

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	No. 07-0566
General increase in electric rates	:	(On Remand)

COMMONWEALTH EDISON COMPANY'S
POST-HEARING REPLY BRIEF

TABLE OF CONTENTS

INTRODUCTION1

I. THE COMMISSION HAS NO STATUTORY AUTHORITY TO ORDER A REFUND IN THESE CIRCUMSTANCES.2

II. A REFUND IS NOT EQUITABLE IN THIS CASE.4

III. IF THE COMMISSION DOES ORDER A REFUND, IT MUST ACCOUNT FOR COMED’S THIRD-QUARTER 2008 PLANT ADDITIONS.....7

 A. The Commission Must Consider ComEd’s Evidence Concerning Third-Quarter Plant Additions.7

 B. In Calculating ComEd’s Third-Quarter Plant Additions, the Commission Should Rely on Actual Costs Rather Than Projections.11

IV. THE PUTATIVE REFUND PERIOD ENDED WITH THE ISSUANCE AND EFFECTIVENESS OF THE COMMISSION’S SUBSEQUENT RATE ORDER.....14

V. THE COMMISSION SHOULD ACCEPT COMED’S PROPOSED METHOD FOR IMPLEMENTING ANY REFUND.....16

 A. The Commission Should Approve ComEd’s Proposal to Provide a Refund Credit to Current Customers.16

 B. The Commission Should Reject Staff’s Proposal to Set the Refund at No Less Than 1.0 Cent per kWh.....17

VI. AG/CUB’S CLAIM CONCERNING HYPOTHETICAL REFUNDS RELATING TO A DIFFERENT RATE APPROVED IN A DIFFERENT DOCKET IS PREMATURE, OUTSIDE THE SCOPE OF THIS DOCKET, AND WITHOUT ANY MERIT.18

CONCLUSION.....22

At the very least, in calculating “the money that would have been collected pursuant to a just and reasonable rate,” *id.*, the Commission must account for ComEd’s third-quarter 2008 plant additions. The Appellate Court could not have been clearer that if the Commission revisits the issue of accumulated depreciation, it must also consider the evidence that ComEd’s third-quarter 2008 plant additions should have been included in rate base. *Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 405 Ill. App.3d 389, 408 (2d Dist. 2010) (“*ComEd*”) (directing the Commission to “allow[] ComEd to request recovery of the aggregate cost of the third-quarter 2008 plant additions.”). The Appellate Court explained that, because of the Stipulation it would be “manifestly unfair,” *id.*, to retroactively account for accumulated depreciation without also accounting for allowable and substantiated third-quarter 2008 plant additions. AG/CUB and Staff fail to explain how being “manifestly unfair” to ComEd could result in what would have been a “just and reasonable” rate during the refund period. *Hartigan*, 148 Ill.2d at 412.

I. THE COMMISSION HAS NO STATUTORY AUTHORITY TO ORDER A REFUND IN THESE CIRCUMSTANCES.

AG/CUB continue to contend that the Commission can order a refund in a case like this without direction or authority of the Appellate Court. AG/CUB Br. at 15. That position is contrary to law. As *Hartigan* made clear, the power to order a refund where the utility has accurately charged its filed rate is an equitable judicial power, not a statutory power belonging to the Commission. *Hartigan*, 148 Ill.2d at 397-98 (refund “is an equitable remedy made available to ratepayers pursuant to this court’s equitable powers” and “is not a statutorily based remedy”); *see also* ComEd Initial Post-Hearing Brief (“ComEd Br.”) at 7-10. Because the Commission does not have equitable powers, a refund is only proper here pursuant to the equitable power of an appellate court.

AG/CUB claim that *Independent Voters of Illinois v. Ill. Commerce Comm'n*, 117 Ill.2d 90 (1987) ("*Independent Voters*") and *Hartigan* are to the contrary. See AG/CUB Corrected Initial Brief on Remand ("AG/CUB Br.") at 16; see also Staff Initial Brief on Remand ("Staff Br.") at 10. In fact, those cases prove ComEd's point. Each involved a *judicially* ordered refund, not a Commission-ordered refund. See *Independent Voters*, 117 Ill.2d at 104 ("[t]he Act does not specifically provide a remedy for this situation," but a court "may exercise its equitable powers when an appropriate remedy is not provided in the Act"); *Hartigan*, 148 Ill.2d at 405; *id.* at 412 (referring to "*judicially* established refund of money collected pursuant to an invalid rate order" (emphasis added)). Indeed, in *Hartigan* the Supreme Court reversed an Appellate Court decision affirming a Commission-ordered refund, ruling expressly that only courts, not the Commission, have jurisdiction to compel a refund of amounts collected pursuant to a Commission rate order. 148 Ill.2d at 397-98.

