

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
)	
vs.)	
)	ICC Docket No. 13-0553
Commonwealth Edison Company)	
)	
Investigation of Tariffs Approved in)	
ICC Docket 13-0386)	

**THE PEOPLE OF THE STATE OF ILLINOIS’
APPLICATION FOR REHEARING**

The People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois (“the People” or “AG”), pursuant to Part 200.880 of the Commission’s Rules of Practice, 83 Ill.Admin.Code Part 200.880, hereby file their Application for Rehearing in the above-captioned proceeding.

I. Introduction

On November 26, 2013, the Commission entered its final Order in this proceeding. In that Order, the Commission rejected recommendations of the People and other Intervenors¹ regarding two important components of the reconciliation calculation – a calculation that if not corrected now, will unfairly impact rates going forward at least through the year 2022, when the formula rate regulatory structure is set to expire.

First, the People request that the Commission reconsider its rejection of the OAG-proposed adjustment which would apply interest to the “net-of-tax” reconciliation balance. Reconsideration is particularly relevant in light of a recently issued Fourth District Appellate Court ruling in *Ameren Illinois Company v. Illinois Commerce Comm’n*, Slip Op. 4-12-1008, 4-

¹ Those Intervenors are the Illinois Industrial Energy Consumers, the City of Chicago and the Citizens Utility Board (“CCI”).

13-0029 (cons.), dated December 11, 2013 (the “Fourth District Opinion”). That opinion presents new controlling law that specifically authorizes the Commission to interpret the relevant portions of the Public Utilities Act (“PUA”) – including the recent modifications to Section 16-108.5 triggered by Public Act 98-0015 (“PA 98-0015”) -- to deduct deferred tax from the reconciliation balance prior to calculating interest on that balance, consistent with established regulatory principles. As the controlling law of the Fourth District Opinion was not available when the Commission entered its Final Order in this docket on November 26, 2013, the Commission should now revisit the issue and adopt the People’s proposed modification to the Company’s formula rate template contained at Appendix C to the People’s Initial Brief.

Second, the Commission’s November 26, 2013 Order imposes an inaccurate interpretation of statutory construction canons to the issue of how the return on equity (“ROE”) “collar” adjustment specified in Section 16-108.5(c)(5) of the Act should be calculated, and imposes the use of end-of-year rate base in making the ROE calculation despite the fact that the recent amendments to the Act that took effect in May of 2013 imposed no such requirement. The General Assembly’s silence on the issue, while taking great pains to insert language that authorized the incorporation of year-end rate base for other components of the formula rate calculation process, point to the need and appropriateness of maintaining the Commission’s previous authorization of average rate base on this aspect of the formula rate calculation. The People seek rehearing on this issue as well.

These arguments are discussed further below.

II. The Fourth District’s Opinion on Deferred Income Tax Requires the Commission To Revisit and Modify its Final Order on the Issue of Reflecting Net-of-Tax Reconciliation Balances.

A. The December 11, 2013 Fourth District Opinion

The recent Fourth District Opinion, which was issued approximately two weeks after the Commission entered its Final Order in this proceeding, stemmed from a consolidated appeal of the Commission’s final orders in Ameren Illinois Company’s (“AIC”) first two electric formula rate cases, Docket Nos. 12-0001 and 12-0293.² In that consolidated appeal, AIC challenged, among other issues, the Commission’s decision in the two cases to deduct deferred income tax from its filing-year projected plant additions for purposes of calculating rate base. See Docket No. 12-0001, Order of September 19, 2012 at 52-53; Docket No. 12-0293, Order of December 5, 2012 at 29-30. In doing so, the Company argued – just as ComEd and the Commission Staff argued in this case relative to the reconciliation balance – that Section 16-108.5 did not specifically authorize the Commission to deduct accumulated deferred income taxes from AIC’s projected plant balances.

