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ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :  
 : Dkt. 05-0597  
Proposed general increase in rates for delivery service. :

IIEC REPLY BRIEF ON REHEARING

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## **IIEC REPLY BRIEF ON REHEARING**

### **INTRODUCTION**

Briefs on Rehearing have been filed in this proceeding by the Illinois Industrial Energy Consumers (“IIEC”); Commonwealth Edison Company (“ComEd”); United States Department of Energy (“DOE”); the Staff of the Illinois Commerce Commission (“Staff”); the Coalition of Electric Energy Suppliers (“CES”); jointly by the Citizens Utility Board (“CUB”) the City of Chicago (“City”), and the Cook County States’ Attorney (“CCSAO”) (collectively (“CCC”); jointly by the Chicago Transit Authority (“CTA”) and Metra; and jointly by the City, CCSAO and the Chicago Board of Education (“BOE”) (collectively, “CCB”).

In its Initial Brief, IIEC described and supported a Stipulation entered into by IIEC, DOE and ComEd (the “Stipulation”). (*See*, IIEC Int. Br. on Reh. 2-3). The purpose of the Stipulation is to resolve, on a compromise basis, and in a manner that will produce just and reasonable rates, certain issues in this case as they relate to: the level of General and Intangible Plant (“G&I Plant”) in delivery service rate base; the level of Administrative and General Expense (“A&G Expense”) to be reflected in delivery service rates; the common equity component in ComEd’s delivery service capital structure; the authorized return on common equity for ComEd as a delivery service company; and the setting of delivery service rates for high voltage customers with demands in excess of 10 MW.

IIEC continues to support and endorse the adoption of the Stipulation, as a whole, as a reasonable and ready compromise of the issues that are the subject of the Stipulation. The record in this proceeding contains sufficient evidence to support a finding that the Stipulation will produce reasonable rates and to support the Commission’s adoption of the Stipulation, as a package. Therefore,

IIEC recommends the Commission favorably consider the adoption of the Stipulation package, as recommended by IIEC, DOE and ComEd.

At this stage of the proceeding and in the context of the agreement among the identified parties pursuant to the Stipulation, IIEC does not believe it is necessary to address the record on G&I Plant, A&G Expense, capital structure or return on common equity any further. In the event the Stipulation is not adopted in its entirety, IIEC will rely on arguments made and positions taken in the alternative portion of its Initial Brief on Rehearing, as well as the Initial and Reply Briefs and the Initial and Reply Briefs on Exception previously filed in its behalf in this proceeding.

However, IIEC will address certain new issues and arguments raised in certain briefs on rehearing, in relation to Rider GCB7, Section 16-125A of the Public Utilities Act (the "Act") (220 ILCS 5/16-125A) and certain statements made with regard to rates for high voltage customers with demands in excess of 10 MW. First, IIEC continues to support the recommendation of ComEd and the Staff that the Commission adopt Rider GCB7 and thereby avoid the \$116 million commodity revenue shortfall that would be otherwise created and collected from ComEd's other customers. Under no circumstance should any commodity related revenue shortfall be collected from delivery service customers. Second, IIEC states that it would not object to the Commission's adoption of ComEd's proposal to maintain a separate rate class for all high voltage customers and to establish a separate facilities distribution charge for high voltage customers with demands in excess of 10 MW and a separate facilities distribution charge for low voltage customers with demands of less than 10 MW. Finally, IIEC will also explain why ComEd is incorrect in asserting that a subsidy, allegedly applicable to over 10 MW customers served at standard voltage, will be extended to high voltage

customers with demands in excess of 10 MW, under the IIEC/DOE rate design for high voltage customers. (*See*, ComEd Int. Br. on Reh. At 58-59).

IIEC's failure to address a specific argument or position of any party should not be considered an acceptance of that argument or position unless otherwise specifically stated herein.

### **III. Rate Design**

#### **1. Rider GCB and GCB7**

In its Initial Brief on Rehearing, IIEC endorsed the recommendation, made by ComEd and supported by Staff, that the Commission reconsider its decision to reject adoption of Rider GCB7. (IIEC Int. Br. on Reh. at 13-14; *See also*, ComEd Int. Br. on Reh. at 51-52 and Staff Br. on Reh. at 58-59).

