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I. INTRODUCTION

Utilities industries, such as the generation and distribution of electricity, are some of the most highly regulated industries in this country. And there is good reason for these industries to be so heavily scrutinized. Without these services—without access to water, gas, and electricity—homes would cease to be inhabitable across not just the state of Illinois but across the country. Many of these utilities face strict regulations about how much and in what capacity they can charge customers for their services, as well as the services they are required to supply. In Illinois, electricity for example, is a "tariffed" industry that must set its rates and services in line with both the determinations of the Illinois Commerce Commission as well as other relevant state laws which detail exactly what electricity services must be supplied in what situations. Utility regulation in Illinois is typical of many states. At least on paper, safety measures are in place to ensure fair rate structures.

Despite these various laws, utilities like electricity provider Commonwealth Edison ("ComEd") remain a thorn in the side of consumers. While courts have often ruled against ComEd on issues like what money can be recovered through rates, there has yet to be a strong pro-consumer decision that definitively names and protects the rights of consumers in their relationship with utilities. Federal bribery charges filed against ComEd in relation to the passage of the 2011 changes to utilities regulation call into question how meaningful the regulations on the books were in the first place. In addition to otherwise "traditional" deceptive business practices, the 2021 class action lawsuit filed against ComEd alleged criminal enterprise under federal and state organized crime statutes, civil conspiracy, violation of the Illinois Consumer Fraud Act, and unjust enrichment. All these alleged

actions attributed to one body cannot be taken as mere coincidence, nor can the failure of current Illinois law to prevent them be taken simply as an aberration. Some deeper change, reaching to the core of how the utilities market is regulated, will have to be made to prevent these abuses from re-occurring.

This note will proceed by first providing historical context to the current predicament. The body of law surrounding this issue, both case law and statutory law, is vast, and thus cannot be fully covered in an issue of this length. What I will do is strive to provide the necessary context based on a brief overview of the case law and meaningful statutory changes. I will in Part II discuss the meaningful changes of the 1997 Customer Choice Law and relevant cases. I will then in Part III discuss the Energy Infrastructure Modernization Act of 2011 and attempt to use case law to describe the current regulatory framework. In Part IV, I will offer two brief comparisons to the systems of other States: first Texas, then New York. In Part V, I will detail the current problems as they exist in Illinois, including a brief discussion of ComEd admitting to bribery in Federal Court, and the subsequent class-action lawsuit to return allegedly excessive rate payments. In Part VI, I will propose democratic control as the best path forward.

II. CHANGE TO ILLINOIS UTILITIES LAW IN 1997

I begin by looking to the change of law that occurred with passage of the Customer Choice Law of 1997, and how that law was interpreted by the Illinois Commerce Commission and Illinois appellate courts.

A. Adding Competition to the Electricity Industry

Before 1997, there was no guarantee in any specific state law that Illinois customers would have any choice about who would provide their electricity. The passage of this Customer Choice Law of 1997[1] allowed alternative retail electric suppliers (ARES) a way into the electricity market protected by law, and as of 2013 they supplied more than half of the electricity purchased by commercial and industrial consumers in Illinois.[2] These companies generally compete

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[1] This law put in place what is substantially the current regulatory framework, now labeled as 220 ILL. COMP. STAT. 5/16-101, *et seq.*

[2] *Rate Relief Law Alters Purchasing Power in Illinois*, Miller, Canfield, Paddock, and Stone, P.L.C, (Sept. 19, 2013) https://www.millercanfield.com/resources-338.html.

against the Illinois Power Agency (who buys primarily from ComEd and Ameren) to offer electricity to residential and/or commercial customers, with the intended benefit of lower prices.[3]

This was the most important change brought about by the 1997 law, though it is debatable what effect it had on the rates and overall quality of service received by consumers across Illinois. In addition, several more specific changes in regulation were made, but these changes are best understood by examining some of the cases that came before the Illinois Appellate Courts.

B. Cases before Illinois Commerce Commission Under that Law

i. 2001 Appeal

In June of 2001 the Illinois Appellate Court heard an appeal of decisions of the Illinois Commerce Commission to ignore certain information that ComEd provided as to a proposed "open-access implementation plan" and a claim that the order of the Commission did not allow ComEd to fully recover through rate payments implementation costs and delivery service costs.[4] This was one of the first cases to consider the full impact of the Customer Choice and Rate Relief law of 1997.[5] This law stated that, even if a customer chooses to "unbundle" their electricity services and purchase its electricity from a supplier other than its local retailer, the local electric utility is still required to provide the rest of its "delivery services."[6]

Under this change in utilities regulation, a utility was now required to file a Delivery Service Tariff (DST) at least 210 days prior to the anticipated start of providing these services, providing both a description of the customers who were to be eligible for these services, as well as the proposed price under which these services would be provided.[7] In this case, ComEd filed its DST in March of 1999, and it was

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[3] Although this is the effect the law was intended to have, in practice it has sometimes had the opposite effect, with ARES prices being significantly higher. *See, e.g.,*, La Risa Lynch, *Alternative energy scams hit poor blacks and Latinos the hardest, complaints show*, The Chicago Reporter (Nov. 16, 2018) https://www.chicagoreporter.com/alternative-energy-scams-hit-poor-blacks-and-latinos-the-hardest-complaints-show/ (detailing a large amount of complaints made for high electricity rates of alternative energy suppliers, rather than ComEd or Ameren).

[4] *Commonwealth Edison Co. v. Illinois Com. Comm'n*, 751 N.E.2d 196, 198 (Ill. App. Ct. 2001) [hereinafter "ComEd I"].

[5] *Id.*

[6] *Id.*

[7] *ComEd I*, 751 N.E.2d at 198.

approved with modifications by the Illinois Commerce Commission.[8] Under the law at the time, rates were based on extrapolations from one historic "test year." In its DST, ComEd used 1997 as the "test year" for determining delivery service rates and revenue requirements.[9] ComEd sought to make certain *pro forma* adjustments for future expenses, basing these adjustments almost exclusively on sworn testimony, rather than specific expenditures or contracts.[10]

The Commission, in denying all nine proposed *pro forma* adjustments, relied on the fact that ComEd had provided no support to these changes other than sworn testimony.[11] The Illinois Appellate Court, in overruling this portion of the Commission's order, found that the Commission had improperly "rejected the testimony outright," rather than considering it fairly.[12] The appellate court here attempted to clarify that, in finding this portion of the Commission's decision "clearly erroneous," they offered no opinion as to whether the evidence actually supported any of the *pro forma* adjustments, and simply ordered the Commission to consider the evidence again.[13]

As to the issue of whether the Commission was correct when calculating the credit for the "Single Billing Option" (SBO), the court held that the requirement that this rate be "cost-based" was not a requirement where the meaning was clear on its face, and the Commissions use of "embedded cost methodology" was not overtly improper.[14] Notably, the court did not disagree with ComEd's argument that the embedded cost methodology resulted in a discount rate that was higher than the cost the utility was actually avoiding, and simply found that the "cost-based" requirement was broad enough that the Commissions methodology was not necessarily wrong.[15]

Even viewing this case decades later, there are two particularly important parts of the holding to take note of. One is the troubling

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[8] *Id.* at 199.
[9] *Id.* at 200.
[10] *See, e.g., id.*; *Illinois Com. Comm'n, On Its Own Motion v. C. Illinois Light Co.*, Interim Order No. 98–0454, app. A at 6–7 (October 21, 1998) (A utility is permitted to make *pro forma* adjustments from the data of the selected historical test year for all measurable changes that would affect the rate payers in things like plant investment, operating revenues, expenses, and capital structures which occur or are "reasonably certain to occur" subsequent to the chosen historical test year but, under the 1997 Customer Choice and Rate Relief Law, prior to January 1, 2001).
[11] *ComEd I*, 751 N.E. 2d at 200–201.
[12] *Id.* at 201.
[13] *Id.* at 202.
[14] *Id.* at 203.
[15] *Id.*

decision of the appellate court that the Commission had simply "rejected outright" the sworn testimony provided by ComEd. The language of the order notwithstanding, the Commission's decision could easily have been read as simply a conclusion that the sworn testimony ComEd provided in supporting its *pro forma* adjustments, was not sufficient on its own without any additional support in the form of contracts or actual expenditures. This suggests a requirement for future Commission decisions that could be read as giving undue weight to the testimony of utility employees and officials.

