STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	**Docket No. 11-0341**
v.	)	
	)	
Ameren Illinois Company	)	
d/b/a Ameren Illinois	)	
	)	
Reconciliation of Revenues Collected	)	
Under Riders EDR and GDR	)	

INITIAL BRIEF OF THE CITIZENS UTILITY BOARD AND THE PEOPLE OF THE STATE OF ILLINOIS

CITIZENS UTILITY BOARD

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Now come the Citizens Utility Board ("CUB") and the People of the State of Illinois by and through the Attorney General Lisa Madigan ("the People" or "the AG"), pursuant to the Rules of Practice of the Illinois Commerce Commission ("ICC" or "the Commission"), 83 Ill. Admin. Code Part 200 and the briefing schedule established by the Administrative Law Judge ("ALJ"), to file this Initial Brief in the above captioned proceeding.

Introduction

This docket is a reconciliation of expenses under the Ameren Illinois Company's ("AIC" or "Ameren") Rider EDR, Energy Efficiency and Demand-Response Cost Recovery ("Rider EDR") and Rider GER, Gas Energy Efficiency Cost Recovery ("Rider GER"). Rider EDR is the cost recovery mechanism for the second year of Ameren's energy efficiency portfolio standard ("EEPS") programs which ran from June 2009-May 2010 ("PY 2"). 220 ILCS 5/8-103(e). Rider GER is the cost recovery mechanism for Ameren's voluntary gas energy efficiency

programs approved by the ICC in ICC Docket No. 08-0104, which also covers the time period from June 2009 through May 2010. Ameren Exhibit 1.0 at 2:24-27.[1]

The Staff of the Illinois Commerce Commission ("Staff") recommend that the Commission disallow the costs of the Small Business Heating, Ventilation, and Air-Conditioning ("SB HVAC") program. Staff Exhibit 2.0R at 4:68. The amount Staff seeks to disallow is $119,550. Staff Exhibit 4.0R at 4:75. Staff asserts that Ameren

> acted imprudently and unreasonably by continuing to spend ratepayer funds on the SB HVAC Program despite clear evidence that the projected benefits of the program did not exceed the projected costs and that continuation of the program, or at least the tune-up portion of the program was expected to substantially reduce net benefits to customers during PY2.

Staff Exhibit 4.0R at 4:68-73. Further, Staff recommends that "the Commission make a policy decision in this case and direct that the Company … only continue to spend ratepayer funds on a program if and when projected benefits exceed projected costs." Staff Exhibit 2.0 at 330-334.

The sole issue CUB and the People will address in this Initial Brief are Staff's recommendations with respect to the SB HVAC program. CUB and the People urge the Commission to reject Staff's recommendations because Ameren's decision to continue the program was not imprudent since Ameren believed it could make changes to the program to maximize benefits and because the program implementer did not recommend discontinuing the program. The Ameren SB HVAC program at issue was one of only two small business program in the Company's natural gas energy efficiency portfolio and small business customers paid socialized costs for Ameren's programs under Rider GER. In addition, the program was

[1] Ameren recommended that the Rider GER programs share a reconciliation period with the EEPS programs to increase efficiencies in the review processes, and the Commission adopted Ameren's proposal. Final Order in 08-0104 at 21-22 (October 15, 2008).

designed to create market transformation, a recognized goal of efficiency programs. As discussed below, CUB and the People urge the Commission to reject the Staff's recommendations, and instead encourage utilities to use their Commission-granted flexibility in managing their energy efficiency programs to maximize benefits for all customers.

I. The Cost Effectiveness of Utility Energy Efficiency Programs is Assessed at the Portfolio Level

The Public Utilities Act ("PUA" or "the Act") requires utilities to demonstrate that the "overall portfolio" of EEPS programs be cost-effective and "represent a diverse cross-section of opportunities for customers of all rate classes to participate in the programs." 220 ILCS 5/8-103(f). The cost-effectiveness of energy efficiency programs is measured by a total resource cost ("TRC") test which compares the costs and benefits of a program: a result of one or greater shows a program is cost-effective. 220 ILCS 5/8-103(a); 220 ILCS 5/8-104(a); 20 ILCS 3855/1-10. The question of at what level (i.e. a particular measure, a particular program made up of multiple measures, or a particular portfolio made up of multiple programs) a TRC should be applied has been discussed several times before the ICC. ICC Docket 10-0564, Order of May 24, 20122 at 92.

