

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

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

**APPENDIX A TO**  
**COMMONWEALTH EDISON COMPANY'S**  
**POST-HEARING REPLY BRIEF**

**AG's Combined Motion to Terminate  
Stay and for Summary Reversal and  
the Memorandum in Support of the  
Motion for Summary Reversal**

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS, ex	)	On Direct Review of
rel LISA MADIGAN, ATTORNEY GENERAL	)	Orders of the Illinois
OF THE STATE OF ILLINOIS,	)	Commerce Commission
	)	
Petitioner,	)	
	)	
v.	)	Docket Nos. 09-0263
	)	
ILLINOIS COMMERCE COMMISSION,	)	
COMMONWEALTH EDISON COMPANY, et	)	
al.	)	
	)	
Respondents.	)	

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**COMBINED MOTION TO TERMINATE STAY and  
FOR SUMMARY REVERSAL**

1. This case involves an appeal of an order of the Illinois Commerce Commission (“Commission”) that was entered on October 14, 2009. Record in Support of the State’s Combined Motion to Terminate Stay and for Summary Reversal (“Supporting Record” or “SR”) at 1-62. The Commission denied petitions for rehearing on December 3, 2009. SR 63.
2. This appeal was filed on January 7, 2010. It has been stayed pursuant to this Court’s order since May 7, 2010. SR 72.
3. The case was stayed pending the resolution of an earlier appeal involving the same parties and the same issue. SR 64-69, 72.
4. This Court issued a decision in the earlier appeal on September 30, 2010. *See Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 2-08-0959 (and

consolidated); \_\_ N.E.2d \_\_; 2010 WL 3909376 (2d Dist. September 30, 2010) (*ComEd*) (SR 73-93).

5. This Court denied Commonwealth Edison’s petition for rehearing in *ComEd* on November 16, 2010. SR 102-03.

6. In *ComEd*, this Court held that Rider SMP, which authorized Commonwealth Edison to pass through to customers the costs of a system modernization pilot program known as “Advanced Metering Infrastructure” or AMI, was unlawful because it was a “classic case of improper single issue ratemaking.” SR 86.

7. This appeal involves a subsequent Commission order authorizing Commonwealth Edison to collect, pursuant to Rider SMP, the specific costs of distributing 141,000 advanced meters (Rider AMP), and tracking customer responses to the meters (Rider AMP-CA). SR 6-8.

8. Because Rider SMP is unlawful pursuant to this Court’s decision in *ComEd*, the Commission’s order authorizing the collection of certain specific expenses under Rider SMP necessarily was unlawful.

9. A judgment of the appellate court is final when entered. *PSL Realty Co. v. Granite Inv. Co.*, 86 Ill. 2d 291, 304 (1981).

10. Where, as here, a Commission-ordered rate is reversed on appeal, the Utility must refund the unlawful portion of the rate order only from the date of the reviewing court’s judgment, but is not required to refund any amounts collected before the reviewing court entered judgment. *People ex rel. Hartigan v. Ill.*

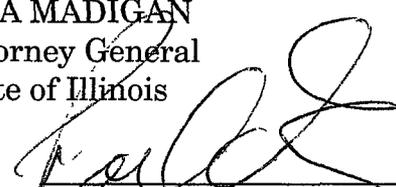
*Commerce Comm'n*, 148 Ill. 2d 348, 395-96 (1992) (“To allow the Commission to now order ‘reparations’ from rates that it originally set would violate the well-established rule against retroactive ratemaking.”).

11. Commonwealth Edison has asserted in parallel litigation that this Court’s decision in *ComEd* does not render Riders AMP and AMP-CA unlawful. SR 99.

12. Consequently, Commonwealth Edison asserts a legal right to continue to collect from ratepayers pursuant to Riders AMP and AMP-CA unless and until this Court enters a judgment reversing the Commission in this appeal. If Commonwealth Edison is correct, then under *Hartigan, supra*, the unlawful amounts it collects while awaiting a judgment in this appeal can never be recouped by ratepayers.

13. For this reason, the State seeks to proceed to final adjudication of this appeal as quickly as possible by (a) moving to terminate the order holding this appeal in abeyance, and (b) moving pursuant to Supreme Court Rules 361(a) and 366(a)(5) for an order summarily reversing the decision and order of the Illinois Commerce Commission.

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IN THE  
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rel LISA MADIGAN, ATTORNEY GENERAL	)	Orders of the Illinois
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**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY REVERSAL**

The Attorney General, on behalf of the People of the State of Illinois (“State”), submits this memorandum in support of the motion to for summary reversal.

**Introduction**

This appeal was filed on January 7, 2010. On May 7, 2010, this Court entered an order “stay[ing] this appeal pending a decision in a related appeal.” Record in Support of the State’s Combined Motion to Terminate Stay and for Summary Reversal (“Supporting Record” or “SR”) at 72. The related appeal was *Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 2-08-0959 (and consolidated); \_\_ N.E.2d \_\_; 2010 WL 3909376 (2d Dist. September 30, 2010) (*ComEd*) (SR 73-93), which was decided on September 30, 2010. The Court denied Commonwealth

Edison's (ComEd) motion for rehearing of the *ComEd* decision on November 16, 2010. SR 102-03

In *ComEd*, this Court reversed the Commission's decision to permit ComEd to recover the costs of its system modernization project through a rider (Rider SMP). SR 86-89. Specifically, the Court invalidated Rider SMP as "a classic example of improper single issue ratemaking." SR 86. This case arises from a subsequent Commission order specifying the charges ComEd could collect under Rider SMP. SR 1-62. Because Rider SMP is unlawful under *ComEd*, the Commission's order authorizing the specific collection of charges pursuant to the rider also is unlawful and should be summarily reversed.

Although Rider SMP became unlawful on the date of this Court's decision, see *Independent Voters of Ill. v. Ill. Commerce Comm'n*, 117 Ill. 2d 90, 102-03 (1987), ComEd has asserted in pending proceedings before the Commission that it may continue to collect fees from ratepayers pursuant to Rider SMP until a judgment is entered in *this* appeal. SR 99. Because of the prohibition on "retroactive ratemaking," the Commission cannot refund to ratepayers any charges they paid before this Court's judgment. *People ex rel Hartigan v. Ill. Commerce Comm'n*, 148 Ill. 2d 348, 394 (1992). Consequently, in order to prevent ComEd from collecting unlawful charges from ratepayers pursuant to a rider that this Court invalidated, it is imperative that the Court expeditiously enter a judgment reversing the Commission's decision authorizing ComEd to collect money pursuant to the-now-invalid Rider

SMP, and make clear that refunds are due ratepayers from the date the Court entered judgment in *ComEd* – September 30, 2010.

