

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
-vs-	:	
	:	
Ameren Illinois Company	:	
d/b/a Ameren Illinois	:	Docket No. 11-0341
	:	
Reconciliation of revenues collected	:	
under Rider EDR with the actual costs	:	
associated with energy efficiency and	:	
demand-response plans.	:	
	:	
Reconciliation of revenues collected	:	
under Rider GER with the actual costs	:	
associated with energy efficiency plans.	:	

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

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**BRIEF ON EXCEPTIONS OF THE STAFF OF
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Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.830 of the Rules of Practice (83 Ill. Adm. Code 200.830) of the Illinois Commerce Commission (“Commission”), respectfully submits its Brief on Exceptions to the Proposed Order (“PO”) issued by the Administrative Law Judge (“ALJ”) on August 19, 2013, in the above-captioned matter.

I. Introduction

There is one and only one contested issue in this proceeding: whether Staff’s recommended disallowance of \$119,550, reflecting the costs associated with Ameren

Illinois Company's ("AIC" or "Company") Small Business ("SB") HVAC Program, should be adopted. Proposed Order at 4. Put another way, the issue is whether the sum in question was reasonably and prudently incurred. Id. at 46. The Proposed Order incorrectly approves an imprudent expenditure of ratepayer funds on energy efficiency. Because the Proposed Order does not give proper weight to Staff's chief legal and factual arguments regarding this issue of prudence, Staff proposes revisions to incorporate these arguments. When duly considered, these arguments require that the Proposed Order be revised to accept Staff's disallowance.

II. Costs Associated with SB HVAC Program Were Not Prudently Incurred

The Proposed Order correctly notes that AIC was given the flexibility to modify or terminate programs that were not cost-effective. Proposed Order at 47. However, any modification to a program, or - more important for purposes of this discussion - failure to modify a program, must be prudent, as the Proposed Order again correctly recognizes. Id.

The Commission has defined "prudence" as:

[T]hat standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.

Illinois Power v. Commerce Comm'n, 245 Ill.App.3d 367, 371; 612 N.E.2d 925, 929 (3rd Dist. 1993).

The court stressed that in any determination of prudence, the contracts, decisions, and actions in question must be reviewed in the light of the facts available at the time they occurred or were made. Illinois Power at 374, 612 N.E.2d at 931.

It follows from this, however, that while a utility's prudence can only be reviewed in the light of the facts available to it at the time it made the relevant decisions, the corollary is also true: a utility must be required to consider and, if need be, act upon facts that it knew or reasonably should have known at the time regarding the prudence of its actions. Otherwise, the "reasonable person" standard by which prudence is judged would be meaningless.

Upon originally filing its three-year plan in Docket No. 08-0104, the Company sought approval of measures that were known at the time of that proceeding to be cost-ineffective. Final Order at 10-11, Central Illinois Light Co., et. al., ICC Docket No. 08-0104 (Oct. 15, 2008) ("Docket 08-0104 Order"). The Commission ordered that those measures be removed from the plan, but based upon the Company's assurances and request, allowed the Company to monitor those measures and gave AIC the flexibility to market those measures if and when they were projected to become cost-effective. Id. at 10-11. At that time, the measures at issue here – gas tune-ups – were already projected to be cost-ineffective; however, the Company did not provide Staff or the Commission with this information during the plan filing. Staff Ex. 2.0R at 16. Thus, the Commission never had the opportunity to carefully review cost-ineffective gas tune-up measures and order the Company to take the same action as it did with all other cost-ineffective measures included in the plan filing. Nevertheless, the Commission-approved plan included provisions regarding prudent program management. Docket 08-0104 Order at 9-11, 16, 18. It is fair

to conclude that the Commission's approval of the plan in 08-0104 was based upon its assumption that AIC would continue to promote cost-effective energy efficiency measures in order to maximize cost-effectiveness and net benefits for ratepayers.

Here, the facts and circumstances surrounding the SB HVAC program for PY2, which were known at the time to AIC, all militated against continuing the program in the same form as the original plan. The Company nonetheless increased expenditures on it. Joint Cross Ex. 1 at 333, 386-393. Despite clear evidence available to AIC and its implementer, the Company took no action to limit the number of cost-ineffective measures implemented during that year. Id. AIC representatives were undoubtedly monitoring the program closely indeed on a monthly basis (see Joint Cross Ex. 1 at 10) - and therefore the Company must be imputed with knowledge of its performance.

