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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On its Own Motion,	:	
	:	11-0711
Development and adoption of Rules	:	
concerning rate case expense.	:	

ADMINISTRATIVE LAW JUDGE’S PROPOSED FIRST NOTICE ORDER

By the Commission:

I. The Procedural Posture of this Case

On November 2, 2011, the Commission issued an Order initiating the instant Docket. In the Initiating Order, it stated that a rulemaking regarding rate case expense would allow all interested parties an opportunity to present ideas and language that will assist the Commission in formulating a policy on the issue of rate case expense. The Commission noted that Section 9-229 of the Public Utilities Act (the “Act”) now requires the Commission to specifically assess the justness and reasonableness of the attorney and expert witness fees that comprise rate case expense. Initiating Order at 1.

Participating in this Docket were a conglomerate of attorneys who represent utilities, (“the Utilities”) the Illinois Attorney General (the “AG”) the Citizens Utility Board (“CUB”) and Commission Staff (“Staff”). After many, many workshops amongst the interested parties, on September 9, 2012, Staff filed a proposed Rule for the parties’ consideration. The Utilities filed Initial Comments on October 21, 2012. Commission Staff and the AG/CUB filed Reply Comments on November 29, 2012.

At a status hearing that convened on December 4, 2012, the Administrative Law Judge (“the ALJ”) directed the parties to address the case law regarding recovery of attorney’s fees and expert witness fees in briefs. The parties and Commission Staff filed Initial Briefs in this regard on January 18, 2013 and the Utilities and Commission Staff filed Reply Briefs on February 14, 2013.

The attached Rule represents changes made pursuant to the Comments and Briefs filed, as well as some made by the Administrative Law Judge to reflect what the relevant case law permits, as well as some minor grammatical changes. This matter is now ready to submit as the first notice Order to the Secretary of State.

II. Background

In 2009, the General Assembly enacted Section 9-229 of the Public Utilities Act. It provides, in total, that:

Consideration of attorney and expert compensation as an expense

§ 9-229. Consideration of attorney and expert compensation as an expense. The Commission *shall specifically assess the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts* to prepare and litigate a general rate case filing. This issue *shall be expressly addressed* in the Commission's final order.

220 ILCS 5/9-229; emphasis added. Thus, after enactment of this statute, the Commission was required to make a specific evaluation as to the justness and reasonableness of the attorney's fees and the expert witness fees that are expended by a utility in order to prepare and litigate a rate case. These fees are included in any rate increase.

In Docket 10-0467, a utility rate case, the Commission noted that there was a need for guidance as to what evidence is required to establish attorney's fees and expert witness fees pursuant to Section 9-229. It concluded that a rulemaking should therefore commence for the purpose of establishing such guidance. See, Docket 10-0467, final Order of May 24, 2011, at 65-92. This decision gave rise to the initiation of this docket.

Subsequent to the commencement of the instant docket, the Appellate Court issued its opinion in *People ex rel. Madigan v. Ill. Commerce Comm.*, 2011 IL App. (1st) 101776, 964 N.E.2d 510. In that case, the AG argued that the amount that the utility recovered in legal fees, which is a part of rate case expense, was unreasonable because the legal fees increased more than 43% over the legal fees that were requested in that utility's previous rate case. Noting that the record contained little evidence substantiating what these attorneys actually did to earn a sum in excess of \$900,000, the Appellate Court ruled that Section 9-229 of the Act required the Commission to "expressly address" this issue. In so ruling, the Appellate Court stated that the documents submitted by the utility (and entered into evidence) did not state what tasks were performed by which attorneys. Rather, generic amounts and generic line items were listed as to the number of hours spent on the case and the attorneys' rates. The Appellate Court also noted that the final Commission order merely concluded that these expenses were just and reasonable because they were "reasonably necessary" in the preparation and presentation of the case. *People ex rel. Madigan*, 2011 IL App. (1st) 101776 at 21-25.

Because the Commission order lacked an explanation or discussion regarding rate case expense, the Appellate Court concluded that it did not comply with Section 9-229 of the Act. It remanded this matter back to the Commission for additional findings on the issue of legal and expert fees pursuant to Section 9-229 of the Act. It further pointed out that required this Commission may to review those fees in accordance with the standard set forth in *Kaiser v. MEPC*, 164 Ill. App. 3d 978, 984, 518 N.E.2d 424 (1st Dist. 1987) and *Fitzgerald v. Lake Shore Animal Hospital, Inc.*, 183 Ill. App. 3d 655, 661

539 N.E.2d 311 (1st Dist. 1989). This standard is that the party seeking such fees must specify: (1) the services performed; (2) by whom they were performed; (3) the time expended, and (4) the hourly rate charged. *Id.* at 25. (Thus, *People ex rel. Madigan* inform the Commission that it may requires documents which explain the litigation-related work performed). It also requires specific Commission evaluation of attorney's fees and expert witness fees.

a. Issues Regarding the General Meaning of Section 9-229 and *People ex rel. Madigan*

The Utilities argue that Section 9-229 does not impose a substantive standard that is different from which the Commission has employed in the past to assess whether rate cases expenses should be allowed. According to the Utilities, this statute simply requires that an "express finding be made." Utility Initial Brief at 3-4. This argument ignores the fact that there can be no express finding as to justness and reasonableness without a thorough analysis of the invoices and like evidence. Before enactment of Section 9-229 of the Act, such analysis did not occur. See, e.g., Docket 07-0241, a utility rate case, Final Order of February 5, 2008, at 45-46. Additionally, this argument ignores the guidance that what the Appellate Court provided ruled in *People ex rel. Madigan*. There, an express finding was made as to justness and reasonableness. Because there was no indication in the final order as to what evidence supported this finding, the Appellate Court found that the requisites in Section 9-229 had not been met. The law regarding rate case expense has changed, due to enactment of this statute.

The Utilities further argue that *Kaiser* and its progeny are not analogous because those cases involve fee-shifting. Utility Initial Brief at 5-6. That is, according to the Utilities, many of those cases involve situations where a contract or a statute requires one party to pay another's legal fees. According to the Utilities, fee-shifting cases are not analogous because rate case expense involves standard operating expenses that are recoverable as of right by the utility. Utility Reply Brief at 6. This is undoubtedly true.

What the Utilities do not seem to grasp, however, is the fact that the fee-shifting provisions in contracts and laws usually contain an element of fault, in that, the wrongdoer pays the fees of the victim. See, e.g., 42 U.S.C. Sec. 1988 regarding attorney's fees and costs for violations of a person's civil rights; 15 U.S.C. Sec. 1601(a) regarding attorney's fees and costs for violations of the Truth in Lending Act; 210 ILCS 45/3-602 regarding attorney's fees and costs for violations of the Nursing Home Care Act; 815 ILCS 137/135(b)(2) regarding attorney's fees and costs for violations of the Consumer Fraud Act; and 5 ILCS 100/10-55 for attorney' fees and costs for violations of the Administrative Procedure Act.¹ Here, ratepayers cannot be considered to be wrongdoers, yet, they are paying the fees for utilities through no fault of their own. This fact only heightens the amount of scrutiny that this Commission should pay to the

¹ Federal case law is similar State case law on this issue. For an in-depth discussion of Federal laws regarding attorney's fees, see Sisk, *A Primer On Award of Attorney's Fees Against the Federal Government*, 25 Ariz. St. L. J. 733 (1993).

amounts claimed for these fees. It does not compel this Commission to dismiss the case law that *People ex rel. Madigan* requires pointed to as guidance the Commission may to follow.

Additionally, as the AG/CUB point out, a utility's ultimate goal is to maximize its profits and provide dividends to shareholders. See, AG/CUB Initial Brief at 8. Litigants in lawsuits can be, and often are, on much more of a level playing field than the relationship between a utility in a rate case and a member of the general ratepaying public.

The Utilities' argument also seems to suggest that all utility expenditures are passed on to consumers. They are not. Only just and reasonable expenditures and prudently-incurred expenditures which are used and useful are passed on to consumers. See, e.g., 220 ILCS 5/8-102; 5/9-101; 5/9-201 and 5/8-211. The goal here is to provide a methodology for documentation that expenses incurred on a rate case are just and reasonable.

The Utilities also posit the novel theory that the fee-shifting cases involve the "American Rule," which is somehow implicated here. They further maintain that the fee-shifting principle addressed ~~required~~ by the Appellate Court in *People ex rel. Madigan* is not consistent with the fact that rate case expenses are, according to the Utilities, incurred for the benefit of both the utility and its customers. See, Utility Reply Brief at 6-7.

