

November 6, 2000

TO: Service List in Dkt. 00-0361

Re: Commonwealth Edison Company
Docket No. 00-0361

Gentlemen:

Enclosed please find Illinois Industrial Energy Consumers' Reply Brief on Exceptions, which has been filed electronically with the Clerk of the Illinois Commerce Commission this date.

Sincerely,

Edward C. Fitzhenry

ECF/alc
Enclosure/29023

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 :
 : No. 00-0361
Petition for Approval of a Revision to Decommissioning :
Expense Adjustment Rider to Take Effect on Transfer :
of ComEd's Generating Stations. :

REPLY BRIEF ON EXCEPTIONS ON BEHALF OF THE
ILLINOIS INDUSTRIAL ENERGY CONSUMERS

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ILLINOIS INDUSTRIAL ENERGY CONSUMERS**

Pursuant to the schedule in this docket, the Illinois Industrial Energy Consumers (IIEC) submit its reply to briefs on exceptions of the parties identified below, pursuant to 83 Ill. Adm. Code 200.830. IIEC's failure to address an argument or conclusion by any party should not be construed as an endorsement of same.

I. **INTRODUCTORY COMMENTS**

A. **The Proposed Order Correctly Approaches Resolving The Issues In The Docket**

The threshold issue before determining what level of decommissioning costs may be recovered pursuant to the Commonwealth Edison Company (ComEd) Petition, is first the determination of whether **any** decommissioning costs should be recovered upon the transfer of the nuclear units to the Exelon Genco (Genco). IIEC has remained steadfast in its positions, that there is no legal authority upon which the Illinois Commerce Commission (Commission) can rely, to justify the recovery of decommissioning costs where the utility transfers the subject nuclear units to the Genco, and no longer owns any interest in the units. (IIEC Initial Br. at 5-14; IIEC Reply Br. at 8-11).

The Hearing Examiners' Proposed Order (Proposed Order) correctly found that as a matter

of law, ComEd cannot recover nuclear decommissioning expenses from ratepayers and customers upon the transfer of the nuclear units to Genco. The Hearing Examiners' determinations and legal analyses have been vigorously supported by not only IIEC, but also CITGO Petroleum Corporation et al (Coalition), City of Chicago, Citizens Utility Board, and others.

Before proceeding further, though, the Commission should fully understand the soundness of the Proposed Order's legal rationale: If the Proposed Order's legal rationale is not accepted and ComEd and the Illinois Commerce Commission Staff's (Staff) position prevail, the logical extension of the Commission's decision is ComEd ratepayers and customers are forever accountable for decommissioning charges, no matter who else owns the nuclear units and no matter how long those units remain in existence and no matter to whom the output is sold. **Because once the Commission finds ComEd's requested relief is legal and permissible, the Commission is also finding as a matter of law this liability always existed and will continue to exist.** So, had ComEd entered into a contract with Genco that obligated ratepayers and customers to pay decommissioning charges for, say 30 years, under ComEd/Staff's legal theory, ratepayers and customers would have had this liability for that period of time. Or, if ComEd had entered into a contract with Genco that provided ratepayers and customers would bear this liability for the life of the nuclear units, again, under the legal analysis offered by ComEd/Staff this liability would remain with ratepayers and customers for the life of these units. Similarly, in the future ComEd could enter into a contract with some other nuclear generation owner, and by doing so, commit ComEd ratepayers and customers to pay the other entity's decommissioning charges.

There is no in between on this very important legal question.

B. The ComEd Position Is Perverse, And Results In An Absurd Result

Not surprising, given their positions in the docket, ComEd and the Staff argue the Commission does have the legal authority to recover decommissioning funds from Illinois citizens, where the nuclear units are no longer owned by an Illinois public utility, but instead a profit seeking entity selling power and energy in the marketplace. Not only is this deplorable from the perspective of those citizens who are subsidizing the business operations of this entity, and we say “citizens” and not ComEd ratepayers and customers because the Genco has no other relationship to these consumers, but the undue enhancement of profits certainly makes it more difficult for ARES or alternative suppliers who must pay the costs of generation through power prices, to compete in Illinois.¹

ComEd boldly asserts, “customers are being asked to pay a reasonable share of the costs of decommissioning.” (ComEd Br. at 17). **Noteworthy is the fact ComEd will not be paying a single dime of its own money.** All it is willing to do is transfer the existing funds (ratepayer generated), pre-Rider 31 base rate collections (ratepayer generated), and future Rider 31 collections (ratepayer generated) to Genco. Remarkably, **ComEd proposes that it be paid to act as a collection agent of Genco!** “ComEd will be compensated for performing such collection service. The collection agency agreement can not be terminated before the collection of all of the decommissioning amounts.” (Edison Ex. 2, Attachment B at 4). Apparently, ComEd’s idea of a reasonable sharing scheme is: ComEd: 0% / Genco: 0% / ComEd ratepayers: 100%.

ComEd further argues the “benefits” of “enhanced competitive development.” (ComEd Br. at 1). There is no credible evidence in the record to suggest subsidizing Genco’s cost of doing

¹ As explained below, Genco’s profitability should be such that it can pay its entire decommissioning liability and still enjoy a handsome return on its investment. (IIEC Ex. 1 IP at 14)

business will enhance competitive development. The transfer will create no more suppliers in the market, no more consumers in the market, will not remove barriers to entry or exit (except Genco's) and will have no effect on visibility of prices.

