

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY d/b/a :
AmerenCILCO, CENTRAL ILLINOIS PUBLIC :
SERVICE COMPANY d/b/a AmerenCIPS, and :
ILLINOIS POWER COMPANY d/b/a AmerenIP : No. 06-0448
:
Petition requesting approval of deferral and :
securitization of power costs :

**COMMONWEALTH EDISON COMPANY’S RESPONSE
TO THE ILLINOIS ATTORNEY GENERAL’S MOTION TO DISMISS**

Commonwealth Edison Company (“ComEd”) pursuant to Section 190 of the Rules of Practice of the Illinois Commerce Commission (the “Commission”), 83 Ill. Admin. Code § 200.190, responds as follows to the Illinois Attorney General’s Office’s (“AG”) Motion to Dismiss (“Motion to Dismiss” or “Mot. to Dismiss”) the instant Petition (“Petition” or “Pet.”) of Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS, and Illinois Power Company d/b/a AmerenIP (collectively, “Ameren”).

ComEd takes no position on the merits of the Petition or of the Ameren plan generally. However, the claim that *Business & Prof’l People for the Pub. Interest, et al. v. Ill. Commerce Comm’n*, 146 Ill.2d 175 (1990) (“*BPI II*”) requires dismissal of the Petition as a matter of law is incorrect. Both the AG’s Motion to Dismiss and Ameren’s Petition:

- oversimplify and mischaracterize the holding of “*BPI II*”;
- ignore key factual differences between *BPI II* and the circumstances presented in this docket (and also by ComEd’s residential rate stabilization proposal pending in Docket No. 06-0411); and
- incorrectly conclude “that a cap and deferral plan appears to be contrary to Illinois law” (Pet., ¶ 9) and is “unlawful” (Mot. to Dismiss, ¶ 3).

Moreover, the applicability of *BPI II* certainly should not be decided on the pleadings, especially when the Motion to Dismiss raises other, independent legal grounds, *i.e.*, authority to securitize debt.

Although Ameren correctly observes in its Petition that “[o]ne mechanism that regulators around the country have used for sudden and significant changes in rates is a phase-in” (Pet., ¶ 8),¹ both Ameren and the AG claim that phase-ins are likely barred in Illinois because the *BPI II* “Court found that allowing a utility to recover in rates expenses incurred in prior periods plus the current level of expense produced a ‘mismatch’ of expenses and revenues that violated the test year principle....” Pet., ¶ 10; *see also* Mot. to Dismiss, ¶ 4. Ameren thus concluded that “[a] cap and deferral plan in these circumstances runs a significant risk of the same treatment in the courts” and that “there is a significant chance that a court would view the deferrals in the same way the Supreme Court did in *BPI II*.” Pet., ¶ 11. As explained below, this is incorrect.

A deferral and recovery plan adopted to phase-in Commission approved rates is not *per se* illegal under Illinois law, nor does such a plan run afoul of the principles established in *BPI II*. To the contrary, (i) *BPI II* addressed a very different issue than that presented in this case, (ii) *BPI II*'s only discussion of rate moderation plans presumed their validity, (iii) the decisions since *BPI II* have not read *BPI II* to bar phase-in plans; (iv) the AG has supported the adoption of phase-in plans subsequent to *BPI II*; and (v) phase-in plans fall well within the Commission's authority to set just and reasonable rates.

¹ *See, e.g., Madison Gas & Elec. Co.*, Pub. Serv. Comm'n of Wis., 3270-UR-111, 224 P.U.R. 4th 500 (Order, Feb. 28, 2003) (granting utility permission to file a proposal to phase-in increase); *Conn. Natural Gas Corp.*, Conn. Dep't of Pub. Util. Control, Dkt. No. 93-02-04, 148 P.U.R. 4th 239 (Order, Dec. 15, 1993) (granting a five-year phase-in of post-retirement benefit costs to reduce impacts on ratepayers); *Dayton Power & Light*, Pub. Util. Comm'n of Ohio, Case No. 91-414-EL-AIR, 1992 WL 281169 (Order, Jan. 22, 1992) (approving three-year phase-in of revenue increase to avoid rate shock).

The *BPI II* issue that movants claim to be relevant here relates to whether ComEd could recover certain deferred charges that had been recorded for accounting purposes in between rate cases. The court held that it could recover some such charges but not those characterized as “operating expenses” and subject to test year rules in ratemaking proceedings. *See generally BPI II*, 146 Ill. 2d at 237-48. This is very different from the present issue, which relates to the Commission's ability to direct how and when a utility can recover an *approved* revenue requirement that was established in a rate proceeding in full compliance with test year and other ratemaking provisions. Indeed, following *BPI II*, the Illinois Supreme Court affirmed a Commission order approving rider recovery for clean-up costs associated with manufactured gas plant sites, and rejected arguments that *BPI II* prohibited the deferral and subsequent recovery of coal tar clean-up costs. *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 166 Ill. 2d 111, 136-40 (1995). *See also Commonwealth Edison Co.*, ICC Docket Nos. 91-0080 through 91-0095 (Cons.), 1992 Ill. PUC Lexis 379 at *141 (Order, Sept. 30, 1992) (finding “that *BPI II* *supports* its decision herein with regard to the deferral and recovery of coal tar cleanup costs”) (emphasis added)).