The second noteworthy part of this opinion is the way in which the appellate court rejected ComEd's argument on the SBO rate. ComEd argued that the methodology used by the Commission resulted in a discount that was higher than the costs they were saving.[16] The appellate court did not seem to find this argument weak or wrong, and seemed to simply decide that the argument did not matter. In other words, if a utility made changes that allowed it to avoid costs in electricity generation or distribution, but the rates consumers paid lowered by a greater amount than the cost being avoided, this would not be a *per se* improper Commission decision. This would seem at least to cut towards greater consumer protection.

ii. ComEd 2007 rate case and subsequent 2009-10 appellate court decisions

ComEd brought another case challenging the rates as set by the Illinois Commerce Commission which reached the Illinois Appellate Court in 2009, with another appeal arising out of the same events in 2010. A factual issue in these cases which was not addressed in the 2001 case is the calculation of ComEd's costs as applied to rate changes, given electricity *generation* was no longer a part of the equation.[17] January 2007 had signaled the end of a transitionary period where residential customers rates were reduced by 20% and nonresidential rates were frozen.[18]

As to the revenue requirement issues raised in this appeal, ComEd essentially sought to be reimbursed through the rate structure decided on by the Commission for costs incurred in complying with a

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[16] *ComEd I*, 751 N.E.2d at 203.

[17] *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 924 N.E.2d 1065, 1074 (Ill. App. Ct. 2d Dist. 2009) [hereinafter "*ComEd II*"]

[18] *Id.* at 1074.

Sarbanes-Oxley,[19] the costs of certain incentive-based employee compensation, and a related expenditure by the parent company, Exelon, to fund employee pensions.[20]

The court found, in referring back to previous precedent, that utilities are only permitted to recover costs which are reasonably and prudently incurred that is related to either operations or services delivery.[21] The Commission had found that only 50% of the cost of the employee incentive plan should be included in the rate base, and the court, finding that a "benefit to ratepayers" is a requirement for salary related expenses to be recoverable, agreed with the Commission.[22]

As to the funding of the pension plan through Exelon, the appellate court noted that the plan the Commission settled on was initially proposed by ComEd, and that ComEd's decision not to fund the pension plan by the less expensive method of issuing debt renders the Commission's decision not to allow ComEd to recover the full amount not unreasonable.[23]

The 2010 appeal discussed ComEd's assertion that it was not granted full recovery of "prudent and reasonable costs of certain employees' salaries and wages.[24] As to an issue of employees who generally worked on delivery-related services, but spent time working on potential merger activities as "unpaid overtime," the Commission found that it was not made clear that these employees would have performed this unpaid overtime work if not for the ongoing potential merger, and thus it was not clear that these expenses were representative

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[19] *See* 15 U.S.C. § 7201 *et seq.* (2006), a relatively new addition to cost calculations for various major corporations at the time of this opinion. Taking no position on the reasonableness of corporations seeking ways to recover the costs of complying with Sarbanes-Oxley, it should be noted that this is an issue which has persisted for years after the passage of the act. *See, e.g.,* Michael Cohn, *SOX compliance still costs companies heavily*, Accounting Today (June 12, 2017 at 5:11pm EDT) https://www.accountingtoday.com/news/sox-compliance-still-costs-companies-heavily. There is reason to believe that, while initially compliance with Sarbanes-Oxley or other similar legislation might lead to a temporary increase in costs, fully adopting these compliance practices could lower costs of audits. Julia Vowley, *Sarbanes-Oxley can reduce audit costs and bring business benefits*, computerweekly.com (Dec 06, 2005) https://www.computerweekly.com/feature/Sarbanes-Oxley-compliance-can-reduce-audit-costs-and-bring-business-benefits (last accessed February 13, 2021).

[20] *ComEd II*, 924 N.E.2d at 1075.

[21] *Id.* at 1076.

[22] *Id.* at 1077.

[23] *ComEd II*, 924 N.E.2d at 1079–1080.

[24] *Commonwealth Edison Co. v. Illinois Commerce Com'n*, 937 N.E.2d 685, 692 (Ill. App. Ct. 2d Dist. 2010) [hereinafter "ComEd III"]

for the test year being used.[25] Accordingly, the Commission excluded one quarter of the labor costs associated with these employees from the test year operating costs.[26] The appellate court elected not to disturb the Commissions finding that there was substantial evidence to at least suggest that these employees did some merger-related work during normal work hours, or that the requirement of working on the merger was made in some way a requirement of their employment.[27] Further, while the court took no opinion on whether or not it would have specifically affirmed the 25% reduction the Commission applied, the deferential standard of review applicable meant this portion of the order had to be affirmed in full.[28]

In answering how the Commission must consider increases or decreases in value of infrastructure that deviates from the chosen test year, the appellate court found that the Commission had erred when it recognized increases in rate base investment value due to post-test-year additions, without recognizing any contemporaneous offsetting decreases due to ongoing depreciation.[29] In essence, the post-test-year additions could be recognized and the rate base changed accordingly, but any accompanying decreases in value of the assets had to also be accounted for. Holding otherwise would have allowed and in fact incentivized utilities to always seek upward *pro forma* adjustments in their rate base, allowing them to recover more from ratepayers than the actual value of their assets at the time the rates are being calculated.[30]

Again, the noteworthy findings of these appeals are short. Even after substantial analysis, there is not a lot that can be found in this opinion that seems likely to harm consumers. What noteworthy findings there are, however, are important to understand and may have long term impact. ComEd is permitted to recover costs reasonably and prudently incurred as part of its rate base, but any benefit to ratepayers that might exist from ComEd being able to attract more qualified employees does not in and of itself justify those costs being fully recoverable.[31] Additionally, ComEd is allowed to recover some costs as they relate to funding of employee pensions, but they are not permitted to simply recover whatever it is that they spent, without regard for cheaper alternatives that could have accomplished the same goal. I

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[25] *Id.* at 699.
[26] *Id.*
[27] *Id.* at 700.
[28] *Id.* at 701.
[29] *Id.* at 703.
[30] *Id.* at 705.
[31] *ComEd II*, 924 N.E.2d at 1078.

draw attention to these facts to make the point that the proposals being advanced by this note are not meant to be taken as an allegation that Illinois has somehow failed to pass adequate regulations. Neither is there some "gold standard" from another state that should become a nationwide model. I simply mean to propose that allowing a profit incentive to be involved in the management and decision-making of such a necessary service as electricity is always going to be at odds with true and complete consumer protection. Because of this fact, some sort of conflict, or in the case of ComEd during the past year and a half, scandal, is almost certain to be the result. Understanding how this concept works in Illinois will require analysis of how the relevant laws have changed post-2011, as well as a deeper analysis of where we are now, but it is important to recognize that rate litigation before the 2011 showed there were little to no glaring weakness in the law.

III. ELECTRICITY UTILITIES REGULATION POST-2011

In 2011, Illinois made many important, if potentially misunderstood at the time, changes to its utility regulatory framework, by passing the Energy Infrastructure Modernization Act (the "Act"). Passed as Public Act 097-0616, this act made changed the electricity resources available to consumers, altered where that electricity came from, and overhauled the regulatory framework governing all these systems.[32]

A. Changes to the Laws

The Act provided that for certain retail customers whose service is not provided based on hourly pricing, these rates are to be measured with a dual channel meter measuring the rate of electricity flowing into and out of the customers facility, with any necessary meter upgrades being provided at the electricity providers expense.[33]

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[32] *See* Amended Illinois Power Agency Act, Pub. Act 097-0616, 2011, https://www.ilga.gov/legislation/publicacts/97/097-0616.htm. Some of these changes included a definition of "distributed renewable energy device," set minimum percentages of renewable energy coming from these distributed renewable energy devices, and what at least appeared to be stricter requirements on energy efficiency, with requirements that certain electric utilities submit more specific potential energy efficiency measures that could be implemented. *Id.* Though many of these changes do not directly affect the rate-setting system, these changes are still important for understanding the overall context of this legislation.

