

September 20, 2022

ATTORNEY GENERAL RAOUL URGES COMMERCE COMMISSION TO ORDER COMMONWEALTH EDISON PAY CUSTOMERS LARGER REFUNDS

Raoul Seeks Rehearing to Reconsider ComEd's Accounting of Criminal Penalty Payments

Chicago — Attorney General Kwame Raoul, along with the city of Chicago and the Citizens Utility Board (CUB), filed an application for rehearing requesting the Illinois Commerce Commission (ICC) revisit its Aug. 17 decision ordering Commonwealth Edison (ComEd) to refund \$38 million to customers.

[Raoul, the city of Chicago and CUB argued](#) that customers should receive larger refunds after ComEd financed a \$200 million contribution from its parent company, Exelon Corporation, as an equity infusion to pay a criminal penalty from a July 2020 deferred prosecution agreement (DPA) ComEd entered into to resolve a federal criminal investigation. ComEd's accounting treatment is argued to have permanently increased ComEd's equity capitalization, resulting in the electric utility collecting \$7 million more in revenues from its customers.

In the DPA, ComEd admitted to engaging in an unprecedented, eight-year bribery scheme to influence and reward former speaker of the Illinois House of Representatives, Michael Madigan, in exchange for support in passing legislation favorable to ComEd and its business.

"ComEd should not be allowed to profit from its wrongdoing by using accounting tricks to collect more money," Raoul said. "ComEd charged customers an additional \$7 million as a result of unnecessary and unreasonable accounting entries. The ICC should not allow ComEd to shift the impact of its DPA fine to customers by charging them millions of dollars every year. The ICC should reconsider its decision and ensure that ComEd customers receive the refunds they deserve."

When the ICC ordered ComEd to refund \$38 million to customers last month, it concluded that this amount covered all costs in rates related to the electric utility's misconduct in the DPA.

According to briefs filed by Raoul's office, ComEd's accounting treatment of Exelon's \$200 million contribution resulted in ComEd collecting \$7 million more in revenues from its customers, which Raoul and the group recommended be refunded to customers. They also requested the equity infusion be removed in future rate proceedings to ensure customers do not pay higher rates as a result of how ComEd financed its DPA penalty payment.

"This application for a rehearing by the ICC is an important step to ensure that Chicago customers are protected after these events that greatly damaged public trust," said Chicago Mayor Lori E. Lightfoot. "I am committed to this continued collaboration with the Attorney General and the Citizens Utility Board to get customers the refunds they deserve."

The ICC refused to make ComEd pay the larger refund, or even to remove the equity infusion. In the application for rehearing, Raoul's office, the city of Chicago, and CUB urge the ICC to reconsider those decisions.

"A \$38 million refund is not enough," said CUB Executive Director David Kolata. "Customers deserve better from ComEd, in the wake of Illinois' most significant utility scandal ever. We will continue to work for a bigger refund, and to hold ComEd accountable."

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
)	
v.)	
)	
Commonwealth Edison Company)	Docket No. 21-0607
)	
Investigation concerning rate effects of)	
conduct admitted in Deferred Prosecution)	
Agreement.)	
)	(consol.)
)	
Illinois Commerce Commission)	
On Its Own Motion)	
)	
v.)	Docket No. 21-0739
)	
Commonwealth Edison Company)	
)	
Investigation of misconduct pursuant to)	
Section 4-604.5 of the Public Utilities Act.)	

**APPLICATION FOR REHEARING OF THE PEOPLE OF THE STATE OF ILLINOIS,
THE CITY OF CHICAGO, AND THE CITIZENS UTILITY BOARD**

The People of the State of Illinois, through KWAME RAOUL, Attorney General of the State of Illinois (“the People” or “the AG”), the City of Chicago (“City”), and the Citizens Utility Board (“CUB”) (collectively, “the Government and Consumer Advocates” or “GCA”), pursuant to Section 10-113 of the Public Utilities Act (“the Act”) (220 ILC 5/10-113) and Section 200.880 of the Rules of Practice of the Illinois Commerce Commission (“ICC” or “Commission”) (83 Ill. Adm. Code Part 200.880), hereby submit their Application for Rehearing with regards to the Commission’s Order entered on August 17, 2022 (“Order”).

