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**NOW COMES** the Staff of the Illinois Commerce Commission (“Staff”) and pursuant to Section 200.830 of the Illinois Commerce Commission Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits this brief on exceptions to the Hearing Examiners’ Proposed Order (“HEPO”) issued on October 25, 2000.

## **I. Exceptions**

- A. The HEPO fails to accurately set forth Staff’s position.

### Argument

Staff appreciates that the Hearing Examiners had an extensive record to review in this proceeding, however in order for the HEPO to accurately reflect Staff’s final position the HEPO requires modification. See, Staff Initial Brief, pp. 10 and 18.

### Proposed Modification

(HEPO p. 5)

## **B. Staff’s Position**

Staff recommended a reduction in the amount ComEd could collect through Rider 31 from ComEd’s requested amount of \$120.933 million to approximately \$73 million. First, Staff argued it was inappropriate to include the cost of site restoration of approximately \$515 million for ComEd’s nuclear stations because Staff contended there would be no assurance that Genco would undertake this expense. Staff argued that removing site restoration expenses would reduce the annual cost of service by approximately \$20.9 million. Staff additionally argued that ComEd’s proposal should be reduced by approximately ~~\$1.9 million per year to reflect the removal of spent fuel storage costs at the Zion station that were the result of the United States Department of Energy’s (“DOE”) delay in accepting spent fuel.~~ \$7 million per year to reflect the recently granted 47 month license extension at Dresden Unit 2. Staff further proposed a reduction of an additional \$20 million per year to account for the impact of decommissioning costs due to presumed license renewal at one or more of ComEd’s nuclear units. Staff also advocated

reducing the period during which decommissioning charges would be recovered from six years to four years.

B. The HEPO's statutory analysis is incorrect.

### Argument

Staff's statutory analysis of the Public Utilities Act ("PUA") which allows ComEd to recover some decommissioning costs is equitable to both ratepayers and ComEd. The end result of the HEPO's analysis is that ratepayers receive the benefit of the nuclear power plants but do not bear any of the burden of paying decommissioning costs during the first four years of the Power Purchase Agreements ("PPA"). On the other hand ComEd's proposal results in ratepayers potentially paying the Genco twice for decommissioning costs during the last two years of the PPA. The end result of Staff's proposal is ratepayers contribute their equitable portion of decommissioning costs related to the power and energy they receive.

The Statutory authority for the recovery of some decommissioning costs can be found through an analysis of the following Sections of the PUA: 220 ILCS 5/9-201, 5/9-201.5, 5/8-508.1 and 5/16-114. Section 16-114 allows ComEd to seek recovery for decommissioning costs when it has responsibility as a matter of contract, even when ComEd no longer owns the plants. This section is critical to ComEd's continued recovery of decommissioning costs after the transfer. Prior to 1997, under the PUA, the recovery from ratepayers of all reasonable costs and expenses to decommission was dependent upon the utility either owning or operating in whole or in part the nuclear unit. 220 ILCS 5/8-508.1(b). The necessary statutory authority for collecting decommissioning when the utility

no longer owns or operates the plants was provided with the passage of Article XVI, signed into law on December 16, 1997 as part of Public Act 90-561 entitled “the Electric Service Customer Choice and Rate Relief Law of 1997” (1997 amendment to the PUA). Section 16-114 of the PUA provides that a utility can collect money through tariff rates to decommission the nuclear plants even though it no longer owns them if it has responsibility as a matter of contract for the decommissioning costs with certain limitations. 220 ILCS 5/16-114 ComEd’s contractual responsibility arises from the contribution agreement between ComEd and the Genco. Under the contribution agreement ComEd is responsible as a matter of contract for decommissioning costs. ComEd Ex. 2, (Berdelle Testimony- Exhibit 1). However, ComEd is only responsible as a matter of contract for those decommissioning costs approved by the Commission. The Commission’s order of course must conform to the specific requirements and limitations of the PUA. Therefore, the Commission has complete discretion subject to the specific requirements and limitations of the PUA as to what costs if any are appropriate, as well as the time period for which the costs can be recovered.

The HEPO implies that because Staff did not address how the Commission’s discretion would be affected if ComEd amended the, as yet, unexecuted contribution agreement to circumvent this limitation, that somehow weakens Staff’s position that the Commission has authority to allow the recovery of some decommissioning costs post transfer. HEPO, p. 13. The HEPO is incorrect. As Staff set forth in its Initial Brief, any decommissioning charge collected by ComEd must be determined by the Commission to be just and reasonable pursuant to Section 9-201. Staff Initial Brief p. 24. The just and reasonable requirement cannot be simply contracted away by ComEd and its transferee.

The HEPO offers no case law or authority supporting such a position. Accordingly, whether or not the contribution agreement contains language stating that the transferor is responsible to collect unfunded Decommissioning Cost charges “to the extent that the Illinois Commerce Commission approves such collections” it is of no significance, and does not in any way undermine Staff’s legal analysis.

The HEPO appears to have adopted the Intervenor’s position that the reference to “April 1, 1999” in Section 16-114 created a cut-off date for the future recovery of decommissioning costs if the appropriate tariff was not filed by April 1, 1999. The HEPO like the Intervenor failed to recognize the substantial change in the requirement of when a utility was allowed to collect decommissioning charges with the passage of the 1997 amendment to the PUA. As discussed previously, under the 1997 amendment to the PUA there was a new relationship between a utility and a nuclear plant which qualified for the recovery of decommissioning charges. Section 16-114 broadened the eligibility requirement by allowing utilities that were responsible “as a matter of contract or statute” to collect decommissioning charges in addition to the preexisting requirement of ownership or operation. Clearly, the legislature, by making this change, did not intend for this new requirement to only apply to contracts entered into during the relatively short time period beginning with the passage of the 1997 amendment to the PUA, and ending April 1, 1999. The purpose of the April 1, 1999 deadline was to require utilities to take the decommissioning costs out of base rates by a certain date. The legislature did not intend to put a moratorium on those utilities entitled to collect decommissioning charges and their ability to enter into different ownership arrangements.

