

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER COMPANY,)	
d/b/a AmerenIP and AMEREN ILLINOIS)	
TRANSMISSION COMPANY)	
)	Docket No. 06-0706
Petition for a Certificate of Public Convenience and)	
Necessity, pursuant to Section 8-406 of the Illinois)	
Public Utilities Act, to construct, operate and maintain)	
new 138,000 volt electric lines in LaSalle County,)	
Illinois.)	

**AMEREN’S RESPONSE IN OPPOSITION TO LASALLE-PERU TWP. HIGH SCHOOL
DISTRICT 120’S PETITION FOR INTERLOCUTORY REVIEW OF RULING
STRIKING REBUTTAL TESTIMONY**

Intervener La-Salle Peru Township High School District 120 (the “District”) sought to file its direct testimony after the time set for filing direct testimony in this case had long passed. When that motion was denied, the District merely re-labeled that very same testimony and filed it as rebuttal testimony. Illinois Power Company d/b/a Ameren IP and Ameren Transmission Company (“Ameren”) moved to strike this rechristened testimony on the ground that it was not proper rebuttal and that its eve-of-trial submission (the parties are in evidentiary hearings today) would be prejudicial and unfair to Ameren. The Administrative Law Judge (ALJ) granted the motion, and the District now seeks interlocutory review.

The District’s interlocutory appeal should be denied. The District had the opportunity to timely submit the direct testimony of Shira Kramer, but failed to do so. The District’s efforts to argue that the testimony is in fact proper rebuttal fail. The testimony does not even mention any of the direct testimony of the parties, or any of the factual positions or opinions stated in that testimony. It raises issues and arguments nowhere mentioned in the direct testimony. The ALJ simply did not abuse his discretion by holding the District to the same schedule and standards that applied to all other parties. The order should be affirmed.

I. BACKGROUND

On November 1, 2006, Illinois Power Company d/b/a AmerenIP (“AmerenIP”) and Ameren Illinois Transmission Company (together, “Ameren”) presented direct evidence in support of their request for a certificate of public convenience and necessity to construct, operate, and maintain two new 138kV electric transmission lines. By mid-February, 2007, nine parties had petitioned to intervene in the case. All of their petitions were granted by early March. The Commission Staff and other intervenors filed their direct testimony on May 30, 2007. On June 7, 2007, the Administrative Law Judge (“ALJ”) issued a notice stating that “those wishing to offer written direct testimony in this matter must file a petition to intervene in accordance with Section 200.200 of 83 Illinois Administrative Code 200 by June 19, 2007” and “the schedule for the remainder of this proceeding will be discussed at the next status hearing in this docket. The status hearing will be held on June 20, 2007 . . .” (June 7, 2007 Order (attached hereto as Exhibit A)). This notice was served on the District. The District filed its Petition to Intervene on June 19, 2007. The District's Petition to Intervene was granted at the June 20, 2007 status hearing (Tr. 73). Counsel for the District did not appear at that hearing, and the District did not request an opportunity to amend the proceeding's schedule to allow it to file direct testimony.

The District gave no indication that it desired to file direct testimony until it filed a Motion to Amend Schedule (“Motion”) on August 20, 2007, one month after Ameren's rebuttal testimony had been submitted, and only a short time before the Commission Staff and intervenors' rebuttal testimony was due. The District's eleventh-hour Motion requested additional time to file direct testimony in this case. In the Motion, the District stated that it intended to “submit the direct expert testimony of a medical expert who will offer an assessment of the risks associated with” operation of transmission lines and electromagnetic fields (“EMFs”). (Motion, ¶ 16 (Attached hereto as Exhibit B).) Further, in the Motion the District sought an

extension to *November 30, 2007*, alleging a need for such extension to file testimony, and further claiming it was the only party that opposed all routes. The ALJ denied the Motion on August 30, 2007.

Notwithstanding the statements made in the Motion that it needed several months to file testimony, somehow the District managed, 10 days after the Motion was filed, to file the direct testimony of four witnesses, one of which indicates the District's support for Ameren's primary route. However, in the guise of rebuttal, the testimony of Shira Kramer (the "Kramer Testimony") included extensive argument with respect to EMFs, referencing no less than 95 scholarly articles and including as an attachment a summary of approximately 20 articles on EMFs (District No. 120 Exhibit 4.1). Although EMFs had been mentioned in summary fashion in other interveners' direct testimony, the Kramer Testimony introduced extensive new information, raised new issues, and propounded new conclusions, none of which were in response to any specific witness or testimony in the proceeding. For example, the Kramer Testimony offered a purported opinion that that EMFs may have cardiovascular effects, psychological effects, reproductive effects, or cause sleep disorders; none of which had ever been addressed in the direct testimony. Moreover, the Kramer Testimony appeared to be the exact same "direct expert testimony of a medical expert" that the District said it intended to file in the Motion.

Instead of the months Ameren was provided to respond to the direct testimony of every other intervenor, Ameren had only two weeks to respond to the "rebuttal" testimony under the schedule set out by the ALJ (Aug. 30 Order). In such a short time span, it was impossible for Ameren to conduct fulsome discovery and properly respond to the extensive testimony. In order

to avoid unfair prejudice from the District's improper maneuver, therefore, Ameren objected to the Kramer Testimony and asked that it be stricken from the record.

The ALJ agreed with Ameren, and barred the Kramer Testimony for a second time when it granted Ameren's motion to strike on September 10, 2007.

II. ARGUMENT

A. THE KRAMER TESTIMONY IS NOT PROPER REBUTTAL TESTIMONY.

Under Illinois law, rebuttal evidence is that which answers or responds to new affirmative matters raised by an adversary. *Rodriguez v. City of Chicago*, 21 Ill. App. 3d 623, 625-26 (1st Dist. 1974); *Gray v. Bonfield*, 59 Ill. App. 381 (1st Dist. 1895). Proper rebuttal evidence is also directed to the specific testimony of an opposing witness. *Pepe v. Caputo*, 408 Ill. 321, 328 (1951). Long-established Commission practice follows Illinois law in requiring that rebuttal testimony respond to another party's testimony and not raise entirely new issues or introduce new information that should be properly presented in a party's case in chief. *Illinois Bell Tel. Co.*, Docket 02-0864, Order, pp. 294-98 (2004); *Citizens Util. Co. of Ill.*, Docket 84-0237, 1985 Ill. PUC LEXIS 38, *42-52 (1985).

The Kramer Testimony does not respond to any other testimony and was rightly excluded. The District effectively concedes that the Kramer Testimony fails to address any other testimony. It never once argues (nor could it) that the Kramer Testimony is directed to any of the testimony referenced in its Petition – neither the direct testimonies on behalf of SOLVE and SHOCK nor Mr. Cruse's Rebuttal Testimony on Ameren's behalf. That alone means that the Kramer Testimony cannot be considered proper rebuttal testimony.

The District tries to argue that “[t]he issues of health risks and potential effects of EMFs have been discussed by the parties in this proceeding” and claims that the testimony “merely

expounds upon the testimony previously submitted regarding the issue of potential health risks inherent with EMFs.” (Pet. at 5.) This, of course, is not what rebuttal is. And moreover, the Kramer Testimony does not “expound upon” (*i.e.* explain) other testimony. It ignores all other testimony.

The Kramer Testimony also seeks to raise new issues on the eve of hearing. It raises specific issues with respect to the causal relationship between EMFs and a variety of illnesses, including whether EMFs can cause cardiovascular effects, psychological effects, reproductive effects, or cause sleep disorders. This is certainly not responsive to Mr. Blue’s testimony on behalf of SHOCK, which (a) limits its discussion to a possible link between EMFs and cancer and (b) explicitly is *not* concerned with establishing a causal relationship between EMFs and any particular illness. (SHOCK Exhibit 1.0, page 4, lines 116-17 (“Whether proof of a causal link between EMF and cancer exists or not, why take the risk[?]”). Nor does the testimony respond to Ms. Jasiak’s testimony on behalf of SOLVE, which stated a “concern” about the “unresolved controversy” of EMFs. (Direct testimony of SOLVE, page 7, lines 90-91.) Moreover, the Kramer Testimony could not have been responding to Ameren’s *rebuttal* testimony of Mr. Cruse, as the Kramer Testimony is much broader and discusses many alleged health effects never discussed by Mr. Cruse or the direct testimony. The District’s implication that the Kramer Testimony is responsive to previous testimony is simply not supported by the record.

