

**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.)

**REPLY TO STAFF'S RESPONSE TO
MOTION FOR LEAVE TO FILE REVISED TESTIMONY**

Illinois Power Company d/b/a AmerenIP ("AmerenIP") and Ameren Illinois Transmission Company (together, "Ameren"), hereby reply to the Response to Motion for Leave to File Revised Testimony ("Response") by the Staff ("Staff") of the Illinois Commerce Commission ("Commission"). In support of this reply, Ameren states as follows:

1. As stated in Ameren's November 28, 2007 Motion for Leave to File Revised Testimony ("Motion"), at hearing on September 27, 2007, Petitioners committed to withdraw certain portions of Mr. Roger Cruse's testimony. (Tr. 905-06, 911-15.) Following the hearing in this matter, Petitioners had discussions with PROTED 80 and SOLVE regarding Mr. Cruse's testimony in an effort to achieve a resolution of the issues surrounding that testimony. As a result of these discussions, Petitioners agreed to changes to Mr. Cruse's (and Mr. Douglas Emmons') testimony that removed those portions of Mr. Cruse's testimony that Ameren committed to withdraw and resolved certain concerns of PROTED 80 and SOLVE regarding Mr. Cruse's testimony and cross-examination. The Revised Testimony (as defined in the Motion) reflects these changes.

2. As also stated in the Motion, as of the date of the Motion, PROTED 80, SOLVE and SHOCK had no objection to the admission of the Revised Testimony. Ameren therefore

believes that the Revised Testimony filed on November 28, 2007 represents the good faith efforts of these parties to successfully resolve the issues regarding Mr. Cruse's testimony.

3. Ameren provided a copy of the revised testimonies of Mr. Cruse, Mr. Emmons and Mr. Murbarger (that was substantially similar to the Revised Testimony) to Staff on November 7, 2007. Staff did not participate in the discussions regarding resolution of the concerns with Mr. Cruse's testimony and offered no specific input into the content of the Revised Testimony filed November 28, 2007.

4. Staff has now filed what it styles a Response, but which is essentially an 11th hour Motion to Strike certain further portions of Mr. Cruse's and Mr. Emmons' testimony. (*See* Response, ¶¶ 17, 18.) In total, Staff seeks to strike over twenty additional sections of Mr. Cruse's and Mr. Emmons' testimony. Ameren considers Staff's Response prejudicial in this respect as it undermines Ameren's efforts to obtain a negotiated resolution to the issues surrounding Mr. Cruse's testimony.

5. Staff's proposals in its Response should be rejected because Staff fails to provide a detailed basis for striking each of the twenty sections of Mr. Cruse's and Mr. Emmons' testimony it seeks to remove. As discussed in more detail below, Staff provides no legal justification for striking much of the testimony Staff proposes to remove, and proposes only vague, generalized justifications for the remaining portions. In some cases, Staff's proposals encompass evidence that is properly admissible. Because Staff's proposal to strike additional portions of Mr. Cruse's testimony is drawn too broadly, and does not provide detailed justification for each of the sections sought to be removed, Staff's proposal to strike additional portions of Mr. Cruse's and Mr. Emmon's testimony should be rejected. *See Jeanguenat v. Zibert*, 78 Ill. App. 3d 948, 953 (3d Dist. 1979) ("Where a motion to strike or exclude is too

broadly drawn so as to reach proper evidence, the trial court is justified in denying same"); *Balfour v. Dohrn Transfer Co.*, 328 Ill. App. 163, 167 (3d Dist. 1946) (where motion to strike was too broad, "trial court could not be expected to sort the evidence, striking those items that were objectionable").

6. Staff's primary justification for moving to strike portions of Mr. Cruse's and Mr. Emmons' testimony is that Mr. Cruse is not qualified to "opine about, defend, or enlarge upon the findings" of the Biological Assessment. (Resp., ¶¶ 13, 23.) Mr. Cruse's qualifications, however, are best tested through cross-examination, not by pleading. Although Mr. Cruse does state that he has minimal biological training, he also states (as Staff acknowledges) that he has an "extensive background in reviewing biological data and reports, have done that for all my career" (Tr. 887-88.) Staff admits that Mr. Cruse can opine about the need for and existence of the study. (Resp., ¶ 13.) Staff ignores the fact, however, that Mr. Cruse has other qualifications, such as a Master of Arts degree in Environmental Studies from the University of Illinois, and job responsibilities such as "preparing appropriate documentation identifying potential impacts to designated state natural areas regulated by the Illinois Nature Preserves Commission ("INPC"), endangered or threatened species impacts jointly regulated by the Illinois Department of Natural Resources ("IDNR") and the United States Fish & Wildlife Service ("USFWS")." (AmerenIP Exhibit 5.0, pp. 1-2.) These other qualifications allow Mr. Cruse to present the findings of the Biological Assessment as they generally relate, in his opinion, to environmental impacts on the proposed transmission lines.

