STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
Petition to Make Housekeeping Revisions and a Compliance Change to filed Rate Formula.	)	Docket No. 14-0316
	)	

COMMONWEALTH EDISON COMPANY'S BRIEF ON EXCEPTIONS TO THE ALJS' INTERIM PROPOSED ORDER DATED JULY 23, 2014

TABLE OF CONTENTS

I. INTRODUCTION 2

II. BACKGROUND 5

III. EXCEPTION TO THE PORTION OF THE IPO ADDRESSING COMED'S PETITION 8

IV. EXCEPTION TO THE PORTION OF THE IPO ADDRESSING "PHASE 2" OF THIS DOCKET 10

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
Petition to Make Housekeeping Revisions and a Compliance Change to filed Rate Formula.	))	Docket No. 14-0316

COMMONWEALTH EDISON COMPANY'S BRIEF ON EXCEPTIONS TO THE ALJS' INTERIM PROPOSED ORDER DATED JULY 23, 2014

Commonwealth Edison Company ("ComEd"), by its counsel, under Section 10-111 of the Public Utilities Act (the "Act"), 220 ILCS 5/10-111, 83 Ill. Admin. Code § 200.830, and the order of the Administrative Law Judges ("ALJs"), submits this Brief on Exceptions ("BOE") to the ALJs' Interim Proposed Order dated July 23, 2014 ("Interim Proposed Order" or "IPO"). ComEd's Exceptions language is set forth in a separate simultaneously filed document.

I. INTRODUCTION

The ALJs' Interim Proposed Order is organized into two parts to address the unusual procedural history of this Docket. The first addresses ComEd's uncontested Petition. The second part addresses Staff's late-filed proposal to add a Phase 2 to the Docket to address two additional issues not raised by ComEd's Petition.

The Petition. As the IPO recognizes, ComEd's Petition originated this Docket by seeking specific relief from the Commission. The Petition seeks approval of: (1) clarifying, or "housekeeping," revisions to ComEd's rate formula approved by the Illinois Commerce Commission ("Commission" or "ICC") under the Energy Infrastructure Modernization Act ("EIMA")[1] and (2) revisions to rate formula to comply with the Commission's final Order in

[1] "EIMA" refers to the Energy Infrastructure Modernization Act, Public Act ("PA") 97-0616, as amended by PA 97-0646 and PA 98-0015, and the changes and additions it made to the Act.

ComEd's 2013 formula rate update proceeding ("FRU"), Docket No. 13-0318. The compliance change effectuates the Commission's direction that ComEd add a second cash working capital ("CWC") calculation to the rate base calculations in the rate formula. *See Commonwealth Edison Co.*, Docket No. 13-0318 (Final Order Dec. 19, 2013), at 18. The Commission's final Order noted the possibility that the compliance change would need to be made in a separate Article IX filing, such as this Docket. *Id.* at 17-18. ComEd's Petition is and always has been uncontested, and the IPO correctly grants the relief requested by ComEd.

The IPO's discussion of the issues, however, is incomplete and one-sided, and its analysis and conclusions suffer from the same misunderstanding that Staff's draft interim proposed order reflected regarding the necessity of the Petition. In short, both Staff and the IPO fail to appreciate that the change directed by 2013 FRU Order required an Article IX filing such as this one and the fact that the CWC change has been appealed by ComEd based, in part, on the argument that the Commission lacked the authority to order a change to the formula in an annual update proceeding under Section 16-108.5(d).[2] As such, the Petition was necessarily filed to comply with the 2013 FRU Order and to preserve and reflect ComEd's legal arguments on appeal. ComEd's Exception No. 1 proposes language to make the first part of the IPO clear, complete and accurate.

