

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 : No. 10-0467
Proposed general increase in electric service rates :

COMMONWEALTH EDISON COMPANY’S RESPONSE
TO JOINT MOTION TO CONSOLIDATE DOCKETS 10-0467 AND 10-0527

Commonwealth Edison Company (“ComEd”), by its attorneys, submits this Response to the Joint Motion to Consolidate Dockets 10-0467 and 10-0527 (“Motion”) filed by the Illinois Attorney General, AARP, the Citizens Utility Board, and the Chicago Transit Authority (collectively, the “Movants”). As the Motion was filed in duplicate in both Dockets, this response is simultaneously being filed in both Dockets as well.

Introduction

The Motion seeks consolidation of two dockets: on the one hand, Docket No. 10-0467 (the “Rate Case”), an investigation into tariffs implementing a proposed general rate increase initiated by the Illinois Commerce Commission (“Commission”) under Section 9-201 of the Public Utilities Act (“PUA” or “Act”); and, on the other, Docket No. 10-0527 (the “Alt Reg Case”), a proceeding commenced by ComEd’s Petition filed under Section 9-244 of the PUA to approve an alternative regulation plan and a tariff, Rate ACEP,¹ implementing it. Those dockets are very different in the most central respects:

- The tariffs at issue are different. The Rate Case does not include Rate ACEP and the Petition in the Alt Reg Case seeks approval of no tariff at issue in the Rate Case.

¹ The full name of the tariff is Rate ACEP – Accelerated Customer Enhancements Pilot (“Rate ACEP”).

- The applicable legal standards are different. The Rate Case is governed by traditional Article IX standards. The Alt Reg Case is governed by standards unique to Section 9-244 “notwithstanding any of the ratemaking provisions of this Article IX or other Sections of [the PUA] ... except as provided in Article XVI ...” 220 ILCS 5/9-244(a).
- The facts are different. The general delivery revenue requirement at issue in the Rate Case includes none of the costs of the activities proposed in the Alt Reg Case. Moreover, the facts proving the justness and reasonableness of that revenue requirement are of no relevance to the Alt Reg Case. Likewise, the facts showing that the proposals made in Alt Reg Case meet the legal requirements of Section 9-244 are no part of ComEd’s case for a general rate increase.

It is true that ComEd’s ability to implement an Alt Reg program is related to the outcome of the Rate Case: ComEd cannot make additional investments without sound base rates. But, that does not create common questions of fact or law between the cases.

The Applicable Standard

Under Section 200.600 of the Commission’s Rules of Practice, the Commission “may order two or more proceedings involving a similar question of law or fact to be consolidated where rights of the parties or the public interest will not be prejudiced by such procedure.” 83 Ill. Adm. Code 200.600. There is no presumption that consolidation is appropriate. Where there has been no persuasive evidence or reasoning presented in favor of consolidation, the Commission has denied consolidation. *Illinois Bell Telephone Co.*, Docket No. 96-0273, 1996 Ill. PUC LEXIS 377, *5 (July 31, 1996). Illinois law gives clear direction regarding the requirements for filing and approving an alternative regulation proposal, and filing the proposal

in a general rate increase is not one of the requirements. The instant case presents no basis for consolidation. The law allows these two cases to be independent and to proceed separately.

Moreover, consolidation is proper only if there are both similar questions of law or fact and the absence of prejudice to the parties or the public interest. 83 Ill. Adm. Code 200.600. The absence of prejudice is a limitation on the ability to consolidate. Even where there are common questions of law or fact, consolidation is not allowed if it will prejudice the parties or the public interest. Movants attempt to distort that standard by arguing that they are better off with consolidation, asserting that they “would be prejudiced *in the absence* of consolidation.” Motion, ¶ 6 (emphasis in original). In addition to being factually unsupported, this is not part of the standard. ComEd was not obligated to file its alternative regulation proposal as part of the pending, or any, rate case. That lawful choice can only be disturbed in the absence of prejudice from consolidation. Movants’ own claim that they would be procedurally, strategically, or tactically better off with a single proceeding is no grounds for consolidation.

Movants further assert that “[t]here is substantial overlap between Dockets 10-0467 and 10-0527 both in terms of questions of law and questions of fact” *Id.*, ¶ 6. Movants’ arguments are flawed. The alleged and limited relationship between the Rate Case and the Alt Reg Case does not warrant consolidation.