### **Background**

The relevant factual background to this case was succinctly set forth by this Court in *ComEd*. As the Court explained, this case began when

ComEd proposed Rider SMP, a ‘system modernization project’ charge to customers, to immediately recoup the costs of modernizing its delivery system toward a ‘smart grid.’ According to ComEd, the rider was new and innovative and created a mechanism for funding discretionary projects that are not necessary for the distribution service. One of the building blocks of the technology is advanced metering infrastructure (AMI), which consists of a communication system, advanced meters, and computer software and hardware to process the information collected from the new meters. The first step toward an AMI system is a pilot program called “Phase 0,” which involves installing 200,000 advanced meters. AMI would allow ComEd to achieve cost savings and improved efficiency by phasing out 675 full-time meter reader and supervisor positions, eliminating meter reading equipment, improving bill collections, reducing billing

errors, and disconnecting nonpaying customers more efficiently. ComEd argued that Rider SMP would give customers the benefits of the technology earlier than might otherwise occur, because ComEd could not afford the project without the rider. . . .

The Commission approved Rider SMP for the limited purpose of implementing Phase 0, commending ComEd for its initiative in pursuing a smart grid but criticizing ComEd for taking a project-by-project approach without a clear goal. The Commission noted that “[t]he estimates of cost in the record have varied greatly and the estimates of benefits have been sporadic at best.” The Commission further found that “[t]he lack of a consistent, thorough analytic approach to estimating [smart grid] benefits simply highlights another shortcoming: ComEd is asking for special recovery for these projects that – whatever their level, all parties agree – could have long-term economic benefits, but as proposed, ratepayers do not share the economic benefits.” The Commission ruled that, after the completion of Phase 0, ComEd may file Rider SMP again to seek recovery for additional smart grid investments.

*Commonwealth Edison Co. v. Ill. Commerce Comm'n*, \_\_ N.E.2d \_\_; 2010 WL 3909376, \*15-16 (2d Dist. September 30, 2010) (SR 86).

The Commission issued the order described above authorizing rider recovery the AMI Pilot Program on September 10, 2008. *Id.* at \*5, 16. On June 1, 2009, ComEd filed tariff sheets, identifying the specific costs of the AMI Pilot Program, and seeking “recovery of the cost of the pilot under Rider AMP as it is currently in force,” SR 4; that is, pursuant to the Commission’s earlier order that was subsequently reversed by this Court in *ComEd*.<sup>1</sup> The Commission, in turn, specifically acknowledged that ComEd’s petition for rider recovery of the AMI Pilot Program was pursuant to its direction in the prior rate case. SR 6-7.

ComEd’s proposed AMI Pilot Program consisted of two components: “the AMI Technology Pilot; and the Customer Application Plan.” SR 7. The AMI Technology Pilot sought to recover through the Commission’s pre-authorized rider the costs of installing 141,000 AMI meters and related infrastructure. SR 4. The Customer Application Plan sought rider recovery for programs designed to examine how customer behavior could change as a result of “smartgrid” technologies. SR 12. ComEd estimated the cost of its AMI Pilot program as \$70,687,894. SR 14. It sought to collect through Rider AMP approximately \$61,796,280 comprised of \$49,147,214 in capital investment costs and \$12,649,066 in operating expenses. SR 14.

The State challenged ComEd’s proposed rider on the grounds, *inter alia*, that rider recovery in this circumstance was unlawful single-issue ratemaking, SR 26, and

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<sup>1</sup> Rider SMP “in this docket has been re-named as Rider AMP.” SR 23.

because ComEd's proposed rider went beyond what the Commission authorized ComEd to include in the SMP Rider, SR 23. The Commission rejected the first argument, noting that it had "considered and rejected the very same argument . . . a year ago in [*ComEd*]." SR 27. Having reaffirmed the validity of its prior order, the Commission concluded that "what ComEd proposes does not exceed what was ordered in ComEd's last rate case, docket 07-0566." SR 25.

On October 3, 2009, the Commission approved the AMI Pilot and the Customer Application Plan, and allowed the costs of these programs to be collected through Rider AMP (formerly Rider SMP). SR 61. The State sought rehearing, raising both the Commission's legal authority to approve rider recovery in this circumstance and whether the Customer Application Plan exceeded the scope of Rider AMP. C.2763-91. The Commission denied the petition for rehearing on December 2, 2009, SR 63, and the State timely appealed on January 7, 2010, SR 65.

When the State filed this appeal, its appeal of the Commission's prior order – the order authorizing Rider SMP for the AMI pilot – was pending on appeal before this Court. SR 64-71. In the prior appeal, the State challenged the Commission's authority to allow ComEd to recover system modernization costs, including the AMI pilot program through a rider. SR 86; *ComEd*, \_\_ N.E.2d \_\_; 2010 WL 3909376, at \*15-16. Because this was an appeal of an order implementing an earlier Commission order that was already pending on appeal, the State requested the Court hold this appeal in abeyance pending the outcome of the earlier-filed appeal. SR 66-67. No

## Argument

This Court's decision in *ComEd* controls the outcome of this case. Under *ComEd*, Rider SMP was unlawful because the costs of Advanced Metering Infrastructure (AMI) cannot be recovered through a rider. Therefore, the Commission necessarily erred in authorizing ComEd to collect in excess of \$60 million for the AMI Pilot program through Riders AMP and AMP-CA, which were merely different names for Rider SMP. SR 23.

Even if there was a question as to whether Rider SMP, declared unlawful by the Court in *ComEd*, was different from the rider at issue in this appeal, Commonwealth Edison is estopped from making such a claim. The doctrine of judicial estoppel "provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding." *Bidani v. Lewis*, 285 Ill. App. 3d 545, 549 (1st Dist. 1996). It applies when five elements are met. "[T]he party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *People v. Caballero*, 206 Ill. 2d 65, 80 (2002).

Commonwealth Edison specifically argued to the Commission that the costs it sought to recover through Rider AMP were only those authorized by the Commission in its earlier decision. SR 111-112. The Commission accepted this argument, thereby providing ComEd the benefit of a rider valued in excess of \$60 million. SR 25-26.

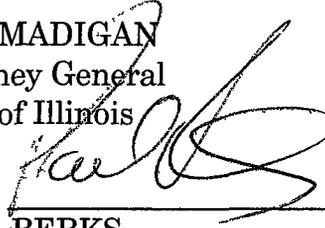
Consequently, the doctrine of judicial estoppel precludes Commonwealth Edison from arguing otherwise to this tribunal.

In short, this Court in *ComEd* already determined that the rider at issue in this appeal is unlawful. The Court's earlier decision applies with full force in this case, and the rider at issue was declared unlawful as of the date of this Court's judgment – September 30, 2010. In order to prevent ComEd from collecting charges from ratepayers pursuant to an unlawful rider, the Court should summarily reverse the Commission's decision authorizing ComEd to collect the costs of its AMI Pilot program through "Rider AMP or "Rider AMP-CA," specifying that Riders AMP and AMP-CA were reversed by the Court's earlier order on September 30, 2010.

### CONCLUSION

For the foregoing reasons, the Commission's decision should be reversed and the matter remanded to the Commission for further proceedings.

