STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Ameren Illinois Company d/b/a Ameren Illinois	)	
	)	
Approval of the Energy Efficiency and	)	**Docket No. 10-0568**
Demand-Response Plan	)	
	)	
	)	

AMEREN ILLINOIS COMPANY'S REPLY BRIEF ON REHEARING

March 17, 2011

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I. INTRODUCTION

Although the Environmental Law and Policy Center ("ELPC") and the Attorney General ("AG") muddle the relevant issues on Rehearing through misstatements and confusing arguments, it remains true that the natural gas spending limit calculated by Ameren Illinois, agreed to by the Staff of the Illinois Commerce Commission ("Staff"), and approved by the Illinois Commerce Commission ("Commission") in the Final Order should be left alone. The belated objections of ELPC and AG – which have been largely rehashed on Rehearing – do little to change the fact that the Commission's approval of the natural gas spending limit remains the only outcome fully supported by the law and record evidence. For the reasons stated in Ameren Illinois' Initial Brief on Rehearing, as well as those set forth below, the Commission should not modify its Final Order on this issue.

II. ARGUMENT

A. ELPC's And AG's Arguments Fail Because They Continue To Confuse Wholesale and Retail *Commodity Costs* with Wholesale and Retail *Customers*.

Instead of arguing whether the commodity costs paid by Ameren Illinois' transportation customers to non-certified alternative gas suppliers are wholesale commodity costs, ELPC and AG continue to create needless confusion with a contrived controversy over the proper customer classes to be included in the natural gas spending limit calculation. *See, e.g.*, AG Br. on Reh'g, p. 6. ELPC's and AG's manufactured controversy can (and should) be disregarded.

First, they argue that transportation customers are retail customers rather than wholesale customers.[1] *See, e.g.*, AG Br. on Reh'g, p. 7 ("there is no justification for asserting these

[1] ELPC cites the Proposed Order in Docket No. 10-0564 as setting out the "appropriate analysis" for determining whether a customer is a retail customer or a wholesale customer. ELPC Br. on Reh'g, p. 5. As stated *infra*, conclusions in the Proposed Order in Docket No. 10-0564 should not be given weight in this proceeding. Moreover, conclusions in the Proposed Order in Docket No. 10-0564 about how to determine whether a customer

delivery customers are not retail customers of the Company.**”**); ELPC Br. on Reh’g, p. 1, 3 (wrongly asserting that “the Commission held that ‘retail customers’ should *include* Ameren’s large transportation customers for the purposes of calculating the savings goals but *exclude* the same customers for purposes of calculating the spending cap” and mischaracterizing the Commission’s decision to exclude dollars paid to alternative gas suppliers as one to “exclude [transportation customers] from the calculation of spending caps . . . .”) But as noted in Ameren Illinois’ Initial Brief on Rehearing, this argument “totally misses the point that a retail customer can still make a wholesale commodity purchase.” Ameren Br. on Reh’g, p. 6. In fact, the Commission can disregard the large portions of ELPC’s and AG’s briefs devoted to arguing why transportation customers should be treated as retail customers under the spending limit provision of the Public Utilities Act (“Act”) because Ameren Illinois’ transportation customers *have already been treated as retail customers in the spending limit calculation approved by the Commission*. Ameren Br. on Reh’g, p. 2 (citing evidence). It is only the wholesale commodity *cost* paid to non-certified alternative gas suppliers by those retail transportation customers that has been excluded. *Id.*, p. 4 (citing Ameren Br., p. 59). The exclusion of the wholesale commodity cost makes absolute sense in that the gas spending limit should not be affected by what is, in effect, a third party cost.

Second, ELPC and AG argue that Ameren Illinois and the Commission improperly excluded transportation customers, as a class, from the spending limit calculation, and only subsection (m) customers should be excluded. ELPC Br. on Reh’g, p. 2 (“Thus, the spending cap must be based on the total amount of gas delivered to retail customers, other than the

(continued…)

qualifies as a retail or wholesale customer are irrelevant to the determination of the appropriate costs to be included in the spending limit, which is the issue here. Ameren Br. on Reh’g, p. 7.

customers described in subsection (m).”)[2]; AG Br. on Reh’g, p. 3, 6 (arguing Ameren Illinois “incorrectly removed a significant portion of transportation gas volumes delivered to its customers” and that only subsection (m) customers should be excluded from the spending limit calculation.)[3] In so arguing, ELPC and AG apparently believe the Commission approved a natural gas spending limit calculation that excluded both subsection (m) customers and all transportation customers. *See*, *e.g.*, ELPC Br. on Reh’g, p. 3 (stating “[t]he Commission cites ‘legislative history’ . . . to support its conclusion that transportation customers should be excluded from the calculation of spending caps . . . .”); AG Br. on Reh’g, pp. 6-7 (“There is no exclusion in this language for other *customer groups*, as Ameren urges.”) (emphasis added). However, the only evidence in the record establishes that the Commission approved a natural gas spending limit that *included* transportation customers because the delivery service charge collected from transportation customers was included in the natural gas spending limit calculation. Ameren Ex. 4.0 (Rev.), p. 3, lines 56-57; Ameren Br. on Reh’g, p. 2 (“rather than *exclude* transportation customers under the provisions of the Act, as ELPC seems to believe, Ameren Illinois *included* them when calculating the spending limit.”) As such, ELPC’s and AG’s arguments as to whether subsection (m) customers should be the only *class* of customers