Other sections of the PUA support this position. Clearly, Section 16-111(g) contemplates an increase in the amount of transactions by utilities with regard to their assets including nuclear plants and trust funds. Under the HEPO's interpretation, Section 16-114 would serve no purpose after April 1, 1999. That clearly is not the intent of the legislature as evidenced by the other language of Section 16-114. When interpreting a statute, one must look to the statutory language and, where the intent of the legislature can be ascertained from the language of a statute, it will be given effect without resorting to other aids of construction. (People v. Robinson, 89 Ill. 2d 469 (1982)). The last sentence of Section 16-114 clearly illustrates that the statute is intended to apply beyond the April 1, 1999 date. The last sentence states "The tariff required by this Section shall be included by the Commission in the reviews required by subsection (d) of Section 9-201.5." Section 9-201.5 requires that a "rate authorized by the Commission under this Section and the decommissioning cost studies underlying the rate shall be subject to hearing and review, in a rate case or otherwise, not less than once every 6 years." 220 ILCS 5/9-201.5. The legislature clearly intended that as a utility's financial relationship with a nuclear plant evolved over time, the utility's Section 16-114 tariff would also change overtime to take into account the changing relationship. The HEPO offers no explanation as to why the legislature would allow contracts entered into after the passage of the 1997 amendment up to April 1, 1999 to be entitled to special treatment (i.e. recovery of decommissioning charges) over contracts entered into after April 1, 1999 (i.e. no recovery of decommissioning charges). This point is especially important given the fact that prior to the passage of the 1997 Amendment to the PUA, those types of contracts would not have

provided a sufficient basis to impose decommissioning charges. Staff Initial Brief, pp. 10-12

The HEPO's legal conclusion that there is no statutory authority to recover decommissioning costs is dependent upon a flawed analysis of Section 16-114.1. In its Reply Brief, Staff set forth the argument that the authorization for a utility to transfer trust funds and collect decommissioning charges under Section 16-114.1 does not mean that there are no other statutory means of transferring trust funds and collecting decommissioning charges under the PUA. The legal maxim "expressio unius exclusion alteriu" which the HEPO seems to rely upon (HEPO, p. 12 and 19) is not a rule of law but rather a rule of statutory construction which may be overcome by a strong indication of contrary legislative intent. (see, Baker V. Miller, 159 Ill. 2d 249, 260 (1994)). The Commission must look to the intent of the legislature based upon the plain language of the statute in reaching its decision. Clearly, Section 16-111(g) allows both a utility with one nuclear plant and a utility with more than one nuclear plant to sell or dispose of plants. The HEPO's ultimate conclusion that a utility with one nuclear plant can continue to collect decommissioning costs while a utility with more than one cannot should be rejected. The HEPO offers no policy basis for such a conclusion. Staff has already pointed out that Section 16-114.1 provides the utility with one nuclear plant an alternative under the PUA when selling/transferring a nuclear plant and collecting decommissioning charges that is not available to a utility with more than one nuclear plant. Staff Reply Brief, p. 13

The HEPO argues that "if the general authority to do this already existed in the Act, the legislature had no need to address these issues. It is well established that the legislature is presumed not to enact unnecessary legislation." HEPO, p. 19. Staff's

interpretation of Section 16-114.1 does not render the legislation useless and unnecessary.

A proper analysis of Section 16-114.1 shows that it authorizes a utility with one nuclear plant which has entered into an agreement to sell its nuclear unit among other things to: (1) file a petition seeking authority to amortize its decommissioning liability pursuant to the agreement of sale ; (2) transfer the decommissioning trusts to the buyer of the nuclear plant in accordance with the terms of the agreement of sale; and (3) revise its decommissioning rate to a level and for a period of time in accordance with the agreement of sale. 220 ILCS 5/16-114.1 (a) and (b). The HEPO criticized ComEd for not discussing why “the legislature also saw fit in section 16-114.1 to specifically authorize utilities owning one nuclear plant; 1) to collect post nuclear plant sale decommissioning costs; 2) to amend its decommissioning tariff; 3) to deposit these collections in the trust funds; 4) or to transfer the trust funds created by Section 8-508.1 if that authority existed elsewhere in the Act.” The crux of the HEPO’s analysis is if the authority already existed for a utility with one nuclear unit to collect decommissioning costs then the legislature would not have proceeded to grant the authority in Section 16-114.1. HEPO, p. 19. That argument carries no weight whatsoever given the fact that there are other “grants of authority” discussed in 16-114.1 that also exist elsewhere in the PUA.

While Section 16-114.1 addresses the transfer of decommissioning trusts, the authority to transfer the decommissioning trusts exists elsewhere in the PUA besides Section 16-114.1. Under Sections 16-111(g) and 8-508.1 a utility has the authority to transfer the trusts funds subject to certain restrictions. The Commission recognized this in its Order in Docket Nos. 00-0369 and 00-0394 by finding that ComEd had the authority to

transfer the decommissioning trusts. ICC Docket Nos. 00-0369 & 00-0394, Order at 22. The authority to amortize the decommissioning liability is addressed in 220 ILCS 5/5-104 and 220 ILCS 5/16-111(g)(4). Given that the authority to transfer the trusts and amortize the decommissioning liability exist elsewhere in the PUA, there is no merit to the HEPO's argument that because post transfer collection of decommissioning is addressed in Section 16-114.1 that authority must not exist elsewhere in the Act. As Staff has previously demonstrated the authority clearly also exists in Section 16-114. The underlying fault in the HEPO's analysis is that it fails to appreciate that under Section 16-114.1 the agreement of sale between the one nuclear unit utility and the buyer is critical. The Commission is directed to look at the terms of the agreement of sale when evaluating the proposed decommissioning rate, the amortization of the decommissioning liability, and the transfer of the decommissioning trusts.

Finally, the HEPO concludes that ComEd's characterization of Section 16-114.1 of the Act as a statute created for the purpose of allowing Illinois Power to create transitional funding and insurance instruments not otherwise permitted under the act is without merit. HEPO, p. 19 The HEPO reaches this conclusion without providing any reasoning whatsoever. An analysis of Section 16-114.1 and 18-103(d)(1) supports ComEd's argument and further illustrates a flaw in the HEPO's analysis of Section 16-114.1.

