

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>COMMONWEALTH EDISON COMPANY</b>	)	
	)	
<b>Annual formula rate update and revenue requirement reconciliation under Section 16-108.5 of the Public Utilities Act.</b>	)	<b>Docket No. 13-0318</b>
	)	

**REPLY OF THE PEOPLE OF THE STATE OF ILLINOIS TO  
COM ED AND STAFF’S RESPONSES TO THE PEOPLE’S MOTION TO  
CONSOLIDATE**

The People of the State of Illinois (the “People”), by and through the Attorney General (“AG”), pursuant to 83 Ill. Adm. Code 200.190, hereby file this Reply to the Responses of Commonwealth Edison Company (“ComEd” or the “Company”) and the Staff of the Illinois Commerce Commission (“Staff”) to the People’s Motion to Consolidate (i) ComEd’s pending annual electric formula rate update filing, Docket No. 13-0318, with (ii) the Complaint filed by the People of the State of Illinois to investigate and modify the Formula Rate Tariff established under sections 16-108.5(c) of the Public Utilities Act (“PUA”), Docket No. 13-0511 (the “AG Complaint”), pursuant to section 200.600 of the Commission rules.

As discussed below, ComEd’s Response misstates the applicable law related to consolidation, wrongly asserts the two dockets share no common issues of fact and law and improperly argues that the People’s motions seek to evade provisions of the PUA. Contrary to ComEd’s misstatements, consolidation of these two cases will achieve administrative efficiency and is appropriate and allowable under both the PUA and the Commission’s broad rules governing consolidation, a position with which the Commission Staff concurs. Staff Response at 5. In addition, the Company’s claims that it will be prejudiced by consolidation ring hollow. In

fact, all of the evidence necessary for the Commission’s investigation in Docket No. 13-0511 already exists within ComEd’s formula rate docket, Docket No. 13-0318. ComEd simply fails to supply any evidence or credible argument that its interest would be prejudiced by consolidation of these two dockets. As discussed further below, the AG request for consolidation of the two dockets should be granted.

**I. CONSOLIDATION IS AUTHORIZED UNDER BOTH COMMISSION RULES AND ILLINOIS LAW, AND IS APPROPRIATE.**

ComEd raises the baseless argument that the Formula Rate Update (“FRU”) being investigated in Docket No. 13-0318 and the People’s Complaint are “legally distinct and present few common factual issues.” ComEd Response at 2. This argument is easily defeated, however, by both the facts and law at issue in each docket.

First, the issues of law and fact are identical in both dockets, notwithstanding that the 13-0318 docket includes *additional* issues outside of the three rate-related issues raised in the AG Complaint in Docket No. 13-0511. ComEd’s pending formula rate case, Docket No. 13-0318, and the AG Complaint both involve a Commission assessment of the just and reasonable rates to be collected as of January 1, 2014. In particular, both cases involve evaluation of the reasonableness and lawfulness of various accounting treatments, with the complaint merely providing the legal framework and tariff structure for the implementation of the adjustments discussed in the pending formula rate case.

More specifically, both cases involve the question of whether the text of P.A. 98-0015 authorized i) an adjustment to the weighted average cost of capital interest rate to gross it up for taxes, increasing the interest rate from the 6.91% weighted average cost of capital interest rate to 9.67%. and (ii) an unauthorized change to the calculation of the return on equity “collar” specified in Section 16-108.5(c)(5) of the Act. In addition, both dockets will examine whether a

“net-of-tax” adjustment to the reconciliation balance should be made before calculating the interest amount.

The ROE collar adjustment proposed in the Complaint to change the formula structure has been raised and thoroughly discussed in Docket 13-0318 through the Direct and Rebuttal testimonies of David J. Effron and Michael L. Brosch, and responded to in ComEd’s Rebuttal filed by ComEd witnesses Ross Hemphill and Christine Brinkman. *See* AG Ex. 2.0 at 11-14; AG Ex. 4.0 at 7-8; ComEd Ex. 12.0 at 3-9; ComEd Ex. 13.0 at 4-8. ComEd will also be filing on September 23, 2013, Surrebuttal testimony responding to the adjustments at issue. The AG Motion for Consolidation would ensure that that same testimony is fully incorporated into the 13-0511 docket.