[33] *See* 220 ILL. COMP. STAT. ANN. 5/16-107.5(c)(2) (West 2018). This change on its own, like the various other changes I will describe in the following pages, do not definitively show whether the Energy Infrastructure Modernization Act can be

Another noteworthy change to benefit potentially smaller retail customers, is that for any billing period where the amount of electricity generated exceeds the amount used, customers are permitted to apply a 1 to 1 kilowatt-hour credit to a future bill.[34]

Perhaps the biggest change as it relates to this note was a change from the former method of ratemaking based on a single historic "test-year,"[35] to a requirement that rates be updated annually, with an intent that rates more accurately reflect the utilities actual costs and "prudent and reasonable" investments.[36] While its efficacy might be debatable, an effort to make rates reflective of actual utility costs is an admirable goal and a policy which should be continued.

There were various other small changes throughout the act, but the most significant changes were made around regulatory reform as it related to the task of infrastructure investment and modernization. The General Assembly in this portion of the Act declared its findings to be that, with the need for refurbishment and modernization of the Illinois electric grid, the customer need for reliability and safety, among other things, would be well-served by "the introduction of performance metrics."[37] This act was written to apply specifically to electric utilities serving more than 1,000,000 customers, but only those who voluntarily chose to be a part of the infrastructure investment program.[38]

Although this section of the new law had the subtitle of regulatory reform, a lot of this act dealt primarily, and sometimes only, with the new investments these utilities were required to make.[39] It should also be noted that specific language was added mandating specific

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described as good or bad for consumers. It should be noted here that a rate system based on a more accurate account of how much energy a ratepayer is or is not using, as well as the specific amount of electricity flowing out, would appear to be a positive for consumers.

[34] 220 ILL. COMP. STAT. ANN. 5/16-107.5(e)(2) (West 2018).

[35] *ComEd III*, 937 N.E.2d at 696.

[36] 220 ILL. COMP. STAT. ANN. 5/16-108.5(c) (West 2018).

[37] 220 ILL. COMP. STAT. 5/16-108.5(a) (West 2018).

[38] 220 ILL. COMP. STAT. 5/16-108.5(b) (West 2018). Given the benefits of a state supported investment/modernization program, it is unlikely this requirement would have turned away any of the larger utilities such as ComEd. It should also be noted that this requirement included creating 2000 full time equivalent jobs, 450 for combination utilities. Receiving money for new jobs does not necessarily mean the benefit will transfer to consumers, but there is a possibility it becomes a win-win for both the utilities and the broader communities they provide their services to.

[39] 220 ILL. COMP. STAT. 5/16-108.5(b)(1)(A) (West 2018).

improvements in various areas of efficiency and general service quality.[40] Even the regulatory framework created in this portion of the Act gave the Illinois Commerce Commission specific authority and obligations to ensure that participating utilities were meeting their peak year job creation obligations.[41]

This new change in the regulatory law did allow participating utilities to attempt to recover their delivery service costs through a performance-based formula rate, though this rate still had to be approved by the Illinois Commerce Commission.[42] While the language does specify that these are to be the utilities actual costs, and the information is to be updated regularly and the utilities are to remain transparent, the investigatory authority and obligations given to the commission do appear to place more emphasis on whether or not the participating utility is actually meeting its investment obligations under subsection (b) of this law, rather than making any determination of what costs can reasonably be included in "actual costs.[43] The utilities actual capital structure for the year in question is what must determine the rates approved by the Commission, though those costs too are subject to a "determination of prudence and reasonableness," giving broad discretion again to the Illinois Commerce Commission in determining implementation.[44]

As to the issue of fixing or otherwise altering rates under this system which may have been ordered improperly, there is a concerning weakness even in this law. Under the old system, if a new rate is stayed or suspended by a reviewing court, the Commission had discretion to

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[40] 220 ILL. COMP. STAT. 5/16-108.5(f) (West 2018). These performance goals are accompanied by reductions in a participating utility's "return on equity" based on what exact failures occurred. 220 ILL. COMP. STAT. 5/16-108(f-5) (West 2018). This note would not be making its point effectively if it were not pointing out the positives of the current regulatory framework, and this connection between performance measures and financial incentives is one such positive. However, it is worth restating that, given such a structure maintains the profit incentive and makes complying with these performance goals effectively optional, this change in the law still does not go far enough to protect ratepayer interests. These provisions will be important below in comparison to both the regulatory framework in New York, and the utility disaster which befell Texas in February of 2021. Texas is an outlier, an extreme example, but nonetheless serves as an important reminder of what might happen if strong utility regulation, both as to rate structures but also general service quality, is not maintained.

[41] 220 ILL. COMP. STAT. 5/16-108.5 (West 2018).

[42] 220 ILL. COMP. STAT. 5/16-108.5(c) (West 2018).

[43] 220 ILL. COMP. STAT. 5/16-108.5(c) (West 2018).

[44] *Id.*

determine what rates will be in effect during the appellate process.[45] This new act uses similar language to state that even if a rate is terminated it remains in effect until a new rate structure is approved.[46]

The language of this new act created a strange potential loophole in the Commission's authority to analyze updated cost inputs to the performance-based formula rate utilities are required to regularly file. The Commission is given authority within 45 days after such filing, either on its own initiative or through complaint, to review the prudence and reasonableness of these costs.[47] The Commission at this time does not, however, have the authority to "consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of [the relevant section.]"[48] Though the applicability of enforceable orders through this particular hearing structure might be small, this is still a substantial potential loophole. Without proper enforcement, a finding that any of these updated costs are either not prudent or not reasonable would serve little meaning and have little effect on the rates that consumers would be paying and the costs they would still be incurring.

I will spend little time in this section discussing the impact of the "Provisions relating to Smart Grid Advanced Metering Infrastructure Deployment Plan," 220 ILCS 5/16-108.6. The important thing to takeaway here is that standards for improving the infrastructure were made, and that these standards are important when comparing Illinois to the Texas (discussed in Part IV).

i. Useful Interpretations by Illinois Courts

The impacts of the various changes made through the Energy Infrastructure Modernization Act as those changes relate to ratepayers cannot be made fully clear without an examination of Illinois Appellate Court cases interpreting these laws.

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[45] *People ex rel. Hartigan v. Illinois Com. Comm'n*, 592 N.E.2d 1066, 1090 (Ill. 1992).

[46] 220 ILL. COMP. STAT. 5/16-108.5(d) (West 2018). This point might not be the direst concern for consumer protection, as nothing in this Act can be construed to be allowing an improper rate structure to stay indefinitely (the Commission must follow procedures outlined in other sections for approving and modifying new rate structures on a particular timeframe). However, it is still problematic that the timeline for a new structure being approved remains unchanged, meaning consumers might be stuck paying improperly large rates for electric serves until the Commission is able to approve a new structure.

[47] 220 ILL. COMP. STAT. 5/16-108(d) (West 2018).

[48] *Id.*

The first instance of an appellate court interpreting the Energy Infrastructure Modernization Act ("EIMA") came in 2014 on a consolidated case reviewing various issues arising out of the 2012 proposed rate change case.[49] This 2012 rate case was appealed two different times, with the March and June opinions each discussing different issues of the overall case.[50] As the background given during the June appeal was of the most value, I will address that opinion for the background given. I will address substantive holdings on the issues from both cases.

A key change in the law created by EIMA was a requirement that utilities make substantial investments in updating and improving facilities, as well as hiring new employees.[51] While that change is not as crucial for understanding this case, it will be crucial for understanding the place of current Illinois regulations compared to the rest of the country, and what that means going forward.

