

August 28, 2000

By e-mail

Donna M. Caton
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
P.O. Box 19280
Springfield, Illinois 62794-9280

Re: Illinois Commerce Commission Docket 00-0394

Dear Ms. Caton:

Enclosed for filing with the Commission, please find the Application for Rehearing of the City of Chicago in the above-referenced docket.

Thank you for your assistance in this matter.

Sincerely yours,

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encl.

cc (w/ encl.): attached service list

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS COMMERCE COMMISSION)	
On its own Motion)	
v.)	
Commonwealth Edison Company)	Docket Nos. 00-0394/00-0369
)	(consol.)
Proceeding pursuant to Section 16-111(g) of the)	
the Public Utilities Act concerning proposed)	
transfer of generating assets and wholesale)	
<u>marketing business and entry into related agreements</u>))	

APPLICATION FOR REHEARING OF THE CITY OF CHICAGO

Pursuant to Section 200.880 of the Rules of Practice¹ of the Illinois Commerce Commission (“Commission”) and Sections 10-113, 10-201(e) and 16-111(g) of the Public Utilities Act (“PUA” or “Act”),² the CITY OF CHICAGO (“City”) by its attorney, Mara S. Georges, Corporation Counsel, submits its Application for Rehearing of the Commission’s Order issued August 18, 2000, approving the Notice of Transfer of Assets and Wholesale Marketing Business (“Notice”) of Commonwealth Edison Company (“Edison”) filed in this proceeding.

SUMMARY

The effect of the refund mandates of Section 8-508.1 of the Public Utilities Act (and the absence of record evidence of any offsetting financial effects) establish that Edison will likely qualify for a rate increase request under the provisions of Section 16-111(d) during the mandatory transition period, if the Notice assets are transferred as proposed. On this and all other issues

¹ 83 Ill. Adm. Code Part 200.

² 220 ILCS 5/1-101 *et seq.* Unless otherwise noted, all section references are to the Public Utilities Act.

presented by Edison's Notice, the utility has the burden of proof. Any deficiencies of evidence or uncertainties must be resolved against Edison, as a matter of law. The Order's finding that Edison will not likely be eligible to seek a rate increase -- despite the failure of any witness or evidence to address the effect of Edison's statutory refund obligations on the statutory return on equity analysis -- is not supported by substantial evidence of record and violates Section 10-201-(e)(iv)(A).

The Order, however, erroneously concludes that there is not a strong likelihood that consummation of the proposed transaction will result in Edison being entitled to request an increase in base rates during the mandatory transition period pursuant to Section 16-119(d) of the Act.³ To reach this result, the Order ignores the fact that none of the studies presented to support the Order's conclusion includes any consideration of the effect of the refund provisions of Section 8-508.1 of the Act. The Order also relies on mischaracterizations of the City's position and leaps to the conclusion that if Edison's refund liability potentially exceeds the trust fund assets, Edison need not make any refund at all. Finally, the Order is based on a record that was improperly diminished by evidentiary and procedural rulings of the hearing examiners.

These defects of the Order violate Sections 10-201(e)(iii) and 10-201(e)(iv)(A)-(D) of the Act.

³ 220 ILCS 5/1-101 *et seq.* Unless stated otherwise all Sections references are to provisions of the Public Utilities Act ("PUA" or "Act").

ARGUMENT

THE ORDER’S CONCLUSION THAT EDISON IS NOT LIKELY TO BE ELIGIBLE TO REQUEST A BASE RATE INCREASE IS UNSUPPORTED BY SUBSTANTIAL RECORD EVIDENCE AND FAILS TO APPLY STATUTORY REFUND PROVISIONS IN VIOLATION OF SECTIONS 10-201(E)(III)(A)-(D).

In connection with its enactment of ratepayer funding requirements to pay for decommissioning nuclear plants owned by Illinois utilities, the Illinois legislature also put in place a series of ratepayer protections. *See*, 220 ILCS 5/8-508.1. Among those protections were directives that monies paid into the decommissioning funds be refunded to ratepayers under certain defined conditions, including the sale or other disposition of plants for which ratepayers have provided decommissioning funds. This “true-up” refund requirement, which is applicable to transfers of nuclear plants that yield a reduction in decommissioning liability for the utility, makes it likely that Edison will qualify for a rate increase request during the mandatory transition period.

