

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CENTRAL ILLINOIS LIGHT COMPANY)	
d/b/a AmerenCILCO)	
)	
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY)	
d/b/a AmerenCIPS)	
)	
ILLINOIS POWER COMPANY)	Docket Nos. 05-0160, 05-0161,
d/b/a AmerenIP)	and 05-0162 (consol.)
)	
Proposal to implement a competitive procurement)	
process by establishing Rider BGS, Rider BGS-L,)	
Rider RTP, Rider RTP-L, Rider D, and Rider MV.)	

**THE AMEREN ILLINOIS UTILITIES’ RESPONSE IN OPPOSITION
TO EMERGENCY MOTION TO STAY**

The Emergency Motion to Stay Implementation of 2007 Tariffs filed by the People of the State of Illinois (“AG” or “Attorney General”) should be denied. There is no “emergency,” and the motion does not seek a true stay. The AG has advanced no basis for the Commission to issue an order to stay, in mid-stream, the tariffs it has approved. Rather than preserve the status quo, as is the purpose of a stay, the AG’s requested order would only serve to imperil the financial condition of the Ameren Illinois Utilities¹ and thereby harm their ability to provide service to ratepayers. Moreover, the AG has not shown, and cannot show, any reasonable prospect of reversing the Commission’s order on appeal.

No provision of the Public Utilities Act empowers the Commission to “stay” a tariff. The Commission has jurisdiction over tariffs, but only as the Public Utilities Act (“Act”) provides. The Act allows the Commission to enter an order establishing temporary rates, but only if the

¹ The Ameren Illinois Utilities are Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS and Illinois Power Company d/b/a AmerenIP.

utility's books and records indicate that the utility is earning excessive net income from the existing rates. 220 ILCS 5/9-202(a). Here, the Commission found just and reasonable the rates that will be charged on and after January 2, 2007, the same rates that the AG now wants the Commission to stay. The AG does not even try to present evidence to the contrary.

Pursuant to the terms of the Final Order in these consolidated dockets, the Ameren Illinois Utilities have signed power supply contracts with the winning bidders from the competitive procurement auction mandated by the Final Order. The AG's current motion merely seeks to prevent implementation of the rates through which the Ameren Illinois Utilities will recover their costs for power procured through those contracts. What the AG really seeks is an order extending the rate freeze beyond the ending date that the General Assembly has already mandated. No provision of the Public Utilities Act allows that. The Commission is required to set rates that are effective on and after January 2, 2007, that properly reflect the utility's cost of service, without reference to what rates used to be.

The rates the AG now wants the Commission to stay are the very rates that the Commission found to be just and reasonable; the AG presents no evidence that they are not. Instead, the AG only argues that the rates under the Commission's Final Order are higher than present rates. The "stay" would almost inevitably lead to another cut in the credit rating of the Ameren Utilities – a result that would have potentially dire consequences for both the utilities and their customers. The Public Utilities Act entrusts the Commission with preserving the financial health of Illinois' regulated utilities, in the interest of the public. The Commission must allow the Ameren Illinois Utilities to move forward in a process that is already well underway, in order to ensure nothing less than the utilities' solvency.

On the merits, the AG's motion is baseless. There is simply no basis for an emergency stay. The Commission painstakingly considered all relevant issues when issuing its order. The AG has shown absolutely no likelihood of success on the merits of its appeal in the Second District and has failed to produce any evidence of irreparable harm. Rather, it is the Ameren Illinois Utilities and their customers who will suffer great harm if the AG's request for a stay is granted. The law simply does not authorize a stay under these facts. For any or all of these reasons, the motion should be denied.

I. PROCEDURAL HISTORY

1. On January 24, 2006, the Commission entered final orders in ICC Docket Nos. 05-0160, 05-0161 and 05-0162 (cons.) ("Final Order") and the related docket initiated by Commonwealth Edison Company ("ComEd"), ICC Docket No. 05-0159 (collectively, "Final Orders").