The Fourth District appellate court specifically rejected that argument. As the Fourth District Opinion noted, “[w]hile the Commission agrees the [PUA] does not expressly allow an adjustment for [deferred income tax], the Commission explains the statute does not expressly disallow the adjustment, but authorizes the Commission to exercise its discretion in determining just and reasonable rates.”³ See Docket No. 12-0293, Order of December 5, 2012 at 29. Moreover, the Court emphasized that a failure to deduct ADIT from the plant balances at issue would ensure that the Company would gain a significant windfall at the expense of ratepayers. The Court held that deducting deferred income tax from projected plant additions is correct as a

² A copy of the opinion is attached to this Application for Rehearing as Appendix A.

³ Fourth District Opinion at ¶ 38.

matter of prudent accounting: “[o]mitting [deferred income tax] from the rate base calculation would allow Ameren what amounts to an interest-free loan at the ratepayers’ expense that would artificially increase Ameren’s rates until the next reconciliation process, a result which is neither just nor reasonable for ratepayers.”⁴

Additionally, the Fourth District Opinion held that “[a]lthough the [PUA] does not expressly provide for the Commission to reduce the rate base by [deferred income tax], the ratemaking process under the [PUA] is ultimately subject to the Commission’s discretion and authority to determine whether those rates are just and reasonable in accordance with the Commission’s practice and law,” citing § 16-108.5(c)(6) of the PUA.⁵ Thus, the Fourth District Opinion held that “[a]s it was consistent with the common practice of the Commission to include [deferred income tax] in the ratemaking process, the Commission did not err by including the [deferred income tax] adjustment for projected plan[t] additions in its ratemaking calculation.”⁶

It is important to note that nothing in Article XVI or Article IX of the PUA expressly authorizes the Commission to deduct deferred income tax from projected plant additions or plant in general for purposes of calculating rate base. Nonetheless, despite the lack of such express statutory authorization, the Appellate Court held in the Fourth District Opinion that the Commission has “discretion and authority” to make such deduction.

B. Implication of the Fourth District Opinion For This Proceeding

Addressing a slightly different aspect of the annual electric formula ratemaking process, Section 16-108.5(d)(1) of the PUA states that “[a]ny over-collection or under-collection indicated by [the annual] reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest calculated at a rate equal to the utility's weighted

⁴ Fourth District Opinion at ¶ 39.

⁵ *Id.*

⁶ Fourth District Opinion at ¶ 40.

average cost of capital approved by the Commission for the prior rate year, the charges for the applicable rate year.” Section 16-108.5(d)(1) says nothing about deducting deferred income tax from the reconciliation over-collection or under-collection for purposes of calculating interest thereon. Although the Commission specifically recognized in its November 26, 2013 Order that it “finds merit in the AG and CCI’s proposal that accumulated deferred income tax, or ADIT should be netted against the reconciliation balance before calculating the interest amount” and that “this concept is consistent with Generally Accepted Accounting Principles, is consistent with standard regulatory practice that matches ADIT elements to the associated assets included in rate base and properly recognizes the cash benefit to the utility that would otherwise have been paid out for income taxes on the amount”, the Commission rejected the proposed ADIT adjustment based on the Act’s failure to specifically permit the deduction. The Commission noted in its November 26, 2013 Final Order that “it is difficult for the Commission to support an interpretation of the Act which reads into it exceptions, limitations, or conditions the legislature did not express. *Davis v. Toshiba Machine Co.*, 186 Ill.2d 181, 184-185 (1999).” Final Order at 43.

As the Fourth District Opinion stated at ¶ 38, however, the absence of express statutory authorization to deduct deferred income tax from a ratemaking amount in an electric formula rate case does not rob the Commission of its inherent discretion and authority to make such adjustment if necessary to establish just and reasonable rates. The Commission has made clear it finds “merit,” as a matter of prudent accounting, in the People’s proposal to deduct deferred income tax from the reconciliation balance for purposes of calculating interest thereon. Final Order at 43. The new guidance provided by the Fourth District Opinion provides the Commission with assurance that it has the discretion and authority to implement this adjustment, despite the lack of express statutory authorization in Section 16-108.5(d)(1) of the PUA.

