

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY)	
d/b/a Ameren Illinois)	
)	Docket No. 14-0317
Rate MAP-P Modernization Action Plan -)	
Pricing Annual Update Filing)	

**APPLICATION FOR REHEARING OF THE CITIZENS UTILITY BOARD
AND THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS**

Now come the Citizens Utility Board (“CUB”) and the Illinois Industrial Energy Consumers (“IIEC”) (collectively “CI”), pursuant to the Rules of Practice of the Illinois Commerce Commission (“ICC” or “the Commission”), 83 Ill. Admin. Code Part 200.880, to hereby file this Application for Rehearing in the above-captioned proceeding.

I. INTRODUCTION

The Commission’s Final Order of December 10, 2014 finds merit in the proposal of CUB, IIEC, and the People of the State of Illinois (“AG”) that the reconciliation balance on which interest is calculated should be net of accumulated deferred income taxes (“ADIT”). Order at 67. The Order acknowledges that the intervenors’ approach conforms to GAAP, could capture deferred tax benefits, and is likely a more accurate accounting for all of the economic impacts caused by the revenue requirement reconciliation. *Id.* Yet, despite the guidance offered in a recent appellate court decision *see, Ameren Illinois Co. v. Illinois Commerce Comm’n, et al.*, 2013 Ill.App. 4th 121008 (discussed below), the Order relies on a statutory interpretation that it states prohibits it from reading exceptions, limitations or conditions into the EIMA that the

legislature did not express. Order at 67, *citing Davis v. Toshiba Machine Co.*, 186 Ill.2d 181, 184-85 (1999). The Commission then notes that this issue is currently on appeal and the appellate court decision will “provide needed clarity on this issue.” Order at 67-68. There is no telling when an appellate court ruling could be issued, much less when the procedural steps necessary to apply it to the rates set in this case could conclude. It is the Commission’s responsibility to set just and reasonable rates, and the evidence in this case demonstrates that Ameren Illinois Company d/b/a Ameren Illinois (“Ameren” or “the Company”) will over-recover interest on its reconciliation balance unless that balance is calculated net of ADIT.

For the reasons set forth in the CI Initial Brief, Reply Brief, and Brief on Exceptions (at 8-21, 6-16, and 4-9, respectively), incorporated herein by reference, as well as those described below, the Commission should grant rehearing to determine the correct reconciliation balance on which interest is calculated.

II. ARGUMENT

As it stands, the Commission’s decision would allow Ameren to recover interest on its full reconciliation balance rather than its actual investment in that balance (i.e. the balance net of ADIT). In other words, Ameren will recover interest on a cash outlay it really did not make in 2013, and therefore will recover more than its actual costs in violation of fundamental cost recovery principles of the formula rate law. Ameren did not actually have to finance the entire amount that is considered the reconciliation balance (*i.e.* the difference between what Ameren collected and its actual 2013 revenue requirement). It benefitted from tax deductions resulting from the fact that its costs were higher than the level reflected in rates. CI Ex. 1.0 at 2-3:33-46. In Docket No. 13-0501/0517 (cons.), the Commission stated that, if further arguments from the

parties were presented or clarity from the legislature is provided on the topic, the Commission would revisit the issue. Docket No. 13-0501/0517 (cons.) Interim Order Nov. 26, 2013 at 26. The parties did in fact present further compelling arguments as to why interest should be calculated only on the net-of-ADIT reconciliation balance in this case. *See* CI Init. Br. at 8-21, CI Reply Br. at 6-16. The proposal set forth by both CI and the AG in this case is appropriate from an accounting standpoint (Order at 67), and is consistent with a recent appellate court opinion. CI will not restate all of the evidentiary grounds previously set forth in CI briefs, but instead incorporate those herein by reference.