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**Illinois Commerce 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**

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**IN THE ILLINOIS APPELLATE COURT  
SECOND DISTRICT**

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<b>PEOPLE OF THE STATE OF ILLINOIS</b> <i>ex rel.</i>	)	
<b>LISA MADIGAN, ATTORNEY GENERAL OF</b>	)	On Direct Appeal
<b>STATE OF ILLINOIS,</b>	)	of Orders of the
	)	Illinois Commerce
<i>Petitioner,</i>	)	Commission
v.	)	
	)	
<b>ILLINOIS COMMERCE COMMISSION,</b>	)	Ill.C.C. Docket No.
<b>ET AL.</b>	)	09-0263
	)	
<i>Respondents</i>	)	

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**RESPONSE TO MOTION  
TO TERMINATE STAY and FOR SUMMARY REVERSAL**

Now comes the Respondent, Illinois Commerce Commission, by its attorneys, and responds to the Combined Motion to Terminate Stay and For Summary Reversal ("Combined Motion") and Record in Support of the State's Combined Motion to Terminate Stay and For Summary Reversal of the People of the State of Illinois ("State") to terminate the stay of the above case and for summary reversal of the decision of the Illinois Commerce Commission under review. The State's Combined Motion is premature under the full facts and, if allowed, the result would effectively conflict with the Supreme Court Rules. In support of this Motion, a Memorandum of Law and the

affidavits of James E. Weging and John P. Kelliher are attached, and the following is stated:

1. On December 13, 2010, the State filed its Combined Motion, copies of which were received in the Commission's Office of General Counsel on December 15<sup>th</sup>. See affidavit of James E. Weging attached.
2. On December 16, 2010, the State filed a Corrected Memorandum, which was received by the Commission on December 17, 2010.
3. The Combined Motion seeks summary reversal and remandment of this case back to the Commission based on the State's reading of the Appellate Court's decision in *Commonwealth Edison Co., et al. v. Illinois Commerce Commission, et al.*, Appeal Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008, 1-08-3030, 1-08-3054, and 1-08-3313 (cons.), Opinion filed on September 30, 2010 ("Rate Order Appeal").
4. Previous to the filing of the Combined Motion ComEd had on December 9, 2010, filed with the Illinois Supreme Court a Motion for Extension of Time to File a Petition for Leave to Appeal.
5. ComEd's Motion was granted by the Court on December 15, 2010 and its Petition for Leave to Appeal of Commonwealth Edison Co. is due on or before January 25, 2011 *per* Order of the Illinois

Supreme Court (Justice Thomas), December 15, 2011, Sup. Ct. No. 111548. See affidavit of James E. Weging attached.

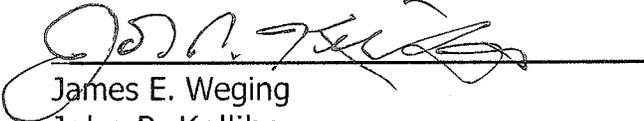
6. On December 10, 2010, the Commission filed a Motion for Partial Stay of the Effect of the Opinion in the ComEd appeals stating its intent to seek leave of the Illinois Supreme Court concerning the limitation of the Commission's authority to establish Rider SMP.
7. On December 14, 2010, the State filed in opposition to the Commission's Motion for Partial Stay of the Rate Order Appeal pending disposition of the Commission's planned Petition for Leave to Appeal. See affidavit of James E. Weging attached.
8. Thus, both Commonwealth Edison Co. and the Illinois Commerce Commission had announced their intent to file Petitions for Leave to Appeal the September 30<sup>th</sup> Opinion in the ComEd Rate Order appeals prior to the filing of the State's Motion to Terminate and for Summary Reversal.
9. On December 21, 2010, the Commission mailed its Petition for Leave to Appeal the September 30<sup>th</sup> decision in *Commonwealth Edison Co., et al. v. Illinois Commerce Commission, et al.*, Appeal Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008, 1-08-3030, 1-08-3054, and 1-08-3313 (cons.). See affidavit of John P. Kelliher attached.

10. As a result of the stay in this case the briefing schedule has been held in abeyance and no argument has been heard by the Appellate Court on the merits of the case. The State's Combined Motion effectively seeks to preempt full briefing on the merits including discussion of any record evidence which may differentiate this case from the Rate Order Appeal.
11. Pursuant to Supreme Court Rule 368(b), the mandate in *Commonwealth Edison Co., et al. v. Illinois Commerce Commission, et al.*, Appeal Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008, 1-08-3030, 1-08-3054, and 1-08-3313 (cons.) is automatically stayed because of the Commission's Petition for Leave to Appeal. Thus, the Court's judgment has not yet been transmitted to the Commission for action consistent with the Court's opinion.
12. Granting the State's Motion for summary reversal in this cause is effectively identical to the issuance of the mandate in the Rate Order Appeal, at least for Rider SMP/AMI. The State's Motion should be denied as inconsistent the Supreme Court Rule 368. The State's argument concerning effective date of Opinions in both its Motion and its Memorandum is beside the point.
13. Because nothing is final until either a denial of the Petitions for Leave to Appeal by the Illinois Supreme Court or issuance of a

Supreme Court decision on the merits, there is no reason at the present time to lift the stay of proceedings in this cause.

**WHEREFORE** the Respondent, Illinois Commerce Commission, asks that this Honorable Appellate Court deny the Motion of the State of the State of Illinois to terminate the stay of the above case and for summary reversal of the decision of the Illinois Commerce Commission under review.

Respectfully submitted,



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PEOPLE OF THE STATE OF ILLINOIS <i>ex rel.</i>	)	
LISA MADIGAN, ATTORNEY GENERAL OF	)	On Direct Appeal
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ILLINOIS COMMERCE COMMISSION,	)	Ill.C.C. Docket No.
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	)	
<i>Respondents</i>	)	

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**MEMORANDUM IN SUPPORT OF COMMISSION'S  
RESPONSE TO MOTION  
TO TERMINATE STAY and FOR SUMMARY REVERSAL**

Because the State has exerted as the only ground for summary reversal of the present appeal the effectiveness of the September 30<sup>th</sup> Opinion in *Commonwealth Edison Co., et al. v. Illinois Commerce Commission, et al.*, Appeal Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008, 1-08-3030, 1-08-3054, and 1-08-3313 (cons.), and because the above appeal has not even briefed on the merits, this Memorandum will demonstrate that the State's Motion is premature.

## **I. Finality and Effectiveness of the September 30th Opinion**

The Illinois Supreme Court in 1986 issued a decision which provides that an Appellate Court opinion is effective upon issuance and that the issuance of the mandate is irrelevant as to the finality of the Appellate Court's opinion. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 304 (1981). Only if rehearing is granted or if the opinion is later modified is the finality of the Opinion altered. *PSL Realty Co.*, *supra*, 86 Ill. 2d at 305 and *Long v. City of New Boston*, 91 Ill. 2d 456, 462 (1982). *Independent Voters of Illinois v. Illinois Commerce Commission*, 117 Ill. 2d 90, 102 (1987), the case which established the availability of prospective refunds in cases where Commission rate orders have been reversed, relied in part on *PSL Realty Co.* See also *People ex rel. Hartigan v. Illinois Commerce Commission*, 148 Ill. 2d 348, 397-398 (1992).