Section 8-508.1(3) of the Act provides:

The following restrictions shall apply in regard to administration of each decommissioning trust:

* * *

(ii) Any assets in a nuclear decommissioning trust that exceed the amount necessary to pay the nuclear decommissioning costs of the nuclear power plant for which the decommissioning fund was established shall be refunded to the public utility that established the fund for the purpose of refunds or credits, as soon as practicable, to the utility's customers.

(iii) In the event a public utility sells or otherwise disposes of its direct ownership interest, or any part thereof, in a nuclear power plant with respect to which a nuclear decommissioning fund has been established, the assets of the fund shall be distributed to the public utility to the extent of the reductions in its liability for future decommissioning after taking into account the liabilities of the public utility for future decommissioning of such nuclear power plant and the liabilities that have been assumed by another entity. The public utility shall, as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning.

These refund obligations are statutory. They are imposed by the same statutory provision that has provided the authority for Edison's collection of some \$2.5 billion in decommissioning charges and cannot be changed by private agreements between Edison and its anticipated corporate affiliate

A. The Proposed Transaction Will Trigger the Statutory "True-Up" Refund

1. Disposition of Assets

First, it is undisputed that, as the Notice states, under the proposed transaction Edison will "transfer to an affiliate . . . all of its nuclear generating assets." Notice at 1. Thus, Edison, in statutory language, will "dispose[] of its direct ownership interest . . . in a nuclear power plant." 220 ILCS 5/8-508.1(c)(iii). The proposed transfer of Edison's interests in its nuclear plants was confirmed by the testimony of Edison witnesses McDonald and Berdelle. Edison Exh. 1 at L148-153; Tr. 84.

2. Reduction in Liability for Future Decommissioning

Second, the factual circumstances defined by the proposed agreements attached to Edison's Notice include a dramatic reduction in Edison's liability for future decommissioning. The proposed Contribution Agreement requires that Genco (the transferee) "shall assume and be responsible for . . . decommissioning the Stations, relieving Edison of its current liability for future decommissioning." Notice, App. A (Contrib. Agr. §§2.3 and 2.3(c)) (emphasis added). Computations based on the factual assertions in this record demonstrate that, as a result of the proposed transaction, Edison's liability for decommissioning costs would be reduced by several billion dollars.

Mr. Berdelle, Edison's Comptroller, testified in response to questions from the bench (a) that its "current decommissioning liability is roughly \$5.6 billion" and (b) that its nuclear

decommissioning trusts currently contain approximately \$ 2.5 billion. Tr. 101. Under the transaction described in Edison's Notice, the "roughly a \$3 billion shortfall in adequate funding of decommissioning" will be assumed by and become the responsibility of Genco. Tr. 101; Notice, App. A (Contrib. Agr. §§2.3 and 2.4). That transfer of liability for future decommissioning funding demonstrates both the fact and the amount of the reduction in liability for future decommissioning Edison will enjoy. That amount is greater than a hypothetical \$2.5 billion refund amount that Edison witness Berdelle acknowledged would adversely affect Edison's rate of return (ROE) calculation under PUA Section 16-111(d). Tr. 161.

3. *Absence of Counterbalancing Effects on the ROE Analysis*

Finally, the record in this case contains no evidence of financial arrangements or circumstances that would counterbalance the adverse ROE effect of the statutory requirement that Edison "as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning." 220 ILCS 5/8-508.1(c)(iii).

4. *The Impact of the Refund Requirement*

Edison has the burden of proof in notice proceedings under Section 16-111(g). The deficiencies and uncertainties in the evidence in the record -- especially the absence of any consideration of possible refunds -- must accordingly be held against Edison. Edison is the party obligated in a Section 16-111(g) proceeding to "present affirmative evidence of its projected safety, reliability and financial strength after the proposed transactions." Order, ICC Dkt. Nos. 99-0273/99-0282 (Edison Fossil Plant Sales), issued Aug. 3, 1999.

