

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION)
)
On Its Own Motion) Docket No. 03-0767
)
Investigation into the proper allocation of)
line extension and service installation)
costs)

**BRIEF IN REPLY TO EXCEPTIONS
OF THE HOME BUILDERS
ASSOCIATION OF ILLINOIS**

NOW COMES the Home Builders Association of Illinois (“HBAI”) and pursuant to Section 200.820 of the Rules of Practice files this Brief in Reply To Exceptions of Unions 15, 51, and 702 of the International Brotherhood of Electrical Workers, AFL-CIO (“IBEW”) and states as follows:

BACKGROUND

This investigation was ordered by the Illinois Commerce Commission (“Commission”) on December 17, 2003 to investigate the proper allocation of line extension and of service installation costs. After numerous workshops to discuss the issues, the utilities who were parties and Staff agreed that it is appropriate for utilities to continue to have the option to extend free line extensions and service connections with the costs recovered in rates. The record was marked “heard and taken” on February 8, 2005. The IBEW intervened late on August 19, 2005 over one and one-half years after this docket was commenced. The Administrative Law Judges’ (“ALJ”) Proposed Order was served November 8, 2005 and the IBEW’s Brief on Exceptions was filed November

15, 2005. HBAI filed a Motion to Extend the Time To File Its Brief In Reply to Exceptions. The ALJ granted an extension of time until November 30, 2005.

IBEW submitted two exceptions to the Proposed Order. The first requested that the Commission initiate another investigation into whether the so-called “private agreements” between the HBAI and Commonwealth Edison Company (“ComEd”) and the Ameren Companies violate the Commission’s Rules or the Public Utilities Act. The second exception states “The Proposed Order should be modified in relevant part so that it either dismisses the proceeding without reference to and incorporation of the Parties’ Settlement Agreement or otherwise complies with the Illinois Administrative Procedure Act’s Rulemaking Requirements.” Not only did IBEW file late, but also their arguments are wrong. HBAI has no problems with the unions, but IBEW attempts to raise new arguments and their arguments are wrong.

**IBEW May Not Raise New Arguments and Issue
For The First Time In It’s Brief On Exceptions
And Therefore, Their Brief on Exception Should Be Disregarded**

New issues may not be raised in a Brief on Exception to the ALJ’s Proposed Order without good cause. This docket has been closed since February 8, 2005.

The Rules of Practice, Section 200.200 on Intervention provides in significant part:

“Except for good cause shown, an intervener shall accept the status of the record as the same exists at the time of the beginning of that person’s intervention. Subject to Section 200.850, any intervener shall be allowed to comment in briefs and oral arguments on any matter addressed in the proceeding, whether before or after his intervention; and such intervener shall be bound by rulings and orders theretofore entered” 83 Ill. Admin. Code 200.200(e).

The ALJ in granting the IBEW intervention noted, “Intervenors must accept the record as it exists” and “includes the completion of hearings in this matter, as well as, all filings made prior to the time IBEW filed its Petition For Leave To Intervene.” IBEW, without justification, filed late and would now ask the Commission to “walk back the clock” by adding to the record as it now exists and contrary to the Commission’s Rules and the admonition of the ALJ. All of the material to be added was available prior to their Brief on Exceptions (See Artis v. Fibre Metal Products (1st Dist 1983) 115 Ill. App. 3d 228, 450 W.E.2d756, 759 where new material was disregarded because it was previously available). The Rules of Practice prohibit such new matter in Section 200.200(e) supra, except for good cause shown (See Ferari v. Department of Human Rights (4th Dist 2004) 351 Ill. App. 3d1099, 815 N.E. 2d 417 holding the department exceeded its authority by accepting a late-filed response without a showing of good cause) and IBEW has not shown cause, good or otherwise to disregard the rules. “Trial courts should not permit” [and neither should the Commission permit] litigants to stand mute... then frantically gather evidentiary material to show the Court erred in its ruling.” Gardner v. Navistar International Transportation Corp. (4th Dist. 1991) 213 Ill. App. 3d342, 57 N.E. 2d1107, 1111. The Commission must follow its rules, Business and Professional People for the Public Interest v. Illinois Commerce Commission (1990) 136 Ill. 2s 192, 555 N.E. 2d 693, 709, totally disregard the IBEW Brief on Exceptions because good cause has not been shown and they have waived these new arguments and issues by standing mute.

