

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY)
d/b/a Ameren Illinois)
Petitioner)
)
Approval of Multi-Year Performance Metrics)
pursuant to Section 16-108.5(f) and (f-5) of the)
Public Utilities Act)

Docket No. 12-0089

**THE CITIZENS UTILITY BOARD'S
RESPONSE TO AMEREN ILLINOIS COMPANY'S
MOTION TO STRIKE**

Pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission (the "Commission" or the "ICC"), the Citizens Utility Board ("CUB"), through its attorneys, hereby submits its response to Ameren Illinois Company's ("Ameren" or "Company") Motion to Strike Instantly, or in the Alternative for an Expedited Ruling, the direct testimony of CUB witness Christopher C. Thomas and AARP/People of the State of Illinois ("AARP/AG") witness Barbara R. Alexander ("Motion") filed on March 26, 2012. Ameren's motion inappropriately attempts to restrict the matters currently before the Commission in this case by excluding proper testimonial evidence. Mr. Thomas' testimony is squarely within the scope of this proceeding. He provides his expert opinion on metrics within the Commission's authority under the Public Utilities Act (the "Act" or the "PUA"), including the recently-enacted Energy Infrastructure Modernization Act, Public Act 97-0616 as modified by Public Act 97-0646 ("EIMA"). His suggestions directly address Ameren's performance under the EIMA, and represent his opinion on how best the ICC can direct Ameren's performance to ensure customers receive the benefit of the EIMA's new performance-based formula rate framework. For the reasons discussed below, Ameren's motion must be denied.

ARGUMENT

Ameren claims that Mr. Thomas' testimony is "irrelevant, immaterial and well beyond the scope of this proceeding," Motion at ¶ 1, without citing any Commission Rule of Practice, any Illinois Rule of Evidence or any legal standard to determine relevance, materiality, or scope.

Under Illinois law, all relevant evidence is admissible. Ill. R. of Evid. 402. Relevant evidence is that having "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." Ill. R. of Evid. 401. While the Commission generally follows the rules of evidence applied in civil cases in the Illinois circuit courts, the Commission's rules favor a more liberal admissibility standard because the Commission's policy is to "obtain full disclosure of all relevant and material facts to a proceeding." Ill. Admin. Code tit. 83, § 200.340. Nothing in the Commission's Rules or Illinois law limits a responding party's direct testimony to the scope of the petitioning party. Mr. Thomas' testimony was submitted as part of CUB's case-in-chief, and, unlike rebuttal, parties are permitted to present any relevant and otherwise-admissible evidence in direct testimony.

The Company asserts that CUB knows "there are other appropriate means by which to take up [its cause]," *Id.* at ¶ 7, though Ameren makes no mention of what those might be and despite Ameren's admission that this docket was initiated by the Company to approve, or approve with modification, Ameren's proposal. *Id.* at ¶ 3. This proceeding is the exact docket in which CUB can, and should, propose to modify Ameren's proposal. Mr. Thomas' testimony suggests ways in which the Commission should modify Ameren's proposal. *See* CUB Ex. 1.0 at 5, 13-14. Ameren has voluntarily chosen to participate in the new provisions of the EIMA and has

petitioned the Commission with the performance metrics plan and corresponding tariff, Ameren's Multi-Year Performance Metrics ("Plan") and Rider MAP-M. *See* 220 ILCS 5/16-108.5(f) (requiring each "participating utility" to develop and file multi-year metrics); 220 ILCS 5/16-108.5(b) (defining a "participating utility" as an electric utility serving at least 1,000,000 customers in Illinois that "*voluntarily* elects and commits to undertake the infrastructure investment program") (emphasis added). In fact, the Commission is currently reviewing similar suggestions made by Mr. Thomas, on behalf of CUB, with respect to a utility's performance under the EIMA. *See* Ill. Commerce Comm'n Docket No. 11-0772.

Despite Ameren's wish that the scope of this proceeding be limited to "approving Ameren Illinois' multi-year performance metrics," this proceeding's scope is actually to approve, or approve "with modification," Ameren's tariff and/or Plan. Motion at ¶ 2; 220 ILCS 5/16-108.5(f-5). The Company believes that on the face of the statute, "only the metrics and related tariffs listed in the statute are at issue." *Id.* at ¶ 3.¹ This unreasonable interpretation would limit the Commission to merely filing in the blanks and would obviate the need for any proceeding whatsoever, much less a 120 day proceeding provided for under the law.

With the establishment of a performance-based formula rate and corresponding performance metrics, the General Assembly hoped to

ensure that the State's electric utility infrastructure will promote future economic development in the State and that the State's electric utilities will be able to continue to provide quality electric service to their customers, including innovative technological offerings that will enhance customer experience and choice. Pub. Act 97-0616 at 220 ILCS 5/16-108.5(a).

¹ Although Ameren does not cite to any particular Section or subsection of the PUA, based on the language provided and the context CUB believes that Ameren's counsel was referring to 220 ILCS 5/16-108.5(f-5).

Within this framework the General Assembly gave the ICC express authority to modify Ameren's Plan. 220 ILCS 5/16-108.5(f-5). In fact, when approving or modifying utility proposals, the ICC has authority under Article XVI of the Act to impose additional obligations on the utility even where those obligations are not enumerated within the statute. *See, e.g.* 220 ILCS 5/16-105 ("approving, or approving as modified" a utility's delivery services implementation plan) (Ill. Commerce Comm'n Docket 01-0530, Final Order at 97-101 (considering Staff proposal to add electronic signature capability to utility's proposed plan, ordering workshops)); 220 ILCS 5/16-111.5 ("approve or modify" utility procurement plan) (Ill. Commerce Comm'n Docket 07-0527, Final Order at 44 (considering AG proposal to require utility to acquire additional forward contracts); Final Order at 59-61 (considering CUB proposal to require utility to procure energy efficiency and demand response in addition to the statutorily required minimum)).

