

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

COMMONWEALTH EDISON COMPANY	:	
	:	No. 13-0318
Annual formula rate update and revenue	:	
requirement reconciliation under	:	
Section 16-108.5 of the Public Utilities Act	:	
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PEOPLE <i>ex rel.</i> MADIGAN, Attorney General	:	
of the State of Illinois,	:	
Complainant,	:	No. 13-0511
v.	:	
COMMONWEALTH EDISON COMPANY,	:	
Respondent.	:	
Complaint to investigate and modify the	:	
Formula Rate Tariff established under	:	
Section 16-108.5 of the Act	:	

**COMMONWEALTH EDISON COMPANY’S  
OBJECTION TO THE ATTORNEY GENERAL’S  
MOTIONS TO CONSOLIDATE DOCKET NOS. 13-0318 AND 13-0511**

Commonwealth Edison Company (“ComEd”) objects to the Motions of the Illinois Attorney General (“AG”) to consolidate ComEd’s pending rate year 2014 Annual Formula Rate Update and Revenue Requirement Reconciliation proceeding (“FRU”) with the AG’s newly-filed Complaint (“Complaint”) to “investigate and modify the Formula Rate Tariff established under Section 16-108.5(c) of the Act” (the “Act” or “PUA”).<sup>1</sup>

These two dockets have distinct purposes and few, if any, common issues. Indeed, the Complaint raises issues barred by law from being addressed in the FRU. Also, the Complaint and FRU also are at such disparate stages that consolidation would deny ComEd fundamental

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<sup>1</sup> The Motions have differing prefatory sections, but identical arguments. Citations herein are to the Motion filed in the lower-numbered Docket No. 13-0318.

procedural rights and obstruct development of a clear record for the Illinois Commerce Commission (“Commission”). The Motions to Consolidate should, therefore, be denied.

## **I. THE LEGAL STANDARD**

Section 200.600 of the Commission’s Rules of Practice authorize “two or more proceedings involving a similar question of law or fact to be consolidated where rights of the parties or the public interest will not be prejudiced by such procedure.” 83 Ill. Admin. Code § 200.600. *See also* 735 ILCS 5/2-1006 (“actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right”).

Where common issues and facts do not predominate or where a single proceeding is impractical or prejudices an objecting party, consolidation is improper. *E.g., Lake Co. Forest Preserve Dist. v. Keefe*, 53 Ill. App. 3d 736 (2<sup>nd</sup> Dist. 1977) (consolidation of claims involving same parties and subject matter improper, where evidence was different); *Lowe v. Norfolk & W. Ry. Co.*, 124 Ill. App. 3d 80, 99-105 (5<sup>th</sup> Dist. 1984) (consolidation was improper where objecting party was prejudiced). *See also Banacki v. OneWest Bank, FSB*, 276 F.R.D. 567, 572-73 (E.D. Mich. 2011) (applying similar federal “common question of law or fact” standard and denying motion to consolidate because “considerations of judicial economy [were] outweighed by the risks of unfair prejudice and confusion”); *Transeastern Shipping Corp. v. India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971) (denying motion to consolidate on “the eve of trial” where other case was not ready for trial).

## **II. THE MOTIONS FAIL THE BASIC LEGAL STANDARD**

The AG claims these dockets “involve identical questions of fact and law.” Motion, ¶ 12. The AG errs. The FRU and the Complaint are legally distinct and present few common factual issues, and none are properly in both cases.

Docket 13-0318 is ComEd's annual FRU for rate year 2014. It is a statutory proceeding, under Section 16-108.5(d) of the Act. Its purpose is to "evaluate the prudence and reasonableness of the costs incurred by the utility to be recovered during the applicable rate year that are reflected in the inputs to the performance-based formula rate derived from the utility's FERC Form 1." 220 ILCS 5/16-108.5(d). The FRU does not deal with questions of what the rate formula should be, and ComEd requests no change to its rate formula in its Petition initiating the FRU. In contrast, Section 16-108.5(c) mandates that:

Subsequent changes to the performance-based formula rate structure or protocols shall be made as set forth in Section 9-201 of this Act.