[2] The parties continuously conflate the appropriate unit of measurement in the savings goals portion of the Act versus the spending limit portion of the Act. There are two distinct sections in 220 ILCS 5/8-104. Subsection 8-104(c) directs the calculation of the savings goals. Under this provision, the appropriate unit of measurement for the calculation of savings goals is volume, or therms. Subsection (d), on the other hand, sets the spending limit. The appropriate unit of measurement for the calculation of the spending limit is the dollars paid in connection with natural gas service. In other words, subsection (c) deals with therms, and subsection (d) deals with dollars. ELPC’s argument that the spending limit should be based on the “total amount of gas delivered” is wrong. It should be based on the amounts paid by retail customers in connection with natural gas service. 220 ILCS 5/8-104(d).

[3] Again, Ameren Illinois notes that AG inappropriately refers to gas volume instead of amounts paid. AG’s argument that the spending limit improperly excluded “volumes” does not make sense in light of the language of the Act.

excluded from the spending limit is irrelevant, creates needless confusion, and should be disregarded.

B. ELPC's And AG's Remaining Arguments Attacking The Final Order Are Also Unfounded.

Both ELPC and AG lodge unfounded attacks on the Final Order, none of which have merit. Some of the arguments set forth by these two parties have already been addressed in either Ameren Illinois' or Staff's Initial Brief on Rehearing, and so Ameren Illinois will not readdress them here.[4] Ameren Br. on Reh'g, p. 7 (demonstrating that the Proposed Order in Docket No. 10-0564 is not inconsistent with the decision in this docket and that the Final Order in this docket consistently treats transportation customers as retail customers under all provisions of the Act.); ICC Staff Br. on Reh'g, p. 7 (explaining that despite ELPC's and AG's arguments to the contrary, the term "wholesale commodity cost" as used in the House debate clearly refers to purchases of gas from non-certified alternative gas suppliers). As follows, however, a few arguments do warrant further response.

First, ELPC argues that it was improper for the Commission to consider legislative history when it issued its Final Order, and AG seems to agree. *See* ELPC Br. on Reh'g, p. 5; AG Br. on Reh'g, pp. 8-9. However, if the Commission has determined the Act is ambiguous, then "the notion that [the Commission] should not look at legislative history to figure out . . . how [they're] going to determine the end result of this . . . is incorrect . . . ." Commission Bench Minutes, Feb. 9, 2011, p. 33, lines 14-17 (quoting Commissioner O'Connell-Diaz); *see also* ICC Staff Br. on Reh'g, pp. 5-6 (citing cases stating same).

[4] In addition, AG argues that there will be some sort of illogical inconsistency if transportation customers' usage is excluded from the spending limit calculation but transportation customers are included in the tariff recovery. AG Br. on Reh'g, p. 9. As previously noted, transportation customers were not excluded from the spending limit calculation, so AG's argument has no merit.

Second, AG's contention that the Act's requirements for Self Directing Customers ("SDCs") is inconsistent with Ameren Illinois' and Staff's interpretation of the spending limit is just not relevant to the issue at hand. That the Act contains separate requirements for SDCs and utilities does nothing to advance the analysis as to how to calculate the spending limit under subsection 8-104(d) (which applies only to utilities).

Moreover, AG baldly asserts that, as a policy matter, the Commission has somehow "significantly reduc[ed] [Ameren Illinois'] ability to provide cost-effective energy efficiency programs . . . .,"[5] AG Br. on Reh'g, p. 10, by approving a spending limit calculation that, as noted by Staff and Administrative Law Judge ("ALJ") Yoder, was supported by the law and the record evidence. *See, e.g.*, Memorandum to the Commission, filed on e-docket on Feb. 9, 2011, pp. 1-2 ("the evidence and arguments support the decision made in this proceeding.") The Commission properly noted that the issue on Rehearing had been belatedly raised by ELPC and AG "at the tail end of the case" *after* evidence had closed and *after* the parties had already submitted Initial Briefs. Commission Bench Minutes, Feb. 9, 2011, p. 35, lines 4-10 (quoting Commissioner O'Connell-Diaz)**.** Now, without citing a shred of evidence to support its argument, AG demands the Commission not only *reverse* its approval of a spending limit that was agreed to by the only parties who submitted evidence on the issue (Ameren Illinois and Staff), but impose *additional* obligations on Ameren Illinois that have absolutely no basis in law. AG Br. on Reh'g, p. 10 (seeking to have the Commission require Ameren Illinois to recalculate the natural gas spending limit and "document all subsection (m) exemptions, including providing explicit information about the number of customers, if any, that have applied for the SDC option,

