STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Ameren Illinois Company d/b/a Ameren Illinois	)	
	)	
Verified Petition for Approval of Multi-Year Performance Metrics Pursuant to Section 16-108.5(f) and (f)(5) of the Public Utilities Act.	)	ICC Docket No. 12-0089
	)	(Rehearing)

REPLY BRIEF ON REOPENING OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff witnesses of the Illinois Commerce Commission ("Staff"), through its undersigned counsel, pursuant to 83 Ill. Adm. Code 200.800, hereby submit their Reply Brief on Reopening in the above referenced docket.

I. INTRODUCTION/STATEMENT OF THE CASE

The Energy Infrastructure and Modernization Act ("EIMA") is a proposal to a participating utility, which if accepted, provides the benefits of formula rates for a 10 year period. In return, ratepayers receive the benefits of both an approved Advanced Metering Infrastructure Development Plan ("AMI plan") as well as an approved Multi-year Performance Metrics Plan ("Metrics Plan") for a 10 year period, enforced by potential financial penalties if the utility does not comply with the Metrics Plan. Ameren Illinois Company d/b/a Ameren Illinois ("AIC" or "the Company") chose to take advantage of this proposal when, on January 3, 2012, pursuant to Section 16-108.5(c), it filed and requested approval of a performance-based formula rate tariff, Rate MAP-P.

See ICC Docket No. 12-0001. It appears now, however, that although AIC wishes to take advantage of the benefits of 10 years of formula rates, it would prefer to avoid any Commission enforcement of a full 10 years of performance metrics.

The current proceeding was reopened to consider a revised start date for AIC's Metrics Plan, and, logically, the impact of that revised start date is within the scope of this proceeding as the start date and the remainder of dates contained in EIMA cannot be simply severed from one another. These dates are all inextricably related. The Commission's decision to reopen this proceeding was not, as the Company describes it, a "consequence of the Commission's decision not to approve the AMI Plan, as originally filed in Docket 12-0244," (AIC IB, p. 1), but rather a consequence of the Company's failure to file an AMI Plan that could be approved by the Commission in its original filing. *See* AIC Verified Petition for Approval of Smart Grid Advanced Metering Infrastructure Deployment Plan, March 30, 2012, Docket No. 12-0244. The Commission had no alternative but to reject AIC's AMI Plan which was not cost-beneficial to customers, which in turn impacted the date on which the Company could begin its Metrics Plan. AIC is now electing to implement its Metrics Plan as of January 1, 2014, which would then run for 10 years or until December 31, 2023. No party suggests that AIC does not have the right to elect a start date that is no later than 14 months after Commission approval of the plan (220 ILCS 5/16-108.5(f)); however, Staff and the Attorney General of the State of Illinois (the "AG") and the AARP object to the impact of that late start date on AIC's obligations under its Metrics Plan and possible financial penalties assessed on AIC if those obligations are not met. Due to specific dates prescribed in the Act, it appears that Sections 16-108.5, 16-108.6, 16-108.7 and 16.108.8, which allow for

formula rates, become inoperative at least one, or more likely two years before the 10 year period for AIC's Metrics Plan concludes. This leads to an absurd result in which AIC would continue to receive the benefits of 10 years of formula rates while evading one or two years of its obligations under the 10 year Metrics Plan, and consequently depriving AIC ratepayers of the benefits under those metrics and possible financial penalties assessed on AIC if the metrics are not met.

For reasons of judicial economy, it is entirely appropriate for the Commission to address this issue in the current proceeding. Given that this reopening concerns a Metrics Plan which is prospective, and given that this issue is squarely before the Commission now, Staff proposes that a decision should be made regarding whether AIC should voluntarily accept dates that would leave in place its future metrics obligations and associated penalties for a full 10 year period. Commission adoption of the AG/AARP's proposed revised MAP-M tariff, along with any other relevant changes to the MAP-M tariff, would be an appropriate and effective way to accomplish this goal.

A. Procedural History

On January 3, 2012, pursuant to Section 16-108.5(c), Ameren Illinois Company d/b/a Ameren Illinois ("AIC" or "the Company") filed and requested approval of a performance-based formula rate tariff, Rate MAP-P. *See* ICC Docket No. 12-0001. The Company then filed its Petition for Approval of Multi-Year Performance Metrics on February 2, 2012 in which the Company requested the issuance of an order from the Illinois Commerce Commission ("ICC"), within 120 days of the filing of the Petition, approving (i) the Company's Multi-Year Performance Metrics ('Metrics Plan") and (ii) Rider MAP-M.

