STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	Docket No. 08-0312
Review of the Original Cost Audit	:	
of Commonwealth Edison Company	:	

REPLY POST-HEARING BRIEF OF COMMONWEALTH EDISON COMPANY

I. INTRODUCTION

The issue before the Commission in this case is whether Commonwealth Edison Company ("ComEd") violated any applicable rules simply by not "synchronizing" an accounting change (made seven years ago) with the end of the ten-year rate freeze in Illinois. The Attorney General ("AG") claims that because ComEd did not synchronize this change, the Commission should require ComEd to refund at least $42 million derived from prudent investments included in rate base.[1] Both ComEd and Commission Staff ("Staff") oppose the AG's proposal.

As discussed in Section II.A, recognizing that no Commission rule or precedent requires such synchronization, the AG attempts to find an implied prohibition on accounting changes in the Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-111 ("Restructuring Act"). The AG's argument is without basis in law or logic, and should be rejected. The AG's position also suffers from a complete lack of evidentiary support, which is apparent from the careful phrasing and equivocation in the AG's Initial Brief.

[1] While the AG does not specify an exact refund figure, the $42 million is derived from the following calculation: multiply the allegedly overstated revenue requirement of $14.2 million in Docket No. 05-0597 by the 1.75 years those rates were in effect, equaling $24.8 million, then add the allegedly overstated revenue requirement of $17.1 million in Docket No. 07-0566 multiplied by the one year those rates have been in effect, to arrive at $42 million. *See* Initial Brief of the People of the State of Illinois ("AG Initial Brief") at 9-10 and 13.

In addition, as discussed in section II.B.1, as well as in ComEd's Initial Brief, the 2002 change in ComEd accounting policy has not resulted and will not result in any double recovery. Moreover, the basic assumption underlying Mr. Effron's calculation of customer savings which he said would have resulted from "synchronization" is wrong, as explained in section II.B.2. Furthermore, as illustrated in section II.C below, the AG's request for a refund is clearly prohibited by the long-standing rule against retroactive ratemaking.

Accordingly, the Commission should reject the AG's refund recommendation, and find the "original cost" of ComEd's delivery system plant in service balance as of December 31, 2004 to be $11,349,394,000.

II. ARGUMENT

A. The Change in Accounting Policy Did Not Violate the Restructuring Act.

In suggesting that ComEd violated the Restructuring Act, the AG tacitly acknowledges that the Commission cannot alter a prior rate order to disallow previously-allowed cost recovery unless it can establish that recovery results from violation of an Act or Commission rule or order. *See Quantum Pipeline Co. v. Ill. Commerce Comm'n*, 304 Ill. App. 3d 310, 319 (3rd Dist. 1999), discussed in ComEd's Initial Post-Hearing Brief ("ComEd Initial Brief") at 6-7. This is a finding that cannot be made with respect to ComEd's change in accounting for cable fault repair expenditures or the timing of that change.

ComEd's change in accounting policy during the rate freeze did not violate the Restructuring Act. The AG's oblique implication to the contrary, based on the Act's specific enumeration of several acts that could be undertaken during the rate freeze without Commission approval, is unfounded. Prior to the Restructuring Act, each of the enumerated actions either required Commission approval or special certifications, or it was unclear whether such approval

was required.[2] It is plain that the purpose of enumerating these actions was to make clear that during the rate freeze these actions would not require Commission approval. Thus, the AG's attempt to justify further restrictions on a utility's freedom to act during the rate freeze by subjecting to Commission approval accounting changes that were never subject to Commission approval prior to the Restructuring Act flies in the face of the General Assembly's manifest intent *to increase* utilities' freedom to act. Moreover, the AG's position is flatly inconsistent with Illinois Supreme Court precedent that refuses to imply prohibitions or other "legislative intent where none is expressed." *In re Parentage of M.J.*, 203 Ill. 2d 526, 539-40 (2003) ("In interpreting a statute, courts should not add requirements or impose limitations that are inconsistent with the plain meaning of the enactment.").

In addition, the AG's position, if accepted, would invalidate every transaction entered into without Commission approval by any Illinois utility during the rate freeze "which might impact rates" (AG Initial Brief at 4) except those specifically authorized by section 5/16-111(g). This plainly absurd result should be rejected by the Commission. *See People v. Swift*, 202 Ill. 2d 378, 385 (2002) ("Where the meaning of a statute is plain on its face, there is no need to resort to other tools of construction. In interpreting statutes, we must avoid constructions which would produce absurd results."); *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 46 (2001) (citations omitted) ("It is well settled that '[s]tatutes are to be construed in a manner that avoids absurd or unjust results.'"); *Ambassador East, Inc. v. City of Chicago*, 399 Ill. 359, 365 (1948) ("Where