The question, then, is whether the Appellate Court has directed a refund or found one necessary to effectuate its order, or even directed the Commission to find facts necessary to determine whether there should be a refund. Here, it has not. The Court did not even utter the word "refund," let alone direct one. Nor does its decision concerning "matching" principles compel such a refund. AG/CUB contend that expecting the Appellate Court to state and discuss the remedy it intends to apply is expecting the Court to use magic words, again pointing to *Independent Voters*. AG/CUB Br. at 18-19. Once again, however, in *Independent Voters*, the Court invoked its own equitable power, after the Commission had ruled that it had no power. 117 Ill.2d at 104 ("[T]his court may exercise its equitable powers when an appropriate remedy is not provided in the [Public Utilities] Act"). Indeed, AG/CUB fail to point to *any* decision in

which the Commission claimed the power to order a refund in circumstances like this without affirmative direction from a court.

II. A REFUND IS NOT EQUITABLE IN THIS CASE.

Even if the Appellate Court has authorized the Commission to consider whether the facts here warrant a refund, those facts show a refund would *not* be equitable. As *Hartigan* holds, a refund is to be calculated by determining 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.” 148 Ill.2d at 412. It cannot be disputed that the Commission, in ComEd’s 2010 rate case, already determined that the rates charged by ComEd during the refund period under-recovered its costs in that same period, and that the “just and reasonable rate” based on those costs was higher. AG/CUB again point to *Independent Voters*, a case preceding *Hartigan*, claiming it forbids consideration of that Commission determination. AG/CUB Br. at 16.

ComEd has explained why this case differs factually from *Independent Voters* (*see* ComEd Br. at 13-16), and AG/CUB offer no response. Instead, they appear to assume the facts do not matter. *Independent Voters* involved costs that categorically could not be included in rates at any time, under the law then in effect. In contrast, no one suggests that ComEd cannot recover capital investment costs or depreciation expenses, the costs at issue here. The error here was a methodological error concerning timing and matching for purposes of computing a proper prospective rate, not one of allowing recovery of an unrecoverable type of expense. Moreover, the Court in *Independent Voters* went so far as to cast doubt on Bell’s good faith, “question[ing] the propriety” of Bell’s attempt to “dispense largesse at [ratepayers’] expense.” *Illinois Bell Tel. Co. v. Ill. Commerce Comm’n*, 55 Ill.2d 461, 481 (1973). Here, by contrast, ComEd followed prior Commission decisions and advocated a position the Commission adopted. Finally, the

methodological error in computing ComEd's prospective rates did not result in ComEd recovering more than its actual just and reasonable costs of service. Customers, in fact, paid less than ComEd's just and reasonable costs during any potential refund period. As set forth above, the test of whether customers overpaid is to compare collections under the "invalid rate" with those under "a just and reasonable rate." The Commission should not determine the "just and reasonable rate" simply by mechanically reducing the "unlawful rate" as urged by AG/CUB and Staff (*see* AG/CUB Br. at 11; Staff Br. at 13-14), when that rate was already too *low* to enable ComEd to recover its costs.¹

That no refund is warranted here follows directly from *Hartigan*, a case that also involved a methodological error. There, the courts had invalidated ComEd's "Rate Order I" on the ground that the Commission had erroneously presumed the reasonableness of ComEd's costs rather than conducting its own analysis. In determining the "just and reasonable" rate that "would have been collected" during two separate refund periods, the Supreme Court looked to subsequent rate orders by the Commission. 148 Ill.2d at 362-63, 409, 413.

One refund period in *Hartigan* ran from the time that the courts struck down Rate Order I through the end of 1988, and was governed by the terms of a "Rate Order II" issued by the Commission in August/September 1989. *Id.* at 363, 409. On the theory espoused by AG/CUB and Staff, Rate Order II should be irrelevant to the calculation of a refund, because "the fact that a subsequent rate order has been issued by the Commission" cannot "erase or negate the need for the Commission" to issue a refund. AG/CUB Br. at 17. AG/CUB cannot legitimately advocate a one-way rule, with a subsequent rate order relevant only if it establishes a new "just and reasonable rate" *below* the amount charged. To AG/CUB and Staff, a refund calculation would

¹ ComEd's Offer of Proof contains additional data that, if admitted, would also support this conclusion. As it consistently has, ComEd expressly preserves that issue for further review.

always involve nothing more than a simple correction of a previous error. But in *Hartigan*, the Supreme Court made clear that a new “Rate Order II” established the just and reasonable rate for a refund period that *preceded* Rate Order II. The Court held that “the amount of money to be refunded consists of the difference between the rates collected pursuant to Rate Order I and the rates that should have been collected which were established in Rate Order II.” 148 Ill.2d. at 409.

Even more to the point, *Hartigan* makes clear that the Supreme Court understood that the Commission’s new post-remand rate order (Rate Order II) took account of actual cost increases during the refund period – cost data that were not available to the Commission when it issued Rate Order I. In response to ComEd’s argument that any refund amount should “be offset by actual cost increases” subsequent to Rate Order I, *id.* at 409, the Court did *not* respond that such actual cost increases were irrelevant, but rather held that such actual cost increases “should already have been taken into account by the Commission at the time it determined what the rates *should have been* in Rate Order II.” *Id.* at 410 (emphasis added). In other words, what the rates “should have been” during the refund window were rates that took into account ComEd’s actual cost increases, incurred after the rates originally were set.