The ComEd position is perverse when the gamut of its proposal is fully explained. ComEd proposes that by virtue of its entering into an agreement with Genco, an entity that does not even exist today, but where ComEd has already crafted the terms and conditions of an agreement that would effectuate the transfer of the nuclear units, it could somehow retain the hope its ratepayers and customers, not even customers of Genco, would be forced to assume this liability. In effect, Illinois citizens are being held responsible for an operating expense incurred by an entity that is not under the jurisdiction of the Commission, but which is operating in the marketplace to sell power and energy and increase its profits however possible. The extra profits made by Genco would be at the direct expense of Illinois ratepayers and customers, and at the indirect expense of other competitors. Surely the General Assembly never intended this kind of result.

There is a plethora of court decisions that hold for the proposition in construing statutory language, the court will assume the General Assembly did not intend an absurd result. "In construing statutory language, a court will assume that the legislature did not intend to produce an absurd or unjust result". Cummins v. Country Mutual Insurance Company, 178 Ill. 2d 474, 687 N.E. 2d 1021, 1024 (Ill.1997). In considering legislative intent, courts must presume that the legislature did not intend absurdity, inconvenience or injustice, and select an interpretation which leads to logical results and avoids that which would be absurd. People v. Acevedo, 211 Ill. Dec. 926, 656 N.E. 2d 118, 123 (Ill. App. 1995).

IIEC submits the notion that Illinois ratepayers and customers would pay a debt or an expense

for some non-regulated entity, such as Genco, where Illinois customers receive nothing in return from this entity² would, indeed, be absurd and unjust. It is absurd and unjust to require Illinois citizens to subsidize the business operations of the Genco. It is equally absurd and unjust that Illinois citizens would be forced to subsidize the business operations of the Genco, to the detriment of ARES or alternative suppliers that must pay all the costs of their generation. Under no circumstances should the Customer Choice Law be deemed the vehicle by which a cross subsidy would be enjoyed by a select market entrant.

II. GENERAL OVERVIEW OF COMED AND STAFF'S POSITIONS, AND COMMISSION'S STATUTORY OBLIGATIONS

IIEC will respond to both ComEd and Staff's legal arguments in tandem, as they are much the same. To the extent these parties offer additional arguments or differ, IIEC will respond accordingly.

No matter the false perception of fairness or whether the "deal" is good which is a theme running through the ComEd brief³, the Commission is not free to stray from its statutory mandate. The Commission is limited by the delegation of authority from the General Assembly. It has been often held the Commission, "because it is a creature of the legislature, derives its power and authority solely from the statute creating it, and its acts or orders which are beyond the purview of this statute are void." City of Chicago v. Illinois Commerce Commission, 79 Ill. 2d 213, 402 N.E. 2d 595, 597-8 (Ill. 1980); Business and Professional People for the Public Interest v. Illinois Commerce

² We address later the red herring argument that consumers benefit from the four year purchase power arrangement.

³ If the "deal" is so good, why is every customer group in this docket so opposed? Of course, the reasons are many. Indeed, IIEC posits the Petition should be rejected even if it means the units are not transferred, thus forgoing the alleged "savings". (IIEC Initial Br. at 4-5).

Commission, 146 Ill. 2d 175, 585 N.E. 2d 1032, 1039 (Ill. 1991). Further, an agency such as the Commission only has the authorization given to it by the legislature through the statutes. To the extent the agency acts outside its statutory authority, it acts without jurisdiction. Schilling v. Book, 84 Ill. App. 3d. 972, 405 N.E. 2d 824, 826-7 (Ill App. 1980).

In Peoples Gas Light and Coke Company v. Illinois Commerce Commission, 165 Ill. App. 3d 235, 520 N.E. 2d 46 (Ill. App. 1988), the court succinctly stated:

“The authority of an agency must either arise from the expressed language of the enabling statute... or devolve by fair implication and intentment from the expressed provisions of the statute as an incident to achieving the objectives for which the agency was created. (citation omitted). In other words, the Commission has no authority except that expressly conferred upon it and is without power to extend its jurisdiction, as that is a legislative prerogative (citation omitted).”
Id. 520 N.E. 2d at 54.

The Commission is limited in its authority to the expressed language or expressed provisions of the statutes, as the Proposed Order correctly finds. (Proposed Order at 17-20).

The conclusory arguments of ComEd and Staff in their simplest form, is that Section 16-114 allows ComEd to seek recovery for decommissioning costs arising out of contract even when it no longer owns the plants. (220 ILCS 5/16-114). They also refer to Section 9-201.5, which provides that the Commission may authorize charges to customers for the costs of decommissioning (220 ILCS 5/9-201.5). Reference to Section 8-508.1 is also made. (220 ILCS 5/8-508.1) The statute requires the creation of a nuclear decommissioning trust, and outlines various requirements and restrictions. Together, it is variously argued these statutes form the basis to perpetually bind ComEd ratepayers and customers to fund a portion of the business operations of a non-public utility - - a third party- - an entity over which the Commission has no jurisdiction.

