

by the AG in the instant Illinois proceeding. But that is as far as the AG gets. Thus, despite Commission’s recent caution that “[it] is completely uninformed as to the decisions from . . . other jurisdictions where [it has] no evidence that circumstances are comparable [because s]***uch comparisons are not relevant***,” *North Shore Gas Co./Peoples Gas Light & Coke*, Docket Nos. 11-0280/0281 (cons.), Final Order, p. 137 (Jan. 10, 2012) (emphasis added), the AG does not demonstrate the comparability of the rate cases from other states to IAWC’s rate case in Illinois requisite to overcome this evidentiary hurdle. Instead, the AG concedes the opposite: “California American is a different company with a different rate increase request” (AG Opp., pp. 2-3); “Clearly, the materials from sister states do not assess Illinois expenses” (*id.*, p. 10). In sum, the substance of the offending testimony relates to selective portions of a proposed order and testimony, briefing and discovery from *other* proceedings related to *other* utilities in *other* jurisdictions. Absent a showing of comparability—and the AG has attempted none—that testimony is not relevant. It should be stricken.

Throughout the AG’s Opposition also is the suggestion that Mr. Smith’s testimony relates to the findings of other state utility commissions. That is not the case. As explained in IAWC’s Motion to Strike, with the exception of a sole (nearly 20-year-old) Pennsylvania commission decision, Mr. Smith does not provide citations to a single *final* order. Rather, the referenced portions of his testimony are comprised of recitations of a *proposed* order in a *pending* California proceeding, party testimony and briefing in that same proceeding, discovery responses in a Pennsylvania proceeding *which was settled* and Mr. Smith’s unverified descriptions of his opinion as to what happened in those cases and others. The AG’s Opposition focuses only on (unidentified) final orders and simply ignores that testimony, legal briefing and discovery.

Astoundingly, the AG also repeatedly tells this Commission the proposed order from the pending California proceeding is a *final* one, stating, “the California PUC *found* that California American was asking ratepayers to pay too much . . .,” and, again, “the California [PUC] *addressed* this very issue” and “the California PUC . . . *dealt with* this complex question.” (AG Opp., pp. 2-3.) That is inaccurate. The California case is still pending, and the California order referenced by Mr. Smith is a *proposed* one. (Even Mr. Smith acknowledges this. (See AG Ex. 4.0, p. 10, ll. 211, 213 and n.2 (referring to the “proposed decision”); IAWC Mtn. to Strike, Appx. C, p. 10.)) Put simply, despite the AG’s repeated contention to the contrary, Mr. Smith’s testimony does not present this Commission with any express “sister” commission “findings.”

As explained in IAWC’s motion, Mr. Smith’s testimony also refers to the alleged commission treatment of certain tax deductions in California, West Virginia, New Jersey, Indiana and other, unidentified states. Yet, he does not provide any commission orders or so much as cite the orders he contends exists. Instead, he asks that all simply rely on his “descriptions” of these cases from other jurisdictions. The AG acknowledges such practice is prejudicial. Referencing Mr. Smith’s attaching (a cherry-picked) expert of the 20-year-old Pennsylvania commission order to his testimony, the AG states:

By providing the related documents, Mr. Smith gave the Commission and the parties the opportunity to review the actual order and relevant information, ***rather than simply rely on his description of them***, enabling parties to address it, question Mr. Smith about it, and fully examine it in the context of this case.

(AG Opp., pp. 5-6 (emphasis added).) While IAWC does not agree the Pennsylvania order is relevant or that providing an *excerpt* of it somehow allows the parties to “fully examine” it, IAWC does agree the failure to provide the materials he relies on leaves the parties to this case to

“simply rely on [Mr. Smith’s] description of them.” (*Id.*)

Finally, even if Mr. Smith’s testimony discussed only final orders from other state commissions (and properly cited and provided complete copies of them), that testimony still would not be proper. Such discussions are meant for briefing. On this point, IAWC and the AG agree. (AG Opp., p. 5 (“The parties could plainly cite to these decisions in briefs”))¹

The AG argues that the Illinois Commission must not be kept “blind” to the “findings and practice” of other state commissions. (AG Opp., p. 4.) Respectfully, the Illinois Commission need not rely on Mr. Smith or the AG to present those findings if it is interested in them; it is fully capable of its own review. (Leaving aside the AG’s implication that the Illinois Commission should not only review the orders of other state commissions, but also defer to them as well.) The AG is correct in asserting, “[t]he Commission has the right to be presented with the relevant information and analysis in order to properly assess the reasonableness of these decisions and the impact they have on ratepayers.” (AG Opp., p. 5.) But, Mr. Smith’s testimony does not provide it. His testimony does not put before the Illinois Commission any such “decisions” of other state commissions. It should be stricken.

