

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition to put a tariff preserving ComEd's	:	No.10-0597
Commission-approved AMI Pilot into	:	
effect on less than 45 notice, pursuant to	:	
Section 9-201 of the Public Utilities Act	:	

**COMED'S VERIFIED REPLY TO THE REPOSE OF THE ATTORNEY
GENERAL TO COMED'S PETITION FOR SPECIAL PERMISSION**

Commonwealth Edison Company ("ComEd") submits this reply to the Verified Response of the Illinois Attorney General's Office ("AG") filed on October 25, 2010 ("AG Response") and in support of its Petition for Special Permission ("Petition").

INTRODUCTION

The September 30 Opinion of the Illinois Appellate Court¹ cast doubt on the Commission's ability to use riders as a funding mechanism to achieve many important policy goals and threatens not only ComEd's AMI Pilot but the Commission's entire Smart Grid initiative. In an effort to keep the Pilot alive, ComEd proposes a tariff (the "Bridge Tariff") that (1) removes unrecovered operating expenses of the Pilot from consideration under Rider AMP and allows them to be evaluated by all stakeholders, including the AG and the Commission in its pending rate case; and (2) confirms that ComEd properly included for review and evaluation in its pending rate case the assets ComEd acquired or installed for the AMI Pilot.

The AG's Response offers no valid reason to reject or suspend the Bridge Tariff. It mischaracterizes the relationship of the Appellate Court's September 30 Opinion to the current Rider AMP and misstates the law applicable to appellate review of rate orders. But, most

¹ *Commonwealth Edison v. Illinois Commerce Comm'n*, No. 2-08-0959 (Ill. App. Ct., 2nd Dist, Sept. 30, 2010). The Appellate Court's Opinion is not final and no mandate has issued. It is subject to both rehearing (ComEd has already filed a Petition for Rehearing) and discretionary appeal to the Illinois Supreme Court.

fundamentally, it grossly mischaracterizes the Petition and Bridge Tariff themselves. Neither seeks automatic approval of any cost recovery, nor presumes any cost to be reasonable. The Bridge Tariff “does not add to ComEd’s costs, allow ComEd to recover any costs that the Commission has not already authorized, or reduce the authority of the Commission to review those costs.” Petition, ¶ 1. It simply moves the process of the Commission’s review of certain AMI Pilot costs from a proceeding under Rider AMP to ComEd’s pending rate case. There is nothing unlawful or improper about that. Certainly nothing in the September 30 Opinion even addresses that question and the AG has long argued that these costs *should* be reviewed in a general rate case.

Yet, the AG now opposes a tariff that would do just that. The AG instead would leave ComEd with no adequate forum in which to recover its AMI operating costs, no matter how prudent or reasonable. Not only would that result be contrary to statute (*e.g.*, 220 ILCS 5/16-108(c)) and constitutional principles, it is exactly the type of gamesmanship that can make Illinois utilities’ investment in Smart Grid pilots and technologies untenably risky – and bring them to a halt.

COMED’S PROPOSAL FURTHERS, NOT LIMITS, THE COMMISSION’S REVIEW

The Bridge Tariff enables ComEd’s unrecovered AMI-related operating expenses and assets to be evaluated by the Commission in ComEd’s pending rate case, Docket No. 10-0467. The AG, however, claims (at ¶¶ 2, 7-8) that the Bridge Tariff would somehow “preempt the Commission’s authority under Section 9-211 of the Public Utilities Act to investigate the justness and reasonableness of pilot expenses.” That is untrue. To the contrary, by directing that ComEd’s unrecovered AMI Pilot operating expenses be included in its requested revenue requirement, the Bridge Tariff assures that these costs will be reviewed by the Commission (as

they would have been under Rider AMP). The Bridge tariff, by its terms, authorizes ComEd “to include the Approved Expenses in its proposed annual revenue requirement in a general rate proceeding filed between June 1, 2010 and December 31, 2010.”² Petition, App. B., Orig. Sheet No. 203.1. The Bridge Tariff does not limit the Commission’s review of that revenue requirement in any way. Indeed, by including them in ComEd’s proposed revenue requirement, the Commission will necessarily review those costs for prudence and reasonableness, just as the Commission would have reviewed them in the post-pilot proceeding under Rider AMP. While the Commission approved the Pilot and found it to be prudent as a project, it has not found any individual costs in the implementation of that Pilot to be reasonable. Nothing in the Petition or the Bridge Tariff changes either of those facts.