A brief reminder of the rules of statutory construction is in order. The meaning of a statute

in the first instance is determined by the statutory language, and where that meaning can be ascertained from the language of the statute, it will be given effect without resorting to other aides of construction. People v. Robinson, 89 Ill. 2d 469, 433 N.E. 2d 674, 677 (Ill. 1982). Moreover, the statute must be read and understood in its entirety, and in conjunction with the law under which it was enacted. A statute should be evaluated as a whole and each provision should be construed in connection with every other section and in light of the statute's general purpose. Peoples Gas Light and Coke Company, 520 N.E. 2d at 54.

It is critically important the Commission not be swayed by contrived legal arguments. This is not a personal injury settlement where everyone is expected to walk away from the table content with the agreement. The Commission must stay within the confines of its statutory authority. IIEC makes this remark because of the statement provided by ComEd in its brief: "If the Commission determines that the decommissioning rate for the six year collection rate should be less than the .141¢ per kilowatt hour requested in the Petition and supported by the record, but more than the .092¢ per kilowatt hour rate recommended by Staff, **ComEd has indicated that it would consider whether such a reduction would enable it to proceed with the Genco transaction.**" (emphasis supplied)(ComEd Br. at 3). ComEd's willingness to take whatever exposes its lack of confidence in its legal position.

Staff argues similarly, stating "the end result of Staff's proposal is ratepayers contribute their equitable portion of decommissioning costs related to the power and energy they receive." (Staff Br. at 2).

In sum, contrary to the tortured legal analyses of both ComEd and Staff, the Commission must recognize the words in the statute for what they are, and not what others may wish or conjure.

III. COMED AND STAFF'S ARGUMENTS PERTAINING TO SECTION 16-114 ARE SERIOUSLY FLAWED

A. ComEd And Staff Go Well Beyond The Plain Reading Of Section 16-114

ComEd and Staff inexplicably go beyond the plain and ordinary reading of Section 16-114, and other statutes for that matter. Before looking beyond the statute in question in order to decipher its interpretation, there must be some determination the statute itself is ambiguous and its understanding or intent cannot be understood without going outside the statute. Gem Electronics of Monmouth v. Department of Revenue, 183 Ill. 2d 470, 702 N.E. 529, 532. (Ill. 1998). Neither ComEd or the Staff argue Section 16-114, or Sections 9-201.5 and 8-508.1, or any other statute is ambiguous. Therefore, it is inappropriate to resort to other aids of construction, or argue something else besides the plain reading of the statute. Yet many of the claims go to their perception of the legislature's intent and arguments other than the plain reading of the statute.

Amazingly, ComEd and Staff argue various claims and pronouncements about Section 16-114 as follows:

- Staff contends, "Section 16-114 allows ComEd to seek recovery for decommissioning costs when it has responsibility as a matter of contract, **even when ComEd no longer owns the plants.**" (Staff Br. at 2) (emphasis supplied).
- Staff argues Section 16-114 allows the "utility... [to] collect money through tariff rates to decommission the nuclear plants even though it no longer owns them if it has responsibility as a matter of contract for a decommissioning costs **with certain limitations.**" (Staff Br. at 3) (emphasis supplied).
- Staff argues, "The legislature clearly intended that as a utility's financial relationship with a nuclear plant evolved over time, **the utility's Section 16-114 tariff would also change overtime to take into account the changing relationship**". (Staff Br. at 5)(emphasis supplied).
- ComEd reiterates its support for the Staff legal position, that Section 16-114 provides a utility can collect through a tariff rate to decommission the nuclear plants **even**

though it no longer owns them if it has responsibility as a matter of contract for decommissioning costs. (ComEd Br. at 2)(emphasis supplied).

- ComEd, after deciding Section 16-114 should be viewed as two alternatives, suggests that, “the statute must be read to contemplate decommissioning recoveries after the utility has ceased to own a nuclear station, but continues to have contractual responsibility for decommissioning costs.” (ComEd Replacement Br. at 11).

IIEC cannot find one word, one phrase, or any combination of words or phrases in Section 16-114, that states or even implies decommissioning expense liability remains with ComEd ratepayers and customers, even when ComEd no longer owns the plants. Moreover, IIEC cannot find any expression of the General Assembly’s above alleged intentions attributable to Section 16-114. IIEC will later explain away the hodge podge approach taken by these parties in their legal analyses.

Arguably, ComEd witness Calvin Manshio’s testimony is supportive of IIEC’s position. In his rebuttal testimony, Mr. Manshio proffers arguments as to why the Commission should approve the ComEd proposal. He argues, in part, “The undisputed facts are that nuclear plants will need to be decommissioned. **Under Illinois law, utilities that own those plants have the right to collect decommissioning costs from their ratepayers.**” (Edison Ex. 11 at 2). Mr. Manshio’s position is that ownership of the nuclear stations is a precondition to collecting decommissioning costs from customers. IIEC is in agreement with Mr. Manshio, in this respect. If the utility does not own the nuclear stations, it has no entitlement under the law to collect decommissioning funds from its ratepayers and customers.

Clearly and unequivocally, Section 16-114 provides that any utility owning or having an interest in, or having responsibility as a matter of contract or statute, for decommissioning costs, shall file with the Commission a tariff conforming to the provisions of Section 9-201.5. **This was to have occurred on or before April 1, 1999.** Stated differently, each utility that owned a nuclear unit or

had an interest therein by virtue of a contract would by April 1, 1999, file a tariff with the Commission to remove all previously authorized decommissioning charges from ratebase, and place those charges in separate riders.