220 ILCS 5/16-108.5(c). In keeping with that dictate, after it was first established in Docket No. 11-0721, even housekeeping changes to the formula have been proposed and made in Article IX filings separate from any FRU.

PA 98-0015 did require that clarifying changes be made to the rate formula<sup>2</sup> that, like the formula itself, will be applicable to FRU dockets. But, those changes are not the subject of any FRU. In fact, they were submitted, proposed and implemented outside the FRU, as required by law. PA 98-0015 required ComEd to file with the Commission, separately from the ongoing FRU, corrected tariffs, spreadsheets, and informational sheets setting forth the rate formula. The Commission, after review as also provided by law, approved ComEd's filing, finding that the "proposed [rate formula] tariff changes are found to be in compliance with Public Act 98-15." *Illinois Commerce Comm'n*, ICC Docket No. 13-0386 (Order, June 5, 2013). ComEd's Amended Petition in the FRU confirmed that, stating (at ¶ 8) that:

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<sup>2</sup> Those changes included: (1) using a utility's "year-end" capital structure specified in ComEd's FERC Form 1; (2) measurement of a utility's actual rate base investments "using a year-end rate base" as reported in the FERC Form 1; (3) interest rate applicable to the delay in recovering (or refunding) participating utilities' reconciliation balances; and (4) quantifying a utility's pension asset. *Id.*

While the review and approval of those revisions are not part of this proceeding, upon their approval, the revised tariff and rate formula will among other things govern how the 2014 Rate Year Net Revenue Requirement, and (subject to future amendment) all subsequent revenue requirements under EIMA formula ratemaking, will be determined.

The Complaint, in contrast, challenges no data or formula inputs at issue in the FRU, but states plainly that it seeks to “investigate and modify the revised formula rate tariff filed by [ComEd] on May 30, 2013 in ICC Docket No. 13-0386 in response to the General Assembly’s enactment of Public Act 98-0015.” Complaint, p.1 (internal abbreviations omitted). The Complaint underscores that fact by attaching and repeatedly pointing to the mathematical calculations it challenges. *Id.*, Exs. 1 – 7 (all being pages of the formula spreadsheet).<sup>3</sup>

Similarly, no parallel issues of fact justify granting the Motions. The factual disputes in the FRU largely concern rate case expenses, expert witness and consultant costs, incentive compensation, ESSPs, measurement of pension expense and payroll taxes, accounting for vacation pay, jurisdictional allocation study methodology, and billing determinants, to name a few. Should the AG claim that there are similar questions of fact because AG witnesses attempted to raise the same formula issues, ComEd has already responded to that testimony by pointing out that those positions are efforts to change the applicable formula, which is relief not permitted in the FRU.<sup>4</sup> The AG, as explained in more detail below, cannot bootstrap challenges to the rate formula itself the FRU by improperly mentioning them in testimony and then pointing to that testimony as grounds for consolidation.

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<sup>3</sup> The Complaint erroneously describes these attachments as tariffs. They are not. They are rate formula spreadsheets that present the approved rate formula mathematically. They are filed and subject to Article IX challenge, but under the Commission’s decisions are authorized by tariffs, and filed with the Commission, but are technically not tariffs.

<sup>4</sup> The AG wrongly claims the Complaint and the FRU “involve evaluation of the reasonableness and lawfulness of three particular accounting adjustments.” 13-0138 Motion at 6. But, they do not. The *lawfulness* of each the three formula elements that are the subject of the Complaint, are not the same as the “prudence and reasonableness” of ComEd’s cost data that is the subject of the FRU.

Finally, ComEd notes that these same points – that formula challenges are distinct from FRU issues, and cannot be raised in an FRU case – were made by Staff in ComEd’s last FRU, *Commonwealth Edison Co.*, ICC Docket No. 12-0321. There, Staff witness Jones testified that formula changes, even when non-substantive and agreed, cannot be made in FRU proceedings because “changes to the formula rate structure cannot be considered in an annual update filing/reconciliation proceeding.” *Id.*, Staff Ex. 6.0, 10:192-94. Staff’s Brief confirmed Ms. Jones’ understanding and cited the same statutory prohibition that ComEd cites in the section above. *Id.*, Staff Init. Br. at 33-34. The Commission Order (at 83) accepted that procedure.