In its Final Order, the Commission stated: “[i]n the future, if further arguments by parties are presented or clarity from the legislature is provided on this topic, the Commission will revisit the issue.” Final Order at 43. The People thus request that the Commission revisit this issue in light of the clear precedent and analysis found in the Fourth District Opinion and the arguments set forth herein, as well as the arguments presented in the People’s Initial Brief, Reply Brief and Brief on Exceptions. Failure to adopt the OAG-proposed deduction of ADIT on the reconciliation over-collection would be contrary to law, not supported by substantial evidence, arbitrary and capricious, and contrary to Section 10-201(e)(iv)(A-D) of the Act. In support of this request for rehearing, the People incorporate by reference the arguments it presented at pages 29-48 of the AG Initial Brief; pages 24-37 of the AG Reply Brief; and pages 13-19 of the AG Brief on Exceptions. Accordingly, the People request that the Commission grant rehearing on this matter.

III. The Commission Should Reconsider Its Rejection Of The Use Of An Average Rate Base in the Return on Equity Collar Calculation.

The Commission’s November 26, 2013 Final Order adopts the Company’s and Staff’s position to include a year-end rate base in the return on equity (“ROE”) collar calculation for annual formula rate updates. In its rejection of the People’s proposal to reflect ComEd’s average rate base in the ROE collar calculation, the Commission concluded that the General Assembly, when it amended the Act through P.A. 98-0015, intended to use year-end rate base, rather than an average rate base, in the ROE collar calculation because “a year-end rate base is the only rate base specifically prescribed anywhere” in the Act. Final Order at 29. This conclusion, however, is based solely on an inference of the General Assembly’s legislative intent that is inconsistent with basic canons of statutory interpretation, and should be rejected by the Commission. As discussed below, the plain language and structure of Section 16-108.5 of the Act, the

amendments to that section found in P.A. 98-0015, and the Commission’s prior decision in Docket No. 12-0321, ComEd’s first formula rate reconciliation proceeding, demonstrate that the General Assembly, in fact, neither changed the Commission’s treatment of the ROE collar rate base in Docket 12-0321 nor indicated an intent that year-end rate base be used in the ROE collar calculation.

The Commission’s Order notes that the “Act is clear that year-end *capital structure* must be used for purposes of the ROE calculation.” Final Order at 29 (emphasis added). While this may be true, it is not a basis upon which to adopt a year-end *rate base* for the ROE collar calculation. The Act is silent on the rate base to use in the collar calculation and, contrary to the conclusion of the Final Order – which adopts Staff’s and the Company’s position on this issue – the Act’s silence does not justify the use of year-end rate base for that purpose. Section 16-108.5(c)(5) of the PUA, prior to the passage of P.A. 98-0015, described the ROE collar and directed the Commission to calculate the ROE “using costs and capital structure approved by the Commission as provided in” Section 16-108.5(c)(2). *This section was not amended by P.A. 98-0015.* However, its referent, Section 16-108.5(c)(2), *was* amended by P.A. 98-0015, now providing that the formula rate shall “[r]eflect the utility’s actual year-end capital structure for the applicable calendar year.” 220 ILCS 5/16-108.5(c)(5). But “capital structure” and “rate base” are not interchangeable terms. Rather, they are independent terms that reflect different calculations.

