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Cutting the Bill for Commonwealth Edison's Nuclear Power Plants: Important Gains for Illinois Public Utility Customers

by Robert L. Jones, Jr.

I. INTRODUCTION

In the fall of 1993, Commonwealth Edison (Edison) agreed to pay its Illinois customers \$1.3 billion, the largest refund issued by any public utility in United States history. The company also agreed to reduce its electricity rates by \$339 million per year. This refund and rate reduction settled a decade-long series of cases with consumer advocates over the billions of dollars Edison spent constructing five nuclear power plants. They provide much-needed relief to Edison customers, who historically have paid some of the highest electricity rates in the country. But more importantly, the decade of litigation has dramatically changed Illinois public utility law. Because of the litigation and reforms to the Illinois Public Utilities Act, Edison and other Illinois utility companies will be far less likely to build more giant nuclear power plants — which up until recently, proved to be a financial boon to utility company investors but a bust for utility customers. Instead, utility companies will have a strong incentive to meet future growth in electricity demand through energy-efficiency programs, smaller-scale power production, and other alternatives. These options are less costly to consumers and less harmful to the environment.

Edison has 12 nuclear power plants in operation — more than any other investor-owned utility in the country — and they account for the majority of electricity generated by the utility company. The recent litigation involved five of the last six plants Edison built. Edison sought permission to build these plants in the early 1970's and started operating them during the 1980's. The nuclear power plants in-

involved in the litigation were: LaSalle 1, which began operation in 1982; Byron 1 and 2, which began operation in 1985 and 1987, respectively; and Braidwood 1 and 2, which began operation in 1987 and 1988, respectively. The total price tag for those plants was nearly \$11 billion.¹

The construction of these nuclear power plants caused dozens of administrative and court cases. Consumer advocates questioned the need for the plants, the safety of their construction, the reasonableness of construction costs, the operating performance of the plants, and the amount utility customers were being asked to pay for their construction. The cases, which began in 1984, produced a series of historic decisions, including: the first and only denial of a nuclear power plant operating license by the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission;² four consecutive full or partial reversals by the Illinois Supreme Court of Illinois Commerce Commission (Commission) utility rate increases;³ a Commission determination that Edison may not earn a return on most of its \$5 billion investment in two operational nuclear power plants because they are currently unneeded;⁴ and orders requiring Edison to pay separate refunds to its customers of approximately \$70 million,⁵ \$250 million,⁶ and \$420 million,⁷ prior to the current refund. In all, Edison will have paid over \$2 billion in refunds and foregone hundreds of millions of dollars more on account of rate increases that were prevented from taking effect.

Before this litigation, utility companies had an enormous advantage over parties who tried to intervene in

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rate cases on behalf of customers. But the resolution of these cases against Edison has begun to level the playing field between Illinois utility customers and utility companies in a number of ways:

- The standing of consumer intervenors has been elevated in court proceedings as well as in proceedings before the Commission, which approves electricity rate increases, approves power plant construction, and establishes public utility policy;
- Illinois utilities are now required to bear more of the financial burden of unreasonable construction costs and poor operating performance of power plants;
- The ability of utilities to recover the costs of constructing excess generating capacity has been limited;
- The power of reviewing courts to fashion equitable procedures and remedies when rate increases are challenged has been affirmed;
- The Commission is now required to decide electricity rate increases on the merits, and cannot strike deals with utilities; and
- Members of the Commission must adhere to more rigorous standards of impartiality.

A full account of the Edison litigation would require hundreds of pages. Instead, this article will provide a brief history of the most significant cases, their key holdings, and their possible future implications.

II. BYRON 1: ESTABLISHING UTILITIES' RESPONSIBILITY TO PAY FOR UNREASONABLE POWER PLANT CONSTRUCTION COSTS

The Byron 1 litigation unleashed a chain of events that dramatically reshaped Illinois public utilities law. Although the Byron 1 cases led to a number of significant reforms, the most important was the abolition of the presumption by the Commission that all of a utility's power plant construction costs are reasonable. The Byron 1 litigation forced Edison to absorb \$330 million in unreasonable

plant costs for the construction of that plant. It also paved the way for another \$734 million in construction cost disallowances for Byron 2, Braidwood 1, and Braidwood 2.

Power plants are the lifeblood of an electric utility's rates. Utilities are allowed to charge customers for not

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only the plant construction costs, amortized over several decades, but also for a fixed rate of return on the unamortized balance of its power plant investment.⁸ That rate of return, set by the Commission, has ranged over the past decade from 13 to 15.4 percent. (The other major components of rates are the utility's operating, maintenance, and fuel costs.) Utilities therefore have a strong incentive to build new plants. Prior to the Byron 1 litigation, that incentive was especially strong because Illinois utilities enjoyed an almost automatic pass-through of power plant construction costs to consumers. A utility simply had to present its bill of costs to the Commission along with summary testimony regarding the reasonableness of the costs. The Commission presumed all such costs reasonable and allowed the utility to recover them, unless a consumer advocate or the Commission staff⁹ could affirmatively prove that specific costs were unreasonable.¹⁰

The presumption of reasonableness was a virtual guarantee of full cost recovery, because neither consumer organizations nor the Commission staff possessed the financial or personnel resources to conduct comprehensive reviews of construction costs.¹¹ For example, the \$1.3 billion dollar cost of Edison's LaSalle I nuclear plant was added to the rate base in 1982 without any contest or disallowance with respect to construction costs.¹² However, the litigation over Edison's Byron 1 plant permanently reversed that presumption of reasonableness.

A. Denial of the Byron 1 Operating License

The first major decision leading to a change in the reasonableness presumption was issued not by an Illinois court or agency, but rather by the federal Nuclear Regulatory Commission (NRC). On January 13, 1984, the Atomic Safety and Licensing Board (Licensing Board) of the NRC issued an order denying an operating license for Edison's Byron 1 plant "because of inadequacies in [Edison's] quality assurance program."¹³ The Licensing Board found that Edison had failed to insure that its contractors carried out their delegated quality assurance tasks. Some contractors' quality assurance programs were found inadequate, while at least one contractor's program was deemed "fraudulent."¹⁴ Because Edison could not verify the quality of the construction work, the Licensing Board was not satisfied "that the Byron facility can be operated without undue risk to public health and safety."¹⁵

That license denial remains the first and only unconditional denial ever by the Licensing Board in the history of nuclear power plant construction in the United States. The Licensing Board's decision sent shock waves across the nation, prompting banner headlines in the *Chicago Tribune* and a front-page story in the *New York Times*.¹⁶

