

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY	)	
d/b/a Ameren Illinois,	)	
Petitioner	)	Docket No. 12-0293
	)	
Rate MAP-P Modernization Action Plan –	)	
Pricing Annual Update Filing	)	

**REPLY IN SUPPORT OF  
VERIFIED MOTION OF AMEREN ILLINOIS COMPANY TO MAINTAIN  
PROTECTION OF CONFIDENTIAL AND PROPRIETARY INFORMATION**

Ameren Illinois Company d/b/a Ameren Illinois (AIC) respectfully submits the instant Reply in support of its Motion to protect from public disclosure certain confidential and proprietary information produced by AIC in discovery and made part of the record as exhibits. AG/AARP’s position in their Response in opposition should be rejected. That response (1) ignores the applicable law; (2) applies the incorrect legal standard; and (3) relies on unfounded assertions that the materials at issue are not confidential. AIC has demonstrated the information is confidential and proprietary; its motion should be granted.

**I. INTRODUCTION**

AG/AARP’s Response is primarily a policy discussion. AG/AARP claim that, because regulated utilities are monopolies, information in their possession related to potential communication strategies and vendor pricing should not be afforded protection from public disclosure, even if the utilities received the information from third parties pursuant to an agreement expressly providing for confidential treatment. AG/AARP’s suggestion that everything in the utilities’ possession is fair game for public disclosure, simply because the utility is a regulated entity, is neither consistent with the statutory protections that utilities are afforded nor good public policy.

Moreover, the legislature has already addressed AG/AARP's policy concerns. Section 4-404 of the Public Utilities Act (Act) requires that the Illinois Commerce Commission (Commission) "***shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person . . .***" 220 ILCS 5/4-404 (emphasis added). This provision is noteworthy for both its clear mandate and its breadth. AG/AARP further disregard the Commission's rules governing protection of confidential information and the May 31, 2012 Protective Ruling entered in this proceeding (Protective Ruling). In fact, absent from AG/AARP's response is *any* mention of the Protective Ruling or the June 12, 2012 Case Management Plan, Section 4-404 of the Act, Rules 200.605 and 200.1050 of the Commission's Rules of Practice and Procedure or the Illinois Trade Secret Act. In other words, AG/AARP ignore the *entire* legal landscape protecting confidential and proprietary information before the Commission. In so doing, they advocate a position contrary to the best interests of Illinois ratepayers.

But for all of AG/AARP's assertions, there is one they do not, and cannot, make: they do not contend the Commission's ability to fashion just and reasonable rates in this proceeding is in any way hindered if the confidential nature of the subject information is preserved. On the other hand, if accepted, AG/AARP's position would have the Commission ignore Section 4-404 of the Act, creating a chilling effect not only on the Commission's ability to obtain sensitive information, but also on Illinois regulated utilities' ability to procure consulting services in the marketplace at competitive rates. The Commission should grant AIC's Motion and accord its vendor's confidential and proprietary information the protection the law commands.

## II. ARGUMENT

### A. AIC Has Demonstrated the Materials at Issue Are Confidential.

AIC has asked the Commission to protect from disclosure: (1) three memoranda authored by its external marketing consultant, Simantel Group, Ltd. (Simantel) and containing Simantel's strategic thought processes, marketing strategies and marketing implementation plans; and (2) eight pages of a 40-page PowerPoint Presentation containing technical and business data provided by Simantel to AIC as well as AIC's potential marketing strategies and funding plans beyond 2011. (AIC Mtn., ¶¶ 16, 18, 19.) In its Motion, AIC explained why these materials are confidential under the terms of the Protective Ruling and applicable law. Namely, they are trade secrets and/or proprietary commercial or financial information, the disclosure of which likely will cause competitive harm to Simantel or AIC. AIC explained, under the applicable case law, courts regularly have found non-public product research, marketing plans, strategies and analyses and intellectual property to constitute valuable and commercially sensitive investments that can be maintained as confidential and the proper subject of protective orders. (*Id.*, ¶ 12.)

