STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

People of the State of Illinois	:	
	:	
Complaint to Suspend Tariff Changes	:	
Submitted by Ameren Illinois and to	:	
Investigate Ameren Illinois Rate MAPP	:	
Pursuant to Sections 9-201, 9-250 and	:	
16-108.5 of the Public Utilities Act.	:	Docket Nos. 13-0501, 13-0517 Cons.
	:	
Ameren Illinois Company	:	
d/b/a Ameren Illinois	:	
	:	
Revisions to its formula rate structure and	:	
protocols.	:	

COMMONWEALTH EDISON COMPANY'S VERIFIED EMERGENCY MOTION
TO STAY ISSUANCE OF THE FINAL ORDER

Commonwealth Edison Company ("ComEd"), pursuant to 83 Ill. Admin. Code § 200.190(a), respectfully moves the Illinois Commerce Commission ("ICC" or "Commission") to stay issuance of the final order in this proceeding ("Motion to Stay") while the Commission considers ComEd's "Verified Expedited Motion to Open an Investigation Regarding the Definition of Formula Rate Structure and Protocols" ("Motion to Investigate") now pending in ICC Docket No. 14-0316 and filed contemporaneously herewith. The Motion to Investigate seeks to avoid the notice and due process violations that will occur if the Commission issues a final order in this docket interpreting the seminal statutory term "the structure or protocols of the performance-based formula rate" in Section 16-108.5(d) of the Public Utilities Act.[1]

[1] The term "the performance-based formula rate structure or protocols" is used in a related provision of Section 16-108.5(c)(6) of the Act. For purposes of this Motion, the phrase "the structure or protocols of the performance-based formula rate" and the phrase "the performance-based formula rate structure or protocols" are also referred to as "formula rate" unless indicated otherwise.

I. BACKGROUND

ComEd and Ameren Illinois ("Ameren") are the only two Illinois electric utilities that have elected to become "participating utilities" under the Energy Infrastructure Modernization Act ("EIMA"). *See generally* 220 ILCS 5/16-108.5(c). As such, they are permitted to recover their delivery services costs through a performance-based formula rate. *Id.* The Commission approved ComEd's formula rate, Rate DSPP – Delivery Service Pricing and Performance ("Rate DSPP")), on May 29, 2012 and later modified it in its rehearing order of October 3, 2012. *See Commonwealth Edison Co.*, ICC Docket No. 11-0721, Final Order (May 29, 2012) ("11-0721 Order"); *Commonwealth Edison Co*., ICC Docket No. 11-0721, Order on Rehearing (Oct. 3, 2012). Ameren's formula rate was approved on September 19, 2012. *See Ameren Illinois Co*., ICC Docket No. 12-0001, Final Order (Sept. 19, 2012).

During the initial docket to approve ComEd's formula rate, the Commission made a ruling regarding which of the formula rate schedules and appendices to include as part of the tariff filing (in Rate DSPP) and which to include as part of the compliance filing, but it did not decide the issue of whether or which schedules and appendices not included in the tariff constitute part of the structure or protocols of the formula rate and it directed that a rulemaking should commence because it would "add clarity to the reconciliations that will take place pursuant to this statute, which should provide greater clarity for utilities, ratepayers and Commission Staff." 11-0721 Order at 153. In doing so, the Commission rejected Staff's claim that a rulemaking was premature. "Staff overlooks the fact that the sooner the rulemaking takes place, the sooner all involved in the rulemaking will familiarize themselves with what formula rate will entail." *Id*.

In ComEd's next proceeding to update Rate DSPP, similar definitional issues were again raised regarding the formula rate, and, again, the Commission did not decide the issue and instead stated that "there will be a rulemaking in which ComEd and other interested parties are encourage [sic] to address this and other relevant issues regarding future formula rate filings." *Commonwealth Edison Co.*, ICC Docket No. 12-0321, Final Order (Dec. 19, 2012) at 105 ("12-0321 Order").

