

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY)	
d/b/a Ameren Illinois,)	
Petitioner)	
)	Docket No. 12-0244
Smart Grid Advanced Metering)	On Rehearing
Infrastructure Deployment Plan)	

**MOTION OF THE CITIZENS UTILITY BOARD TO STRIKE PORTIONS OF THE
VERIFIED INITIAL BRIEF OF THE ILLINOIS POWER AGENCY AND THE INITIAL
BRIEF ON REHEARING OF THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION**

Pursuant to the Rules of Practice of the Illinois Commerce Commission (“ICC” or “the Commission”), 83 Ill. Admin. Code § 200.190, the Citizens Utility Board (“CUB”) respectfully moves for issuance of an order striking portions of Section I (pp. 2-3) and Section II (pp.4-5) of the Verified Initial Brief of the Illinois Power Agency (“IPA Brief”) and Section I (pp. 7-9) of the Initial Brief on Rehearing of the Illinois Competitive Energy Association (“ICEA Brief”). The referenced portions of the IPA and ICEA Briefs include factual assertions which were not in testimony in this proceeding, and as such are inappropriately included in brief.

I. Background

Both the IPA and ICEA have properly intervened in this proceeding and had the opportunity to present direct testimony and subject the factual assertions upon which their brief relies to cross-examination by the other parties to this proceeding. Neither the IPA nor ICEA presented any testimony in the initial or rehearing phase of this proceeding and, therefore, neither the IPA nor ICEA provided the parties in this proceeding with an opportunity to examine the factual assertions upon which their briefs rely.

II. Argument

Due process in administrative proceedings requires the opportunity to be heard and the right to cross-examine adverse witnesses. *Abrahamson v. Ill. Dep’t of Prof’l Reg.*, 153 Ill. 2d 76, 96 (1992). The Commission has consistently held that consideration of evidence without allowing an opposing

party the opportunity to cross-examine or respond violates due process. *See, e.g., Ill. Commerce Comm'n v. Ill. Gas Co.*, ICC Docket 02-0170, Final Order at 35-36 (Aug. 6, 2003); *Ill. Bell Tel. Co.*, ICC Docket 00-0260, Final Order at 20-21 (Sept. 12, 2001); *Commonwealth Edison Co.*, ICC Docket 92-0121, Final Order at 25-26 (Apr. 12, 1995); *Ill. Commerce Comm'n*, ICC Docket 94-0066, Final Order at 266-68 (Feb. 23, 1995) (late introduction of Staff's new modifications proposed for the first time in brief, which were not tested in cross-examination and which no party had the opportunity to address for the record, would violate fundamental fairness and abridge other parties' due process).

The portions cited herein of both briefs contain factual assertions without citations by either party to the record evidence in this proceeding. Such statements violate Commission rules, which require that Commission decisions be based exclusively on the record before the Commission in that proceeding:

In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act. 220 ILCS 5/10-103.

Statements of facts in briefs filed with the Commission should be supported by citation to the record. 83 Ill. Admin. Code § 200.800(a). It is true that the Commission may take administrative notice of specific types of material identified in Section 200.640(a) of the ICC's Rules of Practice. 83 Ill. Admin. Code § 200.640(a). While the Commission may take administrative notice of exhibits and pleadings from other docketed proceedings, CUB and other parties must be notified before or during the hearing of the materials for which some party is seeking administrative notice. 83 Ill. Admin. Code § 200.640(c) (citing 5 ILCS 100-10-40). CUB and other parties shall be provided a reasonable opportunity to contest the material so noticed. 83 Ill. Admin. Code § 200.640(c) (citing 5 ILCS 100-10-40). Moreover, requests for administrative notice of exhibits and pleadings contained

in the record of other docketed Commission proceedings are discouraged by the Commission's Rules of Practice. 83 Ill. Admin. Code § 200.640(b).

It is fundamentally unfair for any party to propose factual assertions in briefs that were not presented through a witness in testimony. It is doubly inappropriate for those assertions to be taken from a pleading of a party in another docketed proceeding without asking for administrative notice and giving the parties in this proceeding the required opportunity to challenge those assertions.

a. IPA Brief

CUB moves to strike the following portions of the IPA Brief, a redlined version is attached as Attachment A:

- Section I page 2: Beginning with the last sentence of the first paragraph beginning with "Finally, the competitive retail market" until the end of that sentence.

This portion of the IPA Brief does not contain citations to either the record of this proceeding or that of any other. The factual assertion contained in this portion is unsubstantiated and neither CUB nor any other party to this proceeding has been given the opportunity to challenge their veracity. The IPA has not requested that the Commission take administrative notice of the assertion contained in this portion, and it does not appear that the factual assertion in the portion is of the type that the Commission may take administrative notice of when requested.

- Section II, pages 4-5: Beginning with the second line of the second paragraph, the sentence beginning with "First, unlike for ComEd..." until the end of the sentence on the fourth line of page 5 ending with "...and vice versa."

This portion of the IPA Brief does not contain citations to the evidentiary record of this proceeding. The factual assertions contained in this portion are unsubstantiated and neither CUB nor any other party to this proceeding has been given the opportunity to challenge their veracity. The IPA has not requested that the Commission take administrative notice of the assertions contained in this portion that are explicitly referenced as from pleadings in other Commission

docketed proceedings. Neither CUB nor any other party has been given a reasonable opportunity to contest the material cited in this proceeding. Moreover, the Commission's Rules discourage the taking of administrative notice of pleadings filed in other proceedings docketed at the Commission. 83 Ill. Admin. Code. § 200.640(b).

- Section II, page 5: Beginning with the third line of the second paragraph, the sentence beginning with "As pointed out in the IPA's Brief on Exceptions in the ComEd AMI Deployment docket..." until the end of the sentence on the eighth line of the second paragraph of page 5 ending with "...continue to do so."

This portion of the IPA Brief does not contain citations to the evidentiary record of this proceeding. The factual assertions contained in this portion are unsubstantiated and neither CUB nor any other party to this proceeding has been given the opportunity to challenge their veracity. The IPA has not requested that the Commission take administrative notice of the assertions contained in this portion that are explicitly referenced as from pleadings in other Commission docketed proceedings. Neither CUB nor any other party has been given a reasonable opportunity to contest the material cited in this proceeding. Moreover, the Commission's Rules discourage the taking of administrative notice of pleadings filed in other proceedings docketed at the Commission. 83 Ill. Admin. Code. § 200.640(b).

b. ICEA Brief

CUB moves to strike the following portions of the ICEA Brief, a redlined version is attached as Attachment B:

- Section I page 7: Beginning with the first line in the second paragraph, the sentence beginning with "ICEA believes that customer migration..." until the end of the paragraph.

This portion of the ICEA Brief does not contain citations to either the record of this proceeding or that of any other. The factual assertions contained in this portion are unsubstantiated

and neither CUB nor any other party to this proceeding has been given the opportunity to challenge their veracity. The ICEA has not requested that the Commission take administrative notice of the assertions contained in this portion, and it does not appear that the factual assertions in the portion are those that the Commission may take administrative notice of when requested.

- Section I pages 8-9: The entirety of subsection E.

This portion of the ICEA Brief does not contain citations to the record of this proceeding. The factual assertions contained in this portion are unsubstantiated and neither CUB nor any other party to this proceeding has been given the opportunity to challenge their veracity. The ICEA has not requested that the Commission take administrative notice of the assertions contained in this portion that are explicitly referenced as from pleadings in other Commission docketed proceedings. Neither CUB nor any other party has been given a reasonable opportunity to contest the material cited in this proceeding. Moreover, the Commission's Rules discourage the taking of administrative notice of pleadings filed in other proceedings docketed at the Commission. 83 Ill. Admin. Code. § 200.640(b).

III. CONCLUSION

WHEREFORE, for the reasons state above CUB respectfully moves that the following portions of the IPA Brief be stricken:

- Section I page 2: Beginning with the last sentence of the first paragraph beginning with "Finally, the competitive retail market" until the end of that sentence.
- Section II, pages 4-5: Beginning with the second line of the second paragraph, the sentence beginning with "First, unlike for ComEd..." until the end of the sentence on the fourth line of page 5 ending with "...and vice versa."
- Section II, page 5: Beginning with the third line of the second paragraph, the sentence beginning with "As pointed out in the IPA's Brief on Exceptions in the

ComEd AMI Deployment docket...” until the end of the sentence on the eighth line of the second paragraph of page 5 ending with “...continue to do so.”

and that the following portions of the ICEA Brief be stricken:

- Section I page 7: Beginning with the first line in the second paragraph, the sentence beginning with “ICEA believes that customer migration...” until the end of the paragraph.
- Section I pages 8-9: The entirety of subsection E.

Respectfully submitted,



Kristin Munsch
Orijit Ghoshal
Attorneys for the CITIZENS UTILITY BOARD
309 W. Washington St., Ste. 800
Chicago, IL 60606
(312) 263-4282
kmunsch@citizensutilityboard.org
oghoshal@citizensutilityboard.org

October 5, 2012