

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CENTRAL ILLINOIS LIGHT COMPANY)	
d/b/a AmerenCILCO)	
)	
CENTRAL ILLINOIS PUBLIC SERVICE)	
COMPANY d/b/a AmerenCIPS)	
)	Docket No. 09-0602
ILLINOIS POWER COMPANY)	
d/b/a AmerenIP)	
)	
Petition for Approval of Reliability Projects)	
Surcharge Rider (“Rider RPS”) to Recover Costs)	
of Implementing Recommendations of Liberty)	
Audit)	

**AMEREN ILLINOIS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS, AND
MOTION TO AMEND PETITION TO VOLUNTARILY WITHDRAW RIDER RPS,
WITHOUT PREJUDICE**

Illinois Power Company d/b/a AmerenIP, Central Illinois Light Company d/b/a AmerenCILCO and Central Illinois Public Service Company d/b/a AmerenCIPS (together, “Ameren Illinois”)¹, hereby oppose the Motion to Dismiss filed by the Office of the Attorney General (“AG”) and the Citizens Utility Board (“CUB”) as legally deficient. In conjunction with their Response, Ameren Illinois also moves to amend its petition to: (i) voluntarily withdraw its proposed Rider RPS and (ii) continue to seek clarification on each Liberty Audit project recommendation to ascertain whether or not the Commission agrees that the Liberty recommendation provides a value to customers. In support of their Response and Motion, Ameren Illinois states as follows.

¹ Effective October 1, 2010, Illinois Power Company d/b/a AmerenIP, Central Illinois Light Company d/b/a AmerenCILCO and Central Illinois Public Service Company d/b/a AmerenCIPS (collectively “Ameren Illinois Utilities” or “AIUs”) merged, with AmerenCIPS as the surviving entity. AmerenCIPS was thereafter renamed Ameren Illinois Company d/b/a Ameren Illinois (“AIC”). AIC is the legal entity succeeding the Petitioners in this cause.

THE AG/CUB MOTION TO DISMISS SHOULD BE DENIED

The AG Motion to Dismiss (“MTD”) is legally insufficient and must be denied. Although styled as a “Motion to Dismiss,” the MTD fails to establish that, as a matter of law, Ameren Illinois’ petition should be dismissed. Under Illinois law, a motion to dismiss must demonstrate that dismissal is warranted purely as a matter of law or identify certain defects in the pleadings. 735 ILCS 5/2-615, 5/2-619. The MTD fails to do either. It is well established that a motion to dismiss under Illinois law attacks only the legal sufficiency of the complaint. 735 ILCS 5/2-615²; Urbaitis v. Commonwealth Edison Co., 143 Ill.2d 458, 475 (Ill. 1991). The question presented by a motion to dismiss is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. Id. Furthermore, “evidentiary material outside of the pleadings may not be considered in ruling on a section 2-615 motion.” Id. AG/CUB fails to address this requirement and cites to “evidentiary material” outside the pleadings.

In ruling on a motion to dismiss, a court accepts as true all well-pleaded facts and draws all inferences from those facts in favor of the nonmovants. Lee v. Nationwide Cassel L.P., 174 Ill. 2d 540, 545 (Ill. 1996). A court “will sustain a dismissal for failure to state a claim only if it clearly appears that no set of facts could be proved under the allegations which would entitle the party to relief.” Id.

In its MTD, AG/CUB has not even asserted, much less demonstrated, that no set of facts could be proved under the Petition which would entitle Ameren Illinois to relief, or otherwise explained why the Petition is not legally sufficient as a matter of law. Thus, AG/CUB has not met the standard for dismissal. Indeed, it cannot meet the standard for dismissal, as Ameren

² AG/CUB have not asserted any defects in the pleadings under 220 ILCS 5/2-619.

Illinois' Petition sets forth facts which, taking all inferences in Ameren Illinois' favor, indicate that the relief requested under the Petition should be granted and that Rider RPS should be implemented. For example, the Petition states "Synchronizing the implementation of the recommendations is challenging, regardless of the type of test year used. Many of these projects are one-time projects, and the amounts spent differ from year to year" (Pet., ¶ 19) and "the AIUs have no other meaningful recourse available to them, if they are to timely move forward with implementation as outlined in their Implementation Plan, but to seek recovery of the implementation costs via a rider mechanism." (Pet., ¶ 15.) These facts, among many others set forth in the Petition, are not alleged to be inferior in any form or manner.

