



ORDINANCE NO. 2216-23

AN ORDINANCE AUTHORIZING THE EXECUTION OF A CERTAIN SETTLEMENT AGREEMENT—COMMONWEALTH EDISON COMPANY AND AZAVAR AUDIT SOLUTIONS, INC.

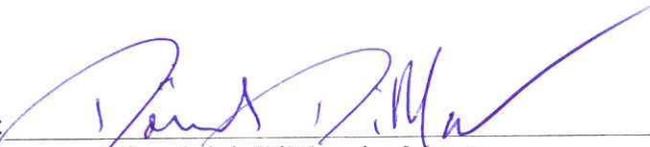
BE IT ORDAINED by the Mayor and Board of Trustees of the Village of Hawthorn Woods, Illinois, that the Mayor and Village Clerk be, and the same, are hereby authorized and directed to execute a certain Settlement Agreement with Commonwealth Edison Company and Azavar Audit Solutions, in substantially the form attached hereto as Exhibit "A", and, by this reference, made a part hereof.

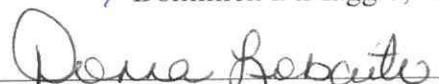
The foregoing Ordinance was adopted on January 23, 2023 by a roll call vote as follows:

AYES: Kaiser, McCarthy, Ryceik, Bayer, Hurst

NAYS: 0

ABSENT AND NOT VOTING: David

APPROVED: 
Dominick DiMaggio, Mayor

ATTEST: 
Donna Lobaito, Village Clerk

ADOPTED: January 23, 2023

APPROVED: January 23, 2023

SETTLEMENT AGREEMENT

This Settlement Agreement dated _____, 2023 ("Settlement Agreement") is entered into by the Village of Hawthorn Woods (the "Municipality"), and Commonwealth Edison Company ("ComEd") (the Municipality, and ComEd together, the "Parties," and each a "Party"), and Azavar Audit Solutions, Inc. ("Azavar").

RECITALS

WHEREAS, ComEd is an Illinois corporation engaged in the transmission, sale, and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act.

WHEREAS, the Municipality is a municipal corporation organized and existing under Article VII of the 1970 Constitution of the State of Illinois.

WHEREAS, Azavar has entered into an agreement with the Municipality to audit ComEd's collection and remittance of municipal utility taxes for electric service;

WHEREAS, Section 3-8-2 of the Municipality's Code of Ordinances imposes a Municipal Utility Tax ("MUT") on the distribution, supply, furnishing, or sale of electricity within the corporate limits of the Municipality.

WHEREAS, on July 17, 2015, Azavar, as the Municipality's authorized agent, issued a Notice of Audit to ComEd seeking to audit ComEd's collection and remittance of MUT for electric service.

WHEREAS, on December 21, 2015, the Municipality issued a Notice of Tax Liability ("NTL") alleging that ComEd failed to collect and remit certain MUT to the Municipality.

WHEREAS, ComEd timely filed its protest of the NTL disputing the allegations in the NTL.

WHEREAS, the Parties continue to disagree about the validity of the allegations in the NTL.

WHEREAS, in recognition of the expense and hazards of litigation, the Parties now wish to resolve the allegations in the NTL.

THEREFORE, in consideration of the various undertakings and covenants hereinafter provided for, the Parties hereby agree as follows:

SETTLEMENT TERMS

NOW, THEREFORE, in consideration of the mutual covenants, agreements and conditions contained herein and upon acknowledgement by each of the Parties of the receipt of valuable consideration, the Parties agree as follows:

1. **Recitals.** Each of the recitals set forth above is expressly incorporated herein.
2. **Settlement Amount.** In consideration of the foregoing and in further consideration of the statements, representations, promises, covenants and warranties as set forth herein, ComEd will pay to the Municipality in settlement of the NTL the total amount of \$32,000.00 (thirty-two thousand dollars and zero cents) (the "Settlement Amount"). This payment will constitute full payment and satisfaction of the NTL.
3. **Erroneous Payments to the Municipality.** The Municipality understands that ComEd is engaged in audit processes with other Illinois communities. In connection with those audits, if ComEd is determined to owe MUT to another community that it erroneously paid to the Municipality, and pays another community any such amount on or before December 31, 2022, the Municipality agrees that, upon notice and reasonable verification of same, ComEd may deduct such amount (the "Credit") from a future MUT remittance to the Municipality. The Credit shall be only for the actual tax erroneously remitted to the Municipality and not for any penalties or interest ComEd may have additionally paid another community. The Credit may be taken by ComEd without regard to any statute-of-limitations or refund arguments that otherwise might be available to the Municipality pursuant to local ordinance or state law. Under no circumstances shall the total amount of the Credit exceed 10% of the Settlement Amount.
4. **Payment Method and Instructions.** Within 15 business days of the full execution of this Settlement Agreement, ComEd will pay the Settlement Amount to the Municipality in full and final settlement of the NTL, the sufficiency of which is hereby acknowledged and agreed to by the Municipality. ComEd will make payment of the Settlement Amount by wire pursuant to Cozen O'Connor's Illinois IOLTA account.
5. **No Admission.** This Settlement Agreement constitutes the compromise of disputed claims, causes of actions, denials, and/or defenses made or to be made by the Parties or any of them, and attorney fees and costs, and is being entered into solely for the purpose of bringing to an end the real or potential claims referred to herein and to avoid further costs of litigation. The Parties understand and agree that neither the entry into this Settlement Agreement nor the payment of the Settlement Amount shall constitute or be construed as an admission of liability by either Party to any person or entity. This Settlement Agreement, each of its provisions, any prior drafts thereof, any negotiations, proceedings, or agreements relating to it, and any matter arising in connection with such negotiations, proceedings, or agreements, shall not be offered or received in evidence in any litigation other than litigation brought to enforce the terms of this Settlement Agreement.

6. General Releases. Effective upon the full execution of this Settlement Agreement by the Parties, the Municipality, on behalf of itself, and its agents, representatives, personal representatives, subsidiaries, partners, managers, members, officers, directors, employees, shareholders, affiliates, divisions, predecessors, successors, and assigns, hereby waives, releases, relinquishes, and forever discharges any and all claims, suits, causes of action, debts, liens, demands, liabilities, obligations, covenants, controversies, agreements, promises, damages, costs, and expenses of any nature or kind whatsoever, at law or in equity, related to the MUT due or allegedly due to the Municipality on or before December 31, 2017, which it has brought or could have brought as of the date of this Settlement Agreement, against ComEd and/or any of its respective affiliates or its respective members, managers, officers, directors, shareholders, owners, partners, agents, lenders, employees, attorneys, personal representatives, successors and assigns. Contemporaneously, and as part of this mutual release, ComEd, on behalf of itself and each of its agents, representatives, personal representatives, subsidiaries, partners, managers, members, officers, directors, employees, shareholders, affiliates, divisions, successors, predecessors and assigns, hereby waives, releases, relinquishes, and forever discharges any and all claims, suits, causes of action, debts, liens, demands, liabilities, obligations, covenants, controversies, agreements, promises, damages, costs, and expenses of any nature or kind whatsoever, at law or in equity, related to the MUT due or allegedly due to the Municipality on or before December 31, 2017, which it has brought or could have brought as of the date of this Settlement Agreement, against the Municipality and/or its respective affiliates or its respective members, managers, officers, directors, shareholders, owners, partners, agents, lenders, employees, attorneys, successors and assigns.

7. Disclosure and Confidentiality. The Parties and Azavar agree to maintain the negotiations, calculations, and terms of this Settlement Agreement in confidence. In making any disclosure permitted in this Paragraph, the Parties and Azavar agree that they will limit the content of all disclosures and make only such disclosures as are necessary to comply with such permitted disclosures:

- a. to the Parties' attorneys, accountants, appraisers, agents, and other persons for the purpose of providing accounting or tax advice or services to one of the Parties;
- b. by counsel to the Municipality, as necessary to provide privileged and confidential legal advice to any other municipality that has issued an NTL to ComEd, provided that such municipalities agree to treat such information as confidential;
- c. as deemed necessary by ComEd, in response to inquiries made regarding this Settlement Agreement by other municipalities that have issued a NTL to ComEd, provided that Parties agree to treat the information provided by ComEd as confidential;
- d. in response to a lawful subpoena, court order or written request from a state or federal government official provided that prior notice, is given to the non-disclosing Party or Parties;

- e. as deemed necessary by ComEd to any regulatory body with jurisdiction over it, including but not limited to, the Illinois Commerce Commission;
- f. to the extent necessary to comply with state or federal laws or regulations, including, but not limited to, to the Freedom of Information Act (“FOIA”) and the Open Meetings Act (“OMA”);
- g. to the extent necessary to enforce the terms of this Settlement Agreement or in any other legal dispute involving only Parties to this Settlement Agreement and/or Azavar.