[2] The actions enumerated in 220 ILCS 5/16-111(g)(1) and (3) clearly required Commission approval prior to the Restructuring Act. *See* 220 ILCS 5/7-204(b) and 5/7-101(3) and 102(A)(c). Whether the action enumerated in 220 ILCS 5/16-111(g)(2) required similar approval was a matter of some doubt. *See Re Central Ill. Light Co.*, 70 P.U.R. 4th 117 (Ill. C.C. 1985) (ICC approval for retirements may be necessary); and *Iowa Gas and Elec. Co.*, Docket No. 86-0456, 1987 WL 1377095 (Ill. C.C. June 24, 1987) (retirement of electric generating equipment authorized). As to 220 ILCS 5/16-111(g)(4), the Restructuring Act allowed utilities to accelerate depreciation without the previously required certified public accountant certification. *See* 220 ILCS 5/5-104 (depreciation accounts) and 220 ILCS 5/16-111(h).

two constructions of law are proposed, this court will avoid the one which produces absurd results and renders the law difficult of operation.”).

The AG argues that the timing of the accounting change was an attempt to undermine “the intent of the rate freeze” and insinuates that ComEd’s actions constituted an end-run around the rate freeze and an improper deferral of a rate increase. *See* AG Initial Brief at 3 and 11. But the intent of the General Assembly is clear from the plain language in the Restructuring Act, which does not prohibit the accounting changes at issue. Unquestionably, ComEd’s rates were frozen between 1997 and 2007 as required by the Restructuring Act. The law and these facts do not justify a refund.

B. The 2002 Change in ComEd Accounting Policy Did Not Result in Any Harm to Customers.

1. No Double Recovery Occurred.

In its Initial Brief, the AG never actually states that ComEd has benefitted from any double recovery. The closest that the AG comes to supporting this argument is the AG’s equivocal statement that ComEd was “*in effect* … able to recover the same expenditures twice.” *Id.* at 12 (emphasis added). The AG fails to explain the difference, but it must be the case that “in effect” recovery is somehow short of actual recovery. In any event, whatever the AG means, this equivocation is not supported by any record evidence. Indeed, as discussed in ComEd’s Initial Brief, Mr. Effron acknowledges that he “did not attempt to determine the amount of cable fault repair expense reflected in rates in the years 2002 - 2006” (Rebuttal Testimony of David J. Effron (“Effron Reb.”), AG Ex. 2.0, 8:169-70), thereby conceding he lacks any empirical basis for his “double recovery” hypothesis. *See also Id.* at 3:46-51 (“it would be extremely difficult, at best, to determine the exact amount of cable fault repair expense reflected in rates in the years 2002 – 2006 and to then compare that expense to the cable fault repair expense recognized

subsequent to the accounting change to determine if such expense was over or under-collected, and I conducted no such examination for the purpose of my testimony.”).

The AG attempts to support its half-hearted argument that a double recovery “tracing” exercise is appropriate here by claiming that the last rate case prior to the accounting change was as recent as 2001, in Docket No. 01-0423, utilizing a 2000 test year. *See* AG Initial Brief at 8. In fact, the rates set in Docket No. 01-0423 did not apply to residential customers at all, but applied only to the small number of non-residential customers buying electricity from an alternative retail energy supplier. Direct Testimony of Kathryn M. Houtsma (“Houtsma Dir.”), ComEd Ex. 1.0, 9:187-200. As discussed in ComEd’s Initial Brief, bundled rates in effect through 2006 for ComEd’s residential and other customers were set in 1995, and ComEd’s Initial Brief discussed the many reasons why tracing these rates to present costs is not appropriate or feasible. *See* ComEd Initial Brief at 12-14. Moreover, even as to the rates set in Docket No. 01-0423, the AG does not identify the amount of cable fault repair costs, if any, included in these rates.

Thus, the record in this case does not contain any information regarding cable fault repair expenditures, if any, included in rates recovered from ComEd’s customers from 2002 through 2006. In the absence of such data, it cannot be said that ComEd recovered all, some, or none of its cable fault repair expenditures in 2002-06. In light of this, Ms. Houtsma’s testimony that “it is not possible to conclude any double recovery has occurred” (Surrebuttal Testimony of Kathryn M. Houstma (“Houtsma Sur.”), ComEd Ex. 3.0, 2:40-41) stands unrebutted, and the Commission has no evidentiary basis to make any finding of “double recovery.”