A second refund at issue in *Hartigan* was for the year 1989, with respect to which the Commission had yet to determine (as of 1992) the “proper rates that should have been charged.” *Id.* at 412-13. Therefore, the Court (in 1992) remanded to the Commission to determine the just and reasonable rate that should have been collected in 1989, an exercise that under the theory of AG/CUB and Staff would be improper. Moreover, the Supreme Court made clear that those “proper rates” should include the cost of constructing three new nuclear generating facilities that were not included in the Rate Order I rate base. *Id.* at 412-13. That is, the Supreme Court again

held that the Commission not only *could*, but *must*, account for cost increases since Rate Order I. Explicitly contrary to the AG/CUB view, the Supreme Court made clear that Commission could “determin[e] that the proper 1989 rates are higher than the Rate Order I rates charged in 1989 ... due to the rate-basing of three new facilities.” *Id.* at 413. Including those facilities would result in a “higher rate base [that] could reduce the refund amount, *if any*, for the year of 1989.” *Id.* (emphasis added).

Tellingly, on remand, the Commission looked to a rate order entered *in 1991*, which was based on actual 1989 data, in calculating the proper rates for 1989. It concluded that the just and reasonable rate for 1989 was *higher* than the amount actually collected. *Commonwealth Edison Co.*, ICC Docket Nos. 83-0537, 84-0555 (June 2, 1993), 1993 WL 13653472. Applying that same logic to this case, the Commission should look to its Order in ComEd’s 2010 rate case, which established that the just and reasonable rate for the refund period at issue here was higher than the amount actually collected. Thus, according to *Hartigan*, no refund is required. That conclusion is also compelled by the Appellate Court decision at issue here, which was predicated upon the obligation to properly “match” revenues and costs, and therefore requires a proper “matching” of revenues and costs for the refund period at issue.

III. IF THE COMMISSION DOES ORDER A REFUND, IT MUST ACCOUNT FOR COMED’S THIRD-QUARTER 2008 PLANT ADDITIONS.

A. The Commission Must Consider ComEd’s Evidence Concerning Third-Quarter Plant Additions.

If the Commission interprets the Appellate Court’s order as directing it to consider and award refunds despite the clear absence of such direction, the Commission must also consider ComEd’s third-quarter 2008 plant additions. The Appellate Court could not have been clearer

that on remand any consideration of accumulated depreciation must also include consideration of ComEd's third-quarter 2008 plant additions. *ComEd*, 405 Ill. App.3d at 408.

According to Staff and AG/CUB, this constitutes impermissible retroactive ratemaking. Staff Br. at 9-10; *see also* AG/CUB Br. at 30. As the ALJ already recognized, if that is so, the same would be true with respect to the accumulated depreciation issue. "It cannot be, as argued by Staff, that considering accumulated depreciation is not retroactive ratemaking, but considering third quarter plant is retroactive ratemaking." 9/16/11 ALJ Order at 2. Indeed, it would be wholly illogical to argue that the Commission can award retroactive refunds on its own, but cannot consider plant additions even where the Appellate Court ordered it to do so. Moreover, ComEd does not urge that any charge be increased, or surcharge imposed, based on its plant additions. Those plant additions merely figure into the amount of the refund other parties are seeking.

The critical point, however, is that if the Appellate Court properly authorized a refund, then neither revisiting the accumulated depreciation issue nor considering ComEd's third-quarter 2008 plant additions constitutes prohibited retroactive ratemaking. A refund flows from the court's equitable power, not the Commission's statutory ratemaking authority, and so the Commission's determination of the "just and reasonable rate" during the refund period is not an exercise in ratemaking, but instead amounts to fact-finding in support of the judicial exercise of equitable power. As the ALJ explained, "it is clear that complying with an Appellate Court remand to determine the proper rates to be used in calculating a refund is not retroactive ratemaking, nor would it automatically result in an illegal surcharge." *Id.* at 2. Here, the Appellate Court determined it would be "manifestly unfair" to bar ComEd from seeking to include third-quarter 2008 plant additions. *ComEd*, 405 Ill. App.3d at 408. Therefore, "[b]oth"

the accumulated depreciation issue *and* the third-quarter 2008 plant additions “must be considered to comply with the remand.” 9/16/11 ALJ Order at 2.

AG/CUB also contend that the Commission has already implicitly made a finding rejecting ComEd’s third-quarter 2008 plant additions. AG/CUB Br. at 8, 14; *see also* Initial Brief on Remand of IIEC (“IIEC Br.”) at 3. Essentially, they argue that because the Commission (1) had before it evidence concerning the first three quarters of 2008; (2) made explicit findings approving the first two quarters; and (3) said nothing at all about the third quarter additions, the Commission must have decided that the third quarter plant additions should be rejected based on the evidence. AG/CUB Br. at 19-30.

