

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	Docket No. 12-0457
	)	
Development and adoption of rules concerning	)	
rate case treatment of charitable contributions	)	

**REPLY BRIEF ON EXCEPTIONS OF THE CITIZENS UTILITY BOARD**

In accordance with the Rules of Practice of the Illinois Commerce Commission (“ICC” or “Commission”), Section 200.830 (83 Ill. Admin. Code 200.830), and the schedule set by the Administrative Law Judge (“ALJ”) in his March 11, 2015 ruling, the Citizens Utility Board (“CUB”) hereby submits these Reply Brief on Exceptions, in response to the Briefs on Exceptions (“BOEs”) filed March 25, 2015 by Nicor Gas Company (“Nicor”), Ameren Illinois Company (“Ameren”), North Shore Gas Company/The Peoples Gas Light and Coke Company (“NS/PGL”), MidAmerican Energy Company (“MidAmerican”), and Commonwealth Edison Company (“ComEd”) (collectively, “the Utilities”). CUB supports the ALJ’s Proposed Order of March 11, 2015, which adopted the Staff Proposed Rule with a very minor change. On the other hand, the Utilities, in their BOEs, continue to request concessions that would frustrate the purpose of the rule, arguing against transparency and leaning heavily on the notion that the Commission need not concern itself with the reasonableness of individual contributions. For the reasons set forth in CUB’s Initial and Reply Comments, and those set forth below, the Commission should adopt the Proposed Order’s conclusions. Those conclusions are consistent with the purpose of this rulemaking, which was intended to establish a “higher standard of information for future filings to ensure that when rate payers are asked to pay for charitable contributions made by the utility, the review of the prudence of those contributions can be

sufficient.” Initiating Order at 1, *citing* ICC Docket No. 11-0721 Final Order at 99). As noted by the Proposed Order, the Commission has broad discretion to adopt reasonable and proper rules and regulations relative to the exercise of its powers and functions. Proposed Order at 32. The Commission should use that discretion to adopt the Proposed Rule (Appendix to the Proposed Order), which provides for the higher level of information that this rulemaking was intended to provide.

### **SECTION 325.120 Supplemental Information To Be Provided Regarding Charitable Contributions**

The Utilities proposed to strike one of the eleven requirements in Section 325.120. Specifically, the Utilities each take issue with Section 325.120(a)(3), which requires utilities to provide a “Description of why the donor utilities believes the charitable contribution amount is reasonable.” This seemingly basic requirement goes to the heart of the purpose of this rulemaking. The Utilities generally argue that the Public Utilities Act (“PUA”) and case law require only that the aggregate amount of contributions be reasonable, not that individual contributions be reasonable. Ameren BOE at 3-5, NS-PGL BOE at 2-4, MidAmerican BOE at 2-3, ComEd BOE at 5-7, Nicor BOE at 3-5. Such a narrow read of the statute, case law, and the Commission’s authority is inaccurate and inappropriate.

The language of the PUA states that the Commission may consider as an operating expense donations made by a public utility “for the public welfare or for charitable scientific, religious or educational purposes, provided that such donations are reasonable in amount.” 220 ILCS 5/9-227. The legislature did not say, as it could have, “provided that the aggregate of such donations is reasonable in amount.” Indeed, even if it had, the sum total of a utility’s donations cannot be reasonable unless the amounts of the individual donations are also reasonable. As

noted in *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill. 2d 175, 254 (1991), there is no presumption of the reasonableness of a utility's donations. In that case, the court did not consider whether donations could or should be considered individually rather than the aggregate, so the Utilities' arguments that "the Illinois Supreme court did not find that the utility bears the burden of showing each individual donation is reasonable," (MidAmerican BOE at 3) are misplaced. The Court also did not reach the opposite conclusion – it simply did not consider the issue. What is clear from the Court's holding in *BPI*, however, is the importance of the Commission's reasonableness review of charitable contributions. The Commission must therefore adopt a rule that comports with that requirement, including considering the Utilities' own "Description of why the donor utility believes the charitable contribution amount is reasonable."

As explained in the Proposed Order, the aggregate amount of a utility's charitable contributions is only one component of the determination of what donation costs should be absorbed by ratepayers. Proposed Order at 13. The Utilities' arguments that the aggregate amount of their contributions can be found reasonable without reviewing the individual components of that amount are simply illogical. For example, Ameren argues that "the language contained in the rule and endorsed by the Proposed Order, may lend itself to parties challenging the reasonableness of individual charitable contributions amounts in a manner not contemplated by the legislature or interpreted by the course...This level of micro-analysis would be counterproductive and frustrate the intent of Section 9-227." Ameren BOE at 3-4. Ameren is wrong. Reviewing individual contributions is not only an authorized, but a necessary part of the Commission's analysis. As the Proposed Order notes, "[i]t is impossible to determine whether an aggregate amount is reasonable unless the reasonability of its component parts has been

demonstrated.” Proposed Order at 13. In fact, even in the absence of this proposed rule, the Commission routinely disaggregates donations and makes independent reasonableness determinations with regard to each one. *See e.g.* ICC Docket No. 12-0511/12-0512 (cons.), Final Order of June 18, 2013 at 166-167; ICC Docket No. 13-0301, Final Order of December 9, 2013 at 77-78.

