

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY	:	
	:	Dkt. 07-0566
	:	On Remand
Proposed general increase in rates for delivery service.	:	

IEC REPLY BRIEF ON EXCEPTIONS ON REMAND

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I. INTRODUCTION

The Illinois Industrial Energy Consumers (“IIEC”) respond to certain positions taken and arguments and exceptions made by Commonwealth Edison Company (“ComEd” or “Company”), in its Brief on Exceptions (“BOE”) to the Proposed Order of November 10, 2011 (“Proposed Order” or “PO”). IIEC’s failure to address any specific argument, exception or position of any specific party in this Reply Brief on Exceptions (“RBOE”) should not be taken as an endorsement or acceptance of that position unless otherwise expressly stated herein.

Specifically, IIEC responds to:

A. ComEd’s contention that the Proposed Order correctly concluded that because the Appellate Court decision did not use the word “refund,” the Commission is without authority to order a refund in this proceeding. (ComEd BOE at 1).

B. ComEd’s argument that a refund would not be equitable in this case, but if a refund is ordered, it should be calculated as though the utility’s third quarter 2008 plant additions had been included in the 2006 test year rate base. (ComEd BOE at 13-16).

II. ARGUMENT

A. A Refund Is Lawful, Equitable, and Required

1. A Commission Refund Order Is Lawful

ComEd contends that the Proposed Order was correct in holding that the Commission is deprived of any authority to order a refund in this proceeding because the Appellate Court decision

in *Commonwealth Edison Co. v. Ill. Comm. Comm'n*, 405 Ill. App. 3d 389 (2d Dist. 2010) (“*ComEd Decision*”) did not use the word “refund.” (ComEd BOE at 1). ComEd argues further that a refund would not be equitable in this case, and that if one is ordered nonetheless, it must be calculated as though the utility’s actual third quarter 2008 plant additions had been included in the 2006 test year rate base.

ComEd is wrong on each point. A Commission order returning excessive rate collections to ratepayers would be lawful, equitable, and is required by the Proposed Order’s findings of fact.

IIEC’s Brief on Exceptions explained in detail that the Commission has both the authority and (assuming the recommended findings of fact) a duty to order a refund. (*See generally*, IIEC BOE). The Appellate Court’s Order to the Commission to conduct “further proceedings consistent with this opinion” is not empty of meaning. That directive incorporates the requirements of precedential case law that the Appellate Court is bound to follow. In *Independent Voters of Illinois v. Illinois Commerce Comm’n.*, 117 Ill. 2d 90, 105 (1987) (“*IVT*”), the Supreme Court refused to countenance judicial determinations that hold rates unlawful but fail to provide ratepayers who had been harmed an effective remedy, *viz.*, a refund of the excessive rates.

ComEd and the Proposed Order urge the Commission to hold that the Appellate Court concluded that ComEd’s rates were illegal and remanded the case, but did not intend that the Commission order appropriate refunds. To do so, the Commission must presume that the Appellate Court acted unlawfully and in direct contradiction to binding Supreme Court precedent -- by

intentionally (or negligently) failing to follow the *IVI* decision. (*Id.*). Respect for the Appellate Court precludes adoption of that baseless accusation.

Respect for this Commission requires recognition that it is not a ministerial body that performs only tasks specifically defined by “magic words” in the opinions of Illinois courts. IIEC explained that, as a fact-finding tribunal of competent jurisdiction, the Commission is responsible for first interpreting then implementing the orders of its reviewing courts. (*Id.* at 6).

[T]he appellate court, in reversing and remanding, need not give specific directions. In the absence of direct guidelines, the trial court must examine the appellate court's opinion and determine from it, and from the nature of the case, what further proceedings would be proper and not inconsistent with the opinion.
(*In re Marriage of McMahon*, 82 Ill. App. 3d 1126, 1133 (Ill. App.Ct. 4th Dist. 1980).

Neither the Commission's authority nor its duties in this proceeding are diminished because the Appellate Court did not use the word “refund” in its opinion. The law is not an obstacle to a Commission refund order.

The only preconditions to a Commission order for an appropriate refund are certain Commission findings of fact that will determine whether a refund is owed and (if so) the amount of the refund. Specifically, the appropriateness of a refund depends on (i) the Commission's disposition of ComEd's third quarter 2008 plant additions, (ii) the Commission's determination of the effects (if any) of that disposition, and (iii) the Commission's calculation of the difference between the rates set in the Commission's original rate order and the rates that would have been charged if they had been set in accordance with the views expressed in the decision of the Appellate

Court reversing that rate order, for the period between reversal and the effective date of the new rate order. (*See IVI* at 105).

2. *A Commission Refund Order Is Equitable*

In addition to arguing that the Commission lacks authority to order a refund in this proceeding, ComEd asserts that the Commission should decline to order a refund in any case because, in ComEd's view, a refund would not be equitable. (ComEd BOE at 5). ComEd argues that a refund is appropriate "only when ratepayers have been harmed and the utility is thereby unjustly enriched" and that the Proposed Order "errs in concluding that ratepayers were harmed." (ComEd BOE at 5).