7. Moreover, Staff's position is inconsistent. Other witnesses in this case have testified about the content of the Biological Assessment despite acknowledging they have no specific training in biology. For example, IL 71 Resisters' witness, Dr. Mixon, testified

regarding the Indiana bat and the Biological Assessment (*see e.g.*, IL 71 Resistors Ex. 3.0, pp. 23-33), despite admitting he had no degrees, licenses, or certifications in biology. (Tr. 464-65.) Again, a witness' qualifications are best tested in cross examination, and not a later pleading to strike the testimony. Nevertheless, Staff did not raise an objection to the admission of any of Dr. Mixon's testimony at hearing.

8. Further, as mentioned above, Staff's proposal to strike other portions of Mr. Cruse's and Mr. Emmons' testimony is too broad in scope. Staff has included in its proposal general statements about environmental impacts, including statements that are not related to the Biological Assessment (but may be related to other assessments of environmental impacts). For example, Staff objects to testimony where Mr. Cruse is making general statements about potential environmental impacts such as "The IL 71 Resistors' route has the potential to have greater environmental impacts than Ameren's proposed primary route. . . ." (Resp., Att. A, p. 2, lns. 26-27), without providing any basis for striking such general statements. Staff also proposes to strike testimony relating to wetlands impacts (for example, "In addition to Indiana bat habitat, the IL 71 Resistors' route also has the potential to impact more wetlands than Ameren's proposed primary route" (Resp., Att. A, p. 2, lns. 43-44)), without providing any basis for striking such testimony, and despite the fact that the Biological Assessment on which Staff focuses does not address wetland impacts at all.

9. Likewise, Staff provides no justification whatsoever for striking Mr. Emmons' testimony. Ameren declines to speculate as to the basis for Staff's proposal in this regard, but only notes that certain of the sections of Mr. Emmons' testimony that Staff proposes to strike (for example, "Some of the areas along these PROTED 80 alternative routes would have significant environmental impacts during the construction of an electric transmission line, as the rebuttal

testimony of Mr. Roger Cruse discusses" (Resp., Att. C, p. 5, lns. 108-09)) properly refer to general conclusions by Mr. Cruse that are unaffected by Staff's proposed deletions from Mr. Cruse's testimony. Staff has provided no basis for striking such testimony.

10. The majority of Staff's proposals to strike portions of Mr. Cruse's and Mr. Emmons' testimony can therefore be classified into four categories:

- (1) General statements by Mr. Cruse about environmental impacts of the transmission lines, including those based on assessments other than the Biological Assessment¹, that Staff has not established a basis for striking;
- (2) Testimony by Mr. Cruse about wetlands that is not related to the Biological Assessment and that Staff has not established a basis for striking;
- (3) Testimony by Mr. Cruse that is related to the need for and existence of the Biological Assessment, which Staff acknowledges is proper, or presents findings of the Biological Assessment that neither "opine about, defend, or enlarge upon the findings" of the Biological Assessment;
- (4) General references to environmental impacts of the transmission lines by Mr. Emmons that Staff has not established a basis for striking.

11. For the reasons discussed above, Ameren believes that Staff's proposal to strike portions of Mr. Cruse's and Mr. Emmons' testimony should be rejected in its entirety. However, Ameren believes that at a minimum the portions of Mr. Cruse's and Mr. Emmons' testimony in the four categories above, which are identified in the following paragraphs, should not be struck.

12. The following are sections of Mr. Cruse's testimony that Staff has proposed to strike that fall into category (1):

¹ See, e.g., the "Preliminary Assessment" of environmental impacts in IL 71 Resistors Exhibit 3.19. Ameren also notes that the Biological Assessment did not address any of the intervenor alternate routes.