I. INTRODUCTION

The Government and Consumer Advocates seek rehearing of the Commission’s findings in its Order regarding the accounting mechanism for the \$200 million that Commonwealth Edison Company (“ComEd” or the “Company”) received from its parent company, Exelon Corporation (“Exelon”), which ComEd reported as an equity infusion. GCA Exceptions and Brief on Exceptions (“BOE”) at 2, citing AG-CITY-CUB Exs. 1.0, 2.2. The Company used Exelon’s equity contribution to pay the criminal penalty in connection with the Deferred Prosecution Agreement (“DPA”) that the Company entered into with the United States Attorney General for the Northern District of Illinois on July 17, 2020. *Id.*

The GCA asked the Commission to adopt the recommendations set forth in the testimony of Lafayette Morgan, Jr., an expert regulatory accountant. See AG-CITY-CUB Ex. 2.2, 220 ILCS 5/4-604.5(a)–(b). Although the Order adopted part of Mr. Morgan’s recommendation, it declined to require ComEd to refund customers the excess returns (or revenues) that the Company collected from ICC Docket No. 21-0367¹ in the amount of \$7.008 million (or \$7,007,728), and also declined to order ComEd to remove the \$200 million equity infusion from each future rate proceeding to ensure that ratepayers do not again pay ComEd excess returns in connection with the DPA. GCA BOE at 2–3, citing AG-CITY-CUB Ex. 2.0 at 13 (Table 2).

For the reasons discussed herein, the GCA respectfully request that the Commission grant rehearing on the above issues to ensure the legislative intent and language of Section 4-604.5 of the Act is achieved. The GCA’s adjustments are necessary for the Commission to accord with state law, which requires it identify and initiate refunds for all ratepayer funds that ComEd “spent, allocated, transferred, remitted, *or caused in any other way to be expended...* in

¹ *Annual formula rate update and revenue requirement reconciliation under Section 16-108.5 of the Public Utilities Act*, Final Order (December 1, 2021).

connection with the conduct detailed” in the DPA. 220 ILCS 5/4-604.5(a)–(b) (emphasis added). But the Order currently gives ComEd unjust enrichment, essentially allowing it to benefit as a result of its DPA payment for criminal and ethical misconduct. Such an interpretation of Section 4-604.5 breaks the rules of statutory construction by ignoring the express directive to find and to remedy “any other way” ratepayers’ funds are expended for DPA costs, and by failing to construe the statute to prevent injustice and prejudice to public interests.

II. LEGAL STANDARD

While the Commission’s decisions are generally entitled to deference, the Act requires the Commission to support its decisions with substantial evidence based on the entire record to avoid appellate reversal. *See* 220 ILCS 5/10-201(e)(iv)(A); *People ex. rel. Hartigan v. Ill. Com. Comm’n*, 148 Ill. 2d 348, 381 (1992). Illinois courts have ruled that “[s]ubstantial evidence consists of more than a mere scintilla but may be something less than a preponderance of evidence and is such evidence as a reasoning mind would accept as sufficient to support a particular conclusion.” *People ex rel. O’Malley v. Ill. Com. Comm’n*, 239 Ill. App. 3d 368, 376 (1993), citing *Ill. Bell Tel. Co. v. Ill. Com. Comm’n*, 203 Ill. App. 3d 424, 433 (1990); *Metro Util. v. Ill. Com. Comm’n*, 193 Ill. App. 3d 178, 184 (1990). The Commission must make findings in support of its decision, and support for the findings must exist in the record. *See Commonwealth Edison Co. v. Ill. Com. Comm’n*, 322 Ill. App. 3d 846, 849 (2nd Dist. 2001).

On appeal, “the [C]ommission’s interpretation of a question of law is not binding ... and is subject to de novo review.” *Cont’l Mobile Tel. Co., Inc. v. Illinois Com. Comm’n*, 269 Ill. App. 3d 161, 166 (1st Dist. 1994). Statutes are not to be construed “in a manner that would lead to consequences that are absurd, inconvenient, or unjust.” *Paciga v. Property Tax Appeal Board*, 322 Ill. App. 3d 157, 161 (2001); see also *In re Park Dist. of La Grange*, 2013 IL App (1st)

110334, ¶ 66 (“[I]n determining the intent of the legislature, the court may properly consider not only the language of the statute, but *also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved*”) (internal citation omitted) (emphasis added).

