

Docket No. 2-10-0024

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS)	On Direct Review of Orders
ex rel. LISA MADIGAN, ATTORNEY GENERAL)	of the Illinois Commerce
OF THE STATE OF ILLINOIS,)	Commission
)	
Petitioner,)	
)	Docket No. 09-0263
vs.)	
)	
ILLINOIS COMMERCE COMMISSION,)	
COMMONWEALTH EDISON COMPANY, et al.,)	
)	
Respondents.)	

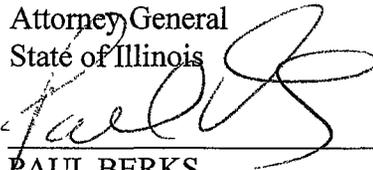
NOTICE OF FILING BY MAIL

TO: All Parties on attached service list

PLEASE TAKE NOTICE that on December 13, 2010, the undersigned filed one (1) original and four (4) copies of the Petitioner's **COMBINED MOTION TO TERMINATE STAY and FOR SUMMARY REVERSAL and RECORD IN SUPPORT OF THE STATE'S COMBINED MOTION TO TERMINATE STAY and FOR SUMMARY REVERSAL** with the Clerk of the Appellate Court, Second Judicial District, 55 Symphony Way, Elgin, Illinois 60120, by depositing such copies in the United States mail at 100 West Randolph Street, Chicago, IL 60601, with proper first-class postage. A copy is served upon you.

Respectfully submitted,

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Docket No. 2-10-0024

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, ex)	On Direct Review of
rel LISA MADIGAN, ATTORNEY GENERAL)	Orders of the Illinois
OF THE STATE OF ILLINOIS,)	Commerce Commission
)	
Petitioner,)	
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v.)	Docket Nos. 09-0263
)	
ILLINOIS COMMERCE COMMISSION,)	
COMMONWEALTH EDISON COMPANY, et)	
al.)	
)	
Respondents.)	

**COMBINED MOTION TO TERMINATE STAY and
 FOR SUMMARY REVERSAL**

1. This case involves an appeal of an order of the Illinois Commerce Commission (“Commission”) that was entered on October 14, 2009. Record in Support of the State’s Combined Motion to Terminate Stay and for Summary Reversal (“Supporting Record” or “SR”) at 1-62. The Commission denied petitions for rehearing on December 3, 2009. SR 63.

2. This appeal was filed on January 7, 2010. It has been stayed pursuant to this Court’s order since May 7, 2010. SR 72.

3. The case was stayed pending the resolution of an earlier appeal involving the same parties and the same issue. SR 64-69, 72.

4. This Court issued a decision in the earlier appeal on September 30, 2010. *See Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 2-08-0959 (and

consolidated); __ N.E.2d __; 2010 WL 3909376 (2d Dist. September 30, 2010) (*ComEd*) (SR 73-93).

5. This Court denied Commonwealth Edison’s petition for rehearing in *ComEd* on November 16, 2010. SR 102-03.

6. In *ComEd*, this Court held that Rider SMP, which authorized Commonwealth Edison to pass through to customers the costs of a system modernization pilot program known as “Advanced Metering Infrastructure” or AMI, was unlawful because it was a “classic case of improper single issue ratemaking.” SR 86.

7. This appeal involves a subsequent Commission order authorizing Commonwealth Edison to collect, pursuant to Rider SMP, the specific costs of distributing 141,000 advanced meters (Rider AMP), and tracking customer responses to the meters (Rider AMP-CA). SR 6-8.

8. Because Rider SMP is unlawful pursuant to this Court’s decision in *ComEd*, the Commission’s order authorizing the collection of certain specific expenses under Rider SMP necessarily was unlawful.

9. A judgment of the appellate court is final when entered. *PSL Realty Co. v. Granite Inv. Co.*, 86 Ill. 2d 291, 304 (1981).