IVI and Ratepayer Harm. ComEd's arguments to distinguish the *IVI* decision rest on its contention that the utility's unlawful rates were merely a "methodological error." ComEd argues further that "no one has argued that ComEd charged customers for non-recoverable costs." (ComEd BOE at 6). In fact, the Appellate Court has conclusively determined that the unlawful order "artificially boosted" ComEd's rate base and that "[t]he approval of excess rate base violates section 9-211" of the Public Utilities Act ("PUA"). (*ComEd Decision* at 405; 220 ILCS 5/9-211). Costs that violate the PUA are certainly "non-recoverable costs," and ComEd's own testimony on remand confirms that rates were higher as a result, even using its flawed calculations. (*See, e.g., Houtsma, ComEd Ex. 56.0 Rev. at 22:439-442*). ComEd's unlawful rates were not a mere methodological error, and ratepayers were harmed by being required to pay rates that reflected ComEd's artificially boosted rate base.

ComEd also argues that the Commission should not use the challenged rates as corrected “in accordance with the views expressed in the [reversing] decision” to quantify the harm to ratepayers. (*IVI* at 105). Instead, ComEd insists that new rates -- determined in the mini-rate case it seeks and using post-test year actuals data -- should be the test of whether ratepayers were harmed. (ComEd BOE at 7-8). This argument was rejected by the Supreme Court in *IVI* and in *People ex rel. Hartigan v. Ill Comm. Comm’n*, 148 Ill. 2d 348 (1992) (“*Hartigan I*”). (*IVI* at 102-3, 105; *Hartigan II* at 405). IIEC’s Reply Brief on Remand detailed how such a process would violate the Supreme Court’s definition of the proper refund calculation, as well as the Commission’s test year rules and policy. (*See* IIEC R. Br. at 9-11).

Hartigan and the Aggrieved Party. ComEd engages in an extensive parsing of details of the “convoluted procedural history” of the *Hartigan* decision, purportedly to assess the equities of a refund. However, in that process ComEd ignores the overarching, determinative holding of the decision on this specific issue -- “the goal of equity is to make the aggrieved party whole.” (*Hartigan II* at 405). At one point, ComEd frames the issue as “what is required to make ratepayers whole.” (ComEd BOE at 2). However, ComEd quickly refocuses its analysis onto itself -- “customers certainly cannot claim to have paid unjustly and unreasonably high rates after the Commission explicitly found that ComEd’s rates were too low and authorized ComEd to increase them.” (*Id.* at 4). There is no doubt among the parties, or in the Proposed Order, that ratepayers are the aggrieved parties in this proceeding. (AG-CUB Br. at 18; Staff R. Br. at 7; IIEC R. Br. at 11; PO at 43). Yet, ComEd argues that even though ratepayers paid unlawfully inflated rates, because

the utility did not get enough money, ratepayers should be denied a refund of illegal rate collections. The Illinois Supreme Court has already rejected ComEd's focus on its own earnings as the standard for determining harm to ratepayers. (*IVI*, 117 Ill.2d at 105).

3. *A Commission Refund Order Is Required*

The fact findings of the Proposed Order -- amply supported by the record -- establish that ComEd collected more than it would have collected under lawful rates, *i.e.*, rates corrected as the *ComEd Decision* held the law requires. The Supreme Court's decision in *IVI* rejected the possibility of a decision holding utility rates unlawful but denying a remedy for ratepayers. The factual determinations recommended in the Proposed Order, and the controlling legal precedents, require that the Commission order a refund of the excess amount collected through ComEd's illegal rates.

B. ComEd's Contention that the Commission Did Not Rule on ComEd's 3Q2008 Plant Additions Is Essentially an Argument that the Commission Violated the PUA

ComEd devotes the largest portion of its brief to arguments challenging the Proposed Order's conclusion (PO at 46) that its third quarter 2008 plant additions appropriately were not considered in setting ComEd's historical test year rates and should not be used in determining the refund amount. (ComEd BOE at 9-18). ComEd argues that, instead, the Commission's determination of the rates that would have been charged if they had been set in accordance with the *ComEd Decision* must reflect a rate base that includes the utility's actual third quarter 2008 plant additions, as shown by the out of test year data submitted in this remand proceeding. (ComEd BOE at 3).

IIEC argued in its briefs that (a) the PUA's requirement that the Commission "establish the rates . . . which it shall find to be just and reasonable" (220 ILCS 5/9-201(c)), (b) the prohibition

against Commission reliance on a non-unanimous stipulation (*Re Commonwealth Edison Company*, Dkt 07-0566, Order, Sep 10, 2008, at 27), and (c) the Commission's express finding that the first two quarters of ComEd's planned 2008 plant additions satisfied test year rules requirements for post-test year adjustments (*Id.* at 28) necessarily entailed rejection of ComEd's third quarter plant additions. (*See*, IIEC Br. at 4-5; IIEC R. Br. at 6-11).