Because this was the first major case since the passage of EIMA, the appellate court in the March 2014 case took care to go through extensively the parts of the new law necessary for understanding the issues before them. EIMA defined a specific formula to determine the rates that a utility may charge.[52] EIMA also defined costs as the actual costs of the financial components forming the basis of the rate determination, based in part on the data of the utilities most recent filing with the Federal Energy Regulatory Commission (FERC).[53] EIMA also required that costs a utility such as ComEd might incur in the course of distribution over state lines (falling under federal costs) or within the state of Illinois (falling under purely state law) be specifically allocated as such, with no requirement that the state cost determination follow the same formula as federal.[54] Rates are further determined in reference to "billing determinants," meaning determinations of how much demand for service used the utility expects, allocating

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[49] *Commonwealth Edison Co. v. Illinois Com. Comm'n*, 2014 IL App (1st) 122860 ¶ 1 (8 N.E.3d 513, 515 (Ill. App. Ct. 1st Dist. 2014)) [hereinafter "*ComEd IV*"].

[50] *Commonwealth Edison Co. v. Illinois Com. Comm'n*, 2014 IL App (1st) 130302, ¶ 1(16 N.E.3d 713, 716 (Ill. App. Ct. 1st Dist. 2014)) [hereinafter "*ComEd V*"].

[51] *ComEd V*, 16 N.E.3d at 717.

[52] *Id.* at 717–18. This formula is generally defined as R (Revenue requirement) = C (operating costs) + lr (invested capital or base rate times rate of return on capital). The rate of return on capital is defined specifically as the reasonable return that could be expected from the present value of a utilities property, thus requiring some specific references to and determination of what an accurate valuation of the utility property is. *Id.* at 718.

[53] *Id.* at 718–19. *See also* 220 ILL. COMP. STAT. 5/16-108.5(c) (West 2018).

[54] *ComEd V*, 16 N.E.3d at 719.

costs among those various classes of ratepayer so that the utility might reasonably expect to recover in the aggregate its revenue requirement.[55] Costs associated with proceedings before the Illinois Commerce Commission are also now included in this rate determination, subject to an assessment of the Commission on what costs are "just or reasonable" to include.[56]

During the March case before the First District, the court addressed an argument that the Commission had improperly mandated a change in rate to reflect the expected growth in number of customers served There, the Commission argued that this was a proper interpretation of the clause requiring that the Commission determine rates which are "prudent and reasonable."[57] The appellate court essentially adopted this argument, but based its holding on a finding that ComEd had not met its burden in showing the Commission acted either "arbitrarily and capriciously" or that the Commission ruling was against the manifest weight of the evidence.[58]

In a succinct statement, the court found that ComEd had not produced any evidence to show that the Commissions application of federal rules to the costs ComEd could recover from services provided to out of state buyers was improper, and thus that part of the Commission ruling would stand.[59] The appellate court also held that witness testimony on the possibility the performance-based incentives could be eliminated, was enough evidence to justify limiting the amount of that cost ComEd could recover from ratepayers.[60]

In this case, ComEd also sought to recover an amount paid to one of its affiliates. The Commission had found this amount to be going towards bonuses to affiliate employees, and thus found it unrecoverable under the Act.[61] The court declined to rule specifically on the interpretation of that section, instead finding that the Commission interpretation was sufficiently in line with the wording of the statute.[62] Lastly, the court simply agreed with the Commission that ComEd had

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[55] *Id.* at 719–20. *See also* 220 ILL. COMP. STAT. 5/16-108.5(c)(4)(H) (West 2018).
[56] *ComEd V,* 16 N.E.3d.at 720. *See also* 220 ILL. COMP. STAT. 5/9-229 (West 2012).
[57] *ComEd IV*, 8 N.E.3d at 524.
[58] *ComEd IV*, 8 N.E.3d at 524. While this lends credence to the interpretation of the Commission that such an adjustment may be reasonable, the fact that the court couched its holding in a failure of ComEd to meet its burden suggests that the same challenge may be more successful if raised later, or with a more substantial evidentiary showing.
[59] *Id.* at 525.
[60] *Id.*
[61] *Id.* at 525–26; *See also* 220 ILL. COMP. STAT. 5/16-108.5(c)(4)(A) (West 2018).
[62] *ComEd IV, 8 N.E.3d* at 526.

not shown that the cost of stock in Exelon ComEd had paid to some managers was in the interest of rate-payers, and that such cost was unrecoverable.[63]

Looking forward to the June case, the appellate court held definitively that the Commission was not restricted to using only "weather-normalized billing determinants," and that the Commission could look to data such as expected growth in the number of ratepayers.[64] The evidence showed the Commission did not "refuse" to consider the evidence on alleged decline in future kWh sales, but had simply not found it persuasive, in part because of a lack of evidence as to why the decline would happen.[65]

As to how to account for electricity provided to out of state consumers, the court took ComEd to be arguing a methodology based on a utilities "actual" costs to be inadequate, and found that ComEd had failed again to explain why.[66] The court also found that ComEd had urged the federal entity (FERC) to adopt the methodology for allocating interstate transmission costs that it was arguing the state must defer to, and rejected that argument that the Commission had to defer.[67] The court also found that the Act's provisions allowing for recover of reasonable costs and attorney's fees associated with proceedings before the Commission, a more detailed justification than simply one employees testimony was necessary.[68]

The only real weakness in these cases in isolation seems to be that Illinois appellate courts continue to be hesitant to make specific

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[63] *Id.*

[64] *ComEd V.*, 16 N.E.3d, at 726–27. The court notably invoked collateral estoppel here in justifying its holding. This gives strong weight to the holdings of the earlier appeal, showing that the courts earlier language that the Commission is free to consider expected population growth or movement in addition to more standard "billing determinants" was correct. The court also cited back to the 2011 rate case for the holding that the Commission was not required to consider factors like expected decline in kWh usage. *Id.* at 727.

[65] *ComEd V*, 16 N.E.3d at 728.

[66] *Id.* at 730.

[67] *ComEd V*, 16 N.E.3d at 732. In this case again the court found that, while ComEd may have had a more compelling argument to make that some of its actual costs were "trapped" by conflicted methodologies between the Illinois Commerce Commission and the FERC, ComEd had failed to provide sufficient evidence about those costs to warrant any further review. *Id.* at 732–33.

[68] *Id.* at 736–37. One employee's testimony is exactly what ComEd tried to rely on here, and the Commission and the appellate court both found that employee's testimony, which would likely have been insufficient anyway, "does not even approach establishing the justness and reasonableness of the $1,544,161 of fees that ComEd seeks to include in its rates." *Id.* at 737.

findings as to how the Illinois Commerce Commission is to conduct these proceedings and make determinations as to things like rates and other costs. Given the strong deference generally paid to the Commission, this is hardly unreasonable. Regardless, it does call into question the reliability and efficiency of future Commission proceedings, particularly given what we know now about how the legislative process can be influenced. Generally, determining how these cases inform us what the best path forward for the state might be, it would be useful to look at what other states are attempting.

IV. USEFUL OTHER STATE COMPARISONS

To truly understand what is going on in Illinois and where we might go from here, it is necessary to at least briefly examine how electricity utilities are being handled by other states. This section will examine two other States. One serves as a warning of how extreme deregulation may go wrong, and the other as a direct comparison to an approach very similar to Illinois.

A. The Texas Catastrophe

Any writing addressing failings of American electricity infrastructure and proposing improvements for the future would be lacking if it did not address the catastrophe that befell the Texas power grid during February of 2021.[69] The state of Illinois law as described in the above discussion of the 2014 appeals to the ComEd 2012 rate case provide a useful touchpoint to compare with what has happened in Texas, which should serve as a warning to all of us about what not to do. While the failure of the Texas power grid was significant and left a lot of people without power for a long time during a winter storm, it came very close to being much worse.[70]

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[69] While at the time of publication no faults in the Texas power grid remain, the damage caused by this catastrophe still gives cause for concern. During the height of this crisis millions of Texans had no access to power or to water, and the water that was flowing through some of the pipes was still unsafe. Millions of people in Texas remained under "boil water" orders for some time after power had been returned, to ensure they were not drinking contaminated water. Phil Helsel, Saphora Smith, Wilson Wong, and Suzanne Gamboa, *Power comes back for most in Texas, but other problems pile up*, NBC News (Feb. 19, 2021 at 12:55am CST) https://www.nbcnews.com/news/us-news/power-comes-back-most-texas-other-problems-pile-n1258311.