The Commission has affirmed this statutory cost-effectiveness requirement -- that Ameren's programs must only be found cost-effective at the portfolio level, and not at the program or measure level -- in both dockets addressing Ameren's energy efficiency plans.ICC Docket No. 07-0539, Order of February 6, 2008 at 21; ICC Docket No. 10-0568, Order of December 21, 2012 at 30. The Commission has not made any exception in this policy for natural gas energy efficiency programs that are not mandated by statute. In fact, the Commission explicitly rejected Staff's request to evaluate cost-effectiveness at the measure level in the

approval of the Peoples Gas Light and Coke Company and North Shore Gas' Company first gas EEPS Plan. Ameren Exhibit 5.0 at 10:229-233. The Commission stated:

> The Commission agrees with the Utilities that Section 8-104 does not require each measure to meet the TRC test, but it does require the portfolio (except for the low income portion) to meet the TRC test. The Commission declines to make the finding requested by Staff witness Brightwell.
>
> ICC Docket 10-0564, Order of May 24, 20122 at 92.

The Commission has been clear about the reason for this conclusion:

> Calculation of the total resource cost test at the portfolio level provides utilities with greater flexibility to ensure that measures with less short-term energy savings value, but greater value over several years, will be included in any overall portfolio of measures and programs. This contention is reasonable and it is hereby approved.
>
> ICC Docket No. 07-0539, Order of February 6, 2008 at 21.

The Commission was explicit that giving utilities flexibility via the application of the TRC at the portfolio level insures that utilities do not have a bias towards measures that only generate savings in the current program year, but instead are able to offer a mix of programs, including measures with long lifetimes. CUB Exhibit 1.0 at 7:137-141. The Commission did note that once the energy efficiency programs are being implemented, Ameren would retain flexibility to modify those programs as circumstances warranted. ICC Docket No. 08-0104, Order of October 15, 2008 at 18 (approving Ameren's natural gas energy efficiency programs, including SB HVAC). In that case, Ameren noted that this flexibility was necessary to address market risk - the risk that, either because of a poor economic climate or the availability of better investments, customers choose not to participate in energy efficiency programs. *Id.* The Commission agreed that this approach was appropriate. *Id.*

There is no reason to believe "the Commission did not envision the Rider GER programs would share the same cost-effectiveness criteria as the Rider EDR programs." CUB Revised

Exhibit 1.0 at 9:177-179. It is reasonable and sensible to assume that the Commission would want the same cost-effectiveness criteria applied to the statutory EEPS programs to apply to the Rider GER programs. Consistency across programs and regulatory requirements is an important goal for the state, a goal reflected in the practice by the Commission of allowing the joint prudency review of both statutory and voluntary energy efficiency programs. *Id* at 9:181-186.

The SB HVAC program was cost-effective when it was proposed in the Plan approved by the Commission. ICC Docket No. 08-0104, Ameren Ex. 1.1 at 2. Ameren's entire portfolio of energy efficiency programs was cost-effective when it was approved by the Commission. ICC Docket No. 08-0104, Ameren Ex. 1.1 at 17. As such, the only reason for which Staff can recommend a disallowance is that Ameren's decision to continue the program was imprudent as soon as the total resource cost test ("TRC test") result showed the program was likely to be cost-ineffective during PY2. Tr. 116-117 (March 13, 2013). Utilities should regularly monitor their programs, and more than annually revisit whether to continue, modify, or discontinue them. Action or inaction related to whether or not a utility is maximizing customer benefits may be grounds for imprudency. Whether an individual program is found to be cost-effective cannot be the sole criteria for this determination, as it is in this case. The Commission must consider other factors, as discussed below. As discussed below, Ameren's decision to continue the program for that year was in fact prudent under the Commission's practice and Illinois law.

II. Ameren's Decision to Continue the SB HVAC Program was Prudent

The basis for Staff's recommended disallowance is that it was imprudent for Ameren to continue the program once Ameren received information from the independent evaluators that the SB HVAC program was projected to be non cost-effective. Staff Ex. 2.0R at 4:66-67 or Tr. 116-117. This recommendation counters Commission practice and Illinois law.

Under Illinois law, costs are recoverable from utility customers if the utility has acted prudently and reasonably. Illinois courts have defined prudence as "that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by a utility management at the time decisions had to be made. *Illinois Power Company d/b/a Ameren IP v. Illinois Commerce Comm'n*, 328 Ill. App. 3d 195, 34; 887 N.E. 2d 678, 684 (3rd Dist. 2008) citing *Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 428 (2003). In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. *Id.*

> Management acts prudently when it makes decisions exercising a standard of care which a reasonable person would be expected to exercise under the circumstances encountered by utility management at the time decisions had to be made. In determining whether or not a judgment was prudently made, only those facts available at the time the judgment was exercised can be considered. Hindsight review is impermissible. Imprudence cannot be sustained by substituting one's judgment for that of another.