- Attachment A (Cruse Rebuttal), p. 2, lines 26-27 through "route"².
- Attachment A (Cruse Rebuttal), p. 5, lines 103-07.
- Attachment A (Cruse Rebuttal), p. 6, lines 132-35.
- Attachment A (Cruse Rebuttal), p. 10, lines 217 "the proposed" through 220 "corridor".
- Attachment A (Cruse Rebuttal), pp. 10-11, lines 221 "In regards" through 227 "habitat".
- Attachment A (Cruse Rebuttal), p. 11, lines 231-34.
- Attachment A (Cruse Rebuttal), p. 14, lines 292-97.
- Attachment A (Cruse Rebuttal), pp. 14, lines 306-12.
- Attachment B (Cruse Surrebuttal), p. 6, lines 118-120.
- Attachment B (Cruse Surrebuttal), p. 8, lines 171-72.
- Attachment B (Cruse Surrebuttal), p. 10, lines 226-28.
- Attachment B (Cruse Surrebuttal), p. 11, lines 231-37.
- Attachment B (Cruse Surrebuttal), p. 14, lines 299 through 302 "impacts".

13. The following are sections of Mr. Cruse's testimony that Staff has proposed to strike that fall into category (2):

- Attachment A (Cruse Rebuttal), p. 2, lines 43 ""the" through 44.
- Attachment B (Cruse Surrebuttal), p. 9, lines 184-90.
- Attachment B (Cruse Surrebuttal), p. 14, lines 302 "specifically" through 303 "Creek".

² Citations are to the Attachments to Staff's Response.

14. The following are sections of Mr. Cruse's testimony that Staff has proposed to strike that fall into category (3):

- Attachment A (Cruse Rebuttal), p. 2, lines 30-31.
- Attachment A (Cruse Rebuttal), p. 2, lines 36 "Most" through 38 "11.01)".

15. The following are sections of Mr. Emmons testimony that Staff has proposed to strike that fall into category (4):

- Attachment C (Emmons Rebuttal), pp. 5-6, lines 108-112.
- Attachment C (Emmons Rebuttal), p. 13, lines 273-75.
- Attachment D (Emmons Surrebuttal), pp. 12-13, lines 270-74.
- Attachment D (Emmons Surrebuttal), p. 15, lines 320-23.
- Attachment D (Emmons Surrebuttal), p. 18, lines 413-14

16. Staff has also moved to strike AmerenIP Exhibits 11.03 and 11.09, which are letters from the Illinois Department of Natural Resources ("IDNR") and Illinois Nature Preserves Commission ("INPC") regarding the transmission line routes. Such a motion is inappropriate at this time. The IL 71 Resistors, joined by PROTED 80, SOLVE and the City of Ottawa, objected to the admission of AmerenIP Exhibit 11.03 at hearing. (Tr. 771-84.) The parties made extensive arguments on the motion, including arguments regarding the foundation of the letters and Staff counsel weighed in with questions regarding the basis of the letter in AmerenIP Exhibit 11.03 and whether maps were provided to IDNR³. (Tr. 777-78.) The Administrative Law Judge ("ALJ") reviewed the email to IDNR that resulted in the letter in AmerenIP Exhibit 11.03 being issued. (Tr. 775.) The ALJ then denied the motion to strike AmerenIP Exhibit 11.03. (Tr. 784.)

³ The discussion about the provision of maps to IDNR was between counsel, however, and not the testimony of any witness. Counsel for the IL 71 Resistors indicated he had not received maps in response to a FOIA request. (Tr. 778.) However, there was no testimony regarding whether maps of the transmission line route were in fact provided to IDNR.

Thus, from a procedural standpoint, it is not appropriate for Staff to again make a motion to strike AmerenIP Exhibit 11.03 in its Response.

17. Likewise, PROTED 80 and SOLVE made a motion to strike AmerenIP Exhibit 11.09. (Tr. 860). That motion was also denied. (Tr. 863.) Staff also offers no rationale for why it would be proper to revisit the ALJ's decisions at hearing with regard to Ameren IP Exhibit 11.09. Thus, Staff's Motion to Strike AmerenIP's Exhibits 11.03 and 11.09 should be rejected as untimely and inappropriate.

WHEREFORE, for the above reasons, Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Company request that Staff's motions to strike contained in the Response be denied.

Dated: December 20, 2007

Respectfully submitted,

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