The AG Response also mischaracterizes ComEd’s inclusion of AMI Pilot assets in rate base, as called for by Rider AMP and the Commission’s Order in Docket No. 09-0263. The AG claims ComEd thereby seeks to “[t]o dispel any doubt that might otherwise arise’ as to their prudence.” AG Response, ¶ 11. This, too, is untrue. The Petition says that ComEd seeks to “dispel doubt” not about the prudence, but about whether these AMI Pilot assets “were properly included in rate base...” Petition, ¶ 6(b). Neither the Petition nor the Bridge Tariff claims that the Commission has made any prudence determination about the AMI Pilot assets beyond approving the AMI Pilot itself. Rather, the Petition makes clear that it “does not seek additional approval of any investment or expense.” *Id.*, ¶ 8.

Once these mischaracterizations are dispelled, the AG Response says little else. Indeed, the AG (Response, ¶ 9) acknowledges that, under these circumstances, dealing with unrecovered

² They are called “Approved Expenses” because they are the specific categories – and only the specific categories – of expenses that the Commission approved as recoverable in Docket No. 09-0263, *i.e.*, the educational and customer application costs. ComEd wants to be clear that it is not attempting to “reach back” and recover, for example, meter-related operating expenses that were not approved in Docket No. 09-0263. Lest the Commission have any doubt, ComEd would be more than happy to use a different name (*e.g.*, Pilot Expenses Includable in the Revenue Requirement”) if doing so would contribute to dispelling this mischaracterization.

AMI Pilot expenses in the rate case is proper. The AG states that “the pending rate case is an appropriate and available forum for review and investigation of whether its costs and investments are recoverable.” AG Response, ¶ 9.³

Yet, by opposing the Petition, it is the AG who would leave the Commission with no ability to review these costs or allow their recovery even if they were reasonable and prudent. If the Petition is denied and the Bridge Tariff is suspended, the AMI Pilot operating expenses will continue to flow through Rider AMP until a mandate issues, at which time (assuming the September 30 Opinion stands) the AG will argue that all sums collected after September 30 are subject to refund and the Commission has no further role.⁴ If the AG prevails, the Commission will have no opportunity to assess the cost of the Pilot. The remaining costs of a Pilot that this Commission found to be in the public interest will simply be unrecoverable, no matter what the Commission thinks is just and reasonable. The Commission should not mistake the fact that it is the AG, not ComEd, who wants to take the AMI Pilot’s costs out of the Commission’s hands.

**THE AG MISCHARACTERIZES
THE SEPTEMBER 30 OPINION**

The AG argues (pp. 1-2) that ComEd’s request is “inconsistent” with, and an attempt to “circumvent,” the September 30 Opinion. The AG errs. The September 30 Opinion struck down, under the doctrine of “single issue ratemaking,” recovery of AMI-related costs through a tracking rider (a prior version of Rider AMO, to be precise). It addresses that rider as a funding

³ The AG’s suggestion that a delay in the rate case is required is equally impractical. In fact, it would render the Petition and Bridge Tariff entirely nugatory. ComEd’s monthly revenue deficiency is far greater than the unrecovered AMI Pilot operating expenses. Therefore, by further urging delay, the AG is advocating yet another way, in effect, to make recovery of these costs impossible no matter what the Commission determines. Updating its revenue requirement for these discrete costs will be possible in ComEd’s rebuttal and discovery concerning them can commence immediately upon approval of the Bridge Tariff.

⁴ If the Bridge Tariff is suspended, costs will have to continue to flow through Rider AMP. Moreover, even if the Bridge Tariff was later approved, by the end of any substantial suspension period, the record in ComEd’s rate case will be closed and with it, any opportunity to recover ComEd’s costs in base rates.

ComEd also believes that the Commission has a further role, in any event, as discussed further below.

mechanism; it does not address the substance of the AMI Pilot. The AG acknowledges this, elsewhere describing the decision as barring “recovery of this single cost through a rider” AG Resp. at 3-4 (emphasis added). Nor did the Court hold that any Pilot costs were imprudent, unreasonable, or unrecoverable through other lawful means. Indeed, the Commission’s approval of the Pilot and the Pilot’s costs were not even before the Court, just as they were not before the Commission in Docket No. 07-0566, the appeal of which the September 30 Opinion decided.

