

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>CENTRAL ILLINOIS LIGHT COMPANY d/b/a AmerenCILCO</b>	:	<b>09-0306 and 09-0309</b>
	:	
<b>CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, d/b/a AmerenCIPS</b>	:	<b>09-0307 and 09-0310</b>
	:	
<b>ILLINOIS POWER COMPANY, d/b/a AmerenIP,</b>	:	<b>09-0308 and 09-0311</b>
	:	
<b>Proposed general increase in electric and gas delivery service rates.</b>	:	<b>(Consolidated)</b>

**IIEC MOTION TO STRIKE PORTIONS OF  
AMEREN EX. 3.0RH AND 4.0RH**

COME NOW the Illinois Industrial Energy Consumers (“IIEC”) by their attorneys, Lueders, Robertson & Konzen and Conrad Reddick, and pursuant to 83 Ill. Adm. Code Part 200.190, for their Motion to Strike portions of the direct testimony on rehearing of 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 (collectively “Ameren”) state as follows:

**I. LEGAL CONCLUSIONS AND OPINIONS**

1. Page 2, lines 29-42 of the direct testimony on rehearing presented by Mr. Fiorella, Ameren Ex. 3.0RH, attempts to instruct the Commission on the appropriate interpretation, meaning and intent of 83 Illinois Administrative Code Part 287.40 as well as in 220 ILCS 5/9-211 and constitutes a legal conclusion and opinion regarding the interpretation of that rule and statute. Therefore, said testimony is improper.

2. Page 7, lines 154-156, and page 11, lines 238-239 of the direct testimony on rehearing of Mr. Fiorella, AIU Ex. 3.0RH, is an attempt to instruct the Commission on the meaning and

intent of Part 287.40 of the Illinois Administrative Code and constitutes a legal conclusion and opinion regarding that rule. Therefore, the testimony is improper.

3. It has long been held by Illinois courts that interpretations of law are not matters to which an expert witness is competent to testify. Christou v. Arlington Park - Washington Park, 104 Ill. App. 3d 257, 261 432 N.E. 2d 920, 924 (1<sup>st</sup> Dist. 1982); *See also* Selby v. Danville Pepsi-Cola Bottling Company, Inc., 169 Ill. App. 3d 427, 436, 523 N.E. 2d 697, 702 (4<sup>th</sup> Dist. 1988). This is true even where the witness is an attorney. (*Id.* at 924). Expert witnesses also may not testify with respect to legal conclusions. Coyne v. Robert H. Anderson & Associates, Inc., 215 Ill. App. 3d 104, 112, 574 N.E. 2d 863, 868 (2d Dist. 1991). Illinois cases have held that the testimony of expert witnesses basing their opinions on their interpretations of case law exceeded their role as an expert. *See, e.g.*, LID Associates v. Dolan, 324 Ill. App. 3d 1047, 1059, 756 N.E 2d 866, 877 (1<sup>st</sup> Dist. 2001). It is the duty of the trial court to decide the legal issues. Good Shepherd Manor Foundation, Inc. v. City of Momence, 323 F. 3d 557, 564 (7th Cir. 2003). This rule applies to bench trials as well as jury trials. *See* Magee v. Huppín-Fleck, 279 Ill. App. 3d 81, 86, 664 N.E. 2d 246, 249 (1<sup>st</sup> Dist. 1996) (“Expert testimony concerning statutory interpretation is not proper, even if the witness is an attorney.”).

The portions of the rehearing testimony of Mr. Fiorella cited above constitute interpretations of law and present legal conclusions. He opines on the intent of, and the appropriate interpretation of the statutory provisions and Rules cited. Therefore, in those portions of his testimony he has exceeded the proper bounds of his role as an expert witnesses, and such testimony should be stricken.

## II. BEYOND THE SCOPE

1. Page 9, lines 205-209, beginning with the sentence that begins on line 205 and continues through the sentence that ends on line 209 of the direct testimony on rehearing presented by Mr. Fiorella, AIU Ex. 3.0RH, deals with the accuracy of IIEC's characterization of the outcome of the ComEd case, which is not an issue upon which the Commission granted rehearing, is beyond the scope of the Commission's grant of rehearing, and is consequently not relevant. Therefore, said testimony is improper.

2. All of the direct testimony of Mr. Dane, Ameren Ex. 4.0RH is beyond the scope of the Commission's grant of rehearing. Mr. Dane states one of the purposes of his testimony is to evaluate an analysis performed by IIEC and relied upon by the Commission in remanding its judgment on accumulated deferred depreciation. (Ameren Ex. 4.0RH at 2). Mr. Danes' testimony is essentially a reply to testimony offered by IIEC witness Gorman in the original case. The Commission did not grant rehearing to evaluate the evidence underlying the Commission's determination of this issue. Mr. Dane does not identify any particular rehearing question to which his testimony is directed. In fact, on its face, it is not directed to any specific question that is the subject of rehearing.