AG/AARP obtained the information, properly designated as confidential, in discovery over two months ago and submitted it, designated as confidential, as an exhibit in this proceeding, again, over two months ago. (*Id.*, ¶¶ 9, 10.) Nevertheless, and despite the procedure set forth in the Protective Ruling for challenging confidential designations, AG/AARP waited until the eleventh hour—after close of business on October 3, 2012—to complain the information should not be accorded protection. (See generally AG/AARP Resp.) But AG/AARP's arguments evince a disregard for the applicable law, entail a derivation of a new, AG/AARP-written legal standard not applicable here, and are based on unfounded assertions regarding the sensitive nature of the information at issue. They carry no weight.

**B. AG/AARP's Response Ignores the Applicable Law.**

AG/AARP cite Sections 10-101, 10-102, 9-226 and Article IX of the Act in support of their opposition. But they inexplicably fail to even *mention* the actual law applicable here, such as Section 4-404 of the Act, 220 ILCS 5/4-404, the June 12, 2012 Case Management Plan (Section D), the Protective Ruling, the Commission's rules under which it was entered, 83 Ill. Adm. Code §§ 200.605, 200.1050, and the Illinois Trade Secrets Act, 765 ILCS 1065/1, et seq.<sup>1</sup> That body of law recognizes the Commission may receive, during the ratemaking process, confidential and proprietary information, and that information must be accorded adequate protection.

In particular, AG/AARP fail to address the Act's governing provision on confidentiality. Section 4-404 ("Protection of confidential and proprietary information") expressly mandates that the Commission "*shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity, including proprietary information provided to the Commission by the Illinois Power Agency.*" 220 ILCS 5/4-404 (emphasis added). Section 4-404 directly conflicts with AG/AARP's implication that regulated utilities, as such, cannot maintain information as confidential or proprietary. Carried to its logical end, AG/AARP's implication would make the body of law protecting trade secrets and other commercially sensitive information in the regulatory setting, and specifically that within the Commission's jurisdiction, utterly superfluous.

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<sup>1</sup> Even the Illinois Freedom of Information Act, exempts from disclosure trade secrets and commercially sensitive information. 5 ILCS 140/7(g). See, e.g., BlueStar Energy Services, Inc. v. Ill. Commerce Comm'n, 374 Ill. App. 3d 990, 996 (1st Dist. 2007) (finding the "FOIA should not be used to subvert the ICC's ability to regulate the public utilities sector, by deterring public utilities from candidly disclosing information pertinent to the ICC's regulatory function.").

The provisions of the Act on which AG/AARP *do* rely—Sections 10-101, 10-102 and 9-226 (AG/AARP Resp., pp. 1-2, 4)—do not preclude the protection AIC seeks here.<sup>2</sup> Section 10-101 requires Commission proceedings and the related records to be public, “*except as in this Act otherwise provided.*” 220 ILCS 5/10-101 (emphasis added). As stated, Section 4-404 otherwise provides. Section 10-102 requires that Commission meetings be conducted in accordance with the Open Meetings Act, 5 ILCS 120/1, *et seq.* 220 ILCS 5/10-102. The Open Meetings Act, in turn, first requires public bodies to conduct their affairs openly, 5 ILCS 120/1, but then sets forth no less than 29 subjects regarding which they may hold closed deliberations, including “[e]vidence or testimony presented in open hearing . . . to a quasi-adjudicative body . . . provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning . . . .” 5 ILCS 120/2(c)(4). AG/AARP ignore these exceptions, but the Commission should not.

AG/AARP also rely (erroneously) on Section 9-226 of the Act. (AG/AARP Resp., p. 4.) That Section requires that certain materials be made available to the Commission related to recoverable advertising costs. 220 ILCS 5/9-226. AG/AARP repeat that such materials, including the information at issue, are “critical” to the Commission’s evaluation of advertising. (AG/AARP Resp., p. 4.) They then conclude, for this reason, the information must be publicly disclosed. (*Id.*) That is a non sequitur. Nothing in Section 9-226 requires public dissemination of the materials enumerated therein or suggests the commercially sensitive nature of such materials precludes the Commission from assessing the reasonableness of the related costs.