2. The Final Orders are currently on appeal in the Appellate Court of Illinois, Second District, in Case No. 2-06-0381 (consol.).

3. On June 1, 2006, the AG petitioned the Supreme Court of Illinois for direct review and stay of the Final Orders in Case No. 102767.

4. On August 4, 2006, the Supreme Court denied the AG's motion for stay of the Final Orders "without prejudice to file in the appellate court," and transferred all appeals to the Second District.

5. On August 10, 2006, the AG filed a motion for stay of the Final Orders in the Second District.

6. On August 15, 2006, the Ameren Illinois Utilities filed a response in objection to the motion for stay, arguing, in relevant part, that the AG's motion should be denied for failure to comply with Illinois Supreme Court Rule 335. Rule 335 requires a party moving for stay of an

administrative order in the appellate court to “show that application has been made to the agency and denied, with the reasons, if any, given by it for denial, or that application to the agency for the relief sought was not practicable.” Ill. Sup. Ct. R. 335(g).

7. On August 23, 2006, the Second District issued an order denying the AG’s motion for stay, for failure to comply with Supreme Court Rule 335.

8. In September 2006, the competitive procurement auction took place, following the procedures set forth in the Final Order. (Nelson Aff. ¶¶ 6-7, 10 (attached as Appendix A).) After the Commission concluded that the auction had been conducted properly and fairly, the Ameren Illinois Utilities entered into the long-term supply contracts in accordance with the auction’s results. (*Id.* at ¶ 6-8.)

9. On December 7, 2006, three months after the auction and almost eleven months after the Final Order issued, the AG filed an emergency motion on this docket requesting stay of implementation of the tariffs approved in the Final Order.

II. ARGUMENT: THE ATTORNEY GENERAL’S REQUEST FOR A STAY IS PROCEDURALLY AND SUBSTANTIVELY DEFICIENT.

The motion should be dismissed as a matter of law because it requests relief that is beyond the Commission’s jurisdiction to grant. The Commission, which may not operate outside the scope of its statutory authority, has no authority to generally stay tariffs. Moreover, the AG’s motion is woefully inadequate to justify a stay of either the Final Order or the tariffs, even if the Commission were to reach the merits.

A. The Commission Has No Authority To “Stay” Tariffs In The Way The AG Requests.

The Commission has no authority under the Public Utilities Act to “stay” a tariff that is in effect. The AG tacitly admits as much. The motion does not even purport to cite any legal

authority for a stay of tariffs. As a matter of law, the limited authority the Commission does have to modify rates without an evidentiary hearing is not applicable here.

The AG has characterized the motion as an attempt to temporarily prevent certain tariffs from being “implemented.” But the tariffs approved in the Final Order have already been implemented. (Nelson Aff. ¶ 10.) The Commission approved tariffs that established a procurement process and a system of charges that would recover costs resulting from that procurement process. The procurement process has already occurred under the tariffs; an auction was held, and when the Commission accepted the results of that process, the Ameren Illinois Utilities obligated themselves to contracts at the accepted auction prices. There is no provision in those contracts to allow suspension of that obligation to purchase power due to a “stay” of the rates. (Nelson Aff. ¶ 10.)

If the Commission were to grant the AG’s motion, the Commission would not be staying the implementation of the tariffs, which has already begun. Rather, the Commission would be either reducing the rates it previously approved for application on and after January 2, 2007, or it would be extending the rate freeze set forth in 220 ILCS 5/16-111. It has no authority to do either.