[70] Texas was reportedly 4 minutes and 37 seconds away from a complete state-wide blackout. *4 minutes, 37 seconds: That's how close Texas came to complete grid*

The regulatory structure surrounding Texas electric utilities does not bear much resemblance to regulation in Illinois, or to any other state for that matter. However, it serves an informative example of what the most extreme levels of deregulation might look like, and the catastrophe that just befell that grid serves as a warning of what might happen if other states were to follow suit.

There are a few things of note in the Texas structure. One is that, rather than reserving jurisdiction over issues like rate determination to one state-wide body, regulatory jurisdiction is delegated to municipalities across the state.[71] The state laws governing the rate-making determinations are limited in language, offering very little in guidance to either state-wide or local governing bodies charged with determining rates.[72] Indeed specific enforceable regulations concerning issues like winterization, or general efficiency and effectiveness of electricity generation and dispersal, are almost completely absent from the state law.

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failure, KHOU-11 (Feb 24, 2021 at 1:15 PM) https://www.khou.com/article/news/local/texas/ercot-texas-power-grid-total-collapse-blackout/285-ae35263d-dfad-49b5-aa6b-26f12c3e1654.

[71] Municipalities are provided "exclusive original jurisdiction" over rates, operations, and services of utilities in the areas of the municipality. Tex. Util. Code. Ann. §33.001. The jurisdiction over rate determination is further set out in its own separate section. Tex. Util. Cod. Ann. § 33.021. The Public Utility Commission of Texas only has jurisdiction over areas outside of municipalities, or inside of municipalities where jurisdiction is specifically surrendered. Tex. Util. Code. Ann. §32.001.

[72] See Tex. Util. Code. Ann. §§33.021–33.026. The requirement that the electric utility in the ratemaking proceeding reimburse the governing body of the municipality for various expenses that might be incurred would, if left unchecked, encourage the same manner of problematic lobbying that brought about class action lawsuits in Illinois to ensure that ratemaking proceedings were as limited in scope as they could be. While Texas state law does make specific references to various parts of the ratemaking process, such as establishing overall revenues and handling depreciation and amortization, much of these laws rely on subjective determinations of what is "reasonable" or leave determinations entirely within the discretion of the Commission. *See, e.g.,* Tex. Util. Code. Ann. §36.056.

It is also debatable at best if this system for determining rates is having a positive effect for the ratepayers themselves. An overly low electric bill might suggest the payments that should be going into maintenance and upgrades to the grid are not being made. In this case, the few Texas residents who escaped the February 2021 winter storm mostly unscathed did not even get to keep the benefit of low electricity bills. Leticia Miranda, *As Texas deep freeze subsides, some households now face electricity bills as high as $10,000*, NBC News (Feb 19, 2021 at 3:06pm CST), https://www.nbcnews.com/business/business-news/deep-freeze-subsides-texans-now-face-electricity-bills-10-000-n1258362.

I will not discuss in depth the Electric Reliability Council of Texas (ERCOT), as they serve no regulatory function as a nongovernment organization. However, the risks that can come with an "independent system operator" having such unsupervised responsibility over so much of a state's grid should serve as a warning to other states approaching near or full monopolies, such as Illinois.[73]

It should be noted that the winter storm that hit Texas was one of the worst the state has seen in a long time.[74] Failures of winterization and a failure to prepare certainly play a role, but it would be unfair to say that this failure occurred under ordinary circumstances. However, those that seek to place the blame entirely on the unusual circumstances and a shortcoming of the ERCOT powers, while avoiding the logical conclusion that a lack of regulation and thus a lack of government control over the grid is the true culprit, are missing the big picture.[75] Rate determinations are inevitably correlated to the effectiveness and efficiency of the grid itself, and standards maintaining both steady rates and a reliable grid can only truly come from the statewide regulatory body. The answer for Texas lies not in handing a private organization more power over a necessary public good. An organization motivated by anything other than providing the best for the most amount of people cannot possibly make these determinations effectively. The answer for Texas, and indeed for the rest of the country, lies in increasing government control over the grid and the service providers themselves.

B. The New York Comparison

Unlike the Texas example, the New York system is much more directly comparable to Illinois. New York also demonstrates well that

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[73] For general information about ERCOT's role in the Texas power grid, including what power they have and what they do not, see http://www.ercot.com/about.

[74] While this may not have been specifically the worst winter storm ever endured, the damages have been significant, and the effects are still lasting. *See, e.g.,* Mari Salazar, *Central Texas school districts continue repairs after winter storms, estimate millions lost due to damages*, KVUE (Updated March 1, 2021 at 8:17 PM) https://www.kvue.com/article/news/education/schools/central-texas-school-districts-repairs-winter-storms-millions-lost-damages/269-e8da2243-6ca5-44a6-b73f-cad95e7f35e9.

[75] *See, e.g.,* David Sibley, *I co-authored the law that deregulated the Texas electrical grid. ERCOT didn't cause winter outages*, The Dallas Morning News (Feb 25, 2021 at 1:30 AM) https://www.dallasnews.com/opinion/commentary/2021/02/25/i-co-authored-the-law-that-deregulated-the-texas-electrical-grid-ercot-didnt-cause-winter-outages/.

the problems arising in Illinois are not unique to that state. This suggests these problems may well be inherent in the very structure of allowing private entities driven in part by profit to control such a public good as necessary as electricity.

New York Utilities are regulated by a similar public body to the Illinois Commerce Commission. The general powers of the New York Public Services Commission are laid out in significant detail in N.Y. Pub. Serv. Law § 66. Unlike Texas, the New York Legislature has provided significant guidance to its regulatory body. This Commission is granted general supervision over all gas corporations or electric corporations which have essentially any authority under law to add to or otherwise operate the electric grid.[76] In addition to the broad ability to review capital expenditures,[77] the Commission also has broad investigatory power to oversee and if necessary, order changes to ensure adequate distribution of gas or electricity.[78] Notably, the Commission also has the authority to inspect not only most premises but also the accounts/books of any entity falling under its jurisdiction, as well as the ability to order entry, charge, or credit of receipts.[79]

In New York, any proposed rates or rate changes must be filed with the New York Public Services Commission, where they are made publicly available for a period of no less than 30 days (unless good cause can be shown why a rate change needs to enter into effect sooner), then after 30 days notice to both the Commission and to each county, the rate change may be enacted.[80] In New York a hearing on proposed rates or rate changes is not necessarily required, but may be held upon either the Commissions own initiative or by complaint.[81] The Commission is also not obligated to, but may engage in an audit of any gas or electric corporation, where the Commission can force the

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[76] N.Y. Pub. Serv. Law § 66 (West 2016).

[77] Detailed Reports on these financial circumstances that generally factor into determinations of things like the appropriate rate to charge consumers is also required under this law and subject to the discretion of the Commission. N.Y. Pub. Serv. Law § 66(6) (West 2016).

[78] N.Y. Pub. Serv. Law §§ 66(2) and (2-a) (West 2016).

[79] N.Y. Pub. Serv. Law §§ 66(8) and (9) (West 2016). In both these proceedings and in others the Commission might undertake it is granted subpoena power as well as the general ability to take witness testimony and receive other evidence as might be necessary throughout the state, either as the Commission as a whole or through its individual members.

[80] N.Y. Pub. Serv. Law §12.

[81] N.Y. Pub. Serv. Law § 66(12)(f) (West 2016).

company being audited to provide for the costs of the Commission-chosen auditors.[82]

In New York, complaints about services received by a utility are generally to be made to the utility itself, however the Commission retains some authority over reviewing the procedures a utility puts in place to address complaints.[83] Finally, although the specifics are set out in some detail, New York law approaches protection of consumer interests in receiving these necessary services as requiring the utilities to provide "safe and adequate" services without special regard to any individual person or persons.[84]

While there is a substantial regulatory framework in place in New York, they have not been free from problems. Complaints about unreasonable rates are common, particularly recently.[85] Complaints about blackouts have also been common.[86] New York has also

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[82] N.Y. Pub. Serv. Law § 66(19) (West 2016).

[83] N.Y. COMP. CODES R. & REGS. tit. 16, § 11.20.

[84] N.Y. Pub. Serv. Law § 65 (West 2020).

