

Docket No.: 11-0721
S.O.M.: 6/22/12
Deadline: 6/25/12

MEMORANDUM

TO: The Commission

FROM: Claudia E. Sainsot and D. Ethan Kimbrel,
Administrative Law Judges

DATE: June 13, 2012

SUBJECT: Commonwealth Edison Company

Tariffs and charges submitted pursuant to Section 16-108.5
of the Public Utilities Act.

Application for Rehearing filed by ComEd.

RECOMMENDATION: Deny Rehearing.

Background

The Public Utilities Act provides, in pertinent part, that:

Within 30 days after the service of any . . . order or decision of the Commission any party to the action or proceeding may apply for a rehearing in respect to any matter determined in said action or proceeding and specified in the application for rehearing.

(220 ILCS 5/10-113). This statute further provides that the Commission shall receive and consider such application and it “shall grant or deny such application in whole or in part within 20 days from the date of the receipt thereof by the Commission.” (*Id.*) Further, no appeal is allowed from any order or decision “unless and until an application for a rehearing thereof shall first have been filed with and finally disposed of by the Commission.” Therefore, no party can appeal a Commission order without filing an application for rehearing. (*Id.*) Additionally, Applications for rehearing must state with specificity the issues for which rehearing is sought. (83 Ill. Adm. Code 200.880(b)).

The Commission issued a final Order in this docket on May 29, 2012. ComEd filed its Application for Rehearing less than a week later, on June 5, 2012. However, it is quite possible that additional Applications for Rehearing will be filed within the remaining portion of the statutory period mentioned above.

The Impact of Rehearing upon Docket 12-0321

ComEd has already filed another new formula rate case, Docket 12-0321. There have been two status hearings in that Docket and the evidentiary hearing is scheduled to commence on September 25, 2012 and continue for several days. Pursuant to the new formula rate statute, 220 ILCS 5/16-108.5, a final Order must be entered on or before December 26, 2012.

It should also be pointed out that while all rate cases are somewhat cumulative, in the sense that the Commission's conclusions in a utility's previous rate cases have an impact on a current rate case, with the formula rates, this is doubly the situation. This is because with formula rates, there is both a reconciliation of the previous year in question and a projection of the next year's expenditures. (See, e.g., 220 ILCS 5/16-108.5(c)(1)). Because of the cumulative nature of reconciliation proceedings, normally, a reconciliation of one year's expenditures (e.g., purchased gas adjustment reconciliations) is not decided until the previous year's reconciliation is fully completed. However, due to the statutory deadlines in Section 16-106.5 of the Public Utilities Act, that cannot occur.

If this Commission were to grant rehearing, statutorily, rehearing would have to be fully completed within 150 days or five months from the time when rehearing is granted. (220 ILCS 5/10-113). It seems unlikely that rehearing could be completed prior to this five-month deadline, as even purely legal issues take a few months for the lawyers to brief and for Administrative Law Judges to issue a proposed order. This effectively would place completion of rehearing some time in November of 2012, which is well past the time when the evidentiary hearing in Docket 12-0321 will occur. Thus, if this Commission were to grant rehearing, there would be no time for any of the parties, including ComEd, to conduct meaningful discovery on any of the issues that were revisited on rehearing, not to mention present evidence on those issues. Indeed, even if nothing were to change upon rehearing, the parties in Docket 12-0321 would not know that until final resolution of rehearing, which will be well-into the statutory time frame for completion of that docket.

It is elemental that the 5th and 14th Amendment constitutional requirements of notice and an opportunity to be heard include notice of what is at issue and an opportunity to present evidence on those issues. (See, e.g., *People ex rel. Nelson v Depositors State Bank*, 377 Ill. 602, 609-10, 27 N.E.2d 326 (1941); *People v. Anderson*, 352 Ill. App. 3d 934, 942, 817 N.E.2d 1000 (1st Dist. 2004)). This is not to suggest that hearing should be denied on this basis. It should not. Rather, it is to inform the Commission of the precarious position the deadlines in 220 ILCS 5/16-108.5 places on the Commission.