Under Section 9-202(a) of the Public Utilities Act, the Commission can order a temporary reduction in rates, but only when the Commission finds, after an examination of the utility’s reports, books and records, that the utility’s net income “is in excess of the amount required for a reasonable return upon the value of [the] utility's property used and useful in rendering its service to the public[.]” 220 ILCS 5/9-202(a). In those circumstances, the Commission can order a temporary reduction, but only in the amount of the excess and only while it determines what the proper rates should be. *Id.*

The AG makes no effort to make the showing required for an order under Section 9-202(a). Nor could the AG do so. There is no evidence that the Ameren Illinois Utilities will earn an excessive return. To the contrary, the Commission just spent two years in the procurement docket and the delivery services rate docket to reach a careful decision about a fair rate of return to the Ameren Illinois Utilities. (Mill Aff. ¶¶ 4-5 (attached as Appendix B).) What the results of those dockets show is that the cost of service on and after January 2, 2007, significantly exceeds the frozen rates. (Mill. Aff. ¶¶ 4, 6-10.) If the Ameren Illinois Utilities are selling power below the cost of service established by the Commission, there cannot be excess income; in fact, there will be an income deficiency. (Mill Aff. ¶ 11; Birdsong Aff. ¶¶ 7-8 (attached as Appendix C).)

Further, the Commission cannot simply decide to extend the rate freeze on its own. The General Assembly established a firm date on which the rate freeze ends. The Commission is obligated to establish just and reasonable rates on and after that date that reflect the actual reasonable and prudent cost of utility service. 220 ILCS §§ 5/1-102(a)(iv), 5/9-201(c), 5/16-111(i). The Commission properly has done so.

B. The Attorney General Does Not Approach Meeting the Burden of Proving Adequate Justification of a Grant of Stay.

On the merits, the AG's request for stay is unsupported and unsupportable. The AG bears the burden of proving adequate justification for a stay. *State of Illinois v. Yvonne J.*, 269 Ill. App. 3d 824, 830, 646 N.E.2d 1239, 1243 (1st Dist. 1994). The AG has fallen far short of meeting that burden.

A stay "is intended to preserve the status quo pending the appeal and to preserve the fruits of a meritorious appeal where they might otherwise be lost." *Stacke v. Bates*, 138 Ill. 2d 295, 308-09 (1990). A party moving for a grant of stay must present a substantial case on the

merits and show that the balance of the equitable factors weighs in favor of granting the stay. *Id.* The motion, thus, requires the Commission to consider: 1) whether the movant has a likelihood of success on the merits, 2) whether failure to grant the stay will result in irreparable harm, 3) whether granting the stay will cause the non-moving party to suffer hardship, *id.* at 306-08, as well as, 4) whether granting of the stay would serve the public interest. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981), *cited with approval by Stacke*, 138 Ill. 2d at 309. Each of those considerations requires dismissal of the AG's motion.

1. The AG Has No Meaningful Chance of Success on the Merits.

The AG has not even attempted to demonstrate a meaningful prospect of success on the merits. (Mot. at ¶ 9). Any reasonable reading of the Final Order shows that the Commission has merely approved recovery of the Ameren Illinois Utilities' costs, subject to an annual prudence review. The Final Order approved tariffs that dictate the steps utilities should take to prudently acquire the power they need to serve their customers and provides that the utilities will recover their actual cost of acquiring such power – nothing more, nothing less. The AG still offers no credible reason why the Commission was wrong in its interpretations of the Act.

Indeed, the Illinois Supreme Court has repeatedly held that the Public Utilities Act allows the use of a formula for recovering changes in cost, as the Final Order does. *See, e.g., Citizens Util. Bd. v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 133, 651 N.E.2d 1089, 1100 (1995) (“Riders often include a reconciliation formula, designed to match revenue recovery with actual costs.”); *see also City of Chicago v. Illinois Commerce Comm'n*, 13 Ill. 2d 607, 608-09 (1958) (affirming an ICC order approving a Peoples Gas Light and Coke Company tariff for retail rates “providing for an automatic adjustment from time to time . . . to reflect changes in the wholesale cost to Peoples of natural gas purchased.”). The AG still offers no alternative to the Ameren Illinois Utilities' securing power through the open market, nor does it assert any legal deficiency

in that process, or that the Commission should have reached some other conclusion. Notably, the AG did not appeal any auction rule, auction protocol, auction design, or any aspect of the regulatory oversight process. Rather than respond to the Commission's carefully reasoned refutation of the AG's (incorrect) legal arguments, the AG's appeal simply repeats a demonstrably incorrect reading of the statute. This effort hardly constitutes a showing of a meaningful likelihood of success on the merits.

