



GlidePath Development LLC (GlidePath), a vendor of distributed energy resources, requested leave to intervene in the matter. The administrative law judge (ALJ) denied the petition as well as GlidePath's amended petition to intervene. GlidePath then moved for an interlocutory appeal before the Commission, which was also denied. After an extensive evidentiary hearing was conducted, the Commission entered its final order approving ComEd's petition. Thereafter, GlidePath sought further review of its petitions to intervene, which the Commission also denied. GlidePath then filed its notice of appeal with this court naming the Commission, ComEd, and the other intervening parties, as respondents.<sup>1</sup>

¶ 2 On appeal, GlidePath maintains that the Commission applied the incorrect law when it denied the petitions to intervene, failed to make adequate findings to support its decisions, and that the decisions were not supported by substantial evidence. GlidePath requests this court vacate the Commission's final order approving the project, reverse each of the orders denying its petitions to intervene, and remand the matter to the Commission for rehearing on ComEd's petition with GlidePath's full participation as an intervening party. In response, both the Commission and ComEd maintain the appeal is moot in light of events that occurred subsequent to the entry of the Commission's final order. For the reasons that follow, we agree with respondents and dismiss the appeal as moot.

¶ 3 **BACKGROUND**

¶ 4 ComEd is a public electric utility responsible for delivering electricity to a majority of northern Illinois through its network of electric distribution power lines known as a "distribution grid." Traditionally, this distribution grid was designed to be a one-way delivery system, essentially taking power from a large central generating station and supplying it to customers.

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<sup>1</sup>The Commission and ComEd were the only respondents to file briefs on appeal.

New technologies have since been invented that have created new ways of distributing power and improving reliability against severe weather disturbances and catastrophic events. One of these new technologies is known as “distributed energy resources”—small-scale devices, such as solar panels or battery storage, that can generate or store power. By employing the use of distributed energy resources as part of a microgrid (a small power grid within the larger grid which can disconnect from the larger grid and operate independently), these distributed energy resources can be relied on to supply energy when the larger grid is unable to do so. GlidePath is a company in the business of developing distributed energy resources and interconnecting those facilities to the distribution grid.

¶ 5 As a public utility, ComEd is governed by the Act and therefore, it must obtain an order from the Commission when it seeks to develop new technologies and pass the cost on to the consumer. To this end, on July 28, 2017, ComEd filed a verified petition with the Commission requesting the authorization to carry out an “innovative distribution microgrid demonstration project and study” in the Bronzeville neighborhood of Chicago (Bronzeville Microgrid).

According to the petition, ComEd chose the Bronzeville location because the microgrid could be overlaid on the existing utility grid in an urban area, was capable of clustering by connecting to an adjacent microgrid owned by the Illinois Institute of Technology, and could be operated in tandem with the Illinois Institute of Technology microgrid. The petition further alleged that the Bronzeville Microgrid would be the first project of its kind in the United States and would be funded, in part, by United States Department of Energy grants. The goal of the Bronzeville Microgrid was to “generate real world planning and operational experience with, a range of learnings about, cutting-edge microgrid technologies, the interconnection of microgrids, and the planning and operation of a clustered and/or community microgrid.” According to ComEd, this

project would benefit consumers and the public generally with the increased knowledge it would gain regarding distribution grid design and operation. ComEd also alleged in its petition that it intended to enlist third parties to develop the Bronzeville Microgrid's distributed energy resources either through a lease, operating agreement, or other economic arrangement, but sought permission from the Commission to own the distributed energy resources if those options were unavailable.

¶ 6 ComEd requested the following relief from the Commission in its petition: (1) a finding that it is reasonable and prudent for ComEd to proceed with the Project; (2) that the operating and capital investment costs associated with the project are distribution costs that are properly recoverable in distribution rates; (3) the reasonable and prudent costs of the project are recoverable from all delivery services customers; and (4) that the project would not adversely affect the State's retail electric competition.