Consistent with IIEC's arguments, the Proposed Order reached the same conclusion.

Although the Appellate Court stated that the Commission did not consider the 3rd quarter plant, that cannot be because the Commission did not adopt the Stipulation - it based its decision on the record. The Commission, therefore, clarifies that the original order in this proceeding should have included a specific finding that it did not find support for the third quarter plant additions in the record.
(PO at 46).

Arguing for a contrary result, ComEd repeats arguments made in its earlier briefs. Each is, in essence, equivalent to an assertion that the Commission did not follow the dictates of the PUA or governing judicial precedent. ComEd's arguments have been substantively rebutted by IIEC and other parties in their responsive briefs. For the Commission's convenience, the following paragraphs note ComEd's main contentions in its brief on exceptions and summarize the rebuttal to ComEd's assertions from IIEC and others.

(1) "[T]he Commission had no need to evaluate that evidence [re third quarter 2008 plant additions], and did not evaluate it, because ComEd had conditionally agreed not to request the inclusion of those plant additions." (ComEd BOE at 10).

Under the PUA, the Commission had a legal duty to determine ComEd's just and reasonable

rates. ComEd's assertion is flatly inconsistent with the Commission's plain declarations that it performed its duty to make a determination, on the record evidence, as to the appropriate post-test year adjustments. The Commission held that the plant additions for the first and second quarters of 2008 met the requirements of Section 287.40 of the Commission's test year rules. (*See* 83 Ill. Adm. Code 287.40). As to the specifics of ComEd's argument, the Commission's determination was made on the evidence, the Commission did not rely on ComEd's stipulation, and the Commission accepted ComEd's conditional waiver after it had made its findings of fact. (IIEC Br. at 4-5, IIEC R. Br. at 6-8); *also see* PO at 46; AG BOE at 1, 22-27).

(2) Therefore, as the Appellate Court held, the Commission had no reason to make, and did not make, any findings with respect to that evidence. (ComEd BOE at 3).

As the Proposed Order found, only the Commission can know the intended meaning of the language of its original order. The Proposed Order recommends that the Commission express that intent with the following statement.

The Commission, therefore, clarifies that the original order in this proceeding should have included a specific finding that [the Commission] did not find support for the third quarter plant additions in the record. (PO at 46).

(*See also*, IIEC Br. at 4-5; AG BOE at 1).

(3) The evidence supporting the third-quarter plant additions submitted by ComEd was of the same type, content, and quality as the evidence supporting the first- and second-quarter plant additions, which the Commission found was adequate to meet the criteria for inclusion in rate base. A failure to reach the same conclusion with respect to the evidence of the third-quarter plant additions would (sic) arbitrary and capricious. (ComEd BOE at 13-14).

Fact determinations are not made on the basis of the type or the quantity of evidence, but on the probative value of the evidence as to a material issue. Whether plans for plant additions one quarter, two quarters, or three quarters into a future year are “known and measurable” logically requires increasingly more difficult proofs. ComEd’s false equivalence of the evidence required for earlier periods and the third quarter of 2008 was not accepted by the Commission, which did not find the utility’s third quarter additions adequately supported. (See AG-CUB BOE at 1; IIEC Br. at 5).

(4) “The notion that none of these projects is known or measurable, even though ComEd actually made the investments and customers were actually served by these capital additions during the putative refund period, defies logic.” (ComEd BOE at 17).

(5) In calculating ComEd’s third-quarter 2008 plant additions, the Commission should use actual figures, rather than the projected figures provided by ComEd in 2008. (ComEd BOE at 18).

ComEd chose a historical test year to set rates in this case. Under the Commission’s test year rules, out of test year data can be considered in setting rates only under the conditions specified in Section 287.40 of the Commission’s rules. (83 Ill. Adm. Code 287.40). Moreover, as IIEC explained in its Reply Brief, the data that should be used to determine the harm to ratepayers, and the refund amount, have been defined in the controlling case law.

ComEd’s further argument for the use of out-of test year actual data is not in accord with the Supreme Court’s definition of the proper refund calculation or with the Commission’s test year rules and policy. . . . The relevant rates are those that would have been set -- not rates set now using information not available to the Commission for that initial determination. . . . ComEd is not entitled to a new mini-rate case, where the Commission issues a new determination

based on new or updated evidence that was not available to the Commission at the time of its decision and does not meet the requirements of the Commission's test year rules for ComEd's chosen test year.

(IIEC R. Br. at 9; IIEC Br. at 6-8; AG-CUB Br. at 28-30).

III. CONCLUSION

For the reasons stated above, the Commission should reject ComEd's contention:

- (1) that the Proposed Order has correctly concluded that because the Appellate Court decision did not use the word "refund," the Commission is without authority to order a refund in this proceeding; and
- (2) that a refund would not be equitable in this case, but if a refund is ordered, it should be calculated as though the utility's third quarter 2008 plant additions had been included in the 2006 test year rate base.

DATED this 23rd day November, 2011.

Respectfully submitted,

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