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<sup>2</sup> AG/AARP also cite the 1965 case of *FCC v. Schreiber*, 381 U.S. 279 (1965), for the importance of transparency in the regulatory process. While AIC does not dispute that proposition generally, the case is inapposite. It concerned the Federal Communication Commission’s authority to promulgate a rule governing the disclosure of information subpoenaed by the Commission during the course of an investigation, and held it was in the Commission’s statutory authority to both promulgate and apply such a rule, and that it was improper for the appellate courts to devise the procedures to be followed by the Commission. *Schreiber*, 381 U.S. at 288-89, 291.

AG/AARP further argue that AIC, as a regulated Illinois utility, is obligated to demonstrate its expenses are just and reasonable under Article IX of the Act. (*Id.*, p. 1.) AIC does not dispute this proposition. But the Act acknowledges and respects confidential, proprietary, trade secret information, *see* 220 ILCS 5/4-404, and the Commission unquestionably is capable of determining the justness and reasonableness of any component of utility rates which is confidential. AG/AARP do not (and cannot) argue to the contrary.

AG/AARP also repeat that the public at large must have access to the subject information—and, it would follow, *all* information in the hands of a public utility—so that it can be informed of the costs underlying the rates they pay and the bases for the Commission’s decision in establishing those rates. (AG/AARP Resp., pp. 4, 7, 8.) In fact, AG/AARP go so far as to claim, without support, “[i]f only the total amount of a utility expense is available to the public, the benefit of transparency is lost, and the public will lose confidence in the regulatory process.” (*Id.*, p. 4.) But under applicable law the AG, as the People’s representative, has access to the information. As the Protective Ruling (which AG/AARP ignores) reminds: “The Office of the Attorney General is governed by the Attorney General Act, 15 ILCS 205/0.01 *et seq.*, ***and will receive information in this proceeding on behalf of the People of the State of Illinois.***” (Protective Ruling, ¶ 4 (emphasis added).) Nothing about the confidential and proprietary nature of the information at issue has prohibited the AG from receiving or reviewing it in this proceeding, or from advocating a position regarding the related cost recovery, on behalf of the People. Moreover, the Attorney General Act itself requires the protection of confidential information by the AG: “The Office of the Attorney General may use information obtained under this Section [from the ICC], including information that is designated as and that qualifies for confidential treatment, ***which information the Attorney General's office shall maintain as***

*confidential*, to be used for law enforcement purposes only, which information may be shared with other law enforcement officials.” 205 ILCS 205/6.5(d) (emphasis added). Put simply, the law contemplates the AG will receive, and maintain, confidential information on behalf of the People.

In sum, AG/AARP would have the Commission ignore essentially every applicable legal provision which serves to protect Simantel’s competitively sensitive work product in AIC’s hands, in favor of several provisions that simply are not applicable. The Commission should not permit its assessment here to be so clouded.

**C. AG/AARP’s Response Proposes to Apply the Wrong Legal Standard.**

AG/AARP’s disregard of the pertinent legal landscape drives them to devise a *new* legal standard to govern the proprietary information here—a “compelling interest at risk” standard. (AG/AARP Resp., p. 2.) That standard, however, does not appear in the Protective Ruling or the applicable law (such as the Illinois Trade Secret Act). Although AG/AARP cite Commission Rule 200.430 in support, that rule does not reflect that standard, either.<sup>3</sup> It provides: “At any time during the pendency of a proceeding, the Commission or the Hearing Examiner may, on the motion of any person, enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies.” 83 Ill. Adm. Code § 200.430(a). The order entered by the ALJs pursuant to that rule, in turn, specifically protects “trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary or privileged, or where disclosure of the trade secrets or information is likely to

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<sup>3</sup> AG/AARP also cite the inapposite case of *In re Marriage of Johnson*, 232 Ill. App. 3d 1068 (1992). It concerned public access to trial court records of civil proceedings under the Illinois Clerk of Courts Act. The Court found that act symbolizes the legislature’s determination that public access to the judicial process serves the public interest, but—notably—does not abrogate a trial court’s inherent power to control its files and to impound any part of a particular case. *Johnson*, 232 Ill. App. 3d at 1072. The case does not concern proceedings before an administrative agency, nor address the protection afforded commercially sensitive, proprietary, trade secret information under Illinois law.

cause competitive harm,” among other information. (Protective Ruling, ¶ 1.a.) It further requires confidential designations to be made in good faith and that a detailed explanation of the basis for any such designation be provided in response to a challenge thereto. (Id., ¶¶ 2, 5.) AG/AARP ignore the Protective Ruling, but *that* sets the applicable standard here.<sup>4</sup>