Ameren should have known about the cost-ineffectiveness of the gas tune-up measure from its initial measure screening performed prior to implementing the measure in the first and second program years. Quite apart from the general knowledge that the Company should have had before program implementation that the gas tune-up measure was not cost-effective, there is the specific knowledge the Company actually did have that the SB HVAC program would not be a success in PY2 if the cost-ineffective gas tune-up measure remained in the program. No later than August 17, 2009, the record shows that based upon the implementer's concerns, AIC's implementer stated "[f]urnace tune-ups will ultimately yield low TRCs" for the SB HVAC Program. Staff Ex. 4.1 at 21. Nonetheless, AIC did not direct its implementer to remove the cost-ineffective gas tune-ups from the SB HVAC Program despite the implementer's warning that the cost-ineffective gas tune-up

measures would ultimately result in a program producing negative net benefits to ratepayers. Id.

On September 3, 2009, the implementer provided its review of planning assumptions to AIC for the SB HVAC Program for PY2. Joint Cross Ex. 1 at 293-294. The implementer's initial analysis for the SB HVAC Program showed the TRC at 0.34 or 0.91 "depending on whether one assumed 100% of the savings came from tune-ups or a 50/50 split between savings from tune-ups and equipment installation." Joint Cross Ex. 1 at 293. In order for the SB HVAC Program to forecast any amount of net benefits to ratepayers for PY2, the implementer stated that it would be required to limit the number of tune-ups to 150, with an assumed split of 25/75 between tune-ups and equipment installations, respectively, and inquired: "How do we/do we need to limit participation to 150 tune-ups?" Id. Rather than taking action to limit the number of gas-tune ups in PY2 or eliminating the measure in question,¹ AIC directed the implementer to conduct the cost-effectiveness analysis for the SB HVAC Program for a three-year period, as opposed to a single year PY2 cost-effectiveness analysis. Id. at 289.

After performing the three-year analysis, the implementer indicated that the SB HVAC program could only be projected to achieve cost effectiveness if the number of gas tune-ups over the three-year period was limited to about 300 and the balance of the incentive dollars for the SB HVAC Program over the three-year period went to the cost-effective new high efficiency equipment installation measures instead of the cost-ineffective tune-up measures. Id. at 158, 289.

¹ The Company previously recognized that elimination of cost-ineffective measures can immediately alleviate the risk that ratepayers will suffer net economic loss. Joint Cross Ex. 1.0 at 347.

Despite this far-from-encouraging projection, AIC relied in part upon this three-year cost-effectiveness analysis to justify continuing the SB HVAC Program. Tr. at 99. Staff requested this three-year cost-effectiveness analysis in discovery in order to review the reasonableness of the analysis; however, it is not of record because neither the Company nor the implementer was able to locate it. Joint Cross Ex. 1 at 288. Staff notes that the failure of a party to produce relevant evidence in its sole control gives rise to the presumption that the evidence would be adverse to that party, absent some reasonable excuse. In re Estate of Wallen, 262 Ill.App.3d 61, 71; 633 N.E.2d 1350, 1359 (2d Dist. 1994). Therefore, the Commission can and should presume that the report would not have justified continuation of the SB HVAC Program, and the Proposed Order should reflect the same.

At the time the missing cost-effectiveness analysis was performed, the Company indicated that 109 customers had received a tune-up incentive through the SB HVAC Program, while only 2 customers had received an incentive for new high efficiency equipment installations. Joint Cross Ex. 1 at 288. Thus, of the customers who had received a SB HVAC Program incentive at the time the cost-effectiveness analysis was performed, 98.2% of the customers opted for a tune-up of their existing equipment, with only 1.8% of the customers opting for purchase of a new high efficiency equipment installation. Id. Since this outcome (almost all participants electing tune-ups) was the precise opposite of the only outcome projected to result in any net benefits to ratepayers (only 100 tune-ups a year, with remaining funds going to high efficiency equipment), the continued marketing of the program simply cannot be considered prudent.