However, in a more recent case, *People v. Brown*, 204 Ill. 2d 422, 425 (2002), the Supreme Court held that the filing of the petition for rehearing prevented its issued decision from being considered final. This should be contrasted with *PSL Realty Co.*, *supra*, where the pendency of the petitions for rehearing, which had been denied, was held not to affect the finality of the earlier judgment. *PSL Realty Co.* 86 Ill. 2d at 305.

Since the issuance of the *Brown* decision, the U.S. Court of Appeals has noted that "Illinois appears to have conflicting decisions on the question of whether a case is still 'pending' when a petition for rehearing is filed" *i.e.* when is the decision final and effective. *Terry v. Gaetz*, 339 F. Appx. 646, 2009 U.S. App, Lexis 17154 (7th Cir., 2009). In a recent appellate decision, *Brown v. Jaimovich*, 365 Ill. App. 3d 329 (1st Dist., 2006), *app. den. sub nom. Brown v. Akhter*, 221 Ill. 2d 632 (2006), the Court addressed the certified question of when a decision in another case, *Robinson v. Johnson* ("*Robinson decision*"), 346 Ill. App. 3d 895 (1<sup>st</sup> Dist., 2003), became effective upon the Circuit Court in the case being reviewed: upon the date of the initial issuance of the *Robinson decision* or upon the date the opinion had been supplemented upon denial of rehearing (365 Ill. App. 3d at 330). The Appellate Court recognized the unsettled nature of the "finality" question (365 Ill. App. 3d at 335-6), ultimately ruling that the *Robinson decision* applied prospectively, *i.e.* only to new cases filed after the date of the initial issuance of the *Robinson decision* (365 Ill. App. 3d at 340).

Thus, the finality of the September 30<sup>th</sup> Opinion in relation to Rider SMP/AMI is far from settled and the State's bare reference to *PSL Realty Co.* is not compelling authority which would justify disposing of this appeal without briefing or argument. In fact, the

finality of the September 30<sup>th</sup> Opinion will depend on (1) what issues are being examined and (2) when the finality of the Opinion is being examined.

In *PSL Realty, supra*, the Supreme Court held that the Appellate Court's Opinion is effective upon issuance because the later issued modified opinion did not alter the issue being examined (the dissolution of the receivership) (86 Ill. 2d at 310-312). However, the Commission in its Petition for Leave to Appeal is challenging the Appellate Court's September 30<sup>th</sup> Opinion, reversing the approval of Rider SMP. Likewise, Commonwealth Edison Company has announced its intention to challenge the Court's ruling on Rider SMP. Clearly, the September 30<sup>th</sup> Opinion will become the final opinion on Rider SMP/AMI, only if the Illinois Supreme Court denies all Petitions for Leave to Appeal or if a later Supreme Court decision reaches a decision identical to the September 30<sup>th</sup> Opinion.

Also, the above-cited opinions on the finality and effectiveness of judgments addressed prior final Court decisions upon which, by the time of those opinions, there could be no further alteration. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 296-298 (1981); *Independent Voters of Illinois v. Illinois Commerce Commission*, 117 Ill. 2d 90, 93 (1987); and *People ex rel. Hartigan v. Illinois Commerce Commission*, 148 Ill. 2d 348, 397-398 (1992).

Here, in contrast, the finality of the September 30<sup>th</sup> Opinion can only be determined in the future and cannot be determined at the present time, since the September 30<sup>th</sup> Opinion on the Rider issue is subject to potential Supreme Court review and possible alteration. As the Illinois Supreme Court clarified in *People ex rel. Hartigan, supra*,

“We take this opportunity to clarify this court's earlier statement concerning the circuit court's lack of authority "to order a rollback, or return, to prior rates." The Commission is responsible for setting rates public utilities may charge its customers. (Ill. Rev. Stat. 1985, ch. 111 2/3, pars. 9-102 through 9-202.) Under the statutory scheme, when Commission-approved rates are reversed by a reviewing court, the invalid rates remain in effect throughout the appellate process unless those rates are suspended or stayed by a court of review. (Ill. Rev. Stat. 1985, ch. 111 2/3, par. 10-204 (formerly Ill. Rev. Stat. 1983, ch. 111 2/3, par. 75).)”

148 Ill. 2d at 400 (emphasis supplied)

The Commission's Petition for Leave to Appeal is a part of the appellate process. The State's attempt to derail that process by proposing a summary reversal and remand in the present case should be rejected.

## **II. Refunds and Riders**

The State's claim that a refund related to Rider SMP/AMI is due because of the September 30<sup>th</sup> Opinion is likewise not as clear a

matter as the State makes out. In prior decisions regarding refunds, the refund was related to base rate items such as the removal of certain operating expenses from base rates. *Independent Voters of Illinois v. Illinois Commerce Commission*, 117 Ill. 2d 90, 93 (1987) ("IVI"). The determination of such a judicial refund presents a simple matter of changing the operating expenses or the rate base for the test year and then lowering the utility's base rates to adjust for the lessened recovery. Once that is determined, the amount of refund from the date of the Court's reversal until the Commission's alteration of the rates in compliance with the mandate can be calculated.

By contrast, the refund in *People ex rel. Hartigan v. Illinois Commerce Commission*, 148 Ill. 2d 348, 402-403 (1992) related to the representations of Commonwealth Edison Company in opposition to the imposition of a judicial stay and does not concern IVI type refund obligations arising from an appellate court judicial reversal of a rate order.

In the Rate Order Appeal, the Appellate Court reversed the Commission for, among other things, the failure to include additional depreciation expense which would have lowered ComEd's rate base. *Commonwealth Edison Co., et al. v. Illinois Commerce Commission, et al.*, Appeal Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008, 1-

08-3030, 1-08-3054, and 1-08-3313 (cons.), pp. 24-34. Unless the Court's Opinion is overturned on further appeal, the Commission on remand will need to lower ComEd's rate base to reflect additional depreciation and, thereafter, lower the base rates ComEd charges. After that, the amount of refund can be calculated.

In contrast to a base rate, a rider by operation is outside and separate from base rate items. There are no reported decisions of which the Commission is aware which provide for a mechanism to determine the measure of any refund related to an improperly granted automatic adjustment rider. Thus it is unclear how or even if a refund is appropriate.

The Commission is generally charged with establishing the just and reasonable rates. 220 ILCS 5/9-201(c), *City of Chicago v. Illinois Commerce Commission*, 281 Ill. App. 3d 617, 622 (1<sup>st</sup> Dist., 1996) and *City of Champaign v. Illinois Commerce Commission*, 209 Ill. App. 3d 1070, 1075 (4<sup>th</sup> Dist., 1992). The State's Combined Motion, Pars. 11 and 12, admits that the parties are informally in dispute about refunds due to the reversal of Rider SMP/AMI, and the Commission cannot at this very preliminary stage state what it will decide on a matter which may be disputed when and if an unaltered September 30<sup>th</sup> Opinion is remanded to the Commission. It may be that, upon remand, the parties will reach an agreement concerning

refunds. However, the State's claim of refunds for Rider SMP is just an argument at the present time and is not supported unquestionably by the caselaw cited.