10. Where, as here, a Commission-ordered rate is reversed on appeal, the Utility must refund the unlawful portion of the rate order only from the date of the reviewing court’s judgment, but is not required to refund any amounts collected before the reviewing court entered judgment. *People ex rel. Hartigan v. Ill.*

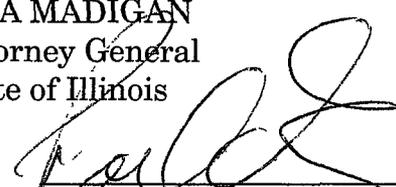
Commerce Comm'n, 148 Ill. 2d 348, 395-96 (1992) (“To allow the Commission to now order ‘reparations’ from rates that it originally set would violate the well-established rule against retroactive ratemaking.”).

11. Commonwealth Edison has asserted in parallel litigation that this Court’s decision in *ComEd* does not render Riders AMP and AMP-CA unlawful. SR 99.

12. Consequently, Commonwealth Edison asserts a legal right to continue to collect from ratepayers pursuant to Riders AMP and AMP-CA unless and until this Court enters a judgment reversing the Commission in this appeal. If Commonwealth Edison is correct, then under *Hartigan, supra*, the unlawful amounts it collects while awaiting a judgment in this appeal can never be recouped by ratepayers.

13. For this reason, the State seeks to proceed to final adjudication of this appeal as quickly as possible by (a) moving to terminate the order holding this appeal in abeyance, and (b) moving pursuant to Supreme Court Rules 361(a) and 366(a)(5) for an order summarily reversing the decision and order of the Illinois Commerce Commission.

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Edison's (ComEd) motion for rehearing of the *ComEd* decision on November 16, 2010. SR 102-03

In *ComEd*, this Court reversed the Commission's decision to permit ComEd to recover the costs of its system modernization project through a rider (Rider SMP). SR 86-89. Specifically, the Court invalidated Rider SMP as "a classic example of improper single issue ratemaking." SR 86. This case arises from a subsequent Commission order specifying the charges ComEd could collect under Rider SMP. SR 1-62. Because Rider SMP is unlawful under *ComEd*, the Commission's order authorizing the specific collection of charges pursuant to the rider also is unlawful and should be summarily reversed.

Although Rider SMP became unlawful on the date of this Court's decision, see *Independent Voters of Ill. v. Ill. Commerce Comm'n*, 117 Ill. 2d 90, 102-03 (1987), ComEd has asserted in pending proceedings before the Commission that it may continue to collect fees from ratepayers pursuant to Rider SMP until a judgment is entered in *this* appeal. SR 99. Because of the prohibition on "retroactive ratemaking," the Commission cannot refund to ratepayers any charges they paid before this Court's judgment. *People ex rel Hartigan v. Ill. Commerce Comm'n*, 148 Ill. 2d 348, 394 (1992). Consequently, in order to prevent ComEd from collecting unlawful charges from ratepayers pursuant to a rider that this Court invalidated, it is imperative that the Court expeditiously enter a judgment reversing the Commission's decision authorizing ComEd to collect money pursuant to the-now-invalid Rider

SMP, and make clear that refunds are due ratepayers from the date the Court entered judgment in *ComEd* – September 30, 2010.

Background

The relevant factual background to this case was succinctly set forth by this Court in *ComEd*. As the Court explained, this case began when

ComEd proposed Rider SMP, a ‘system modernization project’ charge to customers, to immediately recoup the costs of modernizing its delivery system toward a ‘smart grid.’ According to ComEd, the rider was new and innovative and created a mechanism for funding discretionary projects that are not necessary for the distribution service. One of the building blocks of the technology is advanced metering infrastructure (AMI), which consists of a communication system, advanced meters, and computer software and hardware to process the information collected from the new meters. The first step toward an AMI system is a pilot program called “Phase 0,” which involves installing 200,000 advanced meters. AMI would allow ComEd to achieve cost savings and improved efficiency by phasing out 675 full-time meter reader and supervisor positions, eliminating meter reading equipment, improving bill collections, reducing billing

errors, and disconnecting nonpaying customers more efficiently. ComEd argued that Rider SMP would give customers the benefits of the technology earlier than might otherwise occur, because ComEd could not afford the project without the rider. . . .