On May 29, 2012, the Commission entered an Order approving AIC's (i) metrics plan and (ii) Rider Modernization Action Plan-Metrics ("MAP-M"). On June 28, 2012, AIC filed a petition for rehearing of certain limited aspects of its metrics plan and Rider MAP-M; specifically, AIC sought a modification to the Order to facilitate its efforts on rehearing in Docket No. 12-0244. Docket No. 12-0244 involved AIC's smart grid advanced metering infrastructure ("AMI") deployment plan. Contrary to AIC's numerous descriptions throughout its Initial Brief that this was somehow the Commission's decision to not approve or delay approval of the AMI Plan (AIC IB, pp. 1 and 3), the Commission rejected AIC's original plan in its May 29, 2012 Order because AIC failed to demonstrate that its plan was cost-beneficial to customers. AIC revised its AMI deployment plan and has sought approval of it through a petition for rehearing in Docket No. 12-0244. At this time, no final order on rehearing has been issued in that proceeding.

To facilitate its revised AMI deployment plan, AIC sought to modify when its 10 year performance period begins for its AMI-related metrics. The May 29, 2012 Order approving the metrics plan and Rider MAP-M adopted AIC's uncontested preferred starting date of January 1, 2013. Although AIC's proposed start date for the 10 year performance period for all metrics was not opposed, from Staff's perspective, this was not an issue at that time since the 10 year period of time would have concluded on December 31, 2022 or within the operative timeframe of the EIMA. In the event that rehearing in Docket No. 12-0244 was not completed prior to November 1, 2012, AIC requested the option of extending the starting date for the AMI-related metrics to

January 1, 2014. On July 12, 2012 the Commission denied AIC's Petition for Rehearing and instead reopened the record on its own motion to consider AIC's request.

Initial Briefs ("IB") were filed on October 25,2012 by the People of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of the State of Illinois (the "AG") and the AARP ("AARP"); Staff; and Ameren Illinois Company d/b/a Ameren Illinois (collectively, "AIC"). Some of the issues raised in the parties' initial briefs were addressed in Staff's Initial Brief and, in the interest of avoiding unnecessary duplication, Staff has not repeated every argument or response previously made in Staff's Initial Brief. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff's Initial Brief.

B. Legal Framework and Standards

The legal framework and standards set forth in Staff's IB continue to be the provisions of the EIMA that Staff relies upon. Staff IB, pp. 4-10.

II. AIC'S PROPOSED START DATE FOR THE 10-YEAR PERFORMANCE PERIOD FOR AMI-RELATED METRICS

As Staff stated in its IB, due to AIC's failure to file a cost-beneficial AMI Plan and the delays which attended AIC's filing a revised plan, it appears that AIC may elect to commence its AMI related metrics on January 1, 2014. Staff IB, pp. 10-11. Specifically, Section 16-108.5 of the Act provides that:

> The utility shall elect…when the 10 year period shall commence for the metrics set forth in subparagraphs (5) through (8) of this subsection (f), provided that it begins no later than 14 months following the date on which the Commission enters its order approving the utility's Advanced Metering Infrastructure Deployment Plan pursuant to subsection (c) of the Section 16-108.6 of this Act.
>
> 220 ILCS 5/16-108.5(f).

No party argues that AIC should not be permitted to elect when the performance periods for its metrics commence, nor does any party argue that AIC should be required to meet certain metrics prior to obtaining the full AMI functionality necessary to meet those targets. AIC IB, pp. 9-10. However, as both Staff and the AG/AARP note in their IBs, this starting date is problematic in the way it impacts metrics requirements and any financial penalties that may be assessed on AIC in the final years of its Metrics Plan. In the event AIC intends to elect January 1, 2014 as a start date for its metrics plan, AIC should agree to an order that would provide a tariff mechanism for the collection of financial penalties if the utility fails to meet the goals of the Metrics Plan towards the end of its 10 year period, specifically for those years by which Sections 16-108.5 – 16-108.8 become inoperative. *See* 220 ILCS 5/16-108.5(h). The AG/AARP's proposed revised MAP-M tariff would function as an effective mechanism to accomplish this goal. AG/AARP IB, p. 15. Staff would also note that it may also be necessary to revise any relevant language under the "Implementation Of The Penalty" section of the MAP-M tariff, consistent with the changes proposed by Staff and the AG/AARP in this proceeding. *See* AIC Ex. 7.1RO, pp. 5-6.

