

**BEFORE THE ILLINOIS COMMERCE COMMISSION  
STATE OF ILLINOIS**

AMEREN ILLINOIS COMPANY	)	
d/b/a Ameren Illinois	)	
	)	ICC Docket No. 13-0192
Proposed general increase in gas	)	
delivery service rates	)	

**RESPONSE OF THE RETAIL GAS SUPPLIERS  
TO THE CITIZENS UTILITY BOARD'S MOTION TO STRIKE  
CERTAIN REBUTTAL TESTIMONY OF RGS WITNESS CRIST**

The Retail Gas Suppliers ("RGS"), pursuant to the direction of the Administrative Law Judge and the Rules of the Illinois Commerce Commission ("Commission"), and through its counsel, Quarles & Brady LLP, respectfully responds to the Citizens Utility Board ("CUB") Motion to Strike portions of the Rebuttal Testimony of RGS witness Mr. Crist (hereafter, "CUB's Motion").

**Introduction**

CUB's Motion should be denied. Denial of the Motion will protect the "integrity of the fact-finding process" without prejudicing CUB or any other party. (82 Ill. Admin. Code 200.25(a).) To grant CUB's Motion, however, would result in an incomplete, inaccurate, and misleading evidentiary record, depriving the Commission of relevant and material evidence that speaks directly to an important contested issue in this proceeding.

That contested issue is whether and how the Commission should direct Ameren to implement the Small Volume Transportation ("SVT") program that Ameren has proposed to offer to residential and small commercial customers. As the Commission is well aware, Commission-approved SVT programs currently exist in each of the other major Illinois natural gas utility service areas (Nicor, Peoples Gas, and North Shore Gas), and of course, similar competitive programs exist in all of the major Illinois electric service territories, including

Ameren's. The testimony of the parties reflects that only one party -- CUB -- substantively objects to moving forward with implementation of the SVT program Ameren proposes. Other than CUB, the parties and Commission Staff are substantially in agreement that the Commission should direct Ameren to implement the SVT program.

CUB presents its case through a single witness, Mr. Martin Cohen, CUB's former Executive Director and now a consultant. Mr. Cohen invokes the results of the Commission-ordered workshop process (the "Workshops") that resulted from Ameren's last rate case (ICC Docket No. 11-0282) as a reason to not proceed with implementation of the SVT program. Invoking the Workshops for that reason is unfair, inaccurate, and it demands a response. Precluding the information contained in Mr. Crist's testimony that responds to Mr. Cohen, after Mr. Cohen himself invoked the Workshops would leave the Commission with an incomplete, inaccurate, and misleading evidentiary record, and would be manifestly unfair.

CUB's Motion invokes the improper standard for evaluating evidentiary issues in a Commission proceeding. CUB then suggests that issues associated with relevance, hearsay, and confidentiality ought to preclude Mr. Crist's testimony. CUB finally seeks to strike a statement by Mr. Crist that CUB believes expresses a legal opinion. For the reasons stated below, each of CUB's arguments is incorrect, and none of them, either individually or collectively supports striking testimony from the record.

**CUB's Motion Uses The Wrong Standard  
For Evaluating Admissibility Of Evidence In A Commission Proceeding**

The Commission's Rules of Practice leave no doubt that a Commission proceeding is not a civil trial requiring the type of evidentiary protections intended to insulate a jury from certain information. On the contrary, Section 200.25(a) of the Commission's Rules of Practice addresses "Standards for Discretion" and states as the initial consideration:

Integrity of the fact-finding process - The principal goal of the hearing process is to assemble a complete factual record to serve as a basis for a correct and legally sustainable decision.

(83 Ill. Admin. Code 200.25(a).) In other words, Commission procedure is not supposed to be a game of "gotcha," where one party discusses a topic to advance its position -- here, CUB discussing the Commission-ordered SVT Workshops -- but then tries to preclude other parties (RGS, ICEA, and RESA) from responding with relevant information about that same topic.

The primacy of the fact-finding process is reflected in the way in which the Commission treats evidentiary issues. Section 200.610(b) of the Commission Rules of Practice provides:

Evidence - In contested cases, and licensing proceedings, the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed. **However, evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs.**

(83 Ill. Admin Code 200.610(b) (emphasis added).) That provision in the Commission's Rules comes directly from the Administrative Procedures Act ("APA"). (*See* 5 ILCS 100/10-40(a).) Case law under the APA shows that Illinois administrative agencies are to relax the applicable standards for admission of evidence. For example, in *Metro Utility v. Illinois Commerce Commission*, 193 Ill. App. 3d 178, 185-86 (2d Dist. 1990), the Commission argued on appeal and the Appellate Court found that the Commission properly accepted hearsay evidence under the substantially identical predecessor version of Section 200.610. Likewise, in *Discovery South Group, Ltd. v. Pollution Control Board*, 275 Ill. App. 3d 547, 553-54 (1st Dist. 1995), the Appellate Court approved admission of hearsay testimony in an administrative hearing, since it was type commonly relied upon by prudent persons.