### **SECTION 325.140 Required Disclosures**

The Utilities also all seek to strike Section 325.140 in its entirety. That subsection provides for certain disclosures a utility must make to organizations to which it contributes. The Proposed Order found that this subsection provides ratepayers with “clear transparency regarding ratemaking and the determination of whether rates are in fact just and reasonable. If the utilities’ customers are ultimately funding these donations through the rates they pay, then it is the customers, and not the utilities, to which recognition should be given.” Proposed Order at 27. The Utilities seem frustrated by the idea that rate transparency should be a concern of the Commission. For example, ComEd and Nicor argue that “the disclosure requirements in Section 325.140 have no bearing on whether charitable contributions are reasonable as required by Section 9-227.” ComEd BOE at 8, Nicor BOE at 6. NS-PGL argue that the disclosures are “beyond the scope of proceeding and provid[e] no relevant information to the Commission in its decision making process.” NS-PGL BOE at 4. They go on to state that there is no nexus between increasing transparency and fairness and the purpose of this rulemaking. *Id.* at 5. MidAmerican likewise states that there is no nexus between the disclosures and the reasonableness of the donation. MidAmerican BOE at 6. Finally, Ameren goes so far as to claim that the required disclosures are unconstitutional “forced speech.” Ameren BOE at 10-11.

The Utilities' arguments – each more absurd and histrionic than the next – are easily refuted by the logic articulated in the Proposed Order. First, utilities are free to fund any contributions they please by shareholder dollars, in which case the entirety of the draft rule does not apply to that donation. Proposed Order at 27. Further, the rule does not make recovery of a contribution dependent upon an organization actually making such a disclosure – it only states that the utility should make the request. The disclosures required in this subsection are both within the scope of this docket and relevant to the Commission's consideration of charitable contributions. These disclosures provide the higher standard of information sought by the Commission in its Initiating Order. They provide a higher standard of information to recipient donees, to ratepayers, and to the Commission. Additionally, as noted by Staff in its Reply Comments, the Commission can and should consider information that a utility is unwilling or unable to provide this very basic level of transparency to any of those groups. Staff Reply Comments at 13. If the utility is unwilling to make the disclosures provided in the rule, it calls into question the utility's motivations in making the donation.

Ameren's argument that its First Amendment rights are violated (Ameren BOE at 10) by these disclosures is novel, but ultimately fails. For one, Illinois utilities already make similar disclosures on energy efficiency advertising. See Staff Reply Comments Appendix A. By Ameren's logic, they should not be required to conform to the Rules of Part 285, as that might force the utility to "conform to an agenda it has not set." See Ameren BOE at 11. Additionally, as previously noted, if Ameren prefers not to make disclosures in the manner required by the Commission about its donations, then it can easily avoid making those disclosures. It simply must burden its shareholders, rather than its ratepayers, for the costs of those contributions. The fact is that the Commission's authority allows it to dictate the manner in which a utility must

present its costs for recovery. If a utility does not like those requirements, it can avoid any of them by simply not seeking ratepayer recovery. For charitable contributions, a non-essential operating expense that provide nothing to ratepayers in the form of safety or reliability, that option is certainly available.

The Commission should adopt this subsection of the Proposed Rule, which provides a higher level of information to all stakeholders in the ratemaking process.

**SECTION 325.160 Disclosures Regarding Donations or Charitable Contributions made in compliance with the requirements of Article IX and Section 16-108.5(b-10)**

Only ComEd and Nicor provide substantive arguments against this subsection, arguing that it is outside the scope of this proceeding. ComEd BOE at 10, Nicor BOE at 7-8. This subsection should hardly be contentious. It provides for nothing more than a utility certification that the donations for which recovery is sought are not prohibited from recovery by statute. If a utility either refuses to or cannot provide a sworn statement that its donations were made in compliance with existing law, that itself could be evidence that its contributions are not reasonable. This requirement provides an additional level of assurance to the Commission that a utility has considered whether each donation is allowable before it has requested ratepayer recovery for that donation. This is an uncomplicated requirement and is a “reasonable and proper exercise of [the Commission’s] rule making powers.”

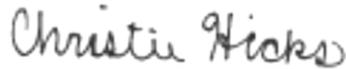
## CONCLUSION

WHEREFORE, CUB respectfully requests that the Commission adopt the conclusions set forth in the Proposed Order as well as the Proposed Rule attached as an Appendix to that Proposed Order.

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Respectfully Submitted,

THE CITIZENS UTILITY BOARD



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