And AIC has complied with that standard. It not only produced the materials at issue in good faith and with narrowly tailored confidential designations, but also, it explained in detail why the three Simantel memoranda and eight pages of the 40-page PowerPoint Presentation are commercially sensitive information, the public dissemination of which could result in harm to Simantel and/or AIC. (AIC Mtn., ¶¶ 10, 11, 16, 18, 19.) AIC explained such dissemination also may constitute a violation of Ameren Service Company’s agreement with Simantel, potentially subjecting AIC or its affiliate to civil liability. (Id., ¶ 15.)

**D. AG/AARP’s Contentions the Information Is Not Confidential Are Unfounded.**

AG/AARP offer a host of claims in an effort to compel public disclosure of Simantel’s commercially sensitive work product. Each is easily disposed of.

First, AG/AARP contend AIC, as a “monopoly” energy distribution company, does not face competitive pressures. (AG/AARP Resp., p. 1.) That is incorrect. Despite its status as a regulated Illinois utility, AIC nevertheless operates in a market, whether for capital, labor or goods and services. The Commission does not dictate what AIC pays its employees or its vendors or what it pays for its transmission poles; the market does. Illinois law, and specifically, the Act, recognizes this. See, e.g., 220 ILCS 5/4-404.

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<sup>4</sup> In concluding their response, AG/AARP invent another new standard. They argue “the costs related to the documents in question are not *exceptional services that require secret negotiation or charges.*” (AG/AARP Resp., p. 8 (emphasis added).) But that also is not the standard in Illinois for protecting from disclosure confidential, proprietary information.

Related, AG/AARP refuse to accept that AIC competes in the marketplace for the procurement of consulting services from outside vendors and, thus, the disclosure of the information at issue could adversely affect AIC's ability to compete for lower-priced services. (AIC Mtn., ¶14; AG/AARP Resp., pp. 5-6.) Presumably, even AG/AARP would agree that lower priced services are in ratepayers' interest. AG/AARP also argue the "need for transparency trumps *any* alleged opinion by Simantel (a non-party to the docket) that the disclosure of the materials at issue might impact its ability to obtain future consulting services with Ameren." (AG/AARP Resp., p. 8.) This view is backwards; the question is not the impact on Simantel's ability to obtain future consulting services with AIC, but AIC's ability to obtain cost effective vendor services from Simantel or any other vendor. (AIC Mtn., ¶ 16.) Such ability would surely be impaired if potential vendors suspected their confidential and proprietary information could be made public in a rate case.

Nevertheless, AG/AARP assert Simantel's work product should be disclosed because "[u]tility *expenses* . . . are regularly reviewed and disclosed in rate cases." (AG/AARP Resp., p. 6.) This argument also misses the point. AIC's advertising expenses *have* been reviewed and disclosed in this proceeding; Simantel's commercially sensitive work product has not been, and need not and should not be, publicly disclosed, however. Moreover, at issue are commercial strategies and intellectual property, not dollars and cents.

AG/AARP next contend disclosure is appropriate because the ALJs "rejected . . . outright" similar contentions in Docket No. 10-0467.<sup>5</sup> That reads too much into the ruling. In that docket, Commonwealth Edison (ComEd) filed a motion to preserve the confidential nature

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<sup>5</sup> 83 Ill. Adm. Code 200.640 requires parties to provide advance notice of their intent to request administrative notice of filings from another docket. AG/AARP did not seek administrative notice of ComEd's motion or the ALJs' ruling thereon in Docket No. 10-0467.

of its outside attorneys' billing records. (Commonwealth Edison Co., Docket 10-0467, ComEd's Verified Mtn. to Preserve Conf. Designations (filed Nov. 12, 2012).) While ComEd initially argued, in part, the billing records contained proprietary billing information (id.), it appears to have abandoned that argument on reply, instead relying largely on the attorney-client privilege. (Docket 10-0467, ComEd's Verified Reply in Support (filed Nov. 24, 2012) (not mentioned in AG/AARP's response).) The ALJs subsequently denied the motion without explanation. (Docket 10-0467, Notice of ALJs' Ruling (filed Dec. 10, 2010) ("The Motion filed by ComEd to Preserve the Confidential Designation of Certain Documents is denied. ComEd did not establish that this information is confidential."))<sup>6</sup> As such, the ALJs in that docket did not, despite AG/AARP's contention, "reject outright" ComEd's argument related to the proprietary nature of the billing rates. And, by contrast, AIC has demonstrated the confidential nature of the information at issue here.

