

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CENTRAL ILLINOIS LIGHT COMPANY d/b/a AmerenCILCO,)))	Docket No. 06-0070
Proposed general increase in rates for delivery service.))	
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS,)))	Docket No. 06-0071
Proposed general increase in rates for delivery service.))	
ILLINOIS POWER COMPANY d/b/a AmerenIP,)))	Docket No. 06-0072
Proposed general increase in rates for delivery service.))	(consol.)

**AMEREN COMPANIES’ RESPONSE TO IBEW’S MOTION TO STRIKE AMEREN’S
REBUTTAL AND SURREBUTTAL TESTIMONY**

Central Illinois Light Company d//b/a Ameren CILCO, Central Illinois Public Service Company d/b/a/ AmerenCIPS and Illinois Power Company d/b/a Ameren IP (collectively, “Ameren Companies” or “Companies”) hereby respond to the Motion to Strike filed by Local Unions 51, 309, 649, 702 and 1306 of the International Brotherhood of Electrical Workers, AFL-CIO (“IBEW” or “Unions”). For the reasons that follow, the Commission should overrule the Union’s motion in its entirety.

I. INTRODUCTION

The Unions’ motion to strike demonstrates only that the Unions want to hold the Ameren Companies to an evidentiary standard that the Unions themselves are unwilling to follow. Moreover, the evidentiary rules that the Unions seek to impose have no basis in law, logic or

common sense. Their motion to strike is an ill-conceived and thinly veiled attempt to have certain testimony stricken for one reason, and one reason only: because the Unions don't like the answers. That isn't good enough. The motion should be denied in its entirety.

All of the testimony that the Unions object to was submitted by the Ameren Companies in direct response to IBEW testimony. In both their direct and rebuttal testimony, IBEW witnesses Miller, Moore and Peterson testified about their interpretations of various rules and statutes, expressed opinions about what issues are or are not relevant to this proceeding, and purported to explain not only what the Ameren Companies' proposed tariffs say, but how they think those tariffs will be interpreted and applied in the field. Perhaps because the IBEW testimony has been thoroughly and convincingly discredited by the Ameren Companies' testimony, the IBEW now cries "foul," based on a newly-found appreciation for evidence rules that the Unions clearly disregarded in their own testimony. According to the Unions, it is improper for witnesses to offer legal interpretations, opine on the relevancy of issues in a case, or explain how tariffs will be applied. The irony of their position is that if the Commission were to agree, most of the IBEW's own testimony would also have to be stricken.

The Ameren Companies should not be held to a different standard than the Unions. The Companies moved to strike the Unions' testimony precisely because the IBEW witnesses purported to offer legal opinions, as well as commentary about which issues are relevant to this case and which are not. The Administrative Law Judges ("ALJs") overruled the Companies' motion. As a consequence, the IBEW testimony became fair game for rebuttal. It is absurd for the Unions to now claim that their witnesses are allowed to testify about certain subjects, but that the Ameren Companies are not allowed to offer any response. The Unions' motion should be denied.

II. ARGUMENT

For the sake of convenience, the Ameren Companies respond to each of the IBEW's arguments in the same order that they appear in the motion, with references to the testimony in question and the page number where this testimony is addressed in the IBEW motion.

Ameren Rebuttal Testimony – Jon R. Carls

Carls, lines 98-113 (Motion, page 2.)

The Unions begin their motion by arguing that Mr. Carls's discussion of "unbundling" should be stricken because it constitutes a legal interpretation of Section 16-102 of the Public Utilities Act. Apparently, the IBEW witnesses are allowed to offer their own definition of "unbundling," but the Ameren witnesses are not. The specific question asked of Mr. Carls was:

Do you agree with [IBEW witness Miller's] opinion that a customer having the option to install a conduit system constitutes unbundling of delivery service?

Carls Surrebuttal, lines 98-99. It is absurd for the IBEW to argue that Ameren's witnesses are precluded from offering rebuttal testimony that is directly responsive to IBEW's testimony.