The Commission states that it is troubled by the fact that the accounting treatment proposed by CI and the AG was not specifically provided for in the EIMA. Order at 67. The Order acknowledges the recent Illinois Appellate Court Decision, *Ameren Illinois Co. v. Illinois Commerce Commission et al.*, 2013 IL App (4th) 121008 (“*Ameren*”), which interpreted the EIMA as requiring the Commission to recognize the impact of ADIT on a utility’s rate base, even though not explicitly provided for in the Act, because to do otherwise would allow the utility to recover inflated, unjust and unreasonable rates. *Ameren* at 13 ¶39. The Order states that the ADIT issue in the *Ameren* case “bears some similarity to the reconciliation interest issue at hand, [but] the Commission is reluctant to rely upon the holdings therein in light of the arguments concerning its applicability.” Order at 67. The *Ameren* decision is directly applicable, and to ignore its effects is to ignore the relevant and controlling case law on this issue. While it is true that this issue is on appeal as it relates to ComEd (Order at 67-68), that fact does not have any bearing on the Commission’s responsibility to make the correct decision in this case. Furthermore, the Commission should not reject relevant and controlling precedent,

based only on a general reference to arguments “about its applicability,” without providing any legal analysis.

Rates from this case have already taken effect, and ratepayers are now paying unjust and unreasonable rates. They will continue to do so indefinitely, as no party has knowledge of or control over when the appellate court might issue its opinion. Even if the appellate court does overturn the Commission’s decision in 13-0553, that will not immediately re-set the rates set in this case. A party, or the Commission on its own motion, will have to take procedural steps to ensure the applicability of that decision to this case, and take further time and effort to then attempt to recover a refund for ratepayers for the unreasonable rates they have paid in the meantime. If the Company were to appeal any such decision, this Final Order – and the inflated rates set by it – will remain in effect during the pendency of an appeal, unless stayed or suspended. 220 ILCS 5/10-204. Ratepayers are being charged unjust rates right now, and will continue to do so until either (1) the Commission conducts rehearing and reverses its decision, or (2) the appellate court overturns the Commission’s 13-0553 decision, and that decision is made applicable to the instant case.

The *Ameren* decision makes clear that acknowledging ADIT in EIMA formula rate calculations is necessary in order to ensure that a utility does not recover above and beyond what would normally be recoverable in a ratemaking case. *Ameren* at 13-14 ¶39. In the *Ameren* case, the court reviewed the Commission’s decision to reduce Ameren Illinois Company’s (“Ameren’s”) rate base by ADIT for projected plant additions. *Ameren* at 11 ¶34. Ameren made the same argument in that case as it has made here – that while the statute provides guidance for other adjustments, it does not mention an adjustment for ADIT. *Ameren* at 12-13 ¶37. The court agreed with the Commission that ignoring the ADIT figure would, contrary to the EIMA, allow

Ameren to recover an unjust and unreasonable rate base that had been inflated by no-cost capital for the benefit of Ameren. *Ameren* at 13 ¶39. The court also noted that its decision was consistent with the common practice of the Commission to acknowledge ADIT in the ratemaking process. *Ameren* at 14 ¶40.

The same logic as the court applied in *Ameren* is directly applicable to this case. Allowing Ameren to recover interest on a reconciliation balance that is not net-of-tax allows Ameren to recover inflated rates beyond what is recoverable in the ratemaking process. The *Ameren* appellate decision makes clear that the CI and AG statutory interpretation is the correct one. In this case, the Commission stated that the statute did not expressly allow for an adjustment for ADIT, but did not expressly disallow the adjustment either. Order at 67. In fact, the Commission made this same statement in response to the Company's argument in *Ameren*. *Ameren* at 13 ¶38. There the Company argued that, because the statute did not specifically mention an adjustment for ADIT, the Commission could not make such an adjustment. *Ameren* at 12 ¶37. The *Ameren* court was apparently persuaded by the Commission's argument that it was not prohibited from making the ADIT adjustment simply because it was not specified in the statute. The Court concludes, in spite of the absence of a specific reference to such an adjustment, that the Commission could still lawfully make that adjustment to prevent the utility from receiving, what the Court characterizes as an interest free loan at ratepayers expense. *Ameren* at 13 ¶39. In this case, allowing Ameren to recover interest on a reconciliation balance that reflects cash outlays that the Company did not make in 2013 is equivalent to having ratepayers pay interest on a loan Ameren never had to take out.

