STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Central Illinois Light Company d/b/a AmerenCILCO Proposed general increase in electric delivery service rates.	)	Docket No. 09-0306
Central Illinois Public Service Company d/b/a AmerenCIPS Proposed general increase in electric delivery service rates.	)	Docket No. 09-0307
Illinois Power Company d/b/a AmerenIP Proposed general increase in electric delivery service rates.	)	Docket No. 09-0308
Central Illinois Light Company d/b/a AmerenCILCO Proposed general decrease in gas delivery service rates.	)	Docket No. 09-0309
Central Illinois Public Service Company d/b/a AmerenCIPS Proposed general increase in gas delivery service rates.	)	Docket No. 09-0310
Illinois Power Company d/b/a AmerenIP Proposed general increase in gas delivery service rates.	)	Docket No. 09-0311 (Consolidated)

RESPONSE TO IIIEC MOTIONS TO STRIKE TESTIMONY OF AIU WITNESSES FIORELLA, DANE AND MCDERMOTT

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Central Illinois Light Company ("AmerenCILCO"), Central Illinois Public Service Company ("AmerenCIPS") and Illinois Power Company ("AmerenIP") (together, the "Ameren Illinois Utilities" or "AIU") hereby respond to the "IIEC Motion to Strike Portions of Ameren Ex. 3.0RH and 4.0RH" and "Motion to Strike Testimony of Witness McDermott" filed by IIEC on August 9, 2010 (the "Motions"). IIEC's Motions seek to strike: (1) portions of the direct testimony on rehearing of AIU witness Mr. Salvatore Fiorella (Ameren Ex. 3.0RH) that IIEC claims are legal opinions (lines 29-42, 154-156 and 238-239), beyond the scope of rehearing (lines 205-209), or hearsay (lines 209-214); the entire direct testimony on rehearing of AIU witness Mr. Daniel Dane (Ameren Ex. 4.0RH) as allegedly beyond the scope of rehearing; and (3) the entire direct testimony on rehearing of AIU witness Dr. Karl McDermott (Ameren Ex. 6.0RH) as alleged improper legal opinions or beyond the scope of rehearing. IIEC's Motions should be denied in their entirety for the reasons discussed below.

INTRODUCTION

Not until the eve of the AIU's rebuttal testimony -- some 40 days after the AIU filed its direct case -- did the IIEC seek to strike the entire direct rehearing testimony of AIU witnesses Mr. Dane and Dr. McDermott and portions of the direct rehearing testimony of Mr. Fiorella. The IIEC ask that this testimony be stricken, even though IIEC's own witnesses (as well as the witnesses of Staff and AG/CUB) already have responded to this testimony and submitted similar testimony in their own direct rehearing case. As discussed below, IIEC's Motions are meritless and serve as only a nuisance to the AIU and the Commission as the parties prepare for the upcoming evidentiary hearing. But even if the Motions did have merit, the IIEC should have sought to strike the testimony prior to submitting testimony responding to the AIU's rehearing direct case (as Staff and AG/CUB did), rather than ask the Administrative Law Judges to

unscramble the egg at the eleventh hour and determine what testimony (from all of the testimony submitted by all of the parties in rehearing) is relevant and admissible.

The IIEC complain that AIU witnesses Mr. Fiorella and Dr. McDermott are offering improper legal opinions. But IIEC's Motions fail to address the fact that regulatory proceedings before the Commission, by their very nature, require parties to submit testimony on the proper application and effect of Commission orders, rules and ratemaking standards. How else would parties justify the reasonableness and appropriateness of a proposed adjustment, if their own accounting experts cannot describe the basis for that adjustment? It is necessary (and routine) for witnesses to address the ratemaking principles and accounting and regulatory policies that underlie, are reflected in or should be considered when interpreting the Commission's rules – particularly so in this case, where the Commission has specifically directed the parties to respond to questions concerning the appropriate application of Part 287.40 and the appropriate adjustment to the test year balance of accumulated depreciation. Indeed, IIEC's own witnesses in this rehearing -- as well as the witnesses of Staff and AG/CUB -- have proffered expert testimony on the appropriate interpretation and application of Part 287.40. To strike Mr. Fiorella's and Dr McDermott's testimony on the grounds alleged by IIEC would mean that large portions of the testimony of IIEC's own witnesses Mr. Gorman and Mr. Meyer, as well as portions of the testimony of Staff witness Ebrey and AG/CUB witness Mr. Effron, would be presumptively inadmissible.