Noteworthy, ComEd did make a compliance filing in response to Section 16-114. So did Illinois Power Company as noted later in the discussion pertaining to Section 16-114.1. So did Union Electric Company (Ameren UE), as did MidAmerican Energy Company.

ComEd made its filing seeking revisions to Rider 31 on November 2, 1998, intending to meet the statutory deadline of Section 16-114. The Commission entered an order approving Rider 31 as being in compliance with Section 16-114. This filing and Commission action demonstrates the singular, stated purpose of the statute.

There is nothing about Section 16-114, directly or indirectly, that authorizes the recovery of decommissioning costs from Illinois citizens upon the transfer of the nuclear units to a third party. It is impermissible to go beyond the plain reading of Section 16-114 in order to extrapolate some other false intention.

B. Timing And Other Arguments Involving Section 16-114

One of the arguments proffered by the Staff is the claim that Section 16-114 broadened the eligibility requirement by allowing utilities that were responsible as a matter of contract or statute to also collect decommissioning charges, and then stated this change did not intend the broader eligibility requirement would only apply to contracts entered into during the relatively short time period beginning with the passage of the Customer Choice Law and ending April 1, 1999. (Staff Br. at 4). Similarly, ComEd argues that Section 16-114 did not become irrelevant after April 1, 1999, and that the statute provides for a starting date for the new tariff. (ComEd Br. at 6).

First, in response, there is nothing about the above arguments that detracts from IIEC's principle position, that Section 16-114 cannot be read to authorize continued recovery of decommissioning charges under these circumstances. To argue whether there is or is not a "moratorium" for when the particular compliance filing needs to be made, misses the point entirely. Rather, the more poignant question is, "Can anyone read into Section 16-114 the specific authority claimed by ComEd and Staff?"

Second, the filing of a tariff, which included previously authorized decommissioning charges from ratebase and placing those charges in separate riders, along with the timing requirements in Section 16-114, is wholly consistent with the statutory scheme in the Customer Choice Law. The first wave of customers that became eligible for delivery services was on October 1, 1999. The changes to Rider 31 were intended to allow for the recovery of decommissioning charges from not only ratepayers, but also customers taking delivery services in the ComEd service territory. Therefore, given this mandate, it was appropriate and a matter of sequential logic to have this tariff in place before October 1, 1999, which the statute does - - April 1, 1999.

Third, the Proposed Order's findings and conclusions pertaining to Section 16-114 do not offend or limit the provisions in Section 16-111(g) as offered by Staff. (Staff Br. at 5). Staff argues that Section 16-111(g) contemplates an increase in the amount of transactions with regard to ownership of assets after April 1, 1999 and, therefore, the Proposed Order's interpretation of Section 16-114 would serve no purpose after April 1, 1999. This contention falls for several reasons.

The Proposed Order correctly finds that Section 16-114 only requires those entities owning a nuclear unit or having responsibility for decommissioning by virtue of a contract, to make the requisite tariff filing by April 1, 1999. Otherwise, "in the absence of such a tariff, customers who

receive their power from alternative sources would not be liable for the payment of decommissioning charges.” (Proposed Order at 19). That is the driving purpose behind Section 16-114. It does not have any other purpose after April 1, 1999. There is no need for it to have another purpose after April 1, 1999. Therefore, any arguments about what may happen after April 1, 1999 are irrelevant.

Staff continues in its reaching arguments on this matter claiming the last sentence in Section 16-114 “illustrates that the statute is intended to apply beyond the April 1, 1999 date.” Staff refers to the statement that the tariff “shall be included by the Commission in the reviews required by subsection (d) of Section 9-201.5.” (Staff Br. at 5). All this means, plain and simple, and completely at odds with Staff’s convoluted conclusion, is that the Section 16-114 tariff and decommission cost studies would be subject to hearing and review. Because the General Assembly envisioned Commission review of the tariff and decommissioning studies does not mean the General Assembly envisioned ratepayer and customer liability for decommissioning charges after the nuclear units are sold.

Fourth, it matters little that Section 8-508.1 was in existence prior to the enactment of the Customer Choice Law (Staff Br. at 2). It still remains the case that there is nothing in Section 16-114 that speaks directly to the General Assembly’s intentions as to whether a utility can recover decommissioning charges from ratepayers and customers after it sold the nuclear units. If, in fact, it had been the General Assembly’s intention to allow for the recovery of these expenses from ratepayers and customers under these circumstances, one would think (and the law so states) the language would have been clear and unambiguous. For instance, the General Assembly could have stated as follows: **“and the Commission is authorized to determine the level of decommissioning charges that may be recovered from a utility’s ratepayers and customers upon the sale or**

transfer of its nuclear units, taking into consideration...”. Well, of course, try as they might, neither Staff or ComEd can find these words in the Public Utilities Act, or even similar words or expressions.

Fifth, no one suggested the riders put in place pursuant to Section 16-114 are expected to terminate on April 1, 1999, as ComEd argues the proverbial red herring (ComEd Br. at 6). Obviously, tariffs filed pursuant to Section 16-114 have collected decommissioning charges from customers and ratepayers before and after April 1, 1999. But the fact Section 16-114 authorizes the tariff in question, does not resolve the question in ComEd’s favor. The mere existence of the tariff is not legal justification to recover decommissioning expenses when the nuclear units are later owned by Genco.

