

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, November 6, 2000, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed **Reply Of The People Of The State Of Illinois To Briefs On Exceptions To Hearing Examiners' Proposed Order** on behalf Of The People Of The State Of Illinois' in the above-captioned docket by submitting it via the e-docket system.

Mark G. Kaminski
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Mark G. Kaminski, a Assistant Attorney General , hereby certify that I served the above identified documents upon all active parties of record on the attached service list by United States Mail, first class postage prepaid on November 6, 2000.

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**REPLY OF THE PEOPLE OF THE STATE OF ILLINOIS
TO BRIEFS ON EXCEPTIONS TO HEARING EXAMINERS' PROPOSED ORDER**

The People of the State of Illinois (hereafter "People" or "AG ") submit the following as their Reply to Briefs on Exceptions to the Hearing Examiners' Proposed Order (hereafter "HEPO").

Reply to ComEd

1. There is No Authority For ComEd's Proposal Under the Public Utilities Act

ComEd asserts that, contrary to the HEPO's conclusion, there is statutory authority for ComEd to collect decommissioning trust funds from Illinois ratepayers subsequent to the transfer of its nuclear assets to its unregulated affiliate, Genco. ComEd BOE at 4. ComEd does not provide any new reasons why its assertion is correct.

ComEd claimed that "...the HEPO's conclusion would give no meaning to the language in

Section 16-114 recognizing that utilities may collect decommissioning charges when a utility has ‘responsibility as a matter of contract ... for decommissioning costs.’ 220 ILCS 5/16-114.”

ComEd BOE, p. 4. This argument fails to recognize the difference between being contractually liable for the actual decommissioning costs of the nuclear plants, and being contractually obligated to collect decommissioning charges on behalf of its unregulated affiliate, Genco. That difference is critical. The People made an exhaustive argument regarding this critical difference in its Initial Brief in Section IX (2), p. 26, and will not repeat it here.

Under the terms of the proposed transfer of nuclear assets to its unregulated affiliate, Genco, ComEd does not retain any responsibility for decommissioning costs. ComEd will not be involved in any actual decommissioning activities.¹ Rather, ComEd has merely agreed to act as a collection agent for its unregulated affiliate, Genco. *See*, Petition Attachment B, par. 8. ComEd witness Berdelle admitted: “If ComEd transferred the plants to a third party and did not contract for the unfunded decommissioning liability, then it would not have the right to collect.” Tr. 1030, line 22. The People could not agree more.

It must be kept in mind that ComEd’s own interpretation of Section 16-114 would require that it “...continues to have contractual responsibility for decommissioning costs.” ComEd BOE, p. 5. The People have clearly shown that ComEd has not retained any responsibility for decommissioning costs. To read Section 16-114 to include a contractual obligation for collecting decommissioning trust funds on behalf of the unregulated affiliate,

¹ ComEd witness Berdelle has acknowledged that ComEd will not retain a contractual responsibility for decommissioning costs. “ComEd is contracting with the Genco to take on the full nuclear decommissioning liability associated with the 13 units.” Tr. 1003, line 13. *See also*, Tr. 1046, line 7.

Genco', as a "responsibility for decommissioning costs", would fly in the face of the reasonable meaning of the statute.

Next, ComEd boldly states that the HEPO's conclusions "... would deprive ComEd of its right to full decommissioning cost recovery...." ComEd BOE, p. 7. Further, ComEd states: "A transfer of the stations does not eliminate ComEd's entitlement to cost recovery." *Id.*

ComEd cites *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 651 N.E.2d 1089 (1995) in support of this alleged entitlement. ComEd's reliance on that case is misplaced. That case dealt with expenses related to coal-tar cleanup. Those expenses were current operating costs of doing business. The Court stated: "The cost of delivering utility service reasonably encompasses current costs of doing business, including necessary costs of complying with legally mandated environmental remediation." *Id.* at 1096. Decommissioning trust fund charges are not used for a nuclear plant's current operating costs. ComEd witness LaGuardia testified that use of decommissioning funds does not begin until after the plant ceases operations. Tr. 400, line 2. Therefore, since *Citizens Utility Board, supra.*, addresses operating costs, it does not support ComEd's proposal to continue collecting decommissioning trust fund charges from Illinois ratepayers after ownership of the nuclear units is transferred to its unregulated affiliate, Genco.

Another ComEd exception involves the HEPO's interpretation of Section 16-114.1. The HEPO correctly reasoned that "Section 16-114.1 of the Act provides detailed guidance regarding post nuclear plant sale decommissioning trusts and future collections for utilities owning one nuclear plant. If general authority to do this already existed in the Act, the legislature had no need to address these issues." HEPO at 20. The HEPO further concluded: "If the only function of

Section 16-114.1 was to create authority for financing instruments and insurance, it would not specifically authorize the continued collection of decommissioning contributions.” HEPO at 20.

ComEd states that its proposal “...requires no such special authority because all of the structural aspects of the transaction with Genco may be approved by the Commission under other provisions of the Act.” ComEd BOE, p. 10. The HEPO clearly points out that there are no provisions of the Act that give the Commission authority to approve ComEd’s proposal.