The Factual Issues Are Distinct

Movants point to testimony on two subjects that they claim establish the requisite commonality. First, they cite the Rate Case testimony of ComEd witnesses Mr. Guerra (Docket 10-0467, ComEd Ex. 1.0) and Dr. Hemphill (Docket 10-0467, ComEd Ex. 14) submitted in June discussing the then contemplated filing of the alternative regulation pilot proposal. Motion, ¶ 3. This demonstrates no common issue of fact whatsoever. ComEd was deliberately open with the

Commission and parties and disclosed its intention to file a Petition under Section 9-244 approximately two months after its Rate Case. It did that in the hope that a constructive dialog might be spurred about ComEd's alternative regulation plans prior to the filing of its case. That does not create any factual commonality between the underlying cases.

Movants also cite Dr. Hemphill's testimony (Docket 10-0527, ComEd Ex. 1.0) that ComEd's alternative regulation proposal "is necessarily conditioned on ComEd receiving approval for rates that give it a reasonable opportunity to recover its other delivery costs." Motion, ¶ 4. This, too, misses the mark. Under Section 9-244, ComEd has a unilateral right not to proceed with an alternative regulation plan that has been modified in any respect. 220 ILCS 9-244(b) ("The utility shall have 14 days following the date of service of [an order proposing modifications to the utility's proposal] to notify the Commission in writing whether it will accept any modifications so identified in the order or whether it has elected not to proceed with the program."). The fact that ComEd openly disclosed to the Commission and the parties that it will be unable to proceed absent a fair Rate Case outcome does not merge Rate Case issues into the Alt Reg Case or vice versa. The issues the Commission must resolve in the Alt Reg Case do not change, nor do the issues in the Rate Case.

Movants also intimate that there is some overlap between the new proposals at issue in the Alt Reg Case and the existing activities, or their costs, at issue in the Rate Case. There is absolutely no evidence to support this claim. None of the projects to be funded by ComEd's alternative regulation proposal are included in its revenue requirement in the pending rate case. As indicated in Dr. Hemphill's testimony in the Alt Reg Case, "[t]he [Alt Reg] proposal recognizes that the projects are discretionary and not part of the existing revenue requirement." Docket 10-0527, ComEd Ex. 1.0, 31:642-43. Rather, "[t]he programs proposed under ComEd's

alternative regulation plan are incremental and should be evaluated individually, on their own merits.” *Id.* at 8:173-75 (emphasis added). The programs proposed in the Alt Reg Case are neither proposed in the Rate Case nor are their costs included therein. While Movants may try to claim that the projects ComEd included in its Alt Reg proposal, in their own view, should have been proposed in the Rate Case, that is a claim of their own creation and not a common issue of fact. Similarly, the factual findings required to be made pursuant to the governing Alt Reg statute are not made “common” to the rate case merely because Movants believe factual/legal comparisons may be made between the two cases, as further discussed below.

The Legal Issues Are Distinct

By its very nature, a proposal under Section 9-244 is designed to be an *alternative* to traditional rate regulation subject to separate and independent statutory provisions and legal standards. In the Rate Case, the Commission must determine if ComEd’s proposed rates are just and reasonable under standards developed from constitutional jurisprudence and Article IX of the Act. In addition, approved “[c]harges for delivery services shall be cost based, and shall allow the electric utility to recover the costs of providing delivery services through its charges to its delivery service customers that use the facilities and services associated with such costs.” 220 ILCS 5/16-108(c). Alternative regulation proposals are subject to very different legal requirements. Section 9-244 lays out specific and distinct criteria that an alternative regulation proposal must meet. Section 9-244(b) provides that “[t]he Commission shall approve the [alternative regulation] program if it [makes eight findings specified in subparagraphs (1) through (8).]

Movants’ attempts to manufacture common issues out the unique requirements of Section 9-244 are based on the misinterpretation or misapplication of these requirements. Movants first

point to Section 9-244(b)(1). Section 9-244(b)(1) requires a finding that an alternative regulation program “is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program and that are consistent with the provisions of Section 9-241 of the Act.” 220 ILCS 5/9-244(b)(1). Movants argue that “[i]n order to determine if the alternative regulation proposal will ‘result in rates lower than otherwise would have been in effect under traditional rate of return regulation,’ the Commission will need to review the record supporting the Company’s revenue requirement under rate of return and the resulting rates” in Docket 10-0467. Motion, ¶ 7. The argument is both inconsistent with the language of the statute itself and with how revenue requirements are determined.

The finding required under subparagraph (1) is specific: that “the program is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program” 220 ILCS 5/9-244(b)(1)(emphasis added). The services covered by ComEd’s alternative regulation proposal are new and go above or beyond those provided through ComEd’s base rates. No facts or information in the Rate Case will identify the cost of providing those services under traditional rate of return regulation. They are not part of the Rate Case at all.