This argument ignores the fact that the "American Rule" (as opposed to the fee structure in Great Britain where the losing party pays the winning party's fees) merely states that each party pays its/his/her attorney's fees, unless there is a contractual or statutory requirement that provides otherwise. See, e.g., *Sandholm v. Kuecker*, 2012 IL 11443, 23-25, 962 N.E. 2d 418. Here, we have a statute that requires specificity with regard to evidence establishing attorney's fees and expert witness fees, Section 9-229 of the Public Utilities Act. The Utilities' argument in this regard only highlights the fact that there is a need for some standards for the parties' and Commission Staff's analysis of the items that are included in rate case expense.

III. The Rule

a. Section .20 Scope

Staff's Position

Staff's Draft Rule provided that:

The requirements of this Part shall only apply to the amounts described in paragraphs (a) and (b) of this Section that are designated by a Utility as rate case expense and sought to be recovered by the Utility through rates.

- a) Amounts expended by a Utility to compensate outside attorneys and technical experts to prepare and litigate a rate case filing.

- b) Amounts expended by a Utility to compensate employees of the Utility or any of its affiliates to prepare and litigate a rate case filing.

The AG/CUB Position

The AG/CUB argue that, to the extent that any in-house utility personnel is charged to rate case expense, the documentation required under Staff's proposed rule for Outside Attorneys and Outside Technical Experts should be mirrored in a requirement for utility personnel. AG/CUB Initial Brief at 13-14.

The Utilities' Position

The Utilities argue that in *In re Charmar Water Co.*, Docket 11-0561, a utility rate case, the Commission entertained (unsuccessful) claims by a utility for its own internal expenses. Utility Initial Brief at 9-10. They point out that after enactment of Section 9-229, other Commission Orders have included internal client/utility expenses in rate case expense. *Id.* at 6. The Utilities also cite 83 Ill. Adm. Code Sec. 285.3085, which requires rate case expense schedules to include "paid overtime" and "other expenses." *Id.* at 8.

Analysis and Conclusions

The Utilities' statement regarding *In re Charmar Water Co.* and some other rate cases is correct. But this does not change the fact that this Commission may ~~is~~ now look to ~~required to abide by~~ Appellate precedent, which does not provide for recovery of these expenses. See, e.g., *People who Care v. Rockford Board of Educ., School Dist. No 205*, 90 F. 3d 1307, 1311-16 (7th Cir. 1996); *Henry v. Webermeier*, 738 F. 2d 188, 190-95 (7th Cir. 1984). Also, there is no indication, from the argument presented here, that the legality of claiming that a utility/client's expenses should be included in rate case expense was ever raised in *Charmar* or in any other rate case. Moreover, in *Charmar*, the utility was unable to substantiate its claim for internal rate case expenses.²

Additionally, 83 Ill. Adm. Code Sec. 285.3085 merely requires utilities to include schedules regarding unspecified paid overtime and other expenses in an initial rate case filing. It does not state that this overtime pay or other expenses must be incurred by the utility/client. Finally, as discussed later herein, in order to determine that Outside Counsel or an Outside Expert is not duplicating work performed by the client/utility, it

² Because provisions regarding the work performed by the utility/client have been eliminated, this Commission need not address the Utilities' argument regarding inclusion of "incremental expenses," except to note that the term "incremental" is a specific accounting term, with which, the general public would not be familiar. See, Utility Initial Brief at 10-12. Even if the client/utility work performed is to be found ultimately to be recoverable in rates, this Commission would decline usage of an undefined accounting term like "incremental." Also, because provisions regarding the work performed by the utility/client have been eliminated, the Commission need not address the Utility argument that the Rule should only cover rate case expense treatment where the utility in a rate case does not choose to seek rate case expense treatment for the work of its employees. See, Utility Reply Brief at 13-14.

may be necessary to examine what work was performed by the client/utility. This regulation does not aid the Utilities.

People ex rel. Madigan suggested that ~~requires~~ this Commission could look to apply the *Kaiser v. MEPC* line of case law for guidance as to rate case expense. Those cases do not allow compensation to the client (here, the utility) for work performed by that client in furtherance of litigation. (e.g., work performed by the client's inside counsel; gathering documents, interviews with outside counsel, depositions, trial time, etc.). *People ex rel. Madigan*, 2011 IL App (1st) 101776 at 16-17. Not surprisingly, neither Staff nor any party cited any Appellate case law to support inclusion of compensation to a utility in rate case expense for work performed by that utility on a rate case. Accordingly, Section .20(b) and the other portions of the Rule that address client expenses have been excluded from the Rule.³

Also, it cannot be said that *People ex rel. Madigan* is inapplicable to utility/client expenses. In that case, rate case expenses included the utility's internal costs, as well as costs that were claimed to have been incurred by the utility's affiliate. *Id.* at 9. Yet, the Appellate Court chose to apply a line of case law that does not include internal costs of litigation incurred by the client.

The Commission further notes that unlike the situation with outside counsel and outside expert witnesses, where there are invoices specifying that litigation-related tasks were performed, there are no invoices for what a utility employee did to further a rate case litigation. Additionally, taking the Utilities' argument to its logical conclusion, rate case expenses incurred internally by a utility could include such items as rent, utility bills, paper clips, and like items which are petty, and difficult to prove.

Further, because utility employees would be paid for work done on a rate case or any other matters, there is no "expenditure" for these employees' time, which is required by Section 9-229 of the Act. Therefore, Section 9-229 does not provide for a utility's internal expenditures that are involved in pursuing a rate case.

Moreover, generally, all of the items that utilities include as expended internally for participation in a rate case are items that the utility would have incurred regardless of whether a rate case existed. Expenses that would have been incurred regardless of litigation are considered to be overhead. *Johnson v. Thomas*, 342 Ill. App. 3d 382, 402 794 N.E.2d 919 (1st Dist. 2003). Only when matters are extraordinary in terms of volume and costs, (e.g., in class action suits requiring extensive amounts of mailing or voluminous photocopying), are such matters recoverable. See, e.g., *Johnson*, 342 Ill. App. 3d at 402; *Losurdo Bros. v. Arkin Distributing Co.*, 125 Ill. App. 3d 267, 276, 465 N.E.2d 139 (1st Dist. 1984).

³ The other sections that were eliminated because they provide for recovery for work performed by the utility/client are: Section .100, entitled "Definitions" concerning "Employees of the Utility or any of its Affiliates Compensation;" relevant portions of Sections .200(a) and (a)(6); Section .200(b)(3)(iii); .200(c)(vi); the entirety of what was formerly Section .200(d) and relevant parts of Section .300(b).

Additionally, many utility employees are occurrence witnesses, in that, they testify as to what happened, or what will happen, in the case of a rate proceeding using a future test year. The fact that these witnesses may also be experts does not alter the fact that they are occurrence witnesses. However, there is no provision in Section 9-229 to compensate occurrence witnesses. The Commission therefore declines to include internal utility expenses in the Rule. Because the Rule does not include compensation for the client/utility's participation in a rate case, the Commission need not entertain the AG/CUB argument that in-house utility expenses on rate cases should be documented in the same manner that Outside counsel/Outside technical experts are documented.

It should additionally be noted that utility employee salaries and like matters are operating expenses. The conclusion above does not exclude these items from rates. Rather, the conclusion above only concerns inclusion of these items in rate case expense [subject to Section 9-229](#). The utilities are free to treat these items as operating expenses.

b. Section .200(a): Requiring Utilities to Provide Discovery Materials

The Rule Provides that:

Section .200 Required Support for Compensation Costs

- a) A Utility subject to Section _____ shall, upon request during discovery, make information available to parties of record in order to assist such parties [in the development of a recommended amount of rate case expense](#) and [for the Commission](#) in assessing the justness and reasonableness of amounts paid to compensate Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff.

The Utilities' Position

The Utilities argue in their Initial Comments that use of the words "such parties" above should be eliminated because, according to the Utilities, insertion of this phrase creates the impression that both the parties and the Commission determine the justness and reasonableness of rate case expense. Utility Comments at 9.

Staff's Position

Staff disagrees with the Utilities' argument on this issue. Staff argues that parties, including Staff, make recommendations regarding rate case expense by promulgating discovery and they base their recommendations upon what they learn from discovery. Staff Initial Comments at 4.