Furthermore, AIC's actions in "modifying" the SB HVAC program in PY2 are not the actions of a reasonable, prudent decision maker. The Company's internal plans at the time showed that the Company intended to complete 340 gas tune-ups during PY2 – clearly in excess of the implementer's recommendation from the missing analysis. Joint Cross Ex. 1.0 at 316-319, 333. Additionally, the combination of the economic climate at the time and the low participation in the high-efficiency equipment installation measures in PY1 was contradictory to the Company's assumption that the balance of the incentive dollars for the SB HVAC Program would go toward the new high efficiency equipment installation measures in PY2. Staff Ex. 4.0R at 17, Staff Ex. 4.1 at 6.

The Commission has previously found that "[r]atepayers are entitled to the cost-effectiveness associated with reasonable and prudent decision-making." Final Order at 20, North Shore Gas Co. and The Peoples Gas Light and Coke Co., ICC Docket Nos. 09-0436/09-0437(cons.)(March 15, 2011). In that energy efficiency rider reconciliation proceeding, the Commission disallowed costs based upon unreasonable and contradicting assumptions used in a cost-effectiveness analysis. Id. at 17-21. The Commission should disallow costs in this case given the unreasonable and contradicting assumptions relied upon, consistent with past Commission decisions.

There was never any doubt that the gas tune-up measure was cost-ineffective. The record shows that the cost-ineffectiveness of the gas tune-up measure is undisputed. It was imprudent for AIC to continue to promote such a measure. In short, the evidence does not support the Proposed Order's conclusion, and it should be amended as follows:

The Commission has reviewed the evidence and arguments presented by the Parties. Staff contends that all the costs incurred in implementing the SB HVAC program for PY 2, totaling \$119,550, were

imprudent and should be disallowed. On the other hand, the rest of the Parties, AIC, CUB, the AG and NRDC, recommend that all such costs be allowed.

~~Although Staff's recommendations are well explained and warrant close consideration, the Commission believes that they of the two competing proposals in the record, the one advanced by CUB, AG, NRDC and AIC is the more reasonable and should be adopted.~~

As observed by CUB, AG, NRDC and AIC, the SB HVAC program was part of the three-year gas energy efficiency plan approved in Docket No. 08-0104. ~~While~~Since AIC was given the flexibility to modify or terminate programs that were not cost-effective, the Commission agrees with ~~AIC and Intervenor~~Staff that under the circumstances, it was ~~not~~ unreasonable for AIC ~~-- upon receiving preliminary TRC values projected by the implementer in August of 2009, some two months into PY 2 which began in June, as well as an update from the implementer in October of 2009 --~~ to continue the providing incentives for cost-ineffective gas tune-up measures, which the Company acknowledges produce minimal energy savings to customers, through the SB HVAC program with modifications, rather than terminating it. AIC's operation of the SB HVAC Program was projected to result in significant economic losses to consumers for PY2, AIC did not modify the program to ensure ratepayers receive net benefits in PY2, and accordingly ratepayers suffered significant economic losses in PY2 as a result of AIC's inaction to modify the cost-ineffective tune-up portion of the program (i.e., the costs were 6.25 times the benefits). (Staff Ex. 4.0R at 20) Given the costs associated with the cost-ineffective gas tune-up measures were projected to overtake any benefits that the new high efficiency HVAC unit installations were expected to create in PY2, it is reasonable to disallow all of the SB HVAC program costs, not solely those associated with the cost-ineffective gas tune-up measures.

As indicated by ~~AIC and Intervenor~~all parties, the implementer did not recommend elimination of the SB HVAC program. Instead, the implementer recommended that AIC focus on cost-effective energy efficiency programs and on market segments that continue to invest in energy efficiency during the economic downturn. Once AIC made clear its desire to continue the SB HVAC program with the cost-ineffective gas tune-ups, the implementer then recommended modifying the program, including further outreach to program allies and limiting the number of gas tune-ups, and projected that the program as modified would become cost-effective over the life of the plan. AIC and Intervenor agreecontend that ~~AIC did in fact modify~~ied the program in a manner consistent with the programmer's recommendations. These assertions, however, are not supported by the official program documentation. Although Staff challenges AIC's~~these~~ assertions and the lack of underlying support for

~~them, the Commission is not inclined to find that all the other Parties have “mischaracterize[d] the evidence” as argued by Staff. The Commission finds that it is most reasonable to rely upon the official program documents in the record, which show that AIC did not in fact eliminate or reduce the incentives for the cost-ineffective tune-up measures offered through the SB HVAC program in PY2. The official documents show that AIC added tune-up measures to the Demand Control Program as part of a bundled offer; while AIC increased expenditures on marketing and outreach for the SB HVAC Program without eliminating or lowering the incentives for the cost-ineffective tune-up measures it continued to offer through the SB HVAC Program.~~

