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 d/b/a AmerenIP, Proposed general increase in rates for delivery service. (Tariffs filed November 2, 2007)	))))))))))))	Docket Nos. 07-0585, 07-0586, 07-0587, 07-0588, 07-0589, and 07-0590 (cons.)

MOTION TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF STAFF WITNESS THERESA EBREY

The Ameren Illinois Utilities hereby submit this motion requesting that the Administrative Law Judges enter a ruling striking certain portions of the Rebuttal Testimony of Staff witness Theresa Ebrey (ICC Staff Exhibit 13.0). In support of their motion, the Ameren Illinois Utilities state as follows:

1. Testimony must be submitted in this proceeding in accordance with the established schedule. The ALJs established a schedule in this proceeding that required Staff and Interveners to submit direct testimony in this matter by close of business on March 14, 2007. Under the established schedule, the Ameren Illinois Utilities had 31 days, or until April 14, 2008, to respond to direct testimony. They had only 14 days, or until May 27, 2008, to respond to Staff and Intervener rebuttal testimony.

2. No party may modify the schedule established by the ALJs to fix a later date for submitting direct testimony. Under the Commission's rules, the schedule in this case is the province of the ALJs:

> The Hearing Examiner may direct parties and staff witnesses to serve testimony and exhibits and may establish a date certain for service. Any party or staff witness who fails, *without good cause shown*, to comply with an order of the Hearing Examiner for the service of testimony and exhibits may be limited in the presentation of evidence in the proceeding or otherwise restricted in participation, *to avoid undue delay and prejudice.* (83 Ill. Adm. Code § 200.660 (emphasis added).)

3. Pursuant to this authority, the ALJs entered a Notice of Schedule directing that Staff/Intervener direct testimony was to be completed no later than March 14, 2008, with the Ameren Illinois Utilities' rebuttal testimony due by April 14, 2008. (*See* Notice of Administrative Law Judge Ruling dated 1/9/2008.) If a party seeks to submit testimony out of time, it must request permission of the ALJs to do so. The party must show that there is good cause to submit late testimony, and that the late filing would not unduly prejudice other parties.

4. The proper scope of rebuttal testimony is determined by long-established Commission practice, which follows Illinois law. *Illinois Bell Tel. Co.*, Docket 02-0864, Order, pp. 294–98 (2004); *Citizens Util. Co. of Ill.*, Docket No. 84-0237, 1985 Ill. PUC LEXIS 38 at *42-52 (1985); *see also Southwestern Ill. Dev. Auth.*, Docket 91-0522, Order, p. 21 (1992). Under Illinois law, rebuttal evidence must answer or respond 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); *see also Kurrak v. American Dist. Tel. Co.*, 252 Ill. App. 3d. 885 (1st Dist. 1993). Rebuttal evidence may only be introduced if it "tends to answer, explain, repel, contradict, or dispose" of such new affirmative matter, *Citizens Util. Co. of Ill.*, at *44-45, and must be directed to the specific testimony of an opposing witness, *Pepe v. Caputo*, 408 Ill. 321, 328 (1951). Thus, rebuttal testimony must 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. The Commission has found that: "[a party] in a rate

proceeding should not be permitted to raise entirely new claims . . . during the rebuttal phase of the proceeding," unless there is good cause for doing so. *Citizens Utils. Co. of Ill.*, at *44-45. *See also Contel of Illinois, Inc.*, Docket No. 90-0128, 1991 Ill. PUC LEXIS 18 (Commission rejected late-filed Staff testimony, as "allowing no time for the [respondent] to file testimony"). In short, rebuttal evidence is strictly limited to that which is directly responsive to testimony presented earlier in the proceeding. *Illinois Bell Tel. Co.*, pp. 294–98; *Southwestern Ill. Dev. Auth.*, p. 21; *Citizens Util. Co. of Ill.*, at *42-52. As discussed below, Staff witness Ms. Ebrey has introduced issues on rebuttal that do not respond to the testimony of other witnesses, are new issues raised outside the established schedule, and for which Staff has not established that good cause exists for a variance from that schedule.

A. Staff witness Ms. Ebrey raises a new rate case expense issue on rebuttal.

5. The Ameren Illinois Utilities move to strike the following portions of the Rebuttal Testimony of Staff witness Theresa Ebrey (ICC Staff Exhibit 13.0): (i) Page 24, line 484, commencing with "Since that date…" through page 25, line 508; and (ii) page 25 line 514, commencing with "limits the…" through page 25, line 515 "…to date."

