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Under section 6.6 of the contribution agreement, ComEd is required to pay decommissioning costs as determined by the Commission and to forward the funds to Genco at least annually for deposit into decommissioning trust funds maintained by Genco. Section 1.1 of the contribution agreement defines "decommissioning trusts" as follows:

"the trusts established under the Trust Agreement dated December 8, 1988, as amended (Tax Qualified Decommissioning Trust) between [ComEd] and the Northern Trust Company and the Trust Agreement dated December 8, 1988, as amended (Non-Tax Qualified Decommissioning Trust) between [ComEd] and the Northern Trust Company."

We can conclude only that the trusts referred to were those established in accordance with all the requirements of section 8--508.1. Therefore, contrary to Chicago's position, the section 8--508.1 decommissioning trust funds remain intact.

We also note that section 16--114 recognizes a public utility's ability to file a tariff to collect decommissioning rates where it has responsibility as a matter of contract for decommissioning costs. 220 ILCS 5/16--114 (West 2000). It would be illogical for provisions of the Act to allow ComEd to collect decommissioning rates to satisfy its obligation under the contribution agreement and then seal those funds off from deposit into the accounts established to hold funds for the eventual purpose of paying decommissioning costs. We will presume that the General Assembly did not intend to create an absurd or unjust result. Cummins v. Country Mutual Insurance Co., 178 Ill. 2d 474, 479 (1997).

Chicago also argues that the second purpose to which decommissioning rates must be applied pursuant to section 9--201.5 is inapplicable in this case. Chicago takes the position that the hearings before the Commission focused on determining the likely total cost of decommissioning, the likely escalation in

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decommissioning costs over the years before decommissioning actually takes place, the likely growth through investment income of the decommissioning trusts over those same years, and the likely number of years remaining before decommissioning. Considering all of this, the Commission approved the collection of \$73 million per year for four to six years based on the Commission's best estimate of what would be needed to pay all the decommissioning costs of all 13 nuclear power plants. Chicago contends that the Commission did not identify any actual savings to ComEd's ratepayers that will flow from its order and concludes that a tariff that simply raises a sum that is equal to expected future decommissioning expenses does not, by definition, reduce those amounts.

ComEd argues that the decommissioning costs are reduced because ComEd customers will not have to pay a decommissioning tariff after 2006.

We believe that Chicago misconstrues section 9--201.5 as requiring that decommissioning rates collected now must somehow reduce the total amount of the price for decommissioning as of the time it actually takes place. In our view, section 9--201.5 requires only that funds collected pursuant to decommissioning rates must be applied so as to reduce the amounts that customers will have to pay later.

The proposal in the petition, approved as modified, eliminates ratepayers' liability for decommissioning costs after four to six years. The \$121 million per year in decommissioning rates proposed by ComEd was based on the amount requested by ComEd in its 1999 decommissioning rate case (In re Commonwealth Edison, Ill. Com. Comm'n Rep. No. 99--0115). That amount was calculated by TLG Services, Inc. (TLG), assuming that decommissioning rates would be collected for the operating life of the nuclear power plants. The operating life was assumed to be equal to the length of the nuclear power plants' NRC operating licenses. The Commission reduced the \$121 million per year to \$73 million per year, but the

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amount will be collected for only 4 to 6 years, not the 27 years based on the expiration of the last NRC operating license. Also, the decommissioning cost estimates calculated in year 2000 dollars prepared by TLG totaled \$5.649 billion (rounded for purposes of our discussion to \$5.6 billion), or \$3.1 billion more than the amount in the decommissioning trusts at the time the petition was filed. ComEd's proposed decommissioning rate was \$121 million per year, with a maximum of \$726 million. The approved decommissioning rate was \$73 million for four to six years, or a maximum total of \$438 million in decommissioning rates, which is significantly less than the estimated deficit in the decommissioning trusts of \$3.1 billion. Ratepayers are liable for decommissioning costs in years five and six of the purchase power agreement only to the extent that ComEd buys power from Genco. Absent this plan, ComEd's ratepayers would have to pay all the decommissioning costs with respect to ComEd's nuclear power plants. Clearly, the Commission's order works to reduce the amount of decommissioning rates ComEd customers will be required to pay in the future.

Moreover, decommissioning costs have to be paid at some point in the future. All of the money ComEd collects for decommissioning purposes is applied to those costs. Money collected now will not have to be collected later. It follows then that the money collected pursuant to the Commission's order reduces the amounts necessary to be charged by ComEd in future years.

Even though decommissioning rates authorized by the Commission must satisfy only one of the requirements of section 9--201.5, as we have explained, the decommissioning rates authorized in this case satisfy both requirements. Therefore, we reject Chicago's arguments that section 9--201.5 has been contravened by the Commission's order.

On appeal, the intervenors make assorted arguments that were rejected by the Commission, contending that section 16--114.1 of the Act (220 ILCS 5/16--

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114.1 (West 2000)) bars ComEd's postsale collection of decommissioning rates. The Commission's order references section 16--114.1, which provides in pertinent part:

"§16-114.1. Recovery of decommissioning costs in connection with nuclear power plant sale agreement.