Staff's Proposed Phase 2. The principal reason there are contested issues in this Docket is that Staff proposes to add a second phase. Staff proposes that "Phase 2" be limited to two specific issues: (1) whether ComEd's rate formula should be altered to apply ComEd's depreciation rate study filed in January 2014 to the 2013 plant balances in the rate base

[2] Because the IPO is based on a draft interim order filed by Staff on June 19, 2014, it carries over the same defects of Staff's draft. Importantly, the unilateral filing of draft interim orders was not provided for in the schedule set by the ALJs. As a result, ComEd never had a proper opportunity to submit its own proposed draft interim order, which explains why its positions are not reflected in the IPO.

calculations in ComEd's pending 2014 FRU, ICC Docket No. 14-0312; and (2) the legal issue of whether, given the restrictions on modifying the rate formula in an FRU in subsections 16-108.5(c) and (d) of the PUA, the portions of ComEd's rate formula that are not set forth in its Rate DSPP – Delivery Services Pricing and Performance ("Rate DSPP") can only be modified in a separate Article IX docket, such as the instant Docket, or whether they also can be modified in an FRU docket (the "legal issue").

With respect to the second issue in particular, ComEd filed a Motion to Open an Investigation Regarding the Definition of Formula Rate Structure and Protocols ("Motion to Investigate") on June 18, 2014, which requested that the Commission initiate the investigation or rulemaking it had promised in past dockets to consider and decide threshold formula rate definition issues with the participation of both participating utilities, Staff and all interested stakeholders. This would ensure that the Commission does not prematurely decide key definitional and statutory interpretation issues in the pending Ameren investigation (to which ComEd was not a party[3]) without the benefit of considering the issues for both participating utilities. *See generally* Docket Nos. 13-0501, 13-0517 (Cons.). Following briefing on the Motion, the ALJs denied the Motion to Investigate on July 22, 2014.

Because the Motion to Investigate and subsequent briefing were filed after Staff's draft interim proposed order was filed, the IPO does not address the Motion to Investigate or acknowledge the issues associated with the Commission deciding the statutory interpretation issues in the Ameren investigation before ComEd has an opportunity to be heard. This is especially troubling given that there has been no rationale stated as to why ComEd's Motion to

[3] While ComEd filed a Petition to Intervene in the Ameren investigation docket on June 18, 2014, the Petition was limited to seeking a stay of the issuance of the final order in that docket while its Motion to Investigate was pending in the present docket. ComEd otherwise did not participate in the docket.

Investigate was denied. ComEd's Exception No. 2 therefore addresses the Motion to Investigate briefing consistent with its denial.[4] Exception No. 2 also addresses an anomalous sequencing provision in the second part of the IPO.

As a final matter, ComEd notes that it repeatedly has expressed the reservation that Staff's proposal to add a Phase 2, and Staff's legal position that any part of the rate formula not set forth in tariff sheets themselves (other than provisions specifically mandated by EIMA) can be changed in any FRU, each create the prospect of further and perhaps essentially never-ending review and revision of the rate formula. Such a prospect is highly inconsistent with the structure and intent of EIMA. EIMA is designed to yield a stable rate formula with limited subsequent changes whose *inputs* would be updated annually. ComEd is further concerned that, at the hearing on July 22, 2014, the Illinois Attorney General's Office (the "AG") stated that in its Brief on Exceptions it intends to propose to add yet another untimely request to change the rate formula as a subject to be litigated in this Docket. That development only confirms the potential serious problem of churning the rate formula contrary to EIMA.

II. BACKGROUND

On April 16, 2014, ComEd simultaneously filed: (1) the 2014 FRU, and (2) the narrowly tailored Petition that initiated this Docket, which was contemplated by the Order in the 2013 FRU, and that is described in the Introduction of this Brief on Exceptions. ComEd believes that the "second CWC calculation" ruling in the 2013 FRU exceeded the Commission's authority in an FRU, but ComEd filed the Petition in order to comply with that ruling while preserving its

[4] In so doing, ComEd does not waive any of its legal rights, including petitioning the Commission for interlocutory review of the ALJs' ruling denying the Motion.

legal rights.[5] The Petition, therefore, is similar in nature to the uncontested housekeeping Petition (ICC Docket No. 13-0339) that ComEd filed in connection with its filing of the 2013 FRU and which the Commission approved.

