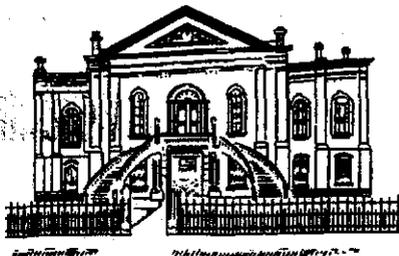


OFFICIAL FILE  
ILLINOIS COMMERCE COMMISSION

LOUIS E. COSTA  
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STATE OF ILLINOIS  
APPELLATE COURT  
FIFTH DISTRICT  
14TH & MAIN STREETS  
P.O. Box 867  
MT. VERNON, IL 62864-0018

October 15, 2004

Donna M. Caton, Chief Clerk  
Illinois Commerce Commission  
527 East Capitol Avenue  
P.O. Box 19280  
Springfield, IL 62794-9280

RE: Illinois Power Company v. Illinois Commerce Commission, et al.  
(ICC No. 02-0169)  
Appellate Court No: 5-04-0441

Dear Clerk:

Enclosed please find the Mandate of the Appellate Court in the above cause.

Under separate cover, the Record on Appeal is being returned to your office in the above cause. Please sign the receipt which is enclosed with the record and return the receipt to this office.

Yours very truly,

  
Louis E. Costa, Clerk

LEC/sp  
Enclo.

cc: Shig William Yasunaga  
John P. Kelliher, Special Assistant Attorney General

STATE OF ILLINOIS, APPELLATE COURT, FIFTH DISTRICT, ss.

AT AN APPELLATE COURT, begun and held at Mt. Vernon, on the First Friday, in the month January, in the year of our Lord, two thousand and four, the same being the 2nd day of January in the year of our Lord, two thousand and four.

Hon.	MELISSA A. CHAPMAN,	Presiding Justice.
Hon.	CLYDE L. KUEHN,	Justice.
Hon.	JAMES K. DONOVAN,	Justice.
Hon.	LOUIS E. COSTA,	Clerk.

BE IT REMEMBERED that on the 9th day of September, 2004, the final judgment of the Appellate Court was entered of record as follows:

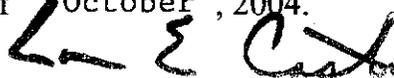
ILLINOIS POWER COMPANY,	)	Petition for the Review
	)	of an Order of the Illinois
Petitioner,	)	Commerce Commission in
	)	
No. 5-03-0441	)	ICC Docket No. 02-0169.
Term, 2004	)	
v.	)	
	)	
ILLINOIS COMMERCE COMMISSION and	)	
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondents.	)	

**RULE 23 ORDER**

It is the decision of this Court that the judgment on appeal be AFFIRMED and stand in full force and effect. And it is further considered by the Court, that costs of appeal shall be taxed as provided by law.

As Clerk of the Appellate Court, Fifth District of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order of the said Appellate Court, in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this 15th day of October, 2004.



\_\_\_\_\_  
Clerk of the Appellate Court.

**NOTICE**

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

NO. 5-03-0441

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

**FILED**

SEP 09 2004

LOUIS E. COSTA  
CLERK, APPELLATE COURT, 5th DIS.

ILLINOIS POWER COMPANY,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and  
THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

) Petition for the Review  
) of an Order of the Illinois  
) Commerce Commission in  
) ICC Docket No. 02-0169.  
)  
)  
)  
)  
)

RULE 23 ORDER

Illinois Power Company (Illinois Power) appeals from an order of the Illinois Commerce Commission (Commission) issued on May 21, 2003, in its docket No. 02-0169. Docket No. 02-0169 was the annual reconciliation of the revenues collected by Illinois Power from its customers under its coal-tar riders (referred to as MGP riders) with the costs associated with coal-tar cleanup expenditures during the 12 months ending December 31, 2001. Pursuant to the Commission's order, utilities were authorized to file proposed tariffs allowing for the collection of charges for the recovery of coal-tar cleanup costs, *i.e.*, costs associated with manufactured gas plants operated decades ago. In response to this order, Illinois Power filed its adjustment for incremental costs for environmental activities for gas operations and adjustment for incremental costs for environmental activities for electric operations. Both riders allow Illinois Power to recover the incremental costs to outside vendors for payments in connection with environmental activities associated with the investigation and cleanup of former manufactured gas plants (MGPs). Furthermore, both riders provide that the Commission may, by order, require an annual review of the

incremental costs collected by Illinois Power under the riders. The underlying proceeding is a review of Illinois Power costs for the reconciliation period for the year 2001.

