

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On its own motion)	
)	Docket No. 06-0800
Investigation of Rider CPP of)	
Commonwealth Edison Company, and)	
Rider MV of Central Illinois Light)	
Company d/b/a AmerenCILCO, of)	
Central Illinois Public Service)	
Company d/b/a AmerenCIPS, and of)	
Illinois Power Company d/b/a)	
AmerenIP , pursuant to Commission)	
Orders regarding the Illinois Auction.)	

**AMEREN ILLINOIS UTILITIES' RESPONSE IN OBJECTION TO
MOTION TO COMPEL**

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 (the “Ameren Illinois Utilities”) hereby submit this response in objection to the Motion to Compel (“Motion”) of the Attorney General (“AG”).

The Motion should be denied because the AG failed to comply with the Commission’s rules regarding governing discovery disputes, and because the AG has failed to make any showing that the requested materials are in fact relevant to issues being litigated in this proceeding, or that the scope of the AG’s request is properly tailored to this proceeding.

Moreover, as the Commission is fully aware, the Commission has requested and received much of the same material from the Ameren Illinois Utilities and is conducting its own review of those materials. No supplemental review in this docket is required to assist the Commission in exercising its authority.

STATEMENT OF FACTS

1. In accordance with its Final Order in Dockets 05-0160, -0161, and -0162 (cons.), on December 20, 2006, the Commission entered an order initiating this docket to investigate the

Illinois Auction process and Rider MV. In the Initiating Order, the Commission issued the following guidance regarding the scope of the docket:

The Commission has received the public reports of the Auction Manager and of the Staff, and is of the opinion that the reviews, recommendations, and suggestions set forth in those reports are appropriate examples of the types of issues to be considered in this docket. The Commission will consider testimony and briefs filed in this proceeding in order to determine whether any changes should be made in the tariffs of ComEd and the Ameren Companies that embody the auction process. The Commission intends to order any material changes in the tariffs in time for the changes to be implemented in a timely manner prior to the next auction, which we understand is to take place no later than January 2008.

Without limiting the authority of the Administrative Law Judge(s) to manage this proceeding, we do wish to observe that prehearing conferences, workshops, and other collaborative efforts might be particularly appropriate in a case such as this to define with precision, and narrow where possible, the issues to be considered in the more formal phases of the docket.

Initiating Order, p. 5.

2. On February 2 and 15, 2007, the parties to this docket participated in workshops to identify and discuss the relevant issues, as instructed by the Initiating Order. Through the workshops, the parties produced an "Issues List," identifying such agreed-upon and contested issues, which was filed with the Commission on February 22, 2007.

3. On March 1, 2007, the AG served data request AG 1.5 on the Ameren Illinois Utilities, which stated:

Please provide all communications and documentation relating to communications by AmerenCILCO, AmerenCIPS, AmerenIP or any of their affiliates or parent companies with Standard & Poor's Corporation, Fitch Ratings and Moody's Investors Service or their affiliates or parent companies from January 1, 2004 to the present.

4. On March 13, 2007, the Ameren Illinois Utilities provided the following response to AG 1.5:

The Ameren Illinois Utilities object to this request on the grounds that it is overbroad, outside the scope of this proceeding, and not

reasonably calculated to the discovery of relevant, admissible evidence. The Ameren Illinois Utilities further object to this request to the extent that it calls for the production of confidential and proprietary information.

5. On March 6, 2007, the Illinois House of Representatives passed a bill to reinstate the Ameren Illinois Utilities' legislatively reduced and frozen rates of 1997, in a 92-5 vote. On March 8, 2007, an Illinois Senate Committee approved a different bill that would also reduce and reinstate the rate freeze, in an 11-0 vote.

6. The following Monday, on March 12, 2007, Moody's Investor Services downgraded the credit ratings of the Ameren Illinois Utilities to "junk" status, stating: "The downgrade of Ameren, Central Illinois Public Service, CILCORP, Central Illinois Light, and Illinois Power is prompted by the passage of rate freeze legislation by both the Illinois House and by a committee of the Illinois Senate last week and the growing support for a rate freeze in both chambers." (Exhibit A.)

7. On or about March 14, 2007, the AG issued several statements to the press, questioning "whether a decision to downgrade the Ameren Illinois utilities' credit ratings to "junk" status on Monday [March 12, 2007] might have been orchestrated by Ameren and ratings agency Moody's Investors Service." (*Ameren faces credit probe – Madigan claims downgrade may have been orchestrated*, Journal Star, March 14, 2007 (Exhibit B), *see also* Exhibits C, G, and H.)

8. In one of those statements, Ben Weinberg, chief of the Public Interest Division with the AG's office, frankly acknowledged that the reason behind AG 1.5 is political: "[The AG wants] to see whether the company may have affected the tone or timing of the [March 12, 2007, Moody's] report, in an effort to "blunt the rate freeze" in the Legislature . . ." *Madigan wants federal investigation*, Journal Gazette and Times-Courier, March 15, 2007 (emphasis added) (Exhibit C.).