Analysis and Conclusion

The Utilities do not state why use of the words “such parties” above creates the impression that the parties and Commission Staff are suddenly now the trier of fact. Nor is it obvious, as discovery is tendered to parties in a proceeding, not to the trier of fact. The Commission declines to modify the Rule in the manner that the Utilities proffer.

c. Section .200(a) Different Standards for Flat Fee Contracts

Currently, Section 200(a) of the Rule provides as follows with regard to analysis of agreements between Outside Counsel and utilities:

- 2) For services provided under an Hourly rate contract, including but not limited to a contract with a Not-to-exceed contract, invoices, disclosing time entries for each Outside Attorney and Support Staff that clearly indicates
 - i. the service(s) provided;
 - ii. by whom the service(s) were provided;
 - iii. the time spent providing the service(s) on a daily basis;
 - iv. the hourly rate charged the person(s) providing the service(s), or some other unit of time measurement period; and
 - v. the applicable code(s) from the American Bar Association’s Uniform Task-Based Management System Litigation Code Set or similar standardized billing system, if and to the extent that the Outside Attorney and Support Staff uses such a coding system in their billing invoices.
- 3) For services provided under an Hourly rate contract, including but not limited to a contract with a Not-to-exceed provision, invoices, disclosing time entries for each Outside Technical Expert and Support Staff that clearly indicates
 - i. the service(s) provided;
 - ii. by whom the service(s) were provided;
 - iii. the time spent providing the service(s) on a daily basis;
 - iv. the hourly rate charged, or some other unit of time measurement period.
- 4) For services provided under a Flat fee contract, all invoices provided by the Outside Attorney and Support Staff or Outside Technical Expert and Support Staff to the Utility related to the

contract, as well as any invoices or documentation retained by the Outside Attorneys or Outside Technical Experts that logs hours spent on the rate case, and summaries of any proposals reviewed prior to the selection for service.

- 5) For a Flat fee contract, documents created or reviewed by the Utility in considering the reasonableness of the contracted fee, including any calculations the Utility performed or reviewed related to the fee prior to execution of the contract. This includes the presumed or estimated hourly rate that would be charged in an Hourly rate contract and the presumed or estimated number of hours to be worked.

The AG/CUB Position

The AG/CUB argue that Section .200(a)(4) should be clarified to make it clear that, in order for a utility to recover attorney's fees when a flat fee contract is at issue, the same level of detail (relevant evidence regarding) that is provided in Sections .200(a)(2) and (3) must be required of a utility, so that the Commission can assess whether the amount paid by the utility under a flat fee contract is reasonable. They point out that the current version of Section .200(a)(4) only requires that the invoices in such a situation shall be among the information provided to the Commission. The AG/CUB contend, essentially, that it would be difficult to evaluate whether the flat fee amount agreed to by the utility was reasonable, without documentation as to the hours spent on the work performed and some sort of estimated hourly rate, which is required of attorneys who bill on an hourly rate. They posit that utility attorneys keep track of their hourly time spent on rate cases for the purpose of their own firm's records. AG/CUB Initial Brief at 10-11.

Analysis and Conclusions

The AG/CUB proffer a reasonable evidentiary requirement, as it is doubtful that Outside Counsel attorneys are not keeping track of their hours, if, for no other reason than to make sure that the law firms are not losing money pursuant to the terms of the flat fee agreement. Even if these attorneys were not keeping time sheets for internal purposes within their law firms, requiring them to keep these records is not unreasonable, as the State and Federal courts generally require such documentation. *Kaiser*, 164 Ill. App. 3d at 984. See, e.g., *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 401 Ill. App. 3d 868, 880-81, 929 N.E. 2d 641 (1st Dist. 2010); *New York State Ass'n for Retarded Children v. Carey*, 711 F. 2d 1136, 1147-48 (2nd Cir. 1983); *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234, 238, 105 S. Ct 1923 (1985). Accordingly, Section .200 of the Rule is modified as follows:

- 2) For services provided, including, but not limited to, under an Hourly rate contract, a Flat fee contract, or including but not limited to a contract with a Not-to-exceed provision contract, invoices, disclosing

- time entries for each Outside Attorney and Support Staff that clearly indicates
- i. the service(s) provided;
 - ii. by whom the service(s) were provided;
 - iii. the time spent providing the service(s) on a daily basis;
 - iv. the applicable hourly rate charged by the person(s) providing the service(s), or some other unit of time measurement period; and
 - v. the applicable code(s) from the American Bar Association's Uniform Task-Based Management System Litigation Code Set or similar standardized billing system, if and to the extent that the Outside Attorney and Support Staff uses such a coding system in their billing invoices.
- 3) For services provided under an Hourly rate contract, including but not limited to a contract with a Not-to-exceed provision, invoices, and ~~or~~ time sheets, disclosing time entries for each Outside Technical Expert and Support Staff that clearly indicates
- i. the service(s) provided;
 - ii. by whom the service(s) were provided;
 - iii. the time spent providing the service(s) on a daily basis;
 - iv. the hourly rate charged, or some other unit of time measurement ~~period~~.
- 4) For services provided under a Flat fee contract, all invoices provided by the Outside Attorney and Support Staff or Outside Technical Expert and Support Staff to the Utility related to the contract, as well as any invoices and time sheets ~~or documentation retained by the Outside Attorneys or Outside Technical Experts that logs hours spent on the rate case,~~ and summaries of any proposals reviewed prior to the selection for service.
- 5) For a Flat fee contract, documents created or reviewed by the Utility in considering the reasonableness of the contracted fee, including any calculations the Utility performed or reviewed related to the fee prior to execution of the contract. This includes the presumed or estimated hourly rate that would be charged in an

Hourly rate contract and the presumed or estimated number of hours to be worked.

Additionally, Section .100 has been modified to include a definition of “time sheet.” It provides that:

~~“Time sheet” means a contemporaneously-executed document that states the hours performed on a particular task, specifying the task performed and the applicable hourly rate in the case of Hourly rate billing or contracts with Not to exceed clauses, or the applicable estimated hourly rate, in the case of a Flat fee contract.~~

However, because the provisions in Section .200(a)(2) regarding time entries have been modified to include flat fee contracts, there is no need to modify Section .200(a)(4). This modification fully addresses the AG/CUB’s concern.

d. Sections .200 and .300: Use of the Words “Necessary” and “Necessity”

Currently Section .200(b) of the Rule, which concerns the required evidentiary support for compensation of costs, contains the descriptive term “reasonable”.~~following pertinent language:~~

~~b) In addition to the information required in _____.200 (a), the Utility shall provide the following information at the time of filing its direct case:~~

~~* * * * *~~

~~4) An explanation of the process, procedures and controls the Utility has in place to ensure that the bills from its Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff and Utility affiliates are accurate, reasonable necessary and not redundant before payment is made to those vendors.~~

Also, Section .300(b), which concerns the determination of reasonable compensation costs, ~~provides that:~~contains the descriptive term “reasonableness”.

~~b) The factors to be considered by the Commission in determining the reasonableness of Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff, and employees of Utility affiliates compensation costs may include, without limitation, the following:~~

~~* * * * *~~

~~(4) Nature, extent and reasonableness necessity of work performed considered at the time the work was performed~~

~~including, without limitation, the amount of support required for pleadings, discovery, briefing and hearings and the relevance of the work products to the justness and reasonableness of the proposed utility rates;~~

~~* * * * *~~

~~(7) Whether it was necessary reasonable for multiple Outside Attorneys and Outside Technical Experts to address the same or similar issues;~~

Staff's Position

Staff had modified its original version of this rule to replace the words "necessary" and "necessity" with "reasonable."

The AG/CUB Position

The AG and CUB aver that use of the words "necessity" and "necessary" in the Rule does not create an additional requirement. Instead, they continue, use of these words here merely creates a criterion for the evaluation of the justness and reasonableness of rate case expense costs. They opine that utilities should not be permitted to recover the cost of unnecessary work from the general public. The AG/CUB maintain that the Commission has the tools to disallow, when appropriate, the cost of excessive attorney and technical expert fees that have not been justified by the utility as necessary for litigation of the matter at bar. AG/CUB Initial Brief at 11-12.

The Utilities' Position

The Utilities assert that the word "necessity" is different from "reasonableness." They point out that this Commission cannot rewrite Section 9-229 of the Act, which, according to the Utilities, is "improper." The Utilities do not state why use of the words "necessary" or "necessity" are "improper," except to state that, in their opinion, these words are vague, inviting unnecessary litigation. Utility Comments at 2-3. The Utilities also state that Section 9-229, unlike the fee provision in the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/508(c)(3), the statute here only requires that just and reasonable attorneys fees are compensable. Utility Initial Brief at 5-6.