III. APPLICATION OF FINANCIAL PENALTIES FOR THE AMI-RELATED METRICS BASED ON AIC'S PROPOSED START DATE

On June 28, 2012, AIC filed a petition for rehearing of certain limited aspects of its metrics plan and Rider MAP-M. On July 2, 2012, the ALJs submitted a memorandum to the Commission providing a recommendation for how best to proceed. On July 12, 2012 the Commission denied AIC's petition for rehearing and instead reopened the record on its own motion to consider the issue of Ameren's proposed

January 1, 2014 start date for its Metrics Plan. Although the Company argues that the scope of review on reopening is narrow, there is nothing to indicate (1) that the scope is as narrow as the Company implies; or (2) that the issue of how future metrics and future penalties are assessed is not properly within the scope on reopening. This proceeding concerns the start date for AIC's 10 year performance period for its AMI-related metrics, and inherent in that determination is the question of whether the plan, associated metrics, and associated penalties for failing to meet those metrics will continue for 10 full years if that date is adopted. The start date and the other associated dates simply cannot be severed from one another without undermining the clear language of EIMA. Consequently, this issue is squarely before the Commission in this Initial Plan filing and should not be, as AIC appears to suggest, kicked down the road past the sunset date of the Act, when Sections 16-108.5-16-108.8 become inoperative and the Commission can no longer enforce the metrics and associated penalties.

A. The Issue of the Impact of AIC's Proposed Start Date on Metrics Compliance and Penalties is Squarely Within the Scope of This Proceeding

The Administrative rules permit the Commission to reopen a proceeding on its own motion. Section 200.900 states as follows:

> After issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening. No party may petition the Commission to reopen on its own motion until after the time to petition for rehearing has expired.

83 Illinois Administrative Code 200.900

On May 29, 2012, the Commission entered an Order approving AIC's (i) metrics plan and (ii) Rider Modernization Action Plan-Metrics ("MAP-M"), with a start date of January 1, 2013. That proceeding was reopened due to consider a subsequent change in events; because AIC failed to present an AMI plan in Docket No. 12-0244 which was cost-beneficial to customers, the schedule no longer accommodated the 2013 start date. Now the parties must consider both the start date itself and the attendant effects of that new proposed start date. Nothing in the ALJ's Memorandum to the Commission ("ALJ Memorandum) (July 2, 2012), Notice of Commission Action (July 12, 2012) or transcript from the Commission's Open Meeting during which this item was discussed, (see Bench Meeting Minutes, July 11, 2012, Tr. 50), limit the scope on reopening. The most expansive discussion of the reopening, in the ALJ Memorandum, merely notes that the start date was not contested in the initial proceeding and thus a rehearing on this issue of law was not necessary. Although the ALJ noted that the start date *may* be worth considering, (ALJ Memorandum – July 2, 2012, emphasis added), the ALJ Memorandum does not limit the scope of reopening merely to choosing a date, nor does the Notice of Commission Action. To do so would ignore the impact of that date on this prospective Metrics Plan going forward, which as both Staff and the AG/AARP have pointed out, is problematic.

The time period provided in Section 16-108.5 for formula rates and updates to the formula rates (seemingly a ten year period beginning January 1, 2012 and ending December 31, 2022), and the time period provided for the achievement of metrics and performance goals, with any attendant financial penalties that may result from a participating utility's failure to meet those goals, simply do not coincide. It appears that

if the Company's proposed start date of January 1, 2014 is adopted, that the 10 year time period provided for formula rates and the updates to formula rates will expire and 16-108.5-16-108.8 will become inoperative before all the metrics are achieved and all any possible attendant penalties are assessed. The last full year for AIC's 10 year Metrics Plan would be January 1, 2023 through December 31, 2023. According to the language of the Act, on June 1, 2024, AIC would be required to file its last report on how it performed under each metric. If any financial penalties were to be imposed on AIC, they would not be assessed until the next rate year or in 2025 – over 2 years beyond the sunset provisions of the formula rate law. Regardless of whether penalties may or may not be imposed at the end of the 10 year period of time, this issue is clearly within the scope of reopening as it is inextricably tied to the start date that AIC has elected to begin its Metrics Plan, as well as the eventual end date of that Plan.

B. This Issue is Ripe for Consideration and Should be Decided In This Reopening Proceeding

AIC's proposed January 1, 2014 start date for its Metrics Plan has a significant impact on (1) whether AIC will continue to comply with its performance metrics for a full 10 years and (2) whether financial penalties under 16-108.5 for noncompliance can be assessed in later years of the plan, given the Act's end date of December 31, 2022. AIC attempts to trivialize Staff and the AG/AARP's position by labeling this a "hypothetical domino effect," (AIC IB, p. 12), when it is clear that this issue <u>will</u> present itself when the relevant provisions of the EIMA expire.

