

Notice of Administrative Law Judge's Ruling

On or about August 15, 2005, the Cook County State's Attorney's Office ("CCASO" or "Movant") and the Citizens Utility Board ("CUB" or "Movant") filed, in the Commonwealth Edison Company ("ComEd") proceeding in Docket 05-0159, a "Motion in limine to bar witnesses from being cross examined simultaneously in this matter with any other matter." Movants request that "the hearing be separate and any cross-examination in this matter be done separately from any other docket", the "other docket" being the "Ameren" cases in 05-0160 et al. Under Movant's request, each witness would be separately cross-examined in each docket.

In support of the Motion, the Movants assert, among other things, that all evidence admitted in this docket needs to be relevant and admissible to this docket, and that the record must be clear and distinct. (Motion at 4-5) In the event that a witness is questioned on testimony that differs in the ComEd and Ameren cases, the record may be "muddled or unclear" and the parties are "left to guess the meaning of the transcript."

On August 19, 2005, responses to the Motion were filed by Ameren, ComEd and the Commission Staff ("Staff"). Ameren opposes the relief sought in the Motion as an unnecessary and untimely challenge to the rulings of April 12, 2005 and April 22, 2005 establishing use of a coordinated schedule that includes a round of common hearings. Ameren asserts that many of the common witnesses have offered similar if not identical pre-filed testimony, and that there are ways to conduct the common hearings in a fair manner that avoid the inefficiencies that would result from Movants' untimely proposal.

ComEd does not oppose the Motion on the condition that any party wanting to cross a witness in 05-0160 et al. could move that its cross of the witness in 05-0159 be adopted as its cross in 05-0160 et al.

In its response, Staff takes no formal position on the motion, but does observe that the majority of common witnesses have identical or near identical testimony in both dockets. By crossing the same witnesses twice, Staff states, the inefficiency and additional time required by Movants' proposal is obvious. To the extent there is cross of a common witness on Ameren-specific or ComEd-specific issues, Staff believes such cross can be identified without difficulty and admitted in one docket only.

On August 22, 2005, a reply was filed by Movants. They do not object to the condition offered by ComEd. With that modification, Movants believe their approach is a reasonable solution to Ameren's and Staff's concerns regarding the inefficiencies of common witnesses being cross-examined twice.

Staff also filed a reply. Staff favors what it refers to as the Ameren proposal to cross each witness once, whereby the cross-examiner would identify up-front whether cross questions are being asked in the Ameren Dockets, the ComEd docket or both.

Upon consideration of the record, it is ruled that the Motion is denied as explained below.

In the ComEd and the Ameren cases, it was observed in rulings issued April 12, 2005 that “[w]hile no approach will provide easy solutions to the potential problems associated with cases of this magnitude, a coordinated proceeding approach strikes the best balance in terms of promoting fairness and avoiding prejudice, minimizing or mitigating inefficiencies and inconvenience to parties, and providing an opportunity to parties to advance consistent positions.”

In subsequent rulings issued April 22, 2005, coordinated schedules were implemented in the two cases. They include hearings the week of August 29 to September 2 for 05-0159, common or joint hearings the week of September 6-9, and hearings in 05-0160 et al. the week of September 12-16.

A key element of the coordinated schedule is the round of common or joint hearings, which provides an opportunity for many of the witnesses who have pre-filed testimony in both dockets to appear and be cross-examined only one time, instead of twice, thereby reducing cross-examination time and overall hearing time for the benefit of the witnesses and all participants.

Subsequent to the time those rulings were issued, numerous Staff and Intervenor witnesses did in fact file their respective testimonies in both dockets. Generally speaking, most of the testimony of witnesses who filed in both docket dockets is common to both cases. Under the circumstances, requiring all such witnesses to be cross-examined twice -- once in 05-0159 and again in 05-0160 et al. -- would be an inefficient use of party and witness time. Such a scenario would likely prolong the hearings, and adversely affect the overall coordinated hearing process, to the inconvenience of all participants. While the ComEd condition -- allowing a party in 05-0160 et al. to move that its entire completed cross of a witness in 05-0159 be adopted as its cross of that witness in 05-0160 et al. -- could mitigate the problem, it carries the obvious risk that one of the many parties will object to such a motion and that the witness will end up being cross-examined twice on the same common testimony.

It is believed there are other measures available to alleviate the concerns raised in the Motion without having to cross-examine witnesses twice. While the use of such measures is not perfect, they are preferable to requiring numerous witnesses to be cross-examined twice. The specific measures to be used in this regard will be the subject of subsequent rulings in both dockets.

In conclusion, the Motion is denied.