STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION On Its own Motion v. COMMONWEALTH EDISON COMPANY Investigation of tariffs approved in Docket No. 13-0386	: : : : : : : : :	No. 13-0553 No. 13-0553

COMMONWEALTH EDISON COMPANY'S MOTION TO COMPEL
THE ILLINOIS ATTORNEY GENERAL TO RESPOND TO DISCOVERY

Commonwealth Edison Company ("ComEd"), pursuant to Sections 190 and 350 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Adm. Code §§ 200.190, 200.350, and Supreme Court Rules 201 and 213, moves to compel the Attorney General ("AG") to respond to Data Request ComEd→AG 2.03. In support, ComEd states:

1. On October 18, 2013, ComEd served the following data request on the AG:

ComEd→AG 2.03 Are you aware of any final order of the Illinois Commerce Commission establishing a test year revenue requirement for an electric, water, or gas utility that did not include a tax gross up of capital costs as part of the calculation of the net revenue requirement? If your answer is anything other than an unqualified, "No," please identify all such decisions by Docket number, case title, and date of the final order.

2. On October 21, 2013, the AG objected. ComEd counsel thereafter initiated the consultation required by Section 350 of the Commission's Rules (83 Ill. Admin. Code 200.350) and S. Ct. R. 201(k). On October 23, during that consultation, the AG confirmed that she would provide no other or additional answer. ComEd has satisfied the consultation requirements of the requirements 83 Ill. Admin. Code 200.350 and S. Ct. R. 201(k). The AG's response is Attachment A hereto.

3. Illinois Supreme Court Rule 201(b)(1) provides, in pertinent part, that "Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts." Likewise, the Commission's Policy on Discovery begins that "[i]t is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding." 83 Ill. Admin. Code § 200.340. None of the AG's objections have merit; some are not even recognized objections.

4. **Relevance Objection**. The AG's main objections are based on a claim of "irrelevance." The Illinois Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Ill. R. Evid. 401; *Green v. Lake Forest Hosp.*, 335 Ill. App. 3d 134, 139 (2nd Dist. 2002). The standard of relevance is liberal, and great latitude is allowed in discovery. *Leeson v. State Farm Mut. Auto. Ins. Co.*, 190 Ill. App. 3d 359, 365 (1st Dist. 1989); *see Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993).

5. The Data Request seeks relevant evidence. The first of the three questions in this investigation is whether ComEd's current rate formula "correctly calculated interest on ComEd's reconciliation balance...." Initiating Order at 2. Under the approved tariff, interest is "calculated at a rate equal to the utility's weighted average cost of capital" (220 ILCS 5/16-108.5(d)(1) by considering taxes, just as allowed WACCs applied to rate base have traditionally been "grossed up" for taxes for decades. *E.g.,* Brinkman Dir., ComEd Ex. 1.0 CORR, 13:268-71. The AG and

others claim that tax costs must be excluded, leaving ComEd unable to recover and retain the allowed WACC. Right or wrong, whether AG and its ratemaking expert witnesses can point to many, few, or no traditional ICC-approved "revenue requirement[s] ... that did not include a tax gross up of capital costs as part of the calculation of the net revenue requirement" bears directly on ComEd's claim that WACCs calculated to recover costs reflect taxes.

6. The AG argued in conference that the relevance to ComEd's position was immaterial because *under its view of the case* ComEd should lose regardless. That is nothing close to the standard of relevance. The rules permit discovery into "any matter relevant to the subject matter ... whether it relates to the ***claim*** or ***defense of the party seeking disclosure*** or of any other party ..." S. Ct. R. 201(b)(1). Discovery is not limited to those facts that the resisting party concedes are determinate. If it were, any party could simply object to discovery of facts on the basis such facts did not fit its own view of the case. One can only imagine the reaction if utilities were entitled to make such objections.

7. **Legal Research / Opinion Objection.** The Data Request asks about whether the AG or its ratemaking experts know of any approved test year revenue requirement not grossed up for taxes. It does not ask the AG to conduct "legal research." It seeks only what the AG and the experts know now, when arguing and testifying, respectively. It also does not ask for "legal analyses" or "legal conclusions." The AG's witnesses (and those of other parties) show no reticence to opine on the recovery of tax costs in other rates and riders.

8. **AG Information Only "Objection".** The AG claims it need not respond to data requests about "documents or information not collected or maintained by The People of the State of Illinois or their agents or representatives in the normal course of business ...." There is no such objection. Discovery extends to "the existence, description, nature, custody, condition, and

location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts," S. Ct. R. 201(b)(1), not only those things the AG maintains or collects. ComEd seeks no special investigations or studies, just a direct answer about the knowledge of the AG and its experts.

9. **The Rest.** The AG's remaining objections are boilerplate. Nothing about this data request is "overbroad" or "unduly burdensome." The most likely answer is, or should be: "No." If it is not "No.", then it should be "Yes." followed by a list of decisions approving those identified revenue requirements of which the AG and its experts are aware.

10. The evidentiary hearing in this highly accelerated proceeding begins today. The AG should be directed to respond to this Data Request in full and without objection prior to the ComEd's witnesses taking the stand and prior to ComEd questioning any other party's witness.

Dated: October 24, 2013

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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ATTACHMENT A

The People of the State of Illinois'
Responses to Commonwealth Edison Company's
Second Set of Data Requests
ICC Docket No. 13-0553
October 21, 2013

ComEd→AG 2.03. Are you aware of any final order of the Illinois Commerce Commission establishing a test year revenue requirement for an electric, water, or gas utility that did not include a tax gross up of capital costs as part of the calculation of the net revenue requirement? If your answer is anything other than an unqualified, "No," please identify all such decisions by Docket number, case title, and date of the final order.

RESPONSE: The People of the State of Illinois object to this data request to the extent it requires the People of the State of Illinois to undertake legal research, legal analyses or provide legal conclusions. The People of the State of Illinois also object to this data request to the extent it seeks documents or information not collected or maintained by The People of the State of Illinois or their agents or representatives in the normal course of business including, but not limited to, documents or information that would require special investigation or studies. In addition, the question is irrelevant, overbroad, unduly burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence.