

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY)
)
) No. 10-0570
Approval of the Energy Efficiency and)
Demand Response Plan Pursuant to Section 8-103(f) of) (rehearing)
The Public Utilities Act.)
)
)

INITIAL BRIEF ON REHEARING OF THE
ENVIRONMENTAL LAW & POLICY CENTER

March 8, 2011

Submitted By:

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INTRODUCTION

The Environmental Law & Policy Center submitted an Application for Rehearing in order to address one limited but extremely important issue: the scope of the Commission's authority over the portion of energy efficiency plans developed and administered by the Department of Commerce and Economic Opportunity (DCEO) under Section 5/8-103 and 5-104 of the Public Utilities Act. The energy efficiency plans for ComEd and Ameren each have two components - the utility plans and the DCEO plans. The Illinois Commerce Commission (ICC) clearly has direct authority over ComEd and Ameren. The issue in this proceeding is how does the Commission address issues with the DCEO part of the utilities plans?

While the ICC does not have direct authority over DCEO, as set forth below, the statute outlines the Commission's authority to modify the DCEO energy efficiency plan. Not only does the statute state this, but the Commission interpreted the statute correctly in Docket No. 07-0540, which was the first efficiency plan ComEd filed under the 2007 law.

LAW

The Illinois legislature set energy efficiency targets for ComEd and Ameren in Section 8-103(b), stating "Electric utilities shall implement cost-effective energy efficiency measures to meet the following incremental annual energy savings goals..." 220 ILCS 8-103(b). The legislature also gives responsibility to the DCEO for 25% of the plans:

Electric utilities shall implement 75% of the energy efficiency measures approved by the Commission, and may, as part of that implementation, outsource various aspects of program development and implementation. The remaining 25% of those energy efficiency measures approved by the Commission shall be implemented by the Department of Commerce and

Economic Opportunity, and must be designed in conjunction with the utility and the filing process.....

The details of the measures implemented by the Department shall be submitted by the Department to the Commission in connection with the utility's filing regarding the energy efficiency and demand-response measures that the utility implements.

220 ILCS 8-103(e). The statute states that DCEO's programs "must be designed in conjunction with the utility and the filing process," and that program details must be "submitted by the Department to the Commission in connection with the utility's filing..."

Id. When the Commission reviews ComEd's filing, it reviews the DCEO section of the ComEd filing as part of that process.

ARGUMENT

In its Final Order, the Commission implies that it has limited or no authority over the EE plans submitted by the Department. This conflicts with the plain language of the Public Utilities Act (PUA), the Commission's Orders in the 2007 energy efficiency cases, the Commission's Final Order in the parallel Ameren case Docket No. 10-0568, and the Proposed Orders in the two gas energy efficiency cases, Peoples Gas Docket No. 10-0564 and Nicor Docket No. 10-0562. All of these cases confirm that the "Commission retains broad authority" over the DCEO portion of the plans. If left uncorrected, the ComEd Order will lead to confusion in the next round of EE planning cases. The Commission should clarify its broad authority over the entire ComEd plan, including the portion implemented by DCEO.

A. The Final Order Incorrectly Implies That the Commission Has No Authority to Review the Portion of the ComEd Plan Implemented by DCEO.

The Commission's analysis of DCEO's filing begins at page 60 of the Final Order. In the very first paragraph, the Commission states that "DCEO is not subject to

the supervision of the Commission and is not regulated by the Public Utilities Act.” Final Order at 60. After reviewing the parties’ positions on the issues, the Commission declines to take any action to improve DCEO’s plan. The language used by the Commission makes it clear that the Commission did not undertake a full review of the Department’s plan because it felt that it had only limited or no authority:

- “Based on our reading of the statute, it appears as though the Commission has limited authority over the DCEO portion of the plan...” (Final Order at 67).
- “In the Commission’s view, DCEO is, for the most part, given great latitude in the statute ...” (Final Order at 70).
- “DCEO is given great latitude in its portion of the statute.” (Final Order at 71).

Not only does the Commission defer to the Department’s plan, but it goes further and concluded that it had only “limited authority” over “how DCEO implements its portion of the plan.” (Final Order at 73).

These findings are inconsistent with both the statute and the Commission’s Order on DCEO’s Plan in the previous ComEd docket three years ago. The legislature directs DCEO to design its programs in conjunction with ComEd and file the programs as part of ComEd’s Plan. The Commission then approves or disapproves the Plan as whole, analyzing both the utility and DCEO sections. 220 ILCS 8-103(f).

The language used to describe what happens if the Department is unable to meet its performance goals also demonstrates that the legislature intended the Commission to review the merits of DCEO’s programs:

If the Department is unable to meet incremental annual performance goals for the portion of the portfolio implemented by the Department, then the utility and the Department shall jointly submit a modified filing to the Commission explaining the performance shortfall and recommending an

appropriate course going forward, including any program modifications that may be appropriate in light of the evaluations conducted under item (7) of subsection (f) of this Section. In this case, the utility obligation to collect the Department's costs and turn over those funds to the Department under this subsection (e) shall continue only if the Commission approves the modifications to the plan proposed by the Department.

220 ILCS 5/8-103(e). This language would make no sense if the Commission had no authority to review and reject the plan proposed by the Department. In fact, under this section of the statute the Commission must “approve” the Department’s plan in order for DCEO to recover its costs for running the programs.

The Commission Order in the parallel Ameren efficiency case, Docket No. 10-0568 contains a good analysis of the law on statutory interpretation:

Staff states that when a court interprets a statute, the primary objective is to ascertain and give effect to the intent of the legislature. Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 262 Ill. App. 3d 266, 274 (1994) Staff notes that courts have held that the best indication of what the legislature intended is the statutory language itself, (Metro Utility Co. v. Illinois Commerce Comm'n, 262 Ill. App. 3d 266, 274 (1997)); and that clear and unambiguous terms are to be given their plain and ordinary meaning (West Suburban Bank v. Attorneys' Title Insurance Fund, Inc., 326 Ill. App. 3d 502, 507 (2001)). Staff states that where statutory provisions are clear and unambiguous, the plain language as written must be given effect, without reading into it exceptions, limitations, or conditions that the legislature did not express, citing Davis v. Toshiba Machine Co., 186 Ill. 2d 181, 184-85 (1999).¹

Docket No. 10-0568 Final Order at 42 (on rehearing for other reasons). In this instance ELPC submits that the language in this statute, while not giving the Commission direct authority over DCEO, certainly gives the Commission authority over the Plan. Moreover, consistent with Illinois Bell Telephone giving effect to the intent of the

¹ ELPC notes that while the quotes in this citation appear to be correct, they are attributed to the wrong cases. The first quote from 262 Ill. App. 3d 266 is actually from Metro Utility Company v. ICC. The second citation is also incorrect, as it is also from 262 Ill. App. 3d 266. However, that cite is for Metro Utility Company not Illinois Bell Telephone, though it is consistent with the Metro Utility Company quote in its entirety. ELPC has attached the Metro Utility case below to help clarify this.

legislature, it would be irrational that the legislature's intent would be to give DCEO authority for \$40 million (25% of \$160 million) worth of annual EE programs with no oversight by ICC.

B. The Final Order Conflicts with the Commission's Orders in the Last Round of EE Cases.

The Commission addressed the issue of its authority over DCEO in Docket No. 07-0540, where it first interpreted the statute. In its 2007 Final Order in Docket No. 07-0540 the Commission concluded:

DCEO has statutory obligations pursuant to the new statute, which logically, makes it a joint petitioner. DCEO is directed, in the future, to make joint filings with the corresponding utilities, with the understanding that DCEO's flexibility to administer, and offer a consistent set of efficiency programs statewide, shall not be compromised by this approach.

Docket No. 07-0540 Order at 26. By making DCEO a joint petitioner, and making the DCEO filing part of the ComEd filing, the Commission clarified that it has authority over DCEO's Plan explicitly because the DCEO Plan *is part of* the ComEd Plan. DCEO has flexibility to administer its programs, but it does so as part of ComEd's Plan.

Review of the Commission's Order in Docket No. 07-0540 in its totality, indicates that the Commission applied the same level of scrutiny to the DCEO programs that it applied to ComEd's programs. For example, in regards to banked savings the Commission concludes:

We note that DCEO's approach strikes a balance between the concerns expressed by ComEd, that it may not know when it reaches the statutory goal, and that expressed by Staff which is, essentially, that utilities should not be provided with a motivation to decrease spending on energy efficiency programs in the "banked" year(s). Limiting the amount of allowable "banked energy savings" to a percentage of the banked year's energy savings is reasonable. It is also reasonable to limit the amount that can be "banked" to one which would only allow utilities to "bank" a *de minimus* carry over, as anything further would violate the statute.

Therefore, ComEd's and DCEO's request for Commission approval of "banked" energy savings is granted, but, they may "bank" no more than 10 percent of the energy savings required by statute in the year, in which, it is "banked."

Docket No. 07-0540 Order at 41. The Commission's analysis indicates no concern regarding its authority over DCEO's proposal. Similarly, in regards to deemed savings the Commission concludes:

As Staff points out, there seems to be no reason, at this time, to independently determine the energy savings values of certain types of light bulbs based on the values that were determined in California. However, "deeming" values now adds a level of certainty to, and definition in, the operation of a plan. And, light bulbs are not weather-sensitive. Therefore, DCEO's recommendation that these values should be deemed, temporarily, with the final values to be determined before the end of the plan's three-year period and applied prospectively, is a reasonable one. During the next three-year period actual values must be developed for use prospectively, in future years. Also, these values must be revisited every three years, or, more frequently, as, new technology may emerge that would change these values or render the use of certain technology obsolete.

Id. at 42. Again, the Commission indicates no lack of authority over DCEO's programs and analyzes DCEO's proposal just as it does any utility proposal.

Finally, ELPC notes the following finding in the Findings and Ordering Paragraphs:

- (2) the Illinois Department of Commerce and Economic Opportunity is a state agency that is statutorily obligated, pursuant to 220 ILCS 5/12-103(e), to implement 25 percent of a utility's energy efficiency and demand response plan, therefore, pursuant to statute, this portion of the plan is subject to Commission approval before implementation;
- (3) the Commission has subject-matter jurisdiction and jurisdiction over Commonwealth Edison Company and the Illinois Department of Commerce and Economic Opportunity;

The language here is very clear. The Commission has subject matter jurisdiction over DCEO for purposes of reviewing this Plan. Contrary to the findings in the current

proceeding, there is no language regarding the Commission's lack of authority over DCEO or DCEO's great latitude.

C. The Final Order Conflicts With the Commission's Orders In Other Pending Energy Efficiency Cases.

The Commission's Final Order in the Ameren Case clarifies that although the Department is given great latitude under the statute, the Commission "retains broad authority over the energy efficiency and demand response plans." Docket No. 10-0568, Final Order at 107. Unlike the ComEd Order, which omitted mention of DCEO entirely in the "Findings and Ordering Paragraphs" section, the Ameren Order states that:

- (4) The Commission has subject-matter jurisdiction and jurisdiction over Ameren Illinois and the Illinois Department of Commerce and Economic Opportunity.

Id. at 108. The Commission exercised this authority in the Ameren case and undertook a substantive review of DCEO's plan and programs. It approved DCEO's plan because it found that the plan "complies with applicable statutes." *Id.* at 107. It did not find, as the Commission did in the ComEd case, that it had only "limited authority" over how DCEO implements its plan. To the contrary, the Ameren Order confirms the Commission's "broad authority" over DCEO's plan. *Id.* at 107.

Similarly, the Commission's Proposed Order in the Nicor case explicitly rejects DCEO's argument that the Commission lacks authority and instead clarifies the Commission's broad authority over the "entirety of Nicor's Plan":

The Commission rejects DCEO's argument that the Commission has limited authority over DCEO's portion of the Plan. It is clear from the language of the statute that the Commission was given authority to review the entirety of Nicor's Plan, including the DCEO portion, and to approve the Riders to collect the funds to pay for these plans. All energy efficiency measures must be approved by the Commission, regardless of whether they are implemented by the utility or the DCEO.

Docket No. 10-0562 (Nicor), Proposed Order at 55. The Nicor Order goes on in the Findings and Ordering Paragraphs Section to state that:

- (2) the Illinois Department of Commerce and Economic Opportunity is a state agency that is statutorily obligated, pursuant to 220 ILCS 5/8-104(e) to utilize 25% of a utility's natural gas funding and achieve no less than 20% of the natural gas savings requirements; therefore, pursuant to statute, this portion of the plan is subject to Commission approval before implementation;
- (3) the Commission has subject-matter jurisdiction and jurisdiction over Northern Illinois Gas Company and the Illinois Department of Commerce and Economic Opportunity;

Id. at 66.

Finally, in the Peoples EE case the Proposed Order states:

The Commission rejects DCEO's argument that the Commission has limited authority over DCEO's portion of the plan. It is clear from the language of the statute that the Commission was given authority to review the entirety of the Plans, including the DCEO portion, and to approve the Riders to collect the funds to pay for these plans. All energy efficiency measures must be approved by the Commission, regardless of whether they are implemented by the utility or the DCEO.

Docket No. 10-0564, Proposed Order at 111.

Looking at the Commission rulings in the 2010 cases, the Commission has described its authority very differently in the ComEd case, from the Ameren, Peoples and Nicor cases even though the same statute applies to each case. The Commission should clarify the ComEd Order to implement the statute correctly and avoid confusion in the next round of EE cases.

D. The Commission Must Explain Why it is Changing its Policy from the Previous ComEd Efficiency Case.

Nowhere in the current Order does the Commission acknowledge that it addressed the issue of its authority over DCEO in 2007, and nowhere does it

acknowledge that it deviates from that Order – much less explain why it deviates. While the Commission is not tied to following its own precedent from previous cases, it must provide some explanation of why it does so.

As the Court noted in Commonwealth Edison v. ICC, “the Commission may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case.” Commonwealth Edison Co. v. Illinois Commerce Com., 180 Ill. App. 3d 899 (Ill. App. Ct. 1st Dist. 1989) citing (National Labor Relations Board v. International Union of Operating Engineers, Local 925 (5th Cir. 1972), 460 F.2d 589, 604.) In the Commonwealth Edison case, the Commission radically altered its past practice regarding the time-frame for analyzing revenue neutrality without notice to interested parties, a hearing, or any readily apparent reason. The Appellate Court overturned the Commission’s Order.

Consistent with the Appellate Court in Commonwealth Edison, in the recent MidAmerican Gas rate case the Commission addressed this issue explaining the value of previous ICC final orders as precedents:

“... the Commission has consistently favored Staff’s analysis. Indeed, utility regulatory commissions typically do precisely what the Company decries. ... Thus, MEC is asking us to both abandon our own prior practice and veer away from our regulatory peers. While our previous decisions are not binding precedent, we cannot depart from them arbitrarily, particularly when they are in harmony with regulatory custom.”

ICC Docket No. 09-0132 at 57-58 (Mar 24, 2010). In that case MidAmerican Energy argued that it should be granted an 80 basis point ROE increase, which it calculated based directly on the increase in the proportion of debt in its capital structure. Staff argued that MidAmerican Energy should be granted only a 42 basis point increase, which it estimated to be the increase that was needed to equalize MidAmerican

Energy's bond rating to those of the gas utilities in the sample. The ICC accepted Staff's argument because it was consistent with previous ICC final orders and regulatory practice, which are based on sound economic rationale. *Id.* at 55-61. The ICC did not have to follow precedent, but it also could not act arbitrarily. If the ICC is going to make a significant change from the policy it set in Docket No. 07-0540, it needs to explain why it is making the change.

CONCLUSION

The ComEd Final Order leaves the Commission with no reasonable oversight over 25% of spending on energy efficiency programs in Illinois – an amount that totals over \$121,254,366 million dollars of ratepayer money over the life of the Plan. ComEd Ex. 1.0 at 7. The legislature did not intend this when it directed DCEO to design its programs “in conjunction with the utility and the filing process” and submit the Plan to the Commission “in connection with the utility's filing.” 220 ILCS 12-103(e). The Commission explicitly rejected DCEO's flawed argument in the Ameren Final Order and the Nicor and Peoples Proposed Orders, and should do the same here.

Respectfully submitted,



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Proposed Replacement Language

The Commission can correct the ComEd Final Order and clarify the scope of its authority over DCEO's portion of the ComEd plan with the following proposed revisions. To the extent possible, this proposed language is drawn from the Commission's orders in the Ameren and Nicor cases.

1. Beginning at page 60:

VII. DCEO

A. DCEO's Filing

~~The Illinois Department of Commerce and Economic Opportunity is an agency of State government created by the Civil Administrative Code. See 5 ILCS 5/5-15. Thus, because it is not a public utility, DCEO is not subject to the supervision of the Commission and is not regulated by the Public Utilities Act. 220 ILCS 5/1-101, et seq.~~

Nevertheless, DCEO is required to submit the details of the measures it implements to the Commission "in connection with the utility's filing regarding the energy efficiency and demand-response measures that the utility implements." See 220 ILCS 5/8-103(e); 220 ILCS 5/8-104(e).

The Commission rejects DCEO's argument that the Commission has limited authority over DCEO's portion of the Plan. It is clear from the language of the statute that the Commission was given authority to review the entirety of Nicor's Plan, including the DCEO portion, and to approve the Riders to collect the funds to pay for these plans. All energy efficiency measures must be approved by the Commission, regardless of whether they are implemented by the utility or the DCEO.

According to DCEO, its Plan supports the budget allocation that DCEO is allowed under the law and meets the requirements imposed on it under the statute as well as additional responsibilities that DCEO has taken on voluntarily.

2. Beginning at page 67

c) Commission Analysis and Conclusion

~~Based on our reading of the statute, it appears as though the Commission has limited authority over the DCEO portion of the plan. Even considering that Staff purports to be attempting to improve the plan, b~~ Because DCEO's method is in compliance with the statute, we do not adopt Staff's change.

3. Beginning at page 70

c) Commission Analysis and Conclusion

~~In the Commission's view, DCEO is, for the most part, given great latitude in the statute, but w~~We note with concern ELPC's testimony that the use of incorrect avoided costs can impact the Commission's ability to properly evaluate DCEO's plan. In this instance, DCEO asserts that its portfolio passes the TRC test and a change in the avoided costs would have a negligible impact; thus the Commission takes no action on this issue at this time. The potential for problems exists, however, and DCEO is directed to work with ELPC and ComEd to reach a conclusion on this issue to ensure that the proper avoided costs are used in the evaluation of DCEO's plan and for future three year plans.

4. Beginning at page 71

c) Commission Analysis and Conclusion

~~DCEO is given great latitude in its portion of the statute. Its DCEO's proposal to offer statewide programs is reasonable. Accordingly, no change to this portion of DCEO's plan is ordered.~~

5. Beginning at page 73

d) Commission Analysis and Conclusion

Section 5/8-103(f) states that "the utility shall . . . provide for an independent evaluation of the performance of the cost-effectiveness of the utility's portfolio of measures and the Department's portfolio of measures." 220 ILCS 5/8-103(f)(7). It is clear that this is a utility requirement. ~~Unlike the previous issues, where the Commission has limited authority over how DCEO implements its portion of the plan, this and~~ falls squarely under our jurisdiction over the utility's filing.

The Commission, however, sees merit in DCEO's plan and believes that DCEO's and ComEd's programs are sufficiently different to warrant separate evaluation. We note Staff's concerns regarding the independence of the evaluation and because we have authority over this particular issue, we will adopt Staff's proposed language to ensure the independence of the evaluator, similar to that adopted in Docket 07-0540.

6. Beginning at page 73

VIII. Findings and Orderings Paragraphs

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, sale and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act;
- (2) the Illinois Department of Commerce and Economic Opportunity is a state agency that is statutorily obligated, pursuant to 220 ILCS 5/8-104(e) to utilize 25% of a utility's natural gas funding and achieve no less than 20% of the natural gas savings requirements; therefore, pursuant to statute, this portion of the plan is subject to Commission approval before implementation;
- (3) the Commission has jurisdiction over Commonwealth Edison Company, the Illinois Department of Commerce and Economic Opportunity, and the subject matter of this proceeding;
- (4) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact;
- (5) the testimony and exhibits admitted into the record provide substantial evidence that ComEd's and DCEO's 2011-2013 Energy Efficiency and Demand Response Plans meet the filing requirements of Section 8-103(f) of the Public Utilities Act, subject to the conditions, modifications, and requirements herein;
- (6) the Stipulation is supported by substantial evidence, consistent with Section 8-103, reasonable and in the public interest.

The only place where the Commission undertook a substantive review of the DCEO plan is with respect to evaluation, measurement and verification (EM&V). On these issues the Commission finds that “[u]nlike the previous issues, where the Commission has limited authority over how DCEO implements its portion of the plan, this falls squarely under our jurisdiction over the utility’s filing.” (Final Order at 73).

CERTIFICATE OF SERVICE

I, Robert Kelter, hereby certify that I served on March 8th, 2011 the attached **INITIAL BRIEF ON REHEARING OF THE ENVIRONMENTAL LAW & POLICY CENTER** upon all active parties of record identified on the included service list electronically via e-mail. Paper copies will be provided upon request.

Respectfully submitted,

A handwritten signature in cursive script that reads "Robert Kelter".

Robert Kelter
Senior Attorney
Environmental Law & Policy Center



LEXSEE 262 ILL. APP 3D 266



Cited

As of: Mar 08, 2011

METRO UTILITY COMPANY, Appellant, v. ILLINOIS COMMERCE COMMISSION; CHICKASAW HOMEOWNERS ASSOCIATION et al; and HOMER TOWNSHIP, Appellees.

No. 2-93-0603

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

262 Ill. App. 3d 266; 634 N.E.2d 377; 1994 Ill. App. LEXIS 728; 199 Ill. Dec. 538

April 5, 1994, Submitted

May 13, 1994, Filed

SUBSEQUENT HISTORY: [***1] Released for Publication June 15, 1994.

PRIOR HISTORY: Appeal from the Order of the Illinois Commerce Commission. Docket No. 92-0176

DISPOSITION: Affirmed.

COUNSEL: For Metro Utility Co., Appellant: Myler, Ruddy & McTavish, Attorneys at Law. G. Alexander McTavish, Myler, Ruddy & McTavish, Aurora, IL. Clyde Kurlander, Attorney at Law, Chicago, IL.

For IL Commerce Comm., Appellee: Illinois Commerce Commission, Donna M. Caton, Chief Clerk, Springfield, IL. APPEARANCE ENTER DATE: 08/16/93. Illinois Commerce Commission, State of Illinois Center. G. Darryl Reed, Illinois Commerce Commission, General Counsel. Carmen L. Fosco, Special Assistant Attorney General, Chicago, IL. For Chickasaw Homeowner's Assoc., Appellee: Lockwood, Alex, Fitzgibbon & Cummings, Attorneys at Law, Chicago, IL. APPEARANCE ENTER DATE: 08/26/93. Thomas D. Paulius, J. William Goodwine, Robert S. Rigg, Lockwood, Alex, Fitzgibbon & Cummings. For Homer Township, Appellee: Kenneth A. Abraham, Kenneth A. Abraham & Associates, P.C., Willowbrook, IL.

JUDGES: PECCARELLI, WOODWARD, McLAREN

OPINION BY: PECCARELLI

OPINION

[*267] [**378] JUSTICE PECCARELLI [***2] delivered the opinion of the court:

Metro Utility Company (Metro), a public utility under the Public [*268] Utilities Act (Utilities Act) (220 ILCS 5/1-101 et seq. (West 1992)), appeals from two orders issued by the Illinois Commerce Commission (Commission). The orders granted Metro smaller increases in its utility rates than Metro had sought. Metro contends that the Commission erred when it: (1) determined to exclude certain items from Metro's test year expenses and rate base, and (2) altered Metro's capital structure by substituting a lower interest rate for a loan. Chickasaw Homeowners Association (CHA), an intervenor, submitted an answering brief in addition to the Commission's brief.

Metro provides water and sewer services to approximately 5,000 customers in six counties in northeastern Illinois. On April 16, 1992, Metro filed proposed revised tariff sheets with the Commission seeking a general increase in water and sewer service rates designed to produce approximately \$ 1,025,000 in increased annual revenues. Metro calculated that the increased rates would

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produce an annual increase in water revenues of approximately \$ 350,000, and an annual increase in sewer revenues of approximately [***3] \$ 675,000, increases of approximately 32% and 87% respectively. Metro had not sought Commission approval for a rate increase since 1984. Metro selected the 1990 calendar year as its historic test year.

The Commission conducted hearings on the matter. The hearings began on June 17, 1992, and took place periodically until December 1, 1992. During the hearing process, Commission staff (Staff) proposed numerous adjustments to Metro's test year levels of expenses and rate base. CHA participated in the hearings and primarily addressed quality of service issues which are not part of this appeal.

After some give and take between Metro and Staff, Metro reduced its rate increase request to a level which would have resulted in increased aggregate revenues of approximately \$ 725,000. Staff's final rate increase recommendations would have resulted in an aggregate revenue increase of approximately \$ 340,000.

On March 10, 1993, the Commission issued an order on the matter, and on April 7, 1993, the Commission issued an amendatory order. The amendatory order corrected certain mathematical errors in the schedules attached to the first order. The narrative text [**379] of both orders (the ratemaking orders) [***4] are identical. The ratemaking orders granted Metro rate increases which would result in annual aggregate increases in revenues of approximately \$ 402,000. Metro contends that the Commission erred when it adopted three Staff adjustments to Metro's test year level of expenses and rate base and when it determined that an interest rate on a Metro loan should be lowered. Metro maintains that these adjustments to its proposed rate [*269] increases resulted in lower projected revenues of approximately \$ 323,000.

Metro filed a timely application for a rehearing on these matters. The Commission denied Metro's application for a rehearing. This appeal followed.

Our supreme court recently set out the principles governing the role of the Commission and the standards for reviewing courts in administrative ratemaking proceedings. The court stated:

"The Commission is the administrative agency responsible for setting rates that public utilities may charge their customers. (Ill. Rev. Stat. 1985, ch. 111 2/3, pars. 9-102 through 9-202; *Hartigan I*, 117 Ill. 2d at 142.) The Commission is the

fact-finding body in the ratemaking process. (*Hartigan I*, 117 Ill. 2d at 142.) [***5] It is governed by the Public Utilities Act (Act) (Ill. Rev. Stat. 1985, ch. 111 2/3, par. 1-101 *et seq.* [now 220 ILCS 5/1-101 *et seq.* (West 1992)]). The Commission's powers are limited to those granted by the legislature in the Act. *Business & Professional People I*, 136 Ill. 2d at 201.

Because the Commission is an administrative agency, judicial review of its orders is limited. (*Business & Professional People I*, 136 Ill. 2d at 204.) Although the Commission is not required to make findings regarding every step, its findings of fact must be sufficient to allow for informed judicial review and will be affirmed if they are based on substantial evidence in the record. (See Ill. Rev. Stat. 1985, ch. 111 2/3, pars. 10-201(e)(iii) through (e)(iv); *Yowell v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* (1935), 360 Ill. 272, 275-76, 195 N.E. 667.) The Commission's findings of fact are *prima facie* correct and will not be overturned by a reviewing court unless they are against the manifest weight of the evidence, beyond the Commission's statutory authority, or violative [***6] of constitutional rights. (*Citizens Utilities Co. v. Illinois Commerce Comm'n* (1988), 124 Ill. 2d 195, 206, 124 Ill. Dec. 529, 529 N.E.2d 510; *Independent Voters v. Illinois Commerce Comm'n* (1987), 117 Ill. 2d 90, 95, 109 Ill. Dec. 782, 510 N.E.2d 850.) Moreover, the burden of proof is on the party appealing the Commission's order. Ill. Rev. Stat. 1985, ch. 111 2/3, par. 10-201(d).

The Commission's interpretation of a question of law, however, is not binding on a reviewing court. (*Business & Professional People I*, 135 Ill. 2d at 204.) Upon review of a Commission order, the court may, in whole or in part, reverse and set aside the order, affirm the order, or remand the cause to the Commission for further proceedings. (*Hartigan I*, 117 Ill. 2d at 142.) Although the reviewing court cannot direct the Commission to take a specific action (*Hartigan I*, 117 Ill. 2d at 142) or judicially set utility rates (*Hartigan I*, 117 Ill. 2d at 142), the court

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[***7] may suspend rates which [*270] it has found to be illegal (Ill. Rev. Stat. 1985, ch. 111 2/3, par. 10-20(a))." (*People ex rel. Hartigan v. Illinois Commerce Comm'n* (1992), 148 Ill. 2d 348, 366-67, 170 Ill. Dec. 386, 592 N.E.2d 1066.)

We will apply these principles to each of Metro's contentions of error.

Metro first contends that the Commission erred when it made a determination in the ratemaking orders to exclude from Metro's test year expenses all heavy maintenance and construction expenses incurred by Metro for work performed by a Metro affiliate, Midwest Construction Company (Midwest). Metro asserts that the exclusion of these [**380] expenses resulted in a reduction in Metro's contractual service expenses for the test year in the amount of \$ 199,349, and a denial of Metro's right to recover, through prospective rates based on the test year expenses, such normal and recurring expenses in the future.

The ratemaking orders explained the Commission's determination that it would not recognize test year expenses that originated from unapproved contracts between Metro and its affiliate, Midwest. Metro admits that the test year expenses [***8] in question arose from contracts for which it had not obtained prior Commission approval as required by the Utilities Act. Nevertheless, Metro maintains that the Commission erred when it decided to exclude the expenses.

Metro first argues that collateral estoppel precluded the Commission from reviewing the expenses arising from the contracts in question because the propriety of the contracts was adjudicated by the Commission in a prior order (Docket No. 90-0026), and a related stipulation and agreement. Docket No. 90-0026 concerned a citation order issued by the Commission on January 18, 1990, which required Metro to show cause why the Commission should not impose penalties on Metro for alleged violations of the Utilities Act, including violations related to the provision of heavy maintenance and construction services to Metro by Midwest. The stipulation and agreement which was approved by the Commission in conjunction with Docket No. 90-0026 stated that its terms were the "final disposition of all the matters raised in this proceeding." The Docket No. 90-0026 order dated February 6, 1991, dismissed the January 18, 1990, citation of Metro with prejudice.

In the ratemaking orders, [***9] the Commission directly addressed the preclusion issue. The Commission determined that Docket No. 90-0026 did not preclude it

from considering whether Metro's failure to obtain prior approval for the contracts in question impacted the rate case. The Commission stated:

"The dismissal of Docket 90-0026 has no impact on this rate case. Docket 90-0026 was a citation proceeding wherein Metro was required to show cause why the Commission should not [*271] impose a civil penalty on Metro. That docket, by its very nature, focused on Metro's activities prior to the Docket's inception. Neither the Order nor the stipulation stated that Metro no longer had to seek approval of the heavy maintenance and construction contract. Rather, Metro was no longer liable for a civil penalty for failing to get Commission approval prior to entering into the affiliated transactions."

Collateral estoppel, or issue preclusion, bars the relitigation of particular facts or issues decided in a prior adjudication between the same parties in a different cause of action. (*Housing Authority v. YMCA* (1984), 101 Ill. 2d 246, 252, 78 Ill. Dec. 125, 461 N.E.2d 959.) [***10] Courts often treat collateral estoppel as a branch of a broader doctrine, *res judicata*, which bars identical causes of action between parties or their privies. (*Housing Authority*, 101 Ill. 2d at 251.) Here, Metro specifically declines to invoke the doctrine of *res judicata*, but argues that the collateral estoppel branch of *res judicata* applies. Because the record shows that the prior action in the Docket No. 90-0026 proceeding was not the same as the current action, we agree that *res judicata* does not apply. We will therefore only address the collateral estoppel branch of the *res judicata* doctrine.

On appeal, the Commission contends that collateral estoppel does not apply to the ratemaking orders because the law is well settled that a Commission order, such as that in Docket No. 90-0026, has no *res judicata* effect. We agree.

The Commission is not a judicial body, and its orders are not *res judicata* in later proceedings before it. (*Mississippi River Fuel Corp. v. Illinois Commerce Comm'n* (1953), 1 Ill. 2d 509, 513, 116 N.E.2d 394.) "The concept of public [***11] regulation includes of necessity the philosophy that the commission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in the past." 1 Ill. 2d at 513.

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Even if collateral estoppel applied to Commission orders, we conclude that it [**381] would not apply in this case because the issues in question were not identical. The issue before the Commission in Docket No. 90-0026 was whether it should impose civil penalties on Metro for, *inter alia*, Metro's failure to obtain approval for contracts with an affiliate. The issue before the Commission in the ratemaking proceeding was whether Metro's failure to obtain approval for contracts with an affiliate should impact the ratemaking proceeding.

For these reasons, we determine that collateral estoppel did not preclude the Commission from reviewing the expenses arising from the contracts in question.

Metro next contends that even if the Commission was not [*272] precluded from reviewing the heavy maintenance and construction expenses arising from Metro's contracts with Midwest, the Commission erred when it did not [***12] allow the expenses because it improperly based its decision on *section 7-101* of the Utilities Act (220 ILCS 5/7-101 (West 1992)). Metro argues that *section 7-101* is not dispositive in Commission ratemaking proceedings and that the Commission's reliance on *section 7-101* is unfair because it prevents Metro from prospectively recovering similar expenses in future years which the Commission acknowledges Metro must necessarily incur.

The ratemaking orders clearly show that the Commission based its decision on *section 7-101* of the Utilities Act. *Section 7-101(3)* provides, in relevant part:

"No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it has first been filed with and consented to by the Commission. The Commission may condition such approval in such manner as it may deem necessary to safeguard the public interest. If it be found by the Commission, after investigation and a hearing, that any such contract is not in [***13] the public interest, the Commission may disapprove such contract. Every contract or arrangement not consented to or excepted by the Commission as provided for in this Section is void.

The consent to any contract or arrangement as required above, does not

constitute approval of payments the-reunder for the purpose of computing expense of operation in any rate proceeding." 220 ILCS 5/7-101(3) (West 1992).

In the ratemaking orders, the Commission addressed the question of whether to recognize these and related expenses arising from contracts not approved under *section 7-101*. The Commission determined to not recognize the expenses and explained its determination in the ratemaking orders as follows:

"Metro, in its Brief on Exceptions, argues that it is unfair for the Commission to require Metro to absorb the costs of the heavy maintenance and construction contract. Specifically, Metro contends that it is not attempting to recover any costs that it incurred in the past with respect to these contracts. Rather through this rate case, Metro is attempting to recover these items in the future. Metro argues that to deny this future recovery constitutes a confiscation of Metro's property. In [***14] addition, Metro contends that Staff admitted that the type of expenses incurred under the heavy maintenance and construction contract are routinely incurred by utilities.

[*273] The Commission is not persuaded by Metro's arguments in its Brief on Exceptions. The Commission is of the opinion that an unapproved affiliated interest contract is void and the Commission is not required to recognize in a rate case the expenses pertaining to such an unapproved transaction. This is especially true in a case such as this where Metro has a history of failing to obtain approval of affiliated interest contracts."

On appeal, the Commission contends that expenses incurred by a public utility pursuant to an unapproved affiliated interest contract are void under *section 7-101* and therefore should not be effective for ratemaking. The Commission argues that any other construction of *section 7-101* would improperly allow Metro to do indirectly what it cannot [**382] do directly under the Utilities Act and would render *section 7-101* virtually meaningless.

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Metro counters that *section 7-101* is not controlling in a ratemaking proceeding. Metro maintains that *section 9-201* of the Utilities Act (*220 ILCS 5/9-201* (West 1992)) [***15] governs ratemaking proceedings and requires a substantive determination based on the level of actual expenses in the test year including expenses which may arise from unapproved affiliated interest contracts. Metro argues that this is especially true in its case where the Docket No. 90-0026 proceeding imposed whatever civil penalties were appropriate for the unapproved contracts. Metro reasons that the denial of the expenses arising from such contracts in this ratemaking proceeding would impose double penalties on it for not obtaining contract approval. Metro asserts that whether the contracts in question were void under *section 7-101* is irrelevant for its rate case because the expenses in question were necessary and proper and therefore must be considered in the ratemaking process.

The resolution of this issue requires us to construe 7-101 of the Utilities Act. Because the construction of a statute is a question of law (*Monahan v. Village of Hinsdale* (1991), 210 Ill. App. 3d 985, 993, 155 Ill. Dec. 571, 569 N.E.2d 1182), the Commission's construction of *section 7-101* is not binding on us and we may independently construe [***16] *section 7-101* (*People ex rel. Hartigan*, 148 Ill. 2d at 367). However, because of an agency's experience and expertise, courts will generally give substantial weight and deference to the interpretation of a statute by the agency charged with the administration and enforcement of the statute. *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n* (1983), 95 Ill. 2d 142, 152-53, 69 Ill. Dec. 78, 447 N.E.2d 295.

A court's primary function in interpreting a statute is to ascertain and give effect to the intent of the legislature in enacting the statute. (*Business & Professional People for the Public Interest v.* [*274] *Illinois Commerce Comm'n* (1991), 146 Ill. 2d 175, 207, 166 Ill. Dec. 10, 585 N.E.2d 1032.) The statutory language is usually the best indication of legislative intent. (*Collins v. Board of Trustees of the Firemen's Annuity & Benefit Fund* (1993), 155 Ill. 2d 103, 111, 183 Ill. Dec. 6, 610 N.E.2d 1250.) Courts should give statutory [***17] language its plain meaning and the fullest possible meaning to which it is susceptible, reading the statute as a whole, in order to effectuate legislative intent. *Collins*, 155 Ill. 2d at 111.

Based on these principles, we conclude that under *section 7-101* the Commission was required to disallow Metro's unapproved affiliated interest contracts in Metro's ratemaking case. This is because the plain language of *section 7-101(3)* provides that every public utility contract or arrangement with an affiliated interest not approved by the Commission under *section 7-101* shall

not be effective and is void. (*220 ILCS 5/7-101(3)* (West 1992).) Because the unapproved contracts were of no effect and void, they could not serve as the basis for test year expenses.

We also find that Metro misconstrued the second paragraph of *section 7-101(3)*. Metro concluded that the sentence "the consent to any contract or arrangement as required above, does not constitute approval of payments thereunder for the purpose of computing expense of operation in any rate proceeding" showed that the legislature did not intend *section 7-101* to apply to ratemaking proceedings. [***18] On the contrary, under statutory construction canons, where a statute specifically enumerates exclusions from the operation of the statute, the statute should apply to all other cases. (See *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n* (1990), 203 Ill. App. 3d 424, 438, 149 Ill. Dec. 148, 561 N.E.2d 426.) Because the legislature excluded the necessary allowance of ratemaking expenses arising from a contract approved under *section 7-101*, we conclude that the legislature must have intended that the lack of approval of a contract under *section 7-101* should result in the disallowance of ratemaking expenses arising from that contract.

We also conclude that reading the statute as a whole favors this interpretation of *section 7-101*. If a public utility could fail to [**383] seek approval for contracts with affiliates, as required by *section 7-101*, and still rely on those contracts in ratemaking proceedings, the utility would, to a great extent, be allowed to circumvent *section 7-101* rendering it a nullity.

Metro's argument that it is being penalized twice is unpersuasive because it could have avoided any double penalty by simply [***19] doing what *section 7-101* required it to do--seek approval for the contracts--before it sought its rate increases.

In sum, the plain language of *section 7-101* shows a clear [*275] legislative intent that public utilities obtain Commission approval for any contract with an affiliated interest. Under *section 7-101* if approval is not obtained, then the contract is void and ineffective. Allowing a public utility to use an unapproved contract as the basis for establishing expenses in a rate case would allow the public utility to circumvent largely the *section 7-101* approval requirement and defeat the legislative intent espoused in *section 7-101*. For all these reasons, we conclude that the Commission did not err when it disallowed the unapproved contracts in Metro's ratemaking case. Moreover, we have determined that because under *section 7-101* unapproved affiliated interest contracts are void the Commission is required to disallow such contracts in a ratemaking case.

Metro next contends that the Commission erred when it disallowed other test year expenses arising from

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unapproved Metro contracts with affiliates. Metro claims that the Commission disallowed capital service contracts with Midwest resulting [***20] in annual revenue losses of approximately \$ 49,000, and increased office lease expenses with affiliated persons of \$ 6,000 annually.

Metro essentially takes the same position on these issues as it did on the heavy maintenance and construction issues. Metro maintains that the sole reason the Commission disallowed these expenses was the Commission's determination that it was not required to recognize expenses arising from transactions between public utilities and affiliated interests in a ratemaking case where the transaction lacked prior *section 7-101* approval. Metro asserts that the Commission's decision denies it the right to recover prospectively revenue for necessary expenses which it actually incurred. Metro argues that the Commission's decision is contrary to the evidence and the law, violates fundamental ratemaking principles because it is unsupported by adequate findings of fact, and violates Metro's constitutional due process rights.

We note that it is undisputed that Metro did not obtain the Commission's prior approval for the contracts and agreements in question. It is also clear that the primary reason for the Commission's decision to disallow the expenses was Metro's failure [***21] to obtain prior approval as required by *section 7-101*. Thus, the question before us again is whether a public utility's failure to obtain Commission approval of contracts with affiliated interests under *section 7-101* of the Utilities Act requires the Commission's disallowance in a ratemaking proceeding of expenses arising from the unapproved contracts.

For the same reasons set forth above, we conclude that the utility's failure to obtain prior Commission approval of the contracts [*276] requires the Commission's disallowance of the expenses. Metro's due process arguments are unpersuasive. The record shows that Metro knew it was required to obtain prior approval for the contracts or they would be void. If Metro wanted the expenses in question to be included with its test year expenses, it could have sought Commission approval of the underlying contracts before it filed its rate case.

For these reasons, we conclude that the Commission did not err when it disallowed the expenses in question.

Metro's final contention on appeal is that the Commission erred when it decided to substitute a lower interest rate on a previously approved Metro debt resulting in a reduction in Metro's allowed rate of [***22] return. In an order filed on October 1, 1986, (Docket No. 83-0181) the Commission granted Metro approval to issue long-term debt in the amount of \$ 1,504,430 at a rate of 12% per year to its affiliate, Midwest. In the ratemaking

orders, the Commission accepted a [**384] proposal based on the testimony of Staff's witness, William G. Saxe (Saxe), to substitute an interest rate of 9% for the 12% rate previously approved on the debt to Midwest. The reduction in the interest rate would reduce Metro's cost of capital thereby reducing Metro's allowed rate of return.

Metro argues that the Commission's determination to lower the loan rate erroneously shifts the burden of proof to Metro in a matter on which it previously obtained Commission approval in Docket No. 83-0181. Metro also contends that the Commission's determination was contrary to fact because it rests on testimony of Saxe that market conditions would allow Metro to refinance the debt at a rate lower than 12% when, given Metro's actual credit rating, this would not in fact be possible. Metro concludes that the Commission's determination was unsupported by adequate findings of fact, unsupported by substantial evidence, and contrary to law.

[***23] Saxe proposed several adjustments to Metro's long-term cost of debt. Metro only contested the proposed adjustment in the interest rate on its debt with Midwest. Saxe noted that the 12% interest rate on that debt was established by Docket No. 83-0181 when interest rates in general were much higher than current rates. Saxe concluded that Metro should refinance its debt with Midwest at lower current rates.

The Commission addressed this issue in the ratemaking orders. The Commission stated:

"Mr. Saxe stated that Metro could refinance this debt at a 9% interest rate. Mr. Saxe supports this contention on two bases. First, he notes that the July 24, 1992 issue of Soloman Brothers *Bond Market Roundup* shows that the yield on A to BBB rated [*277] 25-30 year utility bond issues were 8.25% to 8.45%. Additionally, he asserts that in response to a Staff data request Metro stated that La Salle National Bank indicated that if Metro desired to convert its present 5 year variable rate term note to a five year fixed rate, the rate would be in the range of 9% to 9.25%.

Metro contends that this adjustment is unrealistic because it is unlikely that Metro could refinance the loan at 9% as Staff suggests. [***24]

The terms of the affiliated interest loan are unreasonable in light of current economic conditions. The loan was made at a time when the prevailing interest rates

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were significantly higher than they are today. Metro has not offered any evidence to indicate that it has attempted to refinance this loan. The Commission agrees with Mr. Saxe that based on current interest rates, the loan could be refinanced at a lower rate. The Commission, therefore, accepts Staff's adjustment."

Wayne A. Newman (Newman), Metro's comptroller, responded to Saxe's testimony. Newman testified as follows:

"Q. Why does [Metro] disagree with Mr. Saxe's proposed 9% rate?

A. Metro simply cannot at this time go to the market and borrow another \$ 1.5 million at 9% or any similar rate. The Company was very pleased with the financial arrangements with the La Salle Bank, but negotiations and conclusion of those arrangements were most difficult. Any suggestion that La Salle would provide additional funds at 9.0 to 9.25% is not realistic. Moreover, Metro is hardly comparable to an 'A' or 'BBB' rated utility regarding matters of debt issuance.

During past years when Metro could not raise funds, Midwest served as its [***25] 'banker' and was, realistically, its only source of significant cash sums. The dollars Metro borrowed from Midwest, in reality, have represented and continue to represent Midwest's equity capital and should carry not less than a fair rate of return on equity. Moreover, the 12% approved by the Commission in Docket No. 83-0181 should be used in this proceeding until such time as new arrangements can be made by the Company which should be the subject of Commission order and approval."

The Commission contends that it has provided sufficient findings and analysis to support its conclusions and to allow for judicial review. The Commission argues that

the record supports its determination to reduce [***385] the interest rate on Metro's debt to Midwest. We agree.

Based on the general principles governing administrative ratemaking proceedings quoted above, a reviewing court should affirm [*278] the Commission's findings of fact if they are based on substantial evidence in the record. (*People ex rel. Hartigan*, 148 Ill. 2d at 366.) Substantial evidence is "evidence which a reasoning mind would accept as sufficient to support a particular conclusion [***26] and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. *Metro Utility v. Illinois Commerce Comm'n* (1990), 193 Ill. App. 3d 178, 184, 140 Ill. Dec. 455, 549 N.E.2d 1327.

Here, the Commission set out findings of fact based on substantial evidence. Saxe's conclusion that Metro could refinance its loan at a lower rate was based on Saxe's evaluation of the current credit market for public utilities. The fact that Metro presented contradictory evidence is insufficient to reverse the Commission's order because a reviewing court may not substitute its interpretation of the evidence for that of the Commission. *People ex rel. Hartigan v. Illinois Commerce Comm'n* (1987), 117 Ill. 2d 120, 147, 109 Ill. Dec. 797, 510 N.E.2d 865.

Moreover, the Commission's findings of fact are *prima facie* correct, and the burden of proof rests with the party appealing a Commission order. (*People ex rel. Hartigan*, 148 Ill. 2d at 367.) Metro did not provide evidence that it had attempted [***27] to obtain a replacement loan at a lower rate than on its loan with Midwest, or that its credit rating was different than that implied by Saxe. Consequently, Metro did not overcome the *prima facie* correctness of the Commission's findings of fact.

We cannot say that the Commission's findings were against the manifest weight of the evidence. Accordingly, we will not overturn the Commission's findings. See *People ex rel. Hartigan*, 148 Ill. 2d at 367.

For these reasons, we conclude that the Commission did not err when it decided to substitute a lower interest rate on Metro's loan in the ratemaking proceeding.

Based on the foregoing, we affirm the Commission's orders of March 10, 1993, and April 7, 1993.

Affirmed.

WOODWARD and McLAREN, JJ., concur.

