned, there is no way for the other parties to test the truthfulness of the hearsay statements. For that reason, in general, hearsay to which another party objects is not admitted into evidence and is not considered competent and substantial evidence upon which the Commission can base its decision.

In the Matter of the Application of Union Elec. Co., d/b/a Ameren Missouri for Permission & Approval & A Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain, & Otherwise Control & Manage A Util. Waste Landfill & Related Facilities at Its Labadie Energy Ctr., EA-2012-0281, EFIS 99, at pg. 2 (Mo. P.S.C. Aug. 28, 2013) citing *State ex rel. Marco Sales, Inc. v. Public Serv. Com'n*, 685 S.W.2d 216 (Mo. App. W.D. 1984).

12. With specific respect to newspaper articles or clippings, where the information in them is offered for the truth of the matter asserted, it would constitute

inadmissible hearsay. *Wessel v. Wessel*, 953 S.W.2d 630, 631 (Mo. App. S.D. 1997) citing *Thoroughbred Ford, Inc. v. Ford Motor Co.*, (Mo. App. W.D. 1995).

13. In *Union Elec. Co.*, the Commission excluded newspaper articles, written by a reporter unavailable for examination by parties, and studies prepared and published by non-governmental entities or individuals unavailable for cross-examination by parties. EA-2012-0281, EFIS 99 at pg. 5.

14. Staff objects to the admission of the following documents proffered by the Complainants appended to its respective motions on that grounds that the documents are out-of-court statements offered by the Complainants as proof of the matters asserted, and that no author has been made available to the parties for examination:

- A) "Motion to enter exhibit entitled Article in *Electromagnetic Biology and Medicine*. June 2013. By Samuel Hilham, Washington State Department of Health."

The Complainants proffer testimony from an article in support of its claims of negative health effects of electromagnetic fields and the safety of smart meters. As the document is an out-of-court statement offered as proof to the matter asserted, this document should be excluded as it constitutes hearsay.

- B) "Motion to Admit Rebuttal Evidence to Statement Regarding Fires Associated with KCP&L/GMO Smart Meters."

The Complainants proffer a newspaper article for the purpose of refuting the testimony of GMO witness Julie Dragoo related to alleged increased fire risks posed by AMI meters. As the document is an out-of-court statement offered as proof to the matter asserted, this document should be excluded as it constitutes hearsay.

- C) “Motion to Admit Expert Testimony by Barrie Trower for Civil Action #: 3:11-cv-00739-MO for the case *AHM, BY AND THROUGH HER Guardian ad litem and father, David Mark Morrison, and David Mard Morrison, individually v. Portland Public Schools.*”

The Complainants proffer testimony from an Oregon civil action in support of its claims of negative health effects of electromagnetic fields and the safety of smart meters. As the document is an out-of-court statement offered as proof to the matter asserted, this document should be excluded as it constitutes hearsay.

- D) “Motion to admit an article from the *Journal of Chemical Neuroanatomy.*”

The Complainants proffer an article to assert that FCC safety guidelines, are insufficient to secure the safety of the public, arguing the FCC guidelines to which the Respondent’s materials are compliant are outdated. As the document is an out-of-court statement offered as proof to the matter asserted, this document should be excluded as it constitutes hearsay.

- E) “Motion to enter exhibit entitled *The Seletun Scientific Statement*, Feb. 3, 2011. By the Karolinska Institute Department of Neuroscience.”

The Complainants proffer a press release from a foreign entity to assert that FCC safety guidelines, are insufficient to secure the safety of the public, arguing the FCC guidelines to which the Respondent’s materials are compliant are outdated. As the document is an out-of-court statement offered as proof to the matter asserted, this document should be excluded as it constitutes hearsay.

- F) “Motion to admit BioInitiative 2012 Report including the Updated 2014 Summary to the Public.”

The Complainants proffer a report alleging safety concerns and problems regarding exposure to electromagnetic and radiofrequency fields and addresses the outdated FCC guidelines for safety. As the document is an out-of-court statement offered as

proof to the matter asserted, this video should be excluded as it constitutes hearsay.

G) "Motion to enter an exhibit at a weblink <https://youtu.be/7MfiNYzdi24>."

The Complainants proffer a YouTube video that the Respondent's meter poses a fire risk due to its design. As the document is an out-of-court statement offered as proof to the matter asserted, this video should be excluded as it constitutes hearsay.

15. All motions to proffer evidence have precluded parties from cross-examining the authors of such materials. The Commission should not allow Complainants to rely on such evidence to support its position that cannot be tested by opposing parties for accuracy, authenticity and relevancy.

WHEREFORE, for the foregoing reasons Staff objects to the Complainants' submissions and requests that the Commission determines such submissions inadmissible for lack of an evidentiary foundation and as inadmissible hearsay.

Respectfully submitted,

/s/ Hampton Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 28th day of November, 2016.

/s/ Hampton Williams