Moreover, the *BPI II* court specifically declined to address challenges to the rate moderation plan that had there been approved by the Commission. In doing so, it presumed the validity of such plans: “[o]n remand the Commission will establish new rates, and presumably a new moderation and allocation plan.” *BPI II*, 146 Ill.2d at 262. Nothing in the Court’s order limited the authority of the Commission to adopt a phase-in plan and instead simply assumed that it would be done.

In the cases since *BPI II*, neither the Commission nor any Illinois court has read *BPI II* to prohibit the use of phase-in plans in Illinois. To the contrary, the Commission has approved a

phase-in plan subsequent to *BPI II*. In *Ill. Indep. Tel. Ass'n*, ICC Dkt. Nos. 00-0233, 00-0335 (Cons.) at *27 (Second Interim Order on Reh'g, March 13, 2002), the Commission, to establish a Universal Fund, approved a related Universal Fund surcharge proposed by intervenors, and authorized a phase-in of the rate over a three or five year period, depending on how far away each company's rates were from the set rate. Notably, all parties submitting testimony in that proceeding recommended a phase-in plan, including Staff. *Id.* at 24. Most recently the Commission considered a two year phase-in plan proposed by an intervenor in Nicor's petition for a general increase in natural gas rates. *See N. Ill. Gas Co.*, ICC Docket No. 04-0779 (Order, Sept. 20, 2005). Although in the Nicor proceeding the Commission shared the intervenor's concerns that led to the proposal of a rate moderation plan, the Commission found that the plan had "not [been] adequately developed in the record," and specifically noted that the intervenor "did not adequately address the appropriate levels of rate, in each of the two years or how, if at all, Nicor would be made whole for any lost revenues in the first year of a 'phase in.'" *Id.* at *156. Nothing in the Commission's order suggested that phase-in plans are prohibited, and the Commission only concluded that it could not "adopt a phase-in [*in*] *this proceeding*." *Id.* (emphasis added).

Since *BPI II*, the AG also has supported the use of phase-in plans in Illinois. In *Commonwealth Edison Co.*, ICC Docket No. 01-0664 (Order, Feb. 6, 2002), which involved a petition for investigation and audit of certain ComEd distribution system investments and other expenditures, a large group of petitioners, including the AG's office, the City of Chicago, the Cook County State's Attorney's Office, and the Citizens Utility Board, "expressly reserve[d] their rights to continue to assert that the Commission should phase-in or otherwise moderate the impact of any increases in revenue requirements." *Id.* at *5. Likewise, in *GTE North Inc.*, ICC

Docket Nos. 93-0301 & 94-0041 (Cons.), 1994 WL 711847 (Order, Oct. 11, 1994), the AG recommended that there be a rate phase-in over three years of the rate increase approved in that rate case. The phase-in was rejected, however, because “[t]he AG did not present any evidence on rate design issues and did not explain how a phase-in could be accomplished.” *Id.* at *70.

A properly structured phase-in plan falls well within the Commission’s specific statutory authority to set rates that are “just and reasonable.” 220 ILCS 5/9-201. It has long been the law in Illinois that the Commission’s authority includes the power to make “pragmatic adjustments” and balance ratepayer and shareholder interests in light of the specific circumstances of a particular rate proceeding. *City of Springfield v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 218-19, 222 (1919); *Iowa-Illinois Gas & Elec. Co. v. Ill. Commerce Comm’n*, 19 Ill. 2d 436, 442 (1960). Moreover, the courts have repeatedly affirmed the Commission’s authority to make such pragmatic adjustments, particularly in the area of rate design. *Cent. Ill. Pub. Serv. Co. v. Ill. Commerce Comm’n*, 243 Ill. App. 3d 421, 424, 445 (4th Dist. 1993) (“Because of its complexity and need to apply informed judgments, rate design is uniquely a matter for the Commission’s discretion.”). *See also* 220 ILCS 5/16-101A(d) (finding that the Commission should implement the 1997 Restructuring Act in a manner that was “equitable to all customers” and that ensures “affordable” service.)

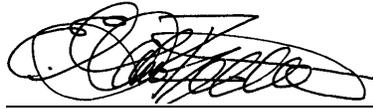
The “statutory authority” arguments made by the AG by themselves, with no evidentiary record, are insufficient grounds to dismiss the Ameren Petition as a matter of law. The Petition does not seek approval of any specific tariffs but, rather, asks for conditional relief. Accordingly, the Commission need not reach – and should not reach – a decision in this docket regarding whether or not *BPI II* should be read as prohibiting cap and deferral plans.

WHEREFORE, Commonwealth Edison Company prays that the AG's Motion to Dismiss, to the extent it relies on a claim that *BPI II* prevents the Commission from considering the Petition as a matter of law, be denied. Moreover, to the extent the Commission concludes that the Petition should be dismissed because securitization cannot lawfully be approved, the Commission need not, and in the context of a Motion to Dismiss should not, decide the applicability of *BPI II* to cap and deferral plans in general.

Dated this 18th day of July, 2006.

Respectfully submitted,

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