Both Edison and the Commission Staff presented rate of return analyses that purport to assess whether the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to the ROE test of Section 16-111(d). Notice, App. F (Berdelle), Staff Exh. 2 (Hardis); 220 ILCS 5/16-111(g).

Both conclude that the ROE condition for a rate increase request is not met. However, neither Staff's nor Edison's ROE analysis reflects any consideration of the significant refunds required under Section 8-508.1 of the PUA. Tr. 152, 173.

Edison's analysis of its financial condition after the transaction did not include a single scenario that evaluated the effect of statutory refunds paid to ratepayers as the PUA requires. Tr. 152. That statutory obligation was ignored despite (a) the plain refund requirement of PUA Section 8-508.1(c)(iii), (b) the triggering conditions produced by Edison's transfer of its nuclear plant ownership interests and decommissioning liability, and (c) the potential impact of the statutory refund on Edison's ROE within the transition period. The same flaw exists in each of the analyses that purport to find that Edison will not qualify for a rate increase request during the transition period. Tr. 152, 173.

The cross-examination of Mr. Berdelle, coupled with the averments of Edison's Notice, confirm that the proposed transaction will produce the necessary triggering conditions for the statutory refund obligation of Section 8-508.1(c)(iii). Edison will transfer its ownership interest in the nuclear plants. As proposed, that transfer will result in a reduction of Edison's liability for future decommissioning, activating the statutory "true-up" refund. From Mr. Berdelle's testimony, it appears the reduction in Edison's liability will be about \$3 billion. Tr. 101. In response to questions from the Hearing Examiners, Mr. Berdelle admitted that a refund of a smaller amount (\$2.5 billion) would adversely affect Edison's ROE calculation for purposes of the Section 16-111(d) analysis. Tr. 161.

As a matter of mathematics and law, "there is a strong likelihood that consummation of the proposed transaction" and the refund it will trigger will provide a basis for a rate increase request under PUA Section 16-111(d). A refund amounting to roughly one-third of Edison's annual revenues, made "as soon as practicable" as the Act requires, will significantly and

adversely affect Edison's ROE during the mandatory transition period.⁴ Since the Commission must give effect to the express refund provisions of Section 8-508.1 of the Act, the Commission must find that there is a strong likelihood that Edison will be eligible to request an increase in its base rates during the mandatory transition period.⁵ The Order does not, and thus violates Sections 10-201(e)(iv)(A)-(C).

The Order concludes only that it "rejects the City's position, which is based on a misinterpretation of Section 8-508.1(c)(3)(iii) of the Act. . . . Under the City's interpretation . . . ratepayers . . . would ultimately contribute no funds for the decommissioning of those plants. This position is unreasonable and contrary to the plain language of Section 8-508.1(c)(3)(iii)." Order at 17. The City's briefs make no such claim; the City only identified the amounts in the trusts and the amount of Edison's claimed reduction in liability, making no attempt to determine the correct amount for ratemaking. Indeed, the Order's own conclusion that the determination of decommissioning cost issues should be reserved for a separate docket (Order at 27) is not consistent with the burden it effectively imposes on the City. The Order violates Section 10-201(e)(iii) and (vi)(A)-(D).

B. The Order's Illogical Application of Section 8-508.1(c)(3)(iii) Effectively Nullifies That Entire Provision of the Act.

⁴ Mr. Berdelle's testimony that there would be no adverse effect from statutory refunds was based on his assumption that refunds would be made only under Section 8-508.1(c)(ii), which concerns refunds when the decommissioning funds exceed the costs of decommissioning, and on Edison's expectation that the fund assets will never exceed costs. *See*, Tr. 153,154,157. A refund under Section 8-508.1(c)(iii) requires a refund based on the reduction in utility decommissioning liability, at the time of a transfer of nuclear plant ownership interests. Mr. Berdelle later acknowledged that an immediate refund of \$2.5 billion could adversely affect Edison's ROE. Tr. 161.

⁵ Despite its clear relevance, rulings by the Hearing Examiners denied the City an opportunity to cross-examine witnesses further on this issue. *See, e.g.*, Tr.. 39, 40, 176, 177. The issue at hand is not whether prices under Edison's Purchased Power Agreement will increase as a result of the proposed transaction (*see Tr. 38-39, 103*), but whether Edison will qualify to seek an increase in its tariffed base rates.