### **III. Conclusion**

Because the Rider issue is pending leave to appeal to the Illinois Supreme Court, the State's Motion is premature and constitutes an attempt to get a mandate issued to the Commission at a time when the issuance of the mandate is forbidden by Supreme Court Rule 368(b). This proceeding should continue to be stayed until final resolution arrives in the parallel appeals from the Commonwealth Edison rate case, upon which the Illinois Appellate Court rendered its September 30<sup>th</sup> Opinion.

Respectfully submitted,



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**ComEd's Opposition to Petitioner's  
Combined Motion to Terminate Stay  
and for Summary Reversal or for  
Other Relief**

RECEIVED

No. 02-10-0024

FILED

JAN 21 2011

ROBERT J. MANGAN, CLERK  
APPELLATE COURT 2nd DISTRICT

JAN 21 2011

ROBERT J. MANGAN, CLERK  
APPELLATE COURT 2nd DISTRICT

**IN THE APPELLATE COURT OF ILLINOIS  
FOR THE SECOND JUDICIAL DISTRICT**

PEOPLE OF THE STATE OF ILLINOIS ex rel.	)	
LISA MADIGAN, ATTORNEY GENERAL OF	)	
THE STATE OF ILLINOIS	)	
	)	
Petitioners-Appellants,	)	Appeals from Orders
	)	of The Illinois Commerce
v.	)	Commission in its
	)	Docket No. 09-0263
THE ILLINOIS COMMERCE	)	
COMMISSION, COMMONWEALTH	)	
EDISON COMPANY,	)	
	)	
Respondents-Appellees.	)	
	)	

**RESPONDENT COMMONWEALTH EDISON COMPANY'S  
OPPOSITION TO PETITIONER'S COMBINED MOTION TO TERMINATE  
STAY AND FOR SUMMARY REVERSAL OR FOR OTHER RELIEF**

Without citing any supporting legal authority, the State moves for extraordinary relief -- a summary reversal of the *entire* Order of the Illinois Commerce Commission in ICC Docket No. 09-0263, which is the subject of this appeal – based on this Court’s reversal of the Commission’s ruling on the much narrower Rider SMP in ICC Docket No. 07-0566. The State neglects to mention, however, that this Court has *never* considered either the substantial new factual record or the legal analysis underlying *any* of the Commission’s Order in Docket No. 2-09-0263, and that large portions of the Commission’s Order in ICC Docket No. 2-09-0263 go beyond the subject matter of the Commission’s earlier ruling. Further, the record contains absolutely no support for the

State's erroneous contention that Commonwealth Edison ("ComEd") took factually inconsistent positions in the proceedings before the Commission and this Court. Finally, no basis exists for applying the doctrine of judicial estoppel, on which the State hinges its argument. Because no legal or factual basis justifies treating this Court's reversal of a rider approved in ICC Docket No. 07-0566 as dispositive of the Commission's Order in ICC Docket 09-0263, this Court should deny the State's request for summary reversal.

Before the Court even gets to the underlying merits of the State's baseless request, though, this Court should address a threshold question: whether to lift a stay on this appeal while proceedings continue in what was Appeal No. 2-08-0959 (cons.) in this Court and is now pending before the Illinois Supreme Court as Docket Nos. 111548 and 111642. The simple fact is that the State seeks summary reversal in Appeal No. 2-10-0024 (wrongfully, as ComEd explains below) based solely on this Court's ruling in Appeal No. 2-08-0959. If the Supreme Court should reverse this Court's ruling in Appeal No. 2-08-0959, or modify it, a summary reversal in this appeal would surely need to be undone, possibly by the Supreme Court depending upon timing. This would create a substantial waste of time and effort, not only by the parties and this Court but possibly by the Supreme Court as well. Therefore, the stay should remain in effect.

### **BACKGROUND**

**ICC Docket No. 07-0566.** On October 17, 2007, ComEd filed new tariffs and asked the Commission to approve a proposed "Rider SMP" for recovery of costs associated with proposed future "System Modernization Projects," including the creation of a "smart grid" for transmitting information about energy consumption electronically to customers. One of the proposed projects included an experimental, one-time pilot

program to install up to 200,000 automated meters in the Chicago vicinity to evaluate the costs and benefits of a potential full-scale deployment of the Automated Metering Infrastructure (“the AMI Pilot”). ComEd proposed the AMI Pilot as the first step in moving towards the “smart grid.”

On September 10, 2008, the Commission issued the Order on review in the prior appeal, No. 2-08-0959. That Order “commend[ed] ComEd for its initiative in pursuing smart grid and AMI” because of their potential to provide many “operational and societal benefits,” but *denied* ComEd’s request to recover costs associated with future System Modernization Projects via a general system modernization rider. (ComEd S.R. 36<sup>1</sup>.) The Commission stated that it lacked sufficient information about the smart grid’s potential benefits and costs, but hoped “to have a better grasp of costs and benefits once Phase 0 [the AMI Pilot] is implemented and analyzed.” (ComEd S.R. 37.)

Consequently, the Commission ordered two things: *First*, it “approved” a much-reduced version of Rider SMP only “for the very limited purpose of implementing Phase 0 -- a scaled deployment of AMI -- as a pilot program,” subject to specific conditions. These conditions included defining the scope and other parameters of Phase 0 in a separate series of AMI Workshops, led by an independent third-party facilitator. (ComEd S.R. 37-39.) Significantly, the Commission did *not* approve recovery of *any* costs via a rider in its September 10, 2008 Order: “Due to the fact that the exact scope of the Phase 0 project will be defined in the AMI workshops, the Commission is not approving a recovery of specific costs in this Order for Phase 0.” (ComEd S.R. 39.) The Commission

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<sup>1</sup> With this Opposition, ComEd submits its Supplement to the Record in Support of the State’s Combined Motion. Citations to ComEd’s Supplement are cited as ComEd S.R. \_\_\_\_\_. Citations to the State’s Record In Support are cited as SR \_\_\_\_\_.

ruled that, upon completion of the workshop process and before any costs for Phase 0 could be recovered, ComEd would have to initiate a new docketed proceeding seeking approval of the Phase 0 project, thereby allowing the Commission to approve the project's "goals, timelines, evaluation criteria," as well as "the amortization period for the meters that will be retired" as a result of the AMI pilot. (*Id.*) The Commission also ordered annual reconciliation proceedings to "examine the reasonableness of Phase 0 project costs" and to "review ComEd's earnings" to ensure that these earnings did not exceed ComEd's established rate of return.<sup>2</sup> (*Id.*)

As the Commission later explained in its Order in Docket No. 09-0263, "In that case [Docket No. 07-0566], essentially, we required ComEd to conduct workshops to actually develop its AMI program." (SR 25.)