The auction has run and the Ameren Illinois Utilities have new contracts in place to buy power to meet their utility obligation to provide bundled electric service to ratepayers. (Nelson Aff. ¶¶ 6-8, 10.) The only aspect of the Final Order that has yet to occur is implementation of the new rates on January 2, 2007, permitting the Ameren Illinois Utilities to recover the cost paid for that power. The cost of acquiring power is a necessary part of the Ameren Illinois Utilities' rates, and the Commission is *required* to approve rates that reflect those costs. *See* 220 ILCS § 5/1-102(a)(iv) (tariff rates must "allow utilities to recover the total costs prudently and reasonably incurred"); 220 ILCS §§ 5/9-220; *see also* *Citizens Util. Bd.*, 166 Ill. 2d at 121, 651 N.E.2d at 1095 ("In setting rates, the Commission . . . must allow the utility to recover costs prudently and reasonably incurred."). The Illinois Commerce Commission simply does not have the authority to require the Ameren Illinois Utilities to operate at a loss. *Mt. Carmel Pub. Util. & Serv. Co. v. Public Util. Com.*, 297 Ill. 303, 308 (1921) ("The State has no power to compel a corporation engaged in operating a public utility to serve the public without a reasonable compensation."). As described further below, that is exactly what would happen in the event of a stay.

2. The AG Makes No Showing of Irreparable Harm.

Even if the AG could show a likelihood of success on the merits, there is still no basis for a stay here because – rhetoric aside – the AG has provided no evidence of any harm to the

customers. Rather, the AG contends that a stay is necessary to avoid ratepayers paying higher rates, but does not even attempt to show why those rates inflict irreparable harm. Without this crucial showing, the AG's request must be denied.

The AG's "evidence" of "harm" consists entirely of the affidavits of Mr. Scott Rubin and Ms. Kristav Childress, both of whom simply recite what they believe the difference will be between the current rates and the new rates and then assert this constitutes "harm." If customers are paying rates that reflect the actual prudent cost of utility service, customers are not "harmed" in any legal sense because those are the rates that are required by law. Under traditional regulation, the Commission allows a utility to recover its actual, prudent expenses plus a reasonable return on its investment. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Waterworks and Improvement Co. v. W. Virginia Pub. Serv. Comm'n.*, 262 U.S. 679 (1923). The tariffs approved by the Commission allow the Ameren Illinois Utilities to recover their actual expenses of acquiring power pursuant to a procedure that the Commission has found to be prudent. There is nothing in the tariffs that is inconsistent with traditional regulation in any way. Indeed, to adopt the AG's definition of "harm" in this context would logically conclude that the Commission, who reviewed and approved the same "harmful" rates the AG seeks to stay, must have violated its statutory duty to protect the public's interest when it did approve the rates.

3. A Stay Would Not Preserve the Status Quo, But Would Inflict Significant And Irreparable Harm Upon the Ameren Illinois Utilities and the Public.

At this late stage, a stay would not preserve the status quo, but would inflict substantial irreparable harm to the Ameren Illinois Utilities and their customers. When determining whether to grant a stay, it is appropriate to consider whether a stay would inflict harm upon the non-movant. *Stacke*, 138 Ill. 2d at 307-09; *Chicago v. Cosmopolitan Nat'l Bank*, 77 Ill. App. 3d 212,

220 (1st Dist. 1979). A stay here would imminently inflict catastrophic harm to the Ameren Illinois Utilities because they would be required to lose money for *every single* kilowatt hour distributed after December 31, 2006. (*See* Mill Aff. at ¶¶ 4-11.) When faced with the legal requirement to lose money from their only revenue source, the Ameren Illinois Utilities' credit ratings will be downgraded. (Birdsong Aff. ¶ 8.) The utilities will then begin down a path toward insolvency that could very well end with the lights going out in the dead of winter.