The AG also does not contend the substance of Mr. Smith’s offending testimony is not hearsay. Instead, the AG next repeatedly argues it nevertheless is admissible because “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). Yet, the AG cites no authority, nor could she, suggesting reasonably prudent persons, let alone *experts*, would rely on mere excerpts of a *proposed* decision in a

¹ This statement contradicts an illogical leap the AG makes later in her Opposition: “If IAWC’s hearsay arguments are accepted, parties would be prohibited from *ever citing* any PUC or Court Orders.” (AG Opp., p. 7.) That suggestion is hyperbolic and is simply is not the case.

pending docket, not yet subjected to final commission review, self-serving party testimony, or unsworn statements in discovery responses and legal briefs in the conduct of their affairs. Simply put, they would not. These documents have no indicia of reliability or finality. Moreover, taken out of context, as Mr. Smith has presented them, the parties are left only to “simply rely on his description of them” (AG Opp., pp. 5-6). Without the whole picture, that reliance would be anything but prudent. Nevertheless, the AG claims, “[i]t is reasonable, prudent, and informative for an expert regulatory accountant to consider *other jurisdiction’s treatment* of issues that span affiliated utilities across state borders.” (AG Opp., p. 7 (emphasis added).) As explained, Mr. Smith’s offending testimony does anything but discuss actual, final extra-jurisdictional commission treatment of such issues. It should be stricken.

The AG also contends the materials which Mr. Smith cites somehow fall within the public records exception to Federal Rule of Evidence 803(8). (AG Opp, p. 6.) It is the Illinois Rules of Evidence that are applicable to this proceeding. *See* 83 Ill. Adm. Code 200.610(c). Rule 803(8) of the Illinois Rules permits the evidentiary admission of:

[the r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report

Ill. R. Evid. 403(8). Thus, to fall within this hearsay exception, the statement at issue must (1) be that of the public agency and (2) set forth (a) activities of the agency or (b) matters observed pursuant to a legal duty and about which there was a duty to report. The out-of-state proposed order, testimony, briefs and discovery responses testified to by Mr. Smith meet none of these requirements. They are not statements of other commissions, they do not record the activities of those commissions, and they were not created pursuant to a legal duty or related to a matter

about which there was a duty to report. The AG's assertion that, because the documents on which Mr. Smith relies are "maintained by a government agency and are publically available" they somehow fall within Rule 803(8), is misplaced. Those terms are absent from Rule 803(8). Moreover, since Mr. Smith has neither provided the documents, nor citations to where they can be found, it is unclear if they are publically available. Finally, the AG does not contend, nor could she, the discovery responses out of the settled Pennsylvania proceeding are publically available. Those are unquestionably hearsay. Remarkably, the AG contends, "given the complexity of the tax issues at hand, the Commission and the parties are entitled to present their expert's review [of] the findings of these sister commissions." (AG Opp., p. 5.) IAWC is aware of no exception to the prohibition against the admission of hearsay on the grounds of complexity of the issues. That is nonsensical. In any event, as stated, Mr. Smith has not presented any such "findings" of other commissions.

Along the same line, the AG argues, "Consistent with Section 200.610 [making the Rules of Evidence applicable to Commission proceedings], the Commission or Hearing Examiner may take administrative notice of the . . . [r]ules, regulations, administrative rulings and orders, and written policies of governmental bodies other than the Commission." 83 Ill. Adm. Code 200.640(a)(1). No one, however, has sought administrative notice of the contentious materials in accordance with Rule 200.640. Further, Mr. Smith has not presented this commission with "[r]ules, regulations, administrative rulings and orders, and written policies of governmental bodies other than the Commission," but with a proposed order and the testimony, legal briefing and discovery of parties before other commissions.

In a last ditch effort to save Mr. Smith's offending, extra-jurisdictional testimony, the AG

argues “the Commission regularly considers its own actions in connection with unrelated utilities as well as the actions in other states.” (AG Opp., p. 10.) That may be the case. Indeed, as the Commission reminded in Docket No. 07-0241, it “is under *no obligation* to consider the ratemaking practices employed in other jurisdictions” *North Shore Gas Co./Peoples Gas Light & Coke*, Docket No. 07-0241, Final Order (Feb. 5, 2008), p. 152 (emphasis added), but can do so if it chooses to, as it did in that docket. That does not somehow sanction Mr. Smith’s improper testimony. Nor does it cure the fact that Mr. Smith’s offending testimony is inappropriate because it relates not to final orders of other commissions (which should be cited, if at all, in briefs) but to a proposed decision, testimony, legal briefing and discovery responses. Thus, the AG’s argument in this regard is inapposite.

WHEREFORE, IAWC’s Motion to Strike portions of Mr. Smith’s direct and rebuttal testimony should be granted and the improper testimony cited at pages 1-2 of that Motion stricken from the record.

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Respectfully submitted,

Illinois-American Water Company

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CERTIFICATE OF SERVICE

I, Anne M. Zehr, certify that on May 14, 2012, I caused a copy of the foregoing Reply in Support of Illinois-American Water Company's Motion to Strike Portions of the Testimony Of Ralph C. Smith to be served by electronic mail to the individuals on the Commission's Service List for Docket No. 11-0767.

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