The Issues In ComEd's Application for Rehearing (pp. 108-114 of the Order).

The Pension Asset(s)

On pages 6-13 of its Application for Rehearing, ComEd states that the investment in its pension benefit customers, because, under Generally Accepted Accounting Principles, ("GAAP") pension contributions reduce pension costs by an amount equal to the investment return they earn in the pension trust fund. It argues that the Commission has recognized this in previous Orders. In support, it cites the final Orders in ComEd last three rate cases, dockets 10-0467, 07-0566, and 05-0597. (Application at 6-8). These cases were thoroughly examined in this docket and no benefit would be served by revisiting them.¹

ComEd further argues that its pension assets are hundreds of millions of "real dollars." It avers that relying on past Commission Orders, it has made over \$383 million in contributions above and beyond the ERISA-required minimums. (ERISA is the Employee Retirement Income Security Act of 1974). It contends that its customers are credited fully for the resulting lowered pension expense, which here, amounts to \$61 million. The Company argues that the Commission's ruling on this issue will discourage any future investment above the required minimums in its pension assets. It points to its FERC Form 1 and states that what is on that form is a source of final historical information. (*Id.* at 8-9).

These contentions were fully explored and are indeed obvious. No purpose would be served by granting rehearing regarding this argument.

ComEd makes an additional statutory construction argument, which is that the General Assembly knew, when including the term "pension asset" in the new statute, that the Commission had allowed a debt return on pension contributions in previous ComEd rate cases. (*Id.* at 9-10). The matter of statutory construction was thoroughly explored in this case and no new facts or laws are presented. Granting rehearing is not warranted.

ComEd again argues that the evidentiary record does not support the final determination with respect to the pension asset issue. It states that Staff's position was that authoritative accounting guidelines determined that the pension plan had to be over-funded in order to qualify as a "pension asset." However, ComEd continues, it

¹ ComEd states therein that docket 05-0597 was affirmed by the 1st Dist. of the Appellate Court on September 17, 2009. In fact, the 2nd District Appellate Court entertained the appeal of that docket on September 17, 2009, in *Commonwealth Edison Co. v. Illinois Commerce Commission*, 398 Ill. App. 3d 510, 519, 522, 924 N.E.2d 1065 (2nd Dist, 2010). In that opinion, the Appellate Court merely ruled against ComEd regarding ComEd's argument that it should have been allowed more of a pension contribution than what the Commission allowed. Thus, the Appellate Court did not rule that the underlying basis for allowing a pension contribution was correct, which is what ComEd's language in its Application for Rehearing suggests.

presented the testimony of its expert, Mr. William Graf, who refuted this conclusion. (*Id.* at 12).

This was merely a “battle of the experts” situation, with the expert opinion of Staff prevailing over the expert that ComEd provided. No new facts or laws are presented. Rehearing is not warranted to address this contention.

Finally, ComEd makes a rather novel assertion that it is relying upon and incorporating arguments made by its witnesses, most of whom are fact witnesses and not expert witnesses. (See, Application at 12). ComEd cites no legal authority whereby a witness can or even should present an argument. It is elemental that fact witnesses testify as to what happened, expert witnesses guide triers of fact with regard to their areas of expertise and only lawyers present arguments. This argument seems to ignore very basic legal procedures, as it is lawyers, not witnesses, who present arguments. This position does not aid ComEd.

Average Year vs. Year-End Rate Base and Capital Structure in Future Years (pp. 7-20 of the Order).

ComEd claims that use of the average year for the statutory reconciliations and for its capital structure will result in it recovering only half of its plant investments. (Application at 13-16). This contention is simply factually incorrect. All the average year does is take the year-end balance for the year in question plus the year-end balance for the previous year and divide that sum by two.

