

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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| Illinois Commerce Commission | : | |
| On it's Own Motion | : | |
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| Vs. | : | |
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| Illinois Power Company d/b/a Ameren IP | : | 04-0677 |
| | : | |
| | : | |
| Reconciliation of Revenues Collected | : | |
| Under Gas Adjustment Charges With | : | |
| Actual Costs Prudently Incurred. | : | |

RESPONSE TO MOTION IN LIMINE OF
ILLINOIS POWER COMPANY

NOW COMES the Staff of the Illinois Commerce Commission (“Staff”), through its undersigned counsel, and pursuant to 83 Ill. Adm. Code Sec. 200.190, files this Response to the Motion In Limine filed by Illinois Power Company (“IP” or “Company”). In support of this Response, Staff states as follows:

1. On November 10, 2004, the Illinois Commerce Commission (“Commission”) approved an Order commencing reconciliation proceedings in accordance with the requirements of Section 9-220 of the Public Utilities Act (“Act”). (220 ILCS 5/9-220) The Commission’s Order directed IP to present evidence reconciling revenue collected under the Company’s purchased gas adjustment clause (“PGA”) with the actual cost of natural gas supplies prudently purchased for the 12 months ending December 31, 2004. (Initiating Order, p. 3)

2. A procedural schedule has been set, under which Staff filed direct testimony on December 2, 2005.

3. On December 22, 2005, the Company filed a Motion in Limine (“Motion”) seeking to exclude from evidence lines 885 through 899 of the Direct Testimony of Eric Lounsberry (Staff Ex. 2.00).

4. IP argues that the testimony should be excluded because (1) it constitutes hindsight evaluation of IP’s actions; and (2) it constitutes evidence of subsequent remedial measures which is inadmissible in negligence actions and IP argues should also be inadmissible in prudence reviews. Staff disagrees with this assessment.

Hindsight Review

5. The testimony to which IP objects is set forth in the Overall Storage Concerns section of Staff’s testimony, where Staff discusses concerns regarding the manner in which IP has operated its storage fields. Staff puts each of its concerns into historical perspective. Information is provided to give the Commission a historical viewpoint from which to consider the Company’s 2004 actions.

6. The conclusion drawn by Staff based upon the Overall Storage Concerns testimony is that “IP’s actions over several years contributed to the problems that IP encountered at the Hillsboro storage field.” (Staff Ex. 2.00, p. 57, lines 1183-1184) Staff opines that “[t]herefore, IP should be held accountable for its actions, or lack thereof, and the additional costs that IP incurred as a result of the Hillsboro storage field not operating at its full capacity should be found imprudent.” (*Id.*, at 58, lines 1205-1207)

7. The testimony to which IP objects is found under the subheading Manpower in the Overall Storage Concerns section. Here Staff reports the number of storage field operators and supervisors over the period from 1991 through 2004. Staff

indicates that the number of storage field operators has remained stable since 1991, but the number of supervisors has been reduced from 3 or 4 in the time period from 1991 through November 1995, to 2 supervisors at the end of 1995, then finally to one supervisor at the beginning of 2000. (Staff Ex. 2.00, p. 41, lines 859-865) Staff also provided the rationale given by IP for the reduction of field supervisors. (*Id.*, lines 867-873) Staff then concludes that “IP’s reduction in oversight has caused it to operate its storage field in a manner that is not safe, reliable and efficient.” (*Id.*, at 42, lines 883-884)

8. While Staff discussed IP’s actions in other years, Staff’s adjustment in this proceeding is based upon IP’s action of relying upon only 1 storage field supervisor in 2004. Although IP took action to reduce staffing in its storage field supervisor position in the time period from 1995 through 2001, that action is ongoing in the sense that IP failed to retain adequate staffing for the storage field supervisor position in 2004. To the extent Staff’s adjustment in this docket is based upon staffing concerns, the staffing concerns are related to the inadequate staffing in 2004. The historical information is background information Staff deemed necessary to put the 2004 action into context.