In *Ameren*, the court examined whether ADIT should properly be deducted from rate base, while in this case, CI and the AG's primary recommendation was to deduct ADIT from the

reconciliation balance on which interest is calculated. The principles behind the *Ameren* decision, however, are not limited only to deducting ADIT from rate base. Just as ADIT must be deducted from rate base, so too must it be deducted from the reconciliation balance on which interest is calculated. Any other result allows Ameren to recover interest on more than its actual investment in the reconciliation balance, (*i.e.*, recover interest on a cash outlay it did not make), thus resulting in unjust and unreasonable rates. Though using a net-of-ADIT reconciliation balance for calculating interest is not specifically prescribed by the EIMA, the *Ameren* decision makes clear that the Commission has the authority to determine whether rates are just and reasonable in accordance with Commission practice. The EIMA's objective to match rates with the utility's actual costs requires that Ameren recover interest on no more than its actual investment in the reconciliation balance.

The *Ameren* decision is consistent with Illinois's long-standing history of recognizing that the Commission has authority to do what is reasonably necessary to accomplish the legislature's objective, including formulating reasonable methods of achieving stated legislative objectives. *Abbott Lab., Inc. v. Ill. Commerce Comm'n*, 682 N.E.2d 340, 348 (5th Dist. 1997) (affirming Commission orders approving penalties imposed on natural gas utilities that were not enumerated by statute). EIMA does not change the ICC's statutory role in ensuring that rates are just and reasonable, and that utility investments used in setting rates are reasonably and prudently made. 220 ILCS 5/16-108.5(d) ("such review shall be based on the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, the Commission applies in a hearing to review a filing for a general increase in rates under Article IX of this Act."). The EIMA makes clear determinations that the

prudence and reasonableness of the utilities' costs are to be made in accordance with standards established under Article IX of the Public Utilities Act ("PUA" or "the Act"). *Id.*

The premise of the *Ameren* order is implicitly based upon the notion that the General Assembly need not legislate every implementation detail or circumstance in the enforcement of a law. Intelligible standards to guide the agency charged with enforcement are sufficient. *Memorial Gardens Ass'n, Inc. v. Smith*, 16 Ill.2d 116, 131 (1959). The General Assembly may delegate to others, including administrative agencies, ". . . the authority to do those things the legislature might properly do, but cannot do as understandingly or advantageously." *Hill v. Relyea*, 34 Ill.2d 552, 555 (1966). As the *Ameren* court stated, the EIMA's ratemaking process is ultimately designed to not allow recovery of costs beyond what would normally be recoverable in a ratemaking case. *Ameren* at 13 ¶39. In this instance, absent the adjustment recommended by CI and the AG, Ameren will recover interest on a loan it never took out and a cash outlay it did not make. Thus, Ameren would recover costs (interest) that are beyond those that would normally be recoverable.

The overarching "actual costs" focus of the formula rate statute requires that the Commission interpret the statute to effect recovery of only the utility's actual prudent and reasonable costs. *See* 220 ILCS 5/16-108.5 (b-5) and (c)(1). The *Ameren* decision is correct that ADIT must be acknowledged in order for costs to be correct. *Ameren* at 13-14 ¶39. The record demonstrates that Ameren's actual interest costs, determined consistently with Commission practice, are determined by interest calculated on the reconciliation balance net of related ADIT.

III. CONCLUSION

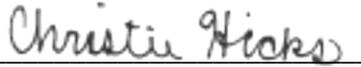
The Commission's Order, for the reasons stated above, is not supported by substantial evidence; is inconsistent with the provisions of Section 16-108.5 of the Public Utilities Act; and lacks the findings necessary to allow an informed judicial review.

WHEREFORE, CI respectfully request that the Commission grant rehearing to reconsider its conclusion on the issue of the treatment of ADIT in determining the reconciliation balance on which interest is calculated.

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Respectfully Submitted,

THE CITIZENS UTILITY BOARD



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