After the license denial, Edison

undertook a massive reinspection of the safety-related construction at Byron. In October 1984, after Edison completed the reinspection program and it was reviewed by the NRC's Appeals Board, the Licensing Board approved Byron 1's operating license.¹⁷

B. Cost Recovery Litigation before the Commission and the Illinois Courts

The license denial prompted the Illinois General Assembly to add a new provision to the Illinois Public Utilities Act (Act) requiring the Commission to conduct an independent audit of the reasonableness of each new power plant's construction costs.¹⁸ The new provision, Section 30.1 of the Act,¹⁹ prohibited the Commission from allowing a utility to charge customers for plant construction costs that were not affirmatively demonstrated as reasonable by an independent audit.²⁰

To fulfill the new statutory requirement, the Commission retained an accounting firm to conduct a comprehensive audit of the Byron 1 construction costs.²¹ After reviewing the audit results, the Commission granted Edison a \$495 million per year rate increase to recover the \$2.55 billion cost of constructing Byron 1.²² The Commission disallowed \$101.5 million in construction costs as unreasonable, which it estimated to be half of the cost of the delay in obtaining the operating license.²³

The Commission's \$101.5 million disallowance was significant. Nonetheless, consumer and governmental parties to the rate case believed that the audit had not complied with generally accepted auditing standards and that the Commission still had unlawfully applied the traditional presumption of reasonableness in Edison's favor. This application of the old presumption allowed Edison to recover certain costs that it had not demonstrated as reasonable, including half the delay costs. As a result, the consumer and governmental parties ap-

pealed the rate hike to the Circuit Court of Cook County. In a scathing 99-page opinion, Judge Richard Curry reversed the rate hike and criticized the Commission's misapplication of Section 30.1.²⁴ Judge Curry stated that Section 30.1 "represent[s] a radical departure" from the standards that had previously governed Commission ratemaking decisions. He also held that the Commission had demonstrated "undisguised hostility to the letter and the spirit of the Section 30.1 audit requirements" by failing to adequately scrutinize Byron 1 costs.²⁵ Although Judge Curry found the rate increase order to be illegal, he allowed Edison to collect the higher rates, subject to refund, pending Edison's appeal of his order.²⁶

On direct appeal from the circuit court in *People ex rel. Hartigan v. Illinois Commerce Commission* (*Hartigan I*), the Illinois Supreme Court affirmed Judge Curry's reversal of the rate order.²⁷ The supreme court held that the audit required by Section 30.1 has reversed the traditional presumption of reasonableness.²⁸ The court stressed that the consequence of reversing that presumption was to shift the burden of proof from consumer intervenors to the utility.²⁹ The new presumption also compelled the Commission to play an active oversight role when it evaluated whether the costs were rea-

sonable through an independent audit. The court then remanded the case to the Commission for a determina-

The Illinois Supreme Court's BPI I decision was a strong affirmation of the standing of consumer intervenors in rate proceedings, as well as a strong admonition to the Commission to decide its cases by rational, consistent, and lawful means in conformity with the Public Utilities Act.

tion of whether Edison had shown that the costs were reasonable.³⁰

On remand, the Commission ordered a new construction cost audit by a different accounting firm.³¹ As a result of this new audit, the Commission adopted a further Byron 1 cost disallowance of \$229 million in 1989. This brought the total Byron 1 cost disallowance to \$330 million. Edison, consumer, and governmental parties appealed the new disallowance to the Illinois Supreme Court. The court upheld the Commission's unreasonable cost findings in *People ex rel. Hartigan v. Illinois Commerce Commission*, a decision known as *Hartigan II*.³²

Following *Hartigan II*'s affirmation of the higher cost disallowance, Edison paid its customers a refund of approximately \$250 million in the second half of 1992. This refund accounted for the excessive Byron 1 plant costs Edison had collected from the date of Judge Curry's reversal of the Byron 1 rate hike through the end of 1988.³³ In addition, Edison ultimately lowered its prospective rates by \$43 million per year to account for the additional construction cost disallowance.

The impact of Section 30.1, which requires that utilities affirmatively

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prove the reasonableness of their construction costs, and the Byron 1 litigation (*Hartigan I* and *II*), which imple-

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mented the new presumption against the utility, has been considerable. Independent construction cost audits have since been conducted for Edison's Byron 2, Braidwood 1, and Braidwood 2 plants. On the basis of those audits, the Commission disallowed \$297 million, \$334 million, and \$103 million, respectively, as unreasonable construction costs at those plants.³⁴ Taking the four Byron and Braidwood plants as a whole, \$1.06 billion in unreasonable Edison construction costs have now been placed on Edison's shoulders rather than ratepayers'. Edison's rates are well over \$100 million lower per year than they would have been absent the disallowances.

Disallowances of such magnitude would have been impossible without shifting the burden of proving the reasonableness of construction costs to utility companies as required by Section 30.1. Without the presumption shift, consumer and government intervenors would have been less able to oppose Edison's attempts to pass on its unreasonable costs to consumers. Significantly, the switch in presumption and enhancement of the Commission's oversight role brought about by the litigation helped make the 1993 settlement possible.

III. LA SALLE 1: FORCING EDISON TO BEAR THE COST CONSEQUENCES OF POOR NUCLEAR PLANT PERFORMANCE

Edison also has been forced to pay refunds to consumers because of the poor performance of one of its nuclear power plants. Before 1978, the rate formula for Illinois electric utilities required Edison to charge ratepayers a fixed amount for power plant operating, maintenance, and fuel costs. This formula gave utilities an incentive to operate their plants efficiently. If poor operation led to higher maintenance and fuel costs than the utility was able to recover through its rates, the utility would bear the extra costs. Conversely, if the utility operated its plants more efficiently than anticipated in the rate formula, it retained the savings.

A few months after the Illinois Supreme Court issued its first decision in the Byron 1 construction cost litigation, the Commission entered an order requiring Edison to pay a \$70 million refund to consumers on account of the poor operation of the LaSalle 1 nuclear plant during 1983, its first year of operation.³⁵ The LaSalle decision marked the first time that the Commission directly penalized a utility for unsatisfactory plant performance.

In 1982, when Edison obtained a \$660 million rate hike from the Commission to place the LaSalle 1 nuclear plant in the rate base, Edison told the Commission that it expected LaSalle 1 to operate at approximately 60 percent of its rated power-generating capacity during 1983.³⁶ However, LaSalle 1 was shut down for most of 1983 because it had numerous problems,³⁷ and it operated at only 17.7% of its projected capacity that year.³⁸

The LaSalle shutdowns required Edison to purchase replacement power. These costs were then passed on to its ratepayers. As a result, Edison customers paid approximately \$70 million more than they would have if LaSalle 1 had operated at the projected levels.³⁹

During the Commission's reconciliation proceeding, a divided Commission ruled that Edison's operating forecast for LaSalle I had been imprudent. The Commission therefore ordered Edison to refund \$70 million that its customers had paid for replacement power, noting that Edison should have known that pre-operation testing requirements would lead to a 1983 capacity factor well under 60 percent.⁴⁰ The appellate court affirmed the refund order,⁴¹ forcing Edison to pay the refund.

