

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY	:	
	:	
Petition for approval of initial	:	No. 09-0373
Procurement Plan	:	

COMMONWEALTH EDISON COMPANY’S MOTION FOR RECONSIDERATION AND TO HOLD LIMITED HEARINGS

Commonwealth Edison Company (“ComEd”) respectfully moves the Illinois Commerce Commission (“Commission”), pursuant to Section 10-101 of the Public Utilities Act (the “PUA”), 220 ILCS 5/10-101, and Sections 200.190 and 200.525 of the Commission’s Rules of Practice, 83 Ill. Adm. Code §§ 200.190, 200.525, for reconsideration of the Commission’s determination that no hearings are necessary in the above referenced proceeding. *See* Notice of Commission Action dated October 7, 2009. It appears that three issues of fact have emerged since the Commission’s decision and an evidentiary hearing limited to those three issues may be required. As described herein, this motion will be moot and need not be considered if the Commission accepts as true all of the factual assertions in ComEd’s submissions, including the Affidavit of Scott G. Fisher. In support of this Motion, ComEd states:

1. On September 30, 2009, after receiving comments on an earlier draft plan in accordance with law, the Illinois Power Authority (“IPA”) filed a Proposed Procurement Plan (“Proposed Plan”) for ComEd and the Ameren Illinois Utilities for the period from June 2010 through May 2015 as well as a Petition, pursuant to Section 220 ILCS 5/16-111.5(d) of the PUA, seeking Commission approval of the Proposed Plan. By order of ALJ Jones, objections to the Proposed Procurement Plan were filed on October 5, 2009, responses thereto were filed by

October 16, 2009, and replies to the responses are due to be filed by 3 p.m. on October 26, 2009. See Notices of Administrative Law Judge's Procedural Ruling dated October 1, 7, and 19, 2009.

2. Before considering the Petition on the merits, the Commission is required to determine "whether a hearing is necessary." Under Section 16-111.5(d)(3) of the PUA, the Commission must make this initial determination within 10 days of the Proposed Plan's filing. Accordingly, at its October 7, 2009 Bench Session, the Commission determined that no hearing was necessary. That determination was necessarily based on the record then available to the Commission and, at the time of that decision, verified responses (let alone any replies) had not been filed.

3. The Commission should -- as, under due process principles, it must -- determine whether an evidentiary hearing is necessary by applying the standard traditionally required for Illinois courts and agencies. Under that standard, a hearing or trial is needed if, and only if, there is a genuine issue of material fact presented by the pleadings and evidence, in this case the Petition and the Verified Objections. See 735 ILCS 5/2-1005(c). This standard satisfies the due process requirements appropriate for a formal administrative proceeding in which critical property rights are affected. See *Yiannopoulos v. Robinson*, 247 F.2d 655, 657 (7th Cir. 1957); *Balmoral Racing Club v. Illinois Racing Bd.*, 151 Ill. 2d 367, 408 (1992); *Brown v. Air Pollution Control Bd.*, 37 Ill. 2d, 450, 454 (1967). However, unlike factual issues, policy and legal issues do not require an evidentiary hearing to resolve. Judges and agencies traditionally resolve such issues summarily and without an evidentiary hearing.

4. Not only does this standard comply with due process and traditional procedural norms, it is entirely consistent with both the PUA and the Illinois Administrative Procedure Act ("IAPA"). Section 10-101 of the PUA states that, among other things, all "investigative

proceedings and ratemaking cases shall be considered ‘contested cases’ as defined in Section 1-30 of the [IAPA], any contrary provision therein notwithstanding.” 220 ILCS 5/10-101 A contested case is defined by the IAPA as “an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30. Thus, whether this proceeding is conceived of as a “ratemaking” proceeding or not, statutory contested case rules as well as constitutional due process rules apply. Under the IAPA, the Commission is required to provide an evidentiary hearing if there exists a dispute concerning a material fact in a contested case. *People ex. rel. Illinois Commerce Comm’n v. Operator Communication, Inc.*, 281 Ill. App. 3d 297, 301 (1st Dist. 1996) A decision in a contested case which does not comply is void. *Id.* at 303; *see also*, 5 ILCS 100/10-50(c). This conclusion is reinforced by Section 16-111.5(d)(3) itself, which specifies no standard of its own. A departure from the established standard that hearings are required to resolve genuine issues of fact should not be read into the PUA by implication. *See Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 251 (2nd Dist., 1994); *Consumers Sanitary Coffee and Butter Stores v. Illinois Commerce Comm’n*, 348 Ill. 615, 618 (1932) (“The [PUA] is in derogation of the common law and nothing is to be read into it by intendment.”).

