STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County and Municipal Employees, Council 31,	)	
Petitioner	)	
and	)	Case Nos. S-RC-10-034 S-RC-10-036
State of Illinois, Department of Central Management Services (Illinois Commerce Commission),	)	
Employer	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On July 2, 2012, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a Recommended Decision and Order (RDO) in the above-referenced consolidated cases, determining that employees of the Illinois Department of Central Management Services (Employer) working at the Illinois Commerce Commission (ICC) in the titles of Administrative Law Judge III and Administrative Law Judge IV, are managerial employees within the meaning of Section 3(j) of the Illinois Public Labor Relations Act, 5 ILCS 315/3(j) (2010),[1] and not public employees within the meaning of Section 3(n) of the Act,[2] and for that reason that the petitions filed by AFSCME Council 31 (Petitioner) to include them in the existing RC-10 bargaining unit it represents should be dismissed.

[1] Section 3(j) provides: "'Managerial employee' means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices."

[2] Relevant to this case, Section 3(n) provides: "'Public employee' or 'employee', for the purposes of this Act, means any individual employed by a public employer ... but excluding all of the following: ... managerial employees [.]"

Pursuant to Section 1200.135(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b), Petitioner filed timely exceptions to the RDO. The Employer has submitted a one-page letter in response which purports to incorporate its post-hearing brief. Based on a review of the RDO, the record, the exceptions and supporting brief, and the substantive portion of the Employer's letter,[3] we affirm and adopt the ALJ's recommended decision and order.

At issue is whether the ALJ IIIs and IVs at the ICC are managerial employees under the traditional, statute-based test. There is a procedural history to the case which informs the issue. The petition for representation was initially assigned to ALJ Ellen Strizak who, after reviewing the Employer's position statement and the Employer's supplemental position statement (filed in response to her show cause order), determined that the Employer had failed to raise an issue of fact or law warranting a hearing and recommended that the Executive Director certify the petitioned-for employees as part of the RC-10 bargaining unit. Following certification, the Employer filed a petition for judicial review, and on December 28, 2010, the Illinois Appellate

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[3] We do not accept the Employer's attempt to incorporate previously filed documents as part of its response. Nothing in the Board's rules allow for such incorporation; in fact, with respect to exceptions and cross-exceptions, the Board's rules provide:

> Exceptions and/or cross-exceptions shall specifically set forth the questions of procedure, fact, law or policy to which exception is taken, shall identify that part of the Administrative Law Judge's recommended decision and order to which objection is made, and shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be deemed to have been waived. Any exception that fails to comply with the foregoing requirements may be disregarded.

80 Ill. Admin. Code §1200.135(b)(2).

In attempting to incorporate a document filed before the ALJ issued her RDO, the Employer assures that its response will *not* be focused on the analysis used by the ALJ, nor responsive to the particular points being raised in the Petitioner's exceptions. Even if the document were to fortuitously address the Petitioner's exceptions in the context of the ALJ's analysis, it would likely contain extraneous material that would diminish the Board's ability to adequately review the case.

Having rejected the attempt to incorporate the pre-decisional brief, the Employer's response consists of this single sentence: "In addition, the State submits that AFSCME's legal analysis is not in conformity with, and misstates and/or misapplies the standards set forth in the Opinion of the Fourth District Court of Appeals in this case, incorporated herein by this reference."

Court, Fourth District, issued a published decision, reversing certification and remanding "for further administrative proceedings on the question of whether the eight ALJs in question are managerial employees." Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766 (4th Dist. 2010).

The court rejected the Employer's "managerial as a matter of law" line of argument, so the only issue remaining concerns straightforward application of the Section 3(j) definition of a managerial employee under the traditional test. The Appellate Court decision provides a great deal of discussion relevant to that topic. We believe the ALJ's analysis closely tracks the task laid out for us by the Appellate Court, and that the evidence of what the ALJ IIIs and IVs do supports the conclusion that they are managerial employees under that analysis.

Conclusion

For these reasons, we affirm and adopt the ALJ's recommended decision and order finding that the Administrative Law Judge IIIs and Administrative Law Judge IVs at the Illinois Commerce Commission are managerial employees within the meaning of the Act, and we dismiss the petitions for representation filed in these consolidated cases.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

John Hartnett, Chairman

Paul S. Besson, Member

James Q. Brennwald, Member

Michael G. Coli, Member

Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois, on October 9, 2012; written decision issued at Chicago, Illinois, October 26, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services, Employer and American Federation of State, County and Municipal Employees, Council 31, Petitioner	)	Case Nos. S-RC-10-034 & S-RC-10-036

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. Background

On July 28, 2009, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union) filed a petition with the Illinois Labor Relations Board (Board) seeking to include the titles Administrative Law Judge III and Administrative Law Judge IV (ALJs) employed at the Illinois Commerce Commission (ICC) in the RC-10 bargaining unit. The State of Illinois, Department of Central Management Services (Employer) opposed the petition, asserting that the employees sought to be represented are excluded from coverage of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), as amended, pursuant to the exemption for managerial employees. The Board's Administrative Law Judge Ellen Strizak denied the Employer an oral hearing and the Board's Executive Director then certified AFSCME as the exclusive representative of the petitioned-for ALJ IIIs and IVs. The Employer filed a petition for administrative review of the Board's order to the Illinois Appellate Court for the Fourth District asserting that the Board erred by certifying AFSCME as the exclusive representative of the ICC's ALJ IIIs and IVs without holding an oral hearing. On December 28, 2010, the Illinois Appellate Court reversed the Board's order and Certification of Representative and remanded the case for hearing on the question of whether the ICC ALJ IIIs and IVs are managerial employees as a matter of fact, within the meaning of Section 3(j) of the Act.

A hearing on the matter was conducted on January 18 and 19, 2012. Both parties elected to file post-hearing briefs.