CUB has never asserted that this, or any other Commission proceeding, is a "free for all." Motion at ¶ 6. However, this proceeding is not as narrowly limited as the Company would prefer. The Commission retains its broad duties under the PUA to ensure that customers in Illinois receive adequate, efficient, reliable, environmentally safe and least-cost public utility services. 220 ILCS 5/1-102. The express grant of authority to an administrative agency, such as the ICC, includes the authority to do what is reasonably necessary to accomplish the legislature's objective. *Abbott Laboratories, Inc. v. Ill. Commerce Comm'n*, 289 Ill.App.3d 705, 712 (1st Dist. 1997). For example, even where "the legislature provided many explicit sanctions" to be employed by the Commission against a gas company for failing to ensure accurate meters, an Illinois court upheld the Commission's extra-statutory decisions to formulate rules to secure meter accuracy. *Peoples Gas, Light*

& Coke Co. v. Ill. Commerce Comm'n, 175 Ill.App.3d at 39, 52 (1st Dist. 1988).

Mr. Thomas' proposals conform to the General Assembly's explicit finding that the regulatory reforms included in EIMA must "promote prudent, long-term infrastructure investment and ... mutually benefit the State's electric utilities and their customers, regulators, and investors." Pub. Act 97-0616 at 220 ILCS 5/16-108.5(a). His testimony directly addresses performance metrics which will provide benefits for "customers" and "electric utilities" to gain from Ameren's "long-term infrastructure investment." *See, e.g.* CUB Ex. 1.0 at 7 (improvements for Ameren in operational efficiency and system reliability; improvements for customers in improved usage information and ability to manage energy usage).

The new provisions of the PUA do not implicitly remove the pre-existing obligations and authority of the Commission to ensure that utility performance provides sufficient benefits to the ratepayers of Illinois. The Public Utilities Act, of which the EIMA is only one part, states that

Except to the extent modified or supplemented by the provisions of this Article, or where the context clearly renders such provisions inapplicable, the other Articles of the Public Utilities Act pertaining to public utilities, public utility rates and services and the regulations thereof, are fully and equally applicable to the tariffed services electric utilities provide. 220 ILCS 5/16-101(a).

This language from Article XVI, the exact Article under which Ameren admits that this performance metric review occurs, clearly requires that subsequent enactments, like the EIMA, do not render other provisions of the PUA inapplicable unless "the context clearly renders such provisions inapplicable." *Id.* Ameren has not identified language in the subsection enacting the performance metrics that renders any of the Commission's pre-existing obligations "inapplicable." *See* Motion at ¶ 1-8.

Ameren characterizes Mr. Thomas’ testimony as deciding there are “*additional measures* that the Commission should track over time;” that “the Commission should *adopt additional metrics*”; “The Commission should *adopt additional performance metrics, beyond those explicit in the Act[.]*” *Id.* at ¶ 4.² This somehow, in the Company’s opinion, means that this proceeding will turn into a “free for all”. *Id.* at ¶ 6. Ameren does not provide any legal authority for the proposition that a “prescriptive law” alters the authority of the Commission to modify a utility proposal within this proceeding, regardless of Ameren’s expressed preference to conserve its resources for less “extraneous matters.” *Id.*

Despite the passage of the EIMA, the Commission continues in its vital role to effectively and comprehensively regulate public utilities. 220 ILCS 5/1-102. The Commission is obligated by the EIMA to ensure that Ameren continues “to provide quality electric service to [its] customers, including innovative technological offerings that will enhance customer experience and choice.” Pub. Act 97-0616 at 220 ILCS 5/16-108.5(a); CUB Ex. 1.0 at 5 (“Commission should adopt additional performance metrics ... to ensure that customers see the greatest possible benefits from the investment Ameren is about to undertake.”). Mr. Thomas’ suggestions, in fact, build upon prior Commission practice in encouraging innovative investments or new business practices.

In 2007, the ICC used a proposal from Commonwealth Edison for a large-scale system modernization rider as an opportunity to create not only a pilot of advanced metering infrastructure technology, but an entire statewide collaborative planning process for smart grid investments. Ill. Commerce Comm’n Docket No. 07-

² The italicized phrases appear that way in the Company’s Motion but not in Mr. Thomas’ direct testimony, although Ameren fails to attribute the source of emphasis.

0566, Final Order at 138 (Sept. 10, 2008). Docket 07-0566 was a general rate case brought under Section 9-201 of the Act, which does not include language authorizing the Commission to order workshops or to order a statewide investigation regarding the merits of smart grid technologies. More recently, the ICC opened workshops to examine whether or not it was appropriate for Ameren to institute a retail gas choice program for its small customers. Ill. Commerce Comm'n Docket No. 11-0282, Final Order at 194 (Jan. 10, 2012). Nothing in Section 9-201 addresses the implementation of a retail gas choice program. Although EIMA lists certain performance criteria that participating utilities must meet, that does not mean that the Commission is prohibited from establishing additional criteria or ordering workshops to consider additional metrics.

Whether or not all of Mr. Thomas' suggestions should be adopted here is something that will be determined by the ALJs and the Commission. What is clear, however, is that Mr. Thomas' suggestions are directly relevant to this proceeding and that the Commission has the authority – and the obligation – to investigate fully all aspects of Ameren's proposed performance under the EIMA.

CONCLUSION

For the reasons enumerated above, CUB respectfully requests that the Commission deny Ameren's motion.

Dated: March 29, 2012

Respectfully submitted,



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