The discussion throughout the Unions' motion of objections based on "legal interpretations" is largely form over substance. The Commission knows what constitutes a legal opinion and what doesn't. The Commission knows that it is not bound by any witness's interpretation of law. And the Commission knows that it will ultimately decide the legal issues in this case. IBEW and Ameren witness have offered testimony about how they think certain rules and statutes should be applied. The Commission may consider this testimony and give it whatever weight it wants. Certainly, however, there is no basis for striking Ameren witnesses' alleged "legal interpretations" that do nothing more than rebut the IBEW's legal interpretations.

Carls, lines 114-129 (Motion, pp. 2-3.)

Here, IBEW moves to strike Mr. Carls's testimony discussing the fact that the Unions testimony in this proceeding mirrors the arguments they have made in labor arbitration proceedings. Again, IBEW shies away from quoting the question that was asked:

[IBEW witness] Mr. Miller addressed in great detail the current practices for line and service extensions, the job classification, responsibilities, training and experience of linemen, makeup and efficiency of a crew, hourly wages, steps involved in an installation of underground line or service, trenching hazards, whether options are "completely new," existence of a labor grievance for a policy change and what work IBEW employees would be responsible for if a customer was allowed to install conduit. What bearing does this testimony have with regard to the tariffs filed in this proceeding?

Carls Rebuttal, lines 114-121.

The IBEW argues that Mr. Carls's answer to this question should be stricken for four reasons. First, they charge that the testimony is "argumentative." The IBEW cites no authority for their claim that "argumentative" is a valid basis for striking rebuttal testimony, nor are the Companies aware of any. The whole point of rebuttal testimony is to refute direct testimony. To say that rebuttal testimony is improper if it is "argumentative" is just silly.

Second, the Unions argue that Mr. Carls's testimony constitutes an "incompetent legal opinion" about the scope of the Commission's authority. This, too, is without merit. Nowhere in his answer does Mr. Carls address the scope of the Commission's authority. He merely points out the similarity of the allegations made in this case with the allegations made in Docket No. 03-0767, and references the *Commission's* opinion in that proceeding that the IBEW's allegations have nothing to do with the Public Utilities Act. The "opinion" that the Unions object to is thus an opinion of the Commission, not Mr. Carls. In any case, the Commission knows the scope of its authority, and knows that it isn't bound by the testimony of any witness in this regard.

Third, the Unions allege that Mr. Carls's testimony is "immaterial." This argument expressly goes to weight, not admissibility. The Commission will ultimately determine what is material and what isn't.

Fourth, the Unions characterize Mr. Carls's testimony as a "collateral attack" of the ALJ's May 22, 2006 ruling denying the Companies' motion to strike IBEW's direct testimony. The easy answer to this is that the ALJ's ruling stated that the Ameren Companies' arguments went to the weight of the IBEW testimony, not admissibility. The Ameren Companies haven't "waived" anything by not seeking interlocutory appeal of the May 22, 2006 ruling. Nothing in that ruling precludes Ameren witnesses from expressing their views about what weight (or not) they believe the Commission should give to the IBEW testimony.

Carls, lines 152-54 (Motion, p. 4.)

The question and answer at lines 144 through 154 respond to IBEW witness Miller's assertion that Ameren is not going to inspect customer-installed conduit. The Unions seek to strike the portion of Mr. Carls's answer that says "Ameren Companies' tariffs indicate that conduit installations must comply with Company specifications and Companies will inspect as need to ensure this condition is met."

None of the Unions' objections to this testimony makes any sense. First, to say that Mr. Carls's answer is hearsay "because it relies upon what Ameren's tariffs say as proof that customers will actually comply with Ameren's specifications" shows only that the Unions do not understand the hearsay rule. Hearsay is an out of court statement by someone other than the declarant, offered to prove the truth of the matter asserted. *People v. Kliner*, 185 Ill. 2d 81, 150, 705 N.E.2d 850, 885 (1998). Mr. Carls's testimony about what the tariffs say does not implicate an out of court statement; that is, he is not testifying about what someone else said in order to

prove that what someone told him is true.¹ He simply references the proposed tariffs. To the extent the tariffs are considered a “statement,” they are a statement of the Ameren Companies, and the Companies are producing witnesses who will be subject to cross examination concerning the tariffs. The availability of cross examination significantly undermines application of the hearsay rule in Commission proceedings, even if the evidence is technically hearsay, which the tariffs are not. *See, e.g., City of Hurst v. Illinois Commerce Comm’n*, 120 Ill App. 3d 354, 458 N.E.2d 568 (5th Dist. 1983). Indeed, if it were true that the proposed tariffs in this case are hearsay, none of the witnesses in this case (or in any other Commission case involving tariffs) would be allowed to testify about the tariffs. Finally, if IBEW’s standard is to be applied – and it should not – how would any rate case get tried? Rate cases are about “tariffs.” Someone has to talk about them. .