That position cannot be squared with what occurred before the Commission or with the Appellate Court’s determinations. As part of a proposed stipulation with Staff, ComEd agreed not to seek recovery of its third-quarter 2008 plant additions so long as the Commission decided, consistent with its past practice, to exclude post-test-year accumulated depreciation of existing plant. *See* ComEd Br. at 4-5 & Attachment A. Thus, while evidence of ComEd’s third-quarter 2008 plant additions was before the Commission, the Commission had no reason to – and did not – make any factual findings concerning that evidence. The fact that the Commission independently assessed ComEd’s evidence with respect to the first two quarters of 2008 is entirely beside the point.

AG/CUB’s position also cannot be reconciled with the Appellate Court’s finding that “the Commission has not had the opportunity to make findings of fact regarding the third-quarter 2008 plant additions.” *ComEd*, 405 Ill. App.3d at 409. Indeed, the Appellate Court directed that, on remand, the Commission “allow[] ComEd to petition for inclusion [of third-quarter 2008 plant additions] in the rate base.” *Id.* Finally, AG/CUB’s position cannot be squared with the

position the Commission itself took before the Appellate Court. In its brief, the Commission stated to the Appellate Court that it would decide the issue of third-quarter 2008 plant additions if the case were remanded – showing that the Commission had not, in fact, made any findings on those plant additions. *See* Comm’n Appellate Court Br. (Attachment B to ComEd’s initial Brief) at 37.

Staff contends that the third-quarter 2008 plant additions are not known and measurable, but offers no testimony or other evidence to that effect. It cites only direct testimony by Mr. Griffin. *See* Staff Br. at 17. But as Staff acknowledges, that testimony preceded ComEd’s rebuttal case, where ComEd submitted additional information. In that same direct testimony, Mr. Griffin expressly stated he “will consider additional evidence that ComEd may provide in rebuttal that 2008 construction projects meet the requirements of” the known and measurable rule. Griffin Dir., Staff Ex. 2.0, 8:148-50. Indeed, Mr. Griffin found that evidence sufficiently persuasive to lead him to reverse his earlier views and to accept that the first and second quarter plant additions were known and measurable. *See* Staff Br. at 17; *see also* Griffin Reb., Staff Ex. 15.0 Corr., 6:117 – 7:143. Like AG/CUB, Staff draws a great inference from Mr. Griffin’s subsequent silence regarding the third quarter additions, but in fact he did not address the third quarter plant additions because of the proposed stipulation between ComEd and Staff. Staff Ex. 15.0 Corr. at 6:104-109. The state of the evidence cannot be denied: since ComEd introduced the additional evidence Mr. Griffin invited, and Staff provided no evidence that the third quarter additions were not “known or measurable.”

Moreover, the Commission’s own conclusion about the evidence directly contradicts Staff’s position. The Commission told the Appellate Court that “[Staff’s] evidence and the stipulation did not include that additional quarter of *pro forma* capital additions.” Thus, “[t]he

Commission cannot know what position either the Staff Witnesses or the Commission would take if this issue were to be remanded.” Commission Appellate Court Br. at 37 (attached as Attachment B to ComEd Br.) (citations omitted).²

Finally, Staff’s position is contrary to reality and common sense. No one contests that ComEd actually made those plant additions and that they served customers during the refund period. Houtsma Revised Dir., ComEd Ex. 56.0 (Revised) at 21:407-415. Yet Staff would have the Commission blind itself to that reality. When calculating the “just and reasonable” rate that should have applied during the refund period (and having “matched” accumulated depreciation to the third quarter of 2008), it would make little sense for the Commission to ignore plant additions for that same quarter that were actually made and in service during the refund period on the ground that they were not “reasonably certain” to be made. 83 Ill. Adm. Code § 287.40. Doing so would serve no purpose other than to arbitrarily inflate a refund claim by denying that real investments serving real customers had real costs.

B. In Calculating ComEd’s Third-Quarter Plant Additions, the Commission Should Rely on Actual Costs Rather Than Projections.

In the original proceeding, ComEd placed substantial testimony before the Commission establishing that its third-quarter 2008 plant additions met the criteria for inclusion in rate base. *See* Houtsma/Frank Reb., ComEd Ex. 25.0 Corr. at 10:197-208, 16:333 – 17:353; ComEd Ex. 25.01, Rev. Sched. B-2; ComEd Ex. 25.02, work papers WPB 2.1 & 2.1b; Donnelly Reb., ComEd Ex. 21.0 Corr. at 23:502 – 68:1348; ComEd Ex. 21.2 (identifying approximately 35,000 pages of supporting documentation); Williams Dir., ComEd Ex. 4.0 2nd Corr., at 38:724 –

² Staff asserts that Counsel for ComEd acknowledged that Staff offered testimony concerning the third-quarter plant additions. Staff Br. 18. ComEd was simply seeking clarification concerning Staff’s position. To be sure, Staff offered direct testimony concerning the third-quarter plant additions *before* ComEd submitted additional information. However, as noted earlier, Staff expressed a willingness to consider additional information, which ComEd then submitted. Staff did not offer any testimony or evidence concerning the third-quarter plant additions after ComEd submitted its additional information, and ComEd’s Counsel did not state otherwise.