Although not styled as such, Ameren Illinois speculates that the MTD could have been intended to be a motion for summary judgment, as it cites pre-filed testimony of Staff and AG. However, even as a motion for summary judgment, the MTD fails. Summary judgment is only appropriate if there is no issue of material fact, which AG/CUB has not demonstrated.

Illinois Appellate Courts have stated that summary judgment "is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free of doubt. Evans v. Brown, 399 Ill. App. 3d 238, 243 (Ill. App. Ct. 2010) (reversing a grant of summary judgment). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id.; Stewart v. BF Goodrich Co., 153 Ill. App. 3d 1078, 1081, (Ill. App. Ct. 1987). Moreover, "at the summary judgment stage, the plaintiff is not normally required to prove his case" but rather to present facts supporting the elements of his claim. BF Goodrich Co., 153 Ill. App. 3d at 1081. When deciding a motion for summary judgment, "the trial court must construe the pleadings,

depositions and affidavits in the light most favorable to the nonmoving party.” In re Estate of Roeseler, 287 Ill. App. 3d 1003, 1013 (Ill. App. Ct. 1997). “Moreover, if fair-minded persons could draw different inferences from the undisputed facts, summary judgment should not be granted.” Id.; Evans, 399 Ill. App. 3d. at 243.

Clearly, there are genuine issues of material fact in this case, all the more so if all inferences are taken in Ameren Illinois’ favor. The MTD cites Staff’s testimony asserting that Ameren Illinois is seeking “special, expedited cost recovery consideration” and cites AG’s testimony that Rider RPS constitutes single issue ratemaking. (MTD, p. 2.) Yet, Ameren Illinois’ testimony states that “In terms of implementing the agreed-upon Liberty Audit recommendations, financing their implementation necessitates a ratemaking mechanism that will enable the AIUs to maintain the ability to meet capital expenditure requirements and demonstrate to the investment community that ability.” (Ameren Ex. 1.0, p. 5.) Likewise, the Petition states “Many of these projects are one-time projects, and the amounts spent differ from year to year. Neither an historical nor a future test year can accurately capture them. They are far better suited to a rider...” (Pet., ¶ 19.) Thus, there is clearly a disputed issue of fact as to whether the Rider RPS is necessary or appropriate.

Another issue of material fact is the question whether the Liberty Audit projects should be implemented. Although the projects were recommended by Liberty, and then agreed to by Ameren Illinois at an earlier time, Mr. Smith, testifies:

Q. Are the AIUs able to demonstrate the prudence and cost-effectiveness of the Liberty Audit compliance costs for which they are seeking expedited Rider RPS rate recovery from customers?

A. This is not clear. (AG Ex. 1.0, p. 24.)

He also expressed concern that cost benefits analyses of the projects had not been performed and a quantification of customer benefits had not been undertaken. (AG Ex. 1.0, pp.

34-35.) Staff witness Mr. Stoller also requested that Ameren Illinois provide a “detailed explanation of why the Commission should grant pre-approval of decisional prudence with respect to each RPS project [Ameren Illinois] proposes to undertake.” Thus, the question of whether the projects are prudent and should be implemented is a disputed issue of material fact. Given these disputed issues of material fact, summary judgment is not appropriate either, had that in fact been what AG/Cub requested.

In addition, the MTD, although seeking dismissal of the whole petition, only directs its arguments to the purported validity of Rider RPS. It does not address, for example, Ameren Illinois’ request for clarification of whether projects should be undertaken per Paragraph 20 of Petition. Further, AG/CUB has not established, or even offered a basis to dismiss Ameren Illinois’ petition without prejudice. For these reasons as well, the MTD should be denied.