Analysis and Conclusions

Staff's suggested language change is problematic. To begin, use of the word "reasonable" adds nothing, as it is already in the Rule, and could create confusion. Use of the word "reasonable" adds nothing to the Rule. Indeed, because rate cases are very involved, the bills for the legal services are often in the millions of dollars, which, some would consider to be unreasonable, just by virtue of the fact that so much money is involved. For the benefit of the Utilities and the general public that will absorb these costs, some criteria are needed to define what is "just and reasonable" for purposes of

Section 9-229 analysis. Staff's and the Utilities' choice of words only subjects the Utilities to the possibility of unnecessary attacks regarding their rate case expenses.

Further, use of the words "necessary" and "necessity" articulates the notion in the case law regarding attorney's fees and expert witness fees that the services performed must advance the litigation. See, e.g., *DuPuy v. McEwen*, 648 F. Supp. 1007, 1019-1020, (N.D. Ill. 2009) concluding that work performed by attorneys that was not related to litigation should not have been included in a fee petition. Additionally, because utilities have many in-house-counsel lawyers and experts, it is necessary to make sure that Outside Counsel and Outside Technical Experts are not duplicating the work of the in-house attorneys and experts that are employees of the utility that is seeking the rate increase in question. Use of the words "necessary" and necessity clarify that such duplication is not permitted.

Also, use of the words "necessary" and "necessity" are especially important here, where the persons (ratepayers) paying the rate case expense incur this cost through no fault of their own. Use of the words "necessary" and "necessity" remind everyone that the general public is not required to pay for unnecessary items or work. The Commission additionally notes that, with regard to Section .300(a)(4), use of the word "reasonableness" in the first line of this subparagraph would just create an unnecessary redundancy in that subparagraph, which could create confusion.

The Commission notes that the Utilities do not state how something that is not necessary is not reasonable. Indeed, if task performed is not necessary, it cannot be reasonable to charge the ratepayers for that service. Additionally, as the AG/CUB point out, use of the word "necessity" in the Rule is only a criterion to use when determining whether rate case expense items are just and reasonable. The ultimate conclusion remains the same.

The Utilities additionally do not state why the words "necessary" and "necessity" are vague. It appears that the Utilities are confusing "vague" with "broad." However, without more, there is nothing contrary to law about use of a broad term in a regulation. See, e.g., *Jackson v. Chicago Classic Janitorial and Cleaning Service*, 335 Ill. App. 3d 906, 911, 823 N.E. 2d 1055 (1st Dist. 2005).

Finally, the Utilities argue that the use of the words "necessary" and "necessity" are "inappropriate." This is not a legal standard. We encourage all parties to express legal arguments in terms of recognized legal standards.

In a related vein, the Rule has been further modified to make it clear that the amount of time taken to perform a task can be considered in the context of rate case expense. Section .300(b)(10) now acknowledges that a determination of reasonable compensation costs can include:

(10) the reasonableness of the amount of time taken to perform a task.

The Utilities' Outside Counsel and Outside Technical experts should be able to satisfy this requirement by articulating briefly, in their documentation, the reason why a

task took a long period of time. (e.g., difficulties in reaching witnesses regarding scheduling, resulting in hours spent scheduling; lengthy legal research required for a brief). This is not to suggest that every explanation of this type will suffice in all situations. Rather, it is to encourage informative documentation regarding rate case expense, which should decrease the amount of litigation over rate case expense. Therefore, Section .200(b) and Section .300(b) are modified as follows:

b) In addition to the information required in ____200 (a), the Utility shall provide the following information at the time of filing its direct case:

* * * * *

4) An explanation of the process, procedures and controls the Utility has in place to ensure that the bills from its Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff and Utility affiliates are accurate, necessary and not redundant before payment is made to those vendors.

a) The factors to be considered by the Commission in determining the reasonableness of Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff, and employees of Utility affiliates compensation costs may include, without limitation, the following:

* * * * *

(4) Nature, extent and necessity of work performed considered at the time the work was performed including, without limitation, the amount of support required for pleadings, discovery, briefing and hearings and the relevance of the work products to the justness and reasonableness of the proposed utility rates;

* * * * *

(7) Whether it was necessary for multiple Outside Attorneys and Outside Technical Experts to address the same or similar issues;

e. Section .200(c)(ii) and (iv): Requiring Utilities to Furnish a Projection of Rate Case Expenses

The Rule provides as follows, in pertinent part:

a. The Utility shall file the following information at the time of filing its rebuttal case and, if applicable, its surrebuttal case, and as otherwise directed by the Administrative Law Judge:

A summary schedule of the compensation costs for which rate recovery is sought that includes for the Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff:

- i) Identification of the Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff;
- ii) Total projected expense update, if the projection is the basis for the total requested rate case expense;
- iii) Actual expense incurred to date, with supporting invoices made available upon request;
- iv) Remaining costs projected to be incurred. . .

The Utilities' Position

The Utilities object to the requirements above in subsections (ii) and (iv) requiring projections as to reasonable expenses. They contend that projections are onerous, especially in light of the new formula rate statute. Utility Initial Comments at 11-12.

Staff's Position

Staff points out that, in traditional rate cases (rate cases that were not brought pursuant to the formula rate statute, 220 ILCS 5/16-108.5, which only concerns electric utilities), there must be a projection of some rate case expense costs, because rate case expenses continue to exist after the evidentiary hearing. Staff Initial Comments at 4.

The AG/CUB Position

The AG/CUB aver that presumably, utilities have a budget for rate case expense, which they monitor to determine how the actual costs compare to that budget. They argue that the Commission should have the benefit of comparing projected costs to actual costs when evaluating rate case expense. The AG/CUB also state that the availability of projections would allow Staff, CUB/AG and other intervenors to more accurately determine the overall revenue requirement impact of rate case expense. AG/CUB Initial Comments at 3-4.

Analysis and Conclusions

It is true that rate case expense in a formula rate case (an electric rate case filed pursuant to 220 ILCS 5/16-108.5) is not a projection, because rate case expense in a

formula rate case is solely for the previous formula rate case, in the form of a true-up of projections that were previously made in the last formula rate case. In such an instance, there would be no projection of rate case expense within the particular rate case because all that would be at issue would be the true-up of the previous year's projections.

However, in other types of rate cases, *e.g.*, rate cases for natural gas and water, some sort of projection of rate case expense is often necessary. If the utility did not provide some evidence as to its future expenses in that type of rate case, the utility would be entitled to no recovery of expenses occurring after trial. The Commission reminds the utilities that they bear the burden of proof in a rate case, which means they bear the burden of presenting sufficient evidence from which the trier of fact can render a decision regarding the reasonableness of the rate case expense items claimed. See, *e.g.*, *Kaiser*, 164 Ill. App. 3d at 984.

Additionally, Section 9-229 of the Public Utilities Act and the pertinent case law make it abundantly clear that, (with the exception of what is defined in Section 16-108.5 of the Act, which concerns rate case expense for the previous rate case) rate case expense only concerns the rate case in question. See, *e.g.*, *Palm v. 2800 Lake Shore Drive Condominium Assn.*, (1st Dist. 2010) 401 Ill. App. 3d 641, 645, 929 N.E.2d 641; *Cabrera v. First National Bank of Wheaton*, (2nd Dist. 2001) 324 Ill. App. 3d 85, 103-04, 753 N.E.2d 1138. Thus, utilities will not be able to recover rate case expense items (as opposed to recovering these items as operating expenses) if they do not provide a projection of what is required of them to complete a rate case. It therefore is in the Utilities' best interests to provide this evidence. The Commission declines to modify the Rule in the manner in which the Utilities suggest, but will modify subsection (iv) slightly, as follows:

- ii) Total projected expense update, if the projection is the basis for the total requested rate case expense;

* * * * *

- iv) Remaining costs projected to be incurred, *if any*. . .

f. New Section .200(d): Recoverable Overhead Expenses on the Part of Outside Counsel or Outside Technical Experts and Modification of the Definition of Miscellaneous Expense in Section __100

There is a new Section of the Rule that requires proof that overhead expenses were specifically excluded from the hourly rate or similar charges in the agreement between Outside Counsel or Outside Expert witnesses with the utility. ~~It provides that:~~

~~d) Inclusion of overhead expenses on the part of an Outside Counsel or an Outside Technical Expert (e.g., photocopying, binding) shall be accompanied by evidence that the rates charged the utility by the Outside Counsel Outside Technical Expert~~

~~specifically exclude such overhead expenses from the rates charged to the Utility.~~

~~Additionally, the Definition of Miscellaneous Expense has been modified as follows:~~

~~“Miscellaneous Expenses” means expense billed by an Outside Counsel, Outside Technical Expert, or other appropriate party to a third party for costs including, but not limited to, travel, travel-related meals, lodging and photocopying, if evidence establishes that such costs were excluded from the rates charged to the utility for compensation for the rate case at issue. specially incurred in furtherance of the rate case at issue. Minimal expenses including, but not limited to telephone charges, postage and photocopying may only be recovered if they are extraordinary in terms of volume and cost.~~

The AG/CUB Position

The AG/CUB contend that the language in Section .200(a)(1) of the Rule, which requires the filing of attorney-client and technical expert-client contracts could clarify whether support costs and other like expenses were intended to be included within the rate charged by the attorney or the technical expert. AG/CUB Initial Brief at 14.