Staff also ~~argues~~notes that in the Order in Docket No. 08-0104 states, “the Commission agreed with Staff’s proposal to require AIC to monitor projected benefits and costs of certain specific gas efficiency measures and to only market those specific measures if and when projected benefits exceed projected costs.” (Staff IB at 5-6, citing Docket 08-0104 Order at 11) ~~As explained by the other Parties, however, AIC, CUB, the AG and the NRDC argue that because the measures to which the Commission referred were specifically “gas griddles and spray valve measures.” Unlike the gas griddles and spray valve measures, the SB HVAC tune-up measure program was not identified in that conclusion as being subject to such measure-specific scrutiny. The Commission agrees with Staff that the flexibility granted to AIC in Docket 08-0104 also requires the Company to monitor all measures and only market those that are projected to be cost-effective. Indeed, the gas griddle and spray valve measures were the only measures identified as cost-ineffective in the plan filing. AIC never presented the Commission with the cost-effectiveness results of the gas tune-up measures in that filing, much less requested Commission approval to implement those cost-ineffective measures.~~

Staff also takes issue with the other Parties’ reliance on Commission findings in other dockets that cost-effectiveness should be evaluated at the portfolio level rather than at the measure or program level. One such case cited by AIC and the Intervenors is the North Shore/Peoples Gas Order in Docket No. 10-0564, where the Commission stated, in part, on page 92, “The Commission agrees with the Utilities that Section 8-104 does not require each measure to meet the TRC test, but it does require the portfolio ... to meet the TRC test. The Commission declines to make the finding requested by [the] Staff witness”

Section 8-104(f)(5), cited by CUB, the AG and NRDC, provides that the utility shall “[d]emonstrate that its overall portfolio of energy efficiency measures, not including programs covered by item (4) of this subsection (f), are cost-effective using the total resource cost test and represent a

diverse cross section of opportunities for customers of all rate classes to participate in the programs.”

Staff responds, in part, that the detailed criteria and other provisions in Section 8-104 are not applicable here, as the Rider GER portfolio pre-dates Section 8-104 and was not developed under or governed by Section 8-104. (Staff RB at 13-15)

The Commission recognizes that Section 8-104(f)(5) is not dispositive here because Section 8-104 is not directly applicable to AIC's GEE Plan approved in Docket No. 08-0104. ~~However, t~~The Commission believes the objectives and criteria in the section do provide some guidance, and should not be totally disregarded, in determining whether AIC's expenditures on the SB HVAC program in PY 2 should be disallowed as imprudent. In this case, is not persuaded by the arguments of AIC and Intervenors contend, and the Commission agrees, that the cost-ineffective gas tune-up measure program at issue was designed and implemented to encourage and develop participation by customers in a hard-to-reach rate class, which is consistent with necessary to meet the policy goals in Section 8-104(f)(5). The record shows that the cost-ineffective gas tune-up measures provide small business customers with a very small amount of energy savings that may last only two years. (AIC Ex. 5.0 at 14) The Commission is concerned that promotion of such cost-ineffective measures whereby participating customers receive minimal savings may serve to further isolate such hard-to-reach customer segments. The customers receiving the cost-ineffective tune-ups may choose not to participate in energy efficiency programs in the future because they never realize significant savings on their utility bills from adoption of the tune-up measure.

In conclusion, the Commission finds, based on the totality of the evidence, that the costs at issue were not prudently incurred, and the proposed disallowance should ~~not~~ be adopted.

The Commission further finds that the reconciliation schedule presented in Appendix B to this Order properly reflects the reconciliation of revenues collected under Rider GER with costs prudently incurred in connection with proper energy efficiency activities as defined in Rider GER for the 12 months ended May 31, 2010. This reconciliation is approved.

With regard to the Proposed Order's reference to the reconciliation schedule presented in Appendix B to the Order, Staff recommends that the schedules attached to Staff's Initial Brief as Appendices A and B be adopted by the Commission.

III. Conclusion

Staff recommends that the Commission enter an order approving the reconciliation consistent with the limitations and qualifications expressed by Staff in its Initial and Reply Briefs and as reflected in this Brief on Exceptions.

WHEREFORE the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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