40:781; McMahan Dir., ComEd Ex. 5.0, at 9:167 – 38:804. Now that actual and incontrovertible data is also available, the Commission can and should consider it.

Both AG/CUB and Staff contend that the Commission can use only data available in September 2008, when it issued its original Order. AG/CUB Br. at 28-29; Staff Br. at 18-19. But there is no reason why that should be so. As the Supreme Court pointed out in *Hartigan*, the Commission should not continue to rely on projections when actual data is available. 148 Ill.2d at 408; *see also West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 79, 81-82 (1935). AG/CUB again cry “retroactive ratemaking,” but again they misunderstand the nature of a refund proceeding, which is not a ratemaking but an exercise in aid of a court’s equitable power to do what is just. There is no reason why a court, in determining the “proper rates that should have been charged” during the refund period (148 Ill.2d at 412-13), must limit itself to projections predating the Commission’s overturned rate order. Similarly, when finding facts to support a court’s exercise of judicial equitable powers, the Commission is also not constrained to ignore reality. Indeed, as ComEd argued in its initial post-hearing brief, using actual figures is particularly apt here, where the Appellate Court invalidated a rate that it found had improperly matched depreciation from one period with gross plant investment from another. ComEd Br. at 20. Given the Appellate Court’s concern with ensuring that rate base reflects figures from matched time periods, it would make sense for the Appellate Court to match actual revenues with actual costs for the same period.

Staff points to a 1993 Commission Order as if it both binds the Commission here and supports Staff’s position. *See* Staff Br. at 18-19. Staff errs on both counts. Commission orders are not binding precedent and the Commission can and should consider the facts of each case. *Mississippi River Fuel Corp. v. Illinois Commerce Comm’n*, 1 Ill. 2d 509, 513 (1953); 220 ILCS

5/10-103, 10-201(e)(iv)(A). Staff regularly argues to depart from past Commission decisions based on current facts, and it cannot argue against that now.

Moreover, the decision Staff cites, *Commonwealth Edison Co.*, Nos. 83-0537, 84-0555, 1993 Ill. PUC LEXIS 166, 143 P.U.R.4th 463 (June 2, 1993), actually supports ComEd's position. There, ComEd argued that both actual and actual weather-normalized data that was previously unavailable should be used in assessing whether assets were used and useful in 1989 as part of a refund calculation. *Id.* at *5. ComEd there relied upon the U.S. Supreme Court's decision in *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 79 (1935), which held that a utility regulator acted arbitrarily and unconstitutionally in evaluating a refund claim by relying solely on a forecast data for a period after actual data for that period had become available. The Commission did not question that holding or attempt to suggest that it was not constitutionally binding. Indeed, the Commission ruled that consideration of "Edison's weather-normalized peak data for 1988 and 1989 is clearly required" in ascertaining whether assets were used and useful in 1989. 1993 Ill. PUC LEXIS 166, *11 (emphasis added). It further observed (in the context of a deferred charge issue) that the "Commission is required by Court mandate to conduct a revenue requirements analysis for 1989 based upon a 1989 test year using *actual* 1989 data" *Id.* at *15 (emphasis added). Here too, in determining whether assets are properly included in rate base as of 2008 for purposes of calculating a refund, the Commission must consider the actual costs of the third-quarter 2008 plant additions, rather than projections made prior to those expenditures.

ComEd acknowledges that the Commission decided not to use actual 1990 data in assessing whether plant was used and useful in 1989. The Commission made that distinction, however, because it concluded that actual 1990 data would not properly be considered in

determining whether plant was used and useful in 1989. That certainly is not the case here in determining the appropriate value to use for third quarter 2008 plant additions, which generally and most appropriately is based upon the actual cost of such plant additions. ComEd is not arguing that the Commission should consider actual data relating to periods beyond those relevant to the period relevant to the question before it. To the contrary, ComEd is arguing for the Commission to consider actual data relevant to the proper determination of the rates that “would have been collected pursuant to a just and reasonable rate” (*Hartigan*, 148 Ill.2d at 412) during the putative refund period. Although the Commission declined to consider actual data relating to later periods, it clearly did not refuse to consider actual data relating to the periods in question. 1993 Ill. PUC LEXIS 166, *11, 15.

In short, whether the decision in Docket Nos. 83-0537 / 84-0555 is binding or not, it supports ComEd’s position here, as does the Supreme Court’s decision in *West Ohio Gas*, which unquestionably is binding.³ The Commission, therefore, must consider the actual costs of the third-quarter 2008 plant additions, rather than rely solely on projections of now past events, in assessing 2008 plant balances.

