

Section 10-201 of the PUA sets out the terms under which an appeal to the courts may be taken. The fact that court appeals of appealable final Commission orders must be preceded by Applications for Rehearing does not mean that all Commission decisions are subject to rehearing or that all Commission orders are appealable. In fact, it is clear that only final decisions are appealable to the Court. “[S]ection 10-201 of the Public Utilities Act permits appeals only from final orders.” *Moncada v. Illinois Commerce Comm'n*, 164 Ill.App.3d 867, 871 (1st Dist. 1987); accord *Candlewick Lake Utilities Co. v. Illinois Commerce Comm'n*, 65 Ill. App. 3d 185, 188 (1st Dist. 1978) (“[I]f we were to allow an appeal from every interlocutory order, there would be interminable delays in the administrative procedures. The general principle in this State is that a party may only appeal from a final order.”); *People v. Illinois Commerce Comm'n*, 114 Ill. App. 3d 384, 388 (1st Dist. 1983) (“We agree with the rationale advanced in *Candlewick* and, accordingly, hold that section 68 [now 10-201] limits appeals to final orders of the Commission”). “The denial of a motion to dismiss is an interlocutory order,” not a final order. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 368 Ill. App. 3d 734, 742 (2nd Dist. 2006). The denial of Motion to Dismiss is not itself appealable. *Cabinet Service Tile, Inc. v. Schroeder*, 255 Ill. App. 3d 865, 868 (1st Dist. 1993) (“The denial of a motion to dismiss is not a final and appealable order.”).

REACT’s speculation that an Application for Rehearing would be untimely after a final order (Resp. at 4-5) also misses this point. A decision denying a motion to dismiss is not an appealable administrative order, so there can be no requirement to file an Application for Rehearing in response. Indeed, if, as a result of the denial of a motion to dismiss, a final order ends up being legally infirm, then the appeal is properly taken from the final order. Because “[o]nly final orders are appealable in administrative proceedings,” *Moncada*, 164 Ill.App.3d at

872, an application for rehearing is properly filed after the final order is issued and it must seek rehearing of that final order. There is nothing “manifestly unfair” (Resp. at 4-5) about this – appeal from final order is a bedrock principle of appellate law. The notion that it denies REACT due process to wait until the end of the case to appeal is completely unfounded.

REACT also claims there is a “conflict” between Sections 200.880 and 200.520. (Resp. at 5-7). This is equally false. Section 200.880 establishes the time for filing and acting on Applications for Rehearing and repeats the statutory requirement that an Application for Rehearing must precede a court appeal. Just like Section 10-201 of the Act, Section 200.880 does not state that all Commission decisions are subject to rehearing, let alone in cases where other rules plainly state that they are not authorized.¹ There is no reason to read the two rules as conflicting when, under their plain terms, they do not. *See People v. Henderson*, 361 Ill.App.3d 1055, 1057 (4th Dist. 2005) (language should be construed to give effect to its intent, not contradictions and absurd results).

Finally, REACT’s “hypothetical” (Resp. at 7) underscores the misunderstanding of appellate procedure inherent in REACT’s entire argument. Had REACT’s “Motion to Dismiss” been granted, ComEd’s appeal – and ComEd’s Application for Rehearing preceding that appeal – would relate to the Commission’s final decision permanently striking ComEd’s filed tariffs and terminating this rate investigation, not from the interlocutory review. Where a motion terminates a case, the decision is final and appealable; where it does not terminate the case it is, by definition, interlocutory.

¹ Moreover, even if the provisions did conflict (which they do not), REACT’s claim that Section 200.880 impliedly repealed or overruled Section 200.520 is incorrect. When Section 200.880 was adopted, no one suggested giving it the twisted reading REACT supports and certainly no one suggested that it overruled part of another rule. Rather, Section 200.520(b) – which deals specifically with applications to rehear decisions on interlocutory appeal – would continue to control in the particular circumstances of this case. *Hernon v. E.W. Corrigan Const. Co.*, 149 Ill.2d 190, 195 (1992) (“Where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail.”).

**II. REACT’S MOTION SHOULD NOT BE ALLOWED
IN THE FACE OF THE RULE’S ABSOLOUTE BAR**

REACT, in the alternative, seeks “leave” to file its Application for Rehearing. There is no legitimate basis for granting REACT’s request. Its main argument appears to be a false accusation of procedural delay by ComEd. But REACT’s position cannot be squared with the facts. REACT did not file its first motion until nearly two months after the tariffs were filed and well after all of the remaining information called for by the Commission’s rate design order had already been fully provided. A special schedule was established to give parties additional time to respond to rate design evidence and parties had *over three months* to do so. In fact, there is nothing remotely “fair” about REACT repeating yet again its effort to terminate this entire proceeding when, as the Commission and the ALJs determined, it cannot show any prejudice and when the lawful remedies are not termination.

Ultimately, REACT’s request is, to use REACT’s words, an “overt and clear failure to comply”² with the Commission’s rules. Section 200.520(b) makes clear that “Petitions to rehear or reconsider Commission action taken” under the rule authorizing interlocutory review “shall not be entertained.” There is no reason to ignore the plain language of the Commission’s rules.

² Resp. at 8.

WHEREFORE, ComEd moves that REACT's Application for Rehearing be stricken.

Dated: December 14, 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
Eugene Bernstein
Bradley R. Perkins
10 S. Dearborn, Suite 4900
Chicago, IL 60603
(312) 394-5400
anastasia.obrien@exeloncorp.com
richard.bernet@exeloncorp.com
eugene.bernstein@exeloncorp.com
brad.perkins@exeloncorp.com

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

