

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF)
ILLINOIS)
) Docket No. 14-0380
Petition for an Order Pursuant to Section 8-509 of)
the Public Utilities Act Authorizing Use of Eminent)
Domain Power.)

**AMEREN TRANSMISSION COMPANY OF ILLINOIS’ RESPONSE IN OPPOSITION
TO VERIFIED MOTION OF IPAVA INTERVENORS TO ADMIT APPRAISALS**

I. INTRODUCTION

On June 18, ATXI moved to strike the Ipava Intervenors’ Brief on Exceptions, and Exceptions because that filing asked the Commission to do something it cannot: base its decision in this case on documents not subjected to the adversarial process or admitted into the evidentiary record. On June 23, the Administrative Law Judge granted ATXI’s motion. Now, the Ipava Intervenors have filed a motion that largely repeats verbatim their unpersuasive response to ATXI’s motion, and again asks the Commission to consider the subject documents. The Ipava Intervenors’ new motion, at best, disregards the ALJ’s June 23 Ruling; at worst, it improperly attempts to circumvent it. For these reasons, and as explained more fully below, the Commission should deny the Ipava Intervenors’ Motion to Admit Appraisals.

II. ARGUMENT

As ATXI explained in its June 18 Motion to Strike, due process in administrative proceedings requires the opportunity to be heard and the right to test adverse evidence. *See, e.g., Gigger v. Bd. of Fire & Police Comm’rs of City of East St. Louis*, 23 Ill. App. 2d 433, 439 (4th Dist. 1959); *Abrahamson v. Ill. Dep’t of Prof’l Reg.*, 153 Ill. 2d 76, 95 (1992); *Balmoral Racing Club, Inc. v. Ill. Racing Bd.*, 151 Ill. 2d 367, 400-01 (1992). Consistent with this principle, the Commission can base its decisions only on the record evidence. 220 ILCS 5/10-103; 220 ILCS

5/10-201(e)(iv); 5 ILCS 100/10-35(c). This ensures that the Commission's findings are grounded in facts that—consistent with due process—have been admitted into evidence and subjected to the adversarial process. *See, e.g., Ill. Comm. Comm'n v. Ill. Gas Co.*, Docket 02-0170, Order, 2003 Ill. PUC LEXIS 682, *35-36 (Aug. 6, 2003) (no consideration given to expert qualifications submitted for the first time in reply brief on exceptions); *Commonwealth Edison Co.*, Docket 92-0121, Order, 1995 Ill. PUC LEXIS 232, *25-26 (Apr. 12, 1995) (no consideration given to proposal offered after evidentiary hearing concluded).

On this basis, ATXI moved the Commission to strike the Ipava Intervenors' Brief on Exceptions, and Exceptions from the record because that filing asked the ALJ to revise his Proposed Order based on certain appraisal documents not subjected to the adversarial process or, consequently, admitted to the evidentiary record. (ATXI Mtn. Strike at 1-2 (filed June 18, 2014).) The ALJ granted the motion. (Notice of ALJ's Ruling (June 23, 2014).)

The Ipava Intervenors' instant motion to admit the appraisal documents into the evidentiary record does not change the analysis. The documents *still* have not been subjected to the adversarial process, so they cannot be admitted to the evidentiary record. (ATXI Mtn. Strike at 1-2.) Indeed, as the Ipava Intervenors aptly pointed out in their response to ATXI's June 18 motion, ATXI has not had the opportunity to test the documents through discovery or to otherwise challenge their veracity through cross-examination at hearing. (Ipava Int. Resp. at 2 (filed June 19, 2014).) Nor can it; the June 9 evidentiary hearing has long since passed.

Labeling the appraisal documents "late-filed exhibits" also does not change the analysis. The Ipava Intervenors argue that the Commission's rules and precedent permit late-filed exhibits like the appraisal documents. (Ipava Int. Mtn. Admit ¶ 7 (filed June 23, 2014).) What they they fail to acknowledge, however, is that late-filed exhibits are admitted to the evidentiary record