Again, all the statute requires is for a utility that owns a nuclear unit, or any utility that has a responsibility to decommission a nuclear unit by virtue of a contract or statute, must make the requisite filing by April 1, 1999. By April 1, 1999, all Illinois electric utilities that owned a nuclear unit made the requisite filing. Nothing more, nothing less.

C. ComEd’s Two Purpose Interpretation Is Wrong

In both its brief and suggested replacement brief, ComEd argues Section 16-114 offers separate and alternate means for decommissioning charge recovery and, therefore, recovery post-transfer is legally permissible. (ComEd Replacement Br. at 11). More specifically, ComEd argues that under Section 16-114 decommissioning charges may be recovered when the utility owns or has an interest in the nuclear unit, or when it has responsibility as a matter of contract. To this, IIEC has no disagreement. However, ComEd then jumps to the unsupportable conclusion that because it is under these two separate circumstances where nuclear decommissioning charges may be recovered

from ratepayers and customers that, therefore, “the statute must be read to contemplate decommissioning recoveries after a utility has ceased to own a nuclear station, but continues to have contractual responsibility for decommissioning costs.”

Because the General Assembly states decommissioning charges can be recovered from ratepayers and customers under both circumstances (ownership and contract) does not mean or imply perpetual cost recovery under the circumstances of the contract. If the General Assembly had intended this type of liability, it would have said so as it did in the subsequent enactment of Section 16-114.1. The fact the utility’s requirement to make a Section 16-114 tariff filing can occur under two different scenarios, says nothing about cost recovery where the nuclear units are sold.

D. The Citizens Utility Board Case Does Not Support ComEd’s Position

ComEd continues to move further away from a statutory interpretation of Section 16-114, making general statements such as claiming that denying it the “right to full decommissioning cost recovery” would be “in violation of principles that have repeatedly been emphasized by the courts”. The only case law offered by ComEd in this regard is Citizens Utility Board v. Illinois Commerce Commission, 166 Ill. 2d 111, 651 N.E. 2d 1089 (1995) (ComEd Br. at 7).

Apart from ignoring completely what is meant by Section 16-114, reliance upon Citizens Utility Board reflects more a state of desperation. As an aside, the case was never cited by ComEd in its initial or reply brief. Nevertheless, the Supreme Court held the recovery of the coal tar clean-up costs was a business expense that could not be avoided by the utility:

“Under environmental statutes, gas and electric utilities face potential liability for site clean-up, even where MGP plants were operated with the attendant care and proper procedures of the day. A utility’s liability may be based on operation of the MGP by predecessor utility, ownership of land where a MGP plant operated, or prior operation of a MGP plant. **Under Federal and State statutes, a utility may be liable for**

coal-tar clean-up even if the utility no longer owns the MGP cite or never operates the plant at the site”.

Id. 651 N.E. 2d at 1093

* * *

“Similarly, the record in the instant case contains extensive evidence that utilities are required to incur coal-tar clean-up expenses under CERCLA and similar Illinois environmental laws. **Coal-tar clean-up expenses benefit a utility’s ratepayers because payment of this legally mandated cost** allows a utility to remain in business and to continue to provide service to its customers”. (emphasis supplied)

Id. 651 N.E. 2d at 1096

Coal-tar expenses were legally mandated expenses that had to be recovered and be paid by the utility. In contrast, the decommissioning charges at issue in this docket are not the expenses of the utility, but instead expenses of the Genco. Additionally, the contract is negotiated freely and voluntarily by ComEd - - there is no legal mandate for ComEd to (1) sell the nuclear units, and (2) continue to pay the decommissioning expenses. Therefore, ComEd’s reliance upon the Citizens Utility Board decision is misplaced.

IV. RESPONSE TO SECTION 16-114.1 ARGUMENTS AND DISCUSSION

Both ComEd and Staff make contrived arguments in response to the Proposed Order’s reasoning and discussion surrounding Section 16-114.1 (ComEd Br. at 8-10; Staff Br. at 6).

By way of background, on June 30, 1999, the General Assembly enacted Section 16-114.1 by Public Act 91-0050. This statute would specifically and only allow an electric utility owning a single nuclear unit to maintain the decommissioning trust authorized under Section 8-508.1, for the purpose of receiving contributions to the trust after the sale of the unit and to transfer the decommissioning trust or the balance thereof, to the buyer of the unit. This statute would not apply

to ComEd as the transfer at issue is for multiple nuclear units. What is most revealing, though, is that the statutory authority to permit the collection of decommissioning charges from ratepayers and customers upon transfer of the nuclear unit did not previously exist in the Customer Choice Law, and only now exists under the very narrow factual circumstance described in Section 16-114.1.