The Utilities’ Position

The Utilities point out that all parties agree that certain expense which cannot be directly assigned to a particular matter or client should be treated as overhead; they are therefore not separately recoverable as rate case expenses, citing Staff Initial Brief at 13-16, AG/CUB Initial Brief at 14-15. The Utilities acknowledge that these costs are largely fixed costs, such as rent. However, where the parties disagree is in the determination of which costs are in fact overhead. The Utilities aver that the Rule must reflect the fact that different practices exist among law firms in calculating hourly rates, as well as accounting for items like photocopying, travel expenses, and mailing. Also, according to the Utilities, the Rule must recognize the fact that the Public Utilities Act governs the substantive recoverability of operating expenses like rate case expense; they therefore surmise that the Rule cannot disallow entire categories of rate case expenses that a utility actually incurs, on the mistaken assumption that these expenses are already accounted for as “overhead.” Utility Reply Brief at 19-29.

In so arguing, the Utilities agree that the costs which law firms cannot practicably attribute to particular clients and matters, such as telephone charges, check processing, newspaper subscriptions and secretarial services are “overhead,” which should not be separately-charged and therefore should not be recoverable as a separate item in rate case expenses. They maintain that the very definition of “overhead” is business expenses that are not chargeable to a particular part of the work or product. The Utilities further recognize that, Staff’s draft Rule recognizes this and it does not include these items in the definitions of “Miscellaneous Expenses” or “Support Staff.” *Id.* at 20.

However, the Utilities contend that law firms do not necessarily consider variable items that are specifically assignable to certain clients and matters as “overhead.” These items are photocopying, mailing expenses, travel, paralegal charges and project assistant charges.⁴ Instead, some law firms bill those expenses to the clients that cause the firm to incur those charges. Utility Reply Brief at 20.

The Utilities further maintain that an expense cannot be “minimal” and “extraordinary” at the same time. They point out that an expense can be a reasonable operating expense and possibly not recoverable, if this Commission were to adopt a hard and fast rule regarding what is or is not an attorney’s “overhead.” The Utilities recommend changing the definition of “Miscellaneous Expenses” to include “Miscellaneous Incidental Expenses.” *Id.* at 22-23.

Analysis and Conclusions

This new provision (cited ~~below~~^{above}) is intended to acknowledge the fact that generally, miscellaneous expenses are not recoverable on the part of an Outside Counsel or an Outside Technical Expert, but some of these expenses can be recoverable in certain circumstances. It should provide Outside Counsel and Outside Technical Experts with a methodology to establish that certain expenses, which appear to be overhead in nature, are specific to a particular rate case, but are excluded by the agreement between the Utility and the attorney or expert regarding fees, thereby reducing the rate charged for an attorney or expert, and are therefore recoverable as rate case expenses.

Without a specific contractual provision to the contrary, the courts define the term “overhead” as expenses that are regularly incurred, regardless of specific litigation, including such matters as in-house delivery charges, photocopying, check processing, newspaper subscriptions, telephone toll charges, and like charges. These charges are not normally recoverable as a separate item from the general rate charged a client. *See, e.g., Johnson v. Thomas*, 342 Ill. App. 3d 382, 401-02, 794 N.E.2d 919 (1st Dist. 2003); *Garrant v. Roth*, 334 Ill. App. 3d 259, 269-73, 772 N.E.2d 499 (1st Dist. 2002).

That is because these expenses are generally already reflected in the rate charged by the attorney or expert. As a result, the courts have concluded that they should not be apportioned to any single matter so as to constitute an additional charge. *Johnson*, 342 Ill. App. 3d at 402. However, an item is not considered to be “overhead,” if it was an expense of an Outside Attorney or Outside Expert that was distinctly incurred in furtherance of a specific cause of action. *Id.* Thus, for example, when an attorney works on a basis that is other than contingency, his or her computerized legal research should be recoverable, when the attorney’s efforts at research are otherwise recoverable. *Id.* at 403-04. Also, reasonable charges for paralegals’ work and that of law students are usually recoverable. *See, e.g., Ryan M. v. Board of Education of the City of Chicago*, 731 F. Supp. 2d 776, 788-89 (N.D. Ill. 2010).

⁴ The Utilities do not state what a “project assistant” does.

Additionally, the Utilities raise a valid point. If their attorney's or expert's fees are reduced, with certain traditionally thought-of "overhead" items being billed separately, there is no reason why the Utilities and their attorneys/technical experts should not be compensated for these "overhead" expenses. What will necessarily be established in such an instance is that the agreement between the law firm/expert and the utility requires such separate billing, and also evidence establishing that this billing for overhead expenses resulted in a reduction of the fees for services rendered.

Left unspecified, the common-law **rules** guidance regarding an attorney's or technical expert's overhead briefly cited above should still apply. Additionally, at some point in time, which the Commission does not decide here, it is possible that these fees could include some overhead in a manner which results in the utility being overcharged when the rate charged and the overhead are combined. This Commission makes no determination here as to when those charges reach that limit, and indeed, it could not, as such a determination must be done, as well as other determinations regarding this type of expense, should be made on a case-by-case basis. The Utilities and their lawyers/experts, however, are again advised to provide as much documentation as they can in the record, in order to prevent unnecessary litigation on this issue. Often, a brief explanation as to why a fee or a cost was necessary can prevent protracted litigation. The Commission also stresses that the conclusion reached above only concerns overhead items, such as photocopying, travel expenses, for out of town attorneys or expert witnesses, and computer research.

However, the Commission disagrees with the Utilities' assertion that an expense cannot be minimal and extraordinary at the same time. Extraordinary circumstances occur all the time in litigation (*e.g.*, unforeseen travel time; unforeseen hearings). These expenses can be minimal, especially when compared to the total amount of billing for an Outside Counsel/Expert. The Rule should remain flexible, in order to balance the needs of ratepayers to not pay excessive fees and those of utilities and their attorneys/experts, who deserve to be, and are legally required to be, compensated adequately.

Therefore, the Rule shall be modified to include the following:

- d) Inclusion of overhead expenses on the part of an Outside Counsel or an Outside Technical Expert (*e.g.*, photocopying, binding) shall be accompanied by evidence that the rates charged the utility by the Outside Counsel Outside Technical Expert specifically exclude such overhead expenses from the rates charged to the Utility.

Additionally, the Definition of Miscellaneous Expense has been modified as follows:

"Miscellaneous Expenses" means expense billed by an Outside Counsel, Outside Technical Expert, for costs including, but not limited to, travel, travel-related meals, lodging and photocopying, if

evidence establishes that such costs were excluded from the rates charged to the utility for compensation for the rate case at issue.

g. New Section .200(c)(vi): Inclusion of Expert/Attorney Affidavits

The Rule has been modified to provide the following:

c) The Utility shall file the following information at the time of filing its rebuttal case and, if applicable, its surrebuttal case, and as otherwise directed by the Administrative Law Judge:

* * * * *

vi) Affidavits from the Outside Counsel or Outside Technical Experts establishing the justness and reasonableness of the charges at issue by setting forth their experience in the legal community or technical field and setting forth the fees that they have charged in similar matters, or providing an affidavit from an attorney or technical expert practicing in the relevant area setting forth the rates charged in that area of practice or technical area.