5. Although at the time the Commission first acted on October 7, 2009, it appeared that no genuine issue of fact was presented, the parties’ subsequent submissions made it clear that there are at least three genuine issues of fact.

- The IPA proposes to acquire renewable resources under very long-term contracts for the output of specific renewable generators. Proposed Plan, p. 52. While such

contracts are authorized under specific provisions of the Illinois Power Authority Act (“IPA Act”) that contain strong legislative protections against consumers being overcharged,¹ the Proposed Plan would procure these contracts under the PUA provisions that are limited to “standard wholesale products.” 220 ILCS 5/16-111.5(b)(3)(iii) ComEd’s verified submissions show that – as a factual matter – long-term unit contingent contracts for renewable power are not “standard wholesale products” and, thus, cannot lawfully be procured as the IPA proposes. Unless the IPA and other parties were to now concur with that conclusion, a genuine factual issue is presented.

- The IPA proposes to solicit demand response as an alternative to traditional, standard capacity, in Spring 2010.² As the IPA notes, “cost-effective demand-response measures shall be procured whenever the cost is lower than procuring comparable capacity products”³ However, as ComEd’s verified submissions show, the PJM Interconnection, LLC (“PJM”) already procures demand response measures in a manner that satisfies this requirement. ComEd Verified Objections at 3. The IPA-proposed additional procurement is not just unnecessary, it is likely to lead to higher rather than lower costs for customers. *Id.* at 4-5. The questions of what resources PJM already procures and the likely cost of IPA’s proposed additional procurement are also genuine issues of fact.

¹ Section 1-75(c) of the IPA Act, 20 ILCS 3855/1-75(c).

² *See, e.g.*, Plan, pp. 2, 9, 52.

³ 220 ILCS 5/16-111.5(b)(3).

- The Proposed Plan specifies hedging ratios – the degree to which supply greater than forecast needs is “locked in” in advance as a hedge against increased demand and spot prices. ComEd, using the same methodology as IPA has used in the past, showed that hedging in excess of 100% of projected July and August demand will result in more, not less, risk. However, although the IPA presented no analysis of its own,⁴ its response “disagrees with ComEd’s contention that better approach would be to procure at 100% during that period.”⁵ Either the factual question must be resolved in ComEd’s favor (because ComEd’s is the only analysis submitted) or the question of summer hedging risk is another issue of material fact that must be resolved.

6. There will be no need for an evidentiary hearing if the Commission accepts as true all of the facts set forth in ComEd’s submissions, including the Affidavit of Scott G. Fisher. In that event, this motion will be moot. However, absent such a determination, the Commission must conduct an evidentiary hearing to resolve the material fact issues. Under the Commission’s rules, this could be a “paper hearing” if all parties consent, or a live hearing affording parties the opportunity to cross examine witnesses. A hearing scheduled shortly after the submission of verified reply comments would meet due process requirements and accommodate the time requirement for the Commission’s final order.

⁴ ComEd Objections, pp. 11-12. In its Response (pp. 2-3), the AG says that there is no analysis supporting the use of a 100% hedge ratio. The AG makes no mention of the ComEd analysis.

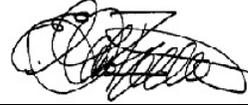
⁵ IPA Response, p. 9.

WHEREFORE, ComEd respectfully requests that, if the factual assertions in ComEd's submissions are not taken as true, the Commission reconsider its October 7, 2009 decision in light of the Verified Responses and Replies and order that an evidentiary hearing be held limited to identified genuine issues of material fact.

Dated: October 26, 2009

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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