The Commission approved Rider SMP for the limited purpose of implementing Phase 0, commending ComEd for its initiative in pursuing a smart grid but criticizing ComEd for taking a project-by-project approach without a clear goal. The Commission noted that “[t]he estimates of cost in the record have varied greatly and the estimates of benefits have been sporadic at best.” The Commission further found that “[t]he lack of a consistent, thorough analytic approach to estimating [smart grid] benefits simply highlights another shortcoming: ComEd is asking for special recovery for these projects that – whatever their level, all parties agree – could have long-term economic benefits, but as proposed, ratepayers do not share the economic benefits.” The Commission ruled that, after the completion of Phase 0, ComEd may file Rider SMP again to seek recovery for additional smart grid investments.

Commonwealth Edison Co. v. Ill. Commerce Comm'n, __ N.E.2d __; 2010 WL 3909376, *15-16 (2d Dist. September 30, 2010) (SR 86).

The Commission issued the order described above authorizing rider recovery the AMI Pilot Program on September 10, 2008. *Id.* at *5, 16. On June 1, 2009, ComEd filed tariff sheets, identifying the specific costs of the AMI Pilot Program, and seeking “recovery of the cost of the pilot under Rider AMP as it is currently in force,” SR 4; that is, pursuant to the Commission’s earlier order that was subsequently reversed by this Court in *ComEd*.¹ The Commission, in turn, specifically acknowledged that ComEd’s petition for rider recovery of the AMI Pilot Program was pursuant to its direction in the prior rate case. SR 6-7.

ComEd’s proposed AMI Pilot Program consisted of two components: “the AMI Technology Pilot; and the Customer Application Plan.” SR 7. The AMI Technology Pilot sought to recover through the Commission’s pre-authorized rider the costs of installing 141,000 AMI meters and related infrastructure. SR 4. The Customer Application Plan sought rider recovery for programs designed to examine how customer behavior could change as a result of “smartgrid” technologies. SR 12. ComEd estimated the cost of its AMI Pilot program as \$70,687,894. SR 14. It sought to collect through Rider AMP approximately \$61,796,280 comprised of \$49,147,214 in capital investment costs and \$12,649,066 in operating expenses. SR 14.

The State challenged ComEd’s proposed rider on the grounds, *inter alia*, that rider recovery in this circumstance was unlawful single-issue ratemaking, SR 26, and

¹ Rider SMP “in this docket has been re-named as Rider AMP.” SR 23.

because ComEd's proposed rider went beyond what the Commission authorized ComEd to include in the SMP Rider, SR 23. The Commission rejected the first argument, noting that it had "considered and rejected the very same argument . . . a year ago in [*ComEd*]." SR 27. Having reaffirmed the validity of its prior order, the Commission concluded that "what ComEd proposes does not exceed what was ordered in ComEd's last rate case, docket 07-0566." SR 25.

On October 3, 2009, the Commission approved the AMI Pilot and the Customer Application Plan, and allowed the costs of these programs to be collected through Rider AMP (formerly Rider SMP). SR 61. The State sought rehearing, raising both the Commission's legal authority to approve rider recovery in this circumstance and whether the Customer Application Plan exceeded the scope of Rider AMP. C.2763-91. The Commission denied the petition for rehearing on December 2, 2009, SR 63, and the State timely appealed on January 7, 2010, SR 65.