¶ 7 Numerous entities and organizations were granted leave to intervene in the proceedings without objection. Among these were the State of Illinois, Citizens Utility Board, Environmental Defense Fund, Direct Energy Services and Direct Energy Business, Environmental Law and Policy Center, Vote Solar, Illinois Competitive Energy Association, Retail Energy Supply Association, and Illinois Power Agency.

¶ 8 On August 14, 2017, GlidePath filed its verified petition to intervene in the matter. In the petition, GlidePath set forth that it was in the business of competitive energy generation, supply, and storage within ComEd's service territory and that it had an interest in the "ownership of generation and how GlidePath, as a distributed energy resource developer, could serve customers within the proposed microgrid." ComEd objected on the ground that GlidePath had alleged only a business interest of the type that typically did not merit intervention. GlidePath did not file a

timely reply. On August 28, 2017, the ALJ denied GlidePath's petition based upon ComEd's unopposed objection.

¶ 9 GlidePath filed a motion for leave to file its response to ComEd's objection on August 29, 2017. In its response, GlidePath asserted it was the only potential intervenor that was a developer of distributed energy resources and therefore it should be allowed to intervene where one of the main issues is whether third-party ownership of distributed energy resources would be more economically efficient. According to GlidePath, this issue was directly within its experience, interest, and expertise. GlidePath further argued that it had an interest in the ownership of the distributed energy resources included in the microgrid project. GlidePath also expressed its concern with ComEd's potential ownership of the distributed energy resources connected to the microgrid project. ComEd did not oppose GlidePath's motion and it was granted. On reconsideration, the ALJ still denied GlidePath's petition to intervene. In so ruling, the ALJ found that GlidePath's petition and response merely alleged GlidePath had a "general business interest in the subject matter of this proceeding." The ALJ observed that GlidePath "is not a customer of ComEd but rather is a vendor in ComEd's service territory." The ALJ concluded that the petition must be denied because "GlidePath neither establishes a cognizable legal interest necessary to support intervention in this docket nor an adverse impact on such an interest."

¶ 10 On October 4, 2017, GlidePath filed its first amended verified petition to intervene, in which it alleged more facts surrounding its interests in the cause. Specifically, GlidePath stated it has "developed distributed energy resources for interconnection to the grid in ComEd's service territory," and that it or "its affiliates would be interested in bidding on opportunities to develop, own, or operate generation or storage for the microgrid." GlidePath stressed its interest, as a

developer of distributed energy resources, regarding whether ComEd or other third party developers would own the distributed energy resource assets that were connected to the microgrid. According to the petition, GlidePath's concerns were to "ensure that such anticompetitive practices which could favor ComEd as against third party providers of [distributed energy resources] are not included in the project." GlidePath also asserted its interest in "developing and promoting policies necessary to support energy storage and clean energy technologies."

¶ 11 GlidePath attached a verified offer of proof to its amended petition which set forth the proposed testimony of Dan Foley, the principal of GlidePath. According to the offer of proof, Foley would testify that GlidePath had applied to be a provider of distributed energy resources for the Bronzeville Microgrid. Foley would explain that GlidePath developed three 20MW battery distributed energy resource facilities in the ComEd footprint which operate in Joliet, West Chicago, and McHenry, Illinois and is developing another facility in Marengo, Illinois. GlidePath also developed one 10MW solar distributed energy resource in the ComEd footprint of Marengo, Illinois. Foley would also testify regarding GlidePath's concerns about the Bronzeville Microgrid, including: (1) ComEd's interpretation of the rules for interconnecting the distributed energy resources; (2) "ComEd's claims that batteries connected to the distribution system are not [Federal Energy Regulatory] or [Commission] jurisdictional;" (3) ComEd's ability to manage time, scope and budget of distributed energy resources projects; (4) ComEd's unwillingness to share an unredacted copy of its Department of Energy grant application referenced in the verified petition; (5) ComEd's use of the distribution tariff; (6) ComEd's interpretation of the tax gross up requirement for interconnections; and (7) the lack of transparency of the distribution interconnection process, including the absence of a published

queue, the lack of access to previous interconnection studies, and the lack of access to executed interconnection agreements. Foley would further testify that each of these concerns needed to be addressed in order for a third party to supply the most cost effective solutions and that they be addressed “prior to approving the expenditure of money for the Bronzeville Microgrid.”