IV. BYRON 2 AND BRAIDWOOD: PROHIBITING RATE DEALS BETWEEN EDISON AND THE COMMISSION

In 1986, Edison began its efforts to place its last three nuclear power plants, Byron 2 and Braidwood 1 and 2, into the "rate base." This action would allow the utility to begin earning a return on its investment in the plants. Following the circuit court's reversal of the Commission's rate hike for Byron 1, which raised the prospect

The "used and useful" issue was important in the BPI I remand because even though all of the Byron and Braidwood plants were completed and fully operational, they were not all needed to meet Edison customers' electricity demands.

of substantial construction cost disallowances for Edison's later plants, Edison twice attempted to enter into a rate "deal" with the Commission and certain governmental parties.

In December 1986, the Illinois Governor, Attorney General, and Cook County State's Attorney supported an Edison proposal that the Commission forego traditional ratemaking hearings for the last three nuclear plants and approve a deal to which Edison and the governmental actors had all

agreed. Under this agreement, Edison would be allowed to raise its rates by \$660 million per year to pay for the three plants.⁴² In return, Edison would not seek a further rate increase for another five years.⁴³ The City of Chicago and the non-governmental consumer intervenors in the Edison rate proceedings opposed the agreement. Just before the Commission was scheduled to vote on the proposed agreement, the Illinois Supreme Court issued its *Hartigan I* decision affirming Judge Curry's reversal of the Byron 1 rate order and emphasizing the paramount importance of conducting the Section 30.1 construction cost audits before placing new generating facilities in the rate base. As a result, the Commission voted to reject the proposed deal in July 1987.⁴⁴

Edison subsequently filed a new, traditional rate hike request. It sought a \$1.4 billion per year rate increase to pay for the new plants.⁴⁵ In early 1988, however, experts from the Commission staff and consumer intervenors testified that Edison's rates should be decreased by several hundred million dollars because of a reduction in the federal corporate tax rate, lower interest rates, and other cost reductions that Edison had received but not passed on to consumers.⁴⁶

Edison responded by striking another rate deal, this time with the Commission staff and its largest industrial customers, who customarily intervene in rate proceedings. In June 1988, the Commission staff filed a motion for an "alternative resolution."⁴⁷ The alternative proposed by the Commission staff was a two-stage, \$480 million rate increase with a five-year rate freeze. With the exception of the industrial customers, consumer intervenors opposed the proposed settlement, this time joined by all participating governmental entities, including the Illinois Governor, the Mayor of Chicago, and the Cook County State's Attorney.⁴⁸

Despite the opposition, the Commission approved the "settlement

agreement" in a December 1988 order. The rate increase took effect on January 1, 1989. Consumer and gov-

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ernmental parties then took a direct appeal to the Illinois Supreme Court, which unanimously reversed the rate order in December 1989, in *Business and Professional People for the Public Interest v. Illinois Commerce Commission (BPI I)*.⁴⁹

The Illinois Supreme Court's *BPI I* decision was a strong affirmation of the standing of consumer intervenors in rate proceedings, as well as a strong admonition to the Commission to decide its cases by rational, consistent, and lawful means in conformity with the Public Utilities Act. The court held that the Commission had no authority to enter a "settlement" to which all intervenors, including consumer organizations, had not agreed. Given the objections of numerous real parties in interest, the Commission was obliged to decide the rate case on the merits, with substantial evidence to support each of the factors in the ratemaking formula set forth in the Illinois Public Utilities Act. Thus, consumer intervenors are full parties in contested rate cases.⁵⁰

The Illinois Supreme Court also held that the Commission's settlement was "void" because the Commission did not have legal authority to enter into such an agreement. The Court

ordered Edison to refund all of the revenues it had collected under the overturned rate order since the beginning of 1989, and to roll back its rates to previous levels.⁵¹ Edison subsequently refunded approximately \$420 million to its customers and reduced its rates by \$235 million per year.

V. BYRON AND BRAIDWOOD: BARRING RATE RECOVERY FOR EXCESS GENERATING CAPACITY

On remand from the *BPI I* decision ruling the Commission's "settlement agreement" void, the Commission held new evidentiary hearings to decide the Byron/Braidwood rate case on the merits. One of the key issues in the litigation became the extent to which Byron 2 and Braidwood 1 and 2 could be considered "used and useful" in light of Edison's considerable excess generating capacity.⁵² The Public Utilities Act prohibits a utility from placing new power plants into the rate base unless they are "used and useful."⁵³

Prior to 1986, the Commission had considerable discretion in choosing standards to judge whether a plant was "used and useful."⁵⁴ However, the Public Utilities Act, rewritten in 1986, expressly gave the Commission the power to deny utilities cost recovery on unneeded plants. The revised Act established a specific "need and economic benefits" test, under which a plant is considered "used and useful" only to the extent that it is necessary to meet customer demand or economically beneficial in meeting such demand. The Act expressly empowers the Commission to take a utility's excess capacity into account in making "used and useful" determinations and setting rates.⁵⁵

The new "used and useful" provision specifically states, however, that generating plants under construction before 1986 — such as the Byron and Braidwood plants — should be evaluated under prior law rather than the new statute.⁵⁶ In 1991, in *Illinois Power Co. v. Illinois Commerce Com-*

mission (*Illinois Power*), the Illinois Appellate Court construed that "grandfather" provision to bar the Commission from applying a "need and economic benefits" test to pre-1986 plants, even though those factors had frequently been considered by the Commission in making rate determinations throughout the century.⁵⁷

The *Illinois Power* decision caused the Commission to use the less stringent "economic dispatch" test instead of the "need and economic benefits" test to evaluate whether the Byron 2 and Braidwood plants were "used and useful."⁵⁸ The two tests differ substantially. Under the "need and economic benefits" test, the Commission first determines whether, in light of the utility's total generating capacity (including any excess capacity), a plant is needed to meet customers' electricity needs or whether the utility already has sufficient capacity to meet demand.⁵⁹ By contrast, under the "economic dispatch" approach, the Commission merely determines whether, in comparison to Edison's other plants, the operating costs of the new plant are sufficiently low to make running the new plant economical compared to existing plants.⁶⁰ This calculus ignores construction costs and the possibility that existing plants might go idle.