*Second*, the Commission's September 10, 2008 Order set forth a comprehensive, long-term regulatory framework for deploying smart grid technologies in Illinois. The Commission recognized that "AMI deployment alone will not produce the benefits of a comprehensive digital smart grid" and that "smart grid and AMI topics should be pursued and considered by the Commission in a deliberate and thorough yet expedited manner." (ComEd S.R. 39.) To that end, the Commission also established a broader Illinois Statewide Smart Grid Collaborative. This formal Collaborative involved the two largest Illinois electric utilities regulated by the Commission, numerous other stakeholders (including many parties to this appeal), Commission staff, and a second independent facilitator. The Commission directed the Collaborative to "consider the costs and

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<sup>2</sup> These procedures mirror those the Commission established in Part 656 of the Illinois Administrative Code for the water utilities' Qualifying Infrastructure Plant ("QIP") Surcharge.

benefits of smart grid implementation and develop a strategic plan for such implementation for presentation -- upon completion and in a docketed proceeding -- to the Commission.” (ComEd S.R. 39-40.)

**AMI Pilot Workshops.** Pursuant to the Commission’s September 10, 2008 Order, between December 2008 and May 2009, ComEd participated in a series of AMI Workshops to define the parameters of the AMI Pilot (Phase 0), including its scope, technological characteristics, and the geographic reach, and to initiate the AMI procurement process. The AMI Workshop participants agreed that any assessment of the benefits and costs of deploying AMI would be incomplete without examining changes in customer behavior from the introduction of AMI and new rate designs. Because AMI technology provides customers with timely information about their energy use, customers may use this information to conserve energy, save money, and ultimately benefit the environment. Therefore, the Workshop participants agreed that, in conjunction with the AMI Pilot, “conducting tests on customer behavior, in response to various stimuli, would be the most effective.” (SR 25.)

**ICC Docket No. 09-0263.** On June 1, 2009, upon conclusion of the AMI Workshop process, ComEd initiated ICC Docket No. 09-0263 to seek approval of:

- (1) the scope of the AMI Pilot – ComEd proposed installing 141,000 automated meters in the City of Chicago, the nine towns bordering Chicago in ComEd’s Maywood operating area, and the City of Elgin;
- (2) recovery of capital investment costs related to the AMI Pilot via Rider AMP;

- (3) the scope and nature of a “Customer Applications Program,” *i.e.*, a study designed to assess customer reactions to the proposed new smart grid technology, which included a robust, statistically-valid assessment of 24 experimental combinations of rate designs, customer technology, information, and education (SR 12); and
- (4) recovery of approximately \$12.6 million in operating and maintenance costs related to the Customer Applications Plan via Rider AMP-CA.

The State opposed each of ComEd’s requests on the ground that each exceeded the scope of the Commission’s September 10, 2008 Order in ICC Docket No. 07-0566. Significantly, the State argued to the Commission the opposite of what it now argues to this Court: as the Commission noted in the Order at issue here, “The [Attorney General]/AARP asserted that this Commission was clear, in the final Order in Docket 07-0566, that Rider SMP ... would only be approved for the limited purpose of determining whether ‘Phase 0’ of that project should be approved” and did not include any other elements. (SR 23.) Consequently, the State contended that the Commission lacked authority to approve the Customer Applications Program and its associated tariff as a part of ICC Docket No. 09-0263. (SR 23.) The State also sought to reduce the AMI Pilot drastically, from 141,000 automated meters to only 5,000 - 10,000 automated meters. (*Id.*)

On October 14, 2009, the Commission issued its Order in Docket No. 09-0263, which is the subject of this appeal. The Commission reduced the scope of the approved AMI Pilot to 131,000 meters (refusing to approve cost recovery for 10,000 meters

proposed for the City of Elgin), and approved recovery of capital investment costs related to the AMI Pilot via Rider AMP.

The Commission acknowledged in its Order that the proposed Customer Applications Program was beyond the scope of its previous order: “It is not contested that when the Commission approved ‘Phase 0’ of the proposed AMI pilot (in Docket 07-0566) it did not approve such an expenditure.” (SR 23.) Nonetheless, the Commission decided, as a matter of regulatory policy, that “the better approach is to encourage utilities to try new ways to reduce or hold down customers’ costs.” (SR 20.) Specifically, the Commission credited the testimony that “the Customer Applications portion of the program will produce no operational savings to ComEd. Instead, according to ComEd, the financial benefits will all flow directly to customers.” (SR 19.) The Commission also found that, absent rider treatment, ComEd would be unable to recover the costs of the pilot programs: “it is an extreme case, in that it imposes the cost of this program for a limited period of time, a time when those costs could not otherwise be included in rates.” (SR 28.)

Based on these facts, the Commission found that the Customer Applications Program warranted rider treatment: “Utilities will be more likely to embrace innovation regarding this type of customer-oriented expenditure, if they have some assurance that reasonably-incurred costs spent on such innovation will be approved by this Commission.” (SR 20.) The Commission, however, imposed a 10% cap on the projected total cost of the Customer Applications Program, and also ordered annual reconciliation proceedings to examine the reasonableness of costs ComEd incurred in the AMI Pilot and the Customer Applications Programs.

**The State's Notice Of Appeal.** On January 7, 2010, after the Commission denied the State's motion for rehearing, the State filed a Notice of Appeal in this Court "for review of the Orders of the Commission in ICC Docket No. 09-0263." (ComEd S.R. 48-68.) Hence, the State has appealed not only from the Commission's approval of Rider AMP to recover specific costs of the AMI Pilot, but also from those portions of the October 14, 2009 Order approving: (i) the scope and technological characteristics of the AMI Pilot, (ii) the nature and scope of the Customer Applications Program, and (iii) a separate Rider AMP-CA for recovery of operational and maintenance costs for the Customer Applications Program, none of which were before the Commission in Docket No. 07-0566.

**The Second District's Decision In Appeal No. 2-08-0959 (cons.).** On September 30, 2010, this Court reversed the Commission's September 10, 2008 Order on Rider SMP (ICC Docket No. 07-0566). Specifically, this Court found that Rider SMP violated the rule against single-issue ratemaking because "[t]he capital costs associated with AMI and the smart grid technologies are not the result of legislative mandate, but rather are the result of ComEd's decision to innovate to reduce other costs," and because they are "completely within the utility's control." (SR 89.)

On November 16, 2010, this Court denied ComEd's petition for rehearing.

On December 15, 2010, the Illinois Supreme Court granted ComEd's request to extend its time for filing a Petition For Leave To Appeal until January 25, 2011. *See* S. Ct. Dkt. No. 111548.

On December 21, 2010, the Commission filed its Petition For Leave To Appeal this Court's September 30, 2010 ruling, which is docketed as No. 111642.

