

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
)	Docket No. 11-0711
Development and adoption of rules)	
Concerning rate case expense)	
)	

REPLY BRIEF OF THE STAFF OF THE
ILLINOIS COMMERCE COMMISSION

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Table of Contents

I. Introduction 3
 A. Procedural History 3
III. Affidavit Requirement 7
IV. Recovery of Expenses for Utility In-House Employees..... 8
 A. Inside Counsel and Experts Covered by Section 9-229..... 8
V. Incremental Expenses 8
VI. Conclusion..... 11

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NOW COME the Staff witnesses of the Illinois Commerce Commission (“Staff”), by and through their undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice (83 Ill. Adm. Code 200.800) and the Administrative Law Judge’s December 4, 2012 Ruling, and respectfully submit this Reply Brief (“RB”) in the instant proceeding.

I. Introduction

A. Procedural History

As Staff discussed in detail in its Initial Brief (“IB”), the Final Order in Docket No. 10-0467, a Commonwealth Edison Company rate case, directed a rulemaking be initiated to examine the issue of rate case expenses and provide guidance to all parties as to what evidence is needed to establish attorney fees and expert witness fees; specifically, how to apply Section 9-229 of the Public Utilities Act (“Act” or “PUA”) in Commission rate cases. (Staff IB at 3) (citing Order, Docket No. 10-0467, May 24,

2011, p. 71; 220 ILCS 9/229) The Commission initiated this proceeding on November 2, 2011. (Initiating Order, Docket No. 11-0711, November 2, 2011, p. 2)

Although Staff filed its proposed Draft Rule (“Draft Rule”) on September 19, 2012, various parties jointly filed Initial Comments on October 31, 2012 and Verified Reply Comments were filed on November 28, 2012, on December 4, 2012 the Administrative Law Judge (“ALJ”) indicated that Initial and Reply Briefs were necessary in order to further address the body of law governing attorney’s fees and expert witness fees and other issues. (*Tr.*, December 4, 2012, pp. 41-43) The ALJ specifically requested the parties brief the following issues: the applicable case law concerning attorneys’ and expert witness fees; affidavit requirement, recovery of expenses for utility in-house employees; overhead costs, and incidental expenses.

IBs were filed on January 13, 2013 by Commonwealth Edison Company (“ComEd”), The Peoples Gas Light and Coke Company and North Shore Gas Company (“Peoples/NS”), MidAmerican Energy Company (“MEC”), Northern Illinois Gas Company d/b/a Nicor Gas (“Nicor”), Ameren Illinois Company d/b/a Ameren Illinois (“Ameren”), and Mt. Carmel Public Utility Company (“Mt. Carmel”) (jointly, the “Utilities”), the Citizens Utility Board (“CUB”) and the People of the State of Illinois (“AG”) (jointly, “AG/CUB”). Some of the issues raised in the parties’ IBs were addressed in Staff’s IB and, in the interest of avoiding unnecessary duplication, Staff has not repeated every argument or response previously made in Staff’s IB. 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 IB.

II. Section 9-229 Has Increased the Burden of Proof

The Utility stakeholders, in their Initial Brief, reason that “Section 9-229 does not impose a substantive standard different from that which the Commission has employed for decades to assess whether rate case expenses should be allowed as an operating expense.” Utilities IB at 3-4. While Staff does not disagree that the standard itself, that rate case expenses be just and reasonable, has not changed, it is clear that the burden of proof has changed dramatically upon the enactment of Section 9-229. To come to any other conclusion ignores the Initiating Order in this proceeding, flies in the face of the Illinois Appellate Court decision in *People ex. rel. Madigan v. Illinois Commerce Comm’n*, 964 N.E.2d 510 (1st Dist. 2011) and language in recent Commission proceedings, and is erroneous.

Section 9-229, as interpreted by the Illinois Appellate Court, certainly imposes a heightened burden of proof on a utility to provide a detailed set of information related to rate case expenses which it proposes to recover. In *Madigan*, the Appellate Court stated that “Section 9-229 created a requirement for more specific findings,” and most importantly that, “Section 9-229 mandates *a more detailed finding than what is generally required of the Commission*, otherwise the purpose of the legislative action to enact it was unnecessary.” *Id.* at 526 (emphasis added). The Court then went on to point the Commission to other cases involving an award of attorney’s fees in which it was necessary for the party seeking the fees to provide a very specific set of information that the Commission has not, in the past, expressly *required* a utility to provide. *Id.* The whole purpose of this rulemaking is to provide the Commission with an evidentiary framework such as the one suggested by the Appellate Court in *Madigan*, to assess the

justness and reasonableness of rate case expense. No party argues that Section 9-229 disturbs the established rule that just and reasonable rate case expense is ordinarily properly and fairly allowed as an operating expense (See Utilities IB at 4), but the evidence that the Commission is required to assess and the finding the Commission is required to make regarding those expenses is not, as the stakeholders seem to propose, unchanged from that which was employed for “decades” prior to this rulemaking.