Moreover, this statutory criterion requires a comparison of the cost of the projects under standard and alternative ratemaking. Making that program-specific comparison has nothing to do with the Rate Case. Indeed, ComEd’s Verified Petition in the Alt Reg Case makes clear exactly the comparison required:

Were ComEd to fund the same investments through traditional test year regulation – e.g., by annually filing a future test year general rate case – customers would receive no 5% credit and the realization of savings would await the next general rate case. Moreover, because of the pass-through nature of O&M

costs under the plan, customers will receive the benefit of any actual operational savings and additional efficiency benefits without waiting for the next rate case, or for alternative regulation review. The plan also limits the recovery of capital costs to approved budgeted amounts $\pm 5\%$, incentivizes ComEd to reduce capital costs below approved budgeted amounts, and allows ratepayers to share in any savings achieved below the budgeted amounts. These incentive and sharing mechanisms are likely to produce greater cost savings for ratepayers than would occur under traditional rate of return regulation.

Docket 10-0527, Verified Petition, ¶ 19(a). By contrast, Movants' argument would prove too much: if they were correct, any utility filing an alternative regulation proposal would have to accompany it with substantiation of its complete revenue requirement. The statute has no such requirement and the Commission has not so held in the past. *See Northern Ill. Gas Co. d/b/a Nicor Gas Co.*, Docket No. 99-0127, 1999 Ill. PUC LEXIS 921; 198 P.U.R.4th 436 (Order Nov. 23, 1999).

Similarly, Section 9-244(b)(2) creates no commonality. That subsection requires a finding that "the program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program that would not be realized in the absence of the program." 220 ILCS 5/9-244(b)(2). Movants cite to testimony by ComEd witnesses Mr. Guerra and Dr. Hemphill in ComEd's rate case generally discussing the benefits of alternative regulation, and assert the following:

Both pieces of testimony contain evidence relevant to fairly assessing ComEd's Petition. Further, the actual implementation of traditional rate of return regulation that is occurring in Docket 10-0467 will allow the Commission to test the assertions by ComEd (and other) witnesses about how traditional rate of return regulation actually accommodates or fails to accommodate the programs ComEd is proposing.

Motion, ¶ 7(B). However, the information provided in the Rate Case is merely background information, and is not proof of the "benefits" of the proposed alternative regulation program discussed in Section 9-244(b)(2).

Moreover, Section 9-224(b)(2) refers to the benefits of the programs, not to comparative benefits of different styles of regulation. The question of whether ComEd’s proposed base rates are just and reasonable or whether “traditional rate of return regulation actually accommodates or fails to accommodate the programs ComEd is proposing” has nothing to do with whether the proposed programs are beneficial. The proof that the programs are beneficial was filed in the Alt Reg Case. As explained in ComEd’s Verified Petition:

The Urban Underground Facilities Reinvestment program has direct and significant reliability benefits. The EV Pilot will help educate ComEd and the public about uses of commercial EVs. ComEd’s Low Income Assistance Program will help customers who otherwise might be unable to receive essential electric service. AMI and DA investments will timely proceed only if the Commission adopts this plan and then expressly finds those investments to be cost beneficial. The AMI, DA, and EV projects also have potential environmental benefits.

Docket 10-0527, Verified Petition, ¶ 19(b).

Movants also point to Section 9-244(b)(4)’s requirement that “implementation of the [alternative regulation] program is not likely to result in deterioration of the utility’s financial condition.” 220 ILCS 5/9-244(b)(4). Movants assert that “[t]he Commission and the parties will need to reference the rate case, Docket 10-0467, in order to assess the financial implications of the investments ComEd is requesting as part of its alternative regulation proposal.” *Id.* This is untrue.

The requirement of Section 9-244(b)(4) applies to the incremental impact of any Alt Reg proposal, *i.e.*, that the alternative regulation program itself “is not likely to result in deterioration of the utility’s financial condition.” 220 ILCS 5/9-244(b)(4). As explained in ComEd’s Verified Petition in Docket 10-0527, ComEd’s alternative regulation plan will not result in any deterioration of ComEd’s financial condition because “[t]he plan allows ComEd to recover budgeted capital carrying costs and incremental O&M, less the guaranteed customer credit, provided ComEd successfully implements the approved programs.” Docket 10-0527, Verified

Petition, ¶ 19(d). Section 9-244(b)(4) does not apply to a utility's overall financial condition at all.