The proposed change eliminating ComEd’s “gross-up” for taxes on the reconciliation interest rate adjustment has also been thoroughly discussed in pre-filed testimony in Docket No. 13-0318 by AG accounting witnesses Effron and Brosch in direct and rebuttal filings. *See* AG Ex. 1.0 at 13-18; AG Ex. 3.0 at 9-12. ComEd has responded to that testimony in rebuttal testimony. Com Ed Ex. 12.0 at 3-9; ComEd Ex. 13.0 at 4-6, 8-9. Again, the Company will also have the opportunity on September 23, 2013 to file surrebuttal testimony on the three issues.

The proposed adjustment to apply interest only to a net-of-tax reconciliation balance has also been thoroughly discussed in pre-filed testimony in Docket No. 13-0318 by AG witnesses Effron and Brosch in direct and rebuttal testimony, and by ComEd witnesses in rebuttal testimony. *See* AG Ex. 1.0 at 18-26; AG Ex. 2.0 at 14-18; AG Ex. 3.0 at 12-22; AG Ex. 4.0 at 8-11; ComEd Ex. 12.0 at 3-9; ComEd Ex. 13.0 at 4-6, 9-13. ComEd’s surrebuttal testimony related to this issue will likewise be filed in a few days.

If not consolidated, the People would need to move to incorporate this same evidence filed in Docket No. 13-0318 and introduce it wholesale into the AG Complaint docket. This sort of duplication is both inefficient and unnecessary. In addition, cross-examination of the evidence related to these three issues is scheduled to occur in Docket No. 13-0318 on September 30 and October 1, 2013. If not consolidated, all of these same witnesses discussing the same three issues verbatim would be required to appear again in Docket No. 13-0511.

In addition, Section 16-108.5 of the Act specifically envisions the likelihood that changes to a formula rate tariff may be necessary, as evidenced in Section 16-108.5(c), which specifically provides that the formula rate provisions of the Act are “not intended to limit the Commission’s authority under Article IX and other provisions of this Act to initiate an investigation of a participating utility’s performance-based formula rate tariff”. 220 ILCS 5/16-108.5(c). The AG Complaint was filed under Sections 9-101, 9-250 and 16-108.5 of the PUA and seeks review of the Company’s tariff filing as approved by the Commission on June 5, 2013, as well as review of the tariff revisions which are the subject of AG witnesses’ testimony in Docket 13-0318. Consolidation is not only appropriate, but administrative efficiency demands consolidation because both dockets are “of the same nature, arise from the same acts, involve the same issue and depend on the same evidence.” *La Salle National Bank v. Helry Corp.*, 136 Ill.App.3d 897, 905, 483 N.E.2d 958, 963–64 (1985). In the absence of consolidation, the Commission may be limited in its ability to adopt the adjustments it concludes are necessary in Docket 13-0318 and ensure that the new rates that take effect on January 1, 2014 reflect reasonable and prudent utility costs, as required under EIMA. 220 ILCS 5/16-108.5(d). Consolidation thus serves the Commission’s interest in approving rates that are truly “just and reasonable.”

ComEd further states that “even housekeeping changes to the formula have been proposed and made in Article IX filings separate from any FRU”, and notes that the changes to the tariff engendered by PA 98-0015 “were submitted, proposed and implemented outside the FRU.” ComEd Response at 3. Those statements while true, do not support ComEd’s claim that consolidation is not in order. In fact, ComEd itself recognized the inextricable link between its May 30, 2013 filing enacting changes in law triggered by PA 98-0115 and Docket No. 13-0318. On May 31, 2013, ComEd filed *in Docket No. 13-0318*, its “Amended Verified Petition” which presented the revised tariff and rate formula that was filed in response to PA 98-0015. In doing so, the Company acknowledged the necessity of considering and, indeed, incorporating those changes within the revenue requirement being examined in the 13-0318 FRU proceeding. The Company stated in its Amended Petition, that upon approval, those revisions:

...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. In particular, this proceeding will implement and be subject to the requirements of PA 98-0015 insofar as they affect the revenue requirements for rate years 2012 and 2014.