only for good cause. 83 Ill. Adm. Code 200.875(c) (permitting the ALJ or the Commission, in their discretion, to consider late-filed exhibits “for good cause shown”); 83 Ill. Adm. Code 200.200(e) (requiring an intervenor to accept the status of the record as it exists at the time of intervention “[e]xcept for good cause shown”). The Ipava Intervenors have offered no cause—let alone *good* cause—for the lateness of their proposed exhibits. The appraisal documents have 2013 dates. (Ipava Int. Mtn. Admit, Ipava Grp. Ex. 1.) And there is no dispute that the Ipava Intervenors received notice of ATXI’s May 13, 2014 petition filing. Yet, inexplicably, the Ipava Intervenors did not request intervention in this proceeding or submit the appraisal documents for the record until June 18—well after the June 9 evidentiary hearing and June 13 Proposed Order. Whether that delay was a proper choice is for the Ipava Intervenors to decide. But the Commission’s rules—and basic due process principles—do not permit the “wait and see” apparent litigation strategy the Ipava Intervenors have employed here. *See, e.g., GTE North Incorp.*, Docket 93-0191, 1993 Ill. PUC LEXIS 488, *3-6 (Order, Dec. 15, 1993) (denying late petition to intervene and motion to reopen the record); *Commonwealth Edison Co.*, Docket 02-0838, 2004 Ill. PUC LEXIS 438, *12-15 (Order, Aug. 4, 2004) (denying late petition to intervene and objection to the record).

The Ipava Intervenors’ claim that they “are not requesting any information that is subjective, or subject to interpretation, be considered,” also does not remove the requisite adversarial scrutiny. (Ipava Int. Mtn. Admit ¶ 8.) Here, the Ipava Intervenors simply highlight ATXI’s point in moving to strike their Brief on Exceptions, and Exceptions: the appraisal documents have not been subjected to the adversarial process. Thus, the Commission has only the Ipava Intervenors’ counsel’s say-so in brief that the documents are what they purport to be. But statements of the Ipava Intervenors’ counsel in brief cannot serve as a lawful basis for the

Commission's order in this proceeding. *See* 220 ILCS 5/10-103; 220 ILCS 5/10-201(e)(iv); 5 ILCS 100/10-35(c); *Johnson v. Lynch*, 66 Ill. 2d 242, 246 (1977).

The Ipava Intervenors' new motion simply overlooks the basic due process guarantee of adversarial scrutiny and, in so doing, the ALJ's June 23 Ruling recognizing that guarantee. Their motion also directly ignores the Ruling. Notable, in their response to ATXI's motion to strike their Brief on Exceptions, and Exceptions, the Ipava Intervenors specifically asked the ALJ to admit the subject appraisal documents as late-filed exhibits:

If necessary or appropriate, Ipava Intervenors ask that the appraisals comprising Group Exhibit 1 be treated as a late-filed exhibit for admission into evidence, under Section 200.875(c) of the Commission's Rules of Practice. 83 Ill. Admin. Code 200.875(c). Ipava Intervenors request that the ALJ reopen the record, if necessary or appropriate, for the sole and limited purpose of admitting Group Exhibit 1 into the evidentiary record. If the ALJ so desires, Ipava Intervenors will produce and file supporting affidavits of the landowners for whom the appraisals are applicable.

(Ipava Int. Resp. at 3.) The ALJ's June 23 Ruling, in granting ATXI's motion, necessarily rejected the Ipava Intervenors' proposed alternative relief. Nevertheless, the Ipava Intervenors' new motion requests precisely the same relief—that the ALJ admit the appraisal documents as late-filed exhibits. The Commission should not condone such disregard of its rulings.

III. CONCLUSION

The ALJ's June 23 Ruling striking the Ipava Intervenors' Brief on Exceptions, and Exceptions was not an invitation to the Ipava Intervenors to ask the Commission to consider the their appraisal documents by other means. Simply put, the time for moving those documents into the evidentiary record—the June 9 evidentiary hearing—has passed. The Commission should, consistent with the ALJ's June 23 Ruling, deny the Ipava Intervenors' new motion to admit the appraisal documents as inexplicably late exhibits.

Dated: June 24, 2014

Respectfully submitted,

AMEREN TRANSMISSION COMPANY OF
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By: /s/ Albert D. Sturtevant

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on June 24, 2014, I caused a copy of the foregoing *Ameren Transmission Company of Illinois' Response in Opposition to Verified Motion of Ipava Intervenors to Admit Appraisals* to be served by electronic mail to the individuals on the Commission's Service List for Docket 14-0380.

/s/ Albert D. Sturtevant

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