3. The Commission specifically stated it would consider, on rehearing:

- (1) What is the appropriate application/interpretation of 83 Ill. Adm. Code 287.40 and 220 ILCS 5/9-211 in the context of adjustments to accumulated depreciation reserve?
- (2) If an adjustment to accumulated depreciation reserve is appropriate, what methodology should be employed in making the adjustment?
- (3) To the extent the Commission wants to alter the manner that it adjusts accumulated depreciation reserve, what, if

any, steps must be taken before doing so?<sup>1</sup>

- (4) What is the appropriate adjustment, if any, to accumulated depreciation reserve in this proceeding (including any of the alleged “technical corrections”)?
  - (a) What is the appropriate valuation of net plant at the end of February 2010?<sup>1</sup>

These are the only questions the Commission directed be addressed with regard to the deferred depreciation issue. However, the subject testimony of Mr. Fiorella and Mr. Dane that IIEC moves to strike seeks to address the legitimacy of certain evidence presented to the Commission by IIEC during the course of the hearings below. Clearly, the subject testimony of Mr. Fiorella and Mr. Dane goes beyond the boundaries of the questions identified by the Commission and should therefore be stricken.

4. In order to be admitted, evidence must be relevant. FRE 401. In order to be relevant, evidence must be within the scope of the proceeding. Therefore, evidence that goes beyond the scope of the proceeding is not relevant, and because it is not relevant, it is not admissible. *See, e.g., People v. Hardin*, 2010 Ill. Lexis 965, 22 (June 24, 2010) (“In finding that the State failed to establish probable cause . . . the trial court weighed the conflicting evidence presented. . . as well as delving extensively into the creditability of his expert testimony. While these factors are generally relevant in a full trial on the merits of the State’s SVP petition, they are well beyond the scope of the limited inquiry in a probable cause hearing.”)

5. Illinois has adopted Fed Rule of Evidence (“FRE”) 401, which states: “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of

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<sup>1</sup> Mr. Dane does claim his analysis was provided in response to a question of the Commission’s June 15, 2010 Notice of Commission Action. However a review of the testimony demonstrates that the testimony is really a response to IIEC witness Gorman’s testimony in the case below and a challenge to the evidence underlying the Commission’s original decision and nothing more.

consequence to the determination of the action more probable or less probable than it would be without the evidence.” FRE 401.

This rule has been upheld and interpreted by the Illinois Supreme Court, who stated: Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; *See People v. Monroe*, 66 Ill. 2d 317, 322, 362 N.E. 2d 295, 296 (1977) (adopting Rule 401); *See also Marut v. Costello*, 34 Ill. 2d 125, 128, 214 N.E. 2d 768, 769 (1966) (holding that evidence is relevant if it "tends to prove a fact in controversy or renders a matter in issue more or less probable"). Relevancy is "tested in the light of logic, experience and accepted assumptions as to human behavior." *Marut*, 34 Ill. 2d at 128. However, “[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.” *Monroe*, 66 Ill. 2d at 322, quoting Fed. R. Evid. 401, Advisory Committee's Note. *Voiken v. Estate of DeBoer*, 192 Ill. 2d 49, 57 (2000); quoting *People v. Monroe*, 66 Ill. 2d 317, 321-22 (1977).

6. Ameren has been provided the opportunity to provide factual evidence to further their position. However, the burden lies with Ameren to demonstrate the relevance of said evidence. *Hawn v. Fritcher*, 301 Ill. App. 3d 248 (4<sup>th</sup> Dist 1998).

Here, however, the Ameren witnesses provide evidence that cannot be considered facts of consequence. The Commission’s grant of rehearing specifies the areas to be discussed and thus tailors explicitly what facts are of consequence or controversy. Therefore, because the Commission has explicitly laid out the scope of the rehearing, evidence outside of those areas are wholly inadmissible.

### III. Hearsay

1. Page 9, line 209 through page 10, line 214 of the direct testimony on rehearing presented by Mr. Fiorella, AIU Ex. 3.0RH, is hearsay and consequently inadmissible. Mr. Fiorella attempts to introduce into evidence the contents of an affidavit prepared by Kathryn Houtsma, a Vice-President of Commonwealth Edison Company, who is not a witness in this case, explaining ComEd's rates set in Docket 07-0566.

2. The content of the Affidavit is being offered as evidence of the truth of the matter asserted therein, and provides no opportunity to cross examine the maker of the affidavit as to the veracity and of the basis for her statement. Therefore, Mr. Fiorella's testimony is hearsay and should be stricken.

3. Hearsay is an out of court statement being offered for the truth of the matter asserted therein. Brawner v. City of Chicago, 337 Ill. App. 3d 875 (1<sup>st</sup> Dist. 2003). The hearsay rule prohibits introducing into evidence written or oral out-of-court statements offered to prove the truth of the matter asserted. Goldberg v. Department of Professional Regulation, 331 Ill. App. 3d 797 (1<sup>st</sup> Dist. 2002). Because Mr. Fiorella's statements are statements that constitute an out of court statement being offered for the truth of the matter asserted therein, it is improper hearsay testimony and should therefore be stricken.

WHEREFORE, IIEC respectfully moves that the portions of the direct testimony on rehearing of Ameren witnesses Dane and Fiorella identified herein, be stricken and for such other and further different relief as may be deemed appropriate.

DATED this 9th day of August, 2010.

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**PROOF OF SERVICE**

STATE OF ILLINOIS       :  
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COUNTY OF MADISON    :

I, Eric Robertson, being an attorney admitted to practice in the State of Illinois, and one of the attorneys for the Illinois Industrial Energy Consumers, herewith certify that I did on the 9th day of August, 2010, electronically file with the Illinois Commerce Commission, IIEC's Motion to Strike Portions of Ameren Exhibits 3.0RH and 4.0RH, and electronically served same on the persons identified on the Commission's official service list.

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SUBSCRIBED AND SWORN TO before me, a Notary Public on this 9<sup>th</sup> day of August, 2010.

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NOTARY PUBLIC