

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS COMMERCE COMMISSION)	
On Its Own Motion)	
)	Docket No. 11-0341
-vs-)	
)	
AMEREN ILLINOIS COMPANY d/b/a)	
Ameren Illinois)	
)	
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 natural gas energy)	
efficiency plans.)	

AMEREN ILLINOIS COMPANY'S BRIEF IN REPLY TO EXCEPTIONS

September 10, 2013

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I. INTRODUCTION

Ameren Illinois Company (“Ameren Illinois” or “AIC”) respectfully submits to the Illinois Commerce Commission (“ICC” or “Commission”) this Reply Brief on Exceptions to the Administrative Law Judge’s Proposed Order (“ALJPO”). This Reply addresses the exceptions raised by the Staff of the Illinois Commerce Commission (“Staff”), acceptance of which would be contrary to the record and would be contrary to law. For the reasons that follow, as well as those set forth in Ameren Illinois’ previous filings in this docket, the Commission should reject Staff’s exceptions as set forth below and enter a Final Order consistent with the exceptions requested or supported by Ameren Illinois.

II. REPLY TO STAFF’S EXCEPTIONS

In its Proposed Order, the ALJ carefully considered the extensive evidentiary record – which included extensive testimony and exhibits (both pre-filed and presented at the evidentiary hearing) – and arguments presented by the parties and agreed with AIC, the Citizens Utility Board (“CUB”), the People of the State of Illinois (the “AG”), and the Natural Resources Defense Council (“NRDC”) that the costs associated with the SB HVAC Program were reasonably and prudently incurred. (ALJPO at 48.) Yet, in Staff’s Brief on Exceptions (“Staff BOE”), Staff reasserts the same, already-rejected arguments, along with a number of unfounded and unsupported claims in an attempt to convince the Commission to reverse the findings contained in the ALJPO. As follows, to do so would go against the record and law; the Commission should thus reject Staff’s proposed exceptions.

A. The Commission Correctly Found that SB HVAC Costs Were Reasonable and Prudent

As reflected in the forty-nine page Proposed Order, the record has been carefully considered and the ALJ properly concluded, for a variety of reasons, that the SB HVAC costs at

issue were reasonable and prudent. (ALJPO at 47-49.) This finding is well supported by the evidence cited in the ALJPO (ALJPO at 4-49) and the law (*see, e.g.*, AIC Initial Brief at 3-4 (identifying the standard for prudence review); CUB/AG Initial Brief at 4-5 (citing 220 ILCS 5/8-103(a); 5/8-104(a), ICC Final Orders in 07-0569, 08-104, 10-0564, 10-0568); *id.* at 7-8 (identifying the standard for prudence review).)

As explained in the ALJPO, despite low preliminary TRC results just months into PY2, the plan implementer projected that, with proposed modifications, the SB HVAC Program was expected to have a positive TRC over the life of the plan. (Joint Cross Ex. 1 at 120; 353 (PY2 Implementation Plan, Oct. 12, 2009 Final Draft).) Based on this, “AIC did in fact modify the program in a manner consistent with the programmer’s recommendations.” (ALJPO at 47-48.) When making this finding, the ALJ explicitly rejected Staff’s position and characterization of the evidence, noting that: “[a]lthough Staff challenges these assertions and the underlying support for them, the Commission is not inclined to find that all the other Parties [AIC, CUB, the AG, and the NRDC] ‘mischaracterize[d] the evidence’ as argued by Staff.” (*Id.* at 48.)

Further, as a result of the above referenced modifications, AIC reasonably believed the Program would become more cost-effective as customer awareness grew. (AIC Reply at 5.) Indeed, as reflected by the ALJPO, “it was not unreasonable for AIC . . . to continue the SB HVAC program with modifications, rather than terminating it.” (ALJPO at 47.) AIC also believed the Program would continue to benefit the overall portfolio by introducing energy efficiency to trade allies and the hard-to-reach and underserved small business market. (AIC Reply at 5.) The ALJ further agreed with this effort, finding “the program at issue was designed and implemented to encourage and develop participation in a hard-to-reach rate class, which is consistent with the policy goals in Section 8-104(f)(5).” (ALJPO at 48.)