Consistent with the goal of deregulating the electricity generation industry, the Ameren Illinois Utilities, as electricity delivery utilities, no longer own any substantial generating capacity. Accordingly, they must acquire the electricity they are required by law to sell. (Nelson Aff. ¶¶ 3-5.) After the long-term supply contracts expire on December 31, 2006, they must acquire that electricity from the wholesale power market – which they have arranged to do through already signed contracts, procured through the market-based auction blessed by the Commission. (Nelson Aff. ¶¶ 5-8, 10.)

The Ameren Illinois Utilities are ultimately dependent upon the rates they charge to meet all the financial obligations of purchasing power, and paying operations and maintenance costs. The Ameren Illinois Utilities can, and do, access the debt and capital markets to meet their cash needs – but at the end of the day, any party doing business with the Ameren Illinois Utilities knows that their primary source of income are their utility rates. (Birdsong Aff. ¶¶ 5-8.) Accordingly, to protect themselves from risks associated with the Ameren Illinois Utilities' ability to pay their debts, the Ameren Illinois Utilities' suppliers focus on the Ameren Illinois Utilities' creditworthiness, as expressed in the credit ratings announced by the rating agencies. (*See* Birdsong Aff. ¶ 8.) These credit ratings will be severely downgraded in the wake of a stay, and the Ameren Illinois Utilities' ability to attract affordable capital will be diminished as well.

For example, Standard & Poor's *explicitly* stated that, should the current rates be extended (as a stay would do), Standard & Poor's would cut the Ameren Illinois Utilities' credit ratings significantly.² Moreover, Moody's Investment Services Rating Action cites "a difficult political and regulatory environment" and "concern about the ultimate full recovery" of power procurement costs as the reason behind its July 26, 2006 downgrade of AmerenCIPS and AmerenCILCO debt securities and a negative outlook for all of the Ameren Illinois Utilities.³ If a stay were granted, the Ameren Illinois Utilities would face further downgrades and even higher prices for the power they must acquire to serve their customers because their suppliers would insist on a premium to compensate them for the additional credit risk. (*See* Birdsong Aff. ¶ 8.) The credit market fully recognizes that requiring a company to sell its chief product at a price below its cost of acquiring the product will mean that the company cannot long remain in the business. (*See* Birdsong Aff. ¶¶ 5-8.)

The effect of this downgrade would be critical and immediate. It would mean that Ameren will not be able to borrow on the open market to meet its short-term obligations. (*See* Birdsong Aff. ¶ 8.) This ability to borrow is crucially important because, as the public's consumption of electricity fluctuates, so does the Ameren Illinois Utilities' cash flow (*i.e.*, the

² Recently, the Illinois General Assembly debated legislation that would affect the Ameren Illinois Utilities' ability to recover the full cost of distributing power. In response to the *mere possibility* that such a law was to be enacted, Standard & Poor's lowered the Ameren Illinois Utilities' credit rating to near non-investment level with the promise to lower Ameren Illinois Utilities' credit rating to non-investment grade if the legislation passed. *See* December 1, 2006 S&P Ratings Direct at ¶ 2 (attached as Appendix D) (Stating if a rate freeze were to be enacted "Standard & Poor's would immediately lower the credit ratings on the Illinois utilities to the 'B' category. . . . [as] [i]nsolvency would be unavoidable."). If the Commission grants the requested stay, which effects the same result as the legislation referenced by Standard & Poor's, this will most certainly lead to the promised credit drop and referenced insolvency.