9. Along with this Amended Petition, ComEd submits the updated cost and other data required by its rate formula and EIMA, as they have each been amended by PA 98-0015, in order to establish charges correctly for Rate Year 2014. That information is presented in testimony (including five revised testimonies submitted with this Amended Petition), schedules (original and revised), and other exhibits (original and revised) to be offered into evidence as well as in other informational submissions called for by the Commission’s Rules and orders.

ComEd Amended Petition at 4 (*italics added*). As noted above, ComEd filed updated testimony from numerous witnesses incorporating the changes engendered by PA 98-0015 and specifically acknowledged the relevance and, indeed, the necessity of incorporating these changes within the 13-0318 FRU proceeding. Similarly, the AG Complaint – which merely offers the changes that

the People believe must be incorporated to accurately reflect the changes triggered by PA 98-0015 and ensure just and reasonable rates – should be incorporated within the record of Docket No. 13-0318. For ComEd to now assert that the AG Complaint “challenges no data or formula inputs at issue in the FRU<sup>1</sup>” or that “no parallel issues of fact justify granting the Motion<sup>2</sup>” in light of its May 31, 2013 filings in the 13-0318 FRU docket is disingenuous at best. Indeed, ComEd’s statements in its Amended Petition filed in Docket 13-0318 relative to formula rate tariff changes, on the one hand, and its Response to the AG request for consolidation of Dockets 13-0318 and 13-0511, on the other hand, ask the Commission to endorse one set of rules for ComEd and another for parties seeking changes to tariff structure. The Commission should reject that call to game the regulatory system.

It should be noted, too, that consolidation of Docket No. 13-0386 (which implemented the PA 98-0015 changes) with Docket No. 13-0318 would have made no sense, given the requirement in Section 16-108.5(k)(1) that “[t]he Commission shall enter a final order approving such (PA 98-0015) tariff changes and revised revenue requirement within 21 days after the participating utility's filing.” 220 ILCS 5/16-108.5(k)(1). In the instant cases, however, both the FRU investigation in Docket No. 13-0318 and the AG Complaint seek to establish new rates for ComEd customers that will take effect on January 1, 2014. Consolidation of these two matters would expedite the resolution of both of these dockets, conserve the Commission’s time, avoid duplicating efforts or inconsistent results, and save unnecessary expenses. *See Peck v. Peck*, 16 Ill.2d 268, 276, 157 N.E.2d 249, 255 (1959).

**II. THE PEOPLE’S MOTION IS NOT AN ATTEMPT TO EVADE THE PUA.**

---

<sup>1</sup> ComEd Response at 4.

<sup>2</sup> *Id.*

ComEd complains that the People's request to consolidate Docket Nos. 13-0318 and 13-0511 amounts to a request that the Commission conduct investigations that are prohibited by the PUA. ComEd Response at 5-6. This argument, as demonstrated below, is thwarted by the provisions of the Act itself.

First, Section 16-108.5(c) specifically provides that it is "not intended to limit the Commission's authority under Article IX and other provisions of this Act to initiate an investigation of a participating utility's performance-based formula rate tariff" provided that "new rates take effect no less than 30 days after the date on which the Commission issues an order adopting the change." 220 ILCS 5/16-108.5(c). This provision specifically recognizes the possibility that the Commission and other parties (and the utilities themselves) may propose changes to the formula rate tariff originally approved in Docket No. 11-0721 and modified in Docket No. 13-0386. The General Assembly's only limitation on the right to offer changes to the formula rate tariff under Article IX provisions relates to the timing of when those new rates shall take effect, as found in the 30-day notice requirement referenced above. The Staff Response concurs on this point. Staff Response at 3.