Pursuant to Section 18-103(d)(1) proceeds from the issuance of transitional funding instruments can be used for one or more specified purposes. Transitional funding instruments are defined in Section 18-102. Those permitted uses include: refinancing of debt or equity; repaying or retiring fuel contracts or obligations related to nuclear spent fuel; expenditures undertaken to comply with 16-128; funding debt service and other reserves,

commercially reasonable costs and fees necessary or desirable in connection with marketing transitional funding instruments and grantee instruments; paying for commercially reasonable costs associated with the issuance and collateralization of transitional funding instruments and grantee instruments; and paying for the commercially reasonable costs associated with the issuance of transitional funding instruments. Section 16-114.1 amends the previously stated list by providing an additional permitted use of the proceeds, but only for a utility with one unit. An electric utility with one unit can also use the proceeds with certain limitations to make contributions or to reimburse itself for contributions it has made to decommissioning trusts in accordance with the agreement of sale. A utility with more than one unit could not do this. For the HEPO to conclude that ComEd's argument is without merit is incorrect. Clearly, as Staff previously argued in its Reply Brief, Section 16-114.1 provides a utility with one nuclear plant an alternative or different means of executing the sale of the nuclear plant.

Proposed Modification  
(HEPO p. 12)

**A. ComEd's Position.**

\* \* \*

ComEd contends that the significance of this provision is that it meant to authorize the use of transitional funding instruments or the purchase of insurance instruments by Illinois Power for purposes of decommissioning in connection with the sale of its nuclear plant. It should not, according to ComEd, be read to limit its proposal in this case which relies on authority granted in other provisions of the Act. (ComEd Reply at 12) ~~ComEd does not discuss why the legislature also saw fit in section 16-114.1 to specifically authorize utilities owning one nuclear plant; 1) to collect post nuclear plant sale decommissioning costs; 2) to amend its decommissioning tariff; 3) to deposit these collections in the trust funds; 4) or to transfer the trust funds created by Section 8-508.1 if that authority existed elsewhere in the Act. See Sections 16-114.1 a, b, and c.~~

Proposed Modification

(HEPO p. 13)

**B. Staff's Position**

\* \* \*

Staff contends that the right to collect decommissioning expense is limited by the Contribution Agreement because, pursuant to the terms of the agreement, ComEd is only responsible as a matter of contract to the extent of those decommissioning costs that are approved by the Commission. (Staff Initial Brief 21) Therefore, according to Staff, the Commission has complete discretion, subject to the specific requirements and limitations of the Act, as to what costs, if any, are appropriate. Furthermore, Staff contends the Commission has discretion as to the time period over which the costs can be recovered. ~~Staff did not address how the Commission's discretion would be affected if ComEd amended the, as yet, unexecuted contribution agreement to circumvent this limitation.~~

Proposed Modification

(HEPO p. 14)

\* \* \*

Staff contends that intervenors' argument that Section 16-114.1 bars ComEd from collecting decommissioning after the sale is incorrect. Staff argues that Section 16-111(g) allows both a utility with one nuclear plant and a utility with more than one nuclear plant to sell or dispose of plants. Staff argues that the most that can be said about Section 16-114.1 is that the utility with one nuclear plant has a choice under the PUA when selling/transferring a nuclear plant and collecting decommissioning charges that is not available to a utility with more than one nuclear plant. ~~Staff offers no case law or authority supporting this interpretation of the statute.~~ Staff argues that the legislature clearly intended for a utility to collect decommissioning expenses after the transfer of nuclear units as long as it remained responsible as a matter of contract for those expenses.

Proposed Modification

(HEPO p. 16-19)

## **VD. COMMISSION'S ANALYSISCommission's Conclusion**

The Commission's authority must either arise from the express language of the enabling statute or devolve by implication or intent from the express provisions of the statute as an incident to achieving the objectives for which the agency was created. Peoples Gas Light and Coke Company v. Illinois Commerce Commission, 165 Ill. App. 3d 235, 520 N.E. 2d 46 (1<sup>st</sup> Dist., 1988). In order to determine whether authority exists in this instance, the Commission must look to the relevant statutes and well settled principles of statutory construction. A close examination of the Act does not support the proposition that the proposal made by ComEd as modified by Staff is authorized by existing law. Although, it is clear that the legislature has authorized the sale of ComEd's nuclear plants and, the collection of decommissioning expense from ratepayers after the sale ~~has not been authorized~~.

ComEd purports to find the necessary legislative authority in several statutes, but primarily in Section 9-201.5 of the Act. Although Staff agrees that ComEd's petition is authorized by the Act, it does not agree with ComEd as to ~~on~~ where that authority lies. Staff contends that Section 16-114 is the source of the Commission's authority in this matter. Staff argues that until the enactment of Section 16-114, no such authority existed in Section 9-201.5 or anywhere else.

Section 9-201.5 of the Act does not, on its face, authorize or address post sale decommissioning collections. The primary concern in construing a statute is to ascertain and give effect to the intention of the legislature. In re Marriage of Burgess, 189 Ill.2d 270, 725 N.E.2d 1266, 1270 (2000). The language relied upon by ComEd in Section 9-201.5 (a) generally authorizes tariffs for decommissioning nuclear power plants, not the situation presented in its petition.

ComEd finds the legislative grant of authority implied in the language of Section 9-201.5 (a) which states that the revenues collected under such rates or tariffs must be used to "recover costs associated with contributions to appropriate decommissioning trust funds" or "to reduce the amounts to be charged under such rates or tariffs in the future." ComEd argues that the language allowing cost recovery refers to the collection of decommissioning money from ratepayers while it owns the plants. According to ComEd, this necessarily implies that the legislature intended the phrase "to reduce the amounts . . . charged . . . in the future" to authorize collection of decommissioning money at times when it does not own the plants. Therefore, ComEd argues, the legislature has authorized it to collect decommissioning funds for Genco after the sale of the plants. This imaginative interpretation of Section 9-201.5 is not persuasive.

Based on our review of Section 9-201.5 the Commission finds nothing which can reasonably be construed to contemplate continued collections of decommissioning tariffs after the utility sells its plants. Contrary to ComEd's argument, the phrase "costs associated with contributions" is not synonymous with contributions. The costs referred to may reasonably be presumed to include such things as the costs of prosecuting a decommissioning rider petition, other costs associated with collecting decommissioning rates and the costs of administering the decommissioning trust funds. Similarly, the language in Section 9-201.5 referring to money collected "to reduce the amounts . . . charged . . . in the future" may more reasonably be

interpreted to be the money collected from ratepayers on an ongoing basis. This money, deposited in the trusts by the nuclear plant owning utility, is expected to grow over time “to reduce the amounts [needed for decommissioning] in the future.” ComEd’s assertion that this phrasing was meant to encompass collections made on an accelerated basis after the sale of its plants is highly unlikely.