## ARGUMENT

### I. This Court Should Not Lift The Current Stay.

In its combined motion, the State seeks relief based solely on this Court's ruling in Appeal No. 2-08-0959 (cons.). On April 19, 2010, the State filed its Motion To Hold Appeal In Abeyance that persuaded this Court to stay the instant appeal during the proceedings in Appeal No. 2-08-0959 (cons.). The State argued there that the resolution of the issues in Appeal No. 2-08-0959 "will guide and direct the resolution of the People's appeal in this case." (SR 65.) Implicit in that Motion is the recognition that if the Supreme Court should accept the Commission's and/or ComEd's Petitions For Leave To Appeal the September 30, 2010 Opinion and reverse or modify that Opinion, any further proceedings in this appeal would have been wasted effort. The State's request now to terminate this stay is therefore precipitous and should be denied.

At a minimum -- and as an alternative to denying the State's request to lift the stay -- this Court should direct the parties to brief this appeal in the ordinary course. The State will not be prejudiced by continuing to pursue the orderly course of litigation: should the State ultimately prevail before this Court in the above-captioned appeal and before the Supreme Court in Appeal Nos. 111548 and 111642 from this Court's September 30, 2010 Order, it may seek whatever refund and interest payments the law allows to compensate customers. Furthermore, the amounts at issue are so small that they do not justify the State's efforts to rush this appeal. The total *annual* surcharge for an average residential customer from the AMP Pilot is less than \$3. (ComEd S.R. 47.)

## II. Summary Reversal Is Improper.

### A. The State Fails To Cite Any Legal Authority For Summary Reversal.

The State fails to cite a single case in which the Illinois Appellate Court summarily reversed an order of the Commission. This is not surprising: there is a very strong preference for resolving appeals on the merits. “A considered judgment of the [lower tribunal] should not be set aside without some consideration of the merits of the appeal.” *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976). This Court has held that even where an appellee fails to file a response brief, the lower court’s judgment should not be reversed except after consideration of the merits of the appeal. *In re Consensual Overhear*, 323 Ill. App. 3d 236, 239 (2d Dist. 2001); *Orava v. Plunkett Furniture Co.*, 297 Ill. App. 3d 635, 636 (2d Dist. 1998). Fundamental principles, “the avoidance of injustice and the doing of substantial justice,” require courts to consider the merits of appeals in such circumstances. *Daley v. Jack’s Tivoli Liquor Lounge, Inc.*, 118 Ill. App. 2d 264, 272-74 (1<sup>st</sup> Dist. 1969).

Here, the Commission entered its Order in Docket No. 09-0263 after a year-long process which involved six months of collaborative AMI Workshops followed by numerous witnesses, exhibits, and hearings before the Commission, providing a much expanded record in this appeal compared to the record in Appeal No. 2-08-0959 (cons.). The scope of the Commission’s Order in ICC Docket No. 09-0263 goes far beyond the limited directive of Rider SMP, which the Commission approved in ICC Docket No. 07-0566 and which this Court reversed in Appeal No. 2-08-0959 (cons.). This Court should not reverse summarily the considered judgment of the Commission without a careful

review of the new record and “consideration of the merits of the appeal.” *First Capitol Mortgage*, 63 Ill. 2d at 131.

Furthermore, this Court should not consider the merits of this appeal until (i) the Illinois Supreme Court has decided whether to take Appeal Nos. 111548 and 111642 and, if it does, until it issues its decision on the merits; and (ii) the parties have briefed the issues in this appeal fully and deliberately.

**B. The Question Whether Rider Treatment Is Appropriate Here Is A Fact-Intensive Inquiry.**

The Supreme Court has long held that the Commission has statutorily-given discretion to approve cost recovery by a rider “in the proper case.” *City of Chicago v. Illinois Commerce Commission*, 13 Ill. 2d 607, 614 (1958). The Supreme Court also has ruled that the rule against single-issue ratemaking “does not circumscribe the Commission’s ability to approve direct recovery of unique costs through a rider when circumstances warrant such treatment.” *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 138 (1995). What constitutes “the proper case,” “unique costs,” and the “circumstances warrant[ing] [rider] treatment” are all fact-intensive questions that do not lend themselves to summary adjudication. For instance, in *Citizens Utility Board*, the Supreme Court analyzed the testimony of numerous witnesses below to determine whether the costs of the coal-tar clean-up were appropriate for recovery by a rider. *Id.* at 138-39.

Here too, the Commission analyzed the testimony of numerous witnesses – testimony *not* in the appellate record in Appeal No. 2-08-0959 (cons.) – before concluding that the specific costs it approved for recovery via Rider AMP were sufficiently “unique” to warrant a rider treatment: “This docket is a unique program.”

(SR 35.) The lion's share of the factual materials that formed the basis of the Commission's Order in ICC Docket No. 09-0263, however, were never presented to the Commission in ICC Docket No. 07-0566 and thus were not included in the record on appeal in Appeal No. 2-08-0959 (cons.).

Moreover, neither the Commission in Docket No. 07-0566, nor the Appellate Court in Appeal No. 2-08-0959 (cons.) addressed whether ComEd may properly recover, by rider, operational and maintenance expenses of the Customer Applications Program – the program that benefited the customers without providing any operational savings to ComEd. Therefore, summary reversal of the Commission's Order at issue here – without addressing the new issues and the new evidence that the Commission considered in issuing that Order – would be improper and fundamentally unjust.

### **III. Judicial Estoppel Does Not Apply.**

The only legal basis that the State raises in support of its request for summary reversal is the doctrine of judicial estoppel, which the State contends bars arguing that there are differences between the Commission's Order on Rider SMP in ICC Docket No. 07-0566 and the Commission's Order at issue here. As explained below, the doctrine of judicial estoppel does not apply here, and thus there is no legal basis for summarily reversing the Commission's Order.

The doctrine of judicial estoppel bars a party from making “totally inconsistent” *factual* statements in different judicial or quasi-judicial proceedings. *Ceres Terminal, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 851 (1<sup>st</sup> Dist. 1994). The doctrine of judicial estoppel does *not* apply to matters of opinion or legal positions. *McNamee v. Sandore*, 373 Ill. App. 3d 636, 649-50 (2d Dist. 2007). Thus, judicial

estoppel does *not* bar a plaintiff from changing *legal* positions. *Id.*; *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 172-73 (2d Dist. 2003).

Here, judicial estoppel does not apply for two reasons: *First*, ComEd's statements regarding the scope of the Commission's Order on Rider SMP constitute legal positions, not statements of fact. *Second*, contrary to the State's contention, ComEd *never* represented to the Commission that the scope of recovery it sought in Riders AMP and AMP-CA was the same as the scope of Rider SMP.

*First*, ComEd's statements regarding the scope of the Commission's Order on Rider SMP constitute legal positions, rather than assertions of fact. In *People v. Caballero*, 206 Ill. 2d 65, 82-83 (2002), on which the State relies, the Supreme Court refused to apply the doctrine of judicial estoppel where the prosecutors made different legal arguments based on the same facts. Here, based on the language of the Commission's September 10, 2008 Order, the parties took different *legal* positions: the State argued that this Order did not authorize the Customer Applications Program and its associated costs; while ComEd argued that this Order anticipated changes in the scope of the AMI Pilot as a result of the AMI Workshops: "To argue now that ComEd and the Commission cannot act based on what was learned during the workshops would make them an empty and wasteful farce. The Commission should approve the Pilot design, including the AMI Customer Applications Plan." (SR 112.) These statements are legal arguments, not factual assertions. Thus the doctrine of judicial estoppel does not apply.