Specifically, Section 16-114.1(b) provides that the utility entering into an agreement to sell the nuclear unit is entitled to amortize its liability for decommissioning costs pursuant to the agreement over the period of time in which the utility is required to make additional contributions to the decommissioning trust, and to revise its decommissioning rate to a level that will recover annual contributions tied to the percentage of the output of the nuclear unit which the agreement obligates the utility to purchase in each year. And while ComEd and Staff argue Section 16-114.1 only outlines the transactional requirements of such a sale, **they ignore completely the statute outlines the recovery of decommissioning charges from ratepayers and customers after the sale of the nuclear unit.** If Section 16-114.1 is only about these transactional authorities and the like, why did the General Assembly state the utility shall be entitled to maintain decommissioning trusts for the purpose of receiving contributions after the consummation of the sale to implement revisions to the decommissioning rate in accordance with the statute? According to ComEd, the General Assembly is not expected to have introduced superfluous language. (ComEd Br. at 5)

Section 16-114.1 is the only statute, the only law, in the Customer Choice Law or in the Public Utilities Act that provides the opportunity for recovery of decommissioning charges from ratepayers and customers in the event of the sale or transfer of ownership of a nuclear unit. This language is found nowhere else. Prior to June 30, 1999, the Commission did not have the authority to permit the recovery of decommissioning charges in the event a utility would sell or transfer its

ownership of a nuclear unit or units, but only now does under the limited provisions in Section 16-114.1.

Contrary to ComEd and Staff's assertions, the Proposed Order's conclusion is consistent with the legal maxim, "expressio unius exclusio alterium" which means the enumeration of one thing in a statute implies the exclusion of all others. Baker v. Miller, 159 Ill. 2d 249, 636 N.E. 2d 551 (Ill. 1994). The holdings relying upon this legal maxim are several and need not be examined at length. Nevertheless, IIEC refers to a not too distant ruling by an appellate court involving a Commission decision where the court did rely upon the legal maxim in interpreting the statute. Specifically, in City of Chicago v. Illinois Commerce Commission, 294 Ill. App. 3d 129, 689 N.E. 2d 241 (Ill. App. 1997), the court had before it a Commission ruling exempting users of a telephone central switching service from payment of full surcharge rates to fund emergency telephone systems. In reaching its decision, the court made note that where a statute lists things to which it refers, there is an inference that all omissions should be understood as exclusions. Id. at 245.

It must then follow from the above holding, that the General Assembly's "omission" to not permit the recovery of decommissioning expenses from ratepayers and customers after the utility has sold the nuclear unit to another entity, and then enacting Section 16-114.1 to permit recovery of decommissioning expenses under the narrow circumstances described, speaks volumes as to the General Assembly's intentions. Such intentions do not mean to give ComEd the right to collect decommissioning charges under these circumstances.

Illinois Power Company, the one Illinois electric utility that met the requirements of Section 16-114.1, had previously made a filing (Rider DE) in compliance with Section 16-114 on April 1, 1999, effective May 17, 1999. In November 1999, Illinois Power Company sought revisions to its

Rider DE pursuant to Section 16-114.1. Petition for an Order under Section 16-114.1 of the Public Utilities Act - Illinois Power Company, Ill. C.C. Dkt No. 99-0578 (Nov. 23, 1999). The Commission's order in that docket specifically states, "IP's Petition was filed pursuant to § 16-114.1 of the Act, "Recovery of decommissioning costs in connection with nuclear power plant sale agreement", which was added to the Act by Public Act 91-1055, effective June 30, 1999." (Order at 1). The Commission noted, "the currently effective version of Rider DE was filed with the Commission on April 1, 1999, pursuant to § 16-114 of the Act, and had become effective on May 17, 1999. (Order at 7). Obviously, if Illinois Power Company believed Section 16-114, Section 9-201.5 and the others were all the authority needed in order to consummate its sale of its nuclear unit and then require its ratepayers and customers to pay some level of decommissioning charges, it never would have needed to make the filing pursuant to Section 16-114.1.

One of the points relied upon in the Proposed Order, was if the legislative authority already existed for Illinois Power Company to consummate the transaction in the manner it did, the utility would not have needed to rely upon Section 16-114.1 (Proposed Order at 20). Staff complains, and then attempts to explain the provisions of Section 16-114.1, and then confusingly refers to the Proposed Order's argument stating it carries no weight given the fact there are "grants of authority" discussed in Section 16-114.1 that also exist elsewhere in the Public Utilities Act. (Staff Br. at 7). Perhaps Staff means that because some aspects of the sale allegedly may be authorized in other sections of the Public Utilities Act, the Proposed Order is wrong in finding "post transfer collection of decommissioning" is only addressed in Section 16-114.1. (Staff Br. at 7-8).

What Staff fails to comprehend or completely ignores, is that Section 16-114.1 must be read

in its entirety and understood in that context, which is wholly consistent with the rules for proper statutory construction. Section 16-114.1, in its entirety, details the manner and means by which a utility can sell its singular unit, and also authorizes the recovery of decommissioning expenses from ratepayers and customers. There is nothing inherently wrong with a legislative provision that affords a utility with one nuclear unit to proceed in the manner allowed under Section 16-114.1, and not permit same for utilities that have multiple nuclear units.

It could very well be in the same way ComEd and Staff speculate, the General Assembly was cognizant of the magnitude of dollars that could be collected from ratepayers and customers who were taking service from an electric utility that owned multiple nuclear units, or, perhaps the General Assembly envisioned that the purchaser of multiple nuclear units would be financially able to absorb all remaining nuclear decommissioning liabilities. But, most likely, the General Assembly was aware of the factual circumstances pertaining to Illinois Power Company, and intended to pass legislation that dealt with only this utility. This makes intuitively good sense as the statute (Section 16-114.1) specifically refers to an electric utility that owns one nuclear unit!