A rulemaking was never initiated, however. Rather, on May 16, 2014, Staff raised the interpretation issue in a docket (ICC Docket No. 14-0316) initiated by ComEd for the purpose of making certain "housekeeping" and compliance changes to Rate DSPP, changes that no party contests.[2] The Staff Motion proposed that the issue of "what constitutes the formula rate structure or protocol" should now be litigated. ICC Docket No. 14-0316, Staff Mot. at 7 (May 16, 2014). Yet, Staff also indicated that this issue is already "before the Commission in Docket No. 13-0501," the present Ameren docket. *Id.*

While ComEd indicated in its response to Staff's Motion that it is willing to work with Staff on these issues,[3] ComEd is concerned that the Proposed Order in the present docket has already been issued and the only remaining items are oral argument and a final order. *See generally Ameren Illinois Co.*, ICC Docket No. 13-0501, 13-0517 Cons., Proposed Order (May 9, 2014) ("Proposed Order" or "PO"). Indeed, the Proposed Order acknowledges that when Staff raised the formula rate interpretation issue in this Ameren docket, it "had been underway for

[2] *See* ICC Docket No. 14-0316, ComEd's Verified Petition to Make a Housekeeping Revision and a Compliance Change to [Its] Filed Performance Based Delivery Service Formula" (April 16, 2014); ICC Docket No. 14-0316, Staff Motion for Leave to File Exceptions to [ComEd's] Draft Order, for Entry of an Interim Order and to Reopen the Record" ("Staff Motion") (May 16, 2014).

[3] *See generally* ICC Docket No. 14-0316, ComEd's Resp. to Staff's Mot. (May 23, 2014). Pursuant to the Administrative Law Judge's Ruling of June 10, 2014 ComEd will continue to work with parties regarding a joint draft interim order, including contingencies related to the grant or denial of ComEd's Motion to Investigate. In doing so, ComEd does not waive any of its arguments herein.

some time and no indication was given that the outcome would be applicable to both AIC and ComEd. Had such an outcome been contemplated at the outset, ComEd may have chosen to participate." PO at 6. Importantly, ComEd received no notice that the Commission would address the interpretation of the statutory term "formula rate structure and protocols" through an Ameren docket rather than in the rulemaking that had long been contemplated by the Commission, ComEd, Staff, and Intervenors.

According to the Proposed Order, Staff intended that the Ameren order's conclusion in this docket regarding the interpretation of the formula rate be applied to ComEd without ComEd having an opportunity to be heard. PO at 6 ("Despite Staff's intentions reflected in Ameren Cross Ex. 1SH, the outcome of this proceeding will not be automatically applied to ComEd."). The Proposed Order properly rejected this proposal, however, and concluded that "Staff or another party may propose that the results of this case be applied to ComEd in an appropriate venue and the Commission will consider the record in that case before deciding whether to do so." *Id.*

Even so, this result – reached without ComEd having an opportunity to participate and be heard – would violate foundational principles of notice and due process, as explained in more detail below. This unfair result can be avoided if the Commission opens an investigation – whether in Docket No. 14-0316 or a separate docket – regarding the interpretation of the statutory language regarding formula rate structure or protocols in which Ameren, ComEd, Staff, and other parties can fully participate. Because ComEd's Motion to Investigate is now before the Commission in Docket No. 14-0316, ComEd requests that the Commission stay issuance of a final order in the present docket until it rules on ComEd's Motion to Investigate. ComEd has

requested that its Motion to Investigate be considered on an expedited basis so that its disposition can be resolved before any statutorily-set deadline in the present docket.