THE AG RESPONSE MISCHARACTERIZES THE LAW

The AG makes two incorrect and – and, as to this Petition, immaterial – claims about the Commission’s role with respect to AMI Pilot costs if the September 30 Order stands. *See* AG Resp., ¶¶ 5, 6, 1. The AG claims that:

1. Rider AMP ceases to be effective on or about September 30. The AG is wrong. Absent a proper stay, a Commission approved rate remains in effect until the appellate process is over. Indeed, absent a stay, the utility is required “to charge rates approved by the Commission throughout the appellate process...” *Hartigan v. Illinois Commerce Comm’n*, 148 Ill.2d 348, 395 (1992). Nothing in the earlier cases cited by the AG are to the contrary. Indeed, *Hartigan* cites and discusses *Independent Voters of Illinois v. Illinois Commerce Comm’n*, 117 Ill.2d 90, 102 (1987) as fully consistent with its ruling.
1. If the September 30 Opinion stands, the Commission has no role other than to “calculate and distribute” refunds. Here, the AG errs for two different reasons. *First*, because the nature of the refund remedy is equitable (*see Hartigan*, 148 Ill.2d at 396-98), any refund would be based in the amount by which collections under Rider AMP exceed those under a just, reasonable, and lawful rate. “[A] refund encompasses the difference between the money collected pursuant to the

invalid rate and the money that would have been collected pursuant to a just and reasonable rate.” *Id.* at 412. Indeed, the refund was the difference between the rate found unlawful and a lawful rate in both *Independent Voters* and *Hartigan*. There is no basis for presuming that all amounts collected under Rider AMP would be refunded. It is the Commission’s role – as the sole entity with delegated legislative ratemaking authority – to determine what the just and reasonable rate was. *See id.* at 400-01; *Hartigan v. Illinois Commerce Comm’n*, 117 Ill.2d 120, 141-148 (1987) (discussing the bar on judicial ratemaking even after an appeal). *Second*, ComEd collected no funds under Rider AMP as struck down by the September 30 Opinion. All funds were collected under a significantly modified tariff approved by the Commission in Docket No. 09-0263. While the September 30 Opinion *may* doom Rider AMP even as revised and approved in 2009, that question will require additional adjudication – either by the Commission or the Appellate Court in the appeal pending from Docket No. 09-0263.⁵

Regardless, however, the issue of what refunds, if any, may be owed if the September 30 Opinion stands does not dictate what to do about AMI Pilot expenses now. ComEd proposes a way forward that uses the currently pending rate case as a vehicle to review those costs and to eliminate, as much as possible, uncertainty over their recovery. That remains a good idea, regardless of any controversy over future refunds.

Finally, the AG briefly claims (at ¶ 12) that the September 30 Opinion’s statement that “the Commission heard no evidence that the system modernization costs might produce unacceptable financial outcomes if not afforded special rider treatment” is the “law of the case.”

⁵ This should be no surprise to the AG. The fact that there are two versions of the rider at issue was one of the key bases for ComEd’s Petition for Rehearing in the Appellate Court. ComEd brought that fact to the Court’s attention and expressly sought a joint decision.

Of course, it is no such thing. The “law of the case doctrine ... generally bars relitigation of an issue previously decided in the same case.” *People v. Hopkins*, 235 Ill. 2d 453, 469 (2009). Even if ComEd were prohibited from challenging the (mistaken) declaration that there was no such evidence presented in Docket No. 07-0566, ComEd is not precluded from providing such proof in other dockets, as it did in Docket No. 09-0263. *See Madigan v. Illinois Commerce Comm'n*, 394 Ill.App.3d 382, 391 (2009) (law-of-the-case doctrine did not apply where the cases were not the same). Nor does it affect this docket or ComEd’s rate case.

WHEREFORE, the Commission should allow ComEd to file the Bridge Tariff effective on October 29, 2010 or, should the Commission act later, within 2 business days of its Order.

Dated: October 26, 2010

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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One of its attorneys

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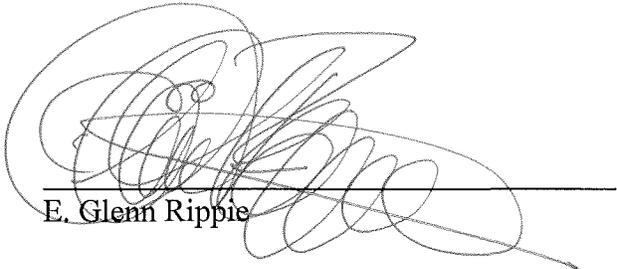
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VERIFICATION

I, E. Glenn Rippie, being first duly sworn, state that I am counsel for ComEd in this docket, that I have read the foregoing Verified Reply, am knowledgeable of the facts stated therein, and the facts stated therein are true and correct to the best of my information and belief.



E. Glenn Rippie

SUBSCRIBED AND SWORN to
Before me on this 26th day of
October, 2010.



Notary Public