When the State filed this appeal, its appeal of the Commission's prior order – the order authorizing Rider SMP for the AMI pilot – was pending on appeal before this Court. SR 64-71. In the prior appeal, the State challenged the Commission's authority to allow ComEd to recover system modernization costs, including the AMI pilot program through a rider. SR 86; *ComEd*, __ N.E.2d __; 2010 WL 3909376, at *15-16. Because this was an appeal of an order implementing an earlier Commission order that was already pending on appeal, the State requested the Court hold this appeal in abeyance pending the outcome of the earlier-filed appeal. SR 66-67. No

Argument

This Court's decision in *ComEd* controls the outcome of this case. Under *ComEd*, Rider SMP was unlawful because the costs of Advanced Metering Infrastructure (AMI) cannot be recovered through a rider. Therefore, the Commission necessarily erred in authorizing ComEd to collect in excess of \$60 million for the AMI Pilot program through Riders AMP and AMP-CA, which were merely different names for Rider SMP. SR 23.

Even if there was a question as to whether Rider SMP, declared unlawful by the Court in *ComEd*, was different from the rider at issue in this appeal, Commonwealth Edison is estopped from making such a claim. The doctrine of judicial estoppel "provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding." *Bidani v. Lewis*, 285 Ill. App. 3d 545, 549 (1st Dist. 1996). It applies when five elements are met. "[T]he party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *People v. Caballero*, 206 Ill. 2d 65, 80 (2002).

Commonwealth Edison specifically argued to the Commission that the costs it sought to recover through Rider AMP were only those authorized by the Commission in its earlier decision. SR 111-112. The Commission accepted this argument, thereby providing ComEd the benefit of a rider valued in excess of \$60 million. SR 25-26.

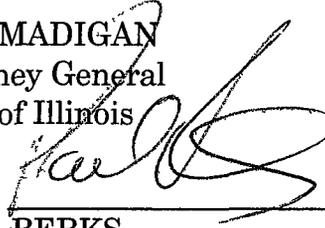
Consequently, the doctrine of judicial estoppel precludes Commonwealth Edison from arguing otherwise to this tribunal.

In short, this Court in *ComEd* already determined that the rider at issue in this appeal is unlawful. The Court's earlier decision applies with full force in this case, and the rider at issue was declared unlawful as of the date of this Court's judgment – September 30, 2010. In order to prevent ComEd from collecting charges from ratepayers pursuant to an unlawful rider, the Court should summarily reverse the Commission's decision authorizing ComEd to collect the costs of its AMI Pilot program through "Rider AMP or "Rider AMP-CA," specifying that Riders AMP and AMP-CA were reversed by the Court's earlier order on September 30, 2010.

CONCLUSION

For the foregoing reasons, the Commission's decision should be reversed and the matter remanded to the Commission for further proceedings.

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ORDER

This matter coming on to be heard upon the State’s Combined Motion to Terminate Stay and for Summary Reversal, due notice having been given, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the State’s Motion to Terminate Stay is GRANTED/DENIED;

IT IS HEREBY ORDERED that the State’s Motion for Summary Reversal is GRANTED/DENIED. Pursuant to this Court’s decision in *Commonwealth Edison Co. v. Ill. Commerce Comm’n, et al.*, __ N.E. 2d __; 2010 WL 3909376 (2d Dist. September 30, 2010), the Commission’s order approving Rider AMP and Rider AMP-CA is reversed effective the date of the Court’s earlier judgment, September 30, 2010.

ENTER: _____
JUDGE

DATED: _____
Paul Berks
Attorney General’s Office, Civil Appeal Division

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

PROOF OF SERVICE

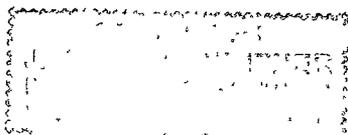
The undersigned, being first duly sworn upon oath, deposes and states that copies of the foregoing **COMBINED MOTION TO TERMINATE STAY and FOR SUMMARY REVERSAL and RECORD IN SUPPORT OF THE STATE’S COMBINED MOTION TO TERMINATE STAY and FOR SUMMARY REVERSAL** were served upon the below-named parties on December 13, 2010, by depositing such copies in the United States mail at 100 West Randolph Street, Chicago, Illinois, in envelopes bearing sufficient postage.

ALL PARTIES ON ATTACHED SERVICE LIST



SUBSCRIBED and SWORN to before me
this 13th day of December, 2010.


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