In short, the relevant rules and cases demonstrate that CUB's approach of suggesting that evidentiary issues should be handled as if this matter were before the Circuit Court is incorrect.

Nonetheless, as discussed below, even under the strict interpretation of the Illinois Rules of Evidence, CUB's position fails on all fronts.

### **The Information About The Workshops Is Relevant**

CUB first alleges that portions of Mr. Crist's testimony are irrelevant, and that because draft tariffs have been filed, the Commission should focus solely on the terms of those tariffs. (See CUB's Motion at ¶¶ 6-8.) In doing so, CUB's Motion glosses over relevant events and the prior testimony that has been filed. Nevertheless, it is important for the Commission to understand the context in which CUB seeks to strike Mr. Crist's testimony. In particular, it is critical for the Commission to recognize that it was not Mr. Crist (or Mr. Wright) who first raised the issue of the SVT Workshops in this proceeding. The following chronology helps place the testimony in context:

January 12, 2012      ICC Docket No. 11-0282, January 10, 2012 Order directs Staff to conduct a Workshop process to commence within 60 days and last no more than 6 months. (See ICC Docket No. 11-0282, Jan. 10, 2012 Order at 194.)

- The January 10, 2012 Order notes that the Commission expects parties to work in good faith to address issues in the Workshops, and specifically references CUB's raising consumer protection issues, noting that those issues should be addressed in the Workshops by any party that wants to address them. (See *id.*)

March 8, 2012      First Workshop:

- As indicated in ICEA/RESA witness Mr. Wright's Rebuttal Testimony, the Agenda for the March 8, 2012 Workshop indicates that consumer protections was the first Agenda item. (See ICEA/RESA Ex. 3.0 at 7:141-142.) As indicated in RGS witness Mr. Crist's Rebuttal Testimony, consumer protection issues were also addressed in multiple subsequent workshops, though CUB did not take an active role or state a substantive position on consumer protection issues during the workshops. (See RGS Ex. 2.0 at 3:43-57.) Notably, while CUB moves to strike testimony regarding these facts, CUB does not contest that the facts related by Mr. Crist and Mr. Wright are true. Thus, any suggestion from CUB's Motion that consumer protection issues were skirted in the workshop process is false and misleading, and a response is appropriate.

April 5, 2012      Next Workshop

May 8, 2012	Next Workshop
June 21, 2012	Next Workshop
August 23, 2012	Ameren Webinar
August 29, 2012	Ameren Webinar
September 5, 2012	Ameren Webinar
September 10, 2012	Ameren Webinar
October 2, 2012	Ameren Letter to Staff re: Workshop
October 31, 2012	Ameren Follow Up Letter to Staff re: Workshop
January 10, 2013	Staff Report to ICC
February 11, 2013	Ameren Files the instant Rate Case

- Ameren's lead witness Craig Nelson testifies about the Workshops and identifies areas in which consensus was allegedly not reached, including "consumer protections" (Ameren Ex. 1.0 at 6:91-109).

June 11, 2013            Staff files Rearden Direct Testimony

- Dr. Rearden refers to the Workshops. (Staff Ex. 7.0 at 5:70-82.)

June 11, 2013            CUB files Mr. Cohen's Direct Testimony

- Mr. Cohen specifically discusses the Workshops at pages 2-4 of his Direct Testimony, implying that consumer protection was not covered in that forum:

Q. Are the issues identified by Mr. Nelson as lacking consensus among SVT workshop participants significant?

A. Yes. **The issues of consumer protection** and recoverability of utility expenses are crucial issues that **must be addressed before proceeding with SVT**. Other related issues may be raised, such as the legality and advisability of including a Purchase of Receivables ("POR") program and how to structure it and recover its costs. I recommend that all identified issues be fully considered and addressed by the Commission before deciding to move ahead with SVT implementation. (CUB Ex. 1.0 at 4:72-79 (emphasis added).)

