

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 7, 2000

COMMISSIONER PRESENT:

Maureen O. Helmer, Chairman

CASE 00-E-1343 - Commission Proceeding Implementing Chapter 190
of the Laws of 2000.

ORDER GRANTING PETITION FOR REHEARING, IN PART,
AND MODIFYING SCHEDULE FOR REFUNDS

(Issued and Effective September 7, 2000)

On August 9, 2000, the Commission issued an Order Modifying Tariff and Mandating Refunds (August 9 Order) in this proceeding. In that Order, the Commission directed Consolidated Edison Company of New York, Inc. (Con Edison) to refund all previously collected replacement power costs associated with the February 15, 2000 outage at the Indian Point No. 2 Nuclear Generating Facility (IP2) on its customers' September 2000 electric bills.

On August 31, 2000, the New York State Consumer Protection Board (CPB) filed a petition for rehearing, seeking a modification of the August 9 Order to delay the refund for approximately one month. CPB also recommends that the Commission solicit comments regarding the specific manner in which the refund should be distributed.

For the reasons set forth herein, CPB's petition is granted. The August 9 Order is modified such that comments should be received on the manner and timing of the refund due Con Edison's customers. The Secretary is directed to forthwith issue a notice to all interested parties seeking input on the disbursement of the refund, as specified below.

BACKGROUND

On February 15, 2000, a small amount of radioactive steam was released from IP2 (February 15 outage). It was later determined that the release was the result of a rupture of a tube in one of the four steam generators at the plant. Due to the known problems with the Westinghouse Model 44 steam generators used at IP2, many persons immediately questioned whether Con Edison had prudently decided against replacing the steam generators at an earlier date.

On August 8, 2000, Chapter 190 was enacted, prohibiting Con Edison from prospectively recovering replacement power costs associated with the February 15 outage and requiring the Commission to order Con Edison to refund all such previously collected costs. On August 9, 2000, the Commission issued the August 9 Order to implement this statute.

On August 14, 2000, Con Edison commenced an action in the United States District Court for the Northern District of New York (Civ. No. 00-CV-1230) challenging the constitutionality of Chapter 190 of the Laws of 2000 (Chapter 190). Con Edison also filed a motion for a preliminary injunction, enjoining the implementation of the statute. The Court declined to immediately issue the injunction; however, it stated it would consider the motion when it hears argument on the case, currently scheduled for September 19, 2000.

On August 31, 2000, CPB filed a petition for rehearing, seeking a modification of the August 9 Order to delay the refund for approximately one month, after which it should be known whether Con Edison's motion for a preliminary injunction enjoining implementation will be granted. CPB expresses concern over the "sawtooth" effect that implementation of the statute may have on electric rates. Specifically, CPB is concerned that ratepayers could be unnecessarily harmed by an immediate refund of the previously collected replacement power costs if the Court

were actually to order reimbursement to the company, particularly if reparations were due when energy rates increase this winter due to rising fuel costs.

Because Con Edison will begin sending out its September bills on or about September 10, 2000, an immediate decision on CPB's petition is necessary. However, because of the widespread interest in this important matter, the Commission decided to solicit comments from interested parties on CPB's petition. Therefore, a Notice Soliciting Comments was issued August 31, 2000, with comments due September 6, 2000.

PUBLIC COMMENTS

The Notice was published on the Commission's web site on August 31, 2000. Copies were mailed on August 31, 2000 to 209 individuals and organizations. As of 5:00 p.m. on September 6, 2000, comments were received from Assemblyman Richard Brodsky, the Attorney General (AG), Con Edison, the Public Utility Law Project of New York, Inc. (PULP) and Westchester County (Westchester).

Assemblyman Brodsky

Assemblyman Brodsky opposes CPB's petition on the basis that Con Edison's lawsuit is "completely unrelated to the PSC's actions on August 9, 2000" and that there is no legal or policy basis allowing Con Edison to continue to hold the previously collected replacement power costs. Assemblyman Brodsky suggests that if implementation of the statute is enjoined, the Commission has discretion to, and could, require that reimbursement to Con Edison occur over time, ameliorating the "sawtooth effect" of concern to CPB. He concludes by seeking a hearing on the decision of whether to withhold the refunds.

Attorney General

The AG also opposes CPB's motion, arguing that the Commission lacks authority to delay the refund, contending that the legislative findings in section 1 and the effective date in section 3 of Chapter 190 indicate that the Legislature intended the refund be made as soon as practicable. The AG also asserts that CPB's concerns are speculative because the Court has not yet decided Con Edison's lawsuit and because the Commission has not completed its prudence proceeding related to IP2. Referring to a Nuclear Regulatory Commission report issued August 31, 2000, the AG claims that Con Edison will ultimately be found liable by the Commission for costs equal to or exceeding the amount of the refund. Finally, the AG suggests delaying the refund would be unfair to Con Edison's customers, especially given the bill increases they experienced this summer.