(a) An electric utility owning a single-unit nuclear power plant located in this State which enters into an agreement to sell the nuclear power plant and as part of such agreement agrees: (i) to make contributions to a tax-qualified decommissioning trust or non-tax qualified decommissioning trust, or both, as defined in Section 8-508.1 for the nuclear power plant, in specified amounts or for a specified period of time, after the sale is consummated, or (ii) to purchase an insurance instrument which provides for the payment of all or a specified amount of the decommissioning costs of the nuclear power plant, shall be entitled, in the case of item (i), to maintain such decommissioning trusts for the purpose of receiving such contributions after the consummation of the sale, to implement revisions to its decommissioning rate in accordance with subsection (b) of this Section, and to transfer such decommissioning trusts, or the balance in the trusts, to the buyer of the nuclear power plant in accordance with the agreement of sale, and in the case of item (ii), to implement revisions to its decommissioning rate in accordance with subsection (c) of this Section.

(b) An electric utility entering into an agreement of sale described in subsection (a) (i) of this Section shall be entitled to file a petition with the Commission for entry of an order authorizing the electric utility (i) to amortize its liability for decommissioning costs pursuant to the agreement of sale over the period of time in which the electric utility is

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required by such agreement to make additional contributions to the tax-qualified decommissioning trust, the non-tax qualified decommissioning trust, or both, and (ii) to revise its decommissioning rate to a level that will recover, over the time period specified in the agreement of sale, an annual amount equal to the electric utility's annual contributions to the decommissioning trusts which are required by the agreement of sale multiplied by the percentage of the output of the nuclear power plant which the agreement of sale obligates the electric utility to purchase in each such year.

(c) An electric utility entering into an agreement of sale described in subsection (a)(ii) shall be entitled to file a petition with the Commission for entry of an order authorizing the electric utility to revise its decommissioning rate to a level that will recover, over 5 years, the electric utility's cost of purchasing the insurance instrument multiplied by the percentage of the output of the nuclear power plant which the agreement of sale obligates the electric utility to purchase in each such year." (Emphasis added.) 220 ILCS 5/16--114.1 (West 2000).

IIEC/Coalition submits that the legal maxim expressio unius est exclusio alterius applies, pursuant to which a court may find that, when certain things are listed or specified in a statute, the legislative intent to exclude all other things from the statute's operation may be inferred (see In re Consensual Overhear, 323 Ill. App. 3d 236, 240 (2001)). IIEC/Coalition contends that, because section 16--114.1 grants authority for the Commission to approve an electric utility selling only one nuclear power plant to collect postsale decommissioning rates, but does not give the Commission the authority to approve the same act by a utility selling more than one nuclear power plant, ComEd is prohibited from doing so in this case. However, because we have concluded that

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sections 9--201.5 and 16--114 provide authority for ComEd's collection of decommissioning rates in this case, the inference created by expressio unius est exclusio alterius is inapplicable here.

Chicago also notes that section 16--114.1 gives electric utilities owning a single-unit nuclear power plant the authority to collect postsale decommissioning costs. Chicago reasons that if ComEd, owning more than one nuclear power plant, has this same authority under the Commission's interpretation of sections 9--201.5 and 16--114, then section 16--114.1 is rendered meaningless. Chicago concludes, therefore, that the Commission's interpretation of sections 9--201.5 and 16--114 must be erroneous. Chicago's argument on this issue mirrors like arguments of other intervenors; therefore, we will resolve all of the intervenors's arguments on this issue by specifically addressing Chicago's contentions.

The Commission recognized that there was an "overlap of authority" between the authority granted in section 16--114.1 permitting postsale decommissioning rates and the general authority available under sections 9--201.5, 8--508.1, and 16--114 to do the same thing. The Commission, however, also noted that section 16--114.1 "provides detailed guidance regarding post nuclear plant sale decommissioning trusts and future collections for utilities owning one nuclear power plant. Section 16--114.1 does not restrict the Commission in evaluating post-plant sale decommissioning cost proposals for utilities owning more than one plant" and concluded that "[s]ection 16--114.1 of the Act is not a bar to post plant sale decommissioning collection by ComEd." We agree with the Commission's conclusion for the reason that section 16--114.1 contains provisions that are not in sections 9--201.5 and section 16--114.

Section 16--114.1 gives an electric utility owning a single-unit nuclear power plant an option in the event of a sale to purchase an insurance instrument

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to pay decommissioning costs. 220 ILCS 5/16--114.1(a)(ii) (West 2000)). Sections 9--201.5 and 16--114 carry no such option. Additionally, the Commission's discretion is greatly limited in the approval of the postsale petition to collect a decommissioning tariff meeting the requirements of section 16--114.1. Subsection (d), inter alia, illustrates this point by providing, "The Commission shall issue an order granting the petition within 30 days after the petition is filed." (Emphasis added.) 220 ILCS 5/16--114.1(d) (West 2000). The word "shall" in a statute is generally indicative of mandatory intent. People v. Porter, 122 Ill. 2d 64, 85 (1988). On the other hand, the Commission has broad authority to grant, modify, or deny a petition to file a decommissioning rate tariff pursuant to section 9--201.5. Section 9--201.5 provides in pertinent part:

"(a) The Commission may after hearing, in a rate case or otherwise, authorize the institution of rate provisions or tariffs that increase or decrease charges to customers to reflect changes in, or additional or reduced costs of, decommissioning nuclear power plants ***." (Emphasis added.) 220 ILCS 5/9--201.5(a) (West 2000).