Moreover, consolidation of these two dockets does not render meaningless the provision in Section 16-108.5(d) prohibiting consideration or ordering of changes to the formula rate structure or protocols in a FRU proceeding, as ComEd suggests. Consolidation merely provides the Commission the ability to consider the Article IX tariff changes in light of the evidence already presented in Docket 13-0318, should it conclude, as ComEd posits, that the FRU investigation does not permit changes to be made in the pending formula rate investigation, and do so in a manner that efficiently incorporates identical evidence.

ComEd's citation to AG witness Effron's and Brosch's rebuttal testimony as evidence that the motions are merely an attempt to evade the PUA requirements is similarly off-base. The quotations cited at page 6 and 7 of their Response merely reflect a recital of actions taken by the AG's office since the filing of ComEd's rebuttal, and reflect a non-attorney witness' attempt to avoid commenting on legal issues better left for attorneys and briefs.

The Company's citation to three cases that ComEd implies support their arguments against consolidation are likewise unavailing. The New York *Hanlon and White Associates, Inc. v. Schultz*, 467 N.Y.S.2d 23 (S. Ct. 1983), case cited by ComEd involved a provision in a lease prohibiting a tenant from enforcing any claim against a landlord in a suit brought by the landlord for payment of rent. The Court held that that provision barred the tenant from obtaining an order consolidating the tenant's action for breach of lease with a landlord's summary proceeding for nonpayment of rent. That case is distinguishable because, unlike the proceedings at issue in the AG's motion, the tenant's claim involved different testimony and evidence than a landlord's nonpayment-of-rent claim.

ComEd also cites *Queens Blvd. Holding Corp. v. ABC Brokerage Inc.*, 656 N.Y.S.2d 691 (App. Div. 1997), as support for its argument against consolidation. This case is also readily distinguishable because the court in *Queens Blvd.* was not directly dealing with a consolidation issue. Rather, the court reviewed the terms of a lease agreement which prohibited interposing counterclaims for nonpayment of that lease with damages for breach of lease. *Queens Blvd. Holding Corp.*, 656 N.Y.S.2d at 691. The appellant sought to circumvent the lease agreement by consolidating the two claims. *Id.* The court held that this was an improper end-run around the

terms of the lease. *Id.* Based on the irrelevant fact patterns and inapposite discussion of law in *Queens Blvd.*, it should be given no weight.<sup>3</sup>

As noted in the AG Motion, the point of consolidation under Illinois law is to expedite the resolution of lawsuits, conserve the court's time, avoid duplicating efforts, and save unnecessary expenses. AG Motion to Consolidate at 5, *citing Peck*, 16 Ill.2d at 276.

Consolidation is proper where the cases are of the same nature, arise from the same acts, involve the same issue and depend on the same evidence. *La Salle National Bank v. Helry Corp.*, 136 Ill.App.3d 897, 905, 483 N.E.2d 958, 963–64 (1985). Consolidation by the Commission of these two proceedings, which clearly arise from and involve identical evidence, witness testimony and statutory law, satisfies this legal standard. ComEd's claim that the AG is trying to circumvent statutory prohibitions should be rejected.

### **III. COMED WOULD NOT BE PREJUDICED BY CONSOLIDATION.**

In its Response, the Company protests that they are prejudiced because the People filed the Complaint in Docket 13-0511 and the motions to consolidate “on the eve of trial.” ComEd Response at 8. ComEd claims consolidation 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. “ *Id.* These arguments both ring hollow and, in fact, prove the point of consolidation.