9. Mr. Weinberg also “acknowledged it was unlikely the Ameren utilities would purposefully sabotage their own credit ratings, because the fiscal downside is so great.” (Exhibit C.).

10. On March 22, 2007, counsel for the AG contacted counsel for the Ameren Illinois Utilities by telephone regarding AG 1.5. Counsel for the Ameren Illinois Utilities subsequently corresponded with counsel for the AG by email on March 23-26, 2007, the substance of which is attached as Exhibit D. In those communications, counsel for the AG was either unable or unwilling to explain why the AG believes that the documents requested in AG 1.5 would produce facts that are relevant to the issues before the Commission in this proceeding. *Id.* Counsel for the AG also declined to identify any particular issue on the Issues List on which the requested documents would offer evidence. Counsel provided no information to the Ameren Illinois Utilities beyond what is set forth in the attached exhibit.

11. On March 28, 2007, the AG filed its Motion to Compel.

12. On March 29, 2007, several statements attributed to counsel for the AG appeared in newspaper articles nationwide. Those articles characterize the Motion to Compel as a “probe” that “is part of a challenge by the attorney general to the integrity of an auction that resulted in a sharp rise in electricity rates paid this year by Illinois residents and businesses.” *Madigan asks for ICC help on credit rating probe*, Chicago Tribune, March 29, 2007 (Exhibit E); *Illinois Questions Ratings Agencies Gave to Utilities*, New York Times, March 29, 2007 (Exhibit F).

I. THE AG DID NOT EXERCISE REASONABLE ATTEMPTS TO RESOLVE DIFFERENCES BEFORE FILING THE MOTION TO COMPEL, AS THE COMMISSION’S RULES REQUIRE.

The Motion should be dismissed because counsel for the AG made no reasonable attempt to resolve differences before filing the Motion to Compel, as is required by Section 200.350 of the Commission’s Rules. That Section requires that, “every motion to compel . . . shall

incorporate a statement showing that consultation and reasonable attempts to resolve differences have failed.” 83 Ill. Admin. Code 200.350.

In discussions with counsel, the Ameren Illinois Utilities asked the AG to explain the relevance of the documents to the Commission’s investigation in this docket, which is a reasonable request. Specifically, counsel for the Ameren Illinois Utilities asked the following question, which goes to the heart of whether a discovery request seeks relevant information:

Why do you believe the communications you seek will add facts to assist the Commission in resolving any issue on the Issues List?

(Exhibit D.) Counsel for the AG was either unable or unwilling to provide a responsive answer to the question. *Id.* Counsel declined to even identify any particular issue on the Issues List. *Id.* Counsel provided no information to the Ameren Illinois Utilities beyond what is set forth in the attached email.

This less than half-hearted attempt to comply with 83 Ill. Admin. Code § 200.350 can hardly be viewed as sufficient, particularly when viewed in comparison with the AG’s eight-page Motion, fifty pages of exhibits, and several concurrent – and far more forthcoming – statements to various news sources. It is not appropriate either to hold back the bases for a discovery request or to invent them solely for the purpose of filing a motion to compel. The Motion should be denied on this basis alone. But, in any event, any “weight” to be attributed to these materials is non-existent.

II. AG 1.5 REQUESTS INFORMATION THAT BEARS NO RELATION TO ANY ISSUE BEFORE THE COMMISSION IN THIS DOCKET.

Second, as noted above, the AG has refused to answer even the most basic questions regarding the purported relevance of the documents requested in AG 1.5. The Motion, while offering several pages of irrelevant accusations, sheds no further light on the topic of relevance, which is a cornerstone in any request of information or materials. The AG states the following

definition of relevant evidence, but offers no analysis or attempt to apply this definition to the information it seeks in AG 1.5:

[T]hat which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

Wojcik v. City of Chicago, 200 Ill. App. 3d 964, 971 (1998) (cited in Motion, pp. 2-3, ¶ 7.)

Indeed, there is no mental contortion by which this definition could possibly apply to the documents requested here.

A showing of why requested documents are relevant is essential to establishing a need to compel discovery in Illinois. *Fabiano v. Palos Hills*, 336 Ill. App. 3d 635, 658-59 (1st Dist. 2002) (“Discovery should be denied absent sufficient evidence that the requested discovery is relevant.”). Simply pointing out issues on the Issues List that contain the word “credit” or “ratings” is not enough. There must be some type of logical connection established between the discovery requested and the facts needed¹ to resolve issues. Here, there is none.¹ The AG cannot begin to describe one. Thus, discovery should be denied. *Id.*

The Ameren Illinois Utilities could find no mention in any of the AG’s public statements to indicate that the AG had any interest in using the requested documents to assess any issue related to the auction or the supplier forward contracts, as the AG states in the Motion. To the contrary, spokespersons for the AG have publicly stated that there are many other issues they want resolved – issues that fall far outside of the scope of this docket:

- “[W]hether a decision to downgrade the Ameren Illinois utilities’ credit ratings to ‘junk’ status Monday [March 12, 2007] might have been orchestrated by Ameren and ratings agency Moody’s Investors Service.” *Madigan questions decision to*

¹ As further evidence of the obvious irrelevance of the documents requested in AG 1.5, it requests documents dating back to January 1, 2004 – more than a year before the dockets proposing and establishing the Illinois Auction were even initiated.

cut Ameren's credit rating; Attorney general asks if Moody's is in cahoots with utility; State Journal Register, March 14, 2007 (Exhibit G)

- “[W]hether the company may have affected the tone or timing of the [March 12, 2007] report, in an effort to “blunt the rate freeze” in the Legislature”
Madigan wants federal investigation, Journal Gazette and Times-Courier, March 15, 2007 (emphasis added) (Exhibit C).
- “[W]hether the two utilities that supply most of Illinois with electricity, Ameren Corp. and Commonwealth Edison Co., are in as dire financial conditions as the credit agencies say.” *Illinois to probe claims of utilities' financial weakness*, Chicago Tribune, March 14, 2007 (Exhibit H).

And so on. Not one of these issues appears on the Issues List, or is even remotely related to any such issue.

Illinois law specifically prohibits parties from using discovery requests to conduct the same type of “probe” the AG has described in the press. *Snoddy v. Teepak, Inc.*, 198 Ill. App. 3d 966, 969 (1st Dist. 1990) (upholding refusal to compel where the “discovery requests were merely a ‘fishing expedition,’ which would have been conducted with the hope of finding something relevant.”). The law does not allow discovery where a movant is merely following a hunch. *See Fabiano*, 336 Ill. App. 3d at 658-59 (1st Dist. 2002) (upholding denial of motion to compel where movants offered no argument as to the relevance of the requested documents and suggested only that the documents “may” contain relevant evidence.). Further, the Commission’s rules expressly forbid a party from using discovery requests to harass, cause prejudice, or disrupt the proceeding. 83 Ill. Admin. Code § 200.340.

The AG’s is intent on refuting the seemingly irrefutable: i.e., that a reasonable analyst could decide that a company whose revenues may be frozen by statute below its cost of service poses an investment risk not serving of an investment grade. The Motion suggests that the only

way an analyst could ever arrive at such a conclusion is through collusion and manipulation, and that the AG is entitled to pursue that claim – which is not on the Issues List – in this docket. Moreover, there is no evidence anywhere that suggests such collusion occurred other than the AG’s own statements to the press. As Michael Haggarty of Moody’s Investors Service noted, “We wouldn’t have taken an action that was so negative if we were at all in cahoots with Ameren.” (Exhibit B).

Finally, AG 1.5 is overbroad, as it requests documents dating back to January 1, 2004 – more than a year before the dockets proposing and establishing the Illinois Auction were even initiated – and because it requests documents that are not even in the Ameren Illinois Utilities possession and control, namely, the Ameren Illinois Utilities’ affiliates. Those parties are not participating in this docket, they are functionally separate from the Ameren Illinois Utilities, and the Ameren Illinois Utilities cannot produce documents on their behalf.

The Commission has important work before it in this docket. Preserving the integrity of the auction process while fine-tuning its details is essential to its continued success. The AG’s new-found alleged interest in bilateral credit requirements, to back into demands for the information being sought in AG 1.5, provides simply no reason to derail these proceedings and distract its participants by allowing discovery on irrelevant topics.

For all of the above reasons, the Motion to Compel should be denied.

Dated: April 6, 2007

CENTRAL ILLINOIS LIGHT COMPANY
d/b/a AmerenCILCO, CENTRAL ILLINOIS
PUBLIC SERVICE COMPANY d/b/a
AmerenCIPS, ILLINOIS POWER
COMPANY d/b/a AmerenIP

by: /s/ Laura M. Earl

Christopher W. Flynn
E-mail: cwflynn@jonesday.com
Laura M. Earl
E-mail: learl@jonesday.com
JONES DAY
77 West Wacker
Chicago, IL 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585

Edward C. Fitzhenry
E-mail: efitzhenry@ameren.com
AMEREN SERVICES COMPANY
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149, MC 1310
St. Louis, Missouri 63166-6149
Telephone: (314) 554-3533
Facsimile: (314) 554-4014

CERTIFICATE OF SERVICE

I, Laura M. Earl, certify that on April 6, 2007, I served a copy of the foregoing Ameren Illinois Utilities' Response In Objection to Motion to Compel by electronic mail to the individuals on the Commission's Service List for Docket 06-0800.

/s/ Laura M. Earl
Laura M. Earl
Attorney for the Ameren Illinois Utilities

CHI-1582788v1