Moreover, acknowledging that the Municipality is a public body subject to FOIA requests and the OMA, and may be subject by law to other public-disclosure requirements, it is therefore agreed that, if there is a legally required public disclosure on or before December 31, 2024 of any of the terms of this Settlement Agreement pursuant to FOIA, the Open Meetings Act, or any other similar public disclosure-requirement, the Municipality shall notify ComEd by electronic mail at least two (2) business days prior to such disclosure of any of the terms of this Settlement Agreement pursuant to such legal requirements. The Municipality shall not be required to provide notice pursuant to this paragraph related to the consideration or approval of the Settlement Agreement by the corporate authorities of the Municipality or the publication of related documents including, but not limited to, meeting minutes and agendas.

The Municipality shall provide such electronic mail communication to the following e-mail address:

- litigationattorneys@exeloncorp.com.

Except for the permitted disclosures referenced above, the Parties and Azavar further agree not to initiate any publicity or make any public statement or comment regarding or related to the NTL or this Settlement Agreement except as required by law or as set forth above in this Paragraph. If media requests are received or questions raised regarding the NTL or this Settlement Agreement, Azavar shall decline to comment and the Parties shall provide only the following response, without elaboration: “The Parties decided to settle this matter. Further comment regarding the settlement is prohibited by the Parties’ Settlement Agreement, except as required by law.”

The Parties and Azavar acknowledge and agree that damages that will result to ComEd if the Municipality or Azavar violates the provisions set forth in this Paragraph shall be extremely difficult or impossible to establish or prove, and agree that the amount of two hundred and fifty dollars and zero cents (\$250.00) shall constitute liquidated damages for any such violation by the Municipality or ComEd and five thousand dollars and zero cents (\$5,000.00) shall constitute liquidated damages for any such violation by Azavar.

ComEd and the Municipality agree that such liquidated damages shall be in lieu of all other claims that ComEd or the Municipality may make by reason of any such violation.

8. Extension of Statute of Limitations. For all tax periods that remain open on or before December 31, 2022, Municipality may request and, if it does so, ComEd shall agree, to extend the applicable limitations period for assessments, refunds and credits of the MUT, as codified, by executing the form attached hereto as Exhibit A prior to the expiration of such tax periods. Should the Municipality choose to conduct an audit for such tax periods in accordance with 65 ILCS 5/8-11-2.5 and 50 ILCS 45/35 for any tax periods that remain open on or before December 31, 2022, the Municipality shall notify ComEd of such audit in accordance with 50 ILCS 45/35 and no later than March 15, 2023. The Parties agree to conduct such audit in good faith and to exercise their best efforts so that such audit be concluded by December 31, 2023.

9. Release as a Defense. This Settlement Agreement may be pleaded as a full and complete defense and may be used as the basis for an injunction against any action, suit, or proceeding, which may be prosecuted, instituted, or attempted by any Party in breach thereof.

10. Remedies. The Parties expressly agree that if either Party elects to take any legal action to enforce the terms of this Settlement Agreement, in addition to any other remedies available, the prevailing Party shall be entitled to recover from the other Party all of its associated costs and expenses, including, without limitation, its reasonable attorneys' fees incurred by the prevailing Party in connection with such enforcement steps.

11. Survival. All promises, covenants, warranties and representations contained in this Settlement Agreement shall survive execution of this Settlement Agreement, except where explicitly stated otherwise.

12. Successors and Assigns. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties' respective successors, assigns, beneficiaries, heirs, executors, trustees, administrators, representatives, officers, directors, stockholders, agents, and insurers.

13. Representation by Counsel. The Parties acknowledge that they have each been represented by independent counsel of their own choice throughout all of the negotiations that preceded and resulted in the execution of this Settlement Agreement. This Settlement Agreement shall be construed fairly as to all Parties and not in favor of or against any of the Parties regardless of who prepared this Settlement Agreement.

14. Entire Agreement. The Parties understand and agree that this is the entire agreement between the Parties.

15. Modification or Amendment. This Settlement Agreement shall not be modified, altered, or discharged except by an instrument in writing, signed by the Party against whom enforcement of the amendment, alteration, or modification is sought.

