

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)
 On Its Own Motion)
 -vs-)
MidAmerican Energy Company)
)
)
)
Determination of compliance with)
Section 8-101 of the Public Utilities Act.)

Docket No. 11-0672

**BRIEF ON EXCEPTIONS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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*Office of the General Counsel
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Staff witnesses of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to Section 200.830 of the Illinois Commerce Commission’s Rules of Practice (83 Ill. Admin. Code 200.830), respectfully submits its Brief on Exceptions to the Proposed Order (“PO”) issued by the Administrative Law Judge (“ALJ”) on June 17, 2013.

I. Procedural History

On August 26, 2011, Staff submitted a Staff Report that the Initiating Order of October 5, 2011, made a part of the record of this proceeding. The Staff Report discusses Staff’s investigation of an accident that occurred on August 9, 2010, involving a contractor who was working on MidAmerican Energy Company’s (“MidAmerican” or “MEC” or “Company”) overhead electric distribution system in Andalusia, Illinois. The

Staff Report explains that Staff concluded that MEC's safety policies associated with contract employees fail to comply with Section 8-101 of the Public Utilities Act ("PUA" or "Act").

Staff filed its Direct Testimony on November 22, 2011, and MidAmerican filed its Direct Testimony on January 12, 2012. Initial Briefs ("IB") were filed on February 23, 2012 by MidAmerican and Staff. MidAmerican and Staff filed their respective Reply Briefs ("RB") on March 15, 2012. The PO was issued on June 17, 2013, and pursuant to the schedule set by the ALJ, Staff now respectfully submits this Brief on Exceptions.

II. Discussion

Staff applauds the efforts of the ALJ in reviewing this case, in finding that Staff's first three recommendations were appropriate, and in adopting them. Staff feels these recommendations will go a long way in protecting the safety, health, comfort and convenience of MEC's patrons, employees, and the public. See PO at 21. However, Staff urges the Commission to also adopt Staff's fourth recommendation in order to fully ensure that MEC's patrons, employees, and the public are properly protected from the "inherently dangerous force" presented by electricity and entities engaged in the business of supplying electricity. Staff IB at 8 (*citing Clinton v. Commonwealth Edison*, 36 Ill. App. 3d 1064, 1068 (1st Dist. 1976)).

The PO does require MEC to "actively participate in the investigation of such incidents to the extent necessary to ensure that such incidents are thoroughly and credibly investigated, and . . . [to] take appropriate actions to minimize the likelihood of any recurrence." PO at 21. Additionally, the PO states that "If the nature, circumstances and complexities of the incident are such that the conduct by MEC of its own

independent investigation is reasonably necessary to ensure a complete and reliable investigation, then MEC will be expected to do so.” *Id.*

However, based on the statutory obligations imposed on all public utilities by the General Assembly, Staff believes MEC should be required to investigate for itself *any and all* OSHA-recordable incidents associated with its electric distribution and transmission facilities. See 220 ILCS 5/8-101. The PO, if adopted, would allow MEC the discretion to pick and choose which incidents it should investigate, and the Commission would rely on MEC to determine when its own investigation is necessary to minimize the likelihood of a recurrence [of injury] or to ensure a complete and reliable investigation. PO at 21. Furthermore, this discretionary language in the PO could be interpreted as providing that, based upon MEC’s judgment, or the judgment of any other similarly situated utility, the utility can eliminate through contract its overall responsibilities for safety that are imposed by law. This should not be the case. Section 8-101 requires all public utilities to ensure the safety of their employees – not to the extent necessary or as reasonably necessary in the utility’s judgment – but always. See 220 ILCS 5/8-101.

Moreover, the PO appears to Staff to potentially cause an issue in execution in that the only way MEC could make a reasoned decision as to the extent an incident investigation by MEC is needed would be for MEC to investigate the incident in question. Clearly, MEC has demonstrated a disinclination for investigating incidents, at least with regard to incidents causing injury to one of its contract employees. See MEC IB at 4-5, 15-19; MEC RB at 7-8, 10-11. MEC seems to believe employment law is properly at issue here, and argues that it should not investigate incidents involving its contractors in order to avoid “controlling their actions to the point that MEC becomes

legally liable for the contractors (sic) actions . . . under the legal principle of ‘retained control.’” MEC RB at 9; PO at 21.

However, MEC has an affirmative legal responsibility pursuant to Section 8-101 of the Act separate and apart from any employment law. The General Assembly deemed it appropriate for public utilities to ensure the safety of its employees, among others. See 220 ILCS 5/8-101. Such statutory requirements override the common law cited by MEC to bolster its position, at least as to the safety requirements of a public utility. While the Act does not specifically define “employee,” it does use the term in many contexts. See, e.g., 220 ILCS 5/2-103; 2-105; 4-201; 4-205; 4-603; 8-505; 15-601. In most of these contexts, the term clearly is used to contemplate all types of employment – including contract employment.

Notably, Section 8-501.5 separately identifies employees and independent contractors. 220 ILCS 5/8-501.5. That Section applies to a public utilities’ employees and independent contractors hired to work on natural gas distribution facilities, and specifies that the utility shall require that proposed employees and independent contractors hired by the public utility must both complete a certificate listing the proposed employees’ or contractors’ violations of pertinent safety or environmental laws. It is worth noting that even here the requirement for the utility is the same regardless of whether direct employees or independent contractors are hired. See *Id.*

Further, there is nothing in the provisions of Section 8-101 that specifically exclude a contractor’s employees. The use of the term “employees” is not restricted in any manner to presume this language only meant direct employees. It is reasonable to conclude this language included not only direct employees, but contractor’s employees

as well. As such, MEC should always ensure the safety of its employees, including its contract employees, despite its concerns with its associated liability. See 220 ILCS 5/8-101.

In summary, Staff believes MEC has an obligation to investigate accidents associated with its distribution system, including injuries to independent contractors. Staff's own investigation led Staff to the conclusion that MidAmerican did not actively participate in the investigation of the accident involving its contractor's employee, and that MidAmerican denied all responsibility for any involvement in such an investigation – instead relying upon the independent contractor itself to conduct the investigation. Staff IB at 13. However, Company witness Campbell states: “[s]ince MidAmerican already participates in the investigation of accidents involving workers that are injured while working on its facilities or property, this recommendation is already a MidAmerican practice and no Commission order appears necessary.” MidAmerican Ex. 1.0 at 15. To the extent the Company claims to already participate in investigations, there appears to Staff to be no reason for the Commission to not fully adopt Staff's fourth recommendation, which is copied below. Staff IB at 13.

The public utility must investigate all OSHA recordable incidents to enable the utility to understand accident causes and then take the steps it deems necessary to avoid future accidents.

PO at 4.

Therefore, Staff believes that the PO should be modified on page 21 to read as follows:

With respect to the investigation of OSHA-recordable incidents involving contractor employees, the Commission believes that MEC has important responsibilities. In that regard, the Commission finds that MEC shall actively participate in the investigation of such incidents ~~to the extent necessary~~ to ensure that such incidents are thoroughly and credibly investigated, and shall take appropriate actions to minimize the likelihood of any recurrence.

~~If the nature, circumstances and complexities of the incident are such that the conduct by MEC of its own~~ Following any future OSHA-recordable incident involving its contractor employees, MEC shall conduct its own independent investigation is reasonably necessary to ensure that a complete and reliable investigation of incidents involving its instrumentalities, equipment, and facilities occurs. ~~Then will be expected to do so~~

III. Conclusion

WHEREFORE, Staff respectfully requests the Commission adopt its recommended exceptions to the Proposed Order.

Respectfully,

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