II. Preliminary Findings

The parties stipulate and I find:

1. At all times material, the Employer has been a public employer within the meaning of Section 3(o) of the Act and the Board has jurisdiction over this matter pursuant to Section 5(a) of the Act.
2. AFSCME is a labor organization within the meaning of Section 3(i) of the Act.
3. The petitioned-for employees are not managerial as a matter of law.

III. Issues and Contentions

The issue is whether the petitioned-for employees are managerial as a matter of fact within the meaning of Section 3(j) of the Act.

The Union argues that the ALJs are not managerial employees within the meaning of Section 3(j) of the Act because their recommendations to the Commission largely do not involve major policy issues and instead predominantly concern routine and/or uncontested matters in which the ALJs apply the facts to the law in accordance with established Commission policy. As such, the Union asserts that the ALJs' work renders them professional rather than managerial employees.

Second, the Union notes that the ALJs do not make effective recommendations concerning policy issues because they merely frame issues for further substantive review by the commissioners and their assistants. Further, the Union asserts that the Commission has rejected ALJs' recommendations, even in routine cases, and that it does not rubber-stamp the ALJs' decisions.

Finally, the Union asserts that the ALJs are not managerial because they rely on the Commission's technical experts and are thus not the "whole game" in recommending the formulation of commission policy. The Union further notes that the ALJs have also received some guidance and instruction with respect to certain cases from their superiors.

The Employer argues that the ALJs are managerial employees because they directly effectuate the policies of the Commission through their effective recommendations.

The Employer notes that the ALJs are engaged predominantly in executive and management functions because they spend 90% of their time making recommendations on cases concerning rates, consumer complaints, certificates of service authority, expansion of services, the promotion of competition, and other policy issues related to the delivery of public utility services in the State of Illinois.

Finally, the Employer argues that the ALJs' recommendations are effective because the Commission accepts them 99% of the time.

IV. Facts

1. Commission Structure

The Illinois Commerce Commission (ICC or Commission) was established by the Illinois General Assembly. The Commission regulates public utilities including gas, electric, water, telephone and sewer. It is statutorily charged with ensuring safe, reliable, public utility service at a reasonable cost to the consuming public. In achieving those goals, it must balance the interest of public utilities and the interests of the citizens of the State of Illinois. The Public Utilities Act provides that "[t]he Commerce Commission shall have general supervision of all public utilities," and that it is "the duty of the Commission to see that the provisions of the Constitution and statutes of this State affecting public utilities ... are enforced and obeyed." 220 ILCS 5/4–101, 4–201 (2010).

The Commission currently has five members. Commissioner Erin O'Connell-Diaz is an attorney with 20 years experience who formerly worked as an administrative law judge and chief administrative law judge at the ICC. Commissioner Sherman Elliott also has approximately 20 years of experience in the field of utilities/utility regulation and formerly worked on the Commission's staff as an economist, a rate specialist and a senior energy advisor. Commissioner John Colgan similarly has 30 years of experience as a consumer advocate with a specialization in utility and energy issues. The Commission's Chairman, Doug Scott, is a former legislator and sat on a committee with purview over energy issues. Commissioner Lula Ford has a number of years of experience on the Commission and sits on national committees relating to utility regulation.

The Commission employs Commissioner's assistants, who may be economists, attorneys or analysts, to assist the commissioners in review of the ALJs' cases; each commissioner has at

least one assistant. The Executive Director runs the Commission's day-to-day operations. Staff members provide technical expertise and work in the financial analyst division, the telecommunications division, or the energy division. The financial analyst division employs economic analysts, rate analysts and tariff administrators; the telecommunications division employs engineering analysts, policy analysts, and rate analysts; the energy division employs gas engineering staff, electrical engineering staff, economic analysts, and pipeline safety analysts. The Commission also has a clerks' office, a consumer-complaint section, and a governmental affairs office which employs legislative liaisons. Finally, the Commission employs administrative law judges.

The administrative law judges conduct hearings on a wide variety of matters relating to utility regulation including cases arising under the Public Utilities Act, the Illinois Administrative Procedure Act, and all other statutes administered by the Commission. The ALJs at issue here are ALJ IIIs Katina Baker, Bonita Benn, Ethan Kimbrel, Sonya Teague and Stephen Yoder, and ALJ IV John Riley.[1]

2. Decision-making Process

The ALJs spend 90% of their time hearing cases[2] and issuing recommendations on them to the Commission. They have complete control over their hearings; however, parties may make interlocutory appeals of evidentiary rulings to the Commission, ALJs are not empowered to dispose of a case, and no case may be completed until the Commission enters a final order.[3]

Cases may be divided into those that are contested and those that are uncontested. A case is contested when the ALJ may make findings or rulings which are adverse to a party. Conversely, a case is uncontested when the ALJ may not making findings adverse to a party.

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[1] The Union introduced some evidence pertaining to ALJs who are either not petitioned-for employees or who were not ALJ IIIs or IVs at the time they issued their recommendations. That evidence is irrelevant to the issue of whether the Commission accepts the *petitioned-for* ALJs' decisions almost all the time because it pertains to decisions made by non-petitioned-for employees. Further it is not even relevant to the Commission's general treatment of ALJ decisions more broadly because it does not present the reversed decisions in the context of all the recommendations made by those particular judges and the Commission's treatment of their recommendations as a body. Rather, it merely shows that the Commission does, on occasion, reverse and substantially change some ALJ decisions, a fact which the Employer does not contest.

[2] The hearings may be oral or based solely on documentary evidence.

[3] In rare instances, the ALJs can issue final orders in telephone arbitration cases where the ALJs' order stand as final because the Commission does not take up the case.

In contested cases, the ALJ schedules prehearing conferences, examines pleadings, sets cases for hearing, analyzes issues, interrogates witnesses, rules on motions and the admissibility of evidence, and otherwise manages the case from beginning to end. After the parties have introduced evidence and briefed the issues, the ALJ prepares a proposed order based on the law, the evidence of record, and an analysis of the parties' briefs.[4] ALJ Glennon Dolan and Chief ALJ Mike Wallace review the order for scrivener's errors but make no substantive review of the ALJs' factual findings or conclusions. The proposed order is then distributed to the parties of record who may file exceptions and replies to exceptions.