IV. THE PUTATIVE REFUND PERIOD ENDED WITH THE ISSUANCE AND EFFECTIVENESS OF THE COMMISSION’S SUBSEQUENT RATE ORDER.

According to AG/CUB, Staff, and IIEC, a refund should keep accruing until May 31, 2011, even though the Commission approved new, higher rates on May 24, 2011 in an order effective that same day. AG/CUB Br. at 5, 10-12; Staff Br. at 11-13; IIEC Br. at 7-8. Elevating form over substance, they argue not from logic but claim that the way the period was defined in

³ At the very least, the Commission should make factual findings in the alternative – that is, make a set of findings using figures available to the Commission in 2008 as well as a set of findings using updated actual figures – to allow the Appellate Court to conduct its review on a full record. See 9/16/11 ALJ Order at 3 (“[A] pragmatic approach to deciding this evidentiary issue requires allowing the actual data in... [H]aving a complete record for the final decision makers is provident.”).

Independent Voters, where the issue was not actively litigated, establishes an absolute rule for future cases, apparently without regard to the equities.

This position makes no practical sense. Refunds are grounded in equity; the purpose of a refund is to redress unjust enrichment. *See Independent Voters*, 117 Ill.2d at 98. They do not, and cannot, explain how ComEd could be unjustly enriched by continuing to collect *lower* rates for the week following the Commission's Order finding that ComEd was significantly under-recovering and authorizing ComEd to raise its rates. Under their view, ComEd would be forced to refund a portion of rates that the Commission had already recognized to be too low to be just and reasonable.

As for *Independent Voters*, *see* AG/CUB Br. at 10-12; Staff Br. at 11, even if the Court did intend to announce a rule – as opposed to simply repeating what the parties there apparently did not contest – *Independent Voters* is plainly distinguishable. As discussed earlier, in that case customers were charged for unrecoverable costs, and that continued until new rates were in force. Thus, there was a reason why the refund needed to continue until the new rates were actually effective. No such facts exist here. ComEd's rates included no improper and unrecoverable costs; the fault was a methodological error in matching time periods and, despite that error, ComEd still under-recovered its costs for the entire refund period. While ComEd believes this fact should preclude any refund at all, at the very least it underscores the inequity of requiring ComEd to pay refunds for the week *after* the Commission determined that new, still higher rates were just and reasonable.

V. **THE COMMISSION SHOULD ACCEPT COMED'S PROPOSED METHOD FOR IMPLEMENTING ANY REFUND.**

A. **The Commission Should Approve ComEd's Proposal to Provide a Refund Credit to Current Customers.**

Staff and AG/CUB contend that any refund must be distributed to ComEd's former customers, no matter what the expense or administrative burden, because Section 9-253 of the Public Utilities Act requires it. *See* Staff Br. at 21; AG/CUB Br. at 31-33. However, as ComEd showed in its initial brief, Section 9-253, by its own terms, applies only to cases where the utility has "overcharged" customers, *i.e.*, charged more than its filed rate. Those are not the circumstances here.

Here, if a refund is authorized and proper, the Commission has the flexibility to do what makes practical sense. And it makes no sense to dilute any refund with the significant administrative expenses that attempting to distribute refunds to former customers would entail. The benefits of identifying such former customers are further outweighed by the costs because, given the recency of the refund period, the overwhelming number of customers during that time remain ComEd customers today. *See* ComEd Br. at 22-25.

However, if the Commission believes that former customers should receive a refund, the Commission should approve the procedure recommended by ComEd witness Tenorio. Under ComEd's proposal, (1) notification would be provided by newspaper, in delivery service bills, and on ComEd's website; (2) funds would be held for former customers for a period of 120 days after the Commission Order becomes final; (3) ComEd would recover its administrative costs (just as under Section 9-253) from this amount; (4) ComEd will develop a claim form for former customers; and (5) upon verification of a claim, ComEd will issue a one-time refund check to the former customer. Tenorio Reb., ComEd Ex. 60.0, 4:72-87. This procedure is reasonable and cost effective and should be approved, if former customers are to receive refunds.

B. The Commission Should Reject Staff’s Proposal to Set the Refund at No Less Than 1.0 Cent per kWh.

Staff and IIEC also argue for Staff witness Harden’s proposal, as revised and clarified in data request responses admitted as IIEC Cross Ex. 1 on Remand, setting the refund at no less than 1.0 cent per kilowatt-hour (“kWh”). Staff Br. at 22; IIEC Br. at 8-9. That proposal, even as revised and clarified, is unworkable. If each customer class receives a minimum refund of 1.0 cent per kWh, ComEd would be forced to pay *twice* the total refund that is owed, even according to Staff or AG/CUB, as shown on Table 1, below.