In Docket No. 10-0467, the proceeding which recommended this rulemaking, the Final Order expressly states, “the Commission does not have the option of presuming that there was no substantive change in the law when Section 9-229 was enacted, as the law is not the same as it was before enactment of this statute.” Order, Docket No. 10-0467, May 24, 2011 at 84. The Order then directed the parties, in this rulemaking, to determine what must be included in rate case expense, the level of specificity involved and the documentation involved as well as to analyze how to incorporate well-established law on this issue regarding fee petitions. *Id.* at 82. The Utilities can hardly argue that nothing has changed with respect to Section 9-229 and the burden of proof that a utility must meet to establish that an item of rate case expense is recoverable. The parties need look no further than the most recent ComEd Formula Rate Update Proceeding where the Commission, again, confirmed that there can be no express finding of justness and reasonableness supported by the record unless there is evidence in the record as to what the Commission is finding to be just and reasonable. Order, Docket No. 12-0321, December 19, 2012 at 53. Specifically, that requires more evidence than was previously required, such as the items detailed in the body of law

cited by the Illinois Appellate Court. *Id.* at 54. The burden of proof which a utility must meet to recover of rate case expenses is simply not the same under Section 9-229 as it is in Section 9-201(c) of the PUA.

III. Affidavit Requirement

As Staff explained in its Reply Comments and IB, Staff's language proposing an Affidavit Requirement is intended to serve merely as an extra layer of review both to encourage outside attorneys, outside technical experts and their support staff to submit bills that accurately reflect the services rendered and to ensure that the utilities are only requesting recovery of costs which were reasonably and prudently incurred. Staff IB at 10-11. There is nothing unduly burdensome about Staff's proposal and further, the Utilities claim that this requirement would incur additional unnecessary expense is misplaced. Utilities IB at 12-13. It is unclear how, if utility officers are already reviewing such expenses, simply requiring them to sign an affidavit attesting to that review would require anything than a nominal expense, if any. Nonetheless, as Staff suggested in its Reply Comments and IB, in an effort to eliminate contested issues, Staff would agree to modifying the language in its Draft Rule in Section _____.200(d) to reflect the Utilities' proposed Alternative No. 2 and 2A, in their Appendix A. Utilities IB at Appendix A. Finally, once again it is worth noting that requiring a utility officer or someone with authority to make affirmations on behalf of the utility is not a new or novel requirement. For example, the General Assembly has required such affidavits in Section 8-104 of the PUA (220 ILCS 5/8-104) and Section 5/2-202(e) (220 ILCS 5/2-202(e)) and the

Commission already has such requirements in its Administrative Rules. (See e.g., Part 420 (83 Ill Admin Code § 420.20)).

IV. Recovery of Expenses for Utility In-House Employees

A. Inside Counsel and Experts Covered by Section 9-229

Staff agrees with the Utilities that there is no requirement that utilities include expenses related to internal personnel as rate case expenses. Utilities IB at 10. However, should utilities include the costs of internal counsel or experts for recovery, then the requirements of Section 9-229 and the Draft Rule would apply. This is consistent with Staff's position in its IB, as well as the Commission Order in Docket No. 11-0561 Cons. (See Staff IB, pp. 11-14; Order, Docket No. 11-0561 Cons. May 22, 2012, p. 19)

V. Incremental Expenses

Ironically, despite essentially arguing that nothing has changed with the enactment of Section 9-229 from regular cost recovery for rates, the Utilities then explain that there is in fact a new paradigm and that the word "incremental" is essential. Specifically, the Utilities state: "[W]ith regard to utility employees, the costs they designated as rate case expense be costs that are 'incremental' to costs otherwise associated with and incurred with regard to those employees that are recoverable in base rates." The Utilities further explain that: "That is, the rate case expense that is incremental encompasses those costs that exceed a baseline of costs that would

otherwise be incurred and recovered in base rates.” Utilities IB at 11-12. Staff recommends that the Commission reject the inclusion of “incremental” in the rule.

First, the use of the word “incremental” is improper for consistency’s sake. As pointed out in Staff’s Verified Reply Comments and IB, utilities do not uniformly present compensation of utility employees or affiliates. Some utilities include 100% of subject employee compensation as rate case expense and none in test year operating expenses. Some utilities include subject employee compensation as allocated between rate case expense and test year operating expenses. And some utilities do not include any employee compensation as rate case expense with 100% in test year operating expenses. The Utilities proposal to include the word incremental to clarify amounts paid to utility or affiliate employees related to preparation or litigation of a rate case filing would apply to only one (allocation of compensation) of the three presentation scenarios described above. Staff recommends a more universal approach should be applied in this Rule.

Second, for utilities that do seek to recover employees and affiliates compensation in rate case expense, Staff has the duty and obligation to investigate to ensure that there is no double recovery. Staff frankly does not see the need for the use of “incremental.” The notion of a baseline is also troubling. The baseline of recoverable costs in either the base rates “bucket” or the Section 9-229 “bucket” is, as it always has been, zero. Then one cost after another is added into the bucket. Although, technically these costs may be accurately called incremental in that one cost is added to a previous cost, cost recovery under both Section 9-210(c) and Section 9-229 has always been recovered in this elemental manner. Staff sees no reason to find a problem where none

exists and to cloud up the issue with the inclusion of “incremental” and the idea of some kind of new baselines based upon what appears to be a distinction with absolutely no difference.

Finally, the Utilities contend that the word “incremental” must be used because it is found in the Energy Infrastructure Modernization Act (“EIMA”). Staff understands that EIMA is currently going through a rewrite in the General Assembly and that there has been substantial litigation over the last two years concerning the language contained in myriad Sections of the EIMA. It is unknown whether the word “incremental” will survive that rewrite process. The rationale as to whether the word “incremental” should be used should be based on whether the word is needed in the rule to be in compliance with Section 9-229, not EIMA.

VI. Conclusion

For the reasons set forth above Staff respectfully requests that the Commission's Final Order in the instant proceeding reflect Staff's recommendations consistent with its Initial Brief, Reply Brief and its Draft Rule.

Respectfully submitted,

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