6. In direct testimony, Ms. Ebrey proposed to disallow recovery of certain rate case expenses. (ICC Staff Ex. 1.0, p. 15.) She did not, however, make any proposals regarding the level of legal rate case expense (attorney fees), and appears to have accepted the Ameren Illinois Utilities' rate case legal expense estimates as reasonable in her direct testimony. (ICC Staff Exhibit 1.0, Schedule 1.09 CILCO-G, page 1, line 11, column C; ICC Staff Exhibit 1.0, Schedule 1.09 CIPS-G, page 1, line 11, column C; Staff Exhibit 1.0, Schedule 1.09 IP-G, page 1, line 11, column C; Staff Exhibit 1.0, Schedule 1.09 CILCO-E, page 1, line 9, column C; Staff Exhibit 1.0,

Schedule 1.09 CIPS-E, page 1, line 9, column C; Staff Exhibit 1.0, Schedule 1.09 IP-E, page 1, line 9, column C; or $194,000 per gas and electric utility.)

7. In rebuttal testimony, Ms. Ebrey acknowledges that "At the time of filing my direct testimony, I did not take issue with the amount of attorney fees included as rate case expense by the AIU." (ICC Staff Ex. 13.0, p. 24.) Ms. Ebrey, however, now proposes an adjustment to the Ameren Illinois Utilities' original proposed pro forma expenses for rate case legal fees. (*Id.*, p. 25.) Thus, by Ms. Ebrey's own admission, she is raising a new issue on rebuttal that could have been raised on direct. (Moreover, she does not direct her new position on legal rate case expense in response to the testimony of any witness.)

8. Ms. Ebrey's new position regarding rate case legal expense is based primarily on updates she received to Staff data request TEE 2.29, which she claims lacked documentation. (*Id.*, p. 24.) However, the Ameren Illinois Utilities had no notice from Ms. Ebrey's direct testimony that she had any concern with their proposed pro forma rate case expenses with respect to legal fees – regarding documentation or any other issue. Ms. Ebrey received one of the updates to TEE 2.29 on February 29, 2008, prior to the Staff / intervener direct testimony due date of March 14, 2008. Thus, if she had a concern about a lack of documentation, she could have raised that concern in her direct testimony, or tried to resolve any discovery issue informally with the Ameren Illinois Utilities, prior to the filing of her rebuttal testimony. Instead, she accepted the Ameren Illinois Utilities' estimated legal fees in direct testimony, and proposed a disallowance for them for the first time in her rebuttal testimony. This is contrary to the requirement that rebuttal testimony respond to another party's testimony and not raise entirely new issues that could have been raised on direct, and contrary to the schedule set by the ALJs in this proceeding. It also causes undue prejudice to the Ameren Illinois Utilities, by denying them

their allotted rebuttal *and* surrebuttal periods to resolve this issue informally with Staff or through the appropriate rounds of testimony. As a result, this portion of Ms. Ebrey's testimony should be stricken.

B. Staff witness Ms. Ebrey has raised a new issue on rebuttal with respect to the Energy Toolkit.

9. The Ameren Illinois Utilities move to strike the following portions of the Rebuttal Testimony of Staff witness Theresa Ebrey (ICC Staff Exhibit 13.0): Page 30, line 623 through page 31, line 632.

10. Ms. Ebrey raised certain concerns about costs related to the Ameren Illinois Utilities' Energy Toolkit in her direct testimony, and proposed to disallow those costs. (ICC Staff Ex. 1.0, pp. 24-26.) Her primary concern was that the Energy Toolkit duplicated information already available. Ameren Illinois Utilities' witness Mr. Keith Martin addressed this concern in his rebuttal testimony. (Ameren Ex. 32.0, pp. 2-6.)

11. In her rebuttal, Ms. Ebrey raises a new concern – that the Ameren Illinois Utilities had not shown what value added ratepayers would receive from the implementation of the Energy Tool Kit. (ICC Staff Ex. 13.0, p. 30.) This concern was not raised in response to Mr. Martin's rebuttal testimony. Rather, it was a new issue that could have been raised on direct. In support of this concern, Ms. Ebrey notes, for the first time, that the Energy Toolkit was implemented for AmerenUE in February 2004 but the impact on energy usage for AmerenUE customers has not been measured. (*Id.*) The data response that Ms. Ebrey relies on for this information (TEE 11.06), however, was provided to Staff on February 14, 2008, well before Staff's due date for direct testimony of March 14, 2008. Thus, Mr. Ebrey could easily have raised this issue in her direct testimony, and so it is improper, and contrary to the schedule set by

the ALJs, for her to raise it on rebuttal. Moreover, because they are seeing this issue for the first time on rebuttal, the Ameren Illinois Utilities are prejudiced, because they have less time to conduct discovery and otherwise respond to Ms. Ebrey's position.