¶ 12 ComEd objected, arguing that GlidePath’s interest as a potential vendor of distributed energy resources to be used in the Bronzeville Microgrid was not the kind of interest that entitled it to intervene. ComEd maintained that GlidePath continued to fail to assert any cognizable legal interest necessary to support intervention and further did not allege an adverse impact on such interest. ComEd also observed that GlidePath did not explain why its concerns were within the scope of the proceeding where ComEd’s petition sought narrow relief concerning a single project. According to ComEd, GlidePath also did not explain why its interests were not already adequately represented by the existing parties to the proceeding.

¶ 13 On November 7, 2017, the ALJ denied the first amended verified petition to intervene on the same basis provided in its prior ruling.

¶ 14 On November 27, 2017, GlidePath filed a “verified petition for interlocutory appeal of denial of amended petition to intervene” (interlocutory review) with the Commission. The interlocutory review set forth arguments similar to those in the amended petition. It also stressed GlidePath’s concern over the ownership of the distributed energy resources and maintained that ComEd should not be allowed to own the distributed energy resources serving the Bronzeville Microgrid. GlidePath also noted that its interest was greater than, or at a minimum equal to, the interest of the eight other intervening parties, and pointed out that the ALJ’s ruling did not have a valid factual basis. The offer of proof was also appended to this petition.

¶ 15 ComEd filed a response which reiterated its previous arguments and GlidePath filed a

similar reply. The Illinois Attorney General filed a reply in support of GlidePath's interlocutory review, stating in pertinent part that, "GlidePath's knowledge, experience and interest in energy generation, like Direct Energy's, should make its intervention non-controversial." The Attorney General further argued that the Commission and the public would be disadvantaged when an interested and educated party is excluded based on "an opposing party's incorrect assertion about what issues are relevant to a proceeding."

¶ 16 On December 13, 2017, the Commission denied the interlocutory appeal without comment. GlidePath filed a verified petition to reconsider the denial of the interlocutory review, which the Commission denied on January 10, 2018.

¶ 17 After an evidentiary hearing was conducted and briefs on the matter were filed, the Commission entered its final order granting ComEd approval of the Bronzeville Microgrid project on February 28, 2018. In granting the petition, the Commission found that it was reasonable and prudent for ComEd to proceed with the Bronzeville Microgrid; that the project served distribution purposes, so its costs could be treated as distribution costs; that the costs should be recovered from all ComEd delivery services customers; and that the project would not adversely affect the State's retail electric competition.

¶ 18 As part of its comprehensive 85-page order, the Commission also addressed the issue of whether ComEd should own the distributed energy resources that were part of the Bronzeville Microgrid. Prior to the entry of the final order ComEd had withdrawn its proposal to own non-storage distributed energy resources and that, instead, it would procure non-storage distributed energy resources through a competitive procurement process from third-party developers. In the event that the competitive procurement process did not yield any qualified bids, ComEd would seek to lease, rather than own, the non-storage distributed energy resources from third parties.



The Commission memorialized this new proposal in its final order. The Commission did, however, order that ComEd was not required to competitively bid for battery storage devices for the Bronzeville Microgrid. The Commission based this decision on its findings that “it is not operationally practical for third-party owned storage to function as the type of integrated distribution device required” and that the Department of Energy grant requirements were inconsistent with third-party owned storage devices.

¶ 19 On March 27, 2018, GlidePath filed an application for rehearing of all of its petitions to intervene, which the Commission denied on April 3, 2018. This appeal followed.

¶ 20 ANALYSIS

¶ 21 On appeal, GlidePath maintains that the Commission erred in denying it the opportunity to intervene in the docket for ComEd’s Bronzeville Microgrid project. GlidePath argues the Commission applied the incorrect law, failed to make adequate findings to support its decision, and that the decision was not supported by substantial evidence. Indeed, GlidePath’s arguments before this court mirror those presented to the Commission. GlidePath requests this court vacate the Commission’s final order approving the Bronzeville Microgrid project, reverse each of the orders denying its petitions to intervene, and remand the matter to the Commission for rehearing on ComEd’s petition with GlidePath’s full participation as an intervening party.