The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent'. *Illinois Commerce Comm'n v. Commonwealth Edison Co.*, ICC Docket No. 84-0395 (Order Oct. 7, 1987), p. 17, 1987 Ill. PUC Lexis 68 at *34. This means that Ameren's decision to continue the program can be assessed only based on what Ameren knew about the program, its energy efficiency programs and the overall energy marketplace at the time.

Commission practice affords utilities, including Ameren, a great deal of flexibility to manage their statutory energy efficiency programs. Most explicitly, in the Final Order for Ameren's natural gas and electric energy efficiency programs in 2010, the Commission found it "necessary to ensure that Ameren not be penalized for planning assumptions that turn out to be inaccurate," and also declined to" micromanage Ameren Illinois by ordering it to allocate more

or less money to individual programs that Intervenors' claim are more cost-effective." ICC Docket No. 10-0568, Order of December 21, 2010 at 30.

This directive speaks directly to the issue in this docket: whether expenditures on a program that was cost-ineffective for a point in time are imprudent. While there are many reasons this expenditure was not imprudent, CUB and the People believe it is important to emphasize the legitimacy of planning values, and the fact that measure or program level cost-effectiveness cannot be the sole cause of imprudency.

A. Ameren Had Reason to Believe the Program Could be Made Cost-Effective

Ameren acted prudently in continuing to fund the SB HVAC program. In the planning stages, the program was approved by the Commission in ICC Docket 08-0104 with a TRC of 1.48, above the cost-effectiveness threshold of 1 for approval and inclusion in the EEPS. ICC Docket No. 08-0104, Ameren Ex. 1.1 at 2. The record shows that utilities "already routinely monitor and publicly report the costs and benefits of their energy efficiency programs" in efforts to maximize the benefits of their portfolio under the greater umbrella of portfolio level cost-effectiveness. CUB Exhibit 1.0 at 13:276-278.

No party disputes that Ameren was aware that the SB HVAC program was not cost-effective in PY 2. The point of dispute is how Ameren responded to that information. Staff asserts that Ameren "[failed] to act on information that it had readily available and [failed] to exercise its ability to modify or drop programs, a flexibility that the Commission had granted at Ameren's request." Staff Revised Ex. 2.0 at 10:198-200. But Ameren did modify the program in response to this information. In fact, Ameren states that the implementer:

> did not recommend pulling the plug on the Program, but rather recommended modifying it to include further outreach to program allies and the small business community. As part of these outreach activities, the implementer suggested

> increasing the incentives for HVAC tune-ups and bundling them with other outreach activities.

Ameren Exhibit 6.0 at 7:146-150.

Ameren "took steps to limit the number of tune-ups and cultivate ally participation and installation of equipment." Ameren Exhibit 4.0 at 10:213-214. Ameren and the program implementer discussed ways to improve the program when it was becoming clear the program was no longer cost-effective, in keeping with the discretion the Commission granted utilities. Ameren's expectation that the SB HVAC program would produce net benefits over time was reasonable, particularly because of the modifications Ameren made to the program in PY 2.

Additionally, Ameren witness Woolcutt testified:

> the implementer noted that with the modifications to the SB HVAC Program as set forth in the updated recommendation, the Program was expected "to yield a TRC" that was greater than 1…Cutting short the SB HVAC in light of such information would have meant disregarding the implementer's recommendations to continue the Program with modifications and would have meant cutting short Ameren Illinois' attempt to penetrate the small business market at a time in the year when customers traditionally seek services relating to gas furnaces.

Ameren Exhibit 6.0 at 8:155-162.

The evidence suggests that Ameren had reason to believe the program would become cost-effective in the future. Staff's sole basis for the recommended disallowance was that Ameren continued the program once it received a projection showing the program may not cost-effective. Tr. 116-117. Staff provides data showing the projected TRC results (Staff Ex. 2.0 at 13-15) and notes that the ICC had asked Ameren to monitor the cost-effectiveness of a gas griddle energy efficiency measure. ICC Staff Ex. 2.0 at 7-8:146-166. The only evidence Staff can cite that Ameren failed to take into account is a reference to an "Economic Downturn" for which Staff provides no citation. ICC Staff Ex. 2.0 at 17:310-312. However, the same page shows that Ameren was in fact considering how to improved the program by targeting both gas

and electric customers and by looking for ways to bundle the program with other measures that might make it more attractive to Ameren customers. *Id.* at 306-307.

Ameren's managerial decisions demonstrate that the decision to offer the SB HVAC program was prudent given the information the utility had at the time. Ameren's program implementer was recommending steps to improve the program, and Ameren was reasonable to think the program could be improved.