No “good cause” has been shown in the sense of Section 200.200 to not “accept the status of the record as it now exists.” IBEW does not argue that its tardiness in filing

was caused by any good reason or that the new matter was unavailable. No “good cause” has been shown to comment on matter not “addressed in the proceeding whether before or after his intervention.” No good cause has been shown for IBEW to not be bound by “orders theretofore entered.” 83 Ill. Admin. Code 1200.200e, supra

IBEW seeks to comment on matter never addressed in this proceeding and raises new matter such as a new investigation, exemptions, outsourcing, risks to the states electrical system and protecting utility employees. None of these were “matters addressed in the proceeding whether before or after his intervention.” 83 Ill. Admin. Code 200.200(e) it is well established that the Commission must follow its own rules. Business and Professional People For The Public Interest, v. ICC at 555 N.E. 2d 693,709.

The IBEW does not follow “orders theretofore entered “in this docket and asks the Commission to disregard its own Order and the Order of the ALJ. The Commission Order initiating this investigation specifically addressed the matters to be addressed in this proceeding. In particular the Commission posed five very specific questions to be answered. Those questions are answered in the Appendix to the Proposed Order. The ALJ ordered the IBEW to accept the record, as it exists. The record is complete, the docket closed and the Commission must follow its own rules.

It would be poor public policy to allow an intervener to raise new matter, not previously addressed, in their Brief on Exceptions. Every docket must come to an end, but this would be impossible if interveners were allowed to endlessly raise new matters after the record was marked “heard and taken, ”the docket closed. The Courts take a dim view of late-tendered evidence and late-tendered arguments:

the interests of finality and efficiency require that trial courts not consider such late-tendered evidentiary materials, no matter what the contents

thereof may be.: Gardner v. Navistar International Transportation Corp. 213 Ill. App.3d 242, 57NE2d p. 1107, 1111, (4th Dist 1991). Cf. Hutchings V. Bauer 212 Ill. App. 3d 172, 571 NE2d p. 169. (2nd Dist 1991).

For the foregoing reasons, The HBAI respectfully asks the Commission to disregard all IBEW's arguments as required by the Commission rules, the ALJ, and case law. If the Commission agrees, it may stop here.

ALTERNATIVE REPLY

Response to Exception 1.

THE AGREEMENTS HBAI HAS WITH AMEREN COMPANIES AND COMED DO NOT VIOLATE THE COMMISSION'S RULES, OR THE PUBLIC UTILITIES ACT AND DO NOT REQUIRE A NEW PROCEEDING.

The public agreements between HBAI and ComEd and the Ameren Companies do not require further investigation because they do not violate the Commission's Rules or The Public Utility Act. The IBEW argues that the present proceeding are deficient and that new proceedings are required to consider Code Parts 410 AND 500. The IBEW's argument that the Commission should open a new docket to determine the legality of the HBAI agreements is misplaced. These public agreements may be examined by the public, Staff and Commission. They will then find that there is nothing in the agreements that legally violate 83 Ill. Admin. Code Parts 410 or 500.

The HBAI has no argument with the union. The IBEW argues that Code Part 410 and 500 preclude the installation of line extensions by anyone other than the utilities themselves. They further argue, without citation of authority, that these Code Parts impose mandatory installation obligations, which cannot be delegated. It must be conceded that sub Sections 410.410(a) (1), 410.410(c) (1), 500.310(b) (1) and 500.320(b)

(1) requires a strained reading to conclude as IBEW does, that only IBEW members working for ComEd and Ameren companies can make the various extension and installations. This is an argument against out outsourcing and has no place in this docket. There is nothing wrong with ComEd, Ameren Companies and HBAI responding to the ALJ's directions to explain their positions.