IIEC continues to support adoption of Rider GCB7 and believes that its adoption would avoid the creation of the \$116 million commodity subsidy described by ComEd. This in turn would eliminate the need for other customers to subsidize the electric commodity service of the select governmental entities fortunate enough to be a party to an intergovernmental agreement, relating to the purchase of electricity, in effect on May 1, 1997 prior to the time the Customer Choice and Rate Relief Law of 1997 (the "1997 Law") was adopted. (220 ILCS 5/16-101 et seq; 220 ILCS 5/16-125A(a)).

The City originally requested that Rider GCB be maintained to allow these entities to achieve rate reductions "on the delivery services side of their bills" not the commodity side. (Walter, City Ex. 1.0 at 6:111-113). Even the City witness realized that this case does not directly concern commodity pricing issues. Therefore, he did not request any resolution of the commodity issue in this case.

(Walters, City Ex. 1.0 at 6:114-115). The City and others should not be granted relief they did not actually request. Rider GCB7 should be adopted.

**a. Statutory Construction**

CCB argue that the legislature did not intend for Section 16-125A to be “time limited.” (CCB Int. Br. on Reh. at 2-3). However, no party has suggested that Section 16-125A is or should be “time limited.” Adoption of Rider GCB7 would not make it so. Indeed, the CCB do not explain how or why adoption of GCB7 would “time limit” Section 16-125A. ComEd witnesses have testified, and ComEd has stated, that Rate GCB7 would allow for the aggregation called for under Section 16-125A. (Alongi/Crumrine, Ex. 62.0 Corrected on Rehearing at 7:148-154; ComEd Int. Br. on Reh. at 53).

CCB further argue that under rules of statutory construction, when there is conflict between specific statutory provisions and general statutory provisions, the more specific provision prevails and must be given effect. (CCB Int. Br. on Reh. at 4). In support of their position, they cite the case of Hern v. American River Transportation Co., 303 Ill. App. 3d 619, 707 N.E. 2d 1283 (5<sup>th</sup> Dist. 1999). They note this decision was “overruled on other grounds” in Bowman v. American River Transportation Co., 217 Ill. 2d 75, 838 N.E. 2d 949 (2005).

However, the Bowman case is instructive on this issue. In that case, the Illinois Supreme Court was specifically called upon to determine whether or not language in the Jones Act, which specifically granted only a plaintiff seaman the option to elect “an action for damages at law, with the right to trial by jury,” would bar a defendant, in an appropriate case, from requesting a jury trial under the Jones Act in Illinois. In holding that the language at issue did not directly address the right of a defendant to request a trial by jury, the Supreme Court concluded that the issue was governed instead

by generally applicable law. Thus, the Supreme Court in Bowman concluded a specific statutory provision did not control over the general law in all circumstances. Likewise, the specific right of certain customers to aggregate their load does not require the Commission to conclude that certain governmental customers are also entitled to be exempt from the end of the rate freeze and entitled to a permanent rate freeze under the 1997 law.

Furthermore, the CCB position ignores that the cardinal rule of statutory construction that takes precedence over all other rules (including the specific versus general rule), is to ascertain and give effect to the intent of the legislature. Anderson v. First American Group of Companies, 335 Ill. App. 3d 407 at 409-410, 818 N.E.2d 743, 748. This is the first obligation of the Commission. Consideration must be given to the statutory language as the best indicator of the legislature's intent. *Id.* In considering that language, the courts (and the Commission) must consider the entire statute and interpret each of the relevant parts together. *Id.* If legislative intent can be determined from the language of the statute that intent must prevail without reliance on other aids to interpretation. *Id.*

The plain language of the 1997 Law, read in its entirety, does not support the conclusion that the legislature intended that of all the electric customers in the State of Illinois only certain governmental customers fortunate enough to execute an intergovernmental agreement in effect prior to the 1997 Law and relating to electricity matters, are entitled to have their electric rates frozen on a permanent basis.