16. **Governing Law.** This Settlement Agreement shall be construed and enforced in accordance with the laws of the State of Illinois, without reference to principles of choice or conflict of law.

17. **Execution in Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and shall be admissible in evidence, but all of which together shall constitute one and the same instrument and shall become effective when counterparts executed by each Party have been delivered to counsel for all other Parties. Execution by facsimile, by an electronically transmitted signature, or by Portable Document Format (PDF), shall be fully and legally binding on the Parties.

18. **Headings.** The paragraph headings in this Settlement Agreement are for convenience only and shall not affect the meaning or interpretation of its provisions.

19. **Authority and No Assignment.** Each Party: (a) represents and warrants that it is authorized to enter into this Settlement Agreement and that it is authorized to give the releases contained herein and (b) represents and warrants that, other than as expressly set forth herein, neither it nor any of its agents, representatives, officers, members, employees, or attorneys have made, assigned, transferred, sold, pledged or hypothecated, or have purported to make, assign, transfer, sell, pledge or hypothecate, any actual or alleged claims, demands, causes of action, obligation, liabilities, or any interest in the matters being released by this Settlement Agreement, which, but for such assignment, transfer, sale, pledge, or hypothecation, would be subject to the release in this Settlement Agreement.

20. **Severability.** Should any provision of this Settlement Agreement be declared or determined by a court to be illegal or invalid, the court shall have the power to modify this Settlement Agreement so that it conforms with prevailing law and the validity of the remaining parts, terms, or provisions shall not be affected thereby. If any provision of this Settlement Agreement shall be held, declared, or pronounced void, voidable, invalid, unenforceable, or inoperative, in whole or in part, for any reason by any court of competent jurisdiction, government authority, or otherwise, such holding, declaration, or pronouncement shall not adversely affect any other provision of this Settlement Agreement, which shall otherwise remain in full force and effect and be enforced in accordance with its terms. To the extent permitted by applicable law, the Parties hereby knowingly, voluntarily and intelligently waive any provision of law that prohibits or renders void or unenforceable any part, provision, representation or warranty hereof.

21. **Attorney Fees and Costs.** Other than as expressly provided herein, the Parties shall each bear their own attorney fees, costs and expenses incurred in connection with this matter.

Dated this 23 day of January, 2023.

VILLAGE OF HAWTHORN WOODS

By: 

Title: Mayor

Dated this 30th day of January, 2023.

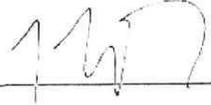
COMMONWEALTH EDISON COMPANY

By: Robert Kleczynski

Title: SVP & General Tax Officer

Dated this 25th day of January, 2023.

AZAVAR AUDIT SOLUTIONS, INC.

By: 

Title: President

Exhibit A

CONSENT TO EXTEND THE TIME TO ASSESS TAX AND FILE A REFUND CLAIM

Commonwealth Edison Company ("ComEd") and the Village of Hawthorn Woods ("Municipality") (collectively the "Parties") consent and agree to the following:

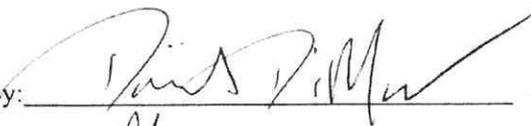
1. The amount of any municipal utility tax due to Municipality on or after January 1, 2018 through December 31, 2018 may be assessed on or before December 31, 2023.
2. On or before December 31, 2023, ComEd may file a claim for refund of, or take a credit for, any municipal tax paid to Municipality in error on or after January 1, 2018 through December 31, 2018.
3. If a provision of the Municipality's Code of Ordinances or any other Illinois law suspends the running of the period of limitations to assess or issue refunds for such tax, then, when the period resumes under such provision, the extended period to assess or request a refund will include the number of days remaining in the extended period immediately before the suspension began.
4. This Form contains the entire terms of the Consent to Extend the Time to Assess Tax and File a Refund Claim. There are no representations, promises, or agreements between the Parties except those found or referenced on this Form.

Dated this 23 day of January, 2023

Dated this 30th day of January, 2023.

VILLAGE OF HAWTHORN WOODS

COMMONWEALTH EDISON COMPANY

By: 

By: Robert Kleczynski

Title: Mayor

Title: SVP & General Tax Officer