Illinois Power seeks a review of the reasonableness and lawfulness of the Commission's findings and conclusions in the order that the costs associated with the "Polynuclear Aromatic Hydrocarbons Study" (PAH Study) were not appropriately recovered under Illinois Power's MGP riders. For the reasons that follow, we affirm.

#### STANDARD OF REVIEW

Since the Commission is an administrative agency, our review of its orders is somewhat limited. *Illinois Power Co. v. Illinois Commerce Comm'n*, 316 Ill. App. 3d 254, 258, 736 N.E.2d 196, 200 (2000). On appeal, a court should reverse such an administrative order only if the court reaches one of the following conclusions: (1) the Commission's findings are not supported by substantial evidence in the record, (2) the Commission acted beyond its authority, (3) the order violates a state or federal statute or constitution, or (4) the proceedings were in violation of the state or federal constitution or laws to the petitioner's prejudice. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 203 Ill. App. 3d 424, 433, 561 N.E.2d 426, 433 (1990).

Because of the agency's familiarity with its own statutes and regulations, the statutory interpretation of the Commission will normally be granted extreme deference on appellate review. *Local Union Nos. 15, 51, & 702 v. Illinois Commerce Comm'n*, 331 Ill. App. 3d 607, 613-14, 772 N.E.2d 340, 345 (2002). In reviewing an order of the Commission, a court may not reevaluate the credibility or weight assigned to evidence or substitute its judgment for that of the Commission. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 283 Ill. App. 3d 188, 200-01, 669 N.E.2d 919, 928-29 (1996). Recognizing that the Commission's decisions are entitled to deference because they are the judgments of an expert body appointed by the legislature, courts have uniformly refused to second-guess the

Commission. *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill. 2d 1, 12, 643 N.E.2d 719, 725 (1994).

The powers of courts in reviewing orders issued by the Commission are limited because the court exercises a statutory jurisdiction pursuant to the Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq.* (West 2002)) rather than a general appellate jurisdiction. *City of Chicago v. Illinois Commerce Comm'n*, 264 Ill. App. 3d 403, 408, 636 N.E.2d 704, 708 (1993). Under that strict statutory standard, the Commission's order is presumed valid by the court. The court's inquiry is confined to the jurisdiction of the Commission, the sufficiency of the evidence, the sufficiency of the findings, and the preservation of constitutional rights. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill. 2d 120, 142, 510 N.E.2d 865, 874 (1987).

The Act also places a heavy burden on parties who appeal Commission orders. They bear the burden of proof on all the issues raised and must overcome the presumption of validity and reasonableness accorded Commission orders if they are to prevail. 220 ILCS 5/10-201(d) (West 2002); *Illinois Power Co. v. Illinois Commerce Comm'n*, 316 Ill. App. 3d 254, 258, 736 N.E.2d 196, 200 (2000). Deference to the Commission's factual findings is particularly appropriate when those findings involve the assessment of technical evidence. *Abbott Laboratories, Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 717, 682 N.E.2d 340, 351 (1997). Courts will not interfere with the functions and authority of the Commission so long as its order demonstrates a sound and lawful analysis. *City of Chicago v. Illinois Commerce Comm'n*, 264 Ill. App. 3d 403, 409, 636 N.E.2d 704, 708 (1993). In analyzing the reasonableness and lawfulness of Commission orders, a court should resolve all doubts regarding the propriety of the means or methods used in the exercise of a power clearly conferred in favor of the action of the Commission in the interest of the administration of the law. *State Public Utilities Comm'n v. Springfield Gas & Electric Co.*,

291 Ill. 209, 215-16, 125 N.E. 891, 895 (1919).

## BACKGROUND

A rider is a cost recovery method that generally alters an otherwise applicable rate and recovers a specific cost under particular circumstances. *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 133, 651 N.E.2d 1089, 1100 (1995) (citing *A. Finkl & Sons Co. v. Illinois Commerce Comm'n*, 250 Ill. App. 3d 317, 620 N.E.2d 1141 (1993)). A rider can increase a rate, allowing the utility to recover the cost as it is incurred, alleviating the delay of waiting until the utility files a general rate case to recover expenses and often includes a reconciliation formula designed to match revenue recovery with actual costs. *A. Finkl & Sons Co.*, 250 Ill. App. 3d at 327, 620 N.E.2d at 1148 (citing *City of Chicago v. Illinois Commerce Comm'n*, 13 Ill. 2d 607, 609, 150 N.E.2d 776, 777 (1958)).