After the ALJ reviews the exceptions and briefs, the ALJ makes appropriate modifications to the original order and issues a post-exceptions proposed order. Chief ALJ Wallace instructed ALJs that he did not "advocate changing or flipping positions" between the proposed order and the post-exceptions proposed order. He further instructed them to make any changes in the legislative style, which displays deleted or changed portions crossed out in red, to permit the Commission to more easily view the ALJs' changes. The ALJs then post the post-exceptions proposed order on the Commission's public e-docket along with a memorandum explaining its salient points to the Commission; the full evidentiary record is also available to the Commission on e-docket.

In uncontested cases, the ALJ likewise holds an evidentiary hearing in which staff's positions and those of the utility are admitted into the record.[5] The ALJs often rely on staff's expertise in such cases and sometimes use sample orders off the ALJ intranet to help them draft their orders. The ALJ intranet contains sample orders for reconciliation cases, informational statements, certificates of service authority cases, petitions for authorization for proprietary treatment of annual reports, applications for a designation as an eligible telecommunications carrier, and negotiated interconnection agreements. Yet, the ALJs always make an "appraisal of all pertinent facts to support pertinent issues and their disposition." While they do not have staff's level of technical expertise, they are nevertheless required to "acquir[e], utiliz[e], and mainta[in] the requisite knowledge of other disciplines involved in regulation, including the laws

[4] An order is called a "proposed order" only when part of the order is adverse to one or more parties.
[5] Some uncontested cases do not require a hearing if the parties settle or if a party fails to appear. In such cases, the ALJ will recommend dismissal.

administered by the Commission."[6] Once the ALJ has drafted an order in an uncontested case, the ALJ posts it on e-docket along with a memorandum explaining its salient points.[7]

The Commission holds about three meetings a month at which it reviews all orders. Orders are placed on the agenda approximately a week and a half before the meeting. Prior to the meeting, a packet is made for each Commissioner which includes the memos and orders for the next Commission meeting. In uncontested cases, the assistants and Commissioners review only the memo and the order which the ALJ has placed on the e-docket. In contested cases, the assistants and the Commissioners read the entire record including the ALJ's proposed order, the memo to the Commission, and testimony from the parties. There is no statute or rule that requires the Commission to defer either to the ALJ's factual findings or the ALJ's legal conclusions.

The assistants split the agenda, review the orders and prepare a summary of the routine/uncontested and non-routine/contested orders for their commissioners. Sonya Teague, now an ALJ, testified that when she assumed the position of commissioner's assistant in 2006, she was instructed by other commissioners' assistants and Commissioner Ford, that she should be very critical in her substantive review of the ALJs' decisions to ensure that their recommendations made sense. After such review, assistants to the same commissioner meet with each other to discuss the cases. Then, the assistants meet with their respective commissioners to discuss the commissioner's own opinions which the commissioner has formulated based on an independent review. In non-routine cases, the commissioners and their assistants may request technical staff to assist them in their review of the cases. Further, the commissioners may also make written inquires to ALJs asking them questions which the ALJs answer in memo form.[8] All the commissioners' assistants then meet to discuss each item on the agenda and to share their commissioners' positions on those items.

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[6] This quote is taken from the ALJ IV job description. The ALJ III job description contains similar language.

[7] In negotiated agreement cases, the utilities, not the ALJ, draft the order. If staff accepts the utilities' agreement upon review of it, the ALJs rely on staff's advice and submit the agreed-upon order with a memorandum recommending that the Commission approve it.

[8] For example, in Docket 07-0585, Ameren, the ALJs recommended a change in the portion of the Ameren rates recovered from a fixed versus a variable cost. The ALJs recommended "slightly over 50% recovery through fixed costs to having about 80% of the fixed costs recovered through a fixed charge." The commissioner inquired as to whether there was testimony supporting that finding and why 100% of the fixed costs should not be recovered through fixed charges.

While commissioners often propose changes to the ALJs' orders in non-routine cases, the Commission generally adopts ALJs' proposed orders verbatim. When commissions seek to make changes, they draft proposed language with their assistants and circulate it to the other commissioners' assistants. The assistants then share the recommended changes with their commissioners and obtain their feedback. Once the commissioners have reached consensus, the assistants work on draft language to reflect the commissioners' joint desired outcome. If the Commission revises the ALJ order, the Commission votes on the revisions. Usually, however, when the Commission goes into meeting, the Chairman reads off the case numbers and the Commission votes to adopt the ALJ's order.

Once the Commission rules on the ALJ's order or ruling, the decision is labeled a Commission order and is served on the parties.

3. Types of Cases

For the last ten years, the ICC has averaged around 755 cases per year including the following: rate cases (20 per year); certificate cases (125 per year); complaint cases (125 per year); negotiate agreement cases (40 per year); reorganization cases (5 per year); Electric Supplier Act cases (20 per year); citation cases (60 per year); reconciliation cases (40 per year); gas (60 per year), electric (60 per year) and water (30 per year) miscellaneous cases; rulemaking cases (20 per year); and confidentiality cases (120 per year). The Commission's orders on each case effectuate a commission policy, though not every order announces a new policy.