ComEd argues that the language in Section 16-114 authorizing “each electric utility owning an interest in, or having responsibility as a matter of contract or statute for, decommissioning costs” must be read to contemplate decommissioning recoveries when the utility no longer owns the plant for which it is collecting. That proposition is reasonable and grounded in a straightforward reading of Section 16-114. ~~However, Although the quoted language of that statute describes the type of entities required to file a tariff under Section 16-114 by April 1, 1999 we agree with Staff’s argument that there was no intent on the part of the legislature to put a moratorium on those utilities entitled to collect decommissioning charges and their ability to enter into different arrangements with nuclear units. In the absence of such a tariff, customers who received their power from alternative sources would not be liable for the payment of decommissioning charges.~~ The Commission, therefore, finds that Section 16-114 creates ~~no~~ a substantive right in the described entities to recover decommissioning costs after the transfer of nuclear generating units to a third party. The Commission further notes that the additional requirement imposed by Section 16-114 to make a jurisdictional allocation of electric sales between Illinois Commerce Commission jurisdiction and FERC jurisdiction must be applied to ComEd’s proposal as recommended by Staff. This “jurisdictional allocation” prevents ratepayers from paying twice for decommissioning costs. To accomplish this no decommissioning costs are authorized to be recovered in years five and six of the power purchase agreement.

ComEd, contrary to the position taken by Staff, does not argue that Section 16-114 is the source of the right to make decommissioning collections for a third party. It argues that reference in Section 16-114 to a utility collecting pursuant to contract for a third party, implies that its interpretation of Section 9-201.5 as the preexisting source of post sale decommissioning authority is correct. In other words, although Section 16-114 refers explicitly to decommissioning collections on behalf of a third party, it is not, in itself, an enabling statute. According to ComEd, the reference in Section 16-114 to decommissioning collections made on behalf of a third party requires that the authority existed somewhere else in the Act prior to the effective date of Section 16-114. ComEd argues that that authority is contained in Section 9-201.5 because there is no other relevant Section of the Act that existed prior to the enactment of section 16-114.

The Commission does not agree that the legislature intended the result as contemplated by ComEd’s interpretation of the relevant statutory provisions. Statutes are only construed together in order to resolve ambiguities that exist in either of them. Kozak v. Retirement Bd. of Fireman’s Annuity and Benefit Fund of Chicago, 95 Ill.2d 211, 447 N.E.2d 394, 399. (1983). Neither Section 9-201.5 nor Section 16-114 of the Act is ambiguous. Neither statute requires a reading of the other to determine its meaning. Neither statute supports ComEd’s argument, we must therefore reject ComEd’s assertions with regard to this issue.

ComEd also states that ~~it finds~~ additional support for its position is found in Section 8-508.1(c)(iii). This statute authorizes a method of allocating excess money collected in trust funds between the utility and its customers after a transfer of a nuclear plant to another entity. Contrary to ComEd's argument, we find that this provision clearly does not refer to or imply that decommissioning money can be collected from ratepayers when a utility no longer owns the nuclear facility. Indeed, no language in Section 8-508.1(c)(iii) authorizes ComEd to contract to recover nuclear decommissioning costs on behalf of a third party. We do agree with Staff that under Section 8-508.1(c)(ii) the legislature imposed a condition on the trust funds with regard to excess funds, that cannot be removed by contracting it away.

The Commission further concludes that ComEd's characterization of Section 16-114.1 of the Act as a statute created for the purpose of allowing Illinois Power to create transitional funding and insurance instruments not otherwise permitted under the act ~~has no is without~~ merit. ComEd argues that the specific grants of authority in Section 16-114.1 permitting future recovery of revised decommissioning rates "mirror[s] general authority available under Sections 9-201.5, 8-508.1 and 16-114" to do these same things. (ComEd Reply at 12 footnote 3) Staff pointed out that "grants of various different authority" addressed in Section 16-114.1 exist elsewhere in the PUA besides Section 16-114.1 Remarkably, ComEd fails to address why the legislature saw fit to grant authority for future recovery of decommissioning costs if it already existed in the Act. Therefore, we must reject the argument made by the Intervenors that because Section 16-114.1 refers to the collection of decommissioning costs post transfer the authority must not have already existed elsewhere in the Act.

~~We further find no explicit legislative directive setting any limitations or conditions on the means by which decommissioning costs may properly be collected from ratepayers subsequent to a sale to an unregulated entity.~~ Section 16-114.1 of the Act provides detailed guidance regarding post nuclear plant sale decommissioning trusts and future collections for utilities owning one nuclear plant. Under Section 16-114.1, the agreement of sale between the utility and the buyer of the nuclear plant sets forth how the Commission can evaluate the proposed sale with regard to decommissioning rate, amortization of liability and transfer of the trust funds. Absent Section 16-114.1 the Commission is not as restricted when evaluating the proposed decommissioning rate. If general authority to do this already existed in the Act, the legislature had no need to address these issues. It is well established that the legislature is presumed not to enact unnecessary legislation. (Lopez v. Fitzgerald, 76 Ill. 2d 107, 117 (1979); Pinkstaff v. Pennsylvania R.R. Co., 31 Ill. 2d 518, 524 (1964). If the only Another function of Section 16-114.1 was to create authorize an additional permitted use of the proceeds from transitional funding instruments. for financing instruments and insurance, it would not specifically authorize the continued collection of decommissioning contributions. For the aforementioned reasons, the Commission is compelled to conclude that ComEd's proposal as modified by Staff's recommendation is not authorized by the Act, and must be rejected.

- C. The Commission should adopt Staff's recommended \$73 million recovery per year for four years.