V. RESPONSE TO ARGUMENTS PERTAINING TO SECTION 9-201.5

A. Section 9-201.5 Provisions

It is also argued Section 9-201.5 is authority, in part, for the Commission to permit the recovery of decommissioning charges in the manner suggested by ComEd. ComEd specifically argues that, “Section 9-201.5, which grants the Commission broad power to approve decommissioning charges, including charges that are not contributed to decommissioning trusts by plant owners, but rather, as in this case, are collected “to reduce amounts to be charged under such rates and tariffs in the future.” (ComEd Br. at 4). The flaws in the ComEd pitch are self-evident.

Section 9-201.5 basically authorizes the decommissioning tariff and the decommissioning cost studies underlying the rate be subject to a hearing and review, in a rate case or otherwise, not less than once every 6 years. In its simplest form, the statute provides that the Commission may authorize charges to customers for the cost of decommissioning. Section 9-201.5 allows the Commission to consider rate provisions or tariffs regarding decommissioning charge recovery outside a rate case.

Where, or how, ComEd could deduce that Section 9-201.5 would also authorize Commission to “include charges that are not contributed to decommissioning trust by plant owners” is never explained. There is nothing in the statute that references or implies anything about contributions from other sources.

Additionally, ComEd’s emphasis on that portion of the statute - - “to reduce amounts to be charged under such rates and tariffs in the future” - - is taken out of context. The Commission has previously proclaimed the purpose and intent of Section 9-201.5 in prior Rider 31 cases: “Section 9-201.5 of the Public Utilities Act (Act) authorizes an electric utility to establish “decommissioning rates” to “reflect changes and, or additional or reduced costs of decommissioning nuclear power plants.” (220 ILCS 5/9-201.5(a)). Commonwealth Edison Company, Ill. C.C. Dkt. No. 96-0113 (Order at 1) (April 24, 1996); Commonwealth Edison Company, Ill. C.C. Dkt No. 95-084 (Order at 1) (April 19, 1995). Furthermore, the Commission has explained the import of Section 9-201.5 is providing limitations to Rider 31: “in order to fully protect ratepayers and Edison, Rider 31’s charges should be subject to annual review proceedings. Interested parties should be allowed to participate in such docketed proceedings. This fully complies with Section 9-201.5 of the Act.” Iowa - Illinois Gas & Electric Company et al, Ill. C.C. Dkt. No. 95-0285 (Order at 7-8) (Oct. 9, 1996).

Nothing can be read in Section 9-201.5 that authorizes the Commission to require ratepayers

and customers pay decommissioning expenses for nuclear units that ComEd no longer owns, operates or has any responsibility to decommission. Moreover, there is no Commission order that can be relied upon to support this vain interpretation. Indeed, the Commission orders that do address the purpose and intent of Section 9-201.5 say nothing about some ongoing, perpetual liability of ratepayers and customers to pay decommissioning charges.

Staff offers, “The HEPO’s ultimate conclusion that a utility with one nuclear plant can continue to collect decommissioning costs while a utility with more than one should cannot be rejected. The HEPO offers no policy basis for such a conclusion”. (Staff Br. at 6). In response, it is pointed out the Proposed Order need not rely upon extrinsic aids to statutory construction as Staff suggests. There is no need to delve into some hidden or unexplained “policy”, or any policy, behind Section 16-114.1. Rather, it states plainly that an electric utility meeting these requirements, is entitled to recover some level of decommissioning charges from ratepayers and customers only as indicated.

B. Combining Statutes To Garner Some Stated Interpretation Is A Flawed Approach

ComEd offers that Sections 9-201.5 and 16-114 should be construed together, to reach the conclusion made by ComEd regarding decommissioning cost recovery. Beyond this conclusory remark and some recitation to case law, not much more is offered. (ComEd Br. at 1, 6).

It would seem that ComEd's position is that Sections 9-201.5 by itself, is not sufficient authority by which the Commission could authorize the relief being requested by ComEd in this docket. Bear in mind, Section 9-201.5 was enacted by Public Act 88-653 and made effective on January 1, 1995, more than five years earlier than the enactment of Section 16-114. ComEd must mean that with the passage of the Customer Choice Law and Section 16-114, where the Commission previously did not have the authority in question, it now does have by virtue of the proposed "bootstrapping".

Try as it might, the "bootstrapping" or cobbling of pieces of statute throughout the Public Utilities Act cannot save the day. Section 9-201.5 and Section 16-114 are inherently different, and accomplish different objectives. Section 9-201.5 is a statutory basis for a rider mechanism to recover decommissioning charges and institutes a review process, and Section 16-114 obligates the utility to remove all decommissioning charges from base rates by April 1, 1999, to be recovered exclusively in a rider. If nothing else, ComEd's argument to combine two statutes to bolster its legal analysis, amplifies the weakness in its reliance on either statute.

VI. THE FACT COMED HAS ENTERED INTO A PURCHASE POWER AGREEMENT WITH GENCO IS IRRELEVANT

Undoubtedly the ComEd proposal is driven by the rate "freeze" now in effect. (220 ILCS 5/16-111(a)). ComEd's rates to its bundled service customers cannot be changed. ComEd

ratepayers will pay the same rates, whether or not the source of power is nuclear, due to the statutory rate freeze. ComEd's only maneuverability is in a context of nuclear decommissioning charges, and it is looking to exploit that maneuverability.