Subsection 410.410(a) (1) provides:

1) "The entity providing distribution services may file a line extension provision in conjunction with its rate schedule. If the entity providing distribution services files a line extension provision, that provision shall be worded so that the applicant will have a choice of obtaining the extension under the provision or obtaining the extension under subsections (b) and (c). If the line extension provision is permitted to become effective by the Commission, then the applicant may proceed under the line extension provision or under subsections (b) and (c)."

Nothing in this provision of the code is violated by the HBAI agreements with ComEd and Ameren companies. The position statement of record with ComEd provides, in pertinent part:

ComEd agrees to engage in good faith discussions with developers to create a pilot project for installation of developer-installed electric infrastructure in developer subdivision, in order to improve or ensure both cost recovery and related timing issues for both the developers and utilities. ComEd will in good faith jointly develop these pilot projects with developers which may include without limitation agreements for developer installation of some distribution facilities, installation of conduit systems by developers per utility specifications or other creative means that will provide joint benefits. The feasibility and desirability of developer-installed infrastructure will be evaluated by ComEd after completion of these pilot projects. Based on this agreement, Issue Three, the builder installation issue will be dropped by the HBAI.

Neither good faith discussions nor evaluation of pilot projects can in any sense violate sub Section 410.410(a) (1). Further investigation is not required.

The position statement between HBAI and Ameren provides, in pertinent part:

Suggested HBAI and Ameren resolution: HBAI and Ameren agree to engage in good faith discussion to develop alternative approaches to installation of electric

infrastructure in developer subdivisions, in order to improve or ensure both cost recovery and related timing issues for both the developers and utilities. The HBAI and all individual utilities would in good faith jointly develop these alternate approaches which may include without limitation agreements for developer installation of some distribution facilities, installation of conduit systems by developers per utility specifications or other creative means that will provide joint benefits. These approaches would be developed prior to the utilities next rate case. Based on this agreement the builder installation issue will be dropped by the HBAI with regard to the Ameren companies.

Neither good faith discussions nor evaluation of pilot projects can in any sense violate 410.410(a) (1) or (b)(1) pertaining to free footage allowance. These are not contradicted by the agreements with ComEd and Ameren Companies.

Subsection 400.410(c) (1) provides:

1) If the cost of the line extension is greater than that allowed in subsection (b), the entity shall make the line extension and shall own, maintain, and replace the line extension upon agreement by the applicant or group of applicants to deposit with the entity an amount under the original or any subsequent extension, equal to the estimated cost of the extension above the free limits.

As previously noted, neither good faith discussions nor evaluation of pilot projects can in any sense violate Section 410.410(c)(1) and the subsection is not violated by the agreement: No investigation is appropriate.

Similarly the provisions of the gas code parts as they might apply to HBAI's agreement with Ameren Companies have not been violated. Section 500.310(b) (1) in pertinent part, provides for rural areas:

1) If an extension of a utility's distribution system should be necessary in order to provide firm gas service for an applicant or group of applicants whose premises are located in urban areas within which the utility operates, the utility, upon written request for service by such applicants, shall without charge make the necessary main extension along a street, highway or other right-of-way to the nearest point adjacent to the premises of such applicants, provided the extension does not exceed 100 feet of low pressure system main or 200 feet of high pressure system main per applicant, and provided further that no free extension shall be made from existing mains on which refunds are still due from previous deposits. In such event any further extension shall be made only upon the applicant making a deposit equal to the full estimated cost of the further extension required.

As again noted, neither good faith discussions nor evaluation of pilot projects could violate this provision. This subsection is not violated by the agreements. The agreements do not need investigation.

