

ILLINOIS COMMERCE COMMISSION

MT. CARMEL PUBLIC UTILITY CO. §
§
Proposed general increase in electric § DOCKET NO. 07-0357
And natural gas rates. §

CITY OF MT. CARMEL'S
RESPONSE TO MT. CARMEL PUBLIC UTILITY COMPANY'S
MOTION TO STRIKE

The City of Mt. Carmel responds to the Motion to Strike by Mt. Carmel Public Utility Company as follows:

Mt. Carmel Ex. 1.0 at Page 3, lines 48-49:

In June 2007, our unemployment rate was 6.3 percent compared with the Illinois average of 5.4 percent and the national rate of 4.7 per cent.

Mt. Carmel Public Utility seeks to strike this sentence on the basis that it is irrelevant to the question of whether rates should be increased by Mt. Carmel Public Utility based upon Mt. Carmel's objection to a data request submitted by the Utility. The testimony is offered only as background as to the City of Mt. Carmel. "Evidence that is essentially background in nature offered as an aide to understanding may be admitted." Cleary and Graham, Handbook of Illinois Evidence, Eighth Ed. at Pg. 118. The objection to the data request was that the unemployment rate is not relevant to determining the level of the utility's rate increase in this case. To the extent that the Utility would seek to use the data to show that it is entitled to an increase, the unemployment rate is not relevant. It is relevant to give the ICC information as to the City of Mt. Carmel.

As background information, the statement is admissible and should not be stricken.

Mt. Carmel Ex. 1.0 at Page 4, lines 66-68:

All three of the companies I just mentioned have expressed concern that the electric rates are already higher in the MCPU area than other sites they are considering in other locations. This concern is even before any rate increase.

Mt. Carmel Utility seeks to strike this testimony as hearsay. It is not hearsay. “When an out-of-court statement is used, not as evidence of the fact asserted but as circumstantial evidence for another purpose, the hearsay rule does not apply.” *Gass v. Carducci*, 37 Ill. App.2d 181, 188 (1st Dist. 1962). Here the issue is whether potential clients considered other locations due to MCPU’s rates, not whether in fact the rates were higher.

MCPU also erroneously argues that because it did not seek either a protective order in this case or file a motion to compel public disclosure of the companies names, that MCPU’s inaction to seek the disclosure under an adequate protective order bars Mt. Carmel’s testimony in this regard. The utility’s failure to pursue discovery should not bar the testimony.

Mt. Carmel Ex. 1.0 at P. 4, lines 69-70.

According to an Illinois Commerce Commission 2006 report, Mt. Carmel Public Utility Co. has the highest rates of any utility listed.

MCPU seeks to bar this testimony based upon a lack of foundation for the report. The report clearly was identified as the Commission’s own 2006 report. A copy of the report was provided to MCPU. Again, the utility seeks to rely upon a data response to strike the testimony stating that the data provided did not contain the name of the Illinois

Commerce Commission. If MCPU were concerned about the data response, the proper procedure was to follow up on the data request or to request that the data be supplemented. MCPU did neither. The Commission has authority to allow its own public reports to be used and relied upon by witnesses. The testimony should not be stricken.

Mt. Carmel Ex. 1.0 at Page 6, lines 114-121:

The utility seeks to amortize rate case expenses over a 3-year period. (MCPU Ex. 1.0 at page 12). The utility's last rate case was in 1997 with tariffs that became effective in 1998. Three years seems too short for an amortization period when the last rate case was almost ten years ago. In response to a City data request, the utility stated that its previous rate cases were in 1982, 1995, and 1997. Using this time between rate cases (25 years divided by 3), average for a rate case by the utility is every 8 years rather than the 3 years used by the utility.

MCPU seeks to strike the testimony as being an expert opinion for which the witness is not qualified. This is not an expert opinion. It is merely a recitation of facts. It factually states what the utility is requesting (3 years). It states when the last case was (1997). It states that the utility said its last three cases were in 1982, 1995 and 1997. It states the average number of years between cases is eight years. These are all facts. The closest the paragraph comes to an opinion is the statement: "Three years seems too short for an amortization period when the last case was almost ten years ago." The witness offers no opinion as to what the exact number of years should be or that she has an opinion as to the number of years the ICC should include in a final order in this docket.