[5] While AG touts "benefits" to the portfolio to entice the Commission into increasing the spending limit, this is a red herring attempting to divert attention from AG's meritless argument that increasing the spending limit is legal under the Act.

along with the gas load associated with those customers.") AG goes too far and in doing so, has lost sight of the fact that the Commission has done exactly what the law requires of it: review the evidence contained in the record and approve a spending limit that comports with the law.

In sum, none of the arguments advanced by either ELPC or AG stand up to scrutiny.

C. The Proposed Order in Docket No. 10-0564 Does Not Bind The Commission; It Should Not Be Given More Weight Than The Commission's Final Order In This Docket.

ELPC also argues the Proposed Order in Docket No. 10-0564 (the Peoples/North Shore case) supports its position that the Commission should reverse itself and order Ameren Illinois to recalculate its natural gas spending limit. ELPC Br. on Reh'g, p. 5. ELPC even goes so far as to repeatedly, and inaccurately, imply that the Proposed Order in Docket No. 10-0564 reflects the final findings of the Commission, when it actually reflects the findings contained in the ALJ's Proposed Order. *See, e.g.*, ELPC Br. on Reh'g, p. 1, 2, 5 (stating "[t]he Commission rejected this process . . . in its Proposed Order in the Peoples/North Shore case . . . .," and "[a]s explained by the Commission in the Peoples Gas Proposed Order . . . .," and "[t]he Commission's Proposed Order in the Peoples Gas case lays out the appropriate analysis.") ELPC's argument that the Proposed Order in Docket No. 10-0564 binds the Commission in this docket falls far short.

First, the premise that the Proposed Order in Docket No. 10-0564 clearly supports ELPC's position is flat wrong. As ALJ Yoder explained to the Commission, "ELPC argues that their reading of a proposed Order in Docket 10-0564 agrees with their argument; although it's kind of ambiguous as to what that language [in the Proposed Order] actually says . . . ." Commission Bench Minutes, Feb. 9, 2011, p. 31, lines 3-7. Indeed, the Proposed Order in Docket No. 10-0564 does not unequivocally support ELPC's position in this docket, despite ELPC's attempt to argue otherwise. Proposed Order, Docket No. 10-0564, (Jan. 20, 2011), p. 41 (stating "[t]he Utilities are directed to recalculate spending limitations in accordance with the

interpretation of Section 8-104 advanced by Commission Staff and Intervenors," when Staff and Intervenors actually proposed different approaches). The Proposed Order also states, "the Commission finds that Staff's calculation of the rate impact cap is consistent with Section 8-104 of the Act." *Id.* As Staff notes in its Initial Brief on Rehearing, this, at best, suggests the ALJ in Docket No. 10-0564 intended to reach a similar conclusion reached by the Commission in the instant docket and *not* the conclusion advanced by ELPC and AG.[6] ICC Staff Br. on Reh'g, p. 9.

Second, at the time of the filing of this brief, there is no Final Order in Docket No. 10-0564. On this point, Ameren Illinois agrees with Commissioner O'Connell-Diaz who stated, "for a party to assert that a proposed Order is somehow authority for the Commission to look at, is premature and inappropriate." Commission Bench Minutes, Feb. 9, 2011, p. 33, lines 8-11. And even when the Commission issues the Final Order in Docket No. 10-0564, that too is not binding because the Commission must take each docket on its own. *See Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 513 (1953) ("The concept of public regulation includes of necessity the philosophy that the commission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding.") Here, the Commission reviewed the timely filed evidence and arguments and determined that the natural gas spending limit, calculated by Ameren Illinois and agreed to by Staff, warranted approval. That approval should be left alone.

[6] Additionally, ELPC conveniently fails to mention that the Proposed Order in Docket No. 10-0562 (the Nicor Gas case) *comports* with the Final Order in this proceeding. Proposed Order, Docket No. 10-0562, (Jan. 14, 2011), p. 15 (finding the "spending limit should start with a definition of 'amounts paid to retail customers in connection with natural gas service' that excludes amounts paid by large customers to non-certified alternative gas suppliers.")

III. CONCLUSION

The Commission approved a natural gas spending limit that was supported by the evidence and the law. ELPC and AG have not provided an adequate reason to change the Final Order. The Commission correctly decided this issue in the Final Order and should affirm its approval on Rehearing.

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Respectfully submitted,

Ameren Illinois Company

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