In short, the AG cannot claim that legal and factual questions concerning the formula itself are “identical” to legal and factual questions about the update when the law itself provides those questions are not only distinct but also immiscible.

### **III. THE MOTIONS ARE AN UNLAWFUL ATTEMPT TO EVADE THE PUA**

The separation between the FRU and the requests to change the formula is more than simply a difference in the factual and legal questions. The PUA actually prohibits the Commission in an FRU case from even considering changes to the formula. It states that:

The Commission shall not, however, have the authority in a [FRU] proceeding under this subsection (d) to consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of this Section.

220 ILCS 5/16-108.5(d) (emphasis added).

The Motions request the Commission do exactly what the law expressly prohibits – that the Commission “modify” three portions of the rate formula – interest on reconciliation balance, calculation of return on equity (“ROE”) collar, and tax treatment of interest on reconciliation balance in formula rate tariff – that comprise “the revised formula rate tariff filed by [ComEd].” Complaint at 1. If the Motions were granted, the effect would be to merge into the FRU the

Complaint's requests to modify the approved rate formula. That flies in the face of the unqualified statement in Section 16-108.5(d) that the Commission in an FRU case has no "authority ... to consider or order any changes to the structure or protocols of the performance-based formula rate ...." Nothing in the PUA, before or after PA 98-0015, makes any exception to the prohibition on considering or ordering "any changes to the structure or protocols of the performance-based formula rate" in the FRU for consolidation.

On top of the specific prohibition in the Act, Illinois law is generally clear that consolidation cannot be used as a means to circumvent a right or requirement to have cases or issues considered separately. *Stancato v. Chicago Business Men's Racing Ass'n*, 246 Ill. App. 464, 466 (1<sup>st</sup> Dist. 1927). The AG's own testimony emphasizes that this is purpose of the Motions. Veteran AG witness David Effron addresses the approved formula used to calculate the ROE Collar, one of the issues in the Complaint, but does not defend that formula challenge as being properly part of the FRU. Instead, his testimony bluntly states:

**Q. Do you have a response to Ms. Brinkman's testimony that your "position is inconsistent with the approved formula"?**

A. Yes. AG counsel has advised me that on September 5, 2013, a complaint was filed with the Commission seeking resolution of certain issues that the Company has labeled "inconsistent with the approved formula," including the use of an average rate base in the ROE collar calculation. The Commission has assigned this complaint to ICC Docket No. 13-0511. I have further been advised by counsel that a motion seeking to consolidate 13-0511 with this docket is currently before the ALJ.

Effron Reb., AG Ex. 4.0, 7:149-56 (internal citations omitted). Similarly, when asked about "Ms. Brinkman's testimony that the recently approved formula template defines how the reconciliation interest is calculated" (an issue in the Complaint), AG witness Brosch responded not with testimony claiming that the rate formula can be changed in an FRU, but instead claimed

that “a complaint proceeding has been initiated to provide an opportunity for consideration of further changes to the template ....” Brosch Reb., AG Ex. 3.0, 14:285-86, 292-94.

The attempt to misuse “consolidation” to evade mandatory jurisdictional or subject matter separation is apparently rare; few attempts are reported outside of prosecutors’ efforts to consolidate prejudicial criminal counts with more innocuous ones. But where attempted, the tactic is uniformly condemned. *E.g.*, *Hanlon & White Assoc’s v. Schultz*, 467 N.Y.S.2d 23, 23 (S. Ct. 1983) (bar on counterclaims in summary proceeding “may not be circumvented by the commencement of this independent, separate action ... and the consolidation with it of the summary proceeding); *107-48 Queens Blvd. Holding Corp. v. ABC Brokerage*, 656 N.Y.S.2d 691 (App. Div. 1997) (contractual bar on claims “may not be circumvented by consolidating ....”); *Moe G. Enterprises, LLC v. Fontana*, 2011 U.S. Dist. LEXIS 2940 (W.D. Pa. 2011) (rejecting “attempt to circumvent the well-pleaded complaint rule by filing a separate lawsuit ... and then moving to consolidate the two actions.”) As did the Illinois Supreme Court in rejecting an attempt to consolidate chancery and partition claims where the “the subject matter of those proceedings ... could scarcely have been properly joined” to begin with, *Blyman v. Shelby Loan & Trust Co.*, 382 Ill. 415, 419 (1943), the Commission should reject the AG’s Motions to consolidate an annual formula rate update proceeding with a complaint about the rate formula.

**IV. CONSOLIDATION WOULD PREJUDICE COMED AND CONFOUND EFFORTS TO COMPILE A CLEAR RECORD FOR DECISION**

Section 200.600 authorizes consolidation only “where rights of the parties ... *will not be prejudiced* by such procedure.” 83 Ill. Adm. Code 200.600 (emphasis added). Here, consolidation *will prejudice* ComEd.

In the FRU, the ALJs approved a schedule to which all parties, including the AG, agreed. It included five rounds of testimony. Four are already complete, and the last testimonies (limited

to rebutting testimony already filed) will be filed by ComEd one business day after these Motions are fully briefed. So far, 19 witnesses have filed 37 testimonies (excluding errata) addressing contested issues. Discovery, which has encompassed a huge range of issues, is all but over. Evidentiary hearings are less than two weeks away.

The Complaint, in contrast, was filed less than two weeks ago, over four months after the FRU started and almost exactly three months after the Commission approved the current rate formula. The initial status hearing has not occurred, and the time for ComEd to answer or otherwise plead has not been set, let alone arrived. ComEd believes the Complaint suffers from serious legal flaws, but no schedule has been set for those issues to be addressed. Forcing ComEd to litigate the Complaint in the framework of an FRU docket on the eve of trial would deny ComEd the right to contest before hearing the legal sufficiency of the Complaint, to conduct discovery on the Complaint, and to defend against the Complaint as an Article IX complaint.<sup>5</sup>

Finally, any issue of “lateness” is a problem of the AG’s own doing. ComEd made no secret that it intended to follow the law separating the FRU and formula issues. The AG also had every opportunity to raise its Article IX rate formula claims months ago, when it decided not to intervene in Docket No. 13-0386, where it could have sought rehearing or even appealed the Commission’s approval of ComEd’s rate formula. ComEd provided the AG with a copy of the filing in Docket No. 13-0386, and filed FRU testimony and schedules applying what became the approved formula on May 31, some three and one half months ago. The prejudice that ComEd

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<sup>5</sup> As noted above, the AG did try to inject into the FRU issues similar to those it now seeks to raise in the Complaint. But, as ComEd pointed out, that attempt is contravened by Section 16-108(d). The fact that ComEd filed responsive testimony in the FRU emphasizing the *impropriety* of the AG’s actions does not deprive ComEd of the right to contest fully the Article IX complaint when it is filed.

will suffer should consolidation be granted is all the more acute because it is largely a function of the AG's own decision to not challenge the formula when it was filed and approved.

**V. CONCLUSION**

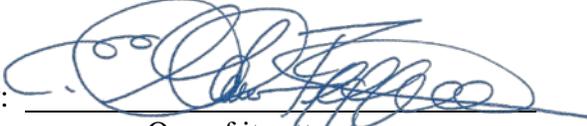
The Complaint improperly raises issues statutorily barred from inclusion in this proceeding and challenges the validity of elements comprising the structure of ComEd's performance-based formula rate tariff already approved by the Commission. The Motions also ignore the plain letter of the law, arguing that "common issues" exist, when they do not, and when inclusion would unfairly prejudice parties to this proceeding.

WHEREFORE, for all of the reasons set forth, Commonwealth Edison Company requests that the Commission deny the Illinois Attorney General's Motions to Consolidate.

Dated: September 17, 2013

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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