Staff filed a response to the Petition on May 8, 2014, stating that it had no objections to the Petition, although the response also included other material and requested that ComEd include certain language in ComEd's Draft Order. Accordingly, ComEd submitted a concise two and one-half page Draft Order on May 14, 2014, the due date set by the ALJs. The Draft Order used as a template the Commission's June 26, 2013, final Order in ICC Docket No. 13-0339. The Draft Order includes the language that was requested by Staff in its May 8th response, with one modification to which Staff agreed:

> (4) the housekeeping revision and compliance change are reasonable and should be approved; ComEd's Petition is largely seeking approval to implement in the 2015 rate year the same Cash Working Capital calculation the Commission ordered it to implement in Docket No. 13-0318 and which ComEd has already implemented for the 2014 rate year; **while ComEd has the right to make a Section 9-201 filing before the Commission, the Commission does not decide here whether ComEd is required to do so given ComEd's request in this Petition; the Commission's decision in this docket has no bearing on the decision that it must and will separately make in the ongoing Docket No. 13-0501.**

(Language in bold requested or agreed to by Staff.)

However, Staff filed a Motion on May 16, 2014, that asked the Commission to make certain changes to ComEd's Draft Order and, more importantly, to expand the scope of this Docket beyond the subject matter of the Petition by "re-opening" the record. More specifically, Staff requested that: (1) the Draft Order be modified to set forth Staff's position and arguments

[5] In brief, under Section 16-108.5(c) and 16-108.5(d) of the Act, the Commission cannot change the formula rate structure and protocols in an FRU, and it can do so only in a separate proceeding under Section 9-201 of the Act, as discussed further in Section III of this Brief on Exceptions. ComEd contends that the Commission-approved schedules, appendices, and work papers that are referenced in Rate DSPP and that provide the data used in the tariff, and which are part of the spreadsheet used to calculate rates under the rate formula, are part of the formula rate structure and protocols within the meaning of the EIMA provisions regarding modifications thereto.

that the Commission acted within its authority in directing the second CWC calculation in the 2013 FRU; (2) the Commission enter the modified Draft Order as an "Interim Order"; (3) the Draft Order be modified to include the additional issues as discussed earlier in this Brief on Exceptions, except Staff's then proposal was more open-ended; and (4) a final Order on all issues be entered by November 30, 2014, in order to allow coordination with the final Order in ComEd's 2014 FRU. (*E.g.*, Staff's May 16th Motion, p. 9.) Staff attached a draft interim order to its May 16th Motion.

ComEd responded on May 23, 2014, to Staff's May 16th Motion. Although ComEd took issue with the untimely nature of Staff's May 16th Motion and did not agree with Staff's arguments in support thereof (or Staff's positions on the issues raised), ComEd explained that it was willing to work with Staff to seek to resolve the specifically identified issues with the rate formula (*i.e.*, the depreciation issue and legal issue).

In its May 29, 2014 reply, Staff continued to argue for adding the depreciation issue and legal issue to a Phase 2 of this docket, and asked for a window of three weeks within which to identify any additional specific issue for Phase 2. Staff subsequently did not identify any additional specific issue for Phase 2.

The ALJ's scheduling order of June 10, 2014, directed the parties "to file a Joint Draft Interim Order by June 19, 2014 which describes the scope of the second phase of the docket", and, further provided that if they did not reach an accord, "this can be discussed at the prehearing conference [set for June 24, 2014]. Scheduling for Phase 2 of this docket will also be discussed at the prehearing conference."

ComEd sought to arrive at an agreed proposed Interim Order with Staff, but, while the parties discussed this subject in good faith, they did not reach an accord. Although the ALJs'

scheduling order did not provide for the unilateral submission of non-agreed draft interim orders, Staff filed a draft interim order on June 19, 2014. The draft interim order was based on the problematic draft interim order attached to Staff's May 16th Motion. As noted in the Introduction of this Brief on Exceptions, ComEd never had a proper opportunity to submit its own proposed draft interim order. Staff's draft was incomplete and one-sided, and that has carried over to the IPO.