Finally, Movants cite Section 9-244(b)(8). That subsection requires a finding that “the [proposed alternative regulation] program includes provisions for an equitable sharing of any net economic benefits between the utility and its customers to the extent the program is likely to result in such benefits.” 220 ILCS 5/9-244(b)(8).² That criterion, like the others, must be evaluated in terms of the specific alternative regulation programs and sharing mechanisms proposed. ComEd's base rates have no bearing on the Alt Reg programs' overall benefits or how any net economic benefits are shared. No common question of law or fact exists here.

Consolidation Would Prejudice ComEd and Other Parties

ComEd and other parties will be prejudiced by consolidation. Not only will consolidation mix distinct legal and factual issues, it will necessary multiply the size and complexity of the record in each case. While the Commission certainly is aware of both proceedings, they involve distinct legal and factual issues. Consolidation would confuse the issues and the facts to the prejudice of the Commission and all parties. It will also necessarily confuse the order, both at the Commission level and in any possible appeal. If these dockets are consolidated, and either docket is appealed, the finality of both will potentially be in question. There is no good reason to make the sustainability of the Rate Case order dependent on issues unique to the Alt Reg Case, or vice versa.

² Movants also simply misstate the standard, asserting that Section 9-244(b)(8) “requires the Commission to assess ‘the extent the program is likely to result in [net economic] benefits.’” Motion, ¶ 7(D). Section 9-244(b)(8) actually requires consideration of the equitable sharing of net economic benefits “to the extent the program is likely to result in such benefits.” 220 ILCS 5/9-244(b)(8)(emphasis added). Movants' improperly ignore and omit the word “to” in “to the extent the program is likely to result in such benefits.” That phrase is a limitation on the sharing requirement for certain types of benefits. ComEd's plan has benefits beyond economic benefits and the overall criterion in Section 9-244(b)(2) is not limited to only economic benefits.

Movants also attach as Exhibit A to the Motion a proposed schedule to “coordinate” the dockets. The dockets should not be consolidated for all the reasons indicated in this response. The new proposed “coordinated” schedule reflects further prejudice to ComEd as this proposal would reduce the time available to ComEd to file surrebuttal testimony in Docket 10-0527. Exhibit A also reflects that true coordination cannot be achieved without sacrificing the “deadline” in the Alt Reg Case, which is 4 days later than the deadline in the Rate Case. Finally, any changes to the previously established schedule should only occur in the context of a status hearing, where the interest and conflicts of all parties can be considered.

Conclusion

The Movants’ arguments attempt to read requirements in Section 9-244(b) that do not exist, and their invitation to confuse these proceedings by consolidating them should be rejected. The Rate Case and Alt Reg Case involve separate legal and factual issues. Section 9-244 requires findings specific to the programs contained in the alternative regulation proposal. The fact that Section 9-244 compares how traditional rate of return regulation would treat those same specific programs does not require the Commission to examine other programs or activities, let alone ComEd’s base rates or the evidence supporting its general revenue requirement.

Likewise, Movants’ assertion that “the Commission will need to reference both the results and the record in both Docket 10-0467 and Docket 10-0527 in order to prepare an Order in each case” is simply incorrect. Indeed, combining these cases would prejudice ComEd and other parties both by conflating testimony and arguments directed at distinct legal issues and by multiplying the complexity of each of the proceedings.

WHEREFORE, the Motion to Consolidate Dockets 10-0467 and 10-0527 should be denied.

Dated: October 19, 2010.

Respectfully submitted,



By: _____
Counsel for Commonwealth Edison Company

E. Glenn Rippie
glenn.rippie@r3law.com
John P. Ratnaswamy
john.ratnaswamy@r3law.com
ROONEY RIPPIE & RATNASWAMY LLP
350 W. Hubbard Street, Suite 430
Chicago, IL 60654
(312) 447-2800

Thomas S. O'Neill
thomas.oneill@comed.com
Senior Vice President & General Counsel
COMMONWEALTH EDISON COMPANY
440 S. LaSalle Street, Suite 3300
Chicago, IL 60605
312-394-7205

Anastasia M. O'Brien
anastasia.obrien@exeloncorp.com
Richard G. Bernet
richard.bernet@exeloncorp.com
Eugene M. Bernstein
eugene.bernstein@exeloncorp.com
Bradley R. Perkins
brad.perkins@exeloncorp.com
10 S. Dearborn, Suite 4900
Chicago, IL 60603
(312) 394-5400

Counsel for Commonwealth Edison Company