Based on the above, as well as the other evidence and arguments provided by AIC, CUB, the AG, and the NRDC – many of which implicate important policy matters involving the planning, implementation, and management of energy efficiency programs and measures (summarized in the ALJPO at 24-29 (AIC); 33-40 (CUB/AG); 41-46 (NRDC) – the ALJPO correctly reflects that the SB HVAC costs were prudently incurred and rejects Staff’s proposed disallowance.

B. Staff’s Arguments For Disallowance Continue to Have No Basis or Merit

Staff largely recycles the same arguments the Commission found insufficient in the ALJPO, along with a handful of new claims that are entirely unsupported by the record or the law. As set forth below, AIC respectfully requests that the Commission reject Staff’s exceptions.

First, Staff claims that the Commission “did not give proper weight to Staff’s chief legal and factual arguments regarding the issue of prudence.” (Staff BOE at 2.) Not so. In its forty-nine page Proposed Order, the Commission thoroughly analyzed well over a hundred pages of briefing, hundreds of pages of exhibits and testimony, and a day of live testimony, in concluding that the SB HVAC costs at issue were reasonable and prudent. (ALJPO at 48.) Indeed, Staff’s “chief argument” – that AIC, CUB, the AG, and the NRDC have all mischaracterized the evidence and that AIC did not prudently follow the implementer’s recommendations following the August 2009 low TRC projections – was specifically addressed and rejected by the ALJ. (*Id.* at 47-48.) The ALJ weighed the evidence and found that it supported AIC, CUB, the AG, and the NRDC’s position that “AIC did in fact modify the program consistent with the programmer’s recommendations,” and thus reasonably continued the SB HVAC program with modifications, rather than terminate it. (*Id.* at 47-48) And as noted above, the ALJ rejected Staff’s position that “all other parties have ‘mischaracterized th[is] evidence.’” (*Id.* at 48.) That Staff disagrees with the ALJ is not a basis to reverse course and now agree with Staff’s disallowance.

Second, Staff falsely suggests that AIC failed to provide Staff and the Commission evidence that the gas tune-ups were projected to be cost-ineffective such that “the Commission never had the opportunity carefully review” cost-effectiveness prior to issuing its Final Order in Docket 08-0104. (Staff BOE at 3.) This claim is flat wrong and unsupported. In its Final Order in Docket No. 08-0104, the Commission assessed all of AIC’s proposed programs and measures and approved the portfolio as cost-effective, along with the flexibility to implement the portfolio. (Final Order Docket No. 08-0104 (Oct. 15, 2008) (approving the portfolio, including the SB HVAC Program). The *only* cite Staff provides for its unfounded claim that AIC somehow hid TRC results during the Docket No. 08-0104 plan filing is Staff Ex. 2.0R at 16 (Staff BOE at 3), which cites the August 17, 2009 implementer’s report that was presented to AIC *ten months after* the October 15, 2008 Final Order in Docket No. 08-0104. That the implementer calculated a TRC value – which is a variable-sensitive test that can change depending on who calculates it and when – *after* the Final Order issued in Docket No. 08-104 is of no consequence. The Commission should continue the rejection of Staff’s characterization of the record.

Third, Staff claims that the “facts and circumstances” militated against continuing the program, and yet AIC failed to take the implementer’s advice and instead increased expenditures. (Staff BOE at 4-5, 7.) In support, Staff cites the fact that AIC intended to complete 340 gas tune-ups during PY2, rather than the 300 recommended by the implementer to achieve cost-effectiveness. (*Id.* at 5, 7.) Again, though, Staff’s claim is not supported by the record.