It is difficult to see how ComEd’s inaccurate statement is accidental, given the fact that an argument was made in this Docket by the IIEC (the “Illinois Industrial Energy Consumers”) to use the average year for 2010 and this argument was specifically rejected because it would have resulted in averaging ComEd’s 2010 year-end balance with 0, which would have resulted in ComEd receiving half of its year-end rate base. (See, Final Order of May 29-2012, at 17-18). It should also be pointed out that the arguments made by ComEd in briefs clearly differentiated between the IIEC proposal and general use of an average year. (See, *id.* at 16-17). Therefore, the record was clear that only the use of an average year in the instant docket (as opposed to future years) would result in ComEd’s recovery of only half of its plant investments. The record was also clear that this argument was rejected on that basis.

What the use of the average year does is discourage ComEd from making discretionary expenditures toward the end of the year, in order to appear as though it needs more money than is actually the case. Indeed, the two pension contributions made as “pension expenses” were made in August and September of 2010. (See, *id.* at 114). While ComEd argues that the record does not substantiate such conclusion, (See, Application at 16-17), in fact, this conclusion is just a matter of simple mathematics. It should also be pointed out that the reconciliations here will be unlike the traditional reconciliations that are usually at the Commission, where the purchase of only one item is at issue and the need for that item is not disputed. (*e.g.*, purchased

gas reconciliations). Here, most of ComEd's expenditures will be reconciled on an annual basis. Therefore, discretionary items could be at issue going forward. ComEd raises no new facts or laws that have not already been discussed. No purpose would be served by granting rehearing on this issue.

The Calculation of Interest on Reconciliation Adjustments (pp. 161-166 of the Order).

ComEd argues that rehearing is necessary regarding the calculation of interest on the reconciliation adjustments issue because according to ComEd, the Commission improperly mandated that an incorrectly calculated hybrid interest rate of its own creation, rather than the Commission-approved weighted cost of capital, be used to compensate ComEd for its costs of financing the components of the reconciliation adjustment or the saved cost of capital in the event of an over-recovery. (Application at 17-21). ComEd contends that the Commission's hybrid 3.42% interest rate also fails to meet the statutory directive because it does not compensate ComEd for its actual costs of accessing capital in the markets to fund the investments required by EIMA and effectively mandates ComEd to alter its capital structure in contravention of 220 ILCS 5/16-108.5(c). ComEd continues to assert in its application for rehearing as it had through witnesses, its post hearing and proposed order briefs and in oral argument that the reconciliation adjustments bear interest at the rate of its weighted average cost of capital. We do not recommend rehearing on this issue. The Commission's decision was logical and fully supported by the evidence.

New Business and Billing Determinants (pp. 74-76 of the Order).

According to ComEd, rehearing should be granted because the AG/AARP's proposal, which was adopted in the final Order in this Docket, selectively modified billing determinants based upon 2010 customer numbers, using 2011 "data." (Application at 21-24). This incorrect argument was previously rejected in the final Order. (See, final Order of May 29, 2012, at 75). ComEd merely restates the position that was rejected in the final Order. (*Id.*). This argument is not accurate because the AG/AARP used 2010 figures. Rehearing is not warranted on this issue.

The Issues that are Merely Preserved for Appeal

In addition to the issues presented above, ComEd has presented many matters with no real argument as to why the Commission's Order was incorrect. These issues are on pages 24-37 of the Application for Rehearing. It appears that the additional issues were merely included in order to preserve ComEd's right to appeal them. Therefore, we have not addressed these issues, unless otherwise noted below.

General and Intangible Plant (p. 27 of the Order).

ComEd argues on page 25 of its Application, without citing any evidence in the record, that it supplied un-contradicted sworn evidence proving that certain costs were

trapped between ICC jurisdiction and that of the FERC (the Federal Energy Regulatory Commission). According to ComEd, those trapped costs were not taken into account. However, the Order finds that ComEd merely asserted that its costs were being trapped, without bringing into that argument any facts explaining what costs were trapped and why. The Order properly disregarded ComEd's factually unsupported conclusion on this issue.

ComEd further argues that the Order attributes an argument to CUB/City that they never made, which is that ComEd's claim of trapped costs is a claim that, in essence, ComEd "sat on" for decades. This argument is simply incorrect. As the Order points out, CUB/City did in fact make this argument. (See, final Order of May 29, 2012, at 26).

Wages & Salaries Allocator (pp. 28-29 of the Order).