The authority for the postsale collection of decommissioning rates granted in section 16--114.1 alters those provisions in sections 16--114 and 9--201.5 giving like authority. Accordingly, we reject Chicago's argument that the Commission's interpretation of the Act renders section 16--114.1 meaningless and its consequent argument that section 16--114.1 vitiates the Commission's authority to approve ComEd's postsale collection of decommissioning rates.

For the foregoing reasons, we agree with the Commission's conclusion that sections 16--114 and 9--201.5 of the Act provide the statutory authority to grant ComEd's petition as modified.

C. Challenges to the Amount of the Approved Decommissioning Rate

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The material in this section is nonpublishable under Supreme Court Rule 23 (166 Ill. 2d R. 23).

[The following material is nonpublishable under Supreme Court Rule 23]

1. Intervenors' Challenges

All of the intervenors except the State make arguments challenging the amount of the approved decommissioning rate. We will address each argument.

All rates and charges collected by public utilities shall be just and reasonable. See 220 ILCS 5/9--101 (West 2000). The Commission's factual findings are considered prima facie correct (220 ILCS 5/10--201(d) (West 2000)) and will not be reversed unless "the findings of the Commission are not supported by substantial evidence based on the entire record of evidence" (220 ILCS 5/10--201(e)(iv) (West 2000)). Substantial evidence is defined as more than a scintilla of evidence, but may be something less than a preponderance of evidence, such that a reasoning mind would find the proffered evidence sufficient to support a particular conclusion. Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 283 Ill. App. 3d 188, 200 (1996). The appellate court is not permitted to reevaluate the credibility or weight assigned to evidence nor substitute its judgment for that of the Commission. Illinois Bell Telephone Co., 283 Ill. App. 3d at 200-01. In order to succeed in challenging a factual finding of the Commission, appellant must demonstrate that the opposite conclusion is clearly evident. Commonwealth Edison Co. v. Illinois Commerce Comm'n, 295 Ill. App. 3d 311, 321 (1998).

Chicago argues that the Commission's order did not properly allocate decommissioning costs between Genco and ComEd's ratepayers, but rather, resulted in assigning all of the predicted costs to ComEd's ratepayers. ComEd responds by pointing out that the order allocates 100% of the annual funding of the decommissioning trusts for the years 2007 through 2027 to Genco. ComEd also

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submits that the order transfers the risk that decommissioning costs will be higher than expected from its ratepayers to Genco.

In its petition, ComEd proposed to pay for a portion, not all, of the decommissioning costs. ComEd proposed an annual decommissioning rate of \$121 million for six years, which is the same annual amount ComEd petitioned for in its 1999 Rider 31 decommissioning case (In re Commonwealth Edison, Ill. Com. Comm'n Rep. No. 99--0115). The calculations in the 1999 case were made by Thomas S. LaGuardia (LaGuardia) of TLG. According to the record, LaGuardia is president of TLG and a board certified cost engineer. He has been working in the field of nuclear power plant decommissioning since 1969. He is the co-author of "Guidelines for Producing Commercial Nuclear Power Plant Decommissioning Cost Estimates." He has personally supervised TLG's staff in the preparation of site-specific decommissioning studies for more than 85% of the nuclear power plants in the United States, including the ComEd units, all of the operating commercial units in Canada, and one in Japan. The record indicates that TLG's nuclear power plant decommissioning cost estimates have been adopted by most state public utility commissions and the Federal Energy Regulatory Commission.

ComEd submitted cost estimates prepared by TLG which established that decommissioning costs associated with ComEd's nuclear power plants in year 2000 dollars total \$5.6 billion, or \$3.1 billion more than the \$2.5 billion held in the decommissioning trusts. ComEd asserts that decommissioning payments from Genco in addition to the decommissioning rate requested by ComEd will be necessary to make up the \$3.1 billion deficit. In calculating the annual decommissioning rate proposed by ComEd, LaGuardia assumed that decommissioning rate collections would continue through the retirement of the nuclear power plants based on the expiration of each plant's NRC operating license, the last of which expires in 2027.