Rate cases usually arise when utilities regulated by the ICC seek to increase the rates they charge. In such cases, the ALJs formulate new riders, which utilities use to collect revenue, and advance new methods of procurement. Such formulations require a determination as to rate design and an assessment of the types of adjustments that must be made to the rate base. Chief ALJ Wallace testified that in hearing and deciding rate cases, the ALJ IIIs and IVs sometimes break new ground and advance "new scenarios for public utility regulation." Wallace further testified that the ALJs create new policies in procurement by interpreting, applying and implementing the new statutory language which spurs those rate cases.[9] For example, when the legislature passed the Smart Grid Bill, the Commission was required to implement it. In a procurement case related to that bill, the Commission was required to devise a new way of

[9] Around 10-15 of the rate cases arise out of new legislation.

procuring electricity. ALJ Wallace testified that the petitioned-for employees formulated policy when addressing those issues, and similar ones, by setting forth proposals on how individuals buy their electricity or gas in Illinois. Though some rate cases are less complex and less contested than others, Chief ALJ Wallace noted that all rate cases involve the formulation of policy and that ALJs formulate more policy in rate cases than in other cases. The Commission's own decisions in rate cases also provide guidance to ALJs in their future orders.[10]

Certificate cases are brought by businesses that seek licensing to engage in the utility business. The ICC licenses the following business entities: alternative retail electric suppliers; alternative gas suppliers; agents, brokers and consultants; and telephone service suppliers. It grants four different types of certificates which correspond to each class of entity. Certificate cases are uncontested unless the ALJ recommends denying the certificate. In these cases, staff provides the ALJ with an analysis of whether the applicant has complied with the appropriate statutory and administrative code sections and whether it has demonstrated the requisite financial, managerial or technical qualifications. If staff finds that the entity has met those requirements, then the ALJ will generally recommend granting the certificate. Conversely, if staff determines the entity has not met those requirements, then the ALJ will generally recommend denying the certificate.

The ALJs are not required to accept staff's recommendations and, according to their job description, must apply their own knowledge of the technical disciplines to appraise the pertinent facts and issues. Indeed, the ALJs may request that an applicant submit additional information, or may continue a case if a party does not appear. Further, in certificate cases, ALJs are instructed to check whether the applicant has complaints issued against it in other jurisdictions and must inquire as to the disposition of those cases. The ALJs must also address issues concerning "slamming" and "cramming" in telephone certificate orders.[11]

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[10] For example, the Commission made substantive changes to Docket 07-0241, Peoples Gas and North Shore Gas, a rate case, and set forth a road map ALJs should apply for future rider approval. Specifically, the Commission delineated evidentiary standards for future rider requests and stated that it would grant approval of a rider if the utilities met those standards. ALJs now apply that roadmap in their new rate cases. The ALJ who decided that case testified that the Commission's road map was "a pure policy decision that was not in [his] purview."

[11] Slamming refers to a practice by which a utility with which a customer has no contract bills the customer for services without their express approval or knowledge. Cramming occurs where the customer has a relationship with the company but the company adds on services which the customer has not ordered.

In certificate cases, Chief ALJ Wallace testified that the ALJs effectuate the statutory policy of encouraging retail competition in electricity and gas by permitting customers to procure natural gas or electricity from other sources than the incumbent public utility. Further, Chief ALJ Wallace noted that in Docket 08-0083 Judge Baker set policy by ensuring that public utilities provided clean water and fair and adequate service. In that case, she accepted staff's recommendation that the company should be granted a certificate.

In complaint cases, consumers who are dissatisfied with their metering and other public utility services, or who assert that their bills are inaccurate, file complaints with the Commission. A very high percent (90% or more) of complaint cases settle and are thus resolved without an order. Nevertheless, in such cases the ALJ must recommend that the Commission dismiss the complaint. Similarly, the ALJ recommends that the Commission dismiss the complaint if the complainant does not appear at the hearing. [12] However, the ALJ may exercise discretion to continue the case for another date. Most complaint cases that do not settle involve individuals who dispute their bills. While the only individual directly affected by the ALJ's decision in complaint cases is the person who files the complaint, Chief ALJ Wallace testified that the ALJ effectuates policy by ensuring that the Commission protects consumers.

In negotiated agreement cases, the ICC approves interconnection agreements between incumbent telephone companies and the competitive telephone company, pursuant to federal law. Negotiated agreement cases are usually uncontested because the parties have reached agreement. In such cases, staff evaluates the parties' agreement using statutory standards. Staff then files a verified statement recommending the Commission's approval of the agreement. The statement is entered into the record in a proceeding before the ALJ. The ALJ then takes a sample draft order from the ALJ intranet, fills in the blanks, and drafts a memo recommending the Commission approve the agreement based on staff's assessment. The Commission generally approves such agreements.[13]

In reorganization cases, the ALJs assess the buyouts of utility companies or their corporate reorganization. Judge Tapia presided over Docket 09-0268, Frontier.[14] The case

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[12] ALJs set no policy when recommending the Commission dismiss a complaint case.

[13] Although the Commission's policy is to vote on each agreement, the agreement goes into effect as a matter of law if the Commission fails to take action on it within 90 days.

[14] Tapia is no longer employed at the Commission, although she was an ALJ III at the time she issued this order.

concerned a petition for the Commission's approval of the sale of Verizon's assets to Frontier. Judge Tapia recommended denying approval of the sale concluding that Verizon would not be able to supply safe and reliable service if the merger were approved. She found that Frontier did not have a good credit rating and would not be able to borrow money at a reasonable rate to complete the transaction at an affordable cost. The Commission reversed and approved the sale finding that Frontier would be able to raise the money on reasonable terms.

The Commissioners discussed this case at length at a bench session on April 21, 2010. Acting Chairman Manuel Flores stated that "the Commission [had] spent quite a bit of time working [its way] through the case." He thanked O'Connell-Diaz and her office for the hard work in putting together the revisions. He also thanked the ALJ for "her careful consideration of the issues" which "helped [the commission] better frame and understand this case." Flores further thanked the commissioner's assistants noting, "we really appreciate all the work that you have been doing together in working in a collaborative fashion." Commissioner O'Connell-Diaz added, "and just to comment on that with regards to the big rubber stamp of the Commission, obviously the rubber stamp that people think that we do doesn't happen. It's just not true. And this Order, actually many orders, it's because our assistants are busy, they are working over the weekends, at night along with the Commissioners. And as far as I know, I have never seen a rubber stamp...we find that offensive when the companies say we do this rubber stamp thing because we don't."