Likewise, the HBAI and Ameren Companies position statements do not violate the provisions of Subsection 500.320(b) (1). Subsection 500.320(b) (1) provides in part:

1) Of an extension of a utility's distribution system should be necessary in order to provide firm gas service for an applicant or group of applicants whose premises are located in rural areas within which the utility operates, the utility, upon written request for service by such applicants, shall make the necessary main extension along a street, highway or other right-of-way to the nearest point or points adjacent to the point of connection with the service piping of such applicants, upon agreement by the applicant or group of applicants to comply with the provisions of the following subparagraphs:

Neither paragraph (1) above nor the subparagraphs (A) through (B) have been violated. Neither good faith discussions nor evaluation of pilot projects could violate these provisions. These subparts are not violated by the agreements.

It must be concluded the IBEW is "off base." Jointly developing alternative approaches to extensions and installations do not violate Parts 410 and 500 of 83 Ill. Admin. Code even under the strained reading of those parts by IBEW. The resolutions reached with HBAI do not violate those subparts. The subsections cited by IBEW have nothing to do with outsourcing. Whether utilities may or may not contract out the installation of gas and electric line extensions and service installations would appear to be a question of law not pertinent to this docket and not one requiring further hearings.

Lastly IBEW argues erroneously that the agreements between HBAI and ComEd and Ameren Companies may possibly violate Section 16-128 of the Public Utilities Act. Without foundation, they suggest that the pilot programs may affect reliability and safety in the sense of Section 16-128(a). (200 ILCS 5/16-128 (a).) Nothing could be further

from the truth. The statute cited by ComEd has as its purpose the regulation of alternative retail electric suppliers. HBAI and its developers are not alternative retail suppliers.

The public agreements questioned by IBEW were filed on February 8, 2005 with ComEd and on November 18, 2004 (over one year ago) with Ameren Companies. Neither the Commission's Staff, other utilities or anyone else, save IBEW has assailed the agreements. This is undoubtedly because the Commission Rules and the Public Utilities Act are not violated by good faith discussions, joint development, nor by evaluation of pilot projects and because safety and reliability have not been compromised. Further investigation is unnecessary.

Response to Exception 2:

THE PROCEEDINGS AND PROPOSED ORDER

COMPLIES WITH THE ADMINISTRATIVE PROCEDURE ACT'S

RULEMAKING REQUIREMENTS

The IBEW misinterprets the Proposed Order when it says "if the Commission were to adopt the Proposed Order, as is, without further action, then the Commission's Order would constitute an unlawful "rule" under Section 1-70 of the Illinois APA." This is just plain wrong. The Proposed Order does not promulgate a rule. Section 1-70 provides in part:

"Rule" means each agency statement of general applicability that implements, applies, interprets or prescribes law or policy...."
5 ILCS 100/1-70

The terms of the Appendix, Joint Agreement of the Parties are permissive. Moreover, it is unclear how answering the five questions posed by the commission could

be a rule of general applicability in the sense of Section 1-70 of the Illinois APA. The following permissive language indicates that no rule was intended: “provide a framework for consideration of these issues”; “provide a greater level of uniformity, the consensus for free line/main extension;” “establish a process for negotiating alternative extension provisions;” “the consensus amount;” “may propose a process;” “move toward greater uniformity;” “the status quo remains;” “continue unchanged,” and lastly “may be addressed in future rate cases.” The Appendix is a “status quo” arrangement and permissive in scope.

The Commission may establish policy in a variety of ways. The Proposed Order, however, does not propose a new rule or policy as a careful reading of the Appendix reveals many caveats against changing rules and none of the changes are required until the next rate case after the Final Order in this docket. IBEW’s arguments are premature.

WHEREFORE, the Home Builder Association of Illinois respectfully requests the Illinois Commerce Commission to adopt the Hearing Examiners Proposed Order as written.

Home Builders Association of
Illinois

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CERTIFICATE OF SERVICE

03-0767

The undersigned, E.M. Fulton, Jr. hereby certifies that on the 30th day of November, 2005 he served a copy of the foregoing instrument by personally delivering a copy thereof and or mailing a copy thereof by electronic mail and/or United States Mail, postage prepaid, at Springfield, Illinois to the individuals named on the attached Service List in envelopes plainly addressed to each of them.

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