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The Commission's order approved as modified the annual decommissioning rate requested by ComEd, which was based on the total estimated cost of decommissioning the nuclear power plants divided by the number of years remaining in the expected operating life of those plants. Pursuant to ComEd's proposal, the Commission's order made ComEd's ratepayers responsible for decommissioning cost payments only for the years 2001 through 2006 rather than throughout the operating life of the nuclear power plants. The Commission accepted ComEd's proposed figures and used that annual amount as a starting point before making various subtractions to arrive at what the Commission considered a just and reasonable decommissioning rate. We note that no other party presented any decommissioning cost estimates other than to adjust the figures presented by LaGuardia. We cannot conclude that the Commission's findings are not supported by substantial evidence based on the entire record of evidence. Accordingly, we reject Chicago's argument that the order made ComEd's ratepayers liable for all the decommissioning costs.

Chicago also submits that the amount of the approved decommissioning rate was not just and reasonable because there was uncertainty as to when decommissioning would occur. Chicago points out that the Commission found that the growth of the decommissioning trust funds will exceed the escalation rate for decommissioning costs, and, therefore, the longer the funds remain in the decommissioning trusts, the more earnings will accumulate. Chicago claims that the \$2.5 billion in the decommissioning trusts at the time ComEd filed its petition may be sufficient to pay for all of the decommissioning costs if the nuclear power plants operate long enough. Chicago reasons that because the Commission rejected ComEd's position that the nuclear power plants were not likely to operate beyond the terms of their original NRC licenses, it was left to speculation to determine how long the nuclear power plants would operate.

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Instead of putting ComEd to its burden (See 220 ILCS 5/9--201(c) (West 2000)), the Commission, Chicago argues, engaged in speculation and "[struck] a balance between ComEd's position and the intervenors' position" and reduced the yearly decommissioning rates by \$20 million to account for the possibility that the nuclear power plants would operate beyond the expiration of the nuclear plants' current NRC operating licenses. This speculation, Chicago contends, is no substitute for the substantial evidence needed to support the Commission's determination that the decommissioning rates allowed in this case were just and reasonable.

The Commission recognized the uncertainty of the duration of the nuclear power plants' operation in its order. This, however, does not indicate that ComEd failed to carry its burden of proof in this case.

The Customer Choice Law permits the sale of ComEd's nuclear power plants (220 ILCS 5/16--111(g)(3) (West 2000)) and allows ComEd to collect decommissioning rates where it retains responsibility for decommissioning costs as a matter of contract (220 ILCS 5/16--114 (West 2000)). Consequently, in response to ComEd's petition seeking approval for decommissioning rates which will not receive annual Rider 31 adjustments, the Commission is forced to estimate the total amount of decommissioning costs. While speculation has no place in the Commission's decision or in our review of that decision (Ameropan Oil Corp. v. Illinois Commerce Comm'n, 298 Ill. App. 3d 341, 348 (1998)), estimation necessarily does. Because nuclear decommissioning costs are not actually incurred until many years in the future, it is necessary to base decommissioning cost recoveries on estimates. See 220 ILCS 5/9--201.5(a) (West 2000)). We agree with the Commission's position that the uncertainty in these cases does not compel the Commission to claim it cannot make a decision.

The Commission found that it is likely that some, but not all, nuclear

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power plants will operate beyond their initial licensed life. This conclusion is supported by the testimony of William Riley, chief of the electric section of the engineering department of the energy division of the Illinois Commerce Commission. The Commission's decision to reduce ComEd's proposed annual decommissioning rate by \$20 million to compensate for this factor is also supported by Riley's testimony.

In his testimony before the hearing officers, William Riley recommended that ComEd's decommissioning rate be reduced by \$20 million per year to account for the benefit from potential license extensions. Riley's testimony was as follows:

"Q. Do you think the Commission should make an adjustment to ComEd's requested cost of service to account for potential license extensions at ComEd's nuclear stations?

A. Yes. With the current level of activity in license extension *** I find it very difficult to believe that Genco will not pursue this option for any of its nuclear units. Likewise I would be surprised if licenses were extended for all of the units. However, I do not have any opinion as to which units are the best candidates for license extension. As Mr. Berdelle's testimony indicates *** there is great uncertainty related to the benefits of license extension. However, under the same assumptions that ComEd finds reasonable in Docket 99--0115, license extension for only four of ComEd's ten units reduces annual decommissioning collections by \$36.9 million per year. To take a very conservative approach, I recommend that the Commission reduce collections by \$20 million per year. This does not assume a license extension for any particular unit(s), but merely reflects a part of the potential savings due to license extension."

Because the determination of the future costs of decommissioning the nuclear

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power plants necessarily involves estimation, we cannot say that the Commission's decision to accept Riley's estimation was unsupported by substantial evidence based on the entire record of evidence.

It is worthwhile to note that ComEd has indicated in its brief that Genco does intend to seek renewal of the NCR operating licenses. It is also significant that in the intervenors' joint brief in response to ComEd's contentions on appeal, the intervenors, including Chicago, collectively argue that the Commission's finding of fact that the decommissioning rate should be reduced by \$20 million due to the likelihood of license renewals for some of the nuclear power plants is supported by substantial evidence.