¶ 22 Standard of Review

¶ 23 The Commission is an administrative agency created by the Act, which charges it with the “general supervision of all public utilities.” 220 ILCS 5/2-101, 4-101 (West 2016); *State of Illinois ex rel. Pusateri v. Peoples Gas Light & Coke Co.*, 2014 IL 116844, ¶ 12. Judicial review of its orders is limited. *Illinois Power Co. v. Illinois Commerce Comm’n*, 316 Ill. App. 3d 254, 258 (2000). Although the Commission is not required to make findings regarding every step, its

findings of fact must be sufficient to allow for informed judicial review, and they will be affirmed if they are based on substantial evidence in the record. *Id.* The Commission’s findings of fact are *prima facie* correct and will not be overturned by a reviewing court unless they are against the manifest weight of the evidence, beyond the statutory authority of the Commission, or violative of constitutional rights. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 352 Ill. App. 3d 630, 636 (2004); 220 ILCS 5/10-201(d), (e) (West 2016).

¶ 24 Under the Act, any party who appeals an order of the Commission bears the burden of proving all issues raised on appeal and must overcome the presumption of reasonableness accorded to the Commission’s orders. 220 ILCS 5/10-201(d) (West 2016)). In analyzing these orders, Illinois courts have held that decisions of the Commission, and its ALJs, are entitled to great deference, because they are the judgment of an administrative body that is “informed by experience.” (Internal quotation marks omitted.) *Illinois Power Co.*, 316 Ill. App. 3d at 257-58 (quoting *United Cities Gas Co. v. Illinois Commerce Comm’n*, 163 Ill. 2d 1, 12 (1994)). Furthermore, its rules, regulations, and orders are considered *prima facie* reasonable. *City of Chicago v. Illinois Commerce Comm’n*, 264 Ill. App. 3d 403, 408 (1993); 220 ILCS 5/10-201(d) (West 2016). Administrative rules and regulations have the force and effect of law, and must be construed under the same standards that govern the construction of statutes, which we review *de novo*. *Wade v. Illinois Commerce Comm’n*, 2017 IL App (1st) 171230, ¶ 12.

¶ 25 Mootness

¶ 26 Prior to addressing the merits of this appeal, we must consider the respondents’ position that this matter is moot. See *In re Benny M.*, 2017 IL 120133, ¶ 17. (“The existence of an actual controversy is essential to appellate jurisdiction.”). In their briefs, the Commission and ComEd both argue that this matter is moot in light of the events that occurred subsequent to the

Commission's final order. Namely, that the approval of the Bronzeville Microgrid project was time sensitive at the outset and, since the project was approved, significant progress in developing the microgrid has occurred. ComEd specifically maintains that GlidePath cannot be granted effectual relief where the Commission has approved the procurement of distributed energy resources from third-party vendors and where that procurement has already largely taken place.

¶ 27 An issue is considered moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief. *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984). Our supreme court has held that a reviewing court must dismiss a pending appeal where the court has notice of facts which make it impossible to grant effective relief to either party. *Edwardsville School Service Personnel Association, IEA-NEA v. Illinois Educational Labor Relations Board*, 235 Ill. App. 3d 954, 958 (1992). As a general rule, courts of review in Illinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided. *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998). Even if the case is pending on appeal when the events that render an issue moot occur, we will generally not issue an advisory opinion. *Davis v. City of Country Club Hills*, 2013 IL App (1st) 123634, ¶ 10.

When it becomes apparent that an opinion cannot affect the results as to the parties or the controversy before it, the court should not resolve the question merely for the sake of setting a precedent or to govern potential future cases. *Maday v. Township High School District 211*, 2018 IL App (1st) 180294, ¶ 46.