II. COMED'S PROPOSAL TO OPEN AN INVESTIGATION

Litigation to interpret the exact same statutory language in two separate dockets – as Staff and the Proposed Order contemplate – is precisely the sort of duplication and confusion that the Commission sought to avoid through the contemplated rulemaking proceeding.[4] Indeed, the Commission has previously rejected an attempt to implement a new policy in a one-off docket rather than through a rulemaking:

> Finally, Staff's accounting recommendation is a departure from past Commission practices and its Uniform System of Accounts. If the Commission were to adopt Staff's position, it should be accomplished on a uniform basis, as there is nothing unique about the instant land sale or Petitioner's particular status. ***Rather than implement a new Commission policy on an ad hoc basis which could raise certain due process concerns and unnecessarily complicate the Commission's task of regulation, the proper avenue for such a shift would be a rulemaking pursuant to Sec. 10-101 of the Act so that all potentially affected parties could have a meaningful opportunity to participate and so that duplicative litigation be avoided.***

In re Northern Illinois Gas Co., ICC Docket No. 89-0120, 1990 WL 10554476, Order (Ill. C. C. May 31, 1990) (emphasis added). As explained in more detail below, here, too, the Commission should be faithful to the determination in its prior orders to initiate a proceeding in which ComEd and other parties will have an opportunity to be heard on this seminal statutory interpretation issue. This process avoids the "due process concerns and unecessar[y] complicat[ions]" that arise from first adjudicating the meaning of the statutory term formula rate structure or protocols

[4] *See* 11-0721 Order at 153 (finding that a rulemaking would "add clarity to the reconciliations that will take place pursuant to this statute, which should provide greater clarity for utilities, ratepayers and Commission Staff."); 12-0321 Order at 105 (confirming that "there will be a rulemaking in which ComEd and other interested parties are encouraged to address this and other relevant issues regarding future formula rate filings").

in Ameren's docket and then again litigating the exact same issue in ComEd's docket despite the fact that the statutory language has not changed. *Id.*

ComEd understands the Proposed Order's concern regarding the commencement of a rulemaking proceeding several years into the formula rate process and proceedings. PO at 6. On the other hand, and as described further below, the need to resolve the key interpretative issue of the formula rate structure or protocols should not be so hastily decided that it violates important due process rights and results in litigation for years to come. To strike a balance between these concerns, ComEd's Motion to Investigate proposes that – in lieu of a full rulemaking – the Commission conduct an investigation regarding the interpretation of formula rate structure or protocols either in a bifurcated phase of Docket No. 14-0316 or in a separate docket initiated by the Commission. Under either case, both ComEd and Ameren, as well as Staff and any other interested party, could participate and build a singular full and complete record that would enable the Commission to rule on this important statutory interpretation issue once and for all. Importantly, this proceeding could be conducted on an expedited basis.[5]

With respect to the present docket, ComEd is also filing this narrowly tailored Motion to Stay so that the Commission does not inadvertently issue a final order while considering the Motion to Investigate. If the Motion to Investigate is granted, ComEd recommends that an emergency status hearing be held in the present docket, at which time the Commission could decide how to wind down this second phase of the docket or incorporate its record into the new investigation. For convenience, a copy of the Motion to Investigate is attached hereto as Exhibit A.

This proposal avoids the significant legal issues that would arise if the Commission were to continue down its current procedural paths of issuing a final order in this docket and thereafter

[5] If the Commission prefers to commence a rulemaking proceeding, ComEd would not be opposed to this path.

begin adjudicating the interpretation of the exact same statutory term in Docket No. 14-0316. Moreover, this proposal facilitates a full and complete investigation that is not constrained by separately considering the interpretation issue in each docket. As the Proposed Order notes, the Administrative Law Judges had "few viable options" when presented with Staff's out-of-scope interpretation issues. PO at 2. When the serious due process issues are considered, the *only* viable option is the investigation proposed in the Motion to Investigate.

III. THE COMMISSION SHOULD GRANT COMED'S MOTION TO STAY BECAUSE THE HARDSHIP AND INEQUITY TO COMED FAR OUTWEIGHS ANY POTENTIAL HARM TO OTHERS.