It is also important to realize that, to the extent the Commission underestimates this license extension offset, the Commission has concluded that the Act requires that refunds be made to ratepayers as each nuclear power plant is decommissioned (220 ILCS 5/8--508.1(c)(3) (West 2000)). The Commission's order provides that "[ComEd] is required, by law, to make any and all refunds to ratepayers on a plant by plant, trust fund by trust fund basis as each plant is decommissioned." ComEd, in turn, agreed to obligate Genco to refund to ratepayers any funds that remain in the decommissioning trusts in the event there is a surplus after all the stations are decommissioned.

Related to Chicago's argument is Cook's contention that the decommissioning trust funds are adequately funded to cover decommissioning costs without additional contributions. Cook claims that the Commission made four errors in calculating decommissioning costs.

First, Cook submits that the Commission's inclusion of contingency factors was not just and reasonable because contingency factors are too speculative to support reliable cost estimates and are unnecessary in view of TLG's site-specific cost studies. According to the Commission's order, a contingency factor

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is an allowance to compensate for problems which may occur that would cause a contractor to deviate from the optimal performance of a decommissioning task.

It is the decommissioning rate that must be just and reasonable (220 ILCS 5/9--101 (West 2000)). Findings by the Commission, on the other hand, must be supported by substantial evidence based on the entire record of evidence (220 ILCS 5/10--201(e)(iv) (West 2000)). We believe that there is such evidence in the record to support the Commission's decision to include contingency factors. LaGuardia testified that contingency factors are necessary and included as a matter of general practice. Moreover, in its order the Commission specifically recognized its past practice of approving contingency factors in decommissioning cost estimates.

Second, Cook challenges the \$20 million reduction to account for the possibility of the renewal or extension of the nuclear plants' NRC operating licenses as too small. We have concluded above that the Commission's decision to accept this estimation was supported by substantial evidence based on the entire record of evidence.

Third, Cook argues that the Commission underestimated the earnings rate on the funds in the decommissioning trusts. The Commission found that the tax-qualified trusts are likely to earn an overall after-tax rate of 7.49% and the non-tax qualified trusts are likely to earn an overall after-tax rate of 6.83%. At oral arguments, Cook referenced the testimony of Bruce Biewald who opined that a higher rate of return is more likely. As noted above, we are neither allowed to reevaluate the credibility or weight assigned to evidence (Illinois Bell Telephone Co., 283 Ill. App. 3d at 200-01)). It was the Commission's prerogative to accept or reject Biewald's opinion. The Commission rejected it, choosing instead to rely upon the earnings rates proffered by ComEd. We cannot say that the Commission's decision to use the lower earnings rates is unsupported by

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substantial evidence, and Cook has not convinced us otherwise. The burden of proof on all issues appealed from an order of the Commission is on the party appealing. People ex. rel. Jack O'Malley v. Illinois Commerce Comm'n, 239 Ill. App. 3d 368, 377 (1993).

Fourth, Cook contends that the Commission's adoption of the DECON method of decommissioning instead of the SAFESTOR method was erroneous. DECON decommissioning, recommended by TLG, contemplates removal of all radioactive material from the site directly after the nuclear plant's shutdown. SAFESTOR is a method of decommissioning where, after the nuclear power plant ceases operations, the site is secured and maintained in a safe manner and decommissioning is delayed until a later date. The Commission found that the DECON method of decommissioning is preferred over delayed decommissioning because the potential for earnings exceeding escalation rates will be offset by the additional expenses an operator incurs in maintaining and preventing a station from becoming a potential long-term safety hazard. Cook makes no argument in support of its contention other than the assertion that if Genco delays decommissioning due to life extensions or other reasons, earnings would accumulate in the decommissioning trust funds. Therefore, Cook has failed to carry its burden on this issue also. People ex. rel. Jack O'Malley, 239 Ill. App. 3d at 377.

Because we find insufficient support for the four arguments above, we reject Cook's position that the decommissioning trust funds were adequately funded to cover decommissioning costs without additional contributions.

Cook also argues that the Commission's order violates section 8--508.1(c)(3)(iii), which provides:

"In the event a public utility sells or otherwise disposes of its direct ownership interest, or any part thereof, in a nuclear power plant

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with respect to which a nuclear decommissioning fund has been established, the assets of the fund shall be distributed to the public utility to the extent of the reductions in its liability for future decommissioning after taking into account the liabilities of the public utility for future decommissioning of such nuclear power plant and the liabilities that have been assumed by another entity. The public utility shall, as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning." 220 ILCS 5/8--508.1(c)(3)(iii) (West 2000).

Cook views the evidence as showing that the ratepayers have fully funded the decommissioning trusts and that ComEd will have a reduction in its liability and excess decommissioning funds of 30%. Cook concludes, therefore, that under section 8--508.1 the ratepayers are entitled to a refund of at least 30% of the current decommissioning trust funds.