This provision is intended to reflect the guiding requirements set forth in the *Kaiser* line of case law, as well as Federal case law. It is also intended to supplant the utility representative affidavit that Staff initially required (see below). Indeed, it has long been the law in Illinois and in the Federal courts, that an affidavit setting forth the experience of the expert or attorney, similar fees charged, and like matters (or from another expert or attorney establishing the market value of attorneys or experts with similar experiences) is the methodology that is generally used to provide proof of the justness and reasonableness of the charges at issue. See, e.g., *Hess v. Loyd*, 2012 IL App (5th) 090059 at 7, 965 N.E.2d 699; *Ryan M. v. Board of Education of the City of Chicago*, 731 F. Supp. 2d 776, 788 (N.D. Ill. 2010); *Demitro v. GMC Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 23, 902 N.E.2d 1163 (1st Dist. 2009). ~~Without this provision, the Rule would not conform to the *Kaiser* line of case law.~~ The Commission notes that this requirement is not unduly burdensome, as this type of affidavit is routinely furnished in state and Federal courts, as well as in other administrative agencies. Therefore, the Rule shall be modified to include the provision above.

h. Staff's Draft of Section .200(d) Requiring a Utility Representative Affidavit

Staff's Draft of Section .200(d) provided that:

d) No later than five business days prior to the start of evidentiary hearings in the rate case, the Utility shall file an affidavit signed by a Utility representative with authority to make affirmations on behalf of the Utility that to the best of the Utility

representative's knowledge, information and belief as to the following:

(i) The compensation paid or to be paid to Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff, and employees of the Utility or any of its affiliates that the Utility is seeking to recover as rate case expense in the instant rate case is supported by billings or other documentation that:

(a) Are true and accurate;

(b) Support costs that were reasonable to prepare and litigate the rate case;

(c) Were reviewed and approved by Utility management prior to payment; and

(d) Are not duplicative.

(ii) The Utility paid or will pay the billed amounts requested to be recovered as rate case expense; and

(iii) Additional compensation, if any, to be paid to Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff, and employees of the Utility or any of its affiliates for services not yet billed to the Utility, or not yet performed, will be made in accordance with the affirmations required in this subsection (d).

(iv) The filing of the Utility representative affidavit is informational in nature and shall not be binding on the Commission in its assessment of the just and reasonableness of the amount of rate case expense requested by the Utility.

Staff's Position

Staff opines that this affidavit requirement is intended to serve merely as an extra layer of review, both to encourage Outside Attorneys and Outside Technical Experts to submit accurate bills, and to ensure that the utilities are only requesting recovery of costs that were reasonably and prudently incurred. Staff continues on to state that because utility officers are already reviewing rate case expenses, simply requiring them to sign an affidavit attesting to that review should be a simple matter. Staff Reply Brief at 7.

The AG/CUB Position

The AG/CUB support Staff's added requirement. They maintain that it would provide assurance that the amounts charged in the invoices supporting the rate cases expenses were actually paid. The AG/CUB point out that the General Assembly singled out rate case expense as an item requiring a specific Commission finding of justness and reasonableness. AG/CUB Initial Brief at 15.

The Utilities' Position

The Utilities vigorously protest Staff's inclusion of a provision requiring a utility representative to "sign off" that billings made in the particular case are approved by the utility and are accurate. They assert that there is no need for this provision. Utility Initial Brief at 12-13. The Utilities contend that there is no need for this "extra layer of protection" because the Draft Rule requires utilities to provide "detailed" information and documentation supporting their rate case expenses, subject to the scrutiny of Commission Staff, intervenors, such as the AG/CUB, the Administrative Law Judge and ultimately the Commission itself. Utility Reply Brief at 16.

The Utilities further argue that the value expressed by Staff and AG/CUB of having this affidavit is that it would assure this Commission that the rate cases expense invoices were reviewed and actually paid by the utility. They assert that while utilities review invoices, the fact that an invoice was or was not reviewed has no impact on whether the rate charged or the amount of services performed is just and reasonable. *Id.* at 16-17. The Utilities also contend that, unlike the situation in the Sarbanes-Oxley Act, which requires corporate officer verification, (See, 15 U.S.C. Sec. 7241(a)(1)-(3)), the financial information certified by a corporate officer under that Act is usually not the subject of a contested, litigated proceeding. They conclude that, because the underlying documentation is produced pursuant to litigation and possibly challenged in litigation before having any effect upon the public, the Sarbanes Oxley Act does not support including such a requirement. *Id.* at 17-18.⁵

Analysis and Conclusions

This Commission agrees with the Utilities' ultimate conclusion. To begin, this Commission has no assurance that the affiant/utility employee would possess the knowledge to accurately state that the bills submitted actually support rate case expenditures that were reasonable to prepare and litigate the rate case. There is no assurance in this portion of the Rule that the utility affiant knows what services a lawyer or technical expert generally performs, is supposed to perform, or actually did perform. See, Docket 12-0321, Memorandum to the Commission of December 19, 2012, discussing some of the many overhead and otherwise improperly-included items that the utility attempted to include in rate case expense, where a utility accountant testified under oath that in his opinion, were just and reasonable. The fact that a utility employee "signed off" that rate case expense bills support reasonable costs appears to add little or nothing to the Commission's knowledge as to whether these bills are, in fact, just and

⁵ The Utilities do not state what relevance the Sarbanes Oxley Act has in this regard.

reasonable. This is especially true when one contemplates that these bills, if found to be just and reasonable, will be passed on to consumers, irrespective of fault on the part of those consumers.

However, the system in place under *Kaiser* and its progeny, as well as what is mandated in Federal courts, requires briefing by attorneys regarding attorney's fees, and expert witness fees. See, e.g., *Kaiser*, 164 Ill. App. 3d at 988-90; *Clarborne ex. rel L. D. v. Astrue* 877 F. Supp. 622, 624-26 (N.D. Ill 2012); *T.G. ex rel. T. G. v. Midland School Dist 7*, 848 F. Supp. 902, 919, C. D. Ill 2012. Therefore, based upon this guidance this Commission concludes that briefing (posttrial briefing) is the method that should be used to evaluate rate case expense costs the part of utilities. (See below).

Additionally, inclusion of a new Section .200(c)(vi) (above) requiring affidavits regarding the rates charged by Outside Counsel/Outside Technical Experts provides this Commission with some evidence of the reasonableness of the rates charged and passed on to consumers. This is true because these affidavits provide evidence as to what the attorney or expert has charged in the past, or what others in the relevant community charge.

The Commission notes that use of the attorney/technical expert affidavit procedure described above, which has been widely-used in other administrative agencies, as well as in the state and Federal courts has an additional benefit, in that, usage of what is widely-used in the legal community provides all with access to the legal precedent on particular issues. In contrast, use of what was done regarding the Sarbanes-Oxley Act, which, as the Utilities point out, addresses matters which may not be analogous to those that are addressed here, may not provide the parties and the Commission, General Counsel's Office other participating attorneys, and the ALJs, with access to relevant precedent. Because the Commission concludes that the utility affidavit would be of little or no evidentiary value, it is not considering the alternatives proposed by the Utilities. See, Utility Initial Comments, Attachment A. **Therefore, this Section is struck in its entirety.**

i. Inclusion of Section .200(b)(2) as Modified, (Now Section .200(b)(3)) Even Though Internal Utility Expenditures are Excluded from the Rule

This portion of the Rule, as Modified, is as follows:

b) In addition to the information required in ____ .200 (a), the Utility shall provide the following information at the time of filing its direct case:

* * * * *

~~32) For costs provided by employees of the Utility or any of its affiliates,~~ In order to ensure that the work performed by Outside Counsel or an Outside Technical Expert does not duplicate work performed by a utility employee, or work

performed by a utility affiliate, the utility shall provide a schedule that includes:

- i) The total cost per utility employee of the utility employees who performed work on the rate case at issue;
- ii) For each utility employee included in i) above, a schedule reflecting the amount of salaries, payroll taxes and benefits included in the test year; and
- iii) evidence establishing what services the employee performed.

It may appear to be unnecessary to provide for internal utility work performed regarding rate cases, when just previously, the Rule was modified to exclude internal utility costs. However, there is the matter of ensuring that an Outside Counsel or an Outside Technical Expert is not duplicating work performed by a utility employee or performed by a utility affiliate. This provision remains, as is modified above, to ensure that the bills for Outside Counsel/Outside Technical Experts do not bill for services performed by utility employees in furtherance of a rate case.

j. Sections .300(b)(2) and (b)(2)(9): Use of the Term “Outside” in Connection with Attorney’s Fees and Expert Witness Fees

The AG/CUB Position

The AG/CUB point to Sections 300(b)(2) and (b)(2)(9) (formerly Sections .300(a)(2) and (a)(2)(9) of Staff’s Proposed Rule, which are as follows.

ba) The factors to be considered by the Commission in determining the reasonableness of Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff may include, without limitation, the following:

* * * * *

- 9) Hourly rates applicable to Outside Attorneys and Outside Technical Experts representing or retained by utilities and Outside Attorneys or Outside Technical Experts representing or retained by other stakeholders who regularly appear in Commission proceedings.