C. Staff witness Ebrey has raised a new issue on rebuttal with respect to the PUF BMC.

12. The Ameren Illinois Utilities move to strike the following portions of the Rebuttal Testimony of Staff witness Theresa Ebrey (ICC Staff Exhibit 13.0): Page 37, line 759 through page 39, line 794.

13. In her rebuttal testimony, Ms. Ebrey is proposing for the first time to remove expenses for contributions to the Public Utility Fund Base Maintenance Contribution ("PUF BMC") from the Ameren Illinois Utilities' revenue requirements. (ICC Staff Ex. 13.0, pp. 37-39.) She did not raise the issue of contributions to the PUF BMC in her direct testimony, nor does her rebuttal testimony regarding the PUF BMC respond to the testimony of any witness. Rather, she appears to have discovered the PUF BMC issue only on rebuttal.

14. Ms. Ebrey's concern regarding the PUF BMC is that Section 2-203 of the Public Utilities Act ("Act"), 220 ILCS 5/2-203, which requires contributions to the PUF BMC, expires on January 1, 2009, and may or may not be extended. (ICC Staff Ex. 13.0, p. 38.) The fact that Section 2-203 expires is made clear in the statute, which states: "This Section is repealed on January 1, 2009." Section 2-203 became effective on June 28, 2002. Thus, Staff should have been aware of the repeal provision well in advance of the March 14, 2008 due date of their direct testimony.

15. In a data response (response to Ameren Companies 24.13), Ms. Ebrey attempts to explain her failure to include the PUF BMC issue in her direct. She states in pertinent part that her "adjustment…was not proposed in her Direct Testimony since the impact of Senate Bill 1926

("SB 1926") was not brought to Ms. Ebrey's attention by Staff involved with monitoring legislative actions until after her Direct Testimony had been filed" and "SB 1926 was not passed in the Senate until April 17, 2008, over 1 month after Staff filed Direct Testimony in this case and a full 3 months after it was introduced in the Senate." This response, however, does not explain why Ms. Ebrey could not have raised the PUF BMC issue in her direct. To begin with, as explained above, the repeal provision of Section 2-203 has been in place for many years, and Staff's awareness of it should not be dependent on recent legislative activity. Moreover, the data response indicates that SB 1926 was introduced in the Senate two months before Staff's direct was due, so that Staff had ample opportunity to learn of the bill prior to filing direct. Thus, Staff is unable to provide a good cause as to why the PUF BMC issue should not have been in rebuttal. (In addition, a variety of bills in the legislature could increase utility costs if ultimately adopted, yet there is no is proposal that the Ameren Illinois Utilities recover those costs.) Because the PUF BMC issue is one that (i) does not respond to the testimony of any witness, (ii) could have been raised on direct, and (iii) has been introduced outside of the schedule for testimony established by the ALJs, it is not proper rebuttal and should be stricken. Moreover, raising the issue for the first time on rebuttal has prejudiced the Ameren Illinois Utilities, because they have less time to conduct discovery and otherwise respond to Ms. Ebrey's position.

WHEREFORE, the Ameren Illinois Utilities request that the following portions of the Rebuttal Testimony of Staff witness Theresa Ebrey (ICC Staff Exhibit 13.0) be stricken: (i) page 24, line 484, commencing with "Since that date…" through page 25, line 508; (ii) page 25 line 514, commencing with "limits the…" through page 25, line 515 "…to date"; (iii) page 30, line 623 through page 31, line 632; and (iv) page 37, line 759 through page 39, line 794.

May 29, 2008

Respectfully submitted,

CENTRAL ILLINOIS LIGHT COMPANY
d/b/a AmerenCILCO

CENTRAL ILLINOIS PUBLIC SERVICE
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PROOF OF SERVICE

I, Laura M. Earl, certify that on May 29, 2008, I served a copy of the foregoing Motion by electronic mail to the individuals on the Illinois Commerce Commission's Service List for this Docket.

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