In its Final Report, the implementer stated that “[i]f gas tune-ups are limited to 300 and the balance of the incentive dollars for this program over the three year period go to new equipment installs an overall TRC > 1 should be achieved.” (Joint Cross Ex. 1 at 158.) But this recommendation did not address the additional efficiencies saved by bundling the SB HVAC

tune-ups with AC tune-up and thermostat measures nor did it reflect the value of continuing the program so as to serve the small business market. As the implementer found, “bundling these together can drive each measure quickest to its completion goal, along with minimizing the overall program cost.” (*Id.* at 154.) The implementer concluded that “after about 340 bundled offers the economics change and it will no longer make sense to include the furnace tune up in the bundle because the PY2 therm goal for the Small Business Tune-up Program will have been met.” (*Id.* at 155.) Based on this, AIC reasonably believed the 340 bundled tune-ups recommended by the implementer would help the total SB HVAC Program become cost-effective and, in any event, continue to deliver energy efficiency programs to the small business market.

Additionally, CUB, the AG, and the NRDC all agreed that AIC’s modifications to the Program based on these recommendations were reasonable, and, again, the Commission was “not inclined to find that all the other Parties have ‘mischaracterized the evidence as argued by Staff.’” (ALJPO at 48.) Staff’s claims to the contrary should continue to be rejected.

Fourth, Staff claims that the Commission should presume that a preliminary three-year cost-effectiveness analysis – something that Staff asserts was relied upon by the implementer when recommending to *continue* the SB HVAC program with modifications – would not have justified continuing the program simply because the implementer was unable to produce the analysis in discovery. (Staff BOE at 6.) In essence, Staff argues – for the first time – that the Commission should find AIC imprudent (and reverse the ALJ’s review of the pre-filed and live testimony), because a copy of the analysis was not provided to Staff or put in the record. Such an argument asks the Commission not only to disregard the *recommendations* the implementer provided to the Company (which are in the record), but also to presume that the implementer’s

written analysis would have actually *contradicted* its own recommendation. Respectfully, Staff's argument makes little sense.

Moreover, it runs contrary to the very law cited by Staff. Staff relies on *In re Estate of Wallen*, 262 Ill.App.3d 61, 71 (2d. Dist 1994), a case in which a foreign judgment creditor filed a claim against an estate of the sole shareholder of a corporation seeking to enforce a judgment against that estate pursuant to a veil piercing theory, for the proposition 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.” (Staff RBOE at 6.) Not only is *Wallen* factually inapposite, but this case cuts *against* Staff's argument. The *Wallen* court *rejected* a party's request to make an adverse inference, instead requiring “evidence” that the party “had in his control all of the decedent's prior records,” and “without more, [the Court] cannot impute an unfavorable evidentiary presumption arising from the failure to produce evidence under its control.” *Wallen*, 262 Ill.App.3d at 71 (citing case law finding that an unfavorable evidentiary presumption may arise if a party fails to produce evidence “which is under its control . . . without reasonable excuse”). Here, like in *Wallen*, Staff has never even attempted to make such a showing; in fact, the record suggests that the implementer's written work has always been in the *implementer's* “sole control” – not AIC's. See Joint Cross Ex. 1 at 288 (stating that implementer employee, Amber Roberts, who performed the analysis, is no longer employed with the implementer and the implementer was unable to locate the analysis in her files). Thus, even if *Wallen* did apply, Staff's cite to the case cuts *against* its own argument, and Staff's invitation to the Commission to make an unfounded and unsupported presumption against AIC should be declined.

