

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

THE PEOPLE OF THE STATE OF ILLINOIS, )  
ex rel. LISA MADIGAN, Attorney General of the )  
State of Illinois )

Complainants )

Docket No. 13-0511

vs. )

COMMONWEALTH EDISON COMPANY )  
Complaint to investigate and modify the Formula )  
Rate Tariff established under Section 16-108.5 of )  
the Act )

**COMMONWEALTH EDISON COMPANY’S VERIFIED REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS THE VERIFIED COMPLAINT OF THE PEOPLE OF THE  
STATE OF ILLINOIS TO INVESTIGATE AND MODIFY THE FORMULA RATE  
TARIFF ESTABLISHED UNDER SECTION 16-108.5(c) OF THE  
PUBLIC UTILITIES ACT**

Respondent Commonwealth Edison Company (“ComEd”), respectfully submits its Verified Reply in Support of its Motion to Dismiss the Verified Complaint of the People of the State of Illinois to Investigate and Modify the Formula Rate Tariff Established Under Section 16-105.5(c) of the Public Utilities Act (“PUA” or “the Act”).

**INTRODUCTION**

Preliminarily, after ComEd filed its Motion to Dismiss, the Commission initiated an investigation into the same rate formula that is the subject of the Attorney General’s (“AG”) Complaint (ICC Docket No. 13-0553). *See* Order (October 2, 2013) at 1-2. Thus, the AG’s Complaint now serves no useful purpose. For that reason alone, the Complaint should be dismissed, as moot.

If the ALJs nonetheless are of the opinion that it is necessary to reach the merits of the Motion to Dismiss, the AG’s Response to ComEd’s Motion to Dismiss (“Response”)

misconstrues the PUA and misstates the arguments ComEd presented in its Motion in an attempt to support the AG's unauthorized and untimely Complaint. ComEd does not deny that Section 16-108.5 permits the Illinois Commerce Commission ("Commission" or "ICC") to investigate ComEd's rate formula. Likewise, the Commission's authority to initiate an investigation of rates to determine if they are just and reasonable is not at issue here, and nothing in ComEd's position would "prohibit the Commission from ever correcting a mistake or changing a tariff" (Response at 6) or prohibit a party from challenging a rate or tariff as unjust or unreasonable (*id.* at 9).

All that is at issue here – but what the AG's Response labors to obfuscate – is the AG's effort to improperly initiate an investigation of ComEd's *formula* in contravention of all relevant law, over three months after ComEd filed its rate formula and after ignoring timely opportunities to challenge that formula. Sections 16-108.5(c) and 9-201 of the PUA make plain that the AG's Complaint is unauthorized by the PUA and is untimely. Similarly, Section 10-113 of the PUA and relevant case law refutes any doubt that the Complaint is an impermissible collateral attack on the Commission's Order. For these reasons, ComEd's Motion should be granted.

## **ARGUMENT**

### **I. The AG's Claim That Its Complaint Is Authorized Under the Act Is Erroneous and Unsupported As a Matter of Law.**

In its Response, the AG misconstrues the meaning of the plain language of Section 16-108.5(c) in its effort to deny the fact that only the Commission may initiate an investigation of ComEd's rate formula under that provision. Specifically, the AG contends that Section 16-108.5(c) preserves *all* of the Commission's authority under Article IX of the PUA, including its authority to conduct investigations of rates initiated by a party's complaint. Response at 2-3. This is incorrect.

Section 16-108.5(c) explicitly preserves only the Commission’s authority to initiate an investigation of a utility’s rate formula. *See* 220 ILCS 5/16-108.5(c). (“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) (emphasis added). On its face this is not a preservation of *all* of the Commission’s Article IX authority, and it is hardly the same as allowing the AG to force the Commission to investigate by filing a complaint. Thus, even if it were the case that Section 9-250 were applicable here – and it is not because Section 16-108.5(c) specifically references only Section 9-201 – the Commission’s authority would be limited to initiating a hearing upon its own motion under the explicit language of Section 16-108.5(c). *See* 220 ILCS 5/9-250 (“[w]henver the Commission, after a hearing had *upon its own motion* or upon complaint...” (emphasis added). The AG’s claim that Section 16-108.5(c) permits an AG Complaint to be a proper means to initiate a Commission investigation of ComEd’s rate formula is therefore wholly erroneous.

**II. The AG Had Sufficient Opportunity to Exercise Its Right to Pursue the Issues Raised in Its Complaint and Did Nothing and Therefore the Complaint is Untimely.**

Equally erroneous is the AG’s straw-man contention that the requirements of Section 16-108.5(k)(1) made it impossible to challenge the filing. Response at 4. ComEd has made no such arguments and the facts do not support one. The AG received ComEd’s formula rate filing on May 30, 2013. At the time it received the filing, options were available to the AG that would have provided sufficient opportunity to pursue the issues raised in the Complaint. The AG could have asked the Commission to take the full 21 days allowed by law before approving the rate formula changes and then pursued whatever other procedures it elected at that stage of the

process. Alternatively, the AG could have elected to apply for rehearing after the Commission entered its Order. Nothing in Section 16-108.5(k)(1) limited the Commission's rehearing authority. Instead, the AG chose to do nothing<sup>1</sup>. The AG should not now complain about inadequate remedies, having wholly failed to invoke those that were available.