The "used and useful" issue was important in the *BPI I* remand because even though all of the Byron and Braidwood plants were completed and fully operational, they were not all needed to meet Edison customers' electricity demands. Because Edison has chosen to generate electricity from

the Byron and Braidwood plants, it has been forced to idle existing and functional fossil fuel plants.

In three consecutive cases, the court has allowed Edison to collect higher rates pending appeal only on the condition that it refund excess revenues in the event of a reversal. This precedent empowers future courts to insist on setting equitable refund terms in exchange for allowing higher rates to be collected pending appeal.

The Commission found that as of 1988, the generating capacity of all the Byron and Braidwood plants, combined with Edison's existing capacity, exceeded its maximum demand on the hottest summer day (its "peak demand") by approximately 37 percent.⁶¹ In spite of a growing demand for electricity, Edison's reserve capacity margin in 1992 was still at 30 percent.⁶² The industry standard for a reserve capacity margin is only 15 percent above peak demand.⁶³ When judged by that 15 percent standard, both Braidwood plants are entirely unnecessary to meet current customer demand.⁶⁴ However, in its rate order on remand issued on March 8, 1991, the Commission granted Edison a \$750 million rate increase, based in significant part on a determination under "economic dispatch" principles that all three plants were 100 percent "used and useful."⁶⁵

The Commission's order was appealed to the Illinois Supreme Court, which reversed and remanded several issues, including the "used and useful" issue, in *Business and Professional People for the Public Interest v. Illinois Commerce Commission (BPI II)*.⁶⁶ The court found that while no particular "used and useful" test was mandated prior to 1986, the Commission always had the discretion to

apply a "need and economic benefits" test. This decision overruled *Illinois Power*, and gave the Commission the discretion to apply a "need and economic benefits" test to pre-1986 plants, including Byron 2 and the Braidwood plants.⁶⁷ On remand following the *BPI II* decision, the Commission did apply a "need and economic benefits" test to the Byron 2, and Braidwood 1 and 2 plants. In its final rate order, it found that Edison had considerable excess capacity and radically revised its "used and useful" findings for the three plants. Even allowing Edison a reserve margin of 20 percent, the Commission still found that 7 percent of Byron 2, 79 percent of Braidwood 1, and 100 percent of Braidwood 2's capacity was unnecessary.⁶⁸ The Commission, however, allowed Edison to recover its reasonable construction costs for the three plants, including the unneeded portions, but denied Edison the right to earn the customary return on its investment in the unneeded portions of the plants.⁶⁹

The denial of a return on Edison's excess capacity required the Commission to scale back the rate hike dramatically. The final order allowed Edison a rate hike of \$144 million per year,⁷⁰ far lower than the original \$750 million increase the Commission approved. The mandatory use of a "need and economic benefits" test will result in fundamental changes for future plants subject to the Act.

VI. BYRON AND BRAIDWOOD: ENSURING FULL REFUNDS OF OVERCHARGES AND ESTABLISHING THE EQUITABLE POWER OF REVIEWING COURTS TO SET FAIR REFUND TERMS

The courts overseeing the Byron and Braidwood refunds used their equitable powers in a manner that has effectively created new ground rules for Public Utilities Act refunds. Most importantly, the courts have all but nullified a rule that for decades had prevented customers, after the reversal of a Commission-approved rate

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Those records revealed that Barnich had made over 375 telephone calls from his Commission telephone during 1990 and 1991 to Commonwealth Edison executives, including Edison's chairman of the board, as well as consultants and lobbyists. A significant number of those calls occurred at particularly important junctures in the Edison rate case before the Commission. Chairman Barnich defended himself against accusations of impropriety by explaining that those Edison officials and lobbyists were his "best friends."

increase, from obtaining a refund of the increased rates charged pending appeal. The courts also have showed a willingness to set an equitable interest rate on certain refunds, rather than being bound by the 5 percent interest rate set forth in the Public Utilities Act.

The prior refund rule was set in 1954, when the Illinois Supreme Court held in *Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.* that a Commission-approved rate increase charged to consumers pending appeal cannot be refunded even if an appellate court rules that it is illegal and excessive. The court reasoned that the Public Utilities Act specifically requires utilities to charge newly set rates pending the appeal of those rates, and that it would contradict the terms of the Act later to deem such charges excessive.⁷¹ The Illinois Supreme Court reaffirmed *Mandel Brothers* in 1987.⁷² The Illinois General Assembly has rejected at least two legislative proposals to repeal the rule.⁷³

Nothing in *Mandel Brothers* pre-

vents a court from staying a rate increase pending appeal. However, because the Act required the posting of an appeal bond, consumer and governmental intervenors historically have not been able to obtain such stays or to avoid the effect of the *Mandel Brothers* rule. Such bonds would have been prohibitively expensive given the tens or hundreds of millions of dollars involved in most utility rate hikes.

The *Mandel Brothers* rule has repeatedly worked to the detriment of consumers. For example, in *Independent Voters*, Illinois Bell was allowed to keep 14 months worth of profits from a rate increase that the court found unlawful. Similarly, in the Byron 1 litigation, the court allowed Edison to keep approximately \$200 million in higher rates that it collected from the date of the Commission's October 1985 rate-increase order until Judge Curry reversed that order in April 1986.⁷⁴

Although *Mandel Brothers* has not been overruled, two concurrent events over the course of the Byron and Braidwood litigation have limited its effect. First, in 1986, the Illinois General Assembly amended the Public Utilities Act to allow the state attorney general, the Office of Public Counsel,⁷⁵ or any city or other governmental body, to petition for a stay or suspension of a rate order without posting a bond.⁷⁶ Second, the courts have shown a willingness to exercise their powers under Illinois Supreme Court Rule 305 to fashion equitable arrangements pending appeal, including imposing refund terms.

The Byron 1 litigation, discussed in Part I of this article, paved the way for this change. When Judge Curry issued his opinion reversing the Commission's rate-hike order in April 1986, he ordered Edison to immediately roll back its rates to their previous level. Edison then filed an emergency motion requesting that the rates be allowed to remain in effect pending further appeal to the Illinois Supreme Court. Judge Curry issued an

equitable order allowing the higher rates to remain in effect, subject to a full refund if his order was ultimately upheld. The order specifically retained jurisdiction in the circuit court to determine the refund terms, including an appropriate interest rate, and to administer the refund.⁷⁷ This order became the model for avoiding the harsh *Mandel Brothers* rule.

After the Illinois Supreme Court affirmed Judge Curry's reversal of the Byron 1 rate order, and the Commission determined on remand to disallow more Byron 1 construction costs as unreasonable, Judge Curry asserted his retained jurisdiction and issued a series of refund orders, including an order directing Edison to pay interest at 9 percent rather than the 5 percent rate set forth in the Public Utilities Act.⁷⁸ Both the Commission and Edison appealed Judge Curry's refund orders to the Illinois Supreme Court, arguing that any refund must be administered by the Commission under the terms of the Public Utilities Act.

In its *Hartigan II* decision, the Illinois Supreme Court affirmed Judge Curry's jurisdiction over the refund and his equitable power to set its terms. The court reasoned that once Edison requested a stay of the rate appeal from Judge Curry, it invoked his equitable powers under supreme court rule 305 to condition the stay on such terms as he deemed just and reasonable. The refund terms were thus derived not from the Public Utilities Act, but rather from Judge Curry's inherent equitable powers.⁷⁹ The Illinois Supreme Court affirmed certain refund terms Judge Curry had established, including the 9 percent interest rate.

The Byron 1 approach of allowing a rate hike to take effect pending appeal, but only subject to a refund pledge, was adopted after each of Edison's subsequent rate hikes in 1988 and 1991.⁸⁰ These pledges were, in part, the basis for Edison's agreement to provide refunds in the 1993 settlement of the rate cases.

Enforcement of Edison's pledge

agreements, in conjunction with the *Hartigan II* decision affirming Judge Curry's equitable power to administer refunds, has created a new refund procedure that effectively supplants the *Mandel Brothers* rule. In three consecutive cases, the court has allowed Edison to collect higher rates pending appeal only on the condition that it refund excess revenues in the event of a reversal. This precedent empowers future courts to insist on setting equitable refund terms in exchange for allowing higher rates to be collected pending appeal.

VII. ENSURING IMPARTIALITY BY COMMERCE COMMISSIONERS

The Edison rate litigation also included an important decision concerning the responsibility of Commerce Commissioners to maintain their impartiality. During the Commission's deliberations on remand from the *BPI I* decision, which rejected the rate deal between Edison and the Commission discussed in Part III of this article, the telephone records of then Commission Chairman Terry Barnich were made public through a Freedom of Information Act request. Those records revealed that Barnich had made over 375 telephone calls from his Commission telephone during 1990 and 1991 to Commonwealth Edison executives, including Edison's chairman of the board, as well as consultants and lobbyists.⁸¹ A significant number of those calls occurred at particularly important junctures in the Edison rate case before the Commission. Chairman Barnich defended himself against accusations of impropriety by explaining that those Edison officials and lobbyists were his "best friends." He also maintained that the calls may have been required by statute. Barnich ignored motions to recuse himself from participating in the Edison rate case deliberations, and the other commissioners ruled that they were powerless to remove a peer commissioner from the case.⁸²

Consumer intervenors filed a mandamus action in the Circuit Court of

Cook County to have Barnich removed from the case on the grounds of an appearance of impropriety. The circuit court refused, but the Illinois Appellate Court quickly issued an order to bar Barnich from deliberating or ruling on Edison's rate increase request. In its opinion *Business and Professional People for the Public Interest v. Barnich*, the appellate court explained that Commerce Commissioners, who serve in a quasi-judicial capacity, are subject to the same standards of conduct as judges, and must avoid even the appearance of impropriety. The appellate court held that on their face the telephone records created an appearance of impropriety, even without delving into the substance of the conversations. The appellate court required Barnich's recusal to protect public confidence in the Commission and the ratemaking process.⁸³

In the short term, rates will be lowered substantially by the refund and rate reduction Edison agreed to in September 1993. The refund alone will lower residential customers' bills by 25 percent and other customers' bills by approximately 19 percent during the one-year refund period.

VIII. THE 1993 SETTLEMENT

In spite of the plethora of court and Commission decisions concerning the Byron and Braidwood plants, several issues remained unresolved in 1993. In the first half of 1993, the Commission issued lengthy decisions on remand from the supreme court's decisions in *Hartigan II*, which required the Commission to review its findings on the reasonableness of the Byron 1 plant costs, and *BPI II*, which permitted the Commission to adopt the "need and economic benefits" standard in evaluating the need for new power

[T]he Commission and the courts are likely to take the arguments of consumer intervenors more seriously. The Illinois Supreme Court clearly indicated that consumer intervenors must be treated as full parties, and must not be subjected to burdens of proof that should properly be borne by utilities.

plants. Both of those decisions by the Commission were appealed by Edison and consumer and governmental intervenors to the appellate court. Other Edison matters were pending in the appellate court, including an appeal over the interest rate applicable to the *BPI I* refund required after invalidation of the rate "deal" between Edison and the Commission discussed in Part III of this article, and appeals of a Commission order involving the differential between the rates Edison charges to residential customers during the summer and winter.

On September 26, 1993, after lengthy negotiations, Edison and all other parties to those appeals agreed to a comprehensive settlement requiring Edison to pay a total refund of approximately \$1.3 billion to ratepayers over a 12-month period. Edison also had to abide by the Commission's January 1993 rate order granting it a \$144 million rate increase rather than the higher increases previously approved by the Commission, in exchange for all parties withdrawing all pending appeals relating to the Byron and Braidwood plants. The agreement also gave Edison permission to file a rate increase petition to recover more of the costs of Byron 2 and Braidwood 1 and 2 after December 21, 1993.⁸⁴ Consumer and governmental parties are free to oppose any such petition. Refund payments began with bills mailed in November 1993, and Edison simultaneously implemented a \$339 mil-

lion rate reduction to bring its rates in line with the January 1993 rate order.⁸⁵

IX. SOME IMPLICATIONS OF THE NEW LEGAL AND REGULATORY LANDSCAPE

After almost a decade of litigation, the Edison cases have brought many benefits to its utility customers. However, whether ratepayers keep these benefits may depend in part on whether they can find the resources necessary to protect their gains.

A. Future Rates

In the short term, rates will be lowered substantially by the refund and rate reduction Edison agreed to in September 1993. The refund alone will lower residential customers' bills by 25 percent and other customers' bills by approximately 19 percent during the one-year refund period. In addition, consumers have already received substantial economic benefits through large refunds and foregone rate increases over the past five years. However, when the refund period ends, Edison customers will again pay rates substantially higher than the national average.

In the medium term, there is a danger of a future rate hike if Edison attempts again to have the Commission declare the Braidwood plants and the remainder of the Byron 2 plant "used and useful," so that Edison can begin to earn a return on the plants. However, such a rate increase is by no means certain, because other factors in the rate formula, such as currently low interest rates, would offset Edison's showing that more of the plants are "used and useful."

B. A New Climate in Rate Cases

The Edison litigation should also change the climate of future Illinois rate litigation in at least four ways. First, the courts appear to have reconsidered their traditional deference to the Commission. Because the Illinois Supreme Court extensively reviewed the ratemaking process and reversed

portions of four Commission rate orders, future courts may scrutinize Commission decisions more carefully. Such a development should benefit ratepayers, who historically have fared less well before the Commission than powerful utility companies.