The GCA request rehearing based on errors of fact and law in the Order and the Order’s failure to consider substantial evidence in the record. On appeal, the Order would be subject to remand or reversal under Section 10-201(e) of the Act, which provides, in pertinent part:

- (iv) The court shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:
 - A. *The findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such rule, regulation, order or decision; or*
 - B. The rule, regulation, order or decision is without the jurisdiction of the Commission; or
 - C. *The rule, regulation, order or decision is in violation of the State or federal constitution or laws; or*
 - D. The proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant.

220 ILCS 5/10-201(e)(iv)(B)(C) (emphases added). A decision is not supported by substantial evidence if a reasoning mind would not accept a particular conclusion as sufficiently supported by the evidence. *Commonwealth Edison Co. v. Ill. Com. Comm’n*, 2014 IL App (1st) 130302, ¶46. The Order fails to meet the foregoing standards and is thus vulnerable to appellate reversal. The Commissions should grant the GCA’s Application for Rehearing to correct these fatal errors.

III. EQUITY INFUSION

THE COMPANY'S EQUITY INFUSION IN CONNECTION WITH THE DPA RESULTS IN COLLECTION OF RATEPAYER FUNDS IN VIOLATION OF SECTION 4-604.5 OF THE ACT.

As set forth in the GCA's Briefs, the record evidence, and the arguments herein, the Commission's rejection of the GCA's (1) proposed adjustment to ComEd's capital structure to refund over \$7 million in excess returns (revenues) the Company collected by treating Exelon's payment as an equity infusion, and (2) proposed removal of this infusion from ComEd's capital structure in future rate proceedings, was improper and constitutes reversible error. GCA Initial Brief ("IB") at 6-16; GCA Reply Brief ("RB") at 4-13; GCA BOE at 3-16.

The Order errs by failing to consider, account for, or otherwise examine substantial record evidence demonstrating the necessity and legislative imperative of correcting the unjust and unreasonable collection by ComEd of ratepayer funds stemming from a capital infusion used to pay a criminal penalty in contravention of Section 4-604.5 of the Act. *See* Order at 30-31. The Commission Analysis and Conclusions in the Order fails to support its rejection or otherwise account for several substantive arguments presented by GCA, including the following:

- The Order adds non-existent terms to the DPA and then improperly applies these supposed DPA terms to supplant the governing statutory language and legislative intent of Section 4-604.5 of the Act which solely controls this proceeding (BOE at 4-10; *see* Order at 30-31).
 - The Order concludes, without basis, that the DPA "expressly authorize[d]" ComEd's use of Exelon's equity infusions to pay the DPA penalty (GCA BOE at 4-5; *see* Order at 30-31), implicitly and incorrectly finding that permissive language in the DPA – and not the governing provisions of Section 4-604.5 of

the Act – control the determination of whether and what ratepayer funds ComEd “collected, spent, allocated, transferred, remitted, or caused in any other way to be expended ratepayer funds in connection with the conduct detailed in the [DPA] ...” ought to be refunded.

- The Order ignores the provision in the DPA that “ComEd shall not seek or accept directly or indirectly reimbursement of indemnification from any source other than Exelon with regard to the fine amount or any other amount it pays pursuant to any other agreement entered into with an enforcement authority or regulator concerning the facts set forth in the Statement of Facts.” See GCA BOE at 5 (quoting DPA at 8 ¶10); *see* Order at 30-31. This Order ignores the fact that Exelon’s equity infusion *caused* ComEd to collect excess returns (or revenue) in the amount of \$7.008 million in ICC Docket No. 21-0367. *Id.*, AG-CITY-CUB Ex. 2.0 at 13 (Table 2); AG-CITY-CUB Ex. 2.1. The Order nowhere addresses how excess returns paid for by ratepayers would not potentially constitute indirect reimbursement from a source other than Exelon, which would violate the terms of the DPA.
- In particular, the Order fails to give effect to Section 4-604.5 of the Act, which requires the Commission to determine whether ComEd “collected, spent, allocated, transferred, remitted, *or caused in any other way* to be expended ratepayer funds in connection with the conduct detailed in the [DPA]” (220 ILCS 5/4-604.5(b) (emphasis added), and mandates that any such ratepayer funds “collected pursuant to this Section, for the purposes of restitution, shall be repaid by the public utility” (*id.* at 4-604.5(e)). The Act governs the proceeding – not the DPA, which no entity of the

State of Illinois is a party to. The Order fails to address why the Act does not control and ignores the expressed, clear intent of the General Assembly to prevent ComEd from collecting these funds from ratepayers because “ethical and criminal misconduct [by a public utility] *shall not be tolerated.*” 220 ILCS 5/4-604.5(a) (emphasis added); GCA BOE at 5-8.