### Argument

The Hearing Examiners' Proposed Order addressed only the threshold question of whether ComEd's proposal was legally permissible. In finding that ComEd's proposal was not legal, the myriad of issues addressed by the parties regarding the appropriate level of cost to recover were not addressed in the HEPO. Since the Hearing Examiners did not make any specific findings regarding the technical aspects of the level of decommissioning costs to recover, Staff finds it unnecessary to provide detailed argument. Staff's positions as to the technical issues in this proceeding are thoroughly set forth in its Initial and Reply Briefs.

In summary, Staff recommends a reduction in the amount ComEd should collect through Rider 31 from ComEd's requested amount of \$120.933 million to approximately \$73 million. First, Staff believes it is inappropriate to include the cost of site restoration of approximately \$515 million for ComEd's nuclear stations because there is no assurance that Genco will undertake this expense. Removing site restoration expenses reduces the annual cost of service by approximately \$20.9 million. Staff also believes that ComEd's proposal should be reduced by approximately \$7 million per year to reflect the recently granted 47 month license extension at Dresden Unit 2. Staff also supports a reduction of an additional \$20 million per year to account for the impact of decommissioning costs due to presumed license renewal at one or more of ComEd's nuclear units. Staff also proposes reducing the period during which decommissioning charges would be recovered from six years to four years. These positions are reflected in the proposed order language

set forth below. In instances where Staff has not taken a specific position on an issue, no language is provided.

Proposed Modification  
(HEPO, p. 19)

## **V. COSTS OF DECOMMISSIONING, OVERALL AND PLANT SPECIFIC**

ComEd noted that its decommissioning cost estimates for its 13 nuclear units were prepared by the national expert, TLG Services, Inc. TLG is qualified to provide such estimates and has prepared site-specific decommissioning cost-studies for more than 85% of the nuclear plants in the United States, all of the operating commercial nuclear units in Canada, and one unit in Japan. (ComEd Ex. 1 (LaGuardia Direct) at 6.)

### **A. Radiological Decommissioning Cost Estimates**

ComEd explained why site-specific radiological decommissioning cost estimates of \$4.682 billion are reasonable. TLG reviewed the estimates previously approved by the Commission in Docket 97-0110 and updated for presentation in Docket 99-0115, and found that the estimates are reasonable. (ComEd Ex. 1 (LaGuardia Direct) at 8.) In particular, the estimates for ten of ComEd's nuclear units – Dresden Units 2 and 3, Quad Cities Units 1 and 2, LaSalle Units 1 and 2, Byron Units 1 and 2 and Braidwood Units 1 and 2 – are reasonable and unchanged from their last approval by the Commission in Docket 97-0110. (ComEd Ex. 1 (LaGuardia Direct) at 8.) ComEd Ex. 1 (LaGuardia Direct) at 9, Docket 99-0115.) The cost estimates for these ten nuclear units account for approximately \$3.595 billion of the \$4.682 billion of ComEd's total estimated radiological decommissioning costs, expressed in 1996 dollars. (ComEd Ex. 1 (LaGuardia Direct), Sch. TSL-1.)

ComEd's estimates submitted for Dresden Unit 1 and Zion Units 1 and 2 were updated in 1999 to reflect changed circumstances. (ComEd Ex. 1 (LaGuardia Direct) at 18, Docket 99-0115.) With respect to Dresden Unit 1, the cost estimates reflect changes since the estimate approved in Docket 97-0110. The net effect of these changes is to reduce the estimated Dresden Unit 1 radiological decommissioning costs by approximately \$35 million, for a total of \$362.8 million.

With respect to Zion Units 1 and 2, TLG claims the cost estimates reflect increased certainty in the nature and scope of required radiological decommissioning made possible after the permanent cessation of nuclear generation operations at that station. Based upon detailed system inspections conducted after the shutdown, including assessment of secondary-side steam generator equipment, TLG concluded that the costs of decommissioning Zion Unit 1 would be \$406.6 million in 1996 dollars and that the cost of

decommissioning Zion Unit 2 would be \$497.7 million. (ComEd Ex. 1 (LaGuardia Direct) at 11, 14-15, Sch. TSL-1, Docket 99-0115; ComEd Ex. 1 (LaGuardia Direct) at 8, Sch. TSL-1.)

CUB witnesses argued that decommissioning will cost less than TLG estimates because of “economies of scale” which will occur as a result of the Unicom-PECO merger. (CUB DT Ex. 1.1 (Biewald Direct) at 11-12; CUB DT Ex. 1.2 (Schlissel Direct) at 30-32.) These witnesses noted that in a proceeding before the Vermont Department of Public Service, AmerGen, a company that will be a ComEd affiliate when the Unicom-PECO merger is complete, indicated that decommissioning costs there would be approximately 23% lower than TLG estimated due to such economies. On this basis, they argued, the Commission should assume a 20% reduction in disbursements caused by economies of scale which, they argued, would result in a \$680 million surplus for the 13 nuclear units in question. (CUB DT Ex. 1.1 (Biewald Direct) at 12.) From this premise, these CUB witnesses argued that ComEd may already have collected adequate funds from ratepayers for decommissioning these units. (CUB DT Ex. 1.2 (Schlissel Direct) at 32.)

In response, ComEd alleged that the pending Unicom-PECO merger will not provide any significant decommissioning “economies of scale” or “synergies and efficiencies” that would substantially reduce decommissioning costs. Mr. LaGuardia argued the cost estimates here already are based on ComEd’s ownership of thirteen nuclear plants and maximum efficiency in the decommissioning process. (ComEd Ex. 10 (LaGuardia Rebuttal) at 8.) He specifically considered whether the Unicom-PECO merger would reduce costs of decommissioning, and explained that because decommissioning activities are so labor intensive, the merger would not be expected to produce cost reductions for decommissioning. (LaGuardia, Tr. at 469.)

## **B. Non-Radiological Decommissioning Cost Estimates**

ComEd presented a study prepared by TLG of the costs of non-radiological decommissioning of ComEd’s thirteen nuclear units. (TSL-9.) Non-radiological decommissioning involves “demolition” of station structures that are not designated for future use after the highly destructive radiological decommissioning process is completed. (TSL-9, at v; ComEd Ex. 13 (Thayer Rebuttal) at 4, 8; ComEd Ex. 10 (LaGuardia Rebuttal) at 10.) Because radiological decommissioning does not result in the complete dismantlement of “[s]ubstantial portions” of the nuclear stations that are not contaminated, many station facilities remain for disposal during the non-radiological decommissioning process.