Illinois Power's coal-tar rider was established following hearings in Commission docket Nos. 91-0080 through 91-0095. As relevant to these proceedings, Illinois Power has two riders designed to recover coal-tar or MGP cleanup costs, identified as adjustments for incremental costs of environmental activities for gas operations and electric operations. Regarding incremental costs, these riders state as follows:

"Incremental Costs refer to all payments by Utility to outside vendors in connection with Environmental Activities associated with the investigation and cleanup of former Manufactured Gas Plants. Such costs also include but are not limited to consultant and legal fees, land acquisition costs, litigation expenses, costs or expenses associated with judgments, orders[,] or decisions (including settlements) by a court, a governmental agency or department, or other adjudicatory or quasi-adjudicatory body related to Manufactured Gas Operations/Sites."

With respect to environmental activities, the riders provide as follows:

"Environmental Activities refer to the investigation, sampling, monitoring, testing,

removal, disposal, storage, remediation[,] or other treatment of residues associated with Manufactured Gas Operations, or with other operations that generated substances subject to federal, state[,] or local environmental laws conducted at locations where Manufactured Gas Plants operated, or the dismantling of facilities utilized in Manufactured Gas Operations."

At issue in these proceedings were \$1,937,818 in costs for the year 2001. The expenditures were related to 25 sites. Illinois Power witnesses testified that in order to establish monthly charges under the riders, Illinois Power estimated total MGP expenditures at the beginning of each year. As the Commission noted, in orders on prior MGP reconciliation dockets, Illinois Power witnesses have stated that these MGP investigation and remediation costs are forecast as a part of Illinois Power's annual operating budget. On a monthly basis, any overrecovery or underrecovery through the riders was calculated based on a comparison of actual monetary revenues collected from customers and the projected monthly MGP expenditures. This amount was then included in the calculation of the rate charged to customers in the succeeding month.

Of the \$1,937,818 in costs claimed to be recoverable under incremental environmental activity cost riders, the Commission staff recommended the disallowance of two separate expenditures totaling \$149,000. The staff did not challenge the prudence of the expenditures but, rather, the appropriateness of recovering these costs through the riders as opposed to through base rates. The first challenged expenditure, which has not been appealed, was the staff's recommended disallowance of \$49,000 for dues associated with Illinois Power's membership with the Electric Power Research Institute (EPRI). The second recommended disallowance was for Illinois Power's share of the cost of a study conducted at the request of Illinois Power, Commonwealth Edison Company, and Ameren by EPRI. The study concerned the background level of polynuclear aromatic hydrocarbons (PAHs) in surface soil

in Illinois. The amount of this second disallowance and the subject of the instant appeal is \$100,000.

Commission staff witness Dianna Hathhorn, a certified public accountant, testified that the PAH Study costs were not appropriate for recovery in the riders since they were not incremental cleanup costs of MGP sites. In Ms. Hathhorn's view, the PAH Study costs were research and development (R&D) costs, which are base-rate components to be considered or rate recovery in the context of a test year in a general ratemaking. The staff believed the PAH Study's underlying purpose to be the influence of the Illinois Environmental Protection Agency (IEPA) to change its cleanup standards statewide rather than to determine the proper cleanup activities at individual Illinois Power MGP sites. Accordingly, the staff testified that the costs at issue are more appropriate for recovery in base rates rather than in the riders. The staff further explained that Illinois Power's base rates include R&D costs and that to include R&D in the rider as well as in the base rates would be to allow a double recovery of R&D costs. Since costs in 2001 were paid for with insurance recoveries held in trust, the staff recommended that Illinois Power be directed to reimburse the insurance trust for all disallowed costs.

The record indicates that the PAH Study had been conducted to determine, on a statistical basis, the concentration of PAHs in surface soil in Illinois. In the PAH Study, samples of PAH levels were taken at a number of locations throughout the state, including six locations "around" Illinois Power MGP sites. Illinois Power posited that the IEPA's cleanup objective for PAHs was too low and, in many cases, below the background concentrations of these compounds. The underlying purpose of the study, as alleged by Illinois Power, is to provide support for revisions the utilities believe should be made to applicable "Tiered Approach to Corrective Action Objectives" (TACO) regulations, which establish the acceptable levels of PAH concentrations that may remain in the soil at MGP

sites.

