

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

THE PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney General of the)
State of Illinois, Complainant)
) Docket No. 13-0511
Complaint to investigate and modify the)
Formula Rate Tariff established under)
Section 16-108.5 of the Public Utilities Act)
)

**RESPONSE OF THE PEOPLE OF THE STATE OF ILLINOIS TO
COMMONWEALTH EDISON COMPANY’S MOTION TO DISMISS**

The People of the State of Illinois (the “People”), by and through Lisa Madigan, Attorney General of the State of Illinois (“AG”), pursuant to 83 Ill. Admin. Code 200.190, hereby file this Response to Commonwealth Edison Company’s (“ComEd” or the “Company”) Motion to Dismiss the above-captioned proceeding.

This docket was initiated by the People’s Complaint under Sections 9-101, 9-250 and 16-108.5 of the Public Utilities Act (“Act”) to challenge several aspects of Commonwealth Edison’s formula rate tariff as not authorized by law (“the AG Complaint”). In its Motion to Dismiss (“Motion”) the AG Complaint, ComEd misstates the applicable law related to formula rate tariff changes under the Act, the rights of parties to request Commission investigations under Section 9-250 of the Act and the applicability of the doctrine of collateral estoppel to this proceeding. For the reasons discussed below, ComEd’s Motion should be denied.

I. Section 16-108.5(c) Permits Commission Investigation of ComEd’s Formula Rate Tariff, Contrary to ComEd’s Claims

ComEd first claims in its Motion that “nothing in Section 16-108.5 provides that an investigation of a formula rate may be initiated by a party Complainant.” Motion at 4. ComEd further asserts that Section 9-201 – not sections 9-101 and 9-250 – “governs changes to the formula rate” and that “a change to a formula can be challenged only in response to a change initiated by a utility (in a 9-201 proceeding)” or as a result of a formal *Commission-initiated* investigation.” *Id.* ComEd is wrong on both counts.

First, ComEd misstates the limitations placed on challenges to the formula rate authorized by Section 16-108.5(c). ComEd suggests the language “but nothing in this subsection (c) is 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” means that only a Commission-initiated docket, and not any other party’s request for investigation under Section 9-250, as the AG requested, can trigger a formula rate tariff challenge and investigation. *Id.* Both the language of Section 16-108.5(c) and Section 9-250 of the Act contradict that conclusion.

Section 16-108.5(c) specifically states that this subsection is not intended to limit the Commission’s authority under Article IX of the Act. 220 ILCS 5/16-108.5(c). Included within Article IX rate setting provisions is Section 9-250 of the Act. Section 9-250, contrary to ComEd’s claims, does *not* limit investigations of a utility’s rates to proceedings that were initiated by the Commission. Section 9-250 is *the* vehicle provided in the Public Utilities Act to challenge a utility’s tariffs and request an ‘investigation by the Commission of that utility’s rates. Section 9-250 provides:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or

product or commodity, or in connection therewith, or that the rules, regulations, contracts, or practices or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

The Commission shall have power, upon a hearing, had upon its own motion or *upon complaint*, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof.

(Source: P.A. 84-617; 84-1025.)

220 ILCS 5/9-250 (emphasis added). The language of Section 9-250 highlighted above makes clear that Commission investigations of a utility's tariffs and rates can be initiated by a party's complaint under that Section. The AG Complaint appropriately cited Sections 16-108.5, 9-250, and 9-101 as the statutory basis for reviewing ComEd's rates to determine whether they are just and reasonable and asking the Commission to commence the requested investigation. Nothing in Section 16-108.5(c), Section 9-250 or any other Article IX provision supports the ComEd argument that the AG or any other party are somehow prohibited from filing a complaint challenging the formula rate tariff or asking the Commission to investigate the formula rates paid by consumers.

ComEd also cites statutory interpretation caselaw that states "court[s] shall not insert words into legislative enactments when the statute otherwise presents a cogent and justifiable legislative scheme." *Id.* The People are not asking the Commission to "insert words into legislative enactments" by their Complaint. As the highlighted language of Section 16-108.5(c)

makes clear, nothing in that subsection limits Section 9-250 of the Act investigations of a rate or tariff to *Commission-initiated* proceedings. In fact, this section specifically contemplates party-initiated challenges to previously approved utility rates and tariffs. ComEd's claims, then, that the only vehicle for parties to challenge the current formula rate tariff is through intervention in Section 9-201 proceedings is wrong as a matter of law.

II. The AG Complaint Was Not Untimely

In addition, ComEd's claim that the AG should have intervened in Docket No. 13-0386, the docket in which ComEd presented modifications to the formula rate tariff triggered by the General Assembly's passage of PA 98-0015 ("Revised Formula Rate Tariff"), if it believed the tariff changes enacted by its filing were inappropriate, is likewise flawed. Motion at 4-5. In fact, the changes to Section 16-108.5(k)(1) triggered by PA 98-0015 made Commission suspension of ComEd's May 30th Revised Formula Rate Tariff filing, and party intervention and challenge of that filing, impossible. New Section 16-108.5(k)(1) provides:

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 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). This section shows a legislative understanding that the changes authorized by P.A. 98-0015 were clearly specified in the law and that the changes therefore could be expedited.