The testimony should not be stricken.

Mt. Carmel Ex. 1.0 at Page 8, lines 153-154.

Mt. Carmel Public Utility has been aware of the declining economic conditions of both the mine and Snap-on for some time.

Mt. Carmel does not object to striking this sentence. However, if the motion to strike is granted, then the testimony of Dan E. Long, MCPU Ex. 1.0R at Page 16, Line 4 through Page 17, Line 3 also must be stricken since it is in rebuttal to this statement. Since there would be no testimony to rebut, the utility's rebuttal testimony on this point is improper.

Mt. Carmel Ex. 1.0 at Page 8, lines 154-156:

However, MCPU did not scale back on building projects or business spending to allow for reduced income.

Mt. Carmel does not object to striking this sentence. However, if the motion to strike is granted, then the testimony of Dan E. Long, MCPU Ex. 1.0R at page 15, line 13 through Page 16, line 2 also must be stricken since it is in rebuttal (and quotes the above language). Since there is no testimony to rebut, the rebuttal testimony on this point is improper.

Mt. Carmel Ex. 1.0 at Page 8, lines 157-158:

In addition, MCPU should structure its rates in favor of small business increase of their current rates that are above residential rates.

The Utility seeks to strike this testimony as "giving an opinion on rate design" because the witness is not a rate design expert. However, the witness is the Economic Development Coordinator for the City of Mt. Carmel. As such, she can testify as to rate

design from the perspective of what would be good for economic development for the City of Mt. Carmel.

The testimony should not be stricken.

Mt. Carmel Ex. 2.0 at Page 3, lines 54-55:

Based on Mr. Long's testimony, apparently only one company did follow through and contacted MCPU.

MCPU seeks to strike this statement stating it is not in rebuttal to Mr. Long's testimony. This is incorrect. At Page 7 of MCPU Ex. 1.0R, Mr. Long stated: "The Company discussed various options with me." Obviously, the relocating company must have contacted MCPU if Mr. Long discussed various options with it. The testimony is in response to Mr. Long's testimony and should not be stricken.

Mt. Carmel Ex. 2.0 at Page 3, lines 58-60:

The potential business found the utility's rates were already 2% higher than the rates in another location that the business was considering.

As with the previous item, MCPU argues that the statement is not in response to any testimony of Mr. Long. However, on page 7 of MCPU Ex. 1.0R, Mr. Long first states that the relocating company discussed various options with him and he found the Michigan rates "were actually lower, it was only by an amount lower than 2%." The testimony is in response to Mr. Long's testimony and should not be stricken.

Mt. Carmel Ex. 2.0 at Page 3, lines 64-66:

Q. Turning to rate case expenses, do you agree that the 10 years between rate cases should be omitted?

A. This is a legal issue that I understand the City will address in its hearing's brief.

MCPU seeks to strike this answer as “not being responsive to the question asked” and if it were answered, calling for an expert opinion. The answer is in response to the question and the witness does not give an expert opinion on the matter, but rather states it will be addressed in Mt. Carmel’s hearings’ brief. The question and answer should not be stricken.

Mt. Carmel Ex. 2.0 at Page 5, lines 96-98:

No. My testimony was not that the Company “overspent” as it is characterized, but rather that the Company needed to take all reasonable measures to conserve cash.

Mt. Carmel did not object to striking the testimony in Mt. Carmel Ex. 1.0 at Page 8 lines 154-156. See above. However, if the motion to strike Ex. 1.0 at Page 8, lines 154-156 is granted, then the testimony of Dan E. Long, MCPU Ex. 1.0R at page 15, line 13 through Page 16, line 2 also must be stricken since it is in rebuttal (and quotes the above language). Since there is no testimony to rebut, the rebuttal testimony on this point is improper. If MCPU’s testimony is stricken at page 15 lines 13 through Page 16 line 2, then this testimony of Mt. Carmel should be stricken since it is responding to other stricken testimony.

For the above reasons, Mt. Carmel requests that the Honorable Administrative Law Judge not strike the City’s testimony as requested by MCPU.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the City of Mt. Carmel's Response to Mt. Carmel Public Utility's Motion to Strike has been sent via electronic means to the service list on this 3rd day of December 2007.

_____/s/_____
Richard C. Balough