Second, the Commission and the courts are likely to take the arguments of consumer intervenors more seriously. The Illinois Supreme Court clearly indicated that consumer intervenors must be treated as full parties, and must not be subjected to burdens of proof that should properly be borne by utilities.

Third, the Commission should play a more aggressive and impartial oversight role. This derives from the supreme court's admonitions in the *Hartigan I* decision, the appellate court's admonitions in the *Barnich* decision, and the unspoken but powerful message sent by the supreme court's reversal of four consecutive Commission orders as overly favorable to a utility.

Finally, ratepayers should be treated more equitably in future refund situations. Before the recent litigation, consumers could be certain that even if they successfully appealed adverse Commission rate orders, the *Mandel Brothers* rule and the low 5 percent interest rate specified in the Public Utilities Act would prevent them from getting back all their money. The utility company stood to gain financially even if it lost in court because it was allowed to retain rate hikes collected pending lengthy appeals and by earning substantial interest on money held subject to refund. That situation has now changed.

The long-term impact of consumers' gains in the recent cases may well be determined by the extent to which a reliable funding mechanism is developed for consumer participation in Commission proceedings and related court cases.

C. Shift Away from Exclusive Reliance on Large Power Plants

In the long term, utility customers should benefit considerably from the nuclear plant litigation and reforms to the Public Utility Act because they should help to drive Edison and other electric utilities away from their traditional reliance on large power plants. Discouraging reliance upon both nuclear and fossil fuel power plants will force utilities to pursue energy efficiency strategies, which are more economical and better for the environment. Edison and other utilities will have to pursue these alternatives because their financial incentive to build large power plants has been dramatically reduced. Because of the construction cost and "used and useful" disallowances in the recent litigation, the substantial return on utility investments in large generating plants,⁸⁶ which seemed so certain in the past, is no longer a sure thing.

In addition, the Illinois Public Utilities Act has been revised to prohibit utilities from considering construction of large power plants as their first option when power demand increases in the future. The so-called "least cost planning" provisions of the Act now require electric utilities to prepare 20-year plans detailing how they will meet customers' needs by utilizing "all available, practical and economical conservation, renewable resources, cogeneration and improvements in energy efficiency" before considering building a large power plant.⁸⁷ For example, if a utility can avoid building a power plant by inducing customers to reduce their electricity demand by means of more efficient air conditioners, lights, and motors, then the utility must choose the latter course unless it is more expensive than building the plant. The adoption of the "least cost" planning process marked a fundamental policy shift in utility law in Illinois and should be relied upon more extensively as a result of the litigation against Edison.

D. A Continuing Imbalance in Resources

Although these gains are impressive, utility companies still enjoy one powerful advantage over consumer intervenors that was reinforced by this litigation: they have superior resources to litigate. As a result, utilities are winning a war of attrition with respect to traditional consumer-side opponents. The long-term impact of consumers' gains in the recent cases may well be determined by the extent to which a reliable funding mechanism is developed for consumer participation in Commission proceedings and related court cases.

Commission rate cases and other adjudications are structured as adversarial proceedings. They are often enormously complex, requiring not only substantial attorney resources, but also extensive participation by expert consultants and witnesses. For example, from 1986 to 1988, Commonwealth Edison spent at least \$27 million on consultants to assist in its litigation efforts concerning the Byron and Braidwood plants.⁸⁸ However, an adversarial system cannot function properly unless consumer intervenors have attorney and expert resources that are generally commensurate with the utility's.

Utilities have deep pockets and their attorneys fees and expert expenses are generally paid by ratepayers, while consumer and governmental parties must continue to rely on charitable donations and scarce tax dollars to mount their cases. In spite of consumer intervenors' considerable success in the past decade of litigation, they received no attorneys' fees. The Public Utilities Act has no provision allowing successful intervenors to recoup fees, and intervenors' sole attempt to recover fees (following the \$250 million Byron 1 refund) was rejected by the circuit court.⁸⁹ By contrast, the Commission routinely allows Edison to recover its legal expenses, including rate case expenses, through rates, even if Edison is not the prevailing party. For example, the

Commission allowed Edison to recover \$2.5 million in rate case expenses, including legal fees, incurred in 1991 alone.⁹⁰

Moreover, in all but a few states, the principal consumer-side utility advocate is state-funded. In Illinois, however, the three state-funded organizations created by the Public Utilities Act for the express purpose of representing consumers in utility cases — the Office of Public Counsel, the

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Governor's Office of Consumer Services, and the Small Business Utility Advocate — have been stripped of all funding in recent years and effectively abolished. Other governmental organizations, such as the Illinois Attorney General, the City of Chicago, and the State's Attorney of Cook County, have only limited budgets for public utilities interventions, and are subject to ever-changing political forces.

The not-for-profit Citizens Utility Board (CUB), a statewide watchdog group, must rely entirely on charitable contributions from consumers, and it must cover proceedings involving dozens of gas, electric, and telephone utilities throughout the state with an annual budget of under \$2 million. Even CUB's fundraising ability is tenuous. In 1986, a federal court terminated CUB's right to insert fundraising materials in utility bill mailings. In the 1992 session, the Illinois Senate passed a bill, which later

failed in the Illinois House, that would have eliminated CUB's primary remaining fundraising mechanism — its ability to insert promotional materials in state-government mailings. A few other not-for-profit entities, such as Business and Professional People for the Public Interest, participated extensively in the Edison cases. But such activity is not a primary mission of those organizations, and there is no assurance that it will continue.

Thus, Illinois utilities have greater, and more reliable, litigation resources than consumer intervenors. Numerous mechanisms could be developed to fund substantial and consistent consumer intervenor participation in Commission and court rate proceedings, thereby lessening that imbalance. They include: recovery through rates of consumer intervenors' rate case expenses; awarding fees on a common fund theory from refunds; providing statutory fees for litigants who obtain reversals of rate orders; and devoting portions of utility refund pools to consumer intervention funds. Such mechanisms should be explored to ensure fairness in future rate determination proceedings. ♦

ENDNOTES

- ¹ For consistency and simplicity purposes, this article refers to "nuclear power plants" where in some cases the technical term would be "nuclear reactor." For example, each of the two reactors at Byron (Byron 1 and 2) is referred to as a nuclear power plant.
- ² Commonwealth Edison Co., 19 NRC 36 (1984).
- ³ People ex rel. Hartigan v. Illinois Commerce Comm'n, 592 N.E.2d 1066 (Ill. 1992); Business and Professional People for the Public Interest v. Illinois Commerce Comm'n, 585 N.E.2d 1032 (Ill. 1991); Business and Professional People for the Public Interest v. Illinois Commerce Comm'n, 555 N.E.2d 693 (Ill. 1989); People ex rel. Hartigan v. Illinois Commerce Comm'n, 510 N.E.2d 865 (Ill. 1987).
- ⁴ Commonwealth Edison Co., 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 74, 1993