To the extent application of other rules of construction is deemed necessary, the rule against unreasonable or absurd interpretations precludes a reading that requires a continuing commodity purchase subsidy, for these favored governmental entities, from other customers, including other

governmental entities, in the ComEd service territory. As ComEd witnesses have testified, such a subsidy was not created by Section 16-125A at the time of its enactment because of the existence of the rate freeze. Any revenue shortfall/subsidy was the responsibility of ComEd during the mandatory transition period. (*See, Alongi/Crumrine, ComEd Ex. 62.0 at 12:246-248*). Thus, the legislature did not intend to create a permanent subsidy in favor of these favored entities in enacting Section 16-125A. Certainly, Section 16-125A cannot now be interpreted and applied, as CCB suggest, to create such a permanent subsidy payable by other customers, now that the transition period is coming to an end and the rate freeze will terminate.

For these reasons, and for the reasons stated in IIEC's Initial Brief on Rehearing, the Commission should reject the misinterpretation of Section 16-125A by CCB and others.

**b. Means of Recovery of Any Subsidy**

To the extent the Commission adopts the incorrect interpretation of Section 16-125A, recommended by CCB and others, the Commission should prohibit recovery of the subsidy from delivery service customers as recommended in IIEC's Initial Brief on Rehearing. (IIEC Int. Br. on Reh. at 15-17).

The CCB argue that it would be fundamentally unfair to permit beneficiaries of public services that the eligible Rider GCB customers provide, to avoid contributing to the subsidy of their purchase of electric commodity. They appear to reason that all ComEd customers somehow benefit from these public services. (*See, CCB Int. Br. on Reh. At 12-14*). However, the CCB do not explain why it is somehow appropriate for all other ComEd customers to subsidize the electricity purchases of these favored governmental entities simply because those favored entities provide governmental services.

Indeed, some of the customers who would be contributing to the subsidy are themselves governmental entities. They also provide governmental services which may be used by citizens of the City of Chicago and the constituents of the other Rider GCB-eligible entities but their commodity purchases will not be subsidized.

In addition, the suggestion that because people outside the City of Chicago benefit from services offered within the City, when they visit the City, they should subsidize the City of Chicago's purchase of electricity, is without merit. (*See*, CCB Int. Br. on Reh. at 13). Such logic ignores the fact that users of the airports and public transportation facilities in the Chicago area pay fees and taxes for that use (i.e., airport taxes and fees and CTA fares). Such users should not be required, in addition, to subsidize the electric commodity purchases of these entities in their electric bills.

In response to testimony offered by IIEC witness Robert Stephens in opposition to allocation of the commodity subsidy to delivery service customers, the CCB argue that the IIEC witness acknowledged those IIEC members operating in the City, such as the University of Illinois and the Merchandise Mart, and their employees benefit from the public services provided by the City and other eligible Rider GCB customers. (CCB Int. Br. on Reh. at 14). However, this argument ignores the fact that IIEC members and their employees located within the City of Chicago and within the boundaries of other eligible governmental entities pay taxes to those entities for services they render. It makes no sense to tax them again through electric rates to subsidize the electric commodity purchases of the certain governmental entities eligible for Rider GCB.<sup>1</sup>

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<sup>1</sup>It is worth noting that 3 MW and over customers are no longer eligible for a fixed price commodity service from ComEd. (Commonwealth Edison Company, Dkt. 05-0159, Order, Jan.

Furthermore, this argument ignores the fact that entities such as the Merchandise Mart and the University of Illinois provide benefits and services to the public themselves. However, no one has asked the City, as a ComEd customer, to subsidize the University's or the Merchandise Mart's acquisition of electric commodity even though, under the logic of CCB, it would be appropriate for the City to do so. (Stephens, Reh. Tr. 328-329).

IIEC favors adoption of Rider GCB7 as proposed by ComEd, which would insure that no ComEd customer is required to subsidize any portion of the electric service for any Rider GCB customer. However, for the reasons stated above and for the reasons stated in IIEC's Initial Brief on Rehearing, if Rider GCB is retained the recommendations of CCB and others for collecting any resulting commodity subsidies from ComEd's delivery service customers should be rejected.

## **2. High-Voltage and Over 10 MW Customers**

Neither the Staff nor any other intervening party has objected to IIEC's recommendation with regard to high voltage customers with demands in excess of 10 MW. ComEd has stipulated to the position of IIEC and DOE on this issue. (ComEd Int. Br. on Reh. at 58). However, ComEd has recommended that in lieu of placing high voltage customers with demands in excess of 10 MW, in the Over 10 MW Class,<sup>2</sup> these customers remain in the separate High Voltage Class and that a separate, distinct facilities distribution charges be applied to high voltage customers with demands in excess of 10 MW and to high voltage customers with demands of less than 10 MW. (ComEd Int.