The Order finds that “the ROE analyses presented by ComEd and Staff establish that there is not a strong likelihood” that the proposed transaction will result in Edison being entitled to request a base rate increase. Order at 17. In other words, the effect of the true-up refund required by Section 8-508.1(c)(3)(iii) is ignored. The Order’s distorted logic concerning the City’s argument and its own conclusion that an amount greater than the fund assets is the “wrong amount” lead it to conclude that \$0 is the “correct amount.” That leap of illogic is absurd on its face, especially in view of the proportionality of burden concept embodied in the “true-up” refund of Section 8-508.1(c)(3)(iii).

There is only one important point in this discussion. The “correct” refund amount may be \$3.1 billion as defined by Edison’s distortion of the City’s argument, or only the \$2.5 billion that can be “refunded” from the trusts, or some other amount altogether, as determined in a ratemaking proceeding. The relevant point here is that the application of Section 8-508.1(c)(3)(iii) will adversely affect Edison’s rate of return, and that fact has been totally ignored in this record and in the Order’s analysis.

In effect, the Order concludes, despite what is clearly a triggering disposition of the plants, that Section 8-508.1(c)(3)(iii) will require no refund at all. That decision -- effectively nullifying an entire section of the Public Utilities Act -- is beyond the Commission’s authority. *See, Illinois Power v. ICC*, 111 Ill. 2d 505 (1986). The legislature created this “true-up” refund requirement to apply specifically in the case of a plant transfer. In addition to being contrary to constitutional requirements for the amendment or repeal of state laws, an attempted Commission nullification suggests unreasonably that the legislature intended that its statutory ratepayer protections could be entirely nullified by conflicting private agreements. Init. Brf. at 5, n. 4.

The Order thus violates Sections 10-201(e)(iv)(A)-(D).

C. The City's Right To Cross-Examine Was Unlawfully Restricted.

Administrative proceedings . . . are governed by the fundamental principles and requirements of due process of law. Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92 (1992). Cross-examination is an essential element of a party's participation in hearings. "The Administrative Procedure Act governs administrative hearings in contested cases when a state agency is involved. When the Act applies, it expressly provides for cross-examination of witnesses in situations that call for full adversarial hearings." Van Harken v. City of Chicago, 305 Ill. App. 3d 972, 713 N.E. 2d 754 (1999) (citations omitted). "A fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence. Van Harken v. City of Chicago at 305 Ill. App. 3d at 983 (citing Lakeland Construction Co. v. Department of Revenue, 62 Ill. App. 3d 1036 (1978)).

Pursuant to its statutory authority, the Commission has ordered hearings (in which the City is a party) to determine whether the results of Edison's proposed transaction satisfy conditions that require the Commission to permit Edison to go forward with the proposal. At various points in the hearings in this proceeding, the City's right to cross-examine witnesses on matters relevant to that determination was improperly curtailed -- or denied outright -- by rulings of the Hearing Examiners, denying the City an opportunity to exercise its due process rights.

Before evidence on results of the proposed transaction could be fully developed through cross-examination, the Hearing Examiners erroneously foreclosed inquiry into the effect, under Sections 16-111(d) and (g) of the Act, of decommissioning cost refunds required by Act. The issue is clearly relevant, since no valid assessment of the likelihood that Edison will be entitled to request an increase in its base rates can be performed without considering the effect of refunds required by the Act. Although full development of the record was precluded, there is, nevertheless, substantial evidence of record that “consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection [16-111](d).” 220 ILCS 5/16-111(g).

The most egregious example of the procedural defects of the Commission proceeding concerned the city’s attempt to examine Staff’s accounting expert Karen Goldberger regarding the effect of statutory refunds on Edison return on equity (ROE) analysis. The City wished to ask Staff’s witness Karen Goldberger about the proper accounting for refunds required under PUA Section 8-508.1 and the effect of entries in the relevant accounts on Edison’s net income and ROE. Tr. 181. The relevance of this inquiry has been clearly established in a previous section of this brief.