---

<sup>3</sup> Both other cases cited by ComEd at page 7 of their Response are equally inapposite or irrelevant. The *Moe G. Enterprises, LLC v. Fontana*, 2011 U.S. Dist. LEXIS 2940 (W.D.Pa. 2011) case has no precedential value because it is not reported. In addition, the motion to consolidate at issue was moot, as the court had no original jurisdiction. *Moe G. Enterprises*, 2011 U.S. Dist LEXIS 2940. In *Blyman v. Shelby Loan & Trust Co.*, 382 Ill. 415 (1943), the Court, in *dicta*, ruled that “subject matter of those proceedings and that of appellants' complaint here for partition could scarcely have been properly joined in a single complaint in chancery. They call for inconsistent remedies and the chancellor did not err in refusing to permit the consolidation.” *Blyman*, 382 Ill. at 419.

Because, as discussed above, the issues and evidence on the three issues raised in the Complaint are literally identical in both dockets, the record is close to complete on these issues. ComEd's claims that it has not had the ability to do discovery or respond to the issues raised in the Complaint is simply not true. The People, in their Complaint, raised no new issues that were not present in the FRU 13-0318 docket. The Company and other intervenors have had sufficient time in the FRU docket to forward discovery questions and respond to the issues through written testimony. That investigation and response is nearly complete, save for hearings and briefing.

ComEd's claim that it has not had an opportunity to "contest before hearing the legal sufficiency of the Complaint" is equally flawed. ComEd made clear its legal position that changes to the formula rate tariff cannot be made in the existing FRU docket in rebuttal and surrebuttal testimony. The Company also discussed the factual, accounting reasons why it believes the changes recommended by AG witnesses Efron and Brosch should not be adopted by the Commission. Less than three weeks later, the People filed their Complaint seeking the formula rate tariff changes at issue. The People provided more than sufficient notice to all involved parties of the proposed change to the formula and rates under both Part 200.530 of the Commission's rules and Section 16-108.5(c)(6)<sup>4</sup>. Staff concurs on that point, noting that "given that the issues to be addressed in Docket 13-0511 were raised by the AG well in advance of the scheduled hearings in this matter, the interested parties have received sufficient constructive notice of the issues such that the Commission's notice requirements under Part 200.530 have been satisfied." Staff Response at 6. If ComEd believed that the changes recommended by AG witnesses Brosch and Efron were truly unlawful, the Company had the opportunity to file a

---

<sup>4</sup> That Section provides, "Any change ordered by the Commission shall be made at the same time new rates take effect...provided the new rates take effect no less than 30 days after the date on which the Commission issues an order adopting the change." 220 ILCS 5/16-108.5(c)(6).

motion to strike the testimony in Docket No. 13-0318. The deadline established in the schedule of Docket No. 13-0318 for filing such motions has passed.<sup>5</sup> The Company took no such action.

As for filing a response in the 13-0511 Complaint, ComEd is free to do so, but has not to date. Given the relief requested in the Complaint (consolidation and Commission action before the 30-day deadline referenced in Section 16-108.5(c)(6)), ComEd should not be permitted to purposefully delay filing a response and then claim prejudice. Certainly, the Company has the ability to challenge the lawfulness of the Complaint in any post-hearing briefs as well.

Finally, ComEd's claim that the AG Complaint is somehow late in filing given that the changes to the formula rate tariff in response to PA 98-0015 occurred in June are particularly disingenuous. ComEd Response at 8-9. In fact, PA 98-0015, which ComEd played a critical role in drafting, provides in pertinent part:

No earlier than 5 business days after the effective date of ... [PA 98-0015], each participating utility shall file any tariff changes necessary to implement th[at] amendatory language ... and a revised revenue requirement under the participating utility's performance-based formula rate. The Commission shall enter a final order approving such tariff changes and revised revenue requirement within 21 days after the participating utility's filing.