Illinois Power's argument before the Commission was that it had engaged in the PAH Study as a part of its efforts to minimize the cleanup costs to ratepayers associated with its manufactured gas plants and that it had engaged in the PAH Study believing that it was the most cost-effective method of achieving its cleanup goals associated with MGP sites. This was based on the fact that while PAH concentration in the soil may be determined either by a statewide area background approach or by a site-specific background approach, the site-specific background approach requires costly field investigation at each site to achieve IEPA concurrence. Accordingly, Illinois Power with EPRI and several Illinois utilities approached the IEPA with a proposal to do a scientific statewide study of background PAH concentrations in hopes of modifying the TACO PAH objectives to take background PAH concentrations into account. TACO regulations establish the acceptable levels of PAH concentrations that may remain in the soil at MGP sites. PAHs are one class of compounds typically found at MGP sites. Illinois Power contended that if the TACO objectives were to be modified, then Illinois Power's customers would see a direct benefit of lower MGP costs. Specifically, Illinois Power asserted that a modified PAH objective would reduce the amount of contamination that must be managed at Illinois Power's MGP sites. Illinois Power acknowledged that at this point it was not possible to ascertain the exact amount of savings that might result from a modification of the TACO objectives. Savings, if any, would be realized when or if PAH objectives are revised. Illinois Power also stated that some of the data could be used in the determination of site-specific background PAH concentrations for six of Illinois Power's MGP sites.

In its opposition to a recovery of the disputed costs through the company's riders, the Commission staff countered that the PAH Study is an attempt to modify the TACO requirements on a generic basis. The staff reiterated that the cost of the PAH Study was not

an incremental cleanup cost but, rather, an R&D cost appropriate for recovery under the company's base rates. According to the staff, simply because a cost is MGP-related does not mean it qualifies for rate recovery under the riders.

After hearing all the evidence in the case, the Commission determined that, although the question was a close one, the activities composing the PAH Study were not sufficiently related to the investigation and analysis of Illinois Power's MGP sites to qualify as "environmental activities" within the meaning of Illinois Power's riders and the Commission order in docket Nos. 91-0080 through 91-0095. The Commission acknowledged that MGP site remediation is a lengthy process involving many phases, including the investigation of MGP sites, and that prudently incurred investigation costs passed to outside vendors may be recoverable under MGP riders. The Commission accepted that the purpose of the study is to convince the IEPA to change its regulations, not to study remediation activities currently taking place at Illinois Power's MGP sites.

The Commission recognized that identifying the nature and extent of contamination is a necessary part of the investigation stage of the remediation process and that the extent of contamination requires remediation at any site if dependent in part on TACO regulations. The Commission pointed out, however, that the staff did not challenge site-specific investigation costs. In contrast, the Commission observed that the PAH Study involves soil sampling and analysis at various locations throughout Illinois, only six of which were near Illinois MGP sites, and that it was undertaken to assist in the IEPA's evaluation of whether allowable PAH concentration levels would be increased. The Commission stated: "The study is multi[ ]utility and multi[ ]location in nature. Results and possible future benefits, if any, of the PAH study are not yet known. Regulations already exist that specify necessary clean up measures. The extracurricular nature of the PAH study leads the Commission to conclude that it does not fall within the realm of environmental activities to be recovered

through [Illinois Power]'s coal tar rider." Thus, the Commission found that the PAH Study costs in question were not properly recoverable through Illinois Power's riders.

Following the entry of the order on May 21, 2003, Illinois Power filed an application for a rehearing with the Commission. From the denial of that application, Illinois Power appeals.

#### ANALYSIS

In this appeal, Illinois Power challenged various factual findings made by the Commission. The Commission's factual findings are *prima facie* correct and may be reversed only if Illinois Power successfully demonstrates that they are not based on substantial evidence, which is less than a preponderance. 220 ILCS 5/10-201(d), (e)(iv) (West 2002); *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill. 2d 1, 11-12, 643 N.E.2d 719, 725 (1994). In order to overturn the Commission's evidentiary determination, under the substantial evidence standard, the petitioner must do more than merely show that the evidence supports a conclusion different from that reached by the Commission; it must affirmatively demonstrate that the opposite conclusion is clearly evident. *Abbott Laboratories, Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 714, 682 N.E.2d 340, 349 (1997). Additionally, the substantial evidence standard may be met even if the evidence "support[s] more than one possible finding, and possibly even several." *Central Illinois Public Service Co. v. Illinois Commerce Comm'n*, 268 Ill. App. 3d 471, 479, 644 N.E.2d 817, 823 (1994).