A. Legal Standard

In Illinois, a motion to stay may be granted at the court's discretion as part of its inherent authority to control the disposition of cases before it. *Certain Underwriters at Lloyd's, London v. Boeing Co.*, 385 Ill. App. 3d 23, 36, 895 N.E.2d 940, 953 (1st Dist. 2008). Stays may be issued at the discretion of the court where the movant requesting the stay makes a sufficient showing that the stay is justified. *See TIG Ins. Co. v. Canel*, et al., 389 Ill. App. 3d 366, 372, 906 N.E.2d 621, 627 (1st Dist. 2009); *see also Certain Underwriters at Lloyd's,* 385 Ill. App. 3d at 36 (a party proves by clear and convincing evidence that a stay of the proceedings outweighs the potential harm to the party against who it is operative). The party seeking the stay meets this requirement where moving forward with the proceeding would result in "a clear case of hardship or inequity." *Certain Underwriters at Lloyd's,* 385 Ill. App. 3d at 36.[6]

As shown below, ComEd's Motion to Stay is justified and should be granted to ensure the Commission does not issue a final order here before ruling on ComEd's Motion to Investigate. If the Commission proceeds to a final order in this docket that rules on the

[6] While some courts also look at the movant's likelihood of prevailing on the merits of an appeal, ComEd is not seeking the stay of a final order already issued and no appeal is at issue.

interpretation of formula rate structure or protocols, ComEd will be denied due process because it had no opportunity to be heard on a key issue of statutory interpretation regarding the meaning of formula rate structure or protocols, which goes to the heart of the EIMA-established cost recovery mechanism. *See* 220 ILCS 5/16-108(c) and (d). Unlike issues of fact, this deprivation of notice and due process cannot be cured by the Proposed Order's assurance that the exact same issue of statutory interpretation will again be taken up in ComEd's docket. Moreover, given the expedited nature of ComEd's Motion to Investigate, the parties to the present docket will not be harmed if issuance of the order is stayed while the Commission considers the Motion. Consistent with applicable law, the Motion to Stay merely requests that the Commission withhold issuance of the final order *within the confines of this docket's statutorily-set schedule and deadline*. The Motion does not seek a stay of the issuance of the Commission's order beyond this deadline.

B. Issuance of a Final Order in This Docket Violates Fundamental Notice and Due Process Requirements, and This Harm Cannot Be Cured Thereafter.

The core issue here – interpretation of the statutory term formula rate structure or protocols – is precisely the sort of issue which, once decided, is "intended to lead to the establishment of policies, practices, rules or programs applicable to more than one utility…." 220 ILCS 5/10-101. Indeed, in its Motion, Staff highlights the critical and far reaching legal impact of how this formula rate interpretation issue is decided:

> To answer that question would determine whether a Sec. 9-201 approval is required to be separately made by the Commission before an adjustment can be made in a formula rate proceeding.

Staff Mot. at 7.

While Section 10-101 of the Public Utilities Act ("Act") grants the Commission some discretion in how it conducts an investigation into issues of broad applicability, it is beyond

dispute that the utilities and other interested parties must be granted an opportunity to be heard prior to the Commission reaching a final conclusion on such issues. As the Commission has previously concluded, piecemeal litigation of a new rule or interpretation "could raise certain due process concerns and unnecessarily complicate the Commission's task of regulation[;] the proper avenue for such a shift would be a rulemaking pursuant to Sec. 10-101 of the Act so that all potentially affected parties could have a meaningful opportunity to participate and so that duplicative litigation be avoided." *In re Northern Illinois Gas Co.*, ICC Docket No. 89-0120, 1990 WL 10554476, Order (Ill. C. C. May 31, 1990) ; *see also* 220 ILCS 5/10-101.

Indeed, the Commission's Initiating Order in the pending rate case expense rulemaking docket clearly articulated the law and rationale for why a rulemaking must be conducted when establishing policies of general applicability:

> The Commission initiates this rulemaking proceeding in order to allow all interested parties an opportunity to present ideas and language that will assist the Commission in formulating a policy on the issue of rate case expense. A rulemaking is an appropriate vehicle for this, as the Commission's intent is that this will establish a general policy for the Commission, as opposed to a pronouncement in a rate case that will only affect a single utility. Section 1-70 of the Illinois Administrative Procedure Act defines "rule" as "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy…." [5 ILCS 100/1-70]. This is exactly what the Commission intends.