Cook's argument, however, fails to take into account that the Commission has arrived at different evidentiary conclusions. The Commission has determined that the total cost of decommissioning is \$5.6 billion and, as we have noted above, we cannot conclude that the Commission's determination is not supported by substantial evidence based upon the entire record of evidence. Moreover, the contribution agreement as implemented by the Commission fixes ComEd's liability for decommissioning costs at the \$2.5 billion in the decommissioning trust funds plus \$73 million collected annually for four to six years. Accordingly, the refund requirements of section 8--508.1(c)(3)(iii) are not implicated because the assets in the decommissioning trusts do not exceed ComEd's liability for decommissioning costs.

Cook's final argument challenges the escalation rate used to calculate decommissioning costs. According to Cook, the major components of a

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decommissioning cost escalation rate are (1) labor or wages; (2) low level radioactive waste burial costs; and (3) other decommissioning costs. Cook contends that the 4.95% escalation rate of decommissioning costs adopted by the Commission exceeds that which is just and reasonable. ComEd and the Commission argue that the rate used was appropriate.

The Commission draws our attention to Cook's application for rehearing before the Commission which, the Commission claims, fails to reference Cook's contention that inconsistent figures were used to calculate low level waste burial costs. Therefore, at least as to this matter, the Commission reasons that Cook has waived its right to appeal. However, upon our careful review of Cook's application for rehearing we have determined that it fails to adequately raise any of Cook's objections to the escalation rate figure.

The Act expressly limits the scope of a party's appeal to the reviewing court to those issues raised in the petition for rehearing before the Commission. 220 ILCS 5/10--113(a) (West 2000). ("No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for rehearing before the Commission.") The purpose of requiring issues to be raised in the petition for rehearing is to inform the Commission and opposing parties of the alleged legal and factual errors in the Commission's order. Citizens Utility Board v. Illinois Commerce Comm'n, 166 Ill. 2d 111, 135 (1995).

Cook's only mention of the escalation rate is in that portion of its application for rehearing that raised the issue that the Commission erred in failing to determine the appropriate amount of decommissioning cost recovery under a scenario where ComEd does not sell its nuclear power plants. Even in that context, however, Cook does not challenge the escalation rate figure the Commission utilized.

In support of its position that the issue has been preserved for review,

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Cook points to the allegation in its application for rehearing that the Commission failed to consider the appropriate factors when determining whether ComEd already had adequate funds for decommissioning. This general allegation, however, could not inform the Commission or opposing parties of the specific mistake alleged. See Citizens Utility Board, 166 Ill. 2d at 136. Accordingly, we conclude that Cook's escalation rate argument was not raised in its application for rehearing, and thus it is waived.

The ELPC claims that three of the Commission's findings as to the amount of the decommissioning rate and its duration were arbitrary, rendering the Commission's approval of \$73 million per year for four to six years arbitrary and capricious and not supported by substantial evidence.

First, ELPC points out that the Commission found that the anticipated renewal or extension of some of the nuclear power plants' NRC operating licenses reduces the amount of the annual decommissioning rate needed to meet decommissioning costs and, therefore, reduced the annual decommissioning rate by \$20 million. ELPC also points out that the Commission suggested that any cost savings from delayed decommissioning are adequately reflected in the \$20 million reduction for license renewals. ELPC argues that the same \$20 million reduction in the annual decommissioning rate cannot represent the cost reduction for license renewals and account for cost savings from delayed decommissioning.

In the portion of the Commission's order addressing the method of decommissioning, the Commissioners concluded:

"While we agree with the position taken in the TLG cost studies that, in most situations, the DECON alternative is the preferred mode of decommissioning, there are two competing points of view with respect to methods of decommissioning. If decommissioning is delayed, there is the potential that trust fund earnings may outpace escalation rates. On the

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other hand, a delay in decommissioning will result in additional ongoing maintenance costs. Additionally, there is the potential for increases in the costs of LLRW, and the uncertainty of stricter federal regulations. After considering both positions, we find that the potential for earnings exceeding escalation rates will likely be offset by the additional expenses an operator incurs in maintaining and preventing a station from becoming a potential long-term safety hazard. Further, we find that any reduction in decommissioning costs due to delayed decommissioning is adequately encompassed by the \$20 million reduction as found in VIII. License Renewal/Life Extension, herein. ComEd will be permitted to recover the amounts for decommissioning it is seeking here without any reduction relating to delayed decommissioning of the Nuclear Stations."

(Emphasis added.)

Although inartfully drafted and somewhat inconsistent, the Commission's order specifically states that it is not allowing a decommissioning rate reduction to account for cost savings from delayed decommissioning. Accordingly, we reject ELPC's argument.

Second, ELPC argues that the Commission's inclusion of contingency factors in calculating the decommissioning rate was arbitrary and unsupported by substantial evidence. This argument lacks merit because ELPC adds nothing to the same argument made by Cook that we have already rejected.

Third, focusing on the years 2005 and 2006, when ComEd's decommissioning rates are proportionately adjusted to reflect the amount of power ComEd buys from Genco, ELPC argues that, because the Commission cannot control the prices that unregulated Genco charges, the Commission's order is erroneous because it allows Genco to charge market prices, which presumably include its decommissioning costs, and at the same time allows ComEd to collect decommissioning costs from

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its captive ratepayers.