The previous Staff witness, Mr. Hardis, used accounting data to perform the Staff’s ROE analysis under Section 16-111(d), but Mr. Hardis was unable to answer the City’s accounting questions. Tr. 174-176. Specifically, the City inquired whether an account involved in his ROE analysis could possibly be affected by an Edison refund. Tr. 174. (Mr. Hardis’ area of expertise is as a financial analyst, not accounting. Tr. 176.)

Before the City could ask the same question (or any other question) of Ms. Goldberger -- and without objection from any party -- the Hearing Examiners made the following preemptive ruling.

First of all, you know what, I'm not going to even let you ask the question because . . . what you're really talking about is really speculative, and Commonwealth Edison has already answered that if the deal -- if the refund you're talking about doesn't go through, they're just not going to do the deal, okay?

* * *

But I think Commonwealth Edison has answered the question by saying, if we're required to pay \$10 billion, we're not going to do the deal. Tr. 177-178.

The City's inquiry was, to the contrary, neither speculative nor answered by Edison's possible future business decision.

The question before the Commission is not whether the statutory refund obligation will, in fact, produce accounting entries that affect Edison's ROE -- a result Edison can avoid by "not doing the deal." The statutory analysis required by PUA Section 16-111(g) and defined by Section 16-111(d) must assume that the deal is done. The question put before the Commission by Section 16-111(g) is whether "consummation of the proposed transaction" will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period. The answer to that question is not affected by Edison's possible reaction to its refund obligations. The question is not (as the Hearing Examiners' ruling suggests) whether Edison's ROE will actually be changed in the future by its refund obligations. Under the Act, if the results of the transaction -- consummated and implemented as proposed -- would permit Edison to request an increase in base rates, the statutory test is satisfied and the Commission may prohibit the transaction.⁶

This procedural deficiency prejudiced the City and violated the provisions of Section 10-201(e)(iv)(B)-(D).

⁶ Whether Edison believes a refund obligation makes the cost of the proposed transfer too high is irrelevant. If a refund or some other aspect of the proposed transaction means there is a strong likelihood that Edison will qualify to request a base rate increase, the statutory questions is answered, whether or not Edison might ultimately abandon the proposed transaction.

D. Incorporation of Prior Briefs

In accordance with Section 200.880 of the Commission’s Rules of Practice, the City incorporates those portions of its prior briefs in this proceeding that are cited in the above argument, and the following (possibly additional) sections of those briefs.

Initial Brief	Pages 1-9 and 15-18	Re: ROE impact of refunds and restriction of cross-examination
Reply Brief	Pages 3 and 6	Re: ROE effect of refunds and Commission caselaw precedent
Brief on Exceptions	Pages 1-8	Re: effect of refunds on ROE analysis
Reply Brief on Exceptions	Pages 5-6	Re: other parties’ arguments on the ROE impact of refunds

CONCLUSION

For the reasons discussed above and in the prior briefs of the City, the City asks that the Commission grant its application for rehearing and find that it is entitled to deny approval of Edison’s Notice under Section 16-111(g). Alternatively, the Commission may re-open the hearings to take evidence on the effect of the statutory “true-up” refund provisions of the Act.

Dated: July 14, 2000

Respectfully submitted,

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Corporation Counsel

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**STATE OF ILLINOIS
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Illinois Commerce Commission)	
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v.)	Docket 00-0394
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Proceeding pursuant to Section 16-111(g))	
of the Public Utilities Act concerning))	
the proposed transfer of generating assets)	
wholesale marketing businesses and)	
entry into related agreements.)	

NOTICE OF FILING

To: Attached Service List

Please take notice that on this date I caused to be sent to Donna M. Caton, Chief Clerk, Illinois Commerce Commission, 527 East Capitol Avenue, P.O. Box 19280, Springfield, Illinois 62794-9280, by e-mail, the Application for Rehearing of the City of Chicago in the above-captioned docket.

Dated: August 28, 2000

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**STATE OF ILLINOIS
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CERTIFICATE OF SERVICE

I, CONRAD REDDICK, an attorney, hereby certify that a copy of the **Application for Rehearing of the City of Chicago** was served upon the parties listed on the attached service list, via electronic mail at the addresses shown.

Dated: August 28, 2000

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