[85] A law deregulating the New York energy industry to allow for more customer choice, like laws passed in Illinois, has not seemed to have had much of an effect in creating low prices for electricity. https://www.electricrate.com/residential-rates/new-york/#:~:text=New%20York%20City%20has%20some,per%20kilo-watt%2Dhour%20for%20electricity. Collier Sutter, *Con Ed says NYC should expect high electricity bills this summer*, Timeout (May 22, 2020 at 4:20 PM) (May 22, 2020) https://www.timeout.com/newyork/news/con-ed-says-nyc-should-expect-high-electricity-bills-this-summer-052220; While the COVID-19 pandemic can hardly be considered a typical circumstance with which to test the effectiveness of a State's utility provision, the fact that these potential problems have continued to arise even during such a pandemic suggests that something more could be done. Kathleen Culliton, *ConEd Eyes Rate Raise as NYC Faces Coronavirus, Hurricane Season*, PATCH NEW YORK (May 26, 2020 at 3:05 PM) https://patch.com/new-york/new-york-city/coned-raises-rates-nyc-faces-coronavirus-hurricane-season; Indeed, even years before the pandemic an issue was already being felt by many New Yorkers. *See, e.g.*, Jon Campbell, *Why is Albany Letting These Energy Companies Scam Thousands of New Yorkers?*, VILLAGE VOICE (Feb. 2, 2016) https://www.villagevoice.com/2016/02/02/why-is-albany-letting-these-energy-companies-scam-thousands-of-new-yorkers/; Emily S. Rueb, *How New York City Gets Its Electricity*, THE NEW YORK TIMES (last visited Feb. 28, 2021 at 7:49 PM) (Noting that customers of Consolidated Edison (ConEd) pay some of the highest electric rates in the Country), https://www.nytimes.com/interactive/2017/02/10/nyregion/how-new-york-city-gets-its-electricity-power-grid.html.

[86] *See, e.g.*, Susan Scutti, *We Now Know the Cause of New York's Massive Blackout*, CNN https://www.cnn.com/2019/07/30/us/nyc-blackout-con-ed-explanation-trnd/index.html (last updated July 30, 2019 at 9:56am EDT) (detailing two blackouts that happened close together, one caused by a "faulty connection" at a substation and one apparently due to high demand during a massive heatwave).

grappled with a variety of potential legislative solutions to tackle issues with their utilities.[87] Although to date it has not happened, public takeover of the utility, if not statewide than at least at a local level, has even been considered by some elected officials.[88]

A regulatory framework does exist that at least in theory is supposed to address all these problems. The services provided by these utilities through the New York grid are supposed to be adequate and sufficient to what New York ratepayers need. The rate structure is supposed to be overseen by an independent public body to ensure it is based on proper cost calculations creating an appropriate revenue for these companies. The grid is even supposed to be regularly well-maintained and updated.[89] However, rates are still unfairly high in the eyes of a lot of ratepayers. Mistakes in management of the system that many believe should have been avoided, for reasons such as high demand in a heat wave being "predictable" also still occur.[90] The regulatory structure does not seem to be doing its job. Why exactly that is happening in New York is a question best answered in another paper, but I submit that the ineffectiveness of these laws may have something to do with ConEd's lobbying activities in the state.[91] Regardless, this much is certain: in another state where private companies driven by a profit incentive play a significant role in the public good of delivering electricity, consumers are not being fully protected.

V. THE CURRENT PROBLEMS IN ILLINOIS

The problems faced by Illinois ratepayers are very similar to what is being experienced by people in New York. Deregulation of the

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[87] Zack Fink, *Cuomo Threatens Legislation to Crack Down on Con Ed and Other Utilities*, SPECTRUM NEWS N.Y. (Oct. 28, 2020,10:11 PM), https://www.ny1.com/nyc/all-boroughs/politics/2020/10/28/cuomo-threatens-legislation-against-utility-providers-.

[88] *De Blasio Raises Prospect of Public Takeover of Con Ed as Power Woes Continue*, NBC N.Y. (Aug. 11, 2020, 9:06 AM), https://www.nbcnewyork.com/news/local/de-blasio-raises-prospect-of-public-takeover-of-con-ed-as-power-woes-continue/2561692/.

[89] *Power Trends: New York's Evolving Electrical Grid*, N.Y. INDEP. SYS. OPERATOR, at 23 (2017), https://www.eenews.net/assets/2017/05/19/document_ew_01.pdf.

[90] *See* Scutti, *supra* note 86.

[91] ConEd is reported as having spent approximately $900,000 lobbying in 2019, with the high watermark being just under $1.3 million in 2017. *Client Profile: Consolidated Edison Inc.*, OPEN SECRETS, https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000025111.

energy market happened in Illinois in 1997.[92] And while customers in Illinois do not face the same high rates for electricity as do consumers in New York, the rate Illinois consumers are paying is still slightly higher than the national average for residential customers.[93] Commercial customers are the only ones afforded a price somewhat below the national average.[94] A lot was made of the 2011 Energy Infrastructure and Modernization Act, and the positive changes the law would signal both for ratepayers and for the Illinois electric grid overall.[95] However, we have recently learned more about how exactly ComEd was pushing to get this law passed.

On July 17, 2020, ComEd agreed to a deferred prosecution agreement in federal court for a variety of bribery charges.[96] This included an agreement to pay a total fine of $200,000,000, despite the relevant federal guidelines calling for between $240,000,000 and $480,000,000.[97] The bribery here focused primarily on an illegal relationship between ComEd and then Illinois House Speaker Michael Madigan, where ComEd gave him things of valuable in exchange for undue influence over the procedures of the General Assembly.[98] The factual allegations which ComEd admitted responsibility for were extensive, including indirect payments of political allies, work to secure jobs and vendor contracts, and similar such behavior, to Michael Madigan's political allies.[99] ComEd acknowledged that, in its view, the foreseeable benefit of passing the Energy Infrastructure Modernization Act (EIMA) and the 2016 Future Energy Jobs Act (FEJA) exceeded $150,000,000.[100] EIMA was defined as a "beneficial" regulatory process where ComEd could reliably determine how much money it could

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[92] See Part II, *supra*.

[93] *Illinois Residential Electric Rates*, ELECTRICRATE, https://www.electricrate.com/residential-rates/illinois/ (last visited Mar. 5, 2021).

[94] *Id.*

[95] ComEd put a lot of effort into selling the positive effects this bill would have. *See Illinois General Assembly Enacts Energy Infrastructure Modernization Act*, COMED (Oct. 27, 2011), https://www.transmissionhub.com/wp-content/uploads/2018/12/ComEd-press-release-10.27.11.pdf (news release by Commonwealth Edison Co.).

[96] Deferred Prosecution Agreement, *United States v. Commonwealth Edison Co.*, 1:20-cr-00368 Doc. #3 (N.D. Ill. July 17, 2020).

[97] *Id.* at 7.

[98] *Id.* at 21–22.

[99] *Id.* at 25.

[100] *Id.* at 34.

generate and thus improve financial stability, and FEJA was defined as a renewal of this same beneficial framework.[101]

Since passage of EIMA, the revenue ComEd was able to collect significantly more money from customers across Illinois.[102] Circumstances where customers have been able to benefit from rate decreases, even small ones, have been difficult to find.[103]

It is particularly important in the light of the Texas catastrophe to note that the required infrastructure upgrades that came in the 2011 Energy Infrastructure Modernization Act came along with a (predictable) rate increase, and ComEd pushed hard to get that bill passed.[104] In light of the bribery the organization admitted to centered around exactly getting that bill passed, it is abundantly clear that the benefit of infrastructure modernization could have been obtained another way, a way more in the interest of consumers.

Perhaps if some other approach had been taken there would never have been a class action filed against ComEd on behalf of ratepayers across the state. And while that lawsuit serves an important role simply as an indicator that utility regulation has gone awry, the claims made can teach us in some specificity what we should have done differently.[105]

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[101] *Id.* at 24.

[102] Dan Mihalopoulos, Dave McKinney, *The True, High Cost We're All Paying For ComEd's Springfield Corruption*, WBEZ (Updated July 28, 2020 at 8:07am CST) https://www.wbez.org/stories/the-true-high-cost-were-all-paying-for-comeds-springfield-corruption/000f0b8b-3183-4d7b-b5fc-bee3f2c4d99e (Revenue collected from Northern Illinois consumers increased more than 30% while net annual operating income increased more than 50%.).