Moreover, the District provides no support for its argument that rebuttal testimony is an appropriate vehicle to raise *new* issues related to direct testimony. That is because the Commission’s precedent is quite to the contrary. Rebuttal testimony should only *respond* to an opposing party’s direct testimony, not raise new issues that are loosely related to the direct testimony. *See Illinois Bell Tel. Co.*, Docket 02-0864, Order, pp. 294-98 (2004); *Citizens Util.*

Co. of Ill., Docket 84-0237, 1985 Ill. PUC LEXIS 38, *42-52 (1985). The ALJ was correct in ruling that the Kramer Testimony was not appropriate rebuttal testimony and striking it accordingly.

B. ADMITTING THE REBUTTAL TESTIMONY WOULD UNFAIRLY PREJUDICE AMEREN, AND WOULD NOT UNFAIRLY PREJUDICE THE DISTRICT.

The District also claims that Ameren would not be prejudiced by introducing the Kramer Testimony as rebuttal. Interestingly, the District does not (and cannot) argue that Ameren would be in the same position as it would have been had the District filed this testimony appropriately – as timely direct testimony. Instead, it argues that Ameren has the option of not responding at all, and speculates (with no support) that Ameren must have studied the effects of EMFs at some point. These arguments are both transparently absurd. It is undisputed that Ameren’s time to respond to the Kramer Testimony is significantly reduced if the testimony is introduced as “rebuttal” instead of direct testimony. Naturally, that prejudice would be exacerbated, not alleviated, if Ameren filed no response at all instead of a response that represented Ameren’s best effort on a short time frame. Further, it is unreasonable to expect that Ameren should have been fully prepared to respond within two weeks to detailed testimony it had never seen before merely based on the District’s speculation that Ameren must have already studied the subject matter of EMFs generally.

Thus, the District’s implication that *it* is the one that needs and deserves the Commission’s protection is entirely off-base. To the extent that “the record [is] incomplete and one-sided” (Pet. at 4) the District is “treat[ed] differently than Ameren and other intervenors” (Pet. at 6), the fault can be traced to the District’s own conduct, not Ameren’s or the ALJ’s adherence to the ALJ’s clearly-established schedule. It is no one’s fault but the District’s that the

District did not timely offer the Kramer Testimony. Any prejudice it suffers is therefore not *unfair* prejudice.

C. THE COMMISSION SHOULD SAFEGUARD THE ALJ'S PREROGATIVE TO CONTROL HIS OWN DOCKET.

As the Commission is well aware, it is crucial to the proper functioning of Illinois' utility system that proceedings in the Commission be carried out expeditiously and fairly. ALJs are entrusted with assuring that both of these goals are met. Here, although the District, as a late intervenor, was required to take the proceeding's schedule as it found it (83 Ill. Adm. Code Section 200.200(e)), the ALJ gave the District the opportunity to request a schedule accommodation for its direct testimony at the June 20, 2007 status hearing. The District did not take advantage of that opportunity, and the ALJ denied the District's eleventh-hour request to modify the schedule after Ameren asserted timeliness objections. August 30 Order.

The schedule for submission of pre-filed testimony in Commission proceedings is designed to allow the orderly presentation of, and response to, evidence. The improper designation of the Kramer Testimony as rebuttal testimony not only subverts that process by introducing significant new information late in the proceeding, but also flouts the ALJ's earlier order denying the District the opportunity to submit direct testimony. As such, it prejudices Ameren and other parties seeking to respond to that new information. If the Commission were to allow the District to overturn the ALJ's decision to strike the Kramer Testimony, it would only serve to encourage parties in the District's position to disregard the ALJ's schedule, to the detriment of the parties who are adhering to the ALJ's timetable.

III. CONCLUSION

The Kramer Testimony is not proper rebuttal testimony, and because the scheduled time for filing direct testimony is long past, it should be stricken. Failure to do so could undermine

the ALJ's authority to promote an efficient and fair proceeding. Accordingly, the petition should be denied.

Dated: September 27, 2007

Respectfully submitted,

ILLINOIS POWER COMPANY d/b/a
AmerenIP, and
AMEREN ILLINOIS TRANSMISSION
COMPANY

By: /s/ Albert D. Sturtevant
Albert D. Sturtevant
One of their attorneys

OF COUNSEL:

Christopher W. Flynn
Albert D. Sturtevant
JONES DAY
77 West Wacker Drive
Chicago, IL 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
cwflynn@joneday.com
adsturtevant@jonesday.com

Edward C. Fitzhenry
Managing Associate General Counsel
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
Telephone: (314) 554-3533
Facsimile: (314) 554-4014
efitzhenry@ameren.com