If the new “year-end capital structure” language found in Section 16-108.5(c)(2), as amended by P.A. 98-0015, is interpreted by itself to require the use of year-end *rate base* in the ROE collar calculation, then that same language alone should, logically, also require the use of year-end rate base in the reconciliation year revenue requirement calculation. However, the

General Assembly, in P.A. 98-0015, purposely inserted amendatory language into Section 16-108.5(d)(1) expressly providing that year-end rate base should be used in computing the reconciliation year revenue requirement. If the amendatory “year-end capital structure” language in Section 16-108.5(c)(2) alone mandates the use of year-end rate base in key formula rate calculations (reconciliation year revenue requirement and ROE collar), then that renders the new “year-end rate base” language in Section 16-108.5(d)(1) as amended by P.A. 98-0015 unnecessary and superfluous.⁷ The Commission’s logic on this point in the Final Order is, thus, flawed.

While the General Assembly did not change the ROE collar section of the law (Section 16-108.5(c)(5)) or in any way adopt a requirement to use year-end *rate base* in the ROE collar calculation, a statutory directive addressing how rate base should be calculated for the reconciliation year revenue requirement *was* adopted by the General Assembly. An elementary canon of statutory construction is to avoid interpretations that render any language in the statute superfluous. “A court presumes that the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative.” *Knolls Condominium Ass’n v. Harms*, 202 Ill.2d 450, 458-9 (2002). The General Assembly clearly added the amendatory “year-end rate base” language to Section 16-108.5(d)(1) because it wanted to alter the rate base used in the reconciliation year revenue requirement calculation, recognizing that the amendatory “year-end capital structure” in Section 16-108.5(c)(2) did *not* mandate the use of year-end rate base in the reconciliation year revenue

⁷ Similarly, it is significant to note that Section 16-108.5(c)(5) cross-references Section 16-108.5(c)(2) with regard to the *capital structure* to be used in the ROE collar calculation. However, Section 16-108.5(c)(5) contains no cross-reference to Section 16-108.5(d)(1) with regard to the *rate base* to be used in the ROE collar calculation. P.A. 98-0015 did not address how rate base should be calculated for purposes of the ROE collar. Contrary to the Commission’s conclusion, the General Assembly has not indicated any intention to change the average rate base used in the ROE collar calculation.

requirement calculation. It follows that the “year-end capital structure” amendatory language also did not alter the rate base to be used in the ROE collar calculation. As discussed above, capital structure and rate base are two different concepts and the ROE collar calculation measures profitability – not the reconciliation year revenue requirement.

Prior to the passage of the amendatory P.A. 98-0015, the Commission had, in prior formula rate orders, concluded that using an average rate base in the collar calculation accurately reflected the utility’s actual cost of investment over the course of the year. *See* Docket No. 11-0721, Order at 18-21 (May 29, 2012) (Commonwealth Edison); Docket No. 12-0001, Order at 174-175 (Sep. 19, 2012) (Ameren). P.A. 98-0015 does not address the Commission’s prior adoption of average rate base and did not amend Section 16-108.5(c)(2) to require the use of year-end rate base in the ROE collar calculation. Moreover, neither of the utilities eligible to participate in formula rates challenged the use of average rate base in the ROE collar calculation in prior Commission formula rate dockets in their Applications for Rehearing or on appeal – despite their advocacy for end-of-year rate base in the formula rate reconciliation calculations.

The Commission has, in the past, distinguished between the two issues of (i) average vs. year-end capital structure, and (ii) average vs. year-end rate base. *See, e.g.*, Docket No. 12-0001, Order at 106 (Sep. 19, 2012) (addressing a methodology for determining the Company’s capital structure for purposes of the ROE collar calculation, with “capital structure” shown as the percentage mix of common equity, preferred stock, long-term debt, and short term debt). This previously accepted method continues to be presented by the People. As AG witness Effron stated in direct testimony, “the continuing use of the average rate base in the ROE collar calculation is necessary to accurately measure the ROE earned based on the actual equity investment over the course of the year.” AG Ex. 2.0R at 5.

