

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

**REPLY BRIEF ON EXCEPTIONS
OF COMMONWEALTH EDISON COMPANY**

Petitioner Commonwealth Edison Company (“ComEd”) hereby submits its Reply Brief on Exceptions to the Illinois Commerce Commission (“Commission” or “ICC”).

I. INTRODUCTION

Both the Attorney General (“AG”) and Commission Staff (“Staff”) submitted Briefs on Exceptions (“BOE”). The AG’s BOE takes only one exception to the Proposed Order. That proposed exception, however, is contrary to the evidence and the law, and should be rejected by the Commission in its entirety. As discussed more fully below, the AG’s exception is based on the unsupported and incorrect assumptions that ComEd recovered its cable fault repair costs twice and that (argued for the first time) the rates set in Docket 05-0597 “*did not reflect* the reduction to expenses which had taken place ... as a result of the accounting policy change.” AG BOE at 4 (emphasis added). Moreover, although the AG’s position would violate numerous legal proscriptions, as ComEd pointed out in its BOE, it is not necessary to address these issues in order to sustain the Proposed Order. Finally, the AG’s argument that the Proposed Order somehow failed to consider the merits of the AG’s legal arguments is wholly unfounded. The Proposed Order correctly found that the Commission need not reach ComEd’s legal arguments in

order to reject the AG's recommendation. That being so, it became unnecessary to consider the AG's attempted refutation of these arguments.

Staff's BOE correctly concludes that the original cost of ComEd's delivery system plant in service as of December 31, 2004 is \$11,349,394,000. Staff suggests, however, that the Commission explicitly reject or take no position on several of the theories that ComEd advanced in its Initial Brief. ComEd does not object to the Commission taking no position on those issues on the basis that it is not necessary to decide them to reach the correct conclusion that the original cost of ComEd's delivery system plant in service as of December 31, 2004 is \$11,349,394,000, however, it would be incorrect to reject those arguments. In addition, ComEd and Staff both presented exceptions regarding the inclusion of language specified by the Stipulation between Staff and ComEd in Docket No. 07-0566. ComEd believes that its language closely tracks that of the Stipulation and it is ComEd's understanding that Staff agrees with the language presented by ComEd, and therefore the Commission should incorporate its proposed language on those bases. Lastly, ComEd does not object to Staff's additional exception regarding the statement of Staff's Position.

II. ARGUMENT

A. The AG's BOE

1. The 2002 Change in ComEd Accounting Policy Did Not Result in Any Harm to Customers Because No Double Recovery Occurred.

In its BOE, the AG attempts to recast the issue as whether the rates set were "incorrectly calculated" because the failure to synchronize the accounting change in question with a rate order resulted in rates reflecting "a rate base that included costs already collected as maintenance expenses." AG BOE at 2, 5, 7. The Proposed Order, however, concludes that no double

recovery occurred, and the AG's BOE does not cite *any* evidence to show that this finding is wrong. Proposed Order at 10; AG BOE at 5.

As explained at length in ComEd's Initial Brief and as set forth in the Proposed Order, ComEd has not recovered the costs at issue twice, nor will it, by reason of the change in policy. ComEd Initial Brief at 11-14 and Proposed Order at 10. Indeed, even Mr. Effron conceded that he is unable to demonstrate that any double recovery has occurred when he acknowledged 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. *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.").

Thus, the record in this case contains no evidence whatsoever that cable fault repair expenditures were included in rates recovered from ComEd's customers from 2002 through 2006. In the absence of such evidence, it cannot be said that ComEd recovered any 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" remains unrebutted, and the Proposed Order has correctly found that there is no evidentiary basis to make any finding of "double recovery." Surrebuttal Testimony of Kathryn M. Houtsma ("Houtsma Sur."), ComEd Ex. 3.0, 2:40-41; Proposed Order at 10. The AG's BOE adds nothing to undermine this finding of fact.

2. Contrary to the AG's Contention, Rates in Docket No. 05-0597 Did Reflect a Reduction in Expenses for Cable Fault Repairs.

The AG's new assertion that rates in Docket 05-0597 did not reflect the reduction in expenses resulting from the change in accounting for cable fault repair costs is patently false. AG BOE at 3-4. No cable fault repair expenditures were treated as maintenance expenses in ComEd's revenue requirement in that case. Direct Testimony of Kathryn M. Houtsma ("Houtsma Dir."), ComEd Ex. 1.0, 11:233-35. Indeed, if they had been, test year O&M costs would have been \$45.66 million greater, resulting in a revenue requirement increase of \$31.7 million *more* than the \$14.2 million resulting from the change in accounting policy. *Id.* The AG's piggybacked argument that rates set in Docket No. 05-0597 and thereafter are higher than if the pre-2007 cable fault repair costs had not been included in rate base is generally a statement of the obvious: that all else being equal, rates will be lower if proper capital costs – and no one disputes that these are proper capital costs – are not included in rate base. That argument, however, ignores the fact that the costs would then have been included as maintenance expenses, which would have actually increased the revenue requirement as discussed above.