In fact, a review of the entire Public Utilities Act reveals no other provision with such restrictive language on Commission "review" of electric utility tariff filings as that found in Section 16-108.5(k)(1). The facts with respect to ComEd's Revised Formula Rate Tariff filing are as follows: on May 30, 2013, ComEd filed with the Commission revisions to Rate DSPP and the formula rate templates¹ 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 challenge the requested tariff changes given those facts and the regulatory scheme delineated in subsection (k)(1), which deprived both the Commission and parties the opportunity to study and challenge the tariff through evidence and hearing.

ComEd further argues that "the AG was required to object to the formula rate in ICC Docket 13-0386 either by a pleading filed before the Order or by a timely Application for Rehearing and/or request for a stay", suggesting that otherwise the language in Section 9-201(b) that prohibits rates from taking effect until a Commission order is issued "would be rendered superfluous." Motion at 6. This argument, too, misses the mark.

First, ComEd did not initiate Docket No. 13-0386 under Section 9-201, but rather Section 16-108.5(k). In its transmittal letter filed with the ICC Clerk on May 30, 2013, the Company stated:

¹ 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.

All of the documents submitted are filed with the Commission under the authority of Section 16-108.5(k) of the Public Utilities Act ("Act"), as amended by Public Act ("PA") 98-0015. They implement the specific changes to the formula rate and to revenue requirements relating to prior rate years required by PA 98-0015 and also provide a mechanism for those changes to translate effectively into both new future and revised current charges.

ComEd Letter of May 30, 2013, initiating Docket No. 13-0386. A copy of this Letter is attached to this Response as Appendix A. Thus, filing its tariff changes under Section 16-108.5(k), ComEd implicitly represented that the changes it sought were limited to the terms of P.A. 98-0015 and that the regular 45-day notice and suspension protections were not available to either the Commission or the parties.

Second, while the AG and any party is permitted under Section 10-113 to file an application for rehearing of any Commission order, that provision also provides:

Anything in this Act to the contrary notwithstanding, *the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it.* Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original rules, regulations, orders or decisions.

220 ILCS 5/10-113 (emphasis added). The People have presented the Commission with a Section 9-250 complaint, which requests that the Commission alter and amend the Revised Formula Rate Tariff approved by the Commission on June 5, 2013. This challenge to the existing tariff is consistent with Sections 16-108.5(c) and 9-250, and the rehearing framework envisioned in Section 10-113. In addition to being contrary to the plain language of Section 10-113, ComEd's view would prohibit the Commission from ever correcting a mistake or changing a tariff. Clearly, that was not the General Assembly's intent when it enacted the Public Utilities Act or when it enacted the Energy Infrastructure Modernization Act ("EIMA").

In addition, rules of statutory construction require that statutes should be evaluated as a whole, with each provision construed in connection with every other section. *Roselle Police Pension Bd. v. Village of Roselle*, 232 Ill.2d 546, 552, 905 N.E.2d 831(2009). Section 10-113 of the Act is premised on the Commission’s continuing obligation under the PUA to ensure that any tariff complies with the law -- even if said tariff was previously approved by the Commission, provided the affected utility has notice and an opportunity to be heard.² ComEd certainly has had notice of the issues raised in the AG Complaint – first when the AG presented the Direct testimony of AG witnesses Michael L. Brosch and David J. Effron on July 19, 2013 in Docket No. 13-0318, and when the People filed their Complaint on September 3, 2013. As made clear in the AG Complaint, 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.³ This docket provides ComEd the “opportunity to be heard.”

² One exception can be found in Section 16-108.5(d), wherein it states that the Commission's determinations in formula rate update proceedings filed under Section 16-108.5(d) “shall be final upon entry of the Commission's order and shall not be subject to reopening, reexamination, or collateral attack in any other Commission proceeding, case, docket, order, rule or regulation, provided, however, that nothing in this subsection (d) shall prohibit a party from petitioning the Commission to rehear or appeal to the courts the order pursuant to the provisions of this Act.” This points to the need for the Commission to grant the relief requested in this Complaint. After entry of its Order in Docket No. 13-0318, no party will be able to challenge the formula rates approved in that docket.