TABLE 1: Refund Calculation with \$0.01/kWh Minimum

(a) Customer Delivery Class	(b) Annual kWh*	(c) Monthly kWh (Col. (b)/12)	(d) Staff’s Proposed Refund Credit (cent per kWh)	(e) Monthly Credit (Col. (c) x (d)) (dollars per class)
Single Family w/o electric space heat	21,387,196,569	1,782,266,381	\$.01	\$17,822,664
Multi Family w/o electric space heat	4,318,599,079	359,883,257	.01	3,598,833
Single Family w/ electric space heat	846,860,628	70,571,719	.01	705,717
Multi Family w/ electric space heat	1,734,301,528	144,525,137	.01	1,445,251
Watt Hour	539,524,870	44,960,405	.01	449,604
Small Load	11,486,376,300	957,198,025	.01	9,571,980
Medium Load	10,867,369,174	905,614,098	.01	9,056,141
Large Load	10,249,079,093	854,089,924	.01	8,540,899
Very Large Load	19,466,948,637	1,622,245,720	.01	16,222,457
Extra Large Load	4,200,693,052	350,057,754	.01	3,500,578
Railroad	512,229,931	42,685,828	.01	426,858
Month Total Refund Credit				\$71,340,982

* Source – Staff Group Cross 1(On Remand), SAS 1.02 Supp. Corr., Attachment 2)

Neither Staff nor IIEC offers a solution to this problem. A minimum refund of 1.0 cent per kWh for each customer class simply cannot be mathematically reconciled with the total refund amount that they propose.

Moreover, paying refunds out in as little as a month cannot reflect seasonal loads and will produce windfalls for some customers (such as residential customers without electric space heat) while harming others (such as residential customers with electric space heat). ComEd, by contrast, proposes to pay any refund over a twelve-month period, assuring that any refund received by customers, such as those with residential electric space heat, will match their respective use. Likewise, AG/CUB's proposal for an eight-month period, *see* AG Br. at 32-33, is an acceptable alternative insofar as it allows the refund credit to track seasonal loads.⁴ Moreover, there is no reason to sacrifice fairness in favor of extreme speed. The parties have all agreed on a fair interest rate, which fully compensates customers for any time lost by having a fairer refund period.

VI. AG/CUB'S CLAIM CONCERNING HYPOTHETICAL REFUNDS RELATING TO A DIFFERENT RATE APPROVED IN A DIFFERENT DOCKET IS PREMATURE, OUTSIDE THE SCOPE OF THIS DOCKET, AND WITHOUT ANY MERIT.

One argument remains. AG/CUB opens their brief (at 2-4) with an extended discussion of two riders – ComEd's current Rider AMP and AMP-CA – not at issue in this Docket. Those riders were approved in Docket No. 09-0263, a different Commission case with a different record, which case is the subject of an appeal different from that which resulted in this remand. Those tariffs were also filed on a far different day and in compliance with a different order than the tariffs at issue were. The riders approved in Docket No. 09-0263 also accomplish different

⁴ ComEd expresses no opinion as to whether the AG is proposing that any credits begin to appear on customer's bills as proposed by ComEd, or if the AG is suggesting that these credits should be applied for the eight monthly billing periods that match the putative refund period (that is, October 2012 through May 2013).

purposes and authorize different actions from the rider that was at issue in this Docket. Indeed, the AG's previous attempt to tie them summarily, by motion in the Appellate Court, to the rider that was at issue in this case was rejected by the Appellate Court. Not surprisingly, no witness testified about those riders in this Docket. Lest there be any ambiguity, the Commission in its own filing with the Appellate Court⁵ emphasized that the riders were different and opposed the AG's efforts "to preempt full briefing on the merits [in Appeal No. 02-10-0244 from ICC Docket No. 09-0263] including discussion of any record evidence which may differentiate [that] case from [Appeal No. 2-08-0959]", the appeal resulting in this remand. ICC Resp., ¶10.

The riders approved in Docket No. 09-0263 are, in short, not part of this proceeding. Indeed, they remain on file and effective today, even as this remand is being concluded. Their discussion in the AG/CUB brief is, rather, an apparent effort to poison the well for a hoped-for future remand. That discussion should be ignored as unrelated to this proceeding and rejected as an attempt to create improper prejudice. However, if it is not ignored, it is also devoid of merit. Should the Appellate Court reverse the Commission's decision in Docket No. 09-0263, it may or may not reach the question of whether a refund is warranted. Unless and until that occurs, Riders AMP and AMP-CA remain valid as does the Commission's order approving their filing and there is no basis, in any statute or decision, supporting any suggestion that retroactive refunds could relate back to the date of an appellate ruling on a different Commission order concerning a different tariff.

⁵ Attached hereto as Appendix A are: (1) The AG's Combined Motion to Terminate Stay and for Summary Reversal and the Memorandum in Support of the Motion for Summary Reversal; (2) the Commission's Response to Motion to Terminate Stay and for Summary Reversal and the Memorandum in Support of Commission's Response to Motion to Terminate Stay and for Summary Reversal ("ICC Resp."); (3) ComEd's Opposition to Petitioner's Combined Motion to Terminate Stay and for Summary Reversal or for Other Relief; and (4) the February 28, 2011 Order of the Appellate Court denying the AG's Combined Motion.