¶ 28 We initially observe that in its offer of proof, GlidePath admitted that the issues it raised “should be addressed prior to approving the expenditure of money for the Bronzeville

Microgrid.” In the year that has passed since ComEd’s petition was approved, significant funds have been expended in the development of the Bronzeville Microgrid. As required by the Commission’s order, ComEd filed an annual status report describing the activities undertaken in the past year. The status report provided that ComEd completed Phase I of the Bronzeville Microgrid, which involved selecting vendors for the distributed energy resources (solar photovoltaic and battery energy storage system), and installing these systems. Although 750kW of solar capacity was to be installed by the end of 2018, only 484kW of solar photovoltaic was actually installed; however, ComEd was able to connect the Bronzeville Microgrid to 300kW of existing solar capacity at the Illinois Institute of Technology to make up the difference. The battery energy storage systems were installed on the site and pre-livening activities have been completed. ComEd also completed all feeder infrastructure work associated with Phase I. In addition, ComEd has begun the engineering process for certain sensors to control the distributed energy resources and completed the Department of Energy requirements toward the development and testing of the microgrid master controller technology. Thus, events have occurred that make it impossible for this court to grant effectual relief, rendering this appeal moot. See *Commonwealth Edison Co.*, 2016 IL 118129, ¶ 11.

¶ 29 GlidePath contends that an exception to the mootness doctrine applies here; that this issue is “capable of repetition yet evading review.” See *In re Benny M.*, 2017 IL 120133, ¶ 19. To receive the benefit of the “capable of repetition yet evading review” exception, the complainant must “demonstrate that: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again.” *In re Barbara H.*, 183 Ill. 2d at 491. This exception is to be construed narrowly and requires a demonstration of each criterion to bring the

case within its terms. *Wright v. Pucinski*, 352 Ill. App. 3d 769, 775 (2004) (quoting *In re India B.*, 202 Ill. 2d 522, 542-43 (2002)).

¶ 30 Here, we do not believe that this case meets the rigid standards discussed above. After prematurely seeking review in this court, GlidePath filed its pertinent notice of appeal on May 1, 2018. Thereafter, GlidePath obtained four extensions to file its brief, which was ultimately filed on February 14, 2019, almost one year after the Commission approved ComEd's petition. GlidePath did not seek a stay of the Commission's order at any time either before the Commission or this court. The exception for cases of short duration evading review is clearly not satisfied because respondent could have obtained meaningful review of the case simply by obtaining a stay. See *In re India B.*, 202 Ill. 2d at 543.

¶ 31 Even though GlidePath failed to obtain a stay, we further observe the Act provides that we are to "hear and determine such appeal [from the Commission's final order] with all convenient speed" and, to that end, the Act requires that any proceeding in any court directly affecting an order of the Commission "shall have priority in hearing and determination over all other civil proceedings \*\*\* except election contests." 220 ILCS 5/10-201(e)(i) (West 2016). Despite our legislature's express pronouncement that appeals from Commission orders be considered with "all convenient speed," GlidePath failed to file its opening brief with this court for almost a year. Moreover, when GlidePath's brief was filed, it essentially set forth the same arguments presented in its many pleadings before the Commission. Had this matter been of such importance to GlidePath, it could have requested an expedited briefing schedule in this court pursuant to section 10-201(e)(i) of the Act, but it failed to do so.<sup>2</sup>

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<sup>2</sup> We observe that this court's careful consideration of this appeal did not result in the matter becoming moot. After GlidePath's third request for an extension, this court's order granting the extension stated it was a "final extension," yet GlidePath failed to abide by our order

¶ 32 We further find that GlidePath has failed to meet its burden regarding the second criteria, that there is a reasonable expectation that the complaining party would be subjected to the same action again. See *In re Barbara H.*, 183 Ill. 2d at 491. In order for this second criteria to be met, “[t]he present action and a potential future action must have a substantial enough relation that the resolution of the issue in the present case would have a bearing on a similar issue presented in a future case involving the defendant.” *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 13 (citing *In re Val Q.*, 396 Ill. App. 3d 155, 160 (2009)). In cases where the complaining party challenges the specific facts that were established during the hearing, the exception generally does not apply, because those facts would necessarily be different in any future hearing and would have no bearing on similar issues presented in subsequent cases. *Id.*

¶ 33 GlidePath argues that it has already been subjected to the same action in a different matter before the Commission also involving ComEd. GlidePath describes this other action as a “rate case seeking, among other things, recovery for yet more batteries on its system” and that it was denied intervention on a similar basis as the case at bar.

