STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In Re: MidAmerican Energy Company	)	
	)	Docket No. 03-0659
Verified Petition for a Declaratory Ruling	)	

OPPOSITION OF THE PEOPLE OF THE STATE OF ILLINOIS AND THE CITIZENS UTILITY BOARD TO MIDAMERICAN ENERGY COMPANY'S VERIFIED MOTION TO STAY

Pursuant to Section 200.190 of the Illinois Commerce Commission's Rules of Practice and the Administrative Law Judge's scheduling order of, August 18, 2004, the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois ("the People"), and the Citizens Utility Board ("CUB") submit the following response to MidAmerican Energy Company's ("MEC") Motion To Stay ("the Motion"), filed on August 16, 2004, in the above captioned proceeding.

INTRODUCTION

MEC's motion to stay asks the Commission to stay a proceeding in which an order has been issued and a very narrow issue remains on rehearing. MEC's reason for requesting a stay is that the General Assembly **might** override a gubernatorial veto, and that the law enacted via this override **might** have some impact on this proceeding. MEC's request for a stay depends on too many unlikely occurrences coming together. Such hypothetical possibilities should not impact the applicability of Commission Orders.

MEC's request for a stay should be denied for the following three reasons. First, the legislation in question, Senate Bill 2525, ("SB 2525") is not law. Accordingly, it has no effect on the Order already issued in this proceeding. Second, although SB 2525 passed the General Assembly last session, it was vetoed by the Governor and the likelihood of an override is remote.

The Governor vetoed the Bill and provided sound reasons for doing so. Third, even if the veto were overridden and the bill were enacted into law, that law would only apply prospectively. It would not operate retroactively to turn illegal activity in the past into legal activity. 5 ILCS 70/4. Accordingly, issues in this proceeding concerning MEC's illegal activities in the past would not be mooted.

ARGUMENT

I. SB 2525 Is Not Law And Does Not Impact Existing Commission Orders.

Contrary to MEC's arguments, the Commission's Order resolving docket No. 03-0659 is not impacted in any way by pending legislation. Though the General Assembly passed Senate Bill 2525, the Governor vetoed it. Therefore, since SB 2525 has not been enacted into law, it has absolutely no force of law. The mere fact that this Bill could become law in the future is too remote and does not provide a sufficient reason for the Commission to keep its proceeding and implementation of the terms of one of its Orders on hold.

II. It Is Impossible To Know If The Governor's Veto Will Be Overridden.

MEC asserts that the support SB 2525 received in the General Assembly indicates that the veto is likely to be overridden. MEC Motion at 2. This is pure speculation. It is impossible to know how the General Assembly will vote if there is an attempt to override the veto. The Commission should not delay its proceedings and the applicability of one of its Orders on the remote possibility of a veto override, especially when there is no way to gauge the likelihood of such an override. To do so would drag out this proceeding, and would potentially back the Commission into a situation where, after staying the proceeding for weeks, it has very little time to develop a record to resolve the outstanding issues in the rehearing portion of this docket, which is limited by statute to 150 days. 220 ILCS 5/10-113.

III. Even If the Pending Legislation Becomes Law It Would Not Moot the Instant Proceeding Because It Would Only Apply Prospectively.

Even if the General Assembly overrides the Governor's veto and SB 2525 actually becomes law, it will only apply prospectively. The Commission's Declaratory Order previously concluded that the Public Utilities Act ("the PUA" or "the Act") prohibited a division of MEC from making competitive natural gas commodity sales to customers both within and outside of the utility's service territory. Declaratory Order at 25. In the unlikely event that the Governor's veto is overridden and SB 2525 takes effect, it will amend the PUA to allow a utility fitting certain criteria to make competitive sales of natural gas commodity from a division of the utility.

MEC has argued that SB 2525 "will clarify the Act's treatment of competitive gas sales by utilities in Illinois and render moot the instant proceeding before the Commission." Motion at 2. In essence, MEC argues that SB 2525 will apply to MEC's past, present, and future competitive sales of natural gas commodity and nullify the Commission's Declaratory Order.

But, SB 2525 would not, if enacted into law, override the Commission's Declaratory Order. Instead, SB 2525 would amend the PUA by adding a new Section 7-210 that allows gas utilities to make certain unregulated retail sales on a going forward basis as follows:

> The provisions adopted by the Commission shall permit a gas utility to offer unregulated retail sales of natural gas in the State through the same business division of the utility that offers competitive electric power and energy to electric delivery service customers.

SB 2525, 93d Gen. Assem., Reg. Sess. (Ill. 2004) at §7-210(i). SB 2525 is notably silent on the legality of MEC's past competitive sales of natural gas commodity. SB 2525 makes no mention of an intent to have retroactive effect. It only says:

> This Section shall not be interpreted to invalidate any contract for unregulated sales of natural gas executed by a gas utility prior to the effective date of this amendatory Act of the 93rd General Assembly, but unregulated sales of natural gas pursuant to such

> contract after the effective date of this amendatory Act of the 93rd General Assembly shall be subject to the provisions of this Section.

Id. at §7-210(b). Absent a clearly indicated intent to the contrary, the Illinois Supreme Court has held that amendatory legislation *cannot* have retroactive application. *Caveney v. Bower*, 207 Ill. 2d 82, 90 (2003) (*citing Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27 (2001)).

Additionally, the following language in the Illinois Statute on Statutes prohibits retroactive application of statutory amendments that are substantive rather than procedural: "those that are procedural in nature may be applied retroactively, while those that are substantive may not." *Id*. at 92 (*citing* 5 ILCS 70/4). MEC argued in its Motion and in its earlier Combined Application for Rehearing and Request To Revoke Orders, that SB 2525 moots this proceeding by demonstrating that express statutory authority was not needed to engage in competitive sales of natural gas commodity. MEC Combined Application at 5, 7, 21, fn. 8. MEC, in effect, asserted that when SB 2525 becomes law, it will make legal past conduct that the Commission has already deemed was illegal under current law in its Declaratory Order. Clearly, MEC's position would mean that the Commission would have to apply the new Section 7-210 retroactively in a substantive, and not procedural, way. Just as clearly, Section 4 of the Statute on Statutes forbids such a retroactive application of a statutory amendment. 5 ILCS 70/4. Therefore, in the unlikely event that SB 2525 becomes law, the Commission can only read SB 2525 to have a prospective effect.

As the People and CUB have shown, SB 2525 is not law. It is impossible to predict if it will become law. Furthermore, if it does become law through an override of the Governor's veto, it would only apply prospectively and would not render this proceeding moot. Without this

justification of potential mootness, MEC has no basis for seeking yet another delay in this proceeding in the hopes of a legislative "solution" to its past illegal conduct.

Finally, with regard to the savings MEC claims will result from the stay it requests, the delay MEC seeks will increase costs to all parties rather than reducing them, as parties have to continue to devote resources to MEC's defense of actions that the Commission has declared illegal. The delay MEC proposes will also prolong uncertainty for customers in the market. The Commission should therefore deny MEC's Motion to minimize costs to all parties and restore certainty to Illinois' natural gas market.

CONCLUSION

WHEREFORE, for the reasons stated above, the People and CUB respectfully request that the Commission deny MEC'S Motion to Stay.

Respectfully submitted,

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