We begin by noting that, pursuant to the Commission's order, "ComEd will be permitted to recover during each of the years 2005 and 2006 an annual amount of decommissioning cost recovery determined by multiplying the annual amount of recovery approved in this order times the percentage of the actual energy production of the nuclear plants purchased by ComEd in each such year." Also, ComEd is required to purchase the power Genco's nuclear power plants produce in 2005 and 2006 only if ComEd and Genco can reach an agreement on a market price. In addressing the double collection issue in its order, the Commission concluded that its obligation and duty to ensure that the rates paid for electricity by ComEd's customers in the years 2005 and 2006 are just and reasonable would avert a double recovery of decommissioning costs. The Commission wrote:

"In its review of ComEd's rates, the Commission would have the ability to ensure that no double collection of decommissioning expenses was reflected in bundled rates charged to customers."

Implicit in the Commission's order is its assurance that it will not permit ComEd to agree to purchase power from Genco in 2005 and 2006 at a rate that includes a charge for Genco's decommissioning cost recovery.

Furthermore, support for the concept of limiting collections in years 2005 and 2006 to reflect the percentage of power actually purchased from Genco is found in section 16--114.1. Under that section, an electric utility which owns only one nuclear power plant and enters into an agreement to sell it is authorized:

"to revise its decommissioning rate to a level that will recover, over the time period specified in the agreement of sale, an annual amount equal to the electric utility's annual contributions to the decommissioning trusts which are required by the agreement of sale multiplied by the percentage

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of the output of the nuclear power plant which the agreement of sale obligates the electric utility to purchase in each such year." 220 ILCS 5/16--114.1 (b) (ii) (West 2000).

In light of this express statutory scheme for the sale of a single nuclear power plant, we cannot say that the Commission's decision to apportion ComEd's decommissioning rates in the years 2005 and 2006 was arbitrary or capricious. Moreover, the findings of the Commission are prima facie correct (220 ILCS 5/10-201(d) (West 2000)). Therefore, we will not reverse the Commission's decision.

Finally, IIEC/Coalition argues that the Commission erred in failing to regard the substantial evidence in the record demonstrating that Genco will have sufficient revenues to fully fund decommissioning costs. We reject this argument.

IIEC/Coalition calls our attention to the direct testimony before the Commission of Robert Stephens, who concluded that, even if Genco was required to pay from its own revenues the entire \$121 million of annual decommissioning costs, it would still be able to realize a satisfactory return on its investment. We note, however, that the decommissioning rate authorized under section 16--114 does not require that the electric utility's responsibility for decommissioning costs as a matter of contract can only arise where the transferee would not otherwise have sufficient funds to decommission the nuclear power plants. To the extent the Commission is required to so find pursuant to the requirement that all rates be just and reasonable (220 ILCS 5/9--101 (West 2000)), the Commission could have fairly chosen not to accept the testimony offered by Stephens. A party's claim that its witness should be believed over others is insufficient to overturn a decision of the Commission. See United Cities Gas Co. v. Illinois Commerce Comm'n, 47 Ill. 2d 498, 500-01 (1970).

In conclusion, we reject the intervenors' objections to the approved

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decommissioning rate.

2. ComEd's Challenges

The Commission made the following reductions to ComEd's proposed annual decommissioning rate of \$121 million to arrive at the approved decommissioning rate of \$73 million: (1) \$20 million for the possible extensions or renewals of the nuclear power plants' NRC operating licenses; (2) \$7 million for the actual extension of the Dresden nuclear power plant's NRC operating license by 47 months; and (3) \$20.9 million (rounded for purposes of our discussion to \$21 million) for the exclusion of non-radiological decommissioning costs. On appeal, ComEd seeks the restoration of these sums, contending that its proposed decommissioning rate was just and reasonable and that the reductions were not supported by substantial evidence in the record.

ComEd argues that the Commission abandoned the practice it followed in previous decommissioning proceedings where it calculated decommissioning rates using the term of the nuclear power plants' current NRC operating license. ComEd contends that the Commission arbitrarily reduced the proposed decommissioning rate based on the possibility that some plants will actually operate beyond their initial licensed life. In considering the same contention made by Chicago in support of its position that the decommissioning rate was too high, we have concluded that the reduction of the annual decommissioning rate by \$20 million to account for the possible extension or renewal of the nuclear power plants' NRC operating licenses was supported by substantial evidence. For the same reasons, we reject ComEd's argument. As to ComEd's contention that the Commission's decisions are entitled to less deference when the Commission departs from past practice (Citizens Utilities Board, 291 Ill. App. 3d at 304), we note that this is not the typical Rider 31 decommissioning rate case in which the past practice was employed.

Second, ComEd argues that the Commission erred when it reduced the proposed decommissioning rate by \$7 million, based on a "construction recapture" granted on August 24, 2000, by the NRC, allowing the operation of the Dresden 2 nuclear power plant for 47 additional months under its operating license. ComEd does not take issue with the amount of the estimated \$7 million per year reduction in decommissioning costs due to the additional operating time. Instead, ComEd contends that the NRC's modification of the operating license did not come to the Commission's attention until after the record was marked "heard and taken" on August 29, 2000, and was, therefore, improperly considered by the Commission.