This is not the first time the AG has attempted this sleight of hand: it tried and failed to get the Second District to reverse summarily the Commission's Order in ICC Docket No. 09-0263 in a December 13, 2010 motion based on the same theory it advances here. The Commission and ComEd both opposed the AG's motion, and the Court denied it. Curiously, however, although AG/CUB's brief mentions the Appellate Court granting and then lifting its stay, nowhere does the brief disclose let alone candidly address the AG's earlier Motion seeking to tie the two cases together and the Appellate Court's ruling denying that motion. *See* AG/CUB Br. at 2.

Lacking any argument that the tariffs; their purposes, functions, or effects; the records on which they were considered; or the Commission's decisions to approve them are identical, AG/CUB also raise the issue of collateral estoppel. However, even they acknowledge that the question of collateral estoppel is not before the Commission now, as it is being considered by the Second District in the pending appeal. AG/CUB Br. at 4.

In any event, AG's underlying estoppel claim is without merit. For collateral estoppel to apply, "it must appear clearly and certainly that the identical and precise issue was decided in the previous action." *Hexacomb Corp. v. Corrugated Systems, Inc.*, 287 Ill. App.3d 623, 631 (1st Dist. 1997). Here, however, the factual and legal issues are different. In its October 14, 2009 Order in Docket. No. 09-0263, the Commission emphasized that Riders AMP and AMP-CA are substantially different from Rider SMP (10/14/09 ICC Order at 15):

[AG/AARP] argue, essentially, that the pilot program that is the subject of this docket merely tests technology. This is not accurate. What it tests is the human element, when that human element is given certain technology that aids those humans in making energy consumption-related decisions... The test here, albeit, technology-assisted, tests what influences a human being has when he or she changes his/her energy consumption pattern. This is not the same as a test of the effectiveness of a particular technological invention.

Granted, the behavioral study subject to Riders AMP/AMP-CA would be impossible without first installing 131,000 new advanced meters in demographically diverse areas of the city and suburbs, but the focus of the study, as the Commission found, is on the customers' reactions to new technologies and alternative potential rate designs, as well as customer interactions with the functioning of the AMI meter technology, and *not* merely on the installation of new meters.

Because the nature of the experimental pilot at issue in Docket No. 09-0263 was so different from the nature of the "Phase 0" process approved in Docket No. 07-0563, so were the considerations that guided the Commission in approving Riders AMP/AMP-CA. Even assuming that ComEd could control the costs of installing the first batch of AMI meters, it certainly cannot control customer behavior, *i.e.*, how customers are likely to respond to various rate designs and to receiving more information about their energy use, and how easy or difficult the education process proves to be, for example. Thus, ComEd cannot control its ultimate cost of providing the AMI Pilot Program to those customers. It is also undisputed that "the Customer Applications portion of the program will produce no operational savings to ComEd," and that "the financial benefits will all flow directly to customers." (10/14/09 ICC Order in No. 09-0263 at 16.)

Finally, even if estoppel did apply, ComEd is aware of no case – and AG/CUB cite none – holding that refunds can relate back to the date of an appellate decision in another case based on a claim that such earlier cases established a binding *principle* of law or fact. Indeed, it is clear that is not the law. Refunds, if any, commence as of the date that the Commission's order is found invalid, no earlier. Because Appeal Nos. 2-08-0959 and 2-10-0244 do not involve the same tariffs, *i.e.*, "the same issue," even *if* the Second District reverses the order approving Riders AMP and AMP-CA, any refunds associated with revenues collected thereunder should be

calculated from the date the Second District issues its ruling in Appeal No. 2-10-0244, and *not* from the September 30, 2010 Order in Appeal No. 2-08-0959, as AG/CUB erroneously contend.

In sum, the discussion of tariffs approved in Docket No. 09-0263 is not relevant to this proceeding and need not, and should not be, addressed here in any way other than to note rejection of AG/CUB improper efforts to inject them into this proceeding. However, if the Commission discusses them further, they are meritless both under the law and on the facts.

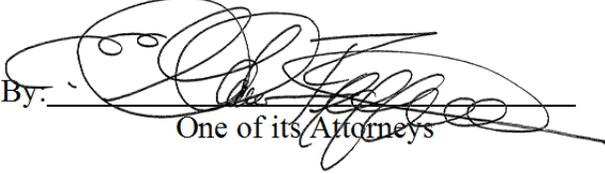
CONCLUSION

For the foregoing reasons, the Commission should conclude that it lacks jurisdiction to order a refund, or alternatively, that a refund would not be equitable in the circumstances of this case. Alternatively, if the Commission nonetheless decides to order a refund, it should account for ComEd's actual third-quarter 2008 plant additions; limit the refund period to September 30, 2010 through May 23, 2011; and adopt ComEd's proposals for implementing the refund as set forth in ComEd Ex. 58.1, subject to technical corrections made in ComEd Ex. 60.2, or in the alternative, should approve AG/CUB's proposal to provide a refund over eight months. The maximum amount of any such refund is \$29,583,000. *See* ComEd Ex. 59.2.

Dated: November 2, 2011

Respectfully submitted,

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