On page 26 of ComEd's Application, it asserts that a finding adopting Staff's position on this issue requires a finding here that the costs at issue are prudent and reasonable and recoverable through ComEd's Rider PE. However, the prudence of the wages and salaries allocator was not litigated in this docket. Rather, the issue was whether direct energy procurement costs should be included in rates when the rates here concern delivery service customers. Therefore, a finding of prudence here would be erroneous. Additionally, Rider PE is not the subject of this docket. ComEd cites no authority that would allow this Commission to amend a tariff that is not the subject of the proceeding. This argument is simply legally invalid.

ADIT on Vacation Pay (pp. 62-64 of the Order).

On page 28 of its Application, ComEd argues that the conclusion reached regarding this issue is contrary to other Commission orders involving ComEd. However, ComEd did not cite these orders in the Application and it did not cite these orders anywhere in the record. Additionally, how much ADIT (Accumulated Deferred Income Taxes) is at issue, is a matter of fact. Rehearing is not warranted on this issue.

Operating Reserves for Accrued Vacation Pay and Accrued Incentive Pay (pp. 67-72 of the Order).

ComEd asserts on pages 28-29 of its Application that the Order errs in reducing rates by its operating reserves for accrued vacation pay and accrued incentive pay. According to ComEd, the ruling is based on the "fiction" that an operating reserve actually has any money in it. This argument ignores the very nature of an operating reserve, which is an account where retained earnings are set aside to satisfy dividends, improvements, contingencies, retirement of preferred stock, etc. (See, e.g., Venturline.com). Merely arguing that the money is not there does not establish the factual validity of that statement. This argument does not aid ComEd.

On page 29 of its Application, ComEd further argues that accrued incentive pay is not financed by customers. This statement is simply incorrect. The whole issue with regard to incentive pay is whether to include incentive pay in rates. (See, pp. 80-89 of the Order of May 29, 2012). If an item is included in rates, customers pay for it.

Restricted Stock (pp. 80-83 of the Order).

On pages 29-30 of its Application, ComEd asserts that it presented “more than sufficient evidence” explaining how the restricted stock program is not an incentive compensation program. This argument overlooks the conclusion in the Order finding that this program was the same program that was the subject of an Appellate Decision. In that decision, the Appellate Court found that this program was an incentive compensation program. Also, in ComEd’s last rate case, Docket 10-0467, this very same program was found to be an incentive compensation program. (See, Docket 10-0467, Final Order of May 24, 2011, at 102; *Commonwealth Edison Co. v. Ill. Commerce Comm.*, 398 Ill. App 3d 510, 518, 924 N.E.2d 1065 (2nd Dist. 2010), finding that ComEd’s argument that its “Earnings-per-Share” program attracts good employees and raises the level of service that customers receive was too remote to consider). These two decisions were fully explored in the Order of May 29, 2012. No purpose would be served in granting rehearing on this issue.

BSC Annual Incentive Compensation (pp. 84-88 of the Order).

ComEd contends on page 30 of its Application that the Order erroneously concludes that Section 16-108.5 of the Public Utilities Act (specifically, 220 ILCS 5/16-108.5(c)(4)(A)) applies to affiliates. This is incorrect. The Order finds that because ratepayers were paying the BSC-related expense, ratepayers are entitled to proof that this portion of BSC’s charges is being prudently incurred. It concluded that this record lacks such proof. ComEd’s argument on this issue does not address what was contained in the Order. No purpose would be served in granting rehearing on this issue.

Advanced Cap on Incentive Compensation Costs (pp. 91-92 of the Order).

On page 31 of ComEd’s Application, it argues that it should not be required to present evidence establishing what its employees do to achieve the statutory performance metrics. Apparently, ComEd’s opinion is that evidence is not necessary at an evidentiary hearing. This argument is groundless.

Perquisites and Awards (p. 95 of the Order).

ComEd correctly points out that the Order of May 29, 2012, did not require ComEd to amend App. 7 of the formula rate template. The Order should have required ComEd to do so. However, this is a ministerial mistake that can be addressed in an amendatory order. It is a scrivener’s error, not a ruling on a substantive issue. An amendatory order will be forthcoming addressing this very minor error.