Illinois Power first argues that the record taken as a whole clearly demonstrates that the PAH Study costs are recoverable under Illinois Power's MGP riders. Illinois Power also argues that the Commission did not read the record. We do not agree with this contention. It is apparent that the Commission did read the record. Ultimately, in this case, the Commission determined that the costs at issue are not "environmental activities" within the

meaning of the riders. The Commission determined that the activities at issue did not qualify as environmental activities because they were not sufficiently related to the investigation and analysis of Illinois Power's particular sites. A reading of the rider supports this conclusion. Thus, the environmental activities at issue refer to the investigation, sampling, monitoring, testing, removal, storage, remediation, or other treatment of the residues associated with particular, specific sites. That the residues tested during the PAH Study were not of "residues associated with Manufactured Gas Operations" appears beyond argument. There was testing at six sites around MGPs.

Illinois Power next argues that the costs associated with the PAH Study were prudent. The Commission determined that the costs at issue were not sufficiently related to the investigation and analysis of Illinois Power's MGP sites to qualify as "environmental activities." Illinois Power argues that since it engaged in the PAH Study with a third-party provider in an attempt to lower its cleanup costs for its MGP sites, there is no doubt that the study is an incremental cost related to its MGP sites. The Commission determined that the activities at issue did not qualify as environmental activities because they were not sufficiently related to the investigation and analysis of Illinois Power's particular sites. It is uncontested that individual sites were not tested. Therefore, the costs did not qualify as being environmental activities under the riders and are thus not recoverable.

Reviewing courts view rider recovery of costs as an unusual adjunct to the normal base-rate recovery scheme. Thus, the Commission's narrow reading of the rider's terms is appropriate and should be accorded substantial deference. Since a tariff is considered to be a law and not a contract (*Illinois Central Gulf R.R. v. Sankey Brothers, Inc.*, 67 Ill. App. 3d 435, 439, 384 N.E.2d 543, 545 (1978) (citing *City Messenger Service of Hollywood, Inc. v. Capitol Records Distributing Co.*, 446 F.2d 6 (6th Cir. 1971))) and since a reviewing court must rely on the Commission's interpretation of the statute if there is a reasonable debate

regarding its meaning (*Peoples Gas, Light & Coke Co. v. Illinois Commerce Comm'n*, 175 Ill. App. 3d 39, 52, 529 N.E.2d 671, 680 (1988)), the Commission's interpretation of and application of the terms of the riders in this case should be accorded substantial deference. Where the "Commission's interpretation is not an unreasonable one," the reviewing court will not overturn it. *Chicago Housing Authority v. Illinois Commerce Comm'n*, 20 Ill. 2d 37, 42, 169 N.E.2d 268, 271 (1960). In this case, testimony supported the Commission's conclusions that the costs at issue were more properly characterized as base-rate R&D costs having the intended purpose of being used to influence the IEPA to change existing regulations than they were as environmental costs. The Commission's determination is a reasonable interpretation of Illinois Power's tariffs and should be affirmed.

Lastly, Illinois Power argues that the Commission imposed a new prudence standard on Illinois Power by requiring that for an expenditure to be considered prudent, the cost must have an immediate benefit. The Commission's decision in this case did not turn on the prudence of the costs at issue but, rather, on the Commission's determination that the activities composing the PAH Study are not sufficiently related to the investigation and analysis of Illinois Power's MGP sites to qualify as environmental activities within the meaning of Illinois Power's riders and the Commission's order.

While imprudently incurred costs are clearly not recoverable through the rider, the prudence of an expenditure does not guarantee its recoverability through a rider. Although the Commission in this case noted that the results and future benefits, if any, of the PAH Study are not yet known, this was but a small part of its analysis, not of the prudence of the expenditures in question, but of their relationship to site-specific investigation costs. The Commission's decision in this case announces no new standard regarding the prudence of costs properly recovered through the MGP riders.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the Commission.

Affirmed.

DONOVAN, J., with CHAPMAN, P.J., and KUEHN, J., concurring.