220 ILCS 5/16-108.5(k)(1). Unlike other provisions of the Energy Infrastructure Modernization Act ("EIMA"), this subparagraph makes no reference to Commission investigation of the tariff or provision for hearing. The language providing that "[t]he Commission *shall* enter a final order approving such tariff changes and revised revenue requirement *within 21 days* of the

---

<sup>5</sup> ComEd filed a letter directed to the ALJs and counsel of record in Docket No. 13-0318 at 5 p.m. on September 19, 2013, which stated: "ComEd does oppose certain substantive positions taken by Staff and Intervenors. ComEd may in some cases also have objections to the admissibility of evidence supporting those positions. ComEd may have other objections to evidence, as well. We will make and preserve all such objections at the hearing. We believe this will save all parties time and avoid potentially duplicative effort." If this letter is suggesting that the Company will be ignoring the schedule approved by the ALJs and agreed to by all parties at the outset of the docket relative to the filing of pre-trial motions related to Direct and Rebuttal testimony, and intends to move to strike testimony it opposes at hearing that could have filed prior to hearing, the People will strenuously object.

participating utility's filing" hardly envisions Commission investigation and intervenor participation in a review of the Company's revised formula rate filing. 220 ILCS 5/16-108.5(k)(1). On May 30, 2013, ComEd filed with the Commission revisions to Rate DSPP and the formula rate templates<sup>6</sup> that it asserted reflected the changes approved in PA 98-0015. ("Revised Formula Rate Tariff"). Six days later, the Commission approved the proposed formula rate template tariff and the rates established under the proposed tariff, and the new rates that are now questioned in the AG Complaint took effect on June 6, 2013. Intervenors cannot be faulted for failing to notice or challenge the requested tariff changes given those facts and the regulatory scheme delineated in subsection (k)(1). Nor should the Commission be faulted for approving the tariff given the strictures of the new law, notwithstanding possible inconsistencies with PA 98-0015.

Indeed, the relevant time frame for assessing any alleged "lateness" is the Commission's investigation in Docket No. 13-0318. As noted above, the People filed their Complaint less than three weeks after ComEd claimed the changes to the ComEd-proposed formula rate update and reconciliation revenue requirement identified in AG testimony required changes to the formula rate tariff. As Staff concurs, there was nothing late about that procedure or process. Neither the rights of the People, AIC, Staff, other parties, nor the public interest would be prejudiced by the requested consolidation or change in schedule, contrary to ComEd's claims. Indeed, parties would be prejudiced and unnecessarily burdened in the absence of consolidation.

#### **IV. STAFF'S PROPOSED SCHEDULE**

As Staff recognizes in its Response, the schedules for both dockets can be coordinated for administrative efficiency and to preserve Commission review. Staff's proposal to either (1)

---

<sup>6</sup> ICC Docket No. 13-0386, *Commonwealth Edison Company - Implementation of Section 16-108.5(k) of the Public Utilities Act as it relates to the rates of Commonwealth Edison Company*, Order of June 5, 2013.

consolidate the proceedings for purposes of evidentiary hearings (and admission of evidence related to the three issues) and then sever the two dockets to be followed by an expedited briefing schedule in Docket No. 13-0511; or (2) consolidate the two dockets with no subsequent severance, but still retain the proposed separate briefing schedule are both acceptable to the People. Under either scenario, no parties will be prejudiced by the consolidation of these dockets.

WHEREFORE, the People of the State of Illinois request that the Commission consolidate Dockets 13-0318 and 13-0511.

Respectfully Submitted,

The People of the State of Illinois  
By LISA MADIGAN, Attorney General

\_\_\_\_\_/s\_\_\_\_\_  
Karen Lusson, Sr. Assistant Attorney General  
Timothy S. O'Brien, Assistant Attorney General  
Public Utilities Bureau  
100 West Randolph Street, Floor 11  
Chicago, Illinois 60601  
Telephone: (312) 814-1104  
Fax: (312) 814-3212  
Email: [klusson@atg.state.il.us](mailto:klusson@atg.state.il.us)  
[tobrien@atg.state.il.us](mailto:tobrien@atg.state.il.us)

September 20, 2013