¶ 34 While GlidePath pursued numerous avenues to obtain leave of this court to incorporate these other records into this case, either by way of supplementing this record or requesting we take judicial notice, we denied those requests. This is because the facts pertaining to GlidePath’s intervention in this appeal would have no bearing on a case before the Commission involving a different factual scenario and different interests. See *In re Alfred H.H.*, 223 Ill. 2d at 359-60 (in case involving involuntary commitment, finding capable of repetition yet evading review

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and requested yet another extension. In granting that fourth extension, this court explicitly set forth that “no further motions to extend time will be entertained.” Thereafter, on February 14, 2019, and almost one year after the Commission approved ComEd’s petition, GlidePath filed its opening brief.

exception inapplicable where respondent disputed whether the specific facts adduced at the commitment hearing were sufficient to involuntarily admit him and argued that he would likely face another petition for involuntary commitment in the future); *McCoy*, 2014 IL App (2d) 130632, ¶ 13.

¶ 35 The statutory limitation on this court's jurisdiction further supports our conclusion that the exception is not met. Because the Commission is creature of statute, Illinois courts exercise limited statutory jurisdiction under section 10-201 of the Act (220 ILCS 5/10-201 (West 2016)). See *Securus Technologies, Inc. v. Illinois Commerce Comm'n*, 2014 IL App (1st) 131716, ¶ 45. Section 10-201 of the Act provides in relevant part that a reviewing court shall reverse a Commission's order or decision, in whole or in part, if it finds that: (a) the findings of the Commission were not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such order or decision; (b) the order or decision was without the jurisdiction of the Commission; (c) the order or decision was in violation of the state or federal constitution or laws; or (d) the proceedings or manner by which the Commission considered and entered its order or decision were in violation of the state or federal constitution or laws, to the prejudice of the appellant. 220 ILCS 5/10-201(e)(iv) (West 2016). In this case, GlidePath does not question the Commission's jurisdiction, or the substantive or procedural constitutionality of its decision; instead, GlidePath maintains that the findings of the Commission, *i.e.* the denials of its petitions to intervene, were not supported by substantial evidence pursuant to section 10-201(e)(iv)(a) of the Act. As discussed, the capable of repetition yet evading review exception to the mootness doctrine does not apply where the complaining party challenges the specific factual findings. See *McCoy*, 2014 IL App (2d) 130632, ¶ 13. To the extent that GlidePath argues that the Commission made no factual findings

we disagree and observe that the Commission’s decision on intervention is accorded great deference under the statute, a standard typically reserved for the review of questions of fact. 220 ILCS 5/10-201(d) (West 2016) (the Commission’s “rules, regulations, orders, or decisions shall be held to be *prima facie* reasonable”). This deference is accorded, not only because it is prescribed by statute, but also because the Commission possesses expertise in the field of public utilities. *Citizens Utility Board v. Illinois Commerce Comm’n*, 2016 IL App (1st) 152936, ¶ 8. Accordingly, we find that the capable of repetition yet evading review exception to the mootness doctrine is inapplicable here.

¶ 36

#### CONCLUSION

¶ 37 For the reasons stated above, we dismiss the appeal.

¶ 38 Appeal dismissed.

¶ 39 JUSTICE GORDON, specially concurring:

¶ 40 I agree with the majority’s result, not necessarily with its reasoning. I would have written a dissent to the ALJ’s denial of the petitioner’s request for intervention if the petitioner had moved for a stay pending this appeal. However, I am troubled by the petitioner’s late response to ComEd’s objections, its failure to expedite this appeal, but most importantly, its failure to request a stay. As a result, it allowed ComEd to proceed ahead with this project rendering this appeal moot and now it asks for relief which we cannot give it.