In Electric Supplier Act cases, the ICC mediates cases between rural electric co-ops which were founded in the 1920s and 1930s to provide electricity to rural areas. These cases may pertain to disputes over customers or territory.

In citation cases, the ICC sanctions utilities for failing to maintain their corporate status, failing to file an annual report, or for accidentally causing property damage. The vast majority of citation cases arise when a utility fails to maintain its corporate status or fails to file an annual report. This usually occurs because the company has gone out of business. If the company has gone out of business, it does not show up at the hearing. The ALJ then issues an order recommending revocation of the certificate unless the company responds and comes into compliance by filing its annual report or fixing its corporate status. ALJs establish no new policy in recommending the revocation of a utility's certificate, but they help "clean out the

closet" by recommending the Commission revoke certificates of inactive or non-compliant utilities, thus enforcing the statute which requires such utilities to obtain certificates to operate.[15]

Reconciliation cases arise when utilities charge a customer for services and the ICC must determine whether the amounts charged for a certain period of time reflect the services provided. In such cases, the customer may be entitled to a refund or the utility may be entitled to collect more money. During an evidentiary hearing, the company provides the Commission with a set of numbers and the Commission's accounting staff assesses that data and files their own position statement which either agrees or disagrees with the company's position. The ALJs evaluate staff's position and the utility's position to make a determination in the case.

Gas, electric and water miscellaneous cases include financing, pipeline and transmission line cases and cases to annex new territory. In financing cases, the Commission staff makes recommendations, submits analysis and presents testimony. The ALJ writes an order approving the financing according to staff's recommendations. In pipeline cases the ALJ receives testimony from staff, the utilities and various intervenors. In such cases, the ALJs similarly rely heavily on staff to provide "accurate, expert information," since, as Chief ALJ Wallace noted, "there is no way that an administrative law judge can be an expert in any one area or all fields [the ICC] regulate[s]."

Rulemaking cases address the Commission's proposed rules.

Confidentiality cases arise when telephone companies request that their annual reports, which must be filed yearly with the Commission, be held confidential. These cases are usually not contested because the Commission, by default, permits the companies to keep their reports confidential for two years upon request. When a company requests confidential treatment of its annual report for two years, the ALJ merely reviews the request to ensure that it is correct and recommends that the Commission grant it.[16] The ALJs are also instructed to ask companies to file both a redacted version of their annual reports for the public and a confidential version. In such cases, the ALJ effectuates the statutory policy that "the Commission shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any

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[15] The Public Utilities Act provides that, "no telecommunications carrier not possessing a certificate of public convenience and necessity or certificate of authority from the Commission at the time this Article goes into effect shall transact any business in this State until it shall have obtained a certificate of service authority from the Commission pursuant to the provisions of this Article." 220 ILCS 5/13-401 (2010).

[16] Previously the ALJs granted, and the Commission would adopt, ALJs' orders which granted confidential treatment of utilities' annual reports for five years.

person, corporation or other entity, including proprietary information provided to the Commission by the Illinois Power Agency." 220 ILCS 5/4-404 (2010).

If the company seeks to keep its annual reports confidential for longer than two years, it must produce evidence supporting that request. The ALJs have discretion to deny or accept the utility's request that its annual reports be kept confidential for more than two years. For example, in Champion Energy, LLC, the utility requested that its annual reports be kept confidential for five years. In support, it filed a Verified Compliance Filing explaining why five years of propriety and confidential treatment was warranted. The ALJ rejected the utility's request and recommended that the utility receive proprietary treatment for a period of two years only, subject to certain conditions. In contrast, in ACN Communications Services, Inc, Docket 09-0074, the ALJ granted a utility's request for confidential treatment for five years after reviewing the utility's verified petition which demonstrated that its annual report contained "highly propriety and confidential commercial and financial information in a very competitive industry, telecommunications."

4. Rate of Commission Acceptance of ALJs' Recommendations

The Employer prepared an analysis of the petitioned-for ALJs' closed cases from 2009-2011.[17] The ALJs resolved a total of 993 cases over the past three years.[18] Eight-two of those cases required a proposed order. However the remaining 992 contained no contested issues and accordingly did not require a proposed order. The Commission has agreed with the ALJs' recommended dispositions 99% of the time.[19]

Katina Baker resolved 201 cases and issued 14 proposed orders; the Commission did not change or overturn any of them. Fewer than 5% of Baker's cases are contested. A majority of those are complaint cases, 80-85% of which settle. Baker also handled a number of negotiated agreement cases.

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[17] The Employer provided only the ALJs' memos summarizing their recommendations together with the Commission's final order and did not submit the ALJ's initial draft orders. While this evidence does not permit comparison between the ALJ draft orders and the Commission's final order, Wallace's testimony that the ALJs' proposed orders are generally accepted verbatim and the fact that the Commission accepted virtually all of the ALJs' recommendations unmodified permits a fair decision of this case, even without the ALJs' draft orders.

[18] The cases for Judge Riley included only the years 2010 and 2011.

[19] Of 993 total cases, 992 were accepted and 989 were accepted without change (according to the Employer's statistics – 986, per Riley's testimony).

Bonita Benn resolved 159 cases and issued 22 proposed orders; the Commission did not change or overturn any of them.

Ethan Kimbrel resolved 103 cases and issued 9 proposed orders; the Commission changed one and overturned none.

Sonya Teague resolved 116 cases and issued 8 proposed orders; the Commission did not change or overturn any of them. Teague's uncontested cases included annual report protection cases, complaint cases, citation cases, negotiated agreement cases, certificate cases; reconciliation cases, and proposed issuance of sale of bonds cases. The eight cases in which Teague wrote proposed orders included complaint cases which she dismissed for want of prosecution and cases in which the utility failed to maintain corporate status or failed to comply with reporting requirements.