The IIEC also complain that AIU witnesses Mr. Fiorella, Mr. Dane and Dr. McDermott are offering testimony that is beyond the scope of rehearing. But to accept IIEC's claim that the subject testimony is beyond the scope of rehearing would in essence require the Administrative Law Judges to ignore the actual scope of rehearing set forth in Items (1) through (4) of the June

15, 2010 Notice of Commission Action ("NOCA"), which specifically asks the parties to explain to the Commission what is a permissible and appropriate adjustment to the test year balance of accumulated depreciation. That necessarily requires the parties to submit expert evidence that supports their positions (or challenges other' positions) on the proper adjustment, including whether the adjustment in the Commission's May 6 Order was appropriate. The point of rehearing is to correct errors in and challenge the basis for findings in the Commission's orders. The testimonies of Mr. Fiorella, Mr. Dane and Dr. McDermott are all well within the scope of the Commission's questions and the proper scope of rehearing in this proceeding.

But even if the IIEC's complaints had merit (and they do not), the IIEC has essentially waived any objections they had to this testimony. The direct rehearing testimony that the IIEC seeks to strike was filed on July 1, 2010 – over 40 days ago. Rather than file a motion to strike before its responsive testimony was due, as other parties did, the IIEC instead elected to file its Motions on the day before rebuttal testimony was due, almost on the eve of rehearing, after responding to the very testimony in now seeks to strike. IIEC's eleventh-hour tactics present the AIU, the Commission and the parties with the potentially burdensome task (should the Motions be granted, and they should not) of unpacking what testimony responds to the testimony that is subject to the Motions and what testimony responds to that testimony. This burden could (and should) have been avoided. The Motions should be summarily denied in their entirety.

ARGUMENT

I. The Subject Testimony Does Not Constitute Improper Legal Opinion.

The Motions allege that portions of the testimony of Mr. Fiorella and the testimony of Dr. McDermott constitute legal opinions. They do not. Mr. Fiorella discusses, as a ratemaking and accounting policy matter, the regulatory "application" of Part 287.40 and Section 9-211, directly in response to NOCA Item (1). In asking for the parties to opine on the proper "application" of

these provisions, the Commission has invited presentation of expert evidence on ratemaking principles and regulatory and accounting policies under Section 287.40 and Section 9-211 in the "context of adjustments to accumulated depreciation reserve." Nowhere does Mr. Fiorella state that he is offering a legal interpretation of Section 287.40. To the contrary at page 11 lines 237-38 of Ameren Exhibit 3.0RH (just preceding the testimony IIEC seeks to strike), Mr. Fiorella states: "*For accounting purposes*, plant investment and related accumulated depreciation are considered together to determine net plant at the same point in time." (Emphasis added.)

IIEC further claims that, because Dr. McDermott recommends what the Commission "should" do instead of what it "must" do in response to NOCA Item 3, his testimony is irrelevant and beyond the scope of rehearing. This is nothing more than an issue of semantic preference. As the AIU explained in their rehearing application, the Commission cannot lawfully change its interpretation of administrative rules, especially where, as here, the AIU relied on such interpretation to their detriment. Dr. McDermott explains that if the Commission wishes to change its policy concerning pro forma adjustments and derivative adjustments to depreciation reserve, the Commission should institute a rulemaking. As with the direct testimony of Mr. Fiorella, Dr. McDermott's testimony falls squarely within the questions posed by the NOCA and the scope of rehearing in this proceeding IIEC's attempts to recast Mr. Fiorella and Dr. McDermott's expert testimony as proffering legal opinions should be rejected.

Indeed, IIEC fails to explain why its own expert witness, Mr. Gorman offered testimony responsive to these same Commission questions. (See, e.g., IIEC Ex. 10.RH, lines 157-171.) In fact, the discussions in the testimony of Mr. Fiorella and Dr. McDermott are no more "legal conclusions" than discussions on the accumulated depreciation reserve issue by not just Mr. Gorman, but also Staff witness Ms. Ebrey and AG/CUB witness Mr. Effron. For example, at the

outset of his direct testimony (lines 56-64) Mr. Gorman provides an interpretation of the requirements of Part 287.40 as:

> 1. Any adjustment must reflect a known and measurable change to the operating results of the test year.
>
> 2. The changes must affect ratepayers and be a change in one of the named test year results -- plant investment, operating revenues, expenses, or cost of capital.
>
> 3. The change in test year results, if subsequent to the test year, must be reasonably certain to occur within 12 months of the filing and the amount of the change must be determinable.
>
> 4. An adjustment must not be made to reflect inflation or attrition, and must be consistent with the schedules provided in the utility's Part 285 filing.