- WL 124650 at *135 (Ill. Commerce Commission, February 24, 1993) (full text of revised order on remand).
- ⁵ Business and Professional People for the Public Interest v. Illinois Commerce Comm'n, 525 N.E.2d 1053, 1055 (Ill. App. Ct. 1988).
- ⁶ People ex rel. Hartigan v. Illinois Commerce Comm'n, No. 85 CH 10970, slip op. at 1-2 (Ill. Cir. Ct. July 2, 1992) (refund order).
- ⁷ Commonwealth Edison Company, Docket No. 87-0427 at 24 (Ill. Commerce Commission, June 28, 1990) (full text of first interim order on remand -- refunds).
- ⁸ Edison's allowed rate of return on common equity (which includes its unamortized plant costs) has ranged in recent years from 15.4% in the October, 1985 rate order to 13% in the most recent order. See Commonwealth Edison Company, 71 P.U.R.4th 81, 132 (Ill. Commerce Commission, 1985) (full text of revised order on remand); Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 75, 1993 WL 124650 at *136 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand).
- ⁹ Rate cases are structured as adversarial proceedings, with the seven gubernatorially-appointed members of the Commission serving in a quasi-judicial capacity. The Commission staff, which is managed by an Executive Director and separated from the Commissioners in contested cases, appears as a full party in rate cases and presents witnesses and argument.
- ¹⁰ People ex rel. Hartigan v. Illinois Commerce Comm'n, 510 N.E.2d 865, 870 (Ill. 1987) (Hartigan I).
- ¹¹ When independent accounting firms were ultimately hired to perform audits of the reasonableness of construction costs for the four Byron and Braidwood plants, the cost was approximately \$4 million per plant. Commonwealth Edison Company, Docket No. 90-0169 at 39-40 (Ill. Commerce Commission, March 8, 1991) (full text of order).
- ¹² See Commonwealth Edison Company, 49 P.U.R.4th 62, 75 (Ill. Commerce Commission, 1982) (full text of order), *aff'd* City of Chicago v. People of Cook County, 478 N.E.2d 1369, 1374-75 (Ill. App. Ct. 1985).
- ¹³ Commonwealth Edison Company, 19 NRC 36, 278 (1984).
- ¹⁴ *Id.* at 214-17.
- ¹⁵ *Id.* at 214.
- ¹⁶ See Casey Bukro, *A-plant License Denied*, CHICAGO TRIBUNE, January 14, 1984, § 1, at 1; *Two-Reactor Plant Is Denied License on Safety Record*, THE NEW YORK TIMES, January 14, 1984, at A1.
- ¹⁷ See People ex rel. Hartigan v. Illinois Commerce Comm'n, 592 N.E.2d 1066, 1080 (Ill. 1992) (Hartigan II).
- ¹⁸ The lead Senate sponsor of the bill establishing Section 30.1 stated on the floor that "[t]his bill is the outgrowth of what happened at the Byron 1 nuclear plant." Senate Hearings, 83rd General Assembly, H.B. 2615, June 19, 1984 at 73.
- ¹⁹ Since Section 30.1 was created, the Public Utilities Act has twice been renumbered. When the Act was comprehensively rewritten in 1986, Section 30.1 became Ill. Rev. Stat., ch. 111 2/3, par. 9-213. It has since been recodified as 220 ILCS 5/9-213.
- ²⁰ "The cost of new electric utility generating plants ... shall not be included in the rate base of any utility unless such cost is reasonable. Prior to including the cost of plants or additions to utility plants in the rate base, the Commission shall conduct an audit of such costs in order to ascertain whether the cost associated with the new generating plant ... is reasonable. ... Any such audit shall be conducted in accordance with generally accepted auditing standards and shall include but not be limited to costs associated with materials, labor, equipment, professional services and other direct and interest costs." 220 ILCS 5/9-213.
- ²¹ Hartigan I, 510 N.E.2d at 868.
- ²² *Id.*
- ²³ *Id.*
- ²⁴ People ex rel. Hartigan v. Illinois Commerce Comm'n, No. 85 CH 10970 (Ill. Cir. Ct. April 29, 1986) (reversing rate hike).
- ²⁵ *Id.* at 15, 29-30.
- ²⁶ See Hartigan II, 592 N.E.2d at 1072.
- ²⁷ Hartigan I, 510 N.E.2d at 867.
- ²⁸ *Id.* at 870.
- ²⁹ "[T]he Commission is to be an active participant. The Commission is not merely an arbitrator between a utility seeking a rate increase and any parties who happen to oppose it. Rather, the Commission is an investigator and regulator of the utilities, and under section 30.1 it may not rely on intervening parties to contest a rate increase or to challenge the evidence offered by the utility. Nothing in the Public Utilities Act requires any party other than the Commission and the utility seeking a rate increase to participate in a ratemaking proceeding." *Id.* at 871.
- ³⁰ *Id.*
- ³¹ Hartigan II, 592 N.E.2d at 1072.
- ³² *Id.*
- ³³ The issue of refunds of overcharges from the beginning of 1989 through March 1991, when the excessive Byron 1 costs were finally removed from the rate base, was left to be resolved in a later proceeding. See Hartigan II, 592 N.E.2d at 1095-96.
- ³⁴ See Business and Professional People for the Public Interest v. Illinois Commerce Comm'n, 585 N.E.2d 1032, 1043 (Ill. 1991) (BPI II).
- ³⁵ Business and Professional People v. Illinois Commerce Comm'n, 525 N.E.2d 1053, 1055 (Ill. App. Ct. 1988).
- ³⁶ *Id.* at 1059.
- ³⁷ *Id.* at 1056.
- ³⁸ *Id.*
- ³⁹ *Id.* at 1056-57.
- ⁴⁰ *Id.* at 1057.
- ⁴¹ *Id.* at 1066.
- ⁴² See Mark Eissman, *Sparks Fly Over Edison Rate Plan*, CHICAGO TRIBUNE, December 19, 1986, §2 at 1.
- ⁴³ *Id.*
- ⁴⁴ See Jean Davidson, *Edison Told 'No' on Rate Hike*, CHICAGO TRIBUNE, July 17, 1987, § 1, at 1.
- ⁴⁵ Business and Professional People for the Public Interest v. Illinois Commerce Comm'n, 555 N.E.2d 693, 695 (Ill. 1989) (BPI I).
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *Id.* at 695-96.
- ⁴⁹ *Id.* at 715.
- ⁵⁰ *Id.* at 700, 704.
- ⁵¹ *Id.* at 715-18.
- ⁵² The remand case involved a host of other issues, including quantifying unreasonable construction costs, determining an appropriate rate of return, determining allowable operating expenses, and determining whether Edison should be awarded "deferred charges" to compensate it for the lag between the dates the last nuclear plants were placed in service and the date they were placed in the rate base. See BPI II, 585 N.E.2d 1032 (Ill. 1991).
- ⁵³ 220 ILCS 5/9-212; BPI II, 585 N.E.2d at 1051.
- ⁵⁴ BPI II, 585 N.E.2d at 1053.
- ⁵⁵ 220 ILCS 5/9-215.
- ⁵⁶ *Id.*
- ⁵⁷ Illinois Power Co. v. Illinois Commerce Comm'n, 566 N.E.2d 1372, 1381 (Ill. App. Ct. 1991).
- ⁵⁸ Commonwealth Edison Company, Docket No. 87-0427 at 3-4, 187-92 (Ill. Commerce Commission, March 8, 1991) (full text of order on remand).
- ⁵⁹ Compare Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427