Steven Yoder resolved 270 cases and issued 15 proposed orders; the Commission changed two of them and overturned none. Two or three of those cases were rate cases. Two hundred and two were certificate cases. While some of the certificate cases required proposed orders, no party filed exceptions to them and instead withdrew their applications to refile with proper documentation. Yoder also handled some reconciliation cases; in all but one, the parties agreed amongst themselves as to the proper monetary amount for repayment.

John Riley resolved 144 cases and issued 15 proposed orders. Of those, the Employer asserted that the Commission changed none and overturned one. In fact, the Commission changed three of his cases (Docket 11-0481, Flash Wireless; Docket 11-0502, Every Call Communications; and Docket 11-02082, Ameren) and overturned one (Docket 10-0701, Bullseye Telecom, Inc.).

V. Discussion and Analysis

Section 3(j) provides that a managerial employee is "an individual who is [1] engaged predominantly in executive and management functions and [2] is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (2010).

The first part of the statutory definition of a "managerial employee" describes the nature of the work to which the individual devotes most of his time. Dep't of Cent. Mgmt. Serv. (Ill Commerce Commission) v. Ill. Labor Rel. Bd. ("ICC"), 406 Ill. App. 3d 766, 774 (4th Dist.

2010). "Executive and management functions," amount to running an agency or department by establishing policies and procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively. ICC, 406 Ill. App. 3d at 774 (citing, Am. Fed. of State, Cnty. & Mun. Employ. Council 31, 25 PERI ¶ 68 (IL LRB-SP 2009)); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986). Employees need not create new policies to fulfill this requirement as long as they help run the agency. ICC, 406 Ill. App. 3d at 778 & 780. To determine whether employees help run the agency, one must compare their job functions to the agency's overall mission. Id. at 774. If the responsibilities of the petitioned-for employees in fulfilling their duties encompass the agency's entire mission, or a major component of it, the employees help run the agency. Id. at 778. In doing so, the employee must also possess and exercise authority and discretion which broadly affects an agency's or a department's goals and the means of achieving them. Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 87 (4th Dist. 1996) (discretion required).

The second part of the definition requires that managerial employees bear responsibility for making such policies happen, thus demonstrating that they possess authority that extends "beyond the realm of theorizing and into the realm of practice." ICC, 406 Ill. App. 3d at 774. An individual directs the effectuation of management policies and practices if he oversees or coordinates policy implementation through development of the means and methods of achieving policy objectives, determines the extent to which the objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected. Id. citing, Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 87.

Further, an advisory employee who makes effective recommendations on "major policy issues" may be managerial. ICC, at 780. The test of effectiveness is the "power or influence of the recommendations." Id.

1. Executive and Management Functions

The ALJs engage in executive and management functions by helping run the agency because they are broadly involved in all cases that come before the Commission and because the orders in those cases are the main avenue by which the Commission carries out its statutory duty to enforce laws related to public utilities. As a preliminary matter, the ALJs are broadly involved in matters which come before the Commission because they conduct hearings in cases

concerning all issues arising under statutes administered by the Commission including rates, certificates, complaints, negotiate agreements, utility reorganizations, Electric Supplier Act cases, citations, reconciliation, gas/ electric /water miscellaneous cases, rulemaking and confidentiality. Second, their recommended orders provide the main mechanism by which ICC exercises its "general supervision of all public utilities," and "see[s] that the provisions of the Constitution and statutes of this State affecting public utilities ... are enforced and obeyed." Public Utilities Act, 220 ILCS 5/4–101, 4–201 (2010). For example, their orders help set the rates utilities may charge (220 ILCS 5/9-101 (2010))[20]; recommend the licensing of corporations that seek to engage in the utility business (220 ILCS 5/8-406(a) (2010))[21]; resolve complaints brought by consumers against utilities or recommend dismissal of such cases upon their settlement (220 ILCS 5/4-601 (2010))[22]; recommend approval of interconnection agreements between incumbent telephone companies and the competitive telephone company (220 ILCS 5/7-102(A) (2010))[23]; assess and oversee the buyouts of utility companies or their corporate reorganization (220 ILCS 5/7-204 (2010))[24]; recommend citation of utilities for hazardous practices or recommend the revocation of their certificates if they fail to file annual reports (220 ILCS 5/5-109 (2010))[25]; reconcile the amount a utility has charged a consumer with the services actually provided (220 ILCS 5/9-220 (2010))[26]; and recommend, upon a utility's request, that its

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[20] "All rates or other charges made, demanded or received by any product or commodity furnished or to be furnished or for any service rendered or to be rendered shall be just and reasonable." 220 ILCS 5/9-101 (2010).

[21] "No public utility...shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business." 220 ILCS 5/8-406(a) (2010).

[22] The Commission shall enforce Illinois consumer protection laws.

[23] "Unless the consent and approval of the Commission is first obtained or unless such approval is waived by the Commission or is exempted in accordance with the provisions of this Section or of any other Section of this Act: No 2 or more public utilities may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other." 220 ILCS 5/7-102(A) (2010).

[24] "No reorganization shall take place without prior Commission approval. The Commission shall not approve any proposed reorganization if the Commission finds, after notice and hearing, that the reorganization will adversely affect the utility's ability to perform its duties under this Act." 220 ILCS 5/7-204 (2010).

[25] "Each public utility in the State, other than a commercial mobile radio service provider, shall each year furnish to the Commission...annual reports." 220 ILCS 5/5-109 (2010).

[26] "Annually, the Commission shall initiate public hearings to determine whether the clauses reflect actual costs of fuel, gas, power, or coal transportation purchased to determine whether such purchases were prudent, and to reconcile any amounts collected with the actual costs of fuel, power, gas, or coal transportation prudently purchased." 220 ILCS 5/9-220 (2010).

annual reports be kept confidential (220 ILCS 5/4-404 (2010))[27]. Thus, the ALJs help run the agency by playing a primary role in helping the Commission fulfill its statutory duty of regulating public utilities because they are extensively involved in a wide array of cases which touch on each aspect of the Commission's regulatory functions.