The AG/CUB contend that the word “outside” should be deleted from the Rule. They reason that the salaries of the Commission’s General Counsel attorneys, the Attorney General’s office and CUB attorneys should be analyzed because, according to the AG/CUB, those attorneys frequently appear in Commission proceedings and therefore,

their salaries would be useful in determining the usual and customary charges for comparable services. AG/CUB Initial Brief at 9-10.

The Utilities' Position

The Utilities posit that the legally-required analysis regarding the rates for attorneys is the "market rate" for such services. They contend that a "market rate" is the fee that is customarily charges in the legal community for such services, citing *Rackow v. Ill. Human Rights Comm.*, 152 Ill. App. 3d 1046, 1062-63, (1st Dist, 1987, and *Demitro v. GMC Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 23, 902 N.E.2d 1163 (1st Dist. 2009). Utility Reply Brief at 7-8. The Utilities point out that when government agencies are awarded attorney's fees, they are awarded such fees according to the market rate, irrespective of the government attorneys' actual salaries, citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984) and many out-of-state cases. *Id.* at 8-9.

The Utilities maintain that, while the AG/CUB assert that the hourly rate of government and not-for-profit attorneys can be easily computed through public records, the AG/CUB do not state what public information they are referring to, how this computation would be performed, or who would perform or verify the computation. *Id.* at 9. They assert that whatever the "computed" hourly rates of Staff attorneys and the AG and CUB attorneys may be calculated to be, that figure would probably need to be adjusted to include items that private sector attorneys cannot attribute to a particular client or matter and therefore do not separately charge for, including such items as rent, utility bills, phone charges, secretarial services, computer equipment, health insurance, retirement plan contributions and other items that are ordinarily included in office overhead. *Id.* at 9-10.

Analysis and Conclusions

The AG and CUB have made no showing that the compensation to attorneys in the Commission's General Counsel's office, or that of the attorneys at the AG's office or that of CUB, (or the compensation to any other government attorney or not-for-profit attorney) would provide this Commission with useful guidance or a useful comparison to attorneys in the private sector who represent utilities in rate cases. To begin, the terms of employment between government/not-for-profit attorneys and those in private practice are not the same. (e.g., employment benefits, pension vs. other retirement plan, the level of support staff, hours expected to be worked, level of responsibility, etc.). Also, the AG and CUB has given this Commission no methodology, through which, this Commission could compare the two (government/not-for-profit vs. private attorneys) in a meaningful way. Indeed, it has been held that the government is entitled to the market rates for its attorney's fees, irrespective of the fact that generally, the actual salary of a government attorney is less than that for an attorney in private practice. *City of Chicago v. Ill. Commerce Comm.*, 187 Ill. App. 3d 468, 470-72, 543 N.E.2d 336 (1st Dist. 1989).

However, the AG/CUB have expressed a valid concern. A more reasonable approach is the attorney affidavit, discussed above, which is added to the Rule and is

customary in the cases that follow *Kaiser* and like Federal and state case law. See, e.g., *Gibson v. City of Chicago*, 873 F. Supp. 2d 975, 982-91 (N.D. Ill. 2012); *Johnson v. GDF, Inc.*, 668 F. 3d 927, 928-34 (7th Cir. 2012). This provides an evidentiary standard with respect to what is reasonable and customary regarding the proper market rate for an Outside Counsel for a utility. It also addresses the AG/CUB concern regarding a sufficient benchmark regarding attorney's fees.

The Commission additionally notes that the hours spent on a particular item by the Commission's General Counsel's office, or that of the AG or CUB, or another attorney involved in a rate case, could possibly be probative in some situations regarding the reasonableness of the hours spent by Outside Counsel on that item. While the Commission will not make a determination as to what those situations might be, it wishes to make it clear that use of information regarding a government attorney/not-for-profit attorney are not precluded in all regards. **In conclusion while the Commission will not make a determination as to what those situations might be, it wishes to make it clear that use of information regarding government attorney/not-for-profit attorney are not precluded in all regards.**

k. New Section .300(a): Inclusion of a Provision Requiring Attorney Review of Rate Case Expense

The Rule now contains that following provision:

Section ____ .300 Determination of Reasonable Compensation Costs

- a) Rate case expenses shall be addressed in the attorney review in post-trial briefs.

The Utilities' Position

The Utilities contend that their accountants and other finance-related employees are very-well situated to testify regarding rate case expense. According to the Utilities, their accountants and finance personnel are competent to testify regarding rate case expense items and the legal and expert services in a rate case. Based on their experience, the Utilities surmise that those witnesses are able to identify complex issues in a rate case. They also, according to the Utilities, typically work closely with counsel in the discovery process, the development of witness testimony, as well as the hearing and briefing stage of a rate case. The Utilities conclude that their accountants, as well as Staff accountants, are able to testify regarding what a lawyer or an expert should or should not be doing, and also as to the reasonableness of a rate charged. Utility Reply Brief at 11-13. Essentially, the Utilities' argument appears to be that all that a utility need proffer, to establish the justness and reasonableness of rate case expenses, is a utility employee testifying that, in his/her opinion, the amount of rate case expense is just and reasonable.

Analysis and Conclusions

The Utilities have ignored what has occurred in recent rate cases. They also have ignored what the case law provides as guidance~~requires~~, despite having a plethora of such law/examples being furnished to them by the ALJ in this Docket. Additionally, the Utilities present no evidence that their finance personnel/accountants actually know what an attorney or an expert's job entails, or what it does not entail, what services were actually performed, or what the market rates are for those services.

This was made abundantly clear in Docket 12-0321, a rate case, where, after proffering no evidence regarding what was actually billed in the form of rate case expense in its case-in-chief, the utility attempted to supplement the record to the Commission with certain bills regarding attorney's fees and expert witness fees. The analysis that followed regarding those bills revealed that, included in rate case expense were such items as: an expert witness billing for services in an inapplicable case regarding a rehearing that did not exist in that other case; local attorneys billing for such matters as meals; the attorneys' cab fares; a car rental, non-legal services rendered by an attorney; billing for acquaintance with the Commission's rules of practice; bills for lobbyists; bills for "whitepapers," which do not exist in litigation; and a bill for unnamed services in an unidentified writ of mandamus action. (Given that a writ of mandamus must be an action against the government in the circuit courts, this item could not have occurred in a rate case).

Those bills did not specify what work was performed for the utility and the entries typically included such non-informing entries as "work on" unspecified pre-filed testimony or "attention to" a vague item. In fact, the bills submitted did not even state what case the lawyers were working on. See, Docket 12-0321, Memorandum to the Commission of December 19, 2012. It should have been obvious to most lawyers practicing in litigation that these items should not have been included in rate case expense. Yet, in that case, a utility accountant testified that in his opinion, all of the rate case expense bills were just and reasonable.

Further, in Docket 10-0467, a utility attempted to recover attorney's fees and expert witness fees for another, unrelated case; payment to experts who did not participate in the docket; as well as recovery of payment for witnesses whose testimony was wholly duplicative of that of other witnesses and fees to entities for which, no explanation was provided as to what services these entities performed to earn those fees. See, Docket 10-0467, final Order of May 24, 2011, at 65-86.

Past experience with rate case expense in rate cases requires this Commission to conclude that what the Utilities proffer, (a utility employee opining that in his or her opinion, the amount of rate case expense is reasonable) is not adequate in terms of protecting the rights of ratepayers against excessive and unwarranted rate case expense items. As was explained earlier herein, it also contravenes the guidance provided ~~what was required of this Commission~~ in *People ex rel. Madigan*.

The Commission therefore rejects the Utilities' argument on this issue. In so ruling, the Commission notes that *People ex rel. Madigan* provided guidance to ~~required~~ this Commission of ~~to adopt~~ the approach in the *Kaiser* line of cases, which do not

include testimony from an accountant or person with a finance background regarding the reasonableness of attorney's fees and expert witness fees. Indeed, the Utilities cite no cases in which this practice was performed.