III. EXCEPTION TO THE PORTION OF THE IPO ADDRESSING COMED'S PETITION

EXCEPTION NO. 1

The first part of the IPO, addressing ComEd's Petition, correctly recommends the approval of ComEd's uncontested Petition, but should be revised to completely and accurately state the parties' positions while affirming the rationale for the filing itself. Because the CWC change is uncontested by Staff and approved in the IPO, the parties' positions are limited to their views regarding whether ComEd needed to file and seek approval of the CWC change under Article IX, particularly under Section 9-201 of the Act. As ComEd argued throughout the 2013 FRU case, the CWC change requires a change to the formula rate, which is prohibited by Section 16-108.5(d) of the Act ("The Commission shall not, however, have the authority in a proceeding under this subsection (d) to consider or order any changes to the structure or protocols of the performance-based formula rate…."). Indeed, the Staff proposal to change the CWC formula contemplated that additional proceedings, potentially including a Section 9-250 proceeding initiated by the Commission, could be required to effect that change. 2013 FRU Order at 17-18. ComEd proposed to make the required change voluntarily, in this Petition, and implementing the Commission's direction is precisely what ComEd's Petition accomplishes.

Notwithstanding that the Petition faithfully implements the 2013 FRU Order's directives, the filing and approval of the CWC change separately in this Section 9-201 docket is also consistent with ComEd's legal position that such a change cannot be approved in an FRU proceeding according to Section 16-108.5(d). Because the Commission's approval of the CWC change is now the subject of an appeal, the approval of the change in this separate docket under Article IX also addresses the current vulnerability of the Commission's "approval" in Docket No. 13-0318 and ensures that a separate basis for approval under Section 9-201 exists.

Accordingly, Exception 1 should be adopted to fairly reflect ComEd's legal position in addition to Staff's position and to acknowledge that the Petition was appropriately filed consistent with the 2013 FRU Order. ComEd's Exception No. 1 also adds appropriate headings, adds certain background legal information about EIMA, adds details regarding the procedural history of this Docket and of the Ameren consolidated Docket that has been referenced at various points by Staff and ComEd (as discussed further in Section IV of this Brief on Exceptions), corrects the treatment of a proposal filed in ComEd's 2014 FRU (reflecting the CWC change in the rate formula) as if it already were approved, strikes the suggestion that Phase 2 be conducted under Section 10-101 of the Act, and adds a Commission Analysis and Conclusions section to the first part of the IPO.

The additional material in Exception No. 1 is self-explanatory, except that the point regarding Section 10-101 requires further comment. EIMA provides for modification of the rate formula in an Article IX docket. Staff's inclusion of language purporting to base Phase 2 on Section 10-101 of the Act is inconsistent with EIMA and unsupported. Section 10-101 is a general investigation provision. It authorizes the Commission to conduct proceedings; it does

not change or enlarge the Commission's substantive authority and jurisdiction. Section 10-101 is not the proper basis for Phase 2.

Exception No. 1 should be adopted.

IV. EXCEPTION TO THE PORTION OF THE IPO ADDRESSING "PHASE 2" OF THIS DOCKET

EXCEPTION NO. 2

On June 18, 2014, ComEd filed its Motion to Investigate. In brief, ComEd's Motion requested that the Commission now implement the standing directives in its recent orders to conduct an investigation regarding a threshold definitional issue under the Energy Infrastructure Modernization Act ("EIMA") – the meaning of the statutory term "the structure or protocols of the performance-based formula rate" in Section 16-108.5(d) of the Act. *See* Order in Docket Nos. 11-0721 and 12-0321. Consistent with the orders' intent to "provide greater clarity for utilities, ratepayers and Commission Staff", the Motion to Investigate would, if granted, ensure that Ameren Illinois ("Ameren") and ComEd – the only two Illinois utilities that have Commission-approved formula rates on file under EIMA – as well as other interested parties may be heard prior to the Commission ruling on this seminal issue of statutory interpretation.