The claim that Mr. Carls’s statement also constitutes improper “habit” testimony is equally pointless. Mr. Carls does not testify about the habit or routine practice of Ameren or anyone else. Nor does he ever claim that because the tariffs say what they say, customers “will actually comply” with the tariffs. He simply testifies about the Companies’ expectations and what the proposed tariff requires. If the Unions believe that the Companies are not going to follow their tariffs, they are free to try to make that point on cross examination.

As a third argument, IBEW claims that Mr. Carls has no personal knowledge of Ameren inspecting customer-installed conduit and cites no evidence to back-up his testimony. These arguments clearly go to weight, not admissibility. Additionally, given the Unions’ claim that the

¹In stark contrast is the IBEW testimony. Mr. Miller, for example, testifies at lines 178 through 200 of his rebuttal testimony about a meeting he attended where unidentified IBEW members stated that Ameren does not currently inspect customer installed conduit. This statement is offered for the express purpose of attempting to establish that what these unidentified members told Mr. Miller is true – that Ameren does not perform inspections. The identity of the person or persons who made this statement are not disclosed, totally foreclosing any ability to cross examine anyone about this statement. If ever a hearsay statement were made, this statement is it. The Ameren Companies anticipate moving to strike this and other hearsay statements at the hearing.

Ameren Companies are not going to follow their tariffs, it is disingenuous for the Unions to claim Mr. Carls's testimony that the Companies *will* follow them is "conjecture."

Carls, lines 155-66 (Motion, p. 5.)

Here, the Unions claim that Mr. Carls is incompetent to rebut IBEW witnesses' testimony about the alleged hazards associated with allowing customers to install their own conduit or line extensions because Mr. Carls does not testify that "he has any personal experience installing line or service extensions or conduit systems." The Unions fail to mention that Mr. Carls addressed this spurious claim in his surrebuttal testimony. (Carls Surrebuttal, lines 99-118.) Additionally, under the Unions' flawed logic, any Commissioner that does not have experience installing line extensions or conduit is incompetent to make a determination of whether the Companies' tariffs are just and reasonable. The Companies hope for the Unions' sake that they really don't believe this. In any event, the Unions are free to explore Mr. Carls's qualifications during cross examination. They certainly haven't made a showing here that Mr. Carls is not qualified to offer the testimony that they now challenge.

Ameren Rebuttal Testimony – John B. Hollibaugh²

Hollibaugh, entire rebuttal testimony (Motion, p. 5.)

The Unions argue that the entire rebuttal testimony of Ameren witness John B. Hollibaugh should be stricken in its entirety because now Mr. John F. Luth will not appear at hearing. The Unions claim that they "must, as a matter of fundamental fairness, have the opportunity to test Mr. Luth's opinions and testify through cross examination." (Motion, p. 6.)

The Unions might have a point if it were not for the fact that Mr. Hollibaugh has adopted Mr. Luth's opinions in their entirety and will be present at hearing. Thus, the Unions are not

² Because Mr. Hollibaugh has adopted Mr. Luth's testimony as his own, the Companies refer to Mr. Luth's testimony as that of Mr. Hollibaugh.

being deprived of the right to test the statements contained in Mr. Hollibaugh 's rebuttal testimony through cross examination. Whatever the Unions would have asked Mr. Luth, they can now ask Mr. Hollibaugh.

The Unions never explain how a substitution of witnesses prejudices them in any way. The best that they can say is that Mr. Luth and Mr. Hollibaugh have “personal knowledge and experiences different and apart” from one another. But what does that have to do with anything? After all, Messrs. Miller, Moore and Peterson of the IBEW also presumably have different “personal knowledge and experiences,” yet all of their direct and rebuttal testimonies are virtually identical – right down to the typographical errors. If it is permissible for the Unions to sponsor virtually the same testimony through three different witnesses, it is equally permissible for one Ameren Company witness to adopt the testimony of another Company witness, as his testimony.