B. The Program Provides Other Benefits to Ameren Customers and the Overall Energy Efficiency Market.

Staff's recommended disallowance would create a precedent that, if applied to all all utility energy efficiency prudency reviews, would thwart utility efforts to design programs that reach hard-to-serve customer sectors and lay the groundwork for market transformation. Ameren's SB HVAC Program was designed to target small businesses, "a particularly difficult market to penetrate due to the fact that they traditionally have limited funds to spend on energy efficiency investments and the relatively lower savings that can be calculated on the small business scale." Ameren Ex. 4.0 at 4:84-87.

Ameren considered it a priority to "build capacity among trade allies" catering to the small business sector to "try to penetrate this market… and increase future participation in the SB HVAC Program and other energy efficiency programs in future plan years." Ameren Ex. 4.0 at 5:89-98. This is in fact recognized practice in energy efficiency programs:

> As traditional in most other HVAC programs throughout the country, the tune-up measure is a standard tactic to cultivate ally participation and educate consumers whereby an equipment's inefficiency is identified and the opportunities for improved efficiency are explained.
>
> Ameren Ex. 4.0 at 10: 199-202.

Market transformation as an important goal in utility decisions related to the implementation of energy efficiency programs, especially when customer funds may be

limited and the embrace of efficiency measures through a particular program is in its nascent stages. As all customer sectors fund utility energy efficiency programs, including the small business customers who funded the Rider GER programs, those customers must be offered programs even if they are difficult markets to achieve cost-effective savings in. While CUB and the People support the close examination of utility expenditures of ratepayer money on energy efficiency programs, and do not reject the possibility of disallowance when the evidence reveals truly imprudent behavior, that threshold was not reached in the instant docket. If Ameren had discontinued the program, it would not have provided benefits to the small business customers who were paying for Ameren's energy efficiency programs and would not have created a foundation to engage those customers in programs in future years. Ameren's managerial decisions demonstrate that the decision to offer the SB HVAC program was prudent given the information the utility had at the time.

III. Staff's Policy Recommendation Would Hinder The Viability Of Ameren's Energy Efficiency Programs And Discourage Investment In Innovative, Longer Lasting Efficiency Measures That Ultimately Benefit Ratepayers.

Staff recommends "the Commission make a policy decision in this case and direct that the Company … only continue to spend ratepayer funds on a program if and when projected benefits exceed projected costs." Staff Exhibit 2.0 at 330-334. The Commission should reject this recommendation. It clearly contradicts previous Commission orders related to cost-effectiveness assessments at a portfolio level basis. If adopted by the Commission, Staff's recommendation would curtail energy efficiency programs by requiring Ameren to immediately cease spending (even if mid-year) on any program if the TRC drops below one. This will have an injurious impact on the viability of energy efficiency programs in general because sudden

cessation of programs could damage relationships with contractors and program allies who market and implement these programs. In addition, it will prevent Ameren from meeting the Act's requirement to reach *all* customer sectors funding the EEPS programs, including those who may be hard to reach, such as small businesses. Finally, it will direct utilities to invest in only in those energy efficiency programs with a guaranteed high TRC result over the life of the program with the unfortunate result of utilities offering only cheap, short-term measures and effectively eliminate the incentive to invest in programs with more lasting results and programs targeted at harder-to-serve populations.

Programs intended for hard-to-reach customer segments may, in particular, not pass the TRC, particularly in a program's early stages. CUB Ex. 1.0 at 13:287-292. Some programs require time to become cost-effective, perhaps through customer education or market changes. In the interim, even less cost-effective programs serve an important function by generating awareness of or interest in other programs. *Id.* If utilities are penalized for offering programs that reach hard-to-reach customer segments or help transform the market, utilities will likely emphasize programs that achieve short-term but guaranteed savings over programs that offer deeper and longer term savings, but which may require more time to develop. That outcome would reduce the economic and societal benefits of investment in innovative, long-lasting energy efficiency measures for ratepayers, who are funding the programs. As such, Staff's recommendation should be rejected.

Conclusion

The Commission should reject Staff's proposed disallowance of the costs of the SB HVAC program. The SB HVAC program was anticipated to be cost-effective when approved in ICC Docket 08-0104, modified when it was found to be cost-ineffective, reached a hard to reach

customer segment, and was designed to help transform the market. Illinois law and Commission practice affirm that energy efficiency programs are only assessed for cost-effectiveness at the portfolio level. While CUB and the People support the close examination of utility expenditures of ratepayer money on energy efficiency programs, and do not reject the possibility of disallowance when the evidence reveals truly imprudent behavior, that threshold was not reached in the instant docket. Staff has failed to demonstrate that there were factors other than a lower than expected TRC as justification for allegations of imprudency.

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