Given this context, it misleads the Commission for CUB to suggest that responsive testimony about the SVT Workshops is irrelevant. The Workshops were introduced in the Direct Testimony of Ameren. Then, CUB itself discussed the issue of the Workshops in its Direct Testimony, and created the impression that it participated in the workshop process, and that the process failed to address, much less reach resolution of, any consumer protection issues. The evidentiary door has been opened on the Workshops issue, and CUB's suggestion that others should be barred from disclosing that there is no factual basis for CUB's position is unfair and wrong as a matter of law. (*See Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 372 (2d Dist. 2011) (Appellate Court permits evidence that would have otherwise been irrelevant because objecting party opened the door by testimony himself about the subject); *Mikus v. Norfolk & Western Railway Company*, 312 Ill. App. 3d 11, 24-25 (1st Dist. 2000) (same).)

Importantly, nothing in Mr. Crist's (or Mr. Wright's) testimony reveals anything specific about CUB's positions in the Workshop -- because CUB never took any specific position. The testimony merely relates that CUB did not do anything.

**The bottom line is that CUB itself has made what happened (or did not happen) in the SVT Workshops on consumer protection relevant.** Knowing what happened is probative and important to evaluate the credibility of the CUB position that the SVT process has not yet addressed consumer protection issues. It was CUB itself -- as the Commission acknowledged its January 10, 2012 Order in ICC Docket No. 11-0282 -- that raised a concern about consumer protection, and the Commission specifically identified the workshop process as a forum for CUB -- CUB was specifically referred to by name -- to raise that issue. (*See ICC Docket No. 11-0282, Jan. 10, 2012 Order at 194.*)

To ensure a complete record, the Commission should know that CUB substantively sidestepped the Workshop process and now tries to hold up SVT development in this case by saying that the progress achieved in the Workshops is worthless and that SVT should not proceed. Knowing whether CUB even substantively participated in the Workshops, is therefore plainly relevant -- because CUB has made it relevant.

### **CUB's Hearsay Objection Is Invalid**

CUB's Motion next suggests that testimony responding to CUB's invocation of the Workshops is hearsay. (See CUB's Motion at ¶¶ 9-13.) The basis for CUB's argument is opaque, at best.

As discussed above, the case law demonstrates that the hearsay rule does not strictly apply to Commission proceedings and similar administrative proceedings. (See *Metro Utility v. Illinois Commerce Commission*, 193 Ill. App. 3d 178, 185-86 (2d Dist. 1990); *Montalbano v. Ill. Dept. of Children & Family Services*, 343 Ill. App. 3d 471, 478-79 (4th Dist. 2003); *Discovery South Group, Ltd. v. Pollution Control Board*, 275 Ill. App. 3d 547, 553-54 (1st Dist. 1995).) Moreover, even if the Commission were to find that some or all of the challenged testimony were hearsay, the case law establishes that an expert witness in an administrative hearing, including a Commission hearing, may rely on information that might otherwise be hearsay. (See *Metro Utility v. Illinois Commerce Commission*, 193 Ill. App. 3d 178, 185-86 (2d Dist. 1990) ("King, as an expert, could base his opinion on data not in evidence, including the opinions of others, so long as experts in the field ordinarily rely upon such data in forming their opinions.").)

However, Mr. Crist's challenged testimony is not hearsay (or is an exception to that hearsay). It is common understanding that hearsay is an out of court statement offered for the truth of the matter asserted. (See Ill. R. Evid. 801(c); see also BLACK'S LAW DICTIONARY at 722

(6th ed. 1990).) In this instance, Mr. Crist does not quote a single "statement" by CUB made at any Workshop. The only quotes in the challenged portions of Mr. Crist's testimony are to statements made in CUB data request responses. (*See* RGS Ex. 2.0 at 2:40-3:41 (quoting excerpts from CUB Responses to ICEA/RESA CUB 2.01 and 2.02.)) Thus, CUB's invocation of the hearsay rule is misplaced as a threshold matter. (*See also* ICEA/RESA Response to CUB's Motion at 3-4.)

CUB apparently objects to Mr. Crist's testimony because he relates the fact that CUB was substantively silent at the Workshops regarding consumer protection. However, under the circumstances, CUB's silence falls squarely within an exception to the hearsay rule. Under the tacit admission rule, a party's silence is admissible as an exception to the hearsay rule. (*See, e.g., People v. Goswami*, 237 Ill. App. 3d 532, 535-37 (3d Dist. 1992) (explaining and applying the tacit admission exception to hearsay).)

Moreover, the silence has long been recognized under Illinois law as constituting a statement or admission against interest. For over 60 years, the Supreme Court has held that admissions may be implied by silence under certain circumstances, such as where the person is not only afforded an opportunity to speak but the situation also naturally and properly calls for speech. (*See Dill v. Widman*, 413 Ill. 448, 454 (1952) ("admissions may be implied by silence when the circumstances are such as not only afford an opportunity to act or speak, but also properly and naturally call for action or reply by persons similarly situated.")) Of course, admissions by a party or his agent are admissible as an exception to the hearsay rule. (*See, e.g., Rincon v. License Appeal Comm'n of City of Chicago*, 62 Ill. App. 3d 600, 608 (1st Dist. 1978).)