The *Kaiser* line of cases, as well as cases concerning attorney's fees in Federal courts, provide guidance ~~requires~~ that the attorneys participating in the case at bar review the fees requested. Those cases discuss such fees, in terms of briefing by the parties, after trial, as opposed to having utility accountants testify on that subject. See, e.g., *Timothy Whelan Law Associates, Ltd., v. Kruppe*, 409 Ill. App. 3d 359, 375-76, 947 N.E.2d 366 (2nd Dist. 2011). Indeed, such testimony is often unnecessary and burdensome. Courts frequently award attorney's fees without an evidentiary hearing on the subject, as briefing is expeditious and efficient for determining the justness and reasonableness of such fees. See, e.g., *Singer v. Brookman*, 217 Ill. App. 3d 870, 880, 578 N.E.2d 1 (1st Dist. 1991), discussing attorney's fees pursuant to sanctions imposed for filing frivolous claims. All that is required is a detailed breakdown of fees and expenses and the opportunity for other attorneys in the docket to respond to that breakdown. *Raintree Healthcare Center v. Ill. Human Rights Comm.*, 173 Ill. 2d 469, 495, 672 N.E.2d 1136 (1996); *Rakow v. Ill. Human Rights Comm.*, 152 Ill. App. 3d 1046, 1063-64, 504 N.E.2d 1344 (2nd Dist. 1987); *Newport Township Road Dist. v. Pavelich*, 2012 IL App (2nd) 11317, 4, 980 N.E.2d 1196; *Dolan v. O'Callaghan*, 2012 IL App (1st) 11105, 8, 979 N.E.2d 383; *Shales v. T. Manning Concrete, Inc.*, 847 F. Supp. 2d 1102 (N.D. Ill. 2012). Indeed, in *Kaiser*, the landmark Illinois case on the subject, there was no expert testimony regarding these fees. See, *Kaiser*, 164 Ill. App. 3d at 988-90.

While expert analysis can provide very valuable input to the attorneys regarding these expenditures, the "bottom line" in cases evaluating these fees is done in briefing. ~~If this Commission were to ignore what the case law requires, it would be ignoring what the Appellate Court required in *People ex rel. Madigan*.~~ Therefore, the additional provision above shall be added to the Rule.

I. Section .300(b)(8) (formerly Section 300(a)(8): Evidence of the Market Fees, Including Rate Case Fees in Other Jurisdictions

Section .300(b)(8) provides that:

- b) The factors to be considered by the Commission in determining the reasonableness of Outside Attorneys and Support Staff, Outside Technical Experts and Support Staff, compensation costs may include, without limitation, the following:

* * * * *

- 1) **Evidence regarding the Mmarket-data⁶ rates** concerning fees charged for comparable services including, as applicable, fees charged in prior rate cases by an affiliate of the utility in Illinois or other jurisdictions.

⁶ The word "data" was removed by the Administrative Law Judge because it is not defined in the Rule and its meaning is unclear. It was replaced with the word "evidence."

* * * * *

The Utilities' Position

The Utilities object to inclusion in the Rule of fees charged in rate cases in other jurisdictions. They point out that there are cost-of-living variations from state to state, as the fees may be less in North Dakota than they are in Chicago, but higher in Washington D.C., due to the differences in the cost of living from state to state. The Utilities also contend that different states have different types of utility rate cases which may involve different levels of complexity. Utility Comments at 14; Reply Brief at 10. Additionally, according to the Utilities, "additional experts will be required to present evidence and testimony" on the issue and the parties will be "arguing incessantly" over whether the issues were comparable in other states. *Id.* at 15.

The AG/CUB Position

The AG/CUB assert that, despite procedural differences amongst various jurisdictions, in rate cases, many times, the underlying issues presented in other public utility commissions are strikingly similar, if not identical, to a rate case before this Commission. AG/CUB Reply Comments at 4. They point out that this type of information is generally publicly available through other public service commission websites, or it is information that is already produced in discovery. The AG/CUB conclude that obtaining this information will not be unduly burdensome or expensive for a utility or any of the parties. They further state that oftentimes, a quick analysis will reveal will reveal whether a comparison to another public utility commission will be relevant. *Id.* at 4-5.

Analysis and Conclusions

It is unclear why the Utilities are under the impression that additional experts are necessary on this issue. The Utilities furnish no reason for this statement. Additionally, the Section above adding affidavits regarding rates charged makes testimony on the subject virtually unnecessary. The Utilities also do not state why the parties will be "arguing incessantly" over whether the issues litigated were comparable in other states. On the contrary, it seems to be a simple matter to point to a public record from another state public utility commission. While the complexity of the charges actually incurred may vary, the charge per attorney or expert may not. Even assuming that such charges would vary, a simple explanation as to why the variance occurred in billing should protect and Outside Counsel/Expert from receiving an unfairly low rate.

The Commission further notes that it is not uncommon to have experts appear at the Commission who have testified at other public utility commissions in other jurisdictions. Therefore, information as to what they charged for a particular service at another state public utility commission could possibly be germane regarding rate case expense. Indeed, the charges in similar cases can evince the market rate for those services. *People Who Care v. Rockford School Dist. No. 205*, 90 F. 3d 1307, 1312. (7th Cir. 1996)

However, the Utilities raise a valid concern regarding the cost of living in different parts of the United States, or, for that matter, in different parts of Illinois. It may be unfair to compare rates in less populated states, like Idaho or Montana to rates in Illinois, especially in Chicago, due to the fact that the cost of living is generally less in less populated areas. This seems to be a simple matter to overcome however, as there are government statistics regarding the cost of living in various areas. See, e.g., www.census.gov.

Also, the Utilities' concern about excessive litigation over fees has some obvious merits. Unless fees from other jurisdictions are used in the limited instances whereby they provide relevant evidence on the subject, this evidence is of no use. Further, evidence regarding the market rate is of no use, if it is not relatively current. The rate for services 20 years in the past, for example, no longer represents the marketplace. Therefore, this portion of the Rule is modified to provide that:

- 1) **Relevant e**Evidence regarding the **prevailing M**market–**data** rates concerning fees charged for comparable services including, as applicable, fees charged in prior rate cases by an affiliate of the utility in Illinois or other jurisdictions.

m. Section .400: Compensation Costs Support Disclosure (Privileged, Confidential and Proprietary Information)

Staff's draft of the Rule currently provides that:

- a) Information disclosed by the Utility in support of Outside Counsel and Support Staff, Outside Technical Experts and Support Staff, and employees of the Utility or any of its affiliates' compensation costs shall be afforded the same protections for privileged, confidential and proprietary information that exist under the Commission's Rules of Practice, the Illinois Code of Civil Procedure, the Illinois Rules of Evidence and other applicable Illinois law.

The Administrative Law Judge added the following:

- b) When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.

- c) When there is dispute regarding a claim of privilege, any party may file a motion seeking an *in camera* inspection of the documents in question by the Administrative Law Judge to resolve that dispute,

provided that the moving party has made a showing of any legal requisites regarding such inspection.

The original language from Staff's draft has been converted to subsection a) and Subsections b) and c) were added. Subsection b) is a verbatim statement from Ill. Sup. Court Rule 201(n). Subsection c) is simply a restatement of well-recognized law regarding parties' rights in a discovery dispute regarding privileged information. See, e.g., *Mahoney v. Gummerson*, 2012 IL App (2d) 120391, 5, 980 N.E.2d 1220; *Mueller Industries v. Berkman*, 399 Ill. App. 3d 456, 470, 927 N.E.2d 794 (2nd Dist. 2010). While Illinois law was cited in section a) above, sections b) and c) were added in recognition of the fact that often, at the Commission, it is not the attorneys who propound or respond to discovery. These sections inform all parties as to when a privilege can be claimed and what their rights are when a privilege is claimed.

IV. Finding and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the subject matter herein;
- (2) the recitals of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (3) this proceeding is a rulemaking and should be conducted as such;
- (4) the proposed Rule, as reflected in the attached Appendix, should be submitted to the Secretary of State to commence the first notice period.

IT IS THEREFORE ORDERED that the proposed Rule, as reflected in the attached Appendix, shall be submitted to the Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this Order is not final; pursuant to Section 10-113 of the Public Utilities Act it is not subject to the Administrative Review Law.

DATED:	April 30, 2013
BRIEFS ON EXCEPTION DUE:	May 15, 2013
REPLY BRIEFS ON EXCEPTION DUE:	May 23, 2013

Claudia E. Sainsot
Administrative Law Judge
Illinois Commerce Commission