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24, 2006 at 129). It is fundamentally unfair to require these delivery service customers to fund the fixed price commodity purchases of CCB.

<sup>2</sup>ComEd uses the term "Extra Large Load Delivery Service" to describe Over 10 MW Class in its tariff.

Br. on Reh. at 58-59). IIEC has no objection to this approach under the circumstances.

ComEd goes on to suggest this rate design would extend the “subsidy,” applicable to over 10 MW customers served at standard voltage, to high voltage customers with demands in excess of 10 MW. ComEd recommends the inclusion of language in the Order on Rehearing to recognize the alleged “extended subsidy.” (ComEd Int. Br. on Reh. At 58-59; ComEd Draft Order on Reh. at 41). IIEC respectfully disagrees with ComEd’s characterization for the following reasons:

First, the Commission has already decided in this case that it was persuaded that it is potentially less costly to serve larger (over 10 MW) customers than smaller customers. (Order at 196). It did so on the basis of evidence presented by IIEC to the effect that the cost of service studies presented by ComEd in this case actually demonstrated that the per unit cost of serving customers over 10 MW was less than the per unit cost of serving smaller customers. (*See*, Order at 194; Chalfant, IIEC Ex. 2.0 at 12:234-241; Chalfant, IIEC Ex. 6.0 at 3:42-57). No party sought rehearing on this issue or in any way challenged the Commission’s findings. Thus, the Commission’s determination that ComEd failed to establish the existence of such a subsidy in this case is closed to reconsideration under the doctrine of the “law of the case.”

The “law of the case” doctrine is one which provides that once a tribunal makes a decision in a particular case, later decisions in that same case are closed to reconsideration except on appeal. *See*, Relph v. Board of Education, 84 Ill. 2d 436, 443, 420 N.E. 2d 147, 150. It is an expression of the practice of courts and other tribunals to refuse to relitigate issues already decided in the case. People v. Patterson, 154 Ill. 2d 414, 468, 610 N.E. 2d 16, 41. In fact, courts have stated that:

Under the law-of-the-case doctrine, generally, a rule established as

controlling in a particular case will continue to be the law of the case as long as the facts remain the same. (*Id.*)

In the case at bar, ComEd produced no additional evidence whatsoever on rehearing to establish the existence of such a subsidy. (*See*, Alongi/Crumrine, ComEd Ex. 57.0 Corrected on Rehearing and ComEd Ex. 62.0 Corrected on Rehearing). Therefore, there has been no change in the facts underlying the Commission's previous determination. The rationale behind this doctrine is that a party's failure to challenge a decision when made (by requesting reconsideration or taking an appeal) makes that decision the law in subsequent stages of the same litigation. *See*, Reich v. Gendraeu, 308 Ill. App. 3d 825, 829, 721 N.E. 2d 634, 637 (2<sup>nd</sup> Dist. 1999). In this case, neither ComEd nor any other party, sought reconsideration of the Commission's decision that it was: "persuaded that the cost of serving very large customers is potentially lower than serving significantly smaller customers." (Order at 196).

Second, as demonstrated above, the evidence ComEd did present in this case fails to establish such a subsidy exists. The IIEC evidence relied upon by the Commission demonstrates this failure and in fact showed it is less costly to serve the larger (over 10 MW) customers. The Commission was persuaded by that evidence and there is no evidence in the record on rehearing that justifies any change in the Commission's original determination, even if the law of the case doctrine were not applicable.

Therefore, ComEd's suggestion that the Commission should modify its Final Order of July 26 to recognize or imply the existence of such a subsidy, should be rejected.

## CONCLUSION

IIEC respectfully recommends that the Commission adopt the Stipulation of IIEC, DOE and ComEd as a package. The Commission should not modify its July 26, 2006 Order to recognize the extension of a subsidy it found did not exist in the first instance. IIEC further recommends the Commission adopt ComEd's recommendation on the adoption of Rider GCB7 and avoid the creation of a commodity subsidy as calculated by ComEd. If Rider GCB is retained, any commodity subsidy should not be collected from delivery service customers under any circumstance.

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