[103] *Small ComEd Rate Decrease Likely Only a Temporary Relief for Customers*, Spark Energy Blog (last accessed March 5, 2021) https://www.sparkenergy.com/small-comed-rate-decrease-likely-only-a-temporary/ (In one example in 2011, customers were only able to qualify for a 1.5 percent rate decrease if they commit to buy from ComEd rather than an alternative rate supplier, effectively giving a financial incentive for customers not to risk the near monopoly ComEd has over the state).

[104] Jennifer Wholey, *ComEd's Smart Grid Bill*, WTTW (October 19, 2011 at 11:15 AM) https://news.wttw.com/2011/10/19/comeds-smart-grid-bill.

[105] At the time of publication of this article, the *Gress* litigation was dismissed by the District Court for the Northern District of Illinois under Rule 12(b)(6). *Gress v. Commonwealth Edison*, 1:20-cv-04405 Doc. #112 (N.D. Ill. Sept. 9, 2021). The complaint was dismissed primarily for a failure to sufficiently plead in accordance with the Federal RICO statute, which is an issue unrelated to anything raised in this note. *Id.* at 14. Notice of appeal was filed by the plaintiffs just under a month later, and as of publication of this note the appeal is before the Seventh Circuit, where Appellants joint brief is due by January 14, 2022. *Gress*, 1:20-cv-04405 Doc. #114 (N.D. Ill.

This class action complaint reiterated the basic structure of what was admitted in the deferred prosecution agreement and characterized the EIMA and FEJA as acts which "dramatically increased costs for consumers and profits for defendants."[106] They alleged that ComEd through these bills were able to more than double their annual profits.[107] The class action complaint, like the Deferred Prosecution Agreement, details an elaborate "racketeering" enterprise by which ComEd contributed financial favors to Michael Madigan and his allies in exchange for assistance in passing their legislative priorities.[108] The figures cited by the plaintiffs calculate the revenue benefits to ComEd at anywhere from hundreds of millions to billions of dollars.[109] While the figures cited by the complaint filed on behalf of the Citizens Utility Board (CUB)[110] vary in their estimates, even the low estimate alleges Illinois rate-payers had to pay extra in excess of $150 million.[111] ComEd, in attacking this claim, makes a few different arguments. One is that any excess rates paid by customers cannot be challenged because the Illinois Commerce Commission approved these rates.[112] Another key part of ComEd's defense is that the Commission's role as an impartial rate-setter was preserved and that the Commission essentially took that role seriously.[113] The essence of the argument is not necessarily that the rates were fair, but rather that because they were decided by the Commission, they cannot be attacked in a judicial proceeding.[114] They also argue that, in spite of somewhat high electricity rates and a

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October 12, 2021); *Gress v. Commonwealth Edison Company*, 21-2872 Doc. 14 (7th Cir. Oct. 28, 2021).

[106] Amended Consol. Class Action Complaint, *Gress v. Commonwealth Edison Co.*, 1:20-cv-04405 Doc. #75 (N.D. Ill. Jan. 05, 2021) at 2.

[107] *Id.*

[108] *Id.* at 6; *Id.* at 24; *Id.* at 30.

[109] *Id.*, at 47.

[110] CUB is an organization created through Illinois statute tasked with representing the interests of consumers throughout the state of Illinois. See 220 ILCS 10/1 *et seq*, "Citizens Utility Board Act."

[111] Complaint and Demand for Jury Trial, *Citizens Utility Board v. Commonwealth Edison Co.*, 1:20-cv-04405 Doc. #76 (N.D. Ill. Jan 05, 2021).

[112] Memorandum in Support of Defendants Motion to Dismiss, *Gress v. Commonwealth Edison Co.*, 1:20-cv-04405 Doc. #85 (N.D. Ill. Feb. 04, 2021) at 1-2. In short, this argument is problematic because it ignores the impact the passage of these laws has not only on how the ICC interprets their cases (as their interpretations are certainly based on the existing law) but also what the ICC is even permitted to do.

[113] *Id.* at 5-8.

[114] *Id.* at 13. The Filed Rate Doctrine does no more than discourage courts from trying to assess what a "reasonable" rate structure might have been in a challenged rate case. *See, e.g.*, *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922).

grid that is far from perfect,[115] the rates ComEd charged have not actually caused any harm.[116]

This class action complaint, brought on behalf of "all individuals and entities who paid ComEd for electricity since June 1, 2012" demonstrates one weakness in an otherwise reasonable regulatory framework.[117] A private entity with a profit incentive can still find ways to exercise undue influence over the political system. Money can buy influence, and in the right circumstances that influence can earn even more money, and the cycle would keep repeating itself if not adequately checked. This then begs the question of what sort of adjustment in regulatory structure could protect against this.

VI. CURRENT DISCOURSE AND THE SOLUTION OF DEMOCRATIC CONTROL

In the context of my discussion above about the state of utility regulation and of the grid generally in Illinois, and comparing it to some other states, it would be unfair to say that Illinois is weak when it comes to specific enforceable standards to which utilities are held. Taking the Texas story as a warning of what might come when deregulation and a lack of standards goes too far, Illinois is certainly a far cry from becoming that.

This does beg the question of why, despite what otherwise seems to be sufficient regulatory structure in Illinois, have problems kept occurring with ComEd, the state's biggest electricity generator and supplier. Complaints about high energy prices, while not being as common as some other states, still occur.[118] The passage into law of various changes in utility regulation through the course of Illinois history, and particularly from 1997 to now, shows that the question of how best to regulate these utilities is not new either.

We often think that the solution to better consumer protection in an industry where individuals complain about high prices is to add more competition. Lower barriers to entry, break up a big player into smaller components, take steps necessary to give customers more

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[115] Julie Wenau, *ComEd must pay up for long power outages*, Chicago Tribune (June 6, 2013) https://www.chicagotribune.com/business/ct-xpm-2013-06-06-ct-biz-0606-comed-outages-20130606-story.html.

[116] *See supra* note 112, at 23.

[117] *Gress*, Consolidated Class Action Complaint, *supra* note 106, at 52.

[118] Oddly enough, these complaints are frequently made by consumers who switch from a big utility like ComEd to an alternative supplier, expecting the prices to be lower. *See* La Risa Lynch, *supra* note 3.

choice. More choice is almost never going to be a bad thing. The idea is that more competition means better results for the individual.[119] In Illinois, we have already seen the results of a move with similar motives, namely attempting to add competition to the electricity industry. However, that change that was intended to lower prices, ended up only increasing them.[120]

In Illinois, attempts were made to change the rate-making structure itself, to force utilities to provide more accurate and more current information, and to make sure that new rates are based on actual costs and reasonable investments.[121] Whatever efficacy these measures might have had, it seems apparent that more could be done. One cannot help but question the benefits of a bill passed off as beneficial to consumers if the utility had to bribe elected officials to get the law passed.[122]

The catastrophe that befell Texas in February of 2021 provided a stark look at what reality might look like if, rather than clear regulation through a central authority, each individual municipality was mostly left to fend for itself, and state law offered limited to no guidance.[123] The brief study of New York demonstrated that the problems being faced by Illinois ratepayers are likely not unique to Illinois, as New Yorkers as well are raising claims of an unreliable grid, unreasonably high electricity rates, and undue political influence.[124] The discussion of a few relevant Illinois appellate court cases demonstrated that, at least on paper, there is strong regulation in Illinois already, that should be providing for a rate-payer friendly system. The question that remains is, if the current system does not work, and none of the obvious changes will improve things, what should we do next? I would

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[119] A common refrain of many politicians is that we need to "break up the big banks" to rein in American financial institutions. Senator Elizabeth Warren, Remarks at the Levy Institute's 24th Annual Hyman P. Minsky Conference, The Unfinished Business of Financial Reform (Apr. 15, 2015), *archived at* http://perma.cc/7JRL-4WV7. The support for this course of action has grown more widespread. Jeff Cox, *Yes, it's time for the big banks to break up, says long-time analyst Dick Bove*, CNBC (Updated June 7, 2017 at 5:56pm EDT) https://www.cnbc.com/2017/06/07/time-for-wall-street-banks-to-break-up-says-analyst-dick-bove.html.