The AG also misconstrues Section 10-113 when it argues that its Complaint is timely because it is consistent with the rehearing framework included in that section. Response at 6-7. Contrary to what the AG asserts, ComEd agrees that under Section 10-113 the Commission has the authority to hear a properly initiated complaint and to make whatever lawful revisions to a tariff that may be required. EIMA only narrows when and how challenges may be brought to the *formula*. All other remedies to ensure that rates are just and reasonable remain intact. The AG's Complaint, however, as explained herein and in ComEd's Motion, fails to conform with the requirements in EIMA regarding challenges to the formula. The Complaint therefore was not properly initiated and is untimely under EIMA.

### **III. Article X of the Act and Relevant Case Law Support that the AG's Complaint Is an Impermissible Collateral Attack of the Commission's Order.**

The relevant provisions of Article X of the PUA make clear that the AG's Complaint is an impermissible collateral attack on the Commission's Order in ICC Docket No.13-0386. The rehearing and appeal process stated in Sections 10-113 and 10-201 are the exclusive remedies for review of a final Commission Order under the PUA. *See Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 110-111 (1951). Section 16-108.5 (c) explicitly provides that "changes to the performance-based formula rate structure or protocols...shall be made as set forth in Section 9-201 of the Act" and thus the AG was required to pursue a timely Section 9-201 challenge to the formula structure in ICC Docket No. 13-0386. *See* 220 ILCS 5/16-108.5(c). By choosing

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<sup>1</sup> The AG can make no claim that it was not aware of the issues it now raises. Its witnesses raised them, albeit improperly, in the FRU.

not to pursue a challenge to the formula in ICC Docket No. 13-0386, the AG lost the opportunity to utilize the remedies available under Sections 10-113 and 10-201 and the Complaint is barred as an impermissible collateral attack on the Commission's Order.

This conclusion is in line with the Commission's decision in *City of Chicago v. Commonwealth Edison Co.*, ICC Docket No. 96-0360, 1997 WL 33771836, \*10 (Illinois Commerce Comm'n, May 7, 1997). The AG's narrow interpretation of that decision unsuccessfully attempts to obscure the crux of the Commission's holding – dismissal of a complaint is appropriate when the complaint is not within the exclusive remedies provided by the PUA. That is exactly the case here. ComEd does not claim, as the AG mistakenly contends, that a party could never challenge a rate as unjust or unreasonable if the party had not initially intervened in a Section 9-201 rate change proceeding. Response at 9. Such a result would be in contravention of those provisions in the PUA intended to provide remedies to ensure that rate are just and reasonable. What ComEd claims and what Section 16-108.5(c) explicitly provides, is that challenges to the *formula*, like those raised by the AG in its Complaint, must be brought under Section 9-201. By challenging ComEd's Commission-approved formula through its Complaint, the AG improperly pursues a remedy not within the remedies provided by the PUA. Such a collateral attack on a Commission Order should not be allowed and ComEd's Motion should be granted.

**WHEREFORE**, for the reasons stated above, Commonwealth Edison Company respectfully requests that the Verified Complaint filed by The People of the State of Illinois against Commonwealth Edison Company on September 4, 2013 be dismissed for want of jurisdiction.

Dated: October 3, 2013

Respectfully submitted,  
COMMONWEALTH EDISON COMPANY

By: /s/ David M. Stahl  
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One of its attorneys

Thomas S. O'Neill  
Senior Vice President & General Counsel  
COMMONWEALTH EDISON COMPANY  
440 S. LaSalle Street, Suite 3300  
Chicago, Illinois 60605  
(312) 394-5400  
thomas.oneill@exeloncorp.com

David M. Stahl  
Ronit C. Barrett  
EIMER STAHL LLP  
224 South Michigan Avenue, Suite 1100  
Chicago, Illinois 60604  
(312) 660-7600  
dstahl@eimerstahl.com  
rbarrett@eimerstahl.com

Richard Bernet  
10 S. Dearborn Street, Suite 4900  
Chicago, IL 60603  
(312) 394-5400  
richard.bernet@exeloncorp.com

E. Glenn Rippie  
ROONEY RIPPIE & RATNASWAMY LLP  
350 West Hubbard Street, Suite 600  
Chicago, Illinois 60654  
(312) 447-2800  
glenn.rippie@r3law.com

Attorneys for Commonwealth Edison Company