In any event, raising concerns with the absence of the implementer's underlying analysis is a red herring. "In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered." *Illinois Commerce Comm'n v. The Peoples Gas Light and Coke Co.*, Docket 00-0720, 2002 Ill. PUC LEXIS 170, at *11 (Ill. PUC Jan. 24, 2002). Here, in determining whether to continue the SB HVAC Program, AIC relied on the implementer's findings, projections, and recommendations, including those facts contained in the implementer's August 2009 PY2 Implementation Plan Overview (*see* Staff Ex. 4.1) and the multiple drafts of the PY2 Implementation Plan (*see* Staff Ex. 4.2). That the implementer did not keep its underlying work product leading to its findings, projections, and recommendations has no bearing on whether AIC reasonably relied on the implementer's actual findings, projections, and recommendations. Rather, the record shows that AIC did reasonably and prudently rely on the implementer's projection that the Program would be cost-effective over the life of the plan and its recommendation to continue the Program with certain modifications. (ALJPO at 47-48.)

Fifth, Staff notes that "at the time the missing cost-effectiveness analysis was performed," few customers had received an incentive for new high efficiency equipment installations. (Staff BOE at 6.) But, as set forth in AIC's prior briefing, the implementer explained to AIC that this timing actually drove the low initial customer participation in the Program and resulting TRC results:

The SB HVAC program was developed in the latter half of PY1. As such there was limited time to develop significant relationships with many of the key channel stakeholders, and the time period for HVAC maintenance activities had already occurred (pre-and-early heating season in the September through November timeframe). PY2 activities will expand outreach/marketing to take advantage of the customer awareness and interest when the next heating season begins. As noted above, the "fix on failure" mentality of this

market needs to be tapped when heating systems are first turned on after being idle for the first four or five months leading into the heating season.

(Joint Cross Ex. 1 at 160; 393 (PY2 Implementation Plan, Oct. 12, 2009 Final Draft).) Based on this, the implementer recommended expanding the Program through additional outreach and marketing in advance of the heating season. (*Id.*) The implementer projected that, with the suggested modifications, the SB HVAC Program was expected to have a positive TRC over the life of the plan. (*Id.* at 120; 353.) And, as CUB, the AG, and the NRDC also argued – and the ALJ found – AIC reasonably relied on these recommendations and modified the SB HVAC Program accordingly. (ALJPO at 47-48.)

Finally, Staff claims that “the record shows that the cost-ineffectiveness of the gas tune-up measure is undisputed.” (Staff BOE at 7.) This is an oversimplification and another red herring. It is neither fair nor helpful to retrospectively select “measures” and assess them in a vacuum (that is, without regard to bundling or purpose) for cost-effectiveness and then disallow costs associated with continuing that measure. As noted by AIC witness Dr. John Chamberlin, he is “not aware of any instance where the TRC was applied to determine cost recovery and to do so would be a very dangerous policy.” (ALJPO at 25 (citing Ameren Ex. 5.0 at 13).) This, along with the other reasons set forth by AIC, is precisely why the other parties who have filed an appearance in this docket, along with the ALJPO, agree that Staff’s position should be rejected and the Commission should find that the SB HVAC costs were reasonable and prudent. (*See* ALJPO at 48-49.)

III. CONCLUSION

For the reasons set forth above, as well as those set forth in Ameren Illinois’ previous filings in this docket, the Commission should enter a Final Order consistent with the exceptions requested or supported by Ameren Illinois.

Dated: September 10, 2013

Respectfully submitted,

The Ameren Illinois Company

By: /s/ Mark W. DeMonte
One of its attorneys

Edward C. Fitzhenry
Matthew R. Tomc
Counsel for Ameren Illinois
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149 (mc 1310)
St. Louis, MO 63166-6149
(314) 554-3533
(314) 554-4673
(314) 554-4014, fax
efitzhenry@ameren.com
mtomc@ameren.com

Mark W. DeMonte
JONES DAY
77 West Wacker Drive
Chicago, IL 60601-169
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
mdemonte@jonesday.com

CERTIFICATE OF SERVICE

I, Mark W. DeMonte, an attorney, certify that on September 10, 2013, I served a copy of the foregoing Ameren Illinois Company's Brief in Reply to Exceptions by electronic mail to the individuals on the Commission's Service List for Docket No. 11-0341.

s/ Mark W. DeMonte

Mark W. DeMonte

Attorney for Ameren Illinois Company