Moreover, the scope of administrative rulings presents an issue of law, not an issue of fact. For instance, in *Arvia v. Madigan*, 209 Ill. 2d 520, 526 (2004), the Supreme Court held that the question of whether a prior administrative ruling against the plaintiff

precluded the plaintiff from subsequently raising a constitutional claim in the circuit court was an issue of law to be reviewed de novo.

*Second*, and more importantly, the State's contention that "Commonwealth Edison specifically argued to the Commission that the costs it sought to recover through Rider AMP were only those authorized by the Commission in its earlier decision" (Corrected Mem in Support of Mtn 8) is without merit. As an initial matter, this statement does not make sense because the Commission did not approve recovery of *any* specific costs through Rider SMP – rather, "essentially, [the Commission] required ComEd to conduct workshops to actually develop its AMI program." (SR 25.)

Further, the very document the State cites – ComEd's Post-Hearing Reply Brief -- refutes the State's argument. (SR 104-16.) In its brief, ComEd asked the Commission "to allow recovery of the costs of the *expanded* pilot." (SR 109-12 (emphasis added).) ComEd also responded to the State's argument that the Commission lacked authority to approve the Customer Applications Program because it exceeded the scope of the Commission's earlier Order: "Legally, nothing in the Order in Docket No. 07-0566 prohibits the study of any type of AMI system, including customer applications. And nothing in the *07-0566 Order* could strip the Commission of jurisdiction to consider the AMI Customer Applications Plan." (SR 110-11, original emphasis.) Saying that the Commission's order on Rider SMP did not prohibit the study of customer behavior in response to the AMI Pilot is not the same as saying that such a study was contemplated, let alone authorized, by the Commission in its earlier order. Clearly, it was not: the proposal for testing customer responses to the AMI technology was developed during the workshop process, *after* the Commission entered its order on Rider SMP. (SR 111-12.)

Moreover, ComEd candidly informed the Commission that it sought to recover a wider variety of costs in Rider AMP than those the Commission addressed in ICC Docket No. 07-0566. (*Id.*) For instance, in addition to capital investment costs of the AMI Pilot, ComEd sought recovery of: incentive compensation costs; \$12.6 million in the operating and maintenance expenses of the Customer Applications Program; and the costs of a series of smart grid projects for which ComEd was seeking matching federal funding under the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5. The Commission *denied* ComEd's request to recover incentive compensation costs in Rider AMP, and ComEd subsequently withdrew its request for recovery of costs for other smart grid projects. (*See* SR 33-36.) The Commission granted cost recovery for capital investment costs of the AMI Pilot and for operational and maintenance expenses of the Customer Applications Program. Thus, ComEd never took two "totally inconsistent" factual positions before the Commission and this Court.

For these reasons, the doctrine of judicial estoppel does not apply here.

#### **IV. Significant Policy Implications Of Reversing The Commission's Order Mitigate Against Summary Disposition.**

The sole justification for the State's precipitous request to dispose of the Commission's Order summarily is the State's desire to obtain refunds of the surcharges ComEd customers have paid to date for the AMP Pilot. The total *annual* surcharge to the average residential customer bill in 2010 for the AMP Pilot was approximately \$2.62. (ComEd S.R. 47.) Even in these difficult financial times, this sum does not justify dispensing with ComEd's due process rights to consideration of this appeal on the merits. Nor does it justify putting the development of smart grid in Illinois at risk, as such a ruling will do.

Indeed the State's desire to benefit customers by returning to them their \$2.62 ignores the significant benefits that those customers are likely to derive as a result of the AMI Pilot and the Customer Applications Program that the State seeks to shut down. Specifically, the Commission found that the AMI Pilot and the Customer Applications Program are the first steps to deploying smart grid technologies in Illinois, which will enable customers to manage their energy use, to lower their energy costs, and to reduce the need for new energy generation thus benefitting the environment. (SR 20-21.) The General Assembly and Congress both recognized that deployment of smart grid technologies will benefit, first and foremost, customers, and declared deployment of smart grid as state and national policy goals.

At the same time Congress recognized that utilities are unlikely to invest significantly in smart grid projects on their own because their operational savings are still uncertain, while the initial capital expenditures are substantial and may take many years to recoup. Indeed, ComEd told the Commission that it was unlikely to invest in the AMI Pilot in the absence of a timely cost recovery because the business case for the experimental AMI deployment was not strong. (SR 19.) ComEd also told the Commission that, without assured cost recovery, it will not invest in discretionary projects, such as the Customer Applications Program, because this program will produce no operational savings to ComEd, with all financial benefits flowing directly to customers. (*Id.*)

Hence, the reversal of the Commission's Order approving cost recovery for the AMI Pilot and the Customer Applications Program will have significant negative impact on the eventual deployment of smart grid technologies in Illinois by significantly

delaying, or stalling this process altogether. Given these significant policy implications, the better approach is to consider this appeal on the merits with full briefing, and without ruling on a matter of such significance precipitously.

### CONCLUSION

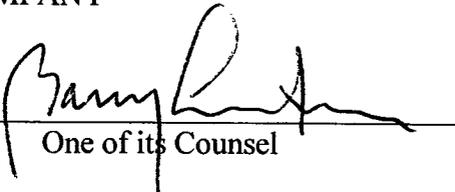
For all the foregoing reasons, Respondent Commonwealth Edison Company respectfully requests that this Court deny Petitioner's Combined Motion To Terminate Stay And For Summary Reversal.

Respectfully submitted,

Dated: January 21, 2011

COMMONWEALTH EDISON  
COMPANY

By:

  
One of its Counsel

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**Order of the Illinois Appellate Court  
Denying the AG's Combined Motion**



STATE OF ILLINOIS APPELLATE COURT SECOND DISTRICT

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APPELLATE COURT BUILDING  
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Appeal from the Illinois Commerce Commission

ICC No.: 09-0263

THE COURT HAS THIS DAY, 02/08/11, ENTERED THE FOLLOWING ORDER IN  
THE CASE OF:

Gen. No.: 2-10-0024

People ex rel. Lisa Madigan v. IL Commerce Commission, et al.

Petitioner-appellant's Combined Motion to  
Terminate Stay and for Summary Reversal, responses  
having been received from both respondents, are  
denied.

The petitioner-appellant shall file a new status  
report on the pending petition for rehearing filed  
in general number 2-08-1037 no later than April 8,  
2011.

Robert J. Mangan  
Clerk

cc: Honorable Lisa Madigan  
Paul Berks  
Janice A. Dale  
Karen L. Lusson  
James E. Weging  
John P. Kelliher  
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