ComEd also argues that four-year normalization of the perquisites and awards that ComEd employees receive is not necessary. However, as the May 29, 2012 Order points out, normalization provides a disincentive to increase discretionary spending at the ratepayers' expense, as it lessens the impact of discretionary spending regarding company "perks" and awards upon rates.

Charitable Contributions (pp. 95-99 of the Order).

ComEd argues on page 32 of its Application that the conclusion in the final Order of May 29, 2012, disallowing a charitable contribution to a university outside of ComEd's service territory (Wisconsin) is wrong because ratepayers receive a direct benefit from that contribution. However, ComEd does not state what that direct benefit is for rate payers. Nor is it obvious, as the university in question, the University of Wisconsin, is not in ComEd's service territory. This argument is meritless.

ComEd also argues that the Order errs in ordering a rulemaking setting standards for charitable contributions because a rulemaking is, according to ComEd, unwarranted and burdensome. However, it appears that including charitable contributions in rates is an unusual practice. (See, Order of May 29, 2012, at 99). Additionally, the fact that ComEd considers the contribution in question to be beneficial to ratepayers is indicia that standards are needed with regard to this issue.

Compliance with Previous Commission Orders/Studies Submitted Pursuant to the 2010 Rate Case Order (pp. 139-143 of the Order).

On page 34 of its Application, ComEd claims that the Order incorrectly requires it to comply with the language in the final Order in its last rate case, Docket 10-0467. According to ComEd, the record shows that it presented various studies and additional "data." The Order makes it clear however, that this simply is not the case.

Rate Design (pp. 145-46 of the Order).

On pages 34-35 of its Application, ComEd argues that the Order errs in adopting Staff's rate design proposal that only 50% of fixed costs for the Residential and Watt-Hour classes will be recovered through fixed charges. In support, ComEd states that it presented evidence establishing that Staff's argument had been waived. This is not correct. Waiver was an issue that was discussed in the Administrative Law Judge's Proposed Order, but it was not raised by ComEd. Additionally, the Commission determined that this issue had not been waived. No new facts or laws have been presented. Rehearing is not warranted.

The IIEC's Argument that ComEd's Tariffs are too Detailed (pp. 150- 153 of the Order).

On page 36 of its Application, ComEd takes issue with the finding in the Order that ComEd did not mention this issue in its Opening Brief and therefore waived its right to address it. According to ComEd, this issue was mentioned in its Opening Brief, just in the wrong area of the brief. However, ComEd does not state where it was discussed in ComEd's Opening Brief. If this issue was mentioned in that brief, it would be a simple matter to state where it was discussed. This argument does not aid ComEd.

Access to Information Regarding Formula Rate Filing (pp. 155-156 of the Order).

On pages 36-37 of its Application, ComEd argues that it should not be ordered to comply with Parts 285 and 286 because it complies with Parts 285 and 286. It is difficult to see why this is an issue because all the Order did was make sure that ComEd would comply with Commission regulations.

ComEd also argues that it should not be required to file a petition. According to ComEd, this is contrary to the requisites in Section 16-108.5 and it is burdensome. However, there is nothing in this statute stating that petitions should not be filed. Additionally, this novel argument overlooks the fact that most litigation, whether here, in the courts, or in other agencies, is instigated with a petition or a complaint. It is difficult to imagine that what is done in routine matters, *e.g.*, collection cases, is burdensome in a matter that sets rates. This argument circumvents basic legal requisites.

Technical Corrections

Finally, ComEd cited two technical errors in the form of incorrect mathematic application of the conclusions in the Order. (See, Application at 37-38). It points to no specific place where the alleged mathematical errors can be defined or quantified. The record has been scoured in order to address these allegations and no erroneous mathematical application has been detected.²

Accordingly, we recommend denying ComEd's Application for Rehearing.

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² Therein, ComEd also cites faulty tabbing in the Appendix to the Order. This matter is too petty to even be considered a mistake.