Next, the ALJs predominantly perform such executive and management functions because they spend 90% of their time issuing recommendations on pending cases, an activity through which they exercise discretion to broadly affect the agency's goals. Here, the ALJs' discretion is best evidenced by their decisions in rate cases where the ALJs formulate new riders, advance new methods of procurement, break new ground, and present "new scenarios for public utility regulation." Notably, while the Board has held that "not all effective recommendations are managerial in nature," the ALJs' rate-related recommendations in this case clearly qualify as such because they do not merely "'nudge' the law in a particular direction within...pre-established...standards" but demonstrate innovation. Cf. State of Illinois, Dep't of Cent. Mgmt. Serv. (Dep't of Human Serv.) ("SOI/DHS"), 28 PERI ¶ 126 (IL LRB-SP 2012).

Contrary to the Union's contention, the mere fact that the ALJs arguably do not spend most of their work time exercising their discretion to its full extent does not undermine the conclusion that their predominant duty—recommending decisions on cases—is a managerial function which requires it. As noted above, that function does require the exercise of significant discretion in at least some cases. Further, there is no indication that the ALJs' predominant duties may be redefined as numerous different functions demarcated by case category. Rather, since their functions with respect to most cases already share significant common characteristics (collection of evidence, setting forth the facts, application of law, and presentation of a recommendation) they are properly viewed as a single class of duties which predominates over all others. Indeed, case law demonstrates that the Board has made no distinctions based on such sub-categories of work in addressing the predominance requirement. See, Cnty. of Cook v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379 (1st Dist. 2004) (physicians' predominant function of patient care markedly different from their allegedly managerial but non-predominant work on committee and department meetings); SOI/DHS, 28 PERI ¶ 126 (IL LRB-SP 2012) (ILRB's ALJ defined the "drafting [of the DHS ALJs'] recommended decisions and reports" as the ALJs'

[27] "The Commission shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity, including proprietary information provided to the Commission by the Illinois Power Agency." 220 ILCS 5/4-404 (2010).

predominant function although the ALJs resolved several different types of cases). Thus, although not every ALJ recommendation requires complex analysis, the ALJs' predominant function is neither mechanical nor highly perfunctory and requires sufficient managerial discretion. Cf. Vill. of Elk Grove Vill. v. Ill. State Labor Rel. Bd., 245 Ill. App. 3d 109, 122 (2d Dist. 1993) (employees' "mechanical" and "highly perfunctory" duties in creating the budget was non-managerial).[28]

Notably, the evidence suggests that the ALJs do exercise discretion even in more routine cases, despite the fact that the Commission's rules have predetermined some aspects of their recommended decisions. For example, in certificate cases, while ALJs must generally dismiss a case if a utility fails to appear at the scheduled hearing, the ALJ retains the discretion to continue the hearing in order to grant the utility additional opportunity to remedy its deficient filings. Similarly, in confidentiality cases, while the ALJs are directed to grant a utility's request to keep its annual reports confidential for two years, the ALJs retain discretion to recommend a grant or denial of a request for confidential treatment that lasts for more than two years.

Similarly, it is immaterial that the ALJs do not create new policies in every case, or indeed, that they allegedly just exercise professional judgment by "appl[ing] the facts to the law in accordance with established Commission policy." First, "employees need not create new policies" to perform executive and management functions if they help run the agency by effectuating existing policy, as the ALJs indisputably do here. ICC, 406 Ill. App. 3d at 778 & 78 (managerial and executive functions "will always entail directing the effectuation of existing policies"). Second, the ALJs' exercise of independent professional judgment supports, rather than undermines, a finding of managerial authority because an employee's exercise of "professional expertise is indispensable to the formulation and implementation of [the employer's] policy." N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 689-690 (1980)("The Board

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[28] While the Union cites to David Wolcott Kendal Memorial School v. NLRB ("Kendal"), 866 F.2d 157 (6th Cir. 1989) for the proposition that the ICC ALJs, like the teachers in Kendal, are merely "clothed with an appearance of authority in some limited areas of decision-making," that case is distinguishable on three grounds. First, in contrast to the faculty at Kendal who did not "significantly or effectively participate in the operation of the enterprise," the ALJs at issue here participate in all types of cases relating to the Commission's regulatory duties. Second, unlike the Kendal faculty whose role in "academic and business affairs" did not predominate, the ALJs' decision-making duties at the ICC encompass 90% of their work time. Third, in contrast to the administration in Kendal which did not "systematically defer" to the faculty's decisions on business and academic affairs, the ICC accepts the ALJs' decisions concerning the regulation of public utilities almost all the time on all matters.

nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument."); Cf. City of Evanston v. State Labor Rel. Bd., 227 Ill. App. 3d 955, 974 (1st Dist 1992) (finding that Assistant Fire Chief-Shift, who had authority to implement changes in Department policy pertaining to shift operations and Division Chief-Emergency Medical Services who had authority to implement changes in Department policy pertaining to the EMS program possessed authority which stemmed from their professional and technical expertise rather than any independent authority, were not managerial).