The intervenors respond, contending that ComEd's application for the license modification was a matter of public record well before the record in this case was marked "heard and taken." The intervenors also point out that the NRC provided public notice that it was considering granting the license modification in June 2000. The intervenors conclude that, based on the public information available, the Commission had to decide whether it was reasonable to predict that ComEd's petition for license modification would be granted. The intervenors also argue that it would be absurd to reverse the Commission's factual finding on this issue when the petition was in fact granted.

In its December 20, 2000, order, the Commission states that the Staff raised this issue in its initial brief to the Commission, which was filed September 20, 2000. Findings of the Commission must be supported by substantial evidence based on the entire record of evidence (220 ILCS 5/10--201(e) (iv) (West 2000)). However, we believe the Commission properly considered this evidence even though it came to light during the intervening time between the date the record was marked heard and taken and the date of the Commission's order.

The Commission's rules of practice allow for the submission of postrecord

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data, including calculations and other numerical analysis. 83 Ill. Adm. Code §200.875 (1994). It is an indisputable fact that the NRC granted ComEd's petition for the construction recapture at Dresden 2 on August 24, 2000, resulting in a 47-month extension of the operating license. The operating life of the Dresden 2 nuclear power plant is a numerical component of the calculation of decommissioning costs and was related to evidence already in the record. Moreover, at oral argument counsel for ComEd conceded that the Commission could "judicially notice" a determination by the NRC.

In connection with this license extension issue, ComEd also submits that it was improper for the Commission to consider the extension of the Dresden 2 operating license in isolation. ComEd claims that the Commission engaged in a practice similar to that which would be prohibited in a general base rate proceeding as "single-issue ratemaking." While this case is different from a proceeding to establish general base rates, our supreme court has explained:

"The rule against single-issue ratemaking recognizes that the revenue formula is designed to determine the revenue requirement based on the aggregate costs and demand of the utility. Therefore, it would be improper to consider changes to components of the revenue requirement in isolation. Often times a change in one item of the revenue formula is offset by a corresponding change in another component of the formula. For example, an increase in depreciation expense attributable to a new plant may be offset by a decrease in the cost of labor due to increased productivity, or by increased demand for electricity." Business & Professional People for Public Interest v. Illinois Commerce Comm'n, 146 Ill. 2d 175, 244 (1991).

ComEd does not direct us to, nor do we find, evidence in the record to indicate that consideration of the 47 additional months of operation at Dresden 2 will

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affect other components of the calculation of decommissioning costs. ComEd only points to factors that are unrelated to the extension of Dresden 2's operation or which were not included in TLG's calculations. Consequently, there was no impropriety when the Commission adjusted its decommissioning cost figures to take into account the Dresden 2 operating license extension.

We, therefore, affirm the portion of the Commission's order reducing the annual decommissioning rate by \$7 million.

Finally, ComEd argues that the Commission erred when it reduced the proposed decommissioning rate by \$21 million to exclude nonradiological decommissioning costs. We disagree.

Nonradiological decommissioning (otherwise termed site restoration costs) involves the demolition of nuclear power plant structures which, while not involved in the radiological decommissioning process, are not designated for future use after radiological decommissioning. On this issue the Commission's order states:

"The Commission agrees with Staff and with Intervenors that it is inappropriate to include non-radiological decommissioning in the overall cost of decommissioning. ComEd's promise to perform non-radiological decommissioning activities after the completion of radiological decommissioning does not hold water. There is no real assurance that site restoration will take place. There is no NRC statutory requirement for site restoration. Nothing within the ComEd pledge itself guarantees that funds collected for site restoration will be used for that purpose. Therefore, the Commission finds that it is inappropriate to require rate payers to contribute towards non-radiological decommissioning."

The Commission was concerned that the funds collected for nonradiological decommissioning would be used by Genco for required radiological decommissioning

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costs. In this way, ComEd customers would be required to pay costs for which Genco otherwise would be responsible. Because there was sufficient evidence before the Commission to show, and the parties agree, that Genco is not subject to regulation by the Commission and that no statute or NRC regulation requires nonradiological decommissioning, we cannot say that the Commission's decision was not based on substantial evidence.

[The preceding material is nonpublishable under Supreme Court Rule 23.]

III. CONCLUSION

Based on the foregoing, we affirm the Commission's order.

Affirmed.

BOWMAN and CALLUM, JJ., concur.

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United States of America

COMMONWEALTH EDISON COMPANY, et al.,

Petitioners-Appellants,

v.

State of Illinois,
Appellate Court,
Second District,

ss.

ILLINOIS COMMERCE COMMISSION, et al.,

Respondents-Appellees.

I, ROBERT J. MANGAN, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this

31st day of December, A.D. 2002.

Robert J. Mangan
Clerk Appellate Court, Second District