The only knowledge or experience remotely relevant to this proceeding are the facts contained in Mr. Luth's prefiled testimony. There has been no claim and no showing that Mr. Hollibaugh lacks personal knowledge of these facts. To the contrary, Mr. Hollibaugh has attested to these facts and, further, will be subject to cross examination. Mr. Luth's absence from the hearing does not prejudice the Unions in any way.

Finally, the adoption of testimony by another witness is a practice that has occurred, and has been allowed, from time to time in Commission proceedings. Rate cases take up to 11 months. Employees come and go, or change positions during these times, or for other reasons are just not available. No prejudice is caused by following this practice here.

Luth, lines 145-147 (Motion, p. 6.)

The Unions next ask the Commission to strike the portion of Mr. Hollibaugh 's testimony where the witness explained how the Commission “‘urged [Ameren] to include a provision in the services agreement with Cellnet requiring compliance’ with Code Part 410” (Motion, p. 6.) IBEW argues that this testimony is hearsay because the statement “is offered to prove that Ameren’s contractors are not subject to Code Part 460.” But that is not what Mr. Hollibaugh said. Mr. Hollibaugh simply testified that Staff asked Ameren to include certain language in an agreement with Cellnet. (A fact confirmed by responses to IBEW’s data requests served to Staff.) Staff is a party to this proceeding, and out of court statements by parties are not subject to the hearsay rule, particularly where, as here, the party making the statement will be subject to cross examination. Even if Staff’s statements were considered hearsay, these statements have independent relevance, separate and apart from the “truth” of whether Ameren’s contractors are subject to Part 460. To the extent that an out-of-court statement is relevant simply for the fact that it was said, it is not barred by the hearsay rule. *People v. Kliner*, 185 Ill. 2d 81, 150, 705 N.E.2d 850, 885 (1998). Indeed, whether Ameren Company and its contractors are subject to Part 460 isn’t a “fact” that can be proven true or false; it is a legal issue that the Commission will decide.

Hollibaugh , lines 148-149 (Motion, p. 7)

The Unions argue testimony that merely establishes that Ameren included language about Part 410 in its agreement with Cellnet is hearsay “because it is offered to prove the truth of the matter asserted that Ameren’s contract with Cellnet in fact contains such a provision.” (Motion, p. 7.) That should not come as a surprise – the point of submitting testimony is to prove something. The Ameren Companies fail to see the logic of how a simple assertion of fact

constitutes hearsay, especially considering that the testimony in question does not involve an out of court statement. This is a senseless objection.

Hollibaugh , lines 155-156 (Motion, p. 7)

Here, the Unions again object to testimony about statements from Staff at the October 2005 meeting, referenced above in the Unions' objection to the testimony at lines 145-147. The question, conveniently omitted by the Unions, was this:

Each of the IBEW witnesses claims that Administrative Code Part 460, not Part 410, applies to the work of Cellnet and Terasen and, therefore, these contractors must become certified as Meter Service Providers ("MSPs"). Do you agree?

Hollibaugh Rebuttal, lines 151-154. In the Unions' view, Ameren witnesses are not allowed to answer this question because any answer necessarily constitutes a legal opinion. This, of course, did not stop the IBEW witnesses from offering their own opinions. Having done so, it strains credibility to suggest that Ameren witnesses should be precluded from rebutting the IBEW opinions. The Unions' hearsay objection is equally unfounded, for the same reasons explained in response to the objections to 145-147, above. Staff is a party, and out-of-court statements by parties are not hearsay.

Hollibaugh , lines 156-169 (Motion, p. 8.)

This objection relates to the remainder of the answer that the Unions object to above at lines 155-56. As demonstrated above, this objection is completely unfounded and should be overruled.

Hollibaugh , lines 186-212 (Motion, p. 8)

Here, the Unions claim Mr. Hollibaugh 's testimony about what the proposed metering service tariffs mean constitutes an improper legal opinion. This is yet another example of the Unions wanting to have their cake and eat it, too. *They* are allowed to express their own

interpretation of the tariffs, but no one else is. Be that as it may, if it were true that any testimony about the meaning or intent of a proposed tariff constituted a legal opinion, virtually no one would be permitted to testify in Commission rate or tariff proceedings – including the Union’s own witnesses.