In her direct testimony (ICC Staff Ex. 1.0RH, lines 162-168 and 177-182), Staff witness Ebrey provides similar interpretations of Part 287.40, stating:

> Section 287.40 is not a restriction of the information that the Commission can consider. The use of the word "may" suggests that a utility has the option to propose a pro forma adjustment but does not guarantee that the Commission will approve it. To interpret it otherwise would place the Commission in the untenable position of not being able to challenge the just and reasonableness of any utility's pro forma adjustments or of not being able to change the adjustment.

and

> The appropriate interpretation and application of 83 Ill. Code 287.40 in the context of accumulated depreciation reserve is for the Commission to consider whether a utility has proposed an adjustment for plant additions in a way that warrants adjustments to the accumulated depreciation reserve and ADIT as well.

AG/CUB witness Mr. Effron also offers an interpretation of Part 287.40: "For the purpose of addressing the question specified by the Commission, the relevant clause in Part 287.40 is the description of allowable adjustments as reflecting "changes affecting the ratepayers in plant investment" and whether "plant investment" in this context should be interpreted to mean growth in plant without reference to concomitant growth in the accumulated reserve for

depreciation ("gross plant") or growth in gross plant net of concomitant growth in the accumulated reserve for depreciation ("net plant")." (AG/CUB Ex. 1.0RH, lines 48-54.)

Even if the testimony did constitute "legal opinion" (and it does not), the fact remains that the testimony is directly responsive to the NOCA. The Commission will ultimately decide the proper interpretation and application of the Part 287.40 and PUA Section 9-211, subject to appellate review. The Commission has asked the parties for their views on the proper interpretation and application of this statute and rule. It is absurd to suggest that the AIU testimony should be stricken because it responds to the Commission's question.[1]

II. The Subject Testimony Is Within The Scope Of Rehearing.

The Motions further allege that portions of the direct testimony of Mr. Fiorella and all of the direct testimony of Mr. Dane and Dr. McDermott are beyond the scope of rehearing. As with the IIEC's claims concerning the alleged improper legal opinions in Mr. Fiorella's and Dr. McDermott's testimony, the IIEC complaints here also fail to hold water.

The centerpiece of IIEC's case in the initial phase of this proceeding was that by failing to make the depreciation reserve adjustment in Docket 07-0566 that IIEC advocates in this case, Commonwealth Edison Company ("ComEd") was allowed to establish rates based on an "overstated" rate base. The May 6 Order specifically relied on this testimony as a basis for ordering a post-test year adjustment to accumulated depreciation. Indeed, the Order found "this evidence alone to be a sufficient reason" to require the adjustment. (p. 30.) The AIU Application for Rehearing took issue with these findings and specifically put the Commission and all parties on notice that during rehearing, the AIU would produce evidence to show that

[1] If in fact Dr. McDermott and Mr. Fiorella's testimony contain legal conclusions as IIEC's Motions falsely assert, and the Administrative Law Judge's determine it should be stricken (which they should not), then the following testimony would have to be stricken in keeping with IIEC's "logic": Gorman, IIEC Ex. 10.0RH, lines 36-107, 157-171; Meyer, IIEC Ex. 11.0RH, lines 89-119; Ebrey, ICC Staff Ex. 1.0RH, lines 133-222, 246-351; and Effron, AG/CUB Ex. 1.0RH, lines 28-59, 84-98.

ComEd's rate base in fact was not "overstated." AIU witness Mr. Dane has shown not only that ComEd's rate base was not overstated, but that if ComEd had been required to adjust depreciation reserve, its rate base would have been <u>understated</u> as soon as new rates went into effect. IIEC now seeks to strike Mr. Dane's testimony (and Mr. Fiorella's reference to it), despite the fact that IIEC attempted to challenge Mr. Dane's testimony in its own direct rehearing testimony. Not only is IIEC's objection to the testimony waived by substantively responding to it; the objection is just silly. The AIU testimony is directly responsive to the analysis that IIEC relies on as the basis for its adjustment and challenges the validity of the very evidence relied upon by the Commission in making what the AIU contend is an impermissible and inappropriate post-test year adjustment to accumulated depreciation.