The provisions of the EIMA contemplate a 10 year period for the formula rates and a commensurate 10 year period for the AMI Plan and the Metrics Plan. The

formula rates provisions have a sunset date of December 31, 2022, after which time these sections become inoperative. *See* Section 16-108.5(h). The EIMA, and the General Assembly in drafting the EIMA, clearly contemplated that in the event a participating utility could elect a start date for its 10 year Metrics Plan that would extend beyond the date by which formula rates and updates to the formula rates became inoperative, that the Metrics Plan would still be in effect and completed at the conclusion of its 10 year period. To read the Act any other way would lead to an absurd result where the Act and the Metrics Plan propose financial penalties for a 10 year period, but the last one or two years could not be used to calculate these penalties nor assess them on the utility. As Staff noted in its IB, this absurdity is further magnified by the fact the largest penalties potentially attach in the latter years of the Metrics Plan. "[A] court construing the language of a statute will assume that the legislature did not intend to produce an absurd or unjust result" (*State Farm Fire & Casualty Co. v. Yapejian,* 152 Ill.2d 533, 541 (1992)), and will avoid a construction leading to an absurd result, if possible (*City of East St. Louis v. Union Electric Co.,* 37 Ill.2d 537, 542 (1967)). *Hubble v. Bi-State Dev. Agency of Illinois-Missouri Metro. Dist.*, 238 Ill. 2d 262, 283 (2010).

Rather than addressing how the start date for the Metrics Plan and the 10 year time period for potential penalties conflicts with the sunset date for EIMA, AIC simply suggests that this issue be litigated in subsequent proceedings where financial penalties are applied, or Article IX proceedings after formula rates expire, (AIC IB, p. 13); however, it is unclear how this addresses the issue at hand. None of the proposed "subsequent proceedings" suggested by AIC makes more sense to adjudicate this issue than the current proceeeding. As the AG/AARP noted in their IB, after the provisions of

EIMA expire, any future assessment of utility performance is limited to "any penalties due and owing at the time of such termination." AG/AARP IB, p. 12 (citing 220 ILCS 5/16-108.5(f-5)). As it is currently drafted, the 10th year of AIC's MAP-M tariff, which runs from January 1, 2023 through December 31, 2023 will continue past the termination of the EIMA. If AIC were to fail to meet its metrics in the last year of its plan, there would be no mechanism to recover these penalties and, further, no motivation for the Company to meet those metrics. To allow the Act to be interpreted this way would not only be contrary to the legislative intent, but would also be unfair to ratepayers who may be entitled to the benefits of any financial penalties assessed in the event the participating utility does not meet its metrics goals. This issue must be decided in this initial filing so that, going forward, the Company is held to the regulatory compact inherent in the EIMA. In order to take advantage of the benefits that accompany formula rates a utility must make agreed upon investments and improvements for a full 10 years. The Company should not be permitted, due to its own error in filing an AMI Plan which was not cost-beneficial to customers, to now avoid its responsibilities under the relevant provisions of the EIMA.

IV. CONCLUSION

This reopening proceeding is the most advantageous place, for reasons of judicial economy, and in order to set parties expectations for this prospective plan going forward, to address the issue of the timing gap between the expiration of formula rates and AIC's full 10 year Metrics Plan. If a mechanism is not put in place to address the timing gap at issue in this proceeding, ratepayers will pay for rates via the formula ratemaking process, but will not receive the benefit of any financial penalties the utility

may incur for a failure to meet its Metrics Plan. Further, the utility has no incentive for meeting its metrics as there would no longer be a financial penalty associated with a failure to do so. It is nonsensical that the Section authorizing recovery of rates may become inoperative before financial penalties can be calculated and recovered. The Commission should not grant this election to move the start date of the Metrics Plan to January 1, 2014 unless AIC agrees to an order that would provide a tariff mechanism for the collection of financial penalties if the utility fails to meet the goals of the Metrics Plan toward the end of its 10 year period, specifically after the time period by which Sections 16-108.5, 16-108.6, 16-108.7 and 16-108.8 become inoperative. The Commission should adopt the AG/AARP's proposed revised MAP-M tariff, along with any other relevant changes to the MAP-M tariff, as it is an appropriate mechanism to accomplish this goal. Furthermore, in the event the Commission approves the AMI related metrics start date of January 1, 2014, the Commission should order AIC to comply or be subject to the collection of the financial penalties as a result of the utility's failure to meet the goals of the Metrics Plan toward the end of its 10 year period, specifically after the time period by which Sections 16-108.5, 16-108.6, 16-108.7 and 16-108.8 become inoperative.

Respectfully submitted,

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