ICC Docket No. 11-0711, Initiating Order (Nov. 2, 2011) at 1. This same law and rationale apply here where the Commission is deciding the meaning of a fundamental statutory term – formula rate structure or protocols. It is difficult to imagine how the interpretation of this core EIMA term in the Ameren docket is not a "rule" designed to "implement[], appl[y], interpret[], or prescribe[] law or policy." *See id.*

Yet, ComEd is not a party to the present docket where the Commission is deciding one of the most important statutory interpretation issues under EIMA. The Proposed Order seeks to

downplay the due process issues by indicating that ComEd will not "automatically" be bound by the Commission's interpretation in the Ameren docket. PO at 6. While it is true that the Commission's orders are not necessarily binding in a separate docket, they cannot be departed from in an arbitrary or capricious manner. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 899, 907, 536 N.E.2d 724, 729 (1st Dist. 1988) ("An administrative agency's exercise of discretion will be set aside when the authority is exercised in an arbitrary or unreasonable manner or when it is a clear violation of a rule of law."). It is therefore difficult to understand how the Proposed Order can suggest that the Commission will decide the definition for Ameren in one case and will immediately revisit the definition of formula rate structure and protocols in ComEd's case in a way that fully and fairly gives ComEd its day in court. In reality, the Proposed Order's suggested procedural path cannot stand – core legal principles and protections require that ComEd be provided an opportunity to be heard *before* the Commission rules on the threshold issue of what formula rate structure or protocols means.

Notice Requirement. As an initial matter, while there is "no set standard for what notice comports with due process (*Bellingham Bay & British Columbia R.R. Co. v. New Whatcom* (1899), 172 U.S. 314, 19 S.Ct. 205, 43 L.Ed. 460), it is clear that a party must be given reasonable notice and a fair opportunity to appear and defend on the merits." *Summers v. Illinois Commerce Comm'n,* 58 Ill. App. 3d 933, 936, 374 N.E.2d 1111, 1113 (4th Dist. 1978). As the Proposed Order readily admits, however, ComEd had no notice that the Commission was foregoing the rulemaking and instead deciding the threshold formula rate structure or protocols interpretation issue *ad hoc* in an Ameren investigation.

> When Ms. Ebrey raised the issues at hand, these consolidated dockets had been underway for some time and no indication was given that the outcome would be applicable to both AIC and ComEd. Had such an outcome been contemplated at the outset, ComEd may have chosen to participate.

PO at 6. Indeed, proper notice for a rulemaking or investigation proceeding is to serve the initiating order or complaint on the utilities so that they may fully participate in the proceeding from the beginning. *See, e.g.,* ICC Docket No. 11-0711, Initiating Order (Nov. 2, 2011); ICC Docket No. 12-0456, Initiating Order (July 31, 2012).

Due Process Requirements. The Act and Commission orders also ensure that the due process rights of utilities and others are preserved when deciding key policy or interpretative issues that may be applicable to more than one utility. 220 ILCS 5/10-101; *In re Northern Illinois Gas Co.*, ICC Docket No. 89-0120, 1990 WL 10554476, Order (Ill. C. C. May 31, 1990); ICC Docket No. 11-0711, Initiating Order (Nov. 2, 2011). "The statutory requirements of notice and opportunity to be heard are also necessary under principles of procedural due process. 'Due process of law is served where there is a right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence which is offered.'" *People ex rel. Illinois Commerce Comm'n v. Operator Commc'n, Inc.*, 281 Ill. App. 3d 297, 302-303, 666 N.E.2d 830, 833-834 (1st Dist. 1996). Moreover, administrative proceedings must conform to the requirements of due process of law, and decisions that do not comply may be held void. *Id.*