³ All three of these proposed adjustments needed to ensure the establishment of just and reasonable rates by January 1, 2014, have been raised and thoroughly discussed in Docket 13-0318 through the Direct and Rebuttal testimonies of David J. Effron and Michael L. Brosch. See AG Ex. 1.0 at 13-26; AG Ex. 2.0 at 9-18; AG Ex. 3.0 at 9-22; AG Ex. 4.0 at 7-11. ComEd has filed discovery on that testimony and specifically responded to these exact issues in the Rebuttal and Surrebuttal testimonies of ComEd witnesses Ross Hemphill and Christine Brinkman. See ComEd Ex. 12.0 at 3-9; ComEd Ex. 13.0 at 4-13; ComEd Ex. 16.0 at 2-8; ComEd Ex. 17.0 at 2-14. While the AG believes it improbable that additional ComEd testimony would elaborate on the issues any further than what has already been filed in Docket No. 13-0318, a schedule for further testimony, hearing and briefing will be established on October 7,

Thus, ComEd's assertion that the Docket No. 13-0386 proceeding represented the only vehicle for challenging the existing formula rate tariff and rates is wrong as a matter of law. As noted above, Sections 9-250 permits the Commission or any party upon complaint to challenge and assert that "the rates or other charges, or classifications, ... demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, or that the rules, regulations, contracts, or practices or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law... ." 220 ILCS 5/9-250. That interpretation of the statute (ignoring the terms of Section 9-250) cannot be justified under either a reading of Section 9-250, 9-201, 16-108.5 or the Act as a whole.

III. The AG Complaint Does *Not* Constitute An Impermissible Collateral Attack On the Commission's June 5, 2013 Order in Docket 13-0386

Finally, ComEd argues the AG Complaint should be dismissed because it constitutes "an impermissible collateral attack on the Commission's (June 5, 2013) Order." Motion at 7. The Company also references Section 10-201(f) of the Act as recognizing "that a party may not collaterally attack Commission orders." *Id.* In support of this point, the Company simply reiterates its complaint that the AG could have intervened in Docket No. 13-0386 and/or filed an application for rehearing in that docket, and having not done that, "has waived appellate review of the issues raised in the Complaint." *Id.*

To be clear, the AG is not seeking an end run around the Article X rehearing provisions with its Complaint, or to "appeal" the Commission's Docket No. 13-0386 Order. The AG is well aware of the framework in the Act for the filing of appeals. The AG filed its Complaint under

2013. In no way can ComEd claim its right to be heard or any due process rights have been compromised by the filing of AG Complaint.

Section 16-108.5 (which states “but nothing in this subsection (c) is 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”), Section 9-250 (which references the Commission’s power, upon a hearing, had upon its own motion or upon complaint) and Section 9-101 (which requires rates to be just and reasonable). If ComEd was right on its collateral attack claims, no party could ever challenge a rate or tariff as unjust or unreasonable if the party had not initially intervened in a Section 9-201 tariff filing or proceeding that allowed the rate or tariff at issue. Certainly, no provision of the PUA supports that interpretation of the EIMA or PUA framework.

ComEd cites the Commission’s ruling in *City of Chicago v. Commonwealth Edison Co.*, Docket No. 96-0360, 1997 WL 33771836, *9 (Illinois Commerce Comm’n, May 7, 1197), to support its collateral attack claim. That Commission ruling, however, is inapposite here. In *City of Chicago* case, the City filed a complaint raising the same issues that they had litigated in a just-completed rate case. The City filed an application for rehearing on the issues, which was denied, and appealed the case to the appellate court – an appeal that was pending at the time the City filed its Complaint. ComEd filed a motion to dismiss the complaint while appellate review was pending, highlighting Section 10-113(a) of the Act, which provides that “[o]nly one rehearing shall be granted by the Commission; but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after 2 years, and invoking the action of the Commission thereon.” 220 ILCS 5/10-113(a). In granting ComEd’s motion to dismiss, the Commission highlighted these facts and concluded that the City’s Complaint violated the statutory scheme in the Act for pursuing appeals, particularly in light of the fact that the issues raised in the City’s complaint had been raised in an application for

rehearing and were then pending before the appellate court. *See City of Chicago*, 11997 WL 33771836, *2, 9-10.

In the instant docket, the AG Complaint follows a perfunctory order issued just 6 days after ComEd filed its Amended Formula Rate Tariff in Docket 13-0386, pursuant to Section 16-108.5(k)(1). That subsection, as noted earlier in this Response, permitted no investigation of rates and provides that “[t]he 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). Contrary to the *City of Chicago* case, the People’s first opportunity to examine and raise issues associated with the Section 16-108.5(k) tariff filing through accounting testimony, and to challenge these rates and seek the establishment of just and reasonable rates came in the larger investigation of the Amended Formula Rate Tariff in Docket No. 13-0318.

Finally, ComEd asserts that the AG “failed to bring a complaint in that docket (Docket No. 13-0386) in the manner required by Section 9-201.” Motion at 8. That argument is similarly flawed for the reasons stated earlier. Again, ComEd did not initiate Docket No. 13-0386 under Section 9-201, but rather Section 16-108.5(k). Thus, the regular 45-day notice and suspension provisions that are an integral part and guarantor of party rights of that section of the Act were not available to either the Commission or the parties. Moreover, ComEd’s suggestion that the AG could bring a complaint in Docket 13-0386 recognizes that the complaint process is the appropriate route to raise issues associated with whether the Company’s formula rate tariff complies with the law.

For all of these reasons, ComEd’s motion to dismiss should be denied.

WHEREFORE, the People of the State of Illinois respectfully request that the Commission deny ComEd's Motion to Dismiss.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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September 26, 2013