Tellingly, the Unions’ objection to Mr. Hollibaugh ’s testimony about how the Companies will implement their tariffs cannot be squared with the Unions’ earlier claim in this proceeding that such testimony not only is proper, but is *required* in this case. In their Response to Ameren Companies’ Motion to Strike IBEW testimony, the Unions said:

[I]n a tariff investigation, the *utility* (Ameren) bears the burden of proof to establish the just and reasonableness of not only its tariff rates and charges, but also the practices embodied in its proposed tariff. *Id.* Put differently, Ameren’s burden of proof “goes to the *details* of the proposed tariffs, and not just to whether it is just and reasonable in general.”

IBEW Response to Motion to Strike, at 3 (citation omitted, emphasis in original). On the very next page of their response brief, the Unions made their point even clearer:

In sum, the “fact of consequence” in these proceedings is whether Ameren’s proposed “rates or other charges, classifications, contracts, practices, rules or regulations. . .in whole or in part, or others in lieu thereof” are “just and reasonable.” 220 ILCS 5/9-201(c). To make that determination, however, the Commission must receive evidence that allows it to evaluate more than Ameren’s proposed rates or charges. *The Commission must also examine evidence regarding how Ameren will implement its tariff provisions, and determine if its implementing practices will result in reliable service and promote the safety and health of Ameren’s patrons, employees, and the public.*

Id., at 4 (emphasis added.) To now say that the Companies are now precluded from discussing how they will implement their tariffs strains all bounds of both logic and credibility. The Unions are estopped from even making this argument.

Hollibaugh , lines 222-238 (Motion, p. 9.)

With this ill-founded objection, the IBEW essentially argues that the Companies are not allowed to rebut IBEW testimony that the proposed tariffs are unjust and unreasonable. They claim that Mr. Holibaugh's disagreement with IBEW witnesses is argumentative, constitutes a legal opinion and is a collateral attack of the order denying the Companies' Motion to Strike IBEW testimony. This is the same thing they said in their objection to lines 114-129 of Mr. Carls's testimony. Their arguments make no more sense here than they did there and should be rejected.

Ameren Surrebuttal Testimony – Jon R. Carls

Carls, lines 84-88 (Motion, p. 10.)

The testimony that the Unions object to at lines 84 through 88 of Mr. Carls's surrebuttal testimony relates to the same subject that the Unions object to at lines 152 -154 of his rebuttal testimony. Once again, IBEW asks the Commission to strike Mr. Carls statements that the proposed line extension tariffs require compliance with good engineering practices and Ameren Company specifications, and that the Companies will inspect customer-installed conduit. Neither of these statements is hearsay, as alleged, because neither involves an out-of-court statement. The "habit" and "conjecture" arguments are equally unfounded, for the reasons previously stated.

Carls, lines 97-98 (Motion, p. 11)

This is the third time that the Unions object to Mr. Carls's testimony that the Companies will inspect customer-installed conduit and line extensions. The objection should be overruled.

Ameren Surrebuttal Testimony – John B. Hollibaugh

Hollibaugh, lines 29-31 (Motion, p. 12.)

The Unions object to Mr. Hollibaugh adopting Mr. Luth's testimony as his own. The Ameren Companies have already addressed this argument. The bottom line is that the Unions are not prejudiced by a substitution of witnesses. Mr. Hollibaugh will be available for cross examination. The Unions can ask him anything they want about the testimony filed under Mr. Luth's name.

III. CONCLUSION

Not a single one of the Unions' objections to the Ameren Companies' prefiled testimony is well founded. It should be obvious that the real reason the Union wants to strike certain testimony is because they simply don't like the answers. That isn't sufficient grounds to strike testimony. The Unions' motion should be denied in its entirety.

Dated: July 21, 2006

Respectfully submitted,

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PROOF OF SERVICE

I, Laura M. Earl, certify that on July 21, 2006, I served a copy of the foregoing Ameren Companies' Response to IBEW's Motion to Strike Ameren's Rebuttal and Surrebuttal testimony. by electronic mail to the individuals on the Commission's Service List for this Docket.

By: /s/Laura M. Earl

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