With respect to the IIEC's complaints with the testimony of Dr. McDermott, even the IIEC could not dispute that the May 6 Order's ratemaking treatment of accumulated depreciation is a change in policy and direction from the Commission's treatment of the adjustment in recent cases. Indeed, the May 6 Order essentially accepts in principle an adjustment advocated by the Dissenting Opinion in the 07-0566 Docket. Dr. McDermott's testimony directly addresses "To the extent that the Commission wants to alter the manner that it adjusts accumulated depreciation reserve, what, if any, steps must be taken before doing so," by outlining various options as to what steps the Commission should take before making such a change. Dr. McDermott explains what, in his view, the Commission "must" not do to change its interpretation of Section 287.40 – namely reverse prior interpretations in the instant case, and what the Commission "must" do to change its interpretation of Section 287.40 – namely pursue such change in a different forum. This testimony falls squarely within the question posed in NOCA Item 3.

The purpose of rehearing is to provide the Commission with an opportunity to correct legal or factual errors in its orders. Citizens Utility Board v. Illinois Commerce Comm'n (1995), 166 Ill. 2d 111, 135 (purpose of rehearing is "to inform the Commission and opposing parties of alleged legal and factual errors in the Commission's order"). The Public Utilities Act (220 ILCS 5-10/113) and the Commission's rules (83. Ill. Adm. Code § 200.880) "make it plain that the standards governing the presentation of new evidence to the Commission are not to be stringently applied." Marathon Oil Co. v. Illinois Commerce Comm'n (1977), 52 Ill. App. 3d 368, 371 (rehearing should have been granted to allow Marathon to present new evidence concerning the adverse and illegal effect of the new rate fixed by the Commission's order). The parties to a proceeding cannot "divine in advance" whether a Commission finding or adjustment might be discriminatory, unreasonable or against the manifest weight of the evidence. Id. at 372.

The AIU expressly indicated in their Application for Rehearing that they would address the validity of IIEC's ComEd evidence as supporting the post-test year adjustment to accumulated depreciation and would present appropriate procedures (outside of a rate case for an individual utility) where all interested parties could comment on changes or clarifications to the Commission's ratemaking treatment of accumulated depreciation. In granting rehearing on these issues, it is reasonable to assume that the Commission wishes to hear evidence on the issue to determine whether there was a sound basis to order a post-test year adjustment to the AIU's accumulated depreciation in light of the evidence presented and its own prior decisions.

III. The Subject Testimony Is Not Hearsay.

IIEC alleges that Mr. Fiorella's reliance on an affidavit by ComEd representative Ms. Houtsma is hearsay. This contention should be rejected. The Commission permits evidence not otherwise admissible under Illinois rules of evidence "to be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs." 83 Ill. Adm. Code

§ 200.610(b). In short, if the evidence is "of a type commonly relied on by reasonable prudent persons," i.e., is reliable, it may be admitted. As a sworn statement in another Commission proceeding, Ms. Houtsma's affidavit is reliable. Moreover, experts commonly rely on evidence that might otherwise be inadmissible hearsay when formulating their opinions. Mr. Fiorella relied on this evidence to conclude that the outcome of the ComEd proceeding does not support of justify IIEC's application of Part 287.40. IIEC should not be heard to complain of evidence concerning the approved rate base in Docket 07-0566, when it is IIEC that relies on the purported result of this case to support its claims. IIEC cannot show (and does not try to show) that it would be prejudiced by admission of this evidence.

WHEREFORE, for the reasons set forth above, the AIU request that IIEC's Motions be denied.

Dated: August 11, 2010

Respectfully submitted,

CENTRAL ILLINOIS LIGHT COMPANY d/b/a AmerenCILCO, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS, ILLINOIS POWER COMPANY d/b/a AmerenIP

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, hereby certify that on August 11, 2010, I served a copy of the foregoing RESPONSE TO IIIEC MOTIONS TO STRIKE TESTIMONY OF AIU WITNESSES FIORELLA, DANE AND MCDERMOTT by electronic mail to the individuals on the Commission's Service List for Dockets 09-0306 – 09-0311.

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