As explained by TLG, during the non-radiological phase of decommissioning:

Site structures will be removed to a nominal depth of three feet below the local grade level whenever possible. Foundation grade slabs greater than three feet in thickness will be abandoned in place and covered over with a three-foot layer of backfill. The site will then be graded and stabilized. This study therefore includes removal costs for

all outlying structures not deemed suitable for follow-on use by ComEd or others.

(TSL-9 at v.)

ComEd argued the record supports the conclusion that TLG's estimate of the cost of non-radiological decommissioning is reasonable. ComEd claims the analysis was conducted using assumptions designed to assure that the estimate included no expenses for removal of structures that could be re-used.

The Attorney General's witness, Mr. Efron, argued that non-radiological decommissioning costs should not be considered based on his understanding that this goes beyond NRC requirements and the requirements of Illinois law and may never actually be incurred depending on the use of the sites after decommissioning is completed. (Attorney General Ex. 1 (Efron Direct) at 11.) Likewise, IIEC witness Stephens argued that it is not reasonable to assume the Genco will perform any activities over and above NRC requirements that may have been required or recognized in Rider 31 levels. (IIEC Ex. 1 (Stephens Direct) at 9.)

Similarly, Staff's witness Mr. Riley argued that non-radiological decommissioning costs should not be considered by the Commission because there is no statutory requirement to restore the site, therefore, Genco will either not restore the site or will delay site restoration as long as possible. (ICC Staff Ex. 2 (Riley Direct) at 6.) Staff also showed, that despite ComEd's assertions to the contrary, Genco has a monetary incentive to delay site restoration because it is cheaper to delay site restoration than to do it immediately. (Staff Initial Brief, pp 13-15)

After Mr. Riley, Mr. Efron and Mr. Stephens had filed their testimony, ComEd pledged that if ComEd's proposal is approved, the funds in the decommissioning trust will be used for both radiological and, to the extent available, non-radiological decommissioning. (ComEd Ex. 8 (Berdelle Rebuttal) at 2.) Staff noted that this commitment provides very little additional assurance because ComEd will only fund the trusts to a level sufficient to perform radiological decommissioning, as required by the NRC, and will have no excess funds to perform site restoration.

### **C. Commission's Conclusion**

The decommissioning cost studies underlying ComEd's proposal were prepared by TLG, an industry leader in making such estimates. ComEd's estimates of radiological decommissioning costs in the present proceeding are based upon the estimates previously approved by the Commission in Docket 97-0110 and updated by TLG in Docket 99-0115.

While ComEd's cost estimates may be accurate, the Commission agrees with Staff and other parties that it is inappropriate to collect site restoration costs from ComEd's customers. The Commission finds that ComEd has not shown site restoration costs to be

reasonably certain to be incurred after the transfer of the nuclear stations to Genco. The Commission finds Staff's argument that Genco will not fund the trusts at a sufficient level to allow site restoration and that Genco has an economic incentive to delay site restoration, to be compelling.

## **VI. ESCALATION FACTORS**

### **A. Rate Components Generally**

Under ComEd's Rider 31, the components used to determine the decommissioning cost escalation rate and the weights to be given to each component are established by the Commission. Under ComEd's proposal in this docket, the escalation rate for "wages" is based upon an employment cost projection by RFA, a nationally recognized firm, and receives a weighting of 40.3%. The escalation rate for "other decommissioning costs" is based on an estimate of the Consumer Price Index by RFA, and receives a weighting of 34.8%. Finally, the escalation rate for waste burial costs is based on costs reported on the tables in Appendix B of the Nuclear Regulatory Commission's NUREG 1307 (excluding the South Carolina Low Level Waste Disposal Tax) for the Barnwell facility, and receives a weight of 24.9%.

### **B. Low Level Waste Escalation Rate**

The low level waste burial escalation rate, calculated using the methodology approved by the Commission in Docket 97-0110, which is based on the average annual rate of escalation for the most recent three years at the Barnwell facility, is 22.44%. (ComEd Ex. 8 (Berdelle Rebuttal) at 7, lines 35-40.) ComEd witnesses explained that, although the Commission's formula focuses on a three-year period, the escalation in low level waste burial costs at the Barnwell facility over longer periods of time confirms that low level waste burial cost increases will far outpace the general rate of inflation and will continue to drive the costs of decommissioning to higher and higher levels. Over the past 20 years, the annual escalation in burial costs at the Barnwell facility has been approximately 21%. (ComEd Ex. 4 (Speck Direct) at 11, lines 11-13.)

Staff witness Riley testified that there is no strong indication that the more than 10 percent per year inflation rate for low level waste burial will continue. (ICC Staff Ex. 2 (Riley Direct) at 9.)

### **C. Overall Escalation Rate**

ComEd's proposal of \$120.9333 million annual decommissioning cost of service for 2001 through 2006 is based on an overall escalation rate of 4.73% calculated using the weightings proposed by ComEd and Staff in Docket 99-0115 and imposing a 10% cap on the waste burial escalation rate suggested by Staff here.

However, at the hearing, ComEd's witnesses repeatedly testified that the 7.81% overall escalation rate determined based on the formula used in Docket 99-0115 and the

actual, uncapped burial escalation rate and not the 4.73% capped rate is most appropriate. (Berdelle, Tr. 1124-1125; Speck, Tr. 369.) They argued that use of the 7.81% rate is appropriate because the reason for inquiring here about the rate of increase in future decommissioning costs is to assess the advantages of ComEd's proposal for ratepayers. Use of a 7.81% rate does not increase the amount that customers will be required to pay for six years. ComEd has already fixed that rate in arriving at its proposal.

Attorney General witness Effron, attempted to calculate an overall cost escalation rate. He calculated a 3.70% average escalation rate based on experiences in 1993-98 for pressurized water reactors. (Attorney General Exhibit 2.1 (Effron Rebuttal) at Schedule DJE-1B.) But he admitted that, in making his calculation, he did not comply with the Commission's orders. He (1) used the wrong cost escalation formula, and (2) miscalculated the rate of increase in waste burial costs, including South Carolina taxes, both in violation of the Commission's rulings in Docket 97-0110. (Effron, Tr. 928-937.) He then expressed a preference for use of the 4.11% rate. (Effron, Tr. at 941-42.) CUB's witness Biewald, likewise assumed a 4.11% rate. (Biewald, Tr. 1422-23.) Other witnesses expressed a preference for use of the "capped" 4.73% overall rate, including Staff witness Riley (Tr. 564-65) and CUB witness Schlissel. (Tr. 649.)