Finally, the ALJs at the ICC are, for practical purposes, the "whole game" when it comes to utility regulation and the ALJs' reliance on staff in some technical matters is consistent with that finding. As a preliminary matter, the ALJs at the ICC are the "whole game" because they help run the agency by hearing and making recommendations on every type of case that comes before the Commission, and because their recommendations form the starting point, and in many cases (as discussed below), the sole basis, for the Commission's final orders. Cf. SOI/DHS, 28 PERI ¶ 126 (IL LRB-SP 2012)(ALJ in Bureau of Administrative Hearings was not the "whole game" in achieving DHS's mission because the agency also employed ALJs in the Bureau of Assistant Hearings who heard other types of appeals).[29]

Second, staff's presence and the ALJs' reliance on staff's technical advice do not eliminate the ALJs' managerial authority because ALJs may be the "whole game" in utility regulation even if they do not work independently. Indeed, the Fourth District Appellate Court, in remanding this case, could not have intended to insert an independence requirement when it had previously rejected it and where doing so would compel a conclusion that discords with the realities inherent in the operation of complex public sector organizations. See, Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ¶ 187 (4th Dist. 2011) ("the Act does not require such independence in management functions").[30]

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[29] The presence of the ALJ Vs at the ICC is immaterial to this finding because they work within the same division and necessarily decide the same types of cases since the petitioned for employees hear cases of every type. See, State of Illinois, Dep't of Cent. Mgmt. Serv. (Dep't of Human Serv.) ("SOI/DHS"), 28 PERI ¶ 126 (IL LRB-SP 2012) (distinguishing between ALJs in *different* sections who heard *different* types of cases).

[30] Notably ALJs are not required to accept staff's advice, and the ALJs thus maintain their discretion to reject it, even in routine cases. While ALJs do not have staff's level of technical expertise and therefore rely heavily on staff's advice, they are also required to "acquir[e], utiliz[e], and mainta[in] the requisite

2. Effectuation of management policies and practices/ the effectiveness of the ALJ's recommendations

The ALJs' decisions constitute effective recommendations, within the Court's definition, because the ALJs' decisions are almost always accepted by the Commission and because there is sufficient evidence to demonstrate that those decisions are influential on the Commission's own final orders. Here, the frequency with which the Commission accepts the ALJs' orders without change and the Commission's mechanism of review mandates a finding that the ALJs' decisions are influential and thus effective.

The court in ICC presented a nuanced approach to determine whether recommendations are effective. In doing so, it essentially rejected a one-dimensional approach, advanced by the Employer here, under which the mere frequency of acceptance demonstrates the effectiveness of a recommendation; instead, it noted that other factors, such as the extent of review, could be an indication of a recommendation's effectiveness. ICC, 406 Ill. App. 3d at 776-777 (rejecting the Board's approach that recommendations could be effective only if there were little independent review). Yet the Court also cautioned that review was "not the litmus test" because it does not describe whether the superior is influenced by the recommendation: On the one hand, "thorough reviews would not necessarily *negate* a reliance on the recommendations," on the other hand, thorough review *could not prove* such reliance because the superior could accept the recommendations simply "because the recommendations are almost always correct." Id. at 777 (emphasis added). The court thus suggested that it would consider frequency of acceptance and extent or nature of review as factors to help determine whether the recommendations are powerful, influential and thus effective.

First, the fact that the Commission accepts between 95 and 99% of the ALJs' recommendations and draft orders weighs heavily in favor of finding that the ALJs' recommendations are effective. Indeed, the Commission adopts the vast majority of the cases decided by ALJs each year, unchanged. Thus, the ALJs' decisions are effective by one measure because they are accepted almost all the time. Id. at 776-777 (the concept, effective

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knowledge of other disciplines involved in regulation" and thus have at least some basis from which to make an independent determination.

recommendation, under Yeshiva, "means what it says" in that effective recommendations are those which are accepted almost all the time)(citing, Yeshiva, 444 U.S. at 677 n. 5).

Second, the mechanism by which the Commission reviews the ALJs' decisions demonstrates that they are influential. Since the Commission undertakes minimal review of routine cases and more extensive review of non-routine ones, the influential quality of the ALJs' decisions is addressed separately with respect to cases of minimal and extensive review.

In cases of minimal review, the Commission is heavily influenced by the ALJs' draft orders/recommendations because the Commission does not review the underlying record and proceeds by relying entirely on the ALJs own application of the facts to the law and the ALJs' recitation of the positions taken by staff and the parties. While the final Commission order, drafted by the ALJs in such routine cases states that "the Commission, [has] considered the entire record herein and [is] fully advised in the premises," the Commission has in fact only considered the entire record as filtered through the ALJ's recommendation. Thus, the ALJ's decision necessarily influences the Commission's decision because the Commission's decision is based solely on the ALJ's recommendation.[31]

In cases of extensive review, the mechanism by which the Commission examines the ALJs' decisions reveals that the Commission ultimately accepts the ALJ decision only when it presents a more persuasive interpretation of fact and law than that presented by the parties in light of the Commission's own review. To illustrate, the ALJs must employ persuasion in complex cases to explain why their conclusions are proper because both the law and the highly technical facts are open to several different legitimate interpretations. The ALJs then direct their analysis to persuade the Commission and to withstand its scrutiny in the face of countervailing arguments on exception. Indeed, the Commissioners themselves acknowledge the ALJs' persuasive function when presented with variable outcomes noting that the ALJs' "careful consideration of the issues....help [the Commission] better frame and understand [the] case." As such, successful persuasion is the only term that accurately characterizes the result when the Commission adopts the ALJs' recommendations verbatim after thorough review of the

[31] Notably, the Union cannot argue that the Commission adopts these routine decisions because they are correct rather than because they are influential since the Commission cannot determine the recommendations are objectively "correct" with limited review where it does not independently ascertain that the recommendations properly reflect the positions of the parties.

ALJs' helpfully framed and considered issues. Thus, the Commission necessarily deems the ALJs' legal analysis "correct" only after the Commission has been persuaded by it.

In conclusion, the ALJs effectuate Commission policy through their effective recommendations.

VI. Conclusions of Law

The petitioned-for ALJ IIIs and IVs are managerial employees within the meaning of Section 3(j) of the Act.

VII. Recommended Order

It is hereby recommended that the petition filed in this case be dismissed.

VIII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 10 days of service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with the Board's General Counsel, Jerald Post, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 2nd day of July, 2012

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/S/ Anna Hamburg-Gal

Anna Hamburg-Gal
Administrative Law Judge