[120] *See* La Risa Lynch, *supra* note 3. The price of the big utilities, ComEd and Ameren, has remained mostly unchanged. Rather, the smaller utilities rates have increased.

[121] *See* Part III.

[122] See the discussion of the ComEd DPA and the *Gress* class action lawsuit, *supra.*

[123] See discussion *supra* in Part IV(a).

[124] See discussion *supra* in Part IV(b).

propose that we need to look "outside of the box" for a less than traditional solution. I believe democratic control of utilities is that solution.

While democratic control of utilities specifically is a more novel concept, democratic control in general is far from new.[125] Nationalization in the United States specifically has a history dating back to at least the early 20th century.[126] Nationalization of specific industries has been attempted at different times in different countries, with varying consequences, and sometimes harsh reactions.[127] However, none of the history behind this concept suggests that it is inherently flawed or that it should be abandoned; merely that effective government control requires care and planning.

As the push for democratic control (otherwise known as nationalization) over local utilities is a newer fight, a list of historic

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[125] Nationalization of various industries has been written about and discussed specifically for a long time. For one example of such writing, *see* John Jewkes, *The Nationalization of Industry*, 20 Univ. Chi. L. Rev. 615 (1953), https://core.ac.uk/download/pdf/234131715.pdf. For a broader discussion of the concept of nationalization, *see* Pierangelo Toninelli, *From Private to Public to Private Again: a Long-Term Perspective on Nationalization*, 43 Analise Soc. 675 (2008), https://www.jstor.org/stable/41012663?seq=1#metadata_info_tab_contents. The argument around how best to approach regulation of public utilities has similarly been ongoing for a long time, without any one clear answer ever appearing, and with the structure of the debate frequently changing. *See*, e.g., Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, Corruption and Reform: Lessons from America's Economic History, Nat'l Bureau Econ. Rsch. 259 (2006), https://www.nber.org/system/files/chapters/c9986/c9986.pdf. Recently, far more explicit pushes have been made at all levels, including the federal level, for full democratic control of public utilities, specifically electricity generation. *See, e.g.*, Gavin Bade, *Power to the People: Bernie Calls for Federal Takeover of Electricity Production*, Politico (Feb. 2, 2020, 6:53 AM), https://www.politico.com/news/2020/02/02/bernie-sanders-climate-federal-electricity-production-110117.

[126] Thomas Hanna, *A History of Nationalization in the United States: 1917-2009*, The Next System Project (Nov. 4, 2019) https://thenextsystem.org/history-of-nationalization-in-the-us.

[127] Adrian Shubert, *Oil Companies and Governments: International Reaction to the Nationalization of the Petroleum Industry in Spain: 1927-1930*, 15 J. Contemp. Hist. 701, 704 (1980), https://journals.sagepub.com/doi/abs/10.1177/002200948001500406?journalCode=jcha ("All foreign companies protested to their home governments and the multinationals added this to their own efforts to pressurize the Spanish governments into submission."). This example demonstrates a pattern. Often when efforts to nationalize are met with resistance, that resistance does not come from consumers being hurt, but rather from the large companies at risk of being nationalized exerting their political influence to force their government to fight against it.

victories to discuss is of course small. However, these efforts have been becoming more popular recently, and some gains have been made.[128] Those gains notwithstanding, many recent efforts have been unsuccessful, or have at the very least encountered roadblocks.[129] However, even these failures suggest the same conclusion about our current approach to the problem: a profit incentive and utility regulation which truly benefits consumers cannot mix.

There are examples of nationalization, or at least of the instinct to exert direct government control, when citizen access to an important resource is at stake.[130] And it is only natural to do so. Even at its best, an industry driven by profit cannot guarantee that their service will be available and accessible to everybody who needs it. So, it is a logical response when faced with that uncertainty, for a public entity to step in and ensure that profit does not prevent access to a necessary good, like healthcare. There is no logical reason why utilities should not be treated the same way.

Electricity cannot fairly be considered a luxury. In much of the world, healthcare is considered a right, rather than a luxury. In most

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[128] For one such list of these victories, *see* Juliana Broad, *Power to the People: Winning Public Control of Electric Utilities*, The Next System Project (Jan. 10, 2020), https://thenextsystem.org/learn/stories/power-people-winning-public-control-electric-utilities. A campaign in Chicago has been underway as well for the city to specifically take democratic control over its own portion of the broader electric grid currently mostly owned and operated through ComEd. Becky Vevea, *Forget ComEd: What if the City of Chicago Ran Its Own Electric Utility*, WBEZ Chicago (Feb. 10, 2020, 6:00 AM), https://www.wbez.org/stories/forget-comed-what-if-the-city-of-chicago-ran-its-own-electric-utility/025529eb-4130-4f5c-a40c-325ce8d9c1ab; *See also* #DemocratizeComEd, https://demcomed.org/ (last visited Nov. 16, 2021). The City of Chicago has analyzed the situation and determined it is unlikely to be financially feasible for the city to take over the utility on its own. Heather Cherone, *City Can't Afford to Take Over ComEd, Study Finds*, WTTW (Aug. 28, 2020, 3:08 PM), https://news.wttw.com/2020/08/28/city-can-t-afford-take-over-comed-study-finds. Rather than suggesting that democratic control is impossible, I believe this simply suggests that a governing body with greater financial flexibility, i.e., the state or federal government, needs to be the entity to act, rather than a local body, even one as large as the City of Chicago.

[129] *See, e.g.*, Drew Birschbach, *Optimistic Pueblo is Outspent in First Attempt at Utility Takeover – Episode 113 of Local Energy Rules Podcast*, Inst. for Loc. Self-Reliance (Sept. 23, 2020), https://ilsr.org/pueblo-muni-campaign-jamie-valdez-ler-113/./

[130] *See, e.g.*, Brian Zinchuk, *NDP Wants to Nationalize For-Profit Long-Term Care Facilities*, Humboldt J. (Feb. 3, 2021, 2:07 PM), https://www.humboldtjournal.ca/news/ndp-wants-to-nationalize-for-profit-long-term-care-facilities-1.24276847.

cases, access to that right is guaranteed by direct government control.[131] In our modern world, access to some level of electricity should be considered a necessity, likely on par in importance with healthcare. Various versions of household heating services require some degree of electricity. Though not universally the case, one's ability to find a job and provide for themselves depends on access to devices that require electricity, such as a telephone or a computer. Cooking food requires access to devices which require electricity to function. In our modern world, we should no longer abide people not having access to life necessities such as electricity simply because they are poor. We need to continue to pursue a method of regulation that allows universal access to all resources required to live a normal life.

Failures of governments to effectively take control of their local utilities cannot be taken to mean that anything is inherently wrong with the strategy, or with the intent. More competition has not always helped to benefit consumers. Stricter government regulation alone will never be a guarantee if private, profit-seeking entities have an ability to influence the political system. Anything worth doing will take care and planning. Taking the profit incentive out of our electric grid may be the only way to ensure an effective grid with electric services available to everybody.

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[131] Donald W. Light, *Universal Health Care: Lessons From the British Experience*, 93 Am. J. Pub. Health 25 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447686/pdf/0930025.pdf. The use of a government run service such as the NHS allows for a stronger guarantee of service availability to all who need it, but also allows for flexibility and approach in experimentation to a greater degree than the traditional United States Approach. "These measures draw on US models, but the NHS can implement them far more systematically and vigorously than comparable efforts in the United States." *Id.* at 28 (referring to efforts to implement stronger quality standards within the NHS); Goran Ridic, Suzanne Gleason, & Ognjen Ridic, *Comparisons of Health Care Systems in the United States, Germany, and Canada*, 24 Materio Socio Medica 112, 113 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3633404/pdf/MSM-24-112.pdf ("Critics must face the reality that the medical care system provides its residents with access to all 'medically necessary hospital and physician services' at a fraction of the cost per capita of the U.S. system.").