9. By the same reasoning, Staff did not rely upon the Ameren representative’s comments “which were based on Ameren’s evaluation of IP’s staffing of its gas storage field operations in 2004, as evidence that IP’s staffing in 1999-2001 were imprudent...” (Motion, p. 3, ¶ 2) The period of time for which IP’s actions are being reviewed in this proceeding is 2004. Staff is not advocating disallowances based upon Company actions in any time period other than 2004. Neither is Staff relying upon Ameren’s testimony in order to come to its conclusion regarding the inadequacy of

staffing in 2004. Ameren's testimony simply corroborates Staff's conclusion. Staff came to the same conclusion regarding the inadequacy of staffing in its testimony in Docket No. 03-0699, the 2003 reconciliation, prior to Ameren's 2004 remarks.

10. Similarly, IP's argument that the Ameren testimony is cited in an attempt to substitute the judgment of Ameren or its witness for the judgment of IP management, misapprehends Staff's position. Staff provided the Ameren evaluation in the interest of a full and complete record and as support for Staff's conclusion that IP's 2004 staffing was inadequate. Based upon Ameren testimony Staff postulated:

The agreement to add additional personnel post merger may indicate that Ameren shared some of Staff's concerns regarding the level of oversight that IP had over its storage operations. (Staff Ex. 2.0, p. 43, lines 897-899)

11. Staff is not advocating disallowances based upon the Company actions in any time period other than 2004, thus the testimony should not be excluded on the basis of it being hindsight review.

Subsequent Remedial Measures

12. IP's argument that the testimony should be excluded because it is a remedial measure is flawed in several respects.

13. First, the argument is based, again, upon the misconception that Staff is proposing adjustments to the 2004 PGA based upon IP's actions in 1999-2001. As discussed above, Staff's adjustments are based upon IP's actions in 2004. The background discussion is presented to provide historical context.

14. Second, the Ameren testimony is not evidence of a subsequent remedial measure. The 2004 Ameren testimony was presented contemporaneously with the IP actions of which Staff is critical and it is not evidence of an action having been taken.

The Ameren testimony was provided in a docket wherein Ameren was seeking Commission approval of a reorganization in which Ameren, through a stock transfer, would purchase IP. The Ameren testimony is evidence, not of remedial action, but of a *plan formulated by a distinct entity*, contingent upon Commission approval of the reorganization, to add additional engineering and supervisory personnel who would focus on storage activities and responsibilities.

15. Third, accepting for purposes of argument only that the Ameren testimony could to be considered a subsequent remedial measure, the public policy purpose for the rule against admissibility of subsequent remedial measures in negligence actions is not furthered by its application to PGA prudence reviews under the Act.

16. IP quoted *Schaffner v. Chicago & North Western Transportation Company*, 129 Ill.2d 1, 14 (1989), “the correction of unsafe conditions should not be deterred by the possibility that such an act will constitute an admission of negligence.” IP then argues that, if evidence of Ameren’s plan were admitted as evidence of IP’s imprudence, it would cause utilities in the future to hesitate to make increases in staffing and improvements in operating practices for fear such actions might be used against them in future prudence reviews. (Motion, p. 5, ¶ 6)

17. However this argument is flawed as it ignores the incentive annual PGA proceedings provide gas utilities to take action to correct unsound practices.

18. The Act provides for an annual PGA reconciliation wherein gas utility actions in connection with gas costs are subject to prudence review. (220 ILCS 5/9-220) Unlike negligence actions, the prudence reviews recur annually. The annual prudence reviews provide utility companies with an overriding incentive to take remedial

actions to address unsound practices.

19. With annual prudence reviews, the failure to take remedial action in year two would result in disallowances based upon the same practices or shortcomings in that year's reconciliation as well as in each subsequent reconciliation until the remedial action was taken or the practice was abandoned.

20. Thus, there is no policy reason for excluding evidence of subsequent remedial action in PGA proceedings.

Wherefore, for the foregoing reasons, Staff respectfully requests that Illinois Power Company's Motion in Limine be denied.

Respectfully submitted,



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January 18, 2006

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