Proceeding to a final order in this docket without ensuring utilities such as ComEd have "a right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence which is offered" (*People ex rel. Illinois Commerce Comm'n,* 281 Ill. App. 3d at 302-303) violates ComEd's due process. The final order may first decide the interpretation issue without ComEd having been granted an opportunity to

be heard. It is unclear how this violation could be cured by the Commission revisiting the interpretation of the very same statutory language in the ComEd docket.[7]

To be sure, the Proposed Order cannot credibly suggest that the Commission will be so untethered to its very recent interpretation of the statute that it will be free to fully and fairly interpret the statute anew just a few months later in the ComEd docket. Indeed, the Commission may not depart from its prior rulings in an arbitrary or capricious manner, (*Commonwealth Edison Co.*, 180 Ill. App. 3d at 907). Moreover, well-established case law requires that statutes be construed in a manner that will favor uniform application (at least where the circumstances are identical). *Kampen v. Dep't of Transp.*, 150 Ill. App. 3d 578, 582, 502 N.E.2d 31, 34 (2d Dist. 1986). Given these legal constraints, it would seem to be in the Commission's as well as all affected parties' best interests to avoid rendering an interpretation of the statute in one docket (Ameren), only to learn later that different circumstances and facts in another docket (ComEd) demonstrate that the first interpretation may have been flawed in one or more respects and incapable of achieving the statutory purpose. The better course would be for the Commission to consider all the potentially different facts and circumstances in one unified docket so that its first interpretation is best suited to deal with all the various circumstances that exist. This approach would be far more sound than the Proposed Order's preference for duplicative litigation on this issue and suggestion that the Commission could interpret the statute one way for Ameren and another for ComEd, as well as far more consistent with well-settled law that directs courts to avoid inconsistent judgments and piecemeal litigation. *Crum & Forster Specialty Ins. Co. v.*

[7] Relatedly, where the Commission's procedures are unfair and prejudice litigants, the appellate courts have struck down these orders on prejudice grounds. *Bus. and Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 226-227 (1989) (finding that the "Commission violated its rules and the Act to the prejudice of the intervenors" when it adopted a confusing standard and procedure); *see also* 83 Ill. Admin Code Part 200.25(b) ("Persons appearing in and affected by Commission proceeding must be treated fairly.").

Extended Stay America Inc., 375 Ill. App. 3d 654, 669-670, 873 N.E.2d 964, 978 (1st Dist. 2007).

C. The Parties to This Docket Will Not Be Harmed by the Grant of a Stay.

The scope of ComEd's Motion to Stay is narrowly tailored to ensure that the Commission does not inadvertently issue an order in the present docket while it considers ComEd's Motion to Investigate in Docket No. 14-0316. The Motion to Stay does not impact the issues decided by the Interim Order during the first phase of this docket. As such, and consistent with applicable law, the Motion to Stay is neither indefinite nor disruptive of the statutorily-prescribed deadline by which a final order must be issued in this docket. Indeed, ComEd has styled its Motion to Investigate as an "expedited" request so that the Commission can reach a decision on the Motion to Investigate well before the statutory clock in this docket expires.

IV. CONCLUSION

For all of the above reasons, ComEd respectfully requests that the Commission grant its Motion and stay issuance of the final order in this proceeding until the Commission rules on ComEd's Motion to Investigate in Docket No. 14-0316.

Dated this 18th day of June, 2014.

Respectfully submitted,

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VERIFICATION

I, Christine M. Brinkman, first being duly sworn, state that I am Commonwealth Edison Company's Director, Rates & Revenue Policy, that I have read the foregoing "Commonwealth Edison Company's Verified Emergency Motion to Stay Issuance of the Final Order", and that the facts stated therein that pertain to Commonwealth Edison Company are true and correct to the best of my knowledge and belief.

Christine M. Brinkman

Christine M. Brinkman

Subscribed and sworn to before
me this 17 day of June, 2014.

Deborah A. Chavez

Notary Public

DEBORAH A. CHAVEZ
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
May 19, 2018