As ComEd explained, the Motion to Investigate is complicated by the fact that the Commission's directives have not been implemented; instead, this key statutory interpretation issue was raised in a separate investigation involving only Ameren. *See* Docket No. 13-0501 / 13-0517 (Cons.) ("*Ameren*"). Yet, ComEd never received notice that the Commission might depart from its past orders and decide this key interpretation issue in an *Ameren* docket. Indeed, up to and including the date of this Brief on Exceptions, the Commission itself has never signaled any retreat from the statements in its previous orders that it will address this issue on a comprehensive, as opposed to a piecemeal, basis. ComEd further explained that proceeding to a

determination on the meaning for "formula rate structure and protocols" in the Ameren docket before providing ComEd with an opportunity to be heard would raise serious notice and due process issues:

- ***The Notice Requirement Is Not Satisfied***: The Commission orders directing that a rulemaking commence to address key definitional issues regarding the formula rate still stand. ComEd has received no notice that a core interpretation issue would no longer be addressed in the rulemaking and instead addressed exclusively in an Ameren docket to which ComEd is not a party. A brief and vague mention of the Ameren docket in a Staff brief does not suffice as notice that the Commission has changed course.
- ***Due Process Is Not Satisfied***: While the Responses to ComEd's Motion to Investigate go out of their way to assure ComEd it will not be bound by any interpretation rendered in the Ameren investigation, a review of the record in that case quickly reveals that Staff and CUB intended to litigate this important statutory term once and apply the resolution to both Ameren and ComEd. That the Proposed Order admitted that its conclusions could not automatically be applied to ComEd does not change the practical reality that the Proposed Order, if adopted, would be used by the parties to deprive ComEd of due process.

Motion to Investigate at 2-3. Following briefing, the Motion was denied, but without a ruling explaining the rationale. Because Staff's draft interim order of June 19, 2014 did not address the Motion, the IPO also fails to reflect any discussion of the Motion or issues it raises.

In light of the serious notice and due process issues identified by ComEd, Exception 2 proposes revisions to the IPO that are designed to mitigate these harms without contravening the

ALJs' ruling. Indeed, the Proposed Order in the Ameren investigation acknowledges that it had few viable options at the time that Staff made its late-filed proposal to decide the interpretation issue in the Ameren docket, and further admits that ComEd did not have notice. PO at 2, 6. As a result, the Proposed Order makes clear that the *Ameren* order's conclusions will not automatically be applied to ComEd. PO at 6. Consistent with the Proposed Order and the assurances made by Staff, AG, and CUB in their responses to ComEd's Motion, ComEd proposes language in Exception 2 clarifying that the *Ameren* order will not be binding on ComEd and that ComEd will have the opportunity to fully and freely litigate the formula rate interpretation issues in Phase 2 of this docket.

Finally, Exception No. 2 also seeks to address an anomalous sequencing provision in the second part of the IPO. The IPO appears to indicate that the legal issue would be decided first, and then, if and only if ComEd's view prevails, the depreciation issue would be decided here. The reason for this sequence is not explained. This two-step, conditional process would be confusing and inefficient. Phase 2 should involve a normal process in which evidence is submitted, briefs are filed, a proposed order issued, there are exceptions and replies, possibly oral argument, and a final Order. The depreciation issue and the legal issue should be addressed together. To fully litigate the depreciation issue, and then not decide it, would be wasteful and would serve no useful purpose. Perhaps Staff's draft interim order was structured in this manner to rationalize why the legal issue would be addressed in Phase 2 even though it is not necessary to address the legal issue in order to resolve the depreciation issue, or perhaps Staff had some other objective in mind. In any event, however, Phase 2 should not proceed in the suggested bifurcated manner.

Exception No. 2 should be adopted. Please note that Exception No. 2 affects the body of the IPO and also the Findings and Ordering Paragraphs.

Dated: July 25, 2014

COMMONWEALTH EDISON COMPANY

By One of its Counsel

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

Richard G. Bernet
Clark M. Stalker
Bradley R. Perkins
10 S. Dearborn Street, Suite 4900
Chicago, Illinois 60603
(312) 394-5400
richard.bernet@exeloncorp.com
clark.stalker@exeloncorp.com
bradley.perkins@exeloncorp.com

E. Glenn Rippie
John P. Ratnaswamy
Maris J. Jager
ROONEY RIPPIE & RATNASWAMY LLP
350 W. Hubbard Street, Suite 600
Chicago, Illinois 60654
(312) 447-2800
glenn.rippie@r3law.com
john.ratnaswamy@r3law.com
maris.jager@r3law.com