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- at 38-44, 1993 WL 124650 at *70-*82 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand) with Commonwealth Edison Company, Docket No. 87-0427 at 191-92 (Ill. Commerce Commission, March 8, 1991) (full text of order on remand).
- ⁶⁰ Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 38-44, 1993 WL 124650 at *70-*82 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand). Nuclear plants, although more expensive to build, are cheaper to run than fossil fuel plants because nuclear fuel is far cheaper than fossil fuels such as coal or oil. *See* Commonwealth Edison Company, 49 P.U.R.4th 62, 69 (Ill. Commerce Commission, 1982) (full text of order).
- ⁶¹ Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at App. B (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand).
- ⁶² *Id.*
- ⁶³ Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 42, 1993 WL 124650 at *77 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand). The purpose of allowing a utility to plan for a reserve capacity margin, in the Commission's words, is to account for the "uncertainty associated with forecasting electric demands, providing for planned and unplanned outages, and the timing of capacity additions that provide customers with the most efficient supply." Commonwealth Edison Company, Docket No. 87-0427 at 41, 1993 WL 124650 at *76-*77 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand).
- ⁶⁴ The Commission found that Edison's weather normalized firm peak demand for 1992 was 16,950 megawatts. Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at App. B (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand). A 15% reserve margin would raise Edison's capacity need to 19,492. Edison already had 20,097 megawatts of capacity before the Braidwood units
- were added. *Id.*
- ⁶⁵ BPI II, 585 N.E.2d at 1039, 1052.
- ⁶⁶ BPI II, 585 N.E.2d at 1054-55.
- ⁶⁷ *Id.*
- ⁶⁸ Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 44, App. B, 1993 WL 124650 at *82 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand).
- ⁶⁹ In the 1993 rate order, the Commission established a rate of return of 13% of common equity, which includes unamortized, "used and useful" plant costs. Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 75, 1993 WL 124650 at *136 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand).
- ⁷⁰ *Id.*
- ⁷¹ Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co., 117 N.E.2d 774, 777 (Ill. 1954).
- ⁷² Independent Voters of Illinois v. Illinois Commerce Comm'n, 510 N.E.2d 850, 854 (Ill. 1987).
- ⁷³ *Id.* at 855.
- ⁷⁴ *See* Hartigan II, 592 N.E.2d at 1095.
- ⁷⁵ The Office of Public Counsel was created by the 1986 rewrite of the Public Utilities Act "to ensure adequate and effective representation of the public rights and interests in utility and telecommunications rates and services." 220 ILCS 5/11-101. The office was granted "the power and duty on behalf of the people of the State to intervene and initiate proceedings" before the Commission and Courts. 220 ILCS 5/11-201. The Office has since been stripped of all funding.
- ⁷⁶ 220 ILCS 5/10-204(c).
- ⁷⁷ Hartigan II, 592 N.E.2d at 1071.
- ⁷⁸ *Id.* at 1073.
- ⁷⁹ *Id.* at 1091-92.
- ⁸⁰ BPI I, 555 N.E.2d at 715 (1988 refund pledge). Opposition of Commonwealth Edison Company to both Emergency Motion for Temporary Stay and Motion for Stay of Illinois Commerce Commission Order at 18, Citizens Utility Board v. Illinois Commerce Comm'n, No. 91-748 (Ill. App. Ct., March 13, 1991) (1991 refund pledge).
- ⁸¹ Business and Professional People for the Public Interest v. Barnich, 614 N.E.2d 341, 342-43 (Ill. App. Ct. 1993).
- ⁸² *Id.* at 343.
- ⁸³ *Id.* at 345.
- ⁸⁴ Edison filed a rate increase request in February 1994, which is now pending

before the Commission. A decision is expected in January 1995.

- ⁸⁵ *See* Memorandum of Understanding and Agreement Regarding Refunds, Sept. 26, 1993.
- ⁸⁶ *See* Commonwealth Edison Company, 71 P.U.R.4th 81, 132 (Ill. Commerce Commission, 1985) (full text of revised order on remand); Commonwealth Edison Company, 140 P.U.R.4th 461 (Ill. Commerce Commission, 1993) (abstract of revised order on remand), Commonwealth Edison Company, Docket No. 87-0427 at 75, 1993 WL 124650 at *136 (Ill. Commerce Commission, Feb. 24, 1993) (full text of revised order on remand).
- ⁸⁷ 220 ILCS 5/8-402(a),(c),(d)(iii)(B) (emphasis added).
- ⁸⁸ Commonwealth Edison Company, Docket No. 87-0427 at 347-48 (Ill. Commerce Commission, Mar. 8, 1991) (full text of order on remand).
- ⁸⁹ People ex rel. Hartigan v. Illinois Commerce Comm'n, No. 85 CH 10970 (Ill. Cir. Ct., September 10, 1992) (order regarding attorneys' fees from refund pool).
- ⁹⁰ Commonwealth Edison Company, Docket No. 90-0169 at 40 (Ill. Commerce Commission, Mar. 8, 1991) (full text of order).

Announcements

Bad Traffic Interferes with Cardiac Care

A new study published in the Journal of the American Medical Association shows that bad traffic is to blame for the dismal survival rate of anyone whose heart stops in a major U.S. city. The study found that between October 1990 and April 1991, only 1.4 of 100 people in New York City survived after all types of cardiac arrest occurred outside a hospital. Mid-size suburban and urban areas had the highest rates of survival, the study showed.