2. The Fundamental Premise of the AG's Synchronization Argument is Wrong.

The AG, through its witness Mr. Effron, argues that had ComEd synchronized the accounting change to take effect when the rates set in Docket 05-0597 were to take effect, January 2, 2007, rates would have been lower.[3] AG Initial Brief at 11-12. According to the AG's logic, this change would have been "known and measurable" and thus a *pro forma* adjustment removing the test year (2004) cable fault repair costs from O&M expense would have been appropriate, while at the same time those costs would not have been capitalized and included in rate base. Aside from the fact that such an adjustment would have deprived ComEd of any opportunity to ever recover those costs, and thus would have been improper for that reason alone, this *pro forma* adjustment would not have been proper under the Commission's *pro forma* rule. That rule, cited in footnote 2 of the AG's Initial Brief, allows a *pro forma* adjustment where the change occurred either during the test year (which is not the case here) or is "reasonably certain to occur subsequent to the historical test year *within 12 months after the filing date of the tariffs* . . . . " Here, the "within 12 months" test would not have been met, inasmuch as the accounting change would have occurred, under the AG's scenario, on January 2, 2007, which was *more than* 12 months after the filing date of the tariffs, which was August 31, 2005.

Because a *pro forma* adjustment could not have been made in Docket 05-0597, ComEd would have recovered its cable fault repair costs as an O&M expense. Thus, the revenue requirement would have been increased by $31.7 million (which is the net effect of including $45.66 million in test year O&M costs and removing 2002-04 cable fault repair costs from rate

[3] Although the AG's Initial Brief claims (at 3) that rates paid from April 1, 2002 "are higher than they should be," Mr. Effron has conceded that ComEd's rates between April 2002 and January 2007 were just and reasonable. Effron Reb., AG Ex. 2.0, 8:180-81.

base, *see* ComEd Ex. 1.3). As those rates were in effect for about 21 months, customers would have paid about $55.5 million more had the accounting change been synchronized in the manner proposed by Mr. Effron.

C. Implementing the Refund Proposed in the AG's Initial Brief Would Violate the Rule Against Retroactive Ratemaking.

If any doubt about the propriety of the AG's proposed adjustment existed before, that doubt has been removed. The explicit request in the AG's Initial Brief for a *refund* of approximately $42 million is clearly prohibited by the rule against retroactive ratemaking. In Illinois, the long-standing rule against retroactive ratemaking prohibits refunds to utility customers who are charged Commission-approved rates even when those rates are later overturned as too high. *Citizens Utilities Co. of Ill. v. Ill. Commerce Comm'n,* 124 Ill. 2d 195, 207 (1988) (as discussed in ComEd's Initial Brief, *Citizens* stands for the further proposition that the Commission may not adjust even rates to be charged prospectively where the basis for the adjustment is a utility's actions prior to a Commission rate order incorporating the effects of those actions). *See also Independent Voters of Ill. v. Ill. Commerce Comm'n,* 117 Ill. 2d 90, 96-106 (1987) (stating rule against retroactive ratemaking and further holding that refunds may only be ordered for "the interval between reversal and the time a new rate schedule is approved by the Commission and takes effect … ."); *Mandel Bros. v. Chicago Tunnel Terminal Co.,* 2 Ill. 2d 205, 775-77 (1954) ("a rate which has been approved by the Commerce Commission" … cannot be deemed excessive "for the purpose of awarding reparations … even though the rate … has subsequently been set aside upon judicial review."); and *City of Chicago v. People of Cook County,* 133 Ill. App. 3d 435, 449 (1st Dist. 1985) (refund of excessive portion of interim rate increase was not warranted where utility's earned return was far below its cost of equity during

the period interim rates were in effect). The AG points to no legal authority supporting its refund request because none exists.

III. CONCLUSION

The Commission should find that the "original cost" of ComEd's delivery system plant in service balance as of December 31, 2004 is $11,349,394,000.[4] The AG's proposal to reduce this balance and require a refund would deny ComEd a fair return on prudent, reasonably incurred investment in used and useful plant. Houtsma Sur., ComEd Ex. 3.0, 3:62-64. If the Commission wishes to establish a new rule that prohibits utilities from making changes in accounting policy between rate cases, it should do so prospectively through a rulemaking or similar forum that involves all utilities in the State. *Id.* at 3:45-48. To adopt the proposal advanced by the AG here, however, would be unwise and unlawful. It should be rejected.

Respectfully submitted,

/s/ David M. Stahl

David M. Stahl
Ronit C. Barrett
Eimer Stahl Klevorn & Solberg, LLP
224 South Michigan Avenue
Suite 1100
Chicago, Illinois 60604
Ph.: (312) 660-7600
Fax: (312) 692-1718

Richard G. Bernet
Assistant General Counsel
Exelon Business Services Corporation
10 S. Dearborn Street
49th Floor
Chicago, Illinois 60603
Ph: (312) 394-3623
Fax: (312) 394-3950

Attorneys for Commonwealth Edison Company

[4] This figure includes a deduction of $396,000 attributable to a disallowance of capitalized incentive compensation, made in ComEd's 2005 rate case. After ComEd filed its Initial Brief in this Docket, the Second District Appellate Court affirmed the Commission's disallowance of that amount in an opinion dated September 17, 2009.