In summary, the MTD does not establish any basis, legal or otherwise, for dismissing the Petition. Instead, the MTD assumes that pre-filed testimony in this case, which has not been subject to cross examination and is as yet unsworn,³ somehow constitutes record evidence upon which a determination that the findings of the Second District Appellate court in Commonwealth Edison Co. v. Illinois Commerce Comm’n, 2010 WL 3909376 (Ill. App. 2 Dist, Sept. 30, 2010), apply to Ameren Illinois’ proposed Rider RPS. Even assuming that the pre-filed testimony in this proceeding will become record evidence, the MTD fails to demonstrate how Rider RPS is similar in some way to ComEd’s Rider SMP, the subject of Commonwealth Edison, or how the costs to be recovered through Rider RPS are not costs imposed upon the utility by an external circumstance over which the utility has no control or costs that affect the utility’s revenue requirement. 2010 WL 3909376 at 19-20. Although the MTD claims that “Ameren’s proposed

³ In fact, the testimony of AG witness Smith is labeled “DRAFT”, suggesting it may be subject to further revision.

Rider RPS does not address a cost over which the utility has no control, and Rider RPS has a direct impact on the Utilities' rate of return," the MTD does not explain why these statements might be so or even cite to pre-filed testimony in support of this conclusion.

In short, the Commission has no basis on which to determine whether the standards set forth in Commonwealth Edison apply in this case. Ameren Illinois suggests that, at best, Commonwealth Edison might have had some bearing on the propriety of Rider RPS *at the briefing stage in this case*, at which time there will be a factual record for the Commission to use in its decision. As discussed below, however, Ameren Illinois requests approval to voluntarily withdraw Rider RPS and so any argument regarding the propriety of the rider is moot.

MOTION TO AMEND PETITION TO VOLUNTARILY WITHDRAW RIDER RPS

Although the MTD must be dismissed, Ameren Illinois agrees to voluntarily withdraw its proposal to implement Rider RPS, without prejudice to the filing of future rider or rate recovery mechanism proposal as necessary, appropriate, and consistent with Commission rules and regulations. Such agreement should not be construed in any way as acknowledgement by Ameren Illinois of the validity of any position of the other parties in this case with respect to Rider RPS.

Ameren Illinois' Petition, however, sought more than just the implementation of Rider RPS. Paragraph 20 of the Petition (which was not addressed by the AG/CUB MTD) states:

Specifically [Ameren Illinois] seeks clarification on each recommendation to ascertain whether or not the Commission agrees with the Liberty recommendation as far as providing a value to customers. If the Commission determines on a decisional prudence basis that the cost of certain recommendations outweigh any benefits, the Commission should so advise the AIUs. The AIUs share the Commission's goal of ensuring ratepayers are not saddled with investments that are not cost effective.

As discussed above, pre-filed testimony of AG witness Mr. Smith and Staff witness Mr. Stoller demonstrates that the question of whether the Liberty projects should be implemented is

an issue of concern for the parties in this case, and that there is in fact a material question as to whether the Liberty projects should be implemented. Therefore, Ameren Illinois seeks leave to amend their petition to withdraw the Rider RPS proposal, but to retain its request for Commission “clarification” as set forth in Paragraph 20 of the Petition.

As Ameren Illinois witness Mr. Craig Nelson explained, the Commission has not approved the Liberty Audit projects. (Ameren Ex. 1.0, p. 7.) Ameren Illinois has agreed to implement projects as set forth in its Implementation Plan. Nevertheless, as discussed above, parties to this proceeding appear to question whether the Liberty projects are in fact necessary. As Mr. Nelson explained, “[a]ll the AIUs are asking for is some form of approval of a project or projects.” (Id.) In light of potential opposition to some or all of the projects, it is appropriate to continue this proceeding under an amended petition, to address the question of whether the projects provide ratepayer benefits on a cost-effective basis and so should be implemented.

WHEREFORE, Ameren Illinois respectfully requests that the AG/CUB Motion to Dismiss be denied and that Ameren Illinois be permitted to withdraw its proposal for Rider RPS and amend its Petition as set forth above.

Dated: October 19, 2010

Respectfully submitted,

AMEREN ILLINOIS COMPANY

By: /s/ Christopher W. Flynn
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CERTIFICATE OF SERVICE

I, Christopher W. Flynn, an attorney, certify that on October 19, 2010, I served a copy of the foregoing AMEREN ILLINOIS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS, AND MOTION TO AMEND PETITION TO VOLUNTARILY WITHDRAW RIDER RPS, WITHOUT PREJUDICE by electronic mail to the individuals on the Commission's Service List for Docket 09-0602.

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