3. ComEd Has Never Advocated That the Commission Cannot or Should Not Review the Results of the Independent Audit or Consider the AG's Arguments; ComEd Has Simply Stated that the AG's Arguments Are Meritless and Would Violate Numerous Legal Prohibitions.

ComEd has never advocated that the Commission cannot or should not review the results of the audit or consider the AG's arguments. AG BOE at 6. To the contrary, ComEd has demonstrated that the AG's arguments are without merit. The AG's improperly narrow interpretations of the *Quantum* and *Citizens Utilities* cases in its BOE do not rebut ComEd's positions. As Staff's BOE shows, however, the Proposed Order is valid regardless of whether the Commission accepts ComEd's view of the *Quantum* and *Citizens Utilities* cases (*see* ComEd Initial Brief at 6-9) or the AG's view (*see* AG BOE at 6).

Moreover, the AG's interpretation of the "entire question in this case" as "whether ComEd's rate base and operating expenses were – and are – accurate given the findings of the original cost audit" is similarly incorrect. AG BOE at 6. The ICC's task in this case is to "make a determination of the original cost of Commonwealth Edison Company's delivery system plant in service balance as of December 31, 2004." Proposed Order at 1 (quoting Initiating Order at 3). The ICC has further stated that at the conclusion of this Audit Approval Docket, "ComEd shall reflect the changes, if any," to the original cost of its delivery system plant in service balance and "[n]othing shall preclude recognition of such changes in any *subsequent* case or proceeding before this Commission." ICC Docket No. 05-0597, April 5, 2006 Interim Order ¶ 3 at 2-3 (emphasis added). Nothing in those directives requires or authorizes the Commission to retroactively determine if ComEd's rate base and operating expenses determined in *prior* rate cases were accurate based on the original cost determination in this Docket, and in any event, to do so would exceed the Commission's authority as contrary to the rule against retroactive ratemaking, as discussed below. *See also* ComEd's Initial Brief at 7-9 and ComEd's Reply Brief at 7-8.

Notably, the AG does not dispute the Commission's conclusion that the original cost of ComEd's delivery system plant in service as of December 31, 2004 is \$11,349,394,000. Instead, the AG requests a *refund* to ComEd's customers in "the amount they were overcharged." AG BOE at 7. As ComEd has repeatedly explained, such a refund would clearly violate the rule against retroactive ratemaking, which prohibits refunds to utility customers who are charged Commission-approved rates even when those rates are later overturned as too high. *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 without proof of double recovery, the AG’s refund request is also factually meritless.

In addition, the fact that North Shore Gas Company and Peoples Gas Light and Coke Company have recently filed rate cases that include proposals to make accounting changes at approximately the same time the new rates are expected to go into effect is not germane to this proceeding. *See* AG BOE at 5. None of the parties to this docket have advocated that synchronization is prohibited, and the AG now concedes that it is not required. AG BOE at 2.

B. Staff’s BOE

With the minor clarifications discussed below, ComEd does not oppose Staff’s proposed exceptions.

1. ComEd Does Not Oppose Staff’s Proposed Exception That the Commission Take No Position Regarding Several of ComEd’s Theories.

Staff suggests that the Commission explicitly reject or take no position on several of the theories that ComEd advanced in its Initial Brief. Staff BOE at 4-8. ComEd does not object to the Commission taking no position on issues on the basis that it is not necessary to decide them to reach the correct conclusion that the original cost of ComEd’s delivery system plant in service as of December 31, 2004 is \$11,349,394,000. If it is not necessary for the Commission to determine the issues, however, then it would be incorrect for the Commission to reject those arguments. The exception language proposed by Staff with regard to this issue is acceptable to ComEd. *See* Staff BOE at 8.

2. The Commission Should Adopt ComEd's Proposed Language Regarding the Precedential Value of the Stipulated Resolutions.

ComEd and Staff both presented exceptions regarding the inclusion of language specified by the Stipulation between Staff and ComEd in Docket No. 07-0566. ComEd believes that its language closely tracks that of the Stipulation, and it is ComEd's understanding that ComEd's proposed language is acceptable to Staff. The Commission should incorporate ComEd's proposed language on those bases. *See* ComEd BOE at 2-3, Exceptions No. 1 and 2.

III. CONCLUSION

In conclusion, as set forth in the Proposed Order, the evidence conclusively demonstrates that the original cost of ComEd's delivery system plant in service as of December 31, 2004 is \$11,349,394,000. ComEd respectfully requests that the Commission reject the AG's proposed exceptions and that the Proposed Order be entered with the limited exceptions suggested in ComEd's BOE. In addition, ComEd does not oppose Staff's proposed exceptions as discussed above.

Dated: December 2, 2009

Respectfully submitted,

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

/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

Attorneys for Commonwealth Edison Company