Con Edison

Con Edison supports CPB's petition. The company shares CPB's concern of a seesaw effect the refund and a potential later reimbursement of the replacement power costs (should its lawsuit be successful) could have on its customers. Con Edison notes that customers would not be harmed by a delay in the refund because they would receive interest on the refund amount from September 2000 until the date of the payment.

Additionally, Con Edison seeks a delay of the implementation of the tariff revision prohibiting prospective collection of the replacement power costs because of a similar "sawtooth effect" concern raised with respect to the refund. Finally, Con Edison contends the Commission has discretion to implement Chapter 190 and it would be in customers' best interests to grant CPB's petition.

PULP

Similar to other commenters, PULP opposes CPB's petition on the basis that the Commission does not have legal authority to grant the requested relief. PULP further contends that the District Court will likely give the Commission discretion in how to reimburse Con Edison, should the company win its lawsuit.

Westchester County

Westchester also opposes CPB's petition, arguing that the Commission does not have the legal authority to delay implementing Chapter 190. Westchester reads the statute as requiring an immediate refund and contends the Commission agreed with this interpretation in the August 9 Order. Westchester further argues that granting CPB's petition would be a judicial act akin to Con Edison's motion for injunctive relief, relief which the Commission cannot confer. Arguing that CPB's petition is at cross purposes with Chapter 190, the County contends that CPB is violating its statutory mandate to protect customers.

Westchester also complains about the Notice, regarding the short time for responses and the method and scope of distribution. Finally, Westchester objects to the refund being made in any manner different than that in which the replacement power costs were collected.

DISCUSSION

While Chapter 190 requires Con Edison to refund all previously collected costs and prohibits future recovery of power replacement costs due to the February 15 outage, it does not specify the timing or manner of the refund. Thus, in the August 9 Order, the Commission exercised its judgment as to the appropriate means of accomplishing the refund provision of Chapter 190.

CPB raises a valid point about the projected increases in customers' bills this winter due to rising fuel prices. August was cooler than forecasted, so September bills will be lower than previously anticipated. Thus, application of the refund to those bills will not have as significant an impact as applying it later in the year.

Moreover, while the Commission assumes the Court will uphold the constitutionality of Chapter 190, the existence of the lawsuit creates at least some uncertainty. CPB's concern over the "sawtooth effect" on rates resulting from an immediate refund followed by a court-ordered reimbursement has merit. Given that the lawsuit is due to be argued on September 19, 2000, at which time or soon after which a ruling on Con Edison's request for injunctive relief is likely to occur, it is in the customers' best interest to delay the refund until that issue is decided.^{1/} Contrary to Westchester's contention that granting CPB's petition would be a judicial act, the Commission's decision is a matter of judgment fully in accord with its ratemaking discretion.

Finally, Westchester has criticized the expediency of our briefing schedule (see below) and Assemblyman Brodsky called for hearings on this issue. It is appropriate to consider the views of interested parties on the method of the refund and whether the refund should be made immediately, or in December or January when the fuel prices are expected to rise substantially. Additionally, parties should be given an opportunity to comment on whether the refund should be made as a lump sum or spread out over a period of months.

^{1/} The AG's concern that the District Court's decision could result in a lengthy appeal process is inapposite. The delay granted herein is only until the instant motion is decided, not until the lawsuit is finally decided.

Because interested parties, through written comments, will be able to thoroughly present their views on these matters, the Secretary is directed to issue a notice forthwith seeking comments on the method and timing of the refund as well as the duration of the repayment period.

Reconsideration of Tariff Amendment

In its comments, Con Edison suggests that the prospective prohibition of replacement power cost collections called for in Chapter 190 and implemented by the tariff amendment required by the August 9 Order should also be delayed. As discussed above, the Legislature was clear that such costs shall not continue to be collected. Therefore, Con Edison's request is rejected.

Alleged Notice Deficiencies

Westchester contends that the short time period for responding to the Notice violates due process. This assertion is without merit. Parties do not have any legal right to comment on petitions for rehearing. However, because of the widespread interest in the subject matter of this proceeding, the Commission allowed parties to provide comments on the petition.

As explained above, the short initial response period was required because of the date when September bills will be mailed out. In that by this Order the Commission is directing that a notice be issued soliciting further comments, interested parties will have ample opportunity to provide input on this matter.

CONCLUSION

To the extent noted above, CPB's petition for rehearing is granted.

It is ordered:

1. The New York State Consumer Protection Board's petition for rehearing is granted to the extent consistent with the body of this order and in all other respects is denied.

2. The Secretary to the Commission shall issue a notice forthwith soliciting comments on the timing and method of the refund and the duration of the refund period.

3. Our Order Modifying Tariff and Mandating Refunds (issued August 9, 2000) is modified in accordance with the body of this Order.

4. This proceeding is continued.

(SIGNED)

Commissioner