³ *See* Moody's Investor Service Ratings Action: Ameren Corporation, "Moody's Downgrades Union Electric (Sr. Uns. To A3), CIPS (Sr. Uns. To Baa3) CILCORP (Sr. Uns. To Ba1), and CILCO (Sr. Uns. To Baa2); Confirms Ameren Corporation and Illinois Power; Outlook Negative for Ameren and Four Illinois Subsidiaries" (July 26, 2006) (attached as Appendix E).

more electricity they must distribute, the higher the costs of operation). While Ameren Illinois Utilities have reliable access to short term credit by way of a credit pool made available by a group of lending facilities, that credit pool limits the Ameren Illinois Utilities to individual credit limits. (See *Birdsong Aff.* at ¶ 8.) Very soon, the Ameren Illinois Utilities will simply be cumulatively piling up debt, with no revenue stream or borrowing capability to repay it. (*Birdsong Aff.* ¶ 8.)

Thus, if the Commission grants the requested stay, the Ameren Illinois Utilities will proceed down a path of insolvency – quite possibly before the Illinois Appellate Court can rule on the merits of the case. This harm would be irreparable because, even if the Ameren Illinois Utilities succeed at the appellate level, they would not be permitted to retroactively recover the deficiency in their rates. See *Citizens Utilities Co. v. Illinois Commerce Comm’n*, 124 Ill. 2d 195, 207, 529 N.E.2d 510, 515 (1988) (retroactive ratemaking “clearly conflicts with fundamental principles of ratemaking in Illinois.”). Moreover, no amount of cash can restore the utilities’ creditworthiness or the ancillary costs to the overwhelming loss of equity. For these reasons, the request for a stay must be denied.

4. A Stay Is Contrary to the Public Interest.

Finally, a stay here is inappropriate because it would frustrate Illinois public policy and cause public harm. See *Ruiz*, 650 F.2d at 565. The Public Utilities Act recognizes that the “health, welfare and prosperity of all Illinois citizens requires the provision of adequate, efficient, reliable . . . and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens.” 220 ILCS § 5/1-102. Toward that end, the General Assembly stated the goals and objectives of Commission rate regulation. These include:

- Allowing utilities “a sufficient return on investment so as to enable them to attract capital in financial markets at competitive rates” (220 ILCS 5/1-102(a)(iii));
- Ensuring the ability of utilities to provide customers to provide electricity service in a reliable manner (220 ILCS 5/1-102(c));
- Promoting the “fair treatment of consumers and investors,” to ensure:
 - Protection of public health, safety and welfare (220 ILCS 5/1-102(d)(i));
 - “Orderly transition periods to accommodate changes in public utility service markets” (220 ILCS 5/1-102(d)(v));
 - Regulation does not result in undue or sustained adverse impact on utility earnings (220 ILCS 5/1-102(d)(vi)).

Granting the AG’s motion would thwart all of these objectives. A stay would require the Ameren Illinois Utilities to sell at a loss (Nelson Aff. ¶¶ 4-8, 10-15; Mill Aff. ¶¶ 4-11; Birdsong Aff. ¶¶ 3-8), would harm the Ameren Illinois Utilities’ ability to access the capital markets (Birdsong Aff. ¶ 8), would impair the Ameren Illinois Utilities’ ability to provide reliable service (Nelson Aff. ¶ 13, Birdsong Aff. ¶ 8), and would thwart the Commission’s mandate to establish rates that reflect the cost of utility services. The irreparable harm a stay would cause to the Ameren Illinois Utilities would thus also result in harm to the public they serve. Both the Commission’s duty to promote the public goals and objectives and the public interest requirement for stay thus warrant rejection of the AG’s request.

III. CONCLUSION

In conclusion, the motion should be denied as a matter of law and fact, for all the reasons stated above.

Dated: December 12, 2006

Respectfully submitted,

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PROOF OF SERVICE

I, Christopher W. Flynn, certify that on December 12, 2006, I served a copy of the foregoing Response by electronic mail to the individuals on the Commission's Service List for Dockets 05-0160, 05-0161, and 05-0162 (consol.).

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