Moreover, it is also delivery service customers, in addition to ratepayers, in the ComEd service territory who are being asked to bear this expense. These customers, simply because they exist and buy power and energy in the ComEd service territory and are not bundled service customers (ratepayers) of ComEd, are being asked to subsidize this cost where they receive absolutely no benefits, and receive none of the power and energy from these nuclear units over the next four years. In fact, **should these customers buy power from Exelon Genco, they could end up pay decommissioning charges twice for the same nuclear generation - - once through the price of power, and again through Rider 31 charges.** Another absurd result from the ComEd/Staff interpretations.

ComEd has argued customers benefit insofar as it has entered into a purchase power agreement with Genco. (ComEd Br. at 2-3, 12). Nevertheless, this does not salvage the underlying legal theories at issue. If ComEd's legal theory is correct, then ComEd could have entered into an agreement with Genco that could have obligated Illinois customers to pay decommissioning expenses for the life of the nuclear stations! This obligation could extend for several decades. This would occur even though Illinois ratepayers and customers would not be the beneficiaries of the power and energy from the nuclear units. Again, it is incomprehensible to believe the General Assembly would have delegated to the Commission the authority to allow this to occur.

It matters nothing that under the ComEd proposal, ComEd ratepayers will be entitled to power and energy from the nuclear units for four years and, perhaps, another two years. Had ComEd

entered into a contract with another supplier or even constructed a different agreement with Genco, it could have negotiated a price for power and energy that was all inclusive. Meaning, whatever the price is, presumably it includes the cost and expenses incurred by the supplier in providing the power and energy to ComEd, which is to be provided to its ratepayers, as well as a profit.

All ComEd has done in its “negotiations” is segregate a portion of the costs and expenses, the decommissioning charges, and pretends this is somehow a benefit. Of course, ComEd will respond by stating that its “deal” would also terminate ComEd ratepayer and customer liability for decommissioning charges at the end of six years. However, if ComEd ratepayers and customers never had that liability in the first place, then the “deal” is even more shallow.

VII COMED’S ARGUMENTS PERTAINING TO THE LEVEL OF DECOMMISSIONING COST RECOVERY SHOULD BE REJECTED.

ComEd continues to make arguments as to why its position pertaining to the decommissioning cost level is appropriate. (ComEd Brief at 13-19). The Commission should thoroughly reject these claims. IIEC and other parties have explained fully why ComEd’s proposed decommissioning level is overreaching in their briefs, and they will not be repeated herein.

In addition, as noted in IIEC’s Brief on Exceptions, if the Commission were to find that as a matter of law ComEd could recover decommissioning expenses from its ratepayers and customers, then the Commission should give consideration to the IIEC position, that the Genco will be sufficiently profitable so that no recovery is needed.

IIEC witness Robert Stephens conducted an analysis of the Genco profitability. Basically, he examined the market prices for power and energy in contrast to the cost of production. Mr. Stephens took into account a number of considerations including estimates of Genco’s costs and assumptions

about the market prices. This difference is before the tax margin associated with the nuclear output. Although their methods may have differed, ComEd's estimate of the difference between market prices and production costs associated with its Dresden and Quad Cities units corroborated Mr. Stephens' estimates units. (See IIEC Initial Br. at 33-34). It appears Mr. Stephens' illustrative price per kilowatthour unit margin is conservatively low in years following the power purchase agreement, especially in the context of an extended power uprate. (ibid).

Next, Mr. Stephens took into account the proposed price per kilowatt hour unit margin estimate, and calculated ComEd's net margin, and with that amount determined an estimated return on the initial investment. Mr. Stephens' then concluded that even if Genco was required to contribute the full \$121 million per year of its own revenue to the decommissioning funds, it still would enjoy a significant return on its initial investment. Therefore, Genco will have ample opportunity to fund its decommissioning requirements with its own market revenues.

VIII. CONCLUSION

Though perhaps well intentioned, the Commonwealth Edison Company and Illinois Commerce Commission Staff approaches fall way short of being legally sustainable. The Illinois Commerce Commission should follow the direction of the Hearing Examiners' Proposed Order and affirmatively reject the Commonwealth Edison Company Petition.

Respectfully submitted,

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29023

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 :
 : No. 00-0361
Petition for Approval of a Revision to Decommissioning :
Expense Adjustment Rider to Take Effect on Transfer :
of ComEd's Generating Stations. :

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on this ____ day of November, 2000, we have electronically filed with the Illinois Commerce Commission, Illinois Industrial Energy Consumers' Reply Brief on Exceptions, along with Proof of Service thereon attached.

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I, Edward C. Fitzhenry, being an attorney admitted to practice in the State of Illinois and one of the attorneys for Illinois Industrial Energy Consumers herewith certify that I did on the day of 6th November, 2000, electronically file with the Illinois Commerce Commission, Illinois Industrial Energy Consumers' Reply Brief on Exceptions, and serve upon the persons identified on the attached service list, both electronically and by depositing same in the United States Mail, in Granite City, Illinois with postage fully prepaid thereon.

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