

that fact aside, there is no policy or rule² limiting the facts or arguments the Commission can hear. Unlike an appellate court that takes an appeal on a closed factual record made below, the Commission is itself the statutory fact finder. It reviews decisions of its ALJs *de novo* and can consider any argument or competently proven fact. No policy prevents it from hearing salient facts or from considering arguments timely made before it. Indeed, the rule invoked by REACT – Section 200.520(a) – expressly provides that parties may submit “any offer of proof” with respect to a petition for interlocutory review, and in no way limits the Commission’s consideration to facts brought to its attention.

ComEd is mindful of the need not to “blindsides” ALJs in a Petition for Review with arguments for reversal that the ALJs have never had an opportunity to consider – the concern apparently reflected in the comments of Commissioner O’Connell-Diaz cited by REACT. ComEd has not done so here. ComEd’s arguments were each made below, either in ComEd’s response to REACT’s Motion to Dismiss or in pleadings relating to ComEd’s own Verified Motion for Leave to File Supplemental Testimony. Presenting the facts in greater detail or with more explanation does not make an argument “new.”

REACT also suggests that ComEd should be prohibited from citing case law not cited in the prior briefing, *see* Mot.. at 8, but that position is even more fanciful. There is no such rule, here or in appellate courts. Moreover, ComEd is arguing in defense of the ALJs’ ruling, not in favor of a Petition for Review seeking reversal of the ALJs’ ruling, as was the circumstance Cmr. O’Connell-Diaz discussed. Making new arguments in defense of a decision does not undercut the original decision-maker or deny that decision-maker a chance to consider arguments that might

² Compare 83 Ill. Admin. Code § 200.520 imposing no such limitation with 220 ILCS 5/10-201(d) applicable to appeals, which provides that “No new or additional evidence may be introduced in any proceeding upon appeal from a rule, regulation, order or decision of the Commission, issued or confirmed after a hearing

have led to a different decision. Indeed, even in court, an appellee can defend a lower court's judgment on any grounds and that decision "may be affirm[ed] on any basis supported by the record." *City of Champaign v. Torres*, 214 Ill. 2d 234, 241 (2005); *Cwik v. Giannoulis*, 237 Ill. 2d 409, 424 (2010).

REACT's Other Arguments Are Improper and Erroneous

REACT contends that Dr. Hemphill's affidavit should be stricken because it is new. *See* Mot. at 3. But while the affidavit itself was not previously submitted to the ALJs, it merely shows – in detail – why ComEd could not submit all the data called for by the *Rate Design Order*³ by June 30. This is an issue that ComEd previously raised both in its direct testimony and in its initial Verified Motion for Leave to File Supplemental Direct Testimony. (¶¶ 3, 4). REACT then disputed that position at length in its Petition for Interlocutory Review. The Hemphill Affidavit responds to REACT's claims, which is entirely proper.

REACT complains for the first time (ironically, given its efforts to strike Hemphill's affidavit) that ComEd did not verify its combined reply supporting its Motion for Leave to File Supplemental Testimony and responding to REACT's original Motion to Dismiss ("Combined Reply"). That pleading required no verification because it not rely on new factual assertions. But, in any event, the facts ComEd points to in its response are all established in testimony, in pleadings verified by Dr. Hemphill, or in the Hemphill Affidavit.⁴

REACT next objects to ComEd's argument that the Commission's powers are limited. *See* Mot. at 4-5. They are. And they do not include the power to summarily "dismiss" tariffs.

³ *Commonwealth Edison Co.*, ICC Docket No. 08-0532 (Order, April 21, 2010) ("*Rate Design Order*").

⁴ ComEd notes that Dr. Hemphill is a proper witness to testify to the facts surrounding the preparation of ComEd's rate case, while REACT's factual claims are "verified" only by its counsel.

Far from being “new,” ComEd made this argument from the start. ComEd’s Combined Reply (at 3) correctly stated:

Once the Commission has suspended rates, Article IX recognizes no procedure for the Commission to “dismiss” those rates without a hearing. The Commission has no authority to add to or subtract from Article IX. *City of Chicago v. Ill. Commerce Comm’n*, 79 Ill. 2d 213, 217-18 (1980); *City of Chicago v. Fair Employment Practices Comm’n*, 65 Ill. 2d 108 (1976); *Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 181 Ill. App. 3d 1002, 1008 (2nd Dist. 1989). The Commission itself has acknowledged this. *In re 21st Century Telecom of Ill., Inc.*, 2001 WL 322609, at *11 (Ill. Commerce Comm’n Jan. 24, 2001).

REACT’s Motion is simply a transparent attempt to regurgitate its argument that the Commission has some “plenary” authority to act in ways beyond that authorized by law.

REACT further mischaracterizes as “new” ComEd’s argument that the *Rate Design Order* did not bar ComEd from filing a rate case until all the information sought was available by that date. *See* Mot. at 6. ComEd has said from the start that the Order should not be so read. *See* Combined Reply at 7. The Order contains no such mandate and it lawfully could not. The Commission has no authority to impose a bar on rate filings, whether to wait for more information or otherwise. The “Act does not restrict when ... a utility may file for a rate increase,” and “the Commission cannot impose a rate moratorium upon a utility during [a] period without the agreement of the utility.” *Bus. & Prof’l People for the Pub. Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 225, 230 (1989) (“*BPI I*”). REACT’s invitation to read a bar into the Order remains both improper and an invitation for the Commission to act illegally.

Finally, REACT complains that ComEd provides the Commission with orders showing how it has interpreted “good cause” in the past. *See* Mot. at 7-8. The notion that providing added citations in a later brief could be improper is, frankly, frivolous. REACT’s complaint is nothing but an excuse to attempt – failingly – to distinguish the cases ComEd brings to the Commission’s attention.

WHEREFORE, REACT's Motion to Strike should be denied. Because it is an attempt to gain an unauthorized reply, it should be denied with no further briefing.

Dated: October 22, 2010.

Respectfully submitted,



By: _____
One of the attorneys for
Commonwealth Edison Company

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

Richard G. Bernet
10 S. Dearborn
Suite 4900
Chicago, IL 60603
(312) 394-5400
richard.bernet@exeloncorp.com

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

David W. DeBruin*
Jared O. Freedman*
JENNER & BLOCK, LLP
1099 New York Avenue, NW
Washington, DC 20001-4412
ddebruin@jenner.com
jfreedman@jenner.com
* admitted in D.C.

Counsel for Commonwealth Edison Company