In addition, the Fourth District Opinion expressly found that the failure of the Public Utilities Act to expressly reference a particular ratemaking adjustment did not foreclose the Commission from making a particular accounting adjustment pursuant to its ratemaking authority. As noted in Part II above, the Court held that “[a]lthough the [PUA] does not expressly provide for the Commission to reduce the rate base by [deferred income tax], the ratemaking process under the [PUA] is ultimately subject to the Commission’s discretion and authority to determine whether those rates are just and reasonable in accordance with the Commission’s practice and law,” citing § 16-108.5(c)(6) of the PUA.⁸ In addressing the appropriateness of the OAG’s recommendation to use average rate base in the ROE collar calculation in the pending Ameren Section 9-201 proceeding, the Commission made clear that it believes use of an average rate base in the ROE collar calculation was the correct methodology to produce just and reasonable rates:

The Commission's decisions in Docket Nos. 12-0001 and 12-0293 reflect its belief that use of the average rate base most accurately reflects AIC's costs. The Commission continues to believe that use of the average rate base will produce a dollar balance that correctly represents the actual capital supplied by equity investors to support AIC’s rate base over the course of the year for which the ROE is being calculated. Nevertheless, the General Assembly has indicated through PA 98-0015 that it intends for year-end rate base to be used in determining rates. While some ambiguity arguably exists when it comes to the ROE collar calculation, the Commission finds that the overall intent of the General Assembly, as reflected in PA 98-0015, includes the use year-end rate base to calculate the common equity balance for the purpose of determining the earned ROE for the collar calculation.

ICC Docket Nos. 13-0501/13-0517 (cons.), Interim Order of November 26, 2013 at 12.

Accordingly, as the Fourth District Opinion stated at ¶ 38, however, the absence of express statutory authorization for a ratemaking adjustment in an electric formula rate case does not rob

⁸ Fourth District Opinion at ¶39.

the Commission of its inherent discretion and authority to make such adjustment to establish just and reasonable rates.⁹

Failure to adopt the use of average rate base in the ROE collar calculation results, in this case, in excessive rates and would be contrary to law, not supported by substantial evidence, arbitrary and capricious, and contrary to Section 10-201(e)(iv)(A-D) of the Act. In support of this request for rehearing, the People incorporate by reference the arguments it presented at pages 19-29 of the AG Initial Brief; pages 16-24 of the AG Reply Brief; and pages 6-12 of the AG Brief on Exceptions. Accordingly, the People request that the Commission grant rehearing on this matter.

⁹ The effect of this treatment of the ROE collar calculation is symmetrical. The People note that in a year where the rate base is declining, which was the case in Docket 12-0321, the use of average rate base will benefit the Company by incorporating a higher rate base into the ROE calculation, compared to using year-end rate base.

IV. Conclusion

WHEREFORE, the People of the State of Illinois request that the Commission revisit the issue discussed above, grant rehearing and modify its Order of November 26, 2013 in accordance with the arguments presented above.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By Lisa Madigan, Attorney General



Karen L. Lusson

Senior Assistant Attorney General

Timothy O'Brien

Assistant Attorney General

Public Utilities Bureau

100 W. Randolph Street, 11th Floor

Chicago, Illinois 60601

Telephone: (312) 814-1136

Telephone: (312) 814-7203

Facsimile: (312) 814-3212

E-mail: klusson@atg.state.il.us

tobrien@atg.state.il.us

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VERIFICATION

STATE OF ILLINOIS)
)
COUNTY OF COOK)

Karen L. Lusson states that she is an Assistant Attorney General of the Public Utilities Bureau in the Illinois Attorney General's Office, that she has read the foregoing *Application for Rehearing of the People of the State of Illinois* in ICC Docket No. 13-0553, that she knows the contents thereof, and that to the best of her knowledge, information and belief, based upon reasonable inquiry, the contents are true and correct.



Karen L. Lusson
Senior Assistant Attorney General
Public Utilities Division
Illinois Attorney General's Office

Signed and sworn to before me
this 26th Day of December, 2013.



Notary Public