AG/AARP also claim "Ameren's assumption that secrecy will promote lower costs simply is unproven." (AG/AARP Resp., p. 6.) But enhanced competition *is* the reason the Illinois law (which AG/AARP ignore) safeguards trade secrets, as the definition makes clear: "Trade secret" means information . . . that . . . is sufficiently secret to derive *economic value*, actual or potential, from not being generally known to other persons who can obtain *economic value* from its disclosure or use . . . ." 765 ILCS 1065(2)(d)(1) (emphasis added). It is AG/AARP's position disclosure would not chill AIC's ability to obtain lower pricing for marketing services that is unsupported.

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<sup>6</sup> AG/AARP also contend this situation is analogous to fee shifting cases wherein courts have required disclosure of opposing counsel's billing records. (AG/AARP Resp., p. 6.) It is not. In those cases, there is *no* disclosure of the attorney's billing records. Here, AG/AARP, the Commission, its Staff and any intervening party subject to the Protective Ruling have access to the commercially sensitive Simantel work product. Thus, there is no "conjecture," as AG/AARP contend. (Id.)

AG/AARP further assert, “any competitor of Simantel *would be hard pressed to decipher that company’s proposed advertising strategy* for Ameren.” (AG/AARP Resp., p. 7 (emphasis added).) AG/AARP have not presented any support for that statement. In fact, it suggests a savvy competitor *could* “decipher” Simantel’s proposed advertising strategy, to Simantel’s competitive disadvantage. Thus, AG/AARP effectively concede the subject information constitutes Simantel’s trade secrets.

Finally, despite AIC’s verified motion, AG/AARP want to see an “ASC document that either defines or supports the referenced agreement between ABS and Simantel regarding confidential information treatment.” (AG/AARP Resp., p. 7.) To assuage AG/AARP’s concerns, the Agreement referenced in AIC’s Motion is attached as Exhibit A. AG/AARP also cry foul at Simantel’s assertion it considers its work product to be confidential trade secrets, condemning it as hearsay. (AG/AARP Resp., p. 7.) It is worth repeating here, however, that despite receiving Simantel’s sensitive information over two months ago, AG/AARP only recently took issue with its confidential nature. Their delay has deprived AIC the opportunity to provide evidence supporting Simantel’s assertion. Despite AG/AARP’s delay, AIC also is submitting an affidavit from Simantel, attached as Exhibit B, which supports its position.

All of AG/AARP’s contentions necessarily beg the question—what is the purpose of Section 4-404 of the Act, the Protective Ruling entered in this proceeding and the surfeit of Illinois law which protects from disclosure commercially sensitive information, such as Simantel’s work product at issue here, if such information suddenly is subject to public dissemination simply because it comes into the possession of a regulated Illinois utility? To accept the position advocated in AG/AARP’s Response would be to moot the applicable legal landscape and risk Illinois regulated utilities’ ability to procure consulting services in the

marketplace at competitive rates to the benefit of their ratepayers. The Commission should not condone such a result.

WHEREFORE, AIC respectfully requests the ALJs order that the portions of AG/AARP Exhibit 3.4 (pages 12, 14, 16-20 and 22) and AG/AARP/Ameren Cross Exhibit 1 identified in its Motion be kept confidential and redacted from the public versions of the exhibits that are filed on the Commission's e-Docket.

Dated: October 12, 2012

Respectfully submitted,

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/s/ Albert D. Sturtevant

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**CERTIFICATE OF SERVICE**

I, Albert D. Sturtevant, an attorney, certify that on October 12, 2012, I caused a copy of the foregoing *Reply In Support Of Verified Motion Of Ameren Illinois Company To Maintain Protection Of Confidential And Proprietary Information* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0293.

*/s/ Albert D. Sturtevant* \_\_\_\_\_  
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