ComEd responded that the 4.11% overall escalation rate is simply a "plug" number for accounting purposes that does not result from a calculation based on actual escalation rates for the components used in the escalation formula. ComEd argued that it is not a rate that ComEd believes will be experienced or can be supported by any evidence in this proceeding. (ComEd Ex. 8 (Berdelle Rebuttal) at 6-7.) Rather, working backwards from the \$120.9333 million amount, ComEd simply determined the cost escalation rate that would have to be achieved in order for six years of collections at that rate to fund TLG's estimate of the costs of decommissioning. (ComEd Ex. 8 (Berdelle Rebuttal) at 6-7; Berdelle, Tr. 1075-1077.)

#### **D. Commission's Conclusion**

The Commission finds that the use of a 7.81% cost escalation rate is inappropriate. This rate reflects an escalation rate for waste burial (22.4%) that is unlikely to occur. The absurdity of this assumption is evidenced by the fact that the annual cost of service using this escalation rate would be over \$1 billion per year. Further, Staff has shown that the rate of waste burial escalation over the last 10 years has been less than 15% per year. The Commission agrees with Staff that the ongoing inflation rate for waste burial is likely to be about 10% and therefore agrees with Staff's use of a 10% cap on waste burial escalation. Therefore, the Commission finds that ComEd should calculate the overall escalation rate based on an escalation rate for waste burial of 10%.

#### **VII. EARNINGS RATE ON DECOMMISSIONING TRUST FUNDS**

In Docket 97-0110, the Commission approved the use of after-tax trust fund earnings rates of 6.26% for the nontax-qualified trusts and 7.30% for the tax-qualified trusts. These rates were premised upon the Commission's order limiting ComEd's

investments in equity securities to 60% of the total market value of the decommissioning trusts.

In Docket 99-0238, ComEd requested authority to increase the limitation on equity investments to 65% of the market value of the trusts. ComEd explained that increasing the equity investment limitation would avoid the necessity for ComEd to sell appreciated equity securities in the trusts, thereby incurring income tax obligations, merely to remain within the 60% limitation. An increase in the percentage of equity investments in the trusts was also consistent with similar authority granted to Illinois Power and Ameren with respect to decommissioning trusts. (ComEd Ex. 11 (Berdelle Direct) at 15-17, Docket 99-0115.)

By an order dated July 8, 1999, the Commission granted ComEd's request and raised the equity investment percentage limitation to 65%. Based on the new 65% equity investment limitation, it became necessary to revise the trust fund earnings rates to reflect the increase in higher-return equity investments. The new after-tax trust fund earnings rates for the nontax-qualified trusts is 6.83% and for the tax-qualified trusts is 7.49%. The parties have generally agreed that those rates are appropriate for use in this proceeding, assuming an overall after-tax trust fund earnings rate of 7.3%, and the Commission accepts this argument.

## **VIII. POWER UPRATE/LICENSE RENEWAL/LIFE EXTENSION**

### **A. License Renewal/Life Extension**

ComEd, in estimating the costs of decommissioning its nuclear units, assumed that the units would operate until the end of their current licenses that have been issued by the NRC. The decommissioning cost studies that were performed by TLG with respect to the ComEd nuclear units each assumed that the units would operate until the end of their licensed lives. (TSL-3 - TSL-8, § 2.1.) Decommissioning work would then begin after station operations were ended.

Staff and several Intervenors criticized ComEd for basing its cost estimates on the assumption that the nuclear units would operate only until their current licenses expired and not thereafter. They claimed that the licenses for the units would be renewed by the NRC, and that the units (or at least some of them) would operate for a period of up to twenty additional years. They further claimed that this increased period of unit operations would allow greater amounts to accrue in the decommissioning trust funds, and the amount needed for decommissioning work at the present time would therefore be reduced. (See, e.g., ICC Staff Ex. 2 (Riley Direct) at 8.)

In response, ComEd presented L. Joseph Callan, the NRC's former Executive Director of Operations. Mr. Callan testified that some of the witnesses in this case had incorrectly characterized license renewal "as essentially an NRC 'rubber stamp' which should be counted on by the . . . Commission in this proceeding." (ComEd Ex. 9 (Callan Rebuttal) at 1.) Mr. Callan disagreed, testifying that, based on his extensive experience with the NRC, there were "too many uncertainties" associated with the NRC renewing the

licenses of ComEd's nuclear units for the Commission to base a policy decision on the presumption that license renewal will occur. (Callan, Tr. 844.) This is because license renewal at the NRC is a "lengthy, costly and arduous process" in which the NRC considers "technical and operational" issues, such as "identifying critical long-lived structures and components which are potentially subject to age related degradation." (ComEd Ex. 9 (Callan Rebuttal) at 5-6.) Mr. Callan concluded that "there is no assurance that the NRC will approve a license extension for any one of ComEd's units, much less all of them as stated by Mr. Schlissel." (ComEd Ex. 9 (Callan Rebuttal) at 9.) Mr. Callan testified that with respect to ComEd's Dresden and Quad Cities Stations, no boiling water reactor plants of the same vintage and type have received license renewal from the NRC. (ComEd Ex. 9 (Callan Rebuttal) at 4.)

ComEd witnesses Callan and Speck further testified as to a number of contingencies which could require the Nuclear Stations to shut down before the end of their present licensed lives or any extended licensed lives. These include: (1) the risk that nuclear power plants (such as ComEd's) that received operating licenses between 1969 and 1988 will not remain economically viable until the mid-21<sup>st</sup> century; (2) the risk that the Genco, after considering other available generating options, will choose not to make the additional investments that will be necessary to operate nuclear plants beyond their existing license expiration dates. (ComEd Ex. 12 (Speck Rebuttal) at 38-39; ComEd Ex. 9 (Callan Rebuttal) at 11-12.)