The People made their arguments regarding Section 16-114.1 in their Reply Brief at page 10, and will not repeat them here. Suffice it to say, that by enacting Section 16-114.1, the legislature intended to retain the authority to determine if a utility can continue collecting decommissioning rates in the absence of retaining liability to decommission its nuclear plants. Absent legislative action to the contrary, the Public Utilities Act does not provide ComEd with the authority to continue collecting decommissioning trust fund charges on behalf of its unregulated affiliate, Genco.

Finally, ComEd’s interpretation of Section 9-201.5 is incorrect. ComEd believes that the language, “...to reduce the amounts to be charged under such rates or tariffs in the future[]”, 220 ILCS 5/9-201.5(a), gives it authority for its proposal. ComEd is confused. Reading every sentence of this statute together clearly shows that “reduce the amounts to be charged” refers to rates that “... increase or decrease charges to customers to reflect changes in, or additional or reduced costs of, decommissioning nuclear power plants....” *Id.* This statute allows for a “true up” of rates collected from Illinois ratepayers. Any rate established under this statute is subject to Commission review at least every six years. 220 ILCS 5/9-201.5(d). The very essence of this statute contemplates continued ownership of the nuclear plants by the utility. That is not the case

with ComEd's current proposal. The HEPO's conclusion that Section 9-201.5 does not provide the authority ComEd is seeking is correct.

In summary, the HEPO correctly found that there is no authority that would allow the Commission to authorize ComEd to continue collecting decommissioning trust fund charges from Illinois ratepayers after the transfer of ownership to its unregulated affiliate, Genco. ComEd has offered no new, persuasive arguments to the contrary. Therefore, the HEPO should stand as proposed.

2. Under Any Reasonable Theory, ComEd Should Not Collect Further Funds From Illinois Ratepayers

The People have, in their previous briefs, exhaustively pointed out that the record evidence in this docket clearly supports no further collections for decommissioning trust fund charges from Illinois ratepayers. The People will not repeat those arguments here. Therefore, the HEPO should stand as proposed.

Reply to Staff

Staff states that "...ratepayers [should] contribute their equitable portion of the decommissioning costs related to the power and energy they receive." Staff BOE at 2. To that end, Staff argues that Illinois ratepayers should contribute decommissioning charges for the four years covered by the Power Purchase Agreement (hereafter "PPA"). Staff's argument fails to recognize that record evidence in this docket clearly establishes that under all reasonable assumptions, Illinois ratepayers have already paid sufficient funds to safely and adequately decommission the nuclear units. The arguments made in the People's briefs will not be repeated here. The Commission cannot lose sight of the fact that any equity considerations must include

the money already paid by Illinois ratepayers. Since Illinois ratepayers have already paid their equitable share, no further collections based merely upon the PPA's four years that Genco is obligated to supply ComEd's native load should be allowed.

The People's reply to ComEd regarding Section 16-114's "...responsibility as a matter of contract..."(220 ILCS 5/16-114) is equally applicable to Staff. Section 16-114 cannot be twisted to allow ComEd, which owns no nuclear plants and is not liable for actual decommissioning, to continue collecting decommissioning trust fund charges from Illinois ratepayers under the guise of a contract that merely obligates ComEd for the collection of decommissioning charges on behalf of its unregulated affiliate, Genco, which both assumes the ownership of the nuclear plants and the full liability for future decommissioning.

Staff attempts to argue that the authority granted to a utility owning one nuclear power plant by Section 16-114.1 is also granted to a utility with more than one nuclear power plant, *i.e.*, ComEd. Staff BOE at 7. To counter the People's argument that the authority granted pursuant to Section 16-114.1 is exclusive to that section, Staff asserts that authority granted by Section 16-114.1 can be found in other portions of the Public Utilities Act. For example, Staff cites Sections 16-111(g) and 8-508.1 as authority to transfer trust funds. Staff BOE at 7. Staff fails to realize that the authority ComEd seeks is to continue collecting decommissioning trust fund charges without retaining any liability for actual decommissioning. Sections 16-111(g) and 8-508.1 do not address that central issue. The Illinois General Assembly enacted Section 16-114.1 to allow Illinois Power to continue collecting decommissioning trust fund charges from its ratepayers without the retention of decommissioning liability. This authority does not exist in any other legislative enactment. In fact, Staff's attempts to point out provisions of the Act that resemble the

authorities granted by Section 16-114.1, actually illustrates the exclusivity of Section 16-114.1.

Staff fails to reveal any provision of the Act that grants a utility with more than one nuclear plant the authority to continue collecting decommissioning rates in the absence of retaining liability to decommission its nuclear plants. As pointed out above, the retention of liability for actual decommissioning is critical to ComEd's continued collection of decommissioning trust fund charges on behalf of its unregulated affiliate, Genco. Since Staff has failed to present any new, persuasive arguments, the HEPO should stand as proposed.

WHEREFORE, the People request the Commission accept the Hearing Examiners' Proposed Order, and enter same as its Final Order in ICC Docket No. 00-0361.

Respectfully submitted,

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