- The Order ignores the record, which fully establishes that ComEd customers would have paid \$7.008 million less in rates had ComEd not treated the Exelon payment of the DPA penalty as a permanent equity increase. See BOE at 8; citing AG-CITY-CUB Ex. 2.0 at 10:232–235, Staff Ex. 3.0 at 4:73–78.
- The Order misstates the facts of the case by accepting ComEd’s argument that its equity infusions are “fully offset ... [and] had no impact on ComEd’s year-end 2020 capital structure used to set 2022 rates.” GCA BOE at 6; *see* Order at 31. This statement ignores the fact that an equity infusion that *permanently* increases the Company’s equity balance by \$200 million moving forward, as the record evidence regarding ComEd’s accounting treatment shows, is *not* “fully offset” by a below-the-line, one-time, single year expense. *Id.* The GCA’s witness Mr. Morgan, illustrated this impact, which continues beyond the single year, which is why the Government and Consumer Advocates asked the Commission to order both a refund for the excess return of \$7.008 million ComEd collected from ratepayers in Docket No. 21-0367, and also remove this increase in the common equity ratio from ComEd’s future rate proceedings. GCA BOE at 9–10.

- The Order fails to address how Section 4-604.5 of the Act could authorize the ICC to permit ComEd, an investor-owned utility that has entered into a DPA for ethical and criminal misconduct, to collect *more* money from ratepayers by selecting an accounting approach that “provide[s] for higher returns and minimize[s] the negative impact on shareholder value – [even] *at the expense of increasing ratepayers’ costs.*” See GCA BOE at 9, citing AG-CITY-CUB Ex. 2.0 at 10:217–221 (emphasis added).
- The Order risks being overturned under recent appellate court precedent stating that, in interpreting a statute, Illinois courts “never condoned public corruption.” GCA BOE at 9, quoting *Sigcho-Lopez v. Ill. State Bd. of Elections*, 2022 IL 127253 at P40-41 (Mar. 24, 2022). This proposition dates back roughly a century, as the Illinois Supreme Court found in 1928 that “a statute should be construed broadly to prohibit corrupt practices by public officers.” *Peabody v. Sanitary Dist. of Chi.*, 330 Ill. 250, 261 (1928). Allowing ComEd to collect a return of and on the capital infusion used to pay a fine stemming from criminal and ethical misconduct directly violates the courts’ well-established proposition.
- The Order provides insufficient justification for why the application of “traditional ratemaking principles” is lawful in this unprecedented proceeding attributable to the Company’s actions, and indeed, where Section 4-604.5 of the Act was enacted in direct response to the Company’s engagement in criminal and ethical misconduct described in the DPA. GCA BOE at 10–13. This section makes clear that this proceeding is not a ratemaking case, nor is it about routine transactions or ordinary accounting measures, but the Order improperly treats it as such. *Id.*

- The Order nowhere mentions or addresses the GCA witness Mr. Morgan’s alternative method to remove the equity infusion from the Company’s common equity balance. *See* GCA BOE at 10, citing GCA IB at 15 (“ComEd might consider using a liability account provided in FERC [Federal Energy Regulatory Commission] Uniform System of Accounts” called FERC Account 223, Advances from Associated Companies). The Order also nowhere addresses ComEd’s failure to explain why it (or Exelon) could not have simply credited and debited the same account, which would have assured no effect on ratepayers. GCA BOE at 10–11. In failing to address these alternatives, the Order does not explain how the decisions are consistent with the legislative intent of Section 4-604.5, which indicate the Commission’s remedial actions are not restrained by traditional accounting, finance, ratemaking, or prior orders. *See* GCA BOE at 13. The Order fails to address how allowing ComEd to be unjustly enriched with ratepayer funds is not unjust and is prejudice to the public interest against ethical and criminal misconduct. *Id.*, citing *Ill. Bell Tel. Co.*, 362 Ill. App. 3d at 661; *Sigcho-Lopez*, 2022 IL 127253 at P42.

IV. CONCLUSION

For the reasons stated above, the Government and Consumer Advocates respectfully request that the Commission grant this Application for Rehearing on the matter of the equity infusion in ComEd’s capital structure in connection to the DPA and the Company’s collection of excess revenues from customers in violation of the Act.

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Respectfully submitted,



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THE PEOPLE OF THE STATE OF ILLINOIS

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THE CITY OF CHICAGO

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