## **B. Power Uprate**

## **C. License Extension for Dresden Unit 2**

In its initial brief, Staff addressed a further license extension issue that did not come to the attention of Staff until after the record was marked heard and taken. On August 24, the NRC granted an application by ComEd to extend the license of ComEd's Dresden 2 unit reactor for 47 months. The purpose of the extension is to extend the operating license for Dresden 2 to the full 40 years from the time operation began. The original 40-year license expiration period for Dresden unit 2 began on Jan. 10, 1966, coincident with the issuance of the plant's construction permit, which was standard practice at the time. As such, after completion of construction, the original license for Dresden Unit 2 provided an operational life of 36 years and one month, rather than the full 40 years. The NRC currently issues operating licenses for 40 years from the time a plant begins operation. An amendment issued by the NRC extends the unit's operating license expiration from January 10, 2006, to December 22, 2009. The NRC issued the amendment following a review, which concluded that Dresden Unit 2 could be operated safely through the construction recapture period. The NRC has granted this construction period recapture for a number of utilities.

With the extension, Dresden 2 will have a 40 year operation life like ComEd's other operating reactors. Currently, decommissioning collections for Dresden unit 2 cease in 2006. This extension will allow an additional four years of decommissioning collections. Staff estimated that this extension would reduce the required annual collections for Dresden 2 by about \$7 million per year. ComEd has since confirmed this estimate.

#### **D. Commission Conclusion**

The Commission agrees that there is uncertainty surrounding the issue of license renewal and life extension. However, the Commission finds that the record shows there is a high probability that ComEd will seek to renew the licenses of at least some of its nuclear units. Likewise, the Commission finds that ComEd would not seek to renew the operating licenses if it did not believe there was a good probability that the Company would exercise the renewal. The Commission further finds that under the current assumptions for escalation rate and return on trust fund assets that license renewal and subsequent life extension will result in a lower revenue requirement for decommissioning. However, due to the uncertainty involved, the Commission finds that it is not appropriate to reflect the maximum amount of revenue requirement reduction that would be achieved by assuming all ComEd's generating units receive license renewals and 20 year life extensions. The Commission finds that Staff's proposed revenue requirement adjustment of \$20 million per year is appropriate and strikes a balance between ComEd's position that no license renewals will take place and the CUB/City of Chicago's position that all units will receive license renewals and life extension.

The Commission also finds that it is appropriate to reflect the 47 month license extension for Dresden Unit 2, that was recently granted by the NRC, in the calculation of rates in this proceeding.

### **IX. METHOD OF DECOMMISSIONING**

#### **A. ComEd's Position**

In estimating the decommissioning costs for its operating nuclear stations, the TLG cost studies for the nuclear stations recommended that ComEd follow the "DECON" method of station which "involves removal of all radioactive material from the site following station shutdown." (TSL-3, § 1, at 1.) TLG argued that, in most situations, the DECON alternative is the preferred mode of decommissioning because it eliminates the costs for caretaking and preventing a station from becoming a potential long-term safety hazard. (TSL-3 – TSL-8, at xii.)

## **B. Intervenors' Position**

Several Intervenor witnesses claimed that substantial cost savings could be realized if the decommissioning of the nuclear stations were to be delayed for a substantial period after the end of station operations. CUB witness Biewald testified, for example, that “a delay in the dismantlement of the [ComEd] units . . . is highly probable,” and that ComEd could thereby “earn additional interest on the [decommissioning] trust funds.” (See, e.g., CUB DT Ex. 1.1 – P (Biewald Direct) at 4, 13.)

In response, ComEd witness Thomas LaGuardia explained why it was incorrect to believe that substantial savings could be achieved through delayed decommissioning of the nuclear stations. First, he explained that the argument for delay ignores the substantial costs for maintenance and other expenses that would be incurred if delayed decommissioning were undertaken. These costs are associated with maintaining station equipment and structures for the extended period after station operations so that decommissioning could be safely performed. (ComEd Ex. 10 (LaGuardia Rebuttal) at 3.)

Second, Mr. LaGuardia explained that it was error to assume that during the period in which decommissioning was delayed, trust fund assets would grow at a rate that would be higher than the rate of decommissioning cost escalation. (E.g., CUB DT Ex. 1.1-P (Biewald Direct) at 4.) He testified that, as a general matter, delayed decommissioning was not advisable because of the risk of substantially increased costs relating to low level radioactive waste disposal and increasingly stringent regulatory requirements concerning decommissioning. (ComEd Ex. 10 (LaGuardia Rebuttal) at 4.) He, therefore, concluded that these risks outweighed any benefits of delayed decommissioning.

## **C. Commission Conclusion**

There is no assurance that delayed decommissioning would lead to reduced decommissioning costs. In fact, ComEd’s witnesses, including TLG, the leading expert in decommissioning cost estimation, testified that the opposite would be true. History shows delay could even lead to funding shortfalls. The Commission therefore rejects the argument that delayed decommissioning will reduce decommissioning costs. ComEd will be permitted to recover the amounts for decommissioning it is seeking here without any reduction relating to purported savings resulting from the delayed decommissioning of the Nuclear Stations.

## **X. CONTINGENCY FACTORS**

### **A. ComEd’s Position**

The TLG decommissioning cost studies for ComEd’s nuclear stations included costs related to “contingency factors.” In ComEd’s 1997 decommissioning case, the Commission approved of the use of contingency factors in the TLG cost studies. The Commission concluded:

[W]e are of the opinion that Mr. LaGuardia properly applied activity-by-activity contingency allowances which properly reflect unpredictable field problems which may arise. The Commission is satisfied that his past experience with decommissioning projects indicates that problems will occur to cause the decommissioning contractor to deviate from the optimal performance of the decommissioning tasks which is assumed in the cost estimate. . . We also would note that elimination of the contingency factor may violate the NRC minimum funding requirements.

(Order, ICC Docket 97-0110, February 19, 1998, at 9.)

### **B. Intervenors' Position**

Certain intervenors criticized the use of contingency factors in the TLG studies. Attorney General witness Efron referred to the Commission Order in Docket 94-0065 entered on January 9, 1995 in support of his position. (Attorney General Ex. 1 (Efron Direct) at 12.) There, the Commission did not approve of the use of contingency factors in the TLG decommissioning cost studies. However, Mr. Efron