In short, nothing about Mr. Crist's testimony involves hearsay -- indeed, he never quotes a single word stated by CUB at any of the Workshops. Any attempt to contrive a hearsay-like

objection to the testimony falls flat, as the law makes clear that neither CUB's substantive silence at the Workshops nor the implied admissions associated with that silence is inadmissible as hearsay.

**Mr. Crist's Testimony Does Not Violate Any Confidentiality Restrictions**

CUB's attempt to paint Mr. Crist as having violated confidentiality is unfounded. (*See* CUB's Motion at ¶ 14.) CUB's Motion refers to "[t]estimony about the specifics of the exchanges during the workshops." (*Id.*) Yet, CUB's Motion fails to identify any such "specifics" or "exchanges". (*See id.*) As noted above, Mr. Crist's challenged testimony does not contain a single quote of any statement made at the Workshops by CUB or any other participant. Nothing in Crist's testimony reveals anything specific about CUB's positions in the workshop (indeed, it could not, because CUB never took any specific position). Mr. Crist simply relates that CUB did not substantively participate.

Mr. Crist no more reveals anything confidential than does Staff or CUB in its testimony about the Workshops. In addition, it should be noted that CUB's Responses to Data Requests, which RGS intends to have admitted to the evidentiary record, contain essentially all of the same information -- and more -- about CUB's non-participation in the Workshops that Mr. Crist relates, and none of those Responses to Data Requests were designated as confidential by CUB. (*See, e.g.*, CUB Responses to RGS 1.01, 1.02, 1.03 and ICEA/RESA 1.02, 2.01, 2.02, 2.03, 2.04, 2.05, attached hereto collectively as Exhibit A.) Indeed, CUB did not even state an objection to several of those Data Requests. (*See* CUB Responses to RGS 1.01, 1.02, and 1.03.)

In short, Mr. Crist did not violate any confidentiality, and CUB's suggestion to strike his testimony on that basis should be rejected.

**CUB's Argument About Mr. Crist's Alleged Legal Conclusion Is Unpersuasive**

Finally, CUB suggests that part of a sentence in Mr. Crist's testimony conveys an impermissible legal conclusion, although CUB's request for relief fails to identify these lines. (*Compare* CUB's Motion at ¶¶ 15-17 with CUB's Motion at ¶ 18.) CUB asserts the second half of the following sentence is statutory interpretation:

Nicor Gas, Peoples Gas, and North Shore Gas all have consolidated billing programs pursuant to tariffs that have been approved by this Commission, which would not have done so if there had been a statute or regulation in Illinois that makes consolidated billing of natural gas customers illegal.

(RGS Ex. 2.0 at 4:72-76.) The challenged statement is obviously not a legal conclusion, but rather an observation made by an expert that he would presume that the Commission would not act contrary to law. Mr. Crist might have made a legal conclusion had he followed his statement by saying: "Therefore, the consolidated billing programs are legal and the Commission can approve them." But he said no such thing, and made no statement about what the Commission may or must legally do in this proceeding.

CUB's objection to Mr. Crist's testimony implies that CUB thinks the Commission may have acted illegally in approving the consolidated billing plan for Nicor Gas, Peoples Gas, and North Shore Gas. However, to RGS's knowledge, CUB never made a challenge that consolidated billing was illegal with respect to Nicor Gas, Peoples Gas, or North Shore Gas, and if it did, its position was held invalid, because all three of those utilities have consolidated billing today. Again, CUB's attempt to strike an alleged legal conclusion from Mr. Crist's testimony should be should be denied.

### **Conclusion**

For the reasons stated herein, RGS respectfully requests that the Commission apply the appropriate legal standard to ensure that the Commission has full and complete evidentiary record, and deny CUB's Motion to Strike. In the event that CUB's Motion to Strike is granted, RGS respectfully requests that the Commission strike all references in Mr. Cohen's testimony to the SVT Workshops.

Respectfully submitted,

**THE RETAIL GAS SUPPLIERS**

By: /s/Christopher J. Townsend  
Christopher J. Townsend

Christopher J. Townsend  
Christopher N. Skey  
Adam T. Margolin  
Quarles & Brady LLP  
300 North LaSalle Street  
Suite 4000  
Chicago, IL 60654  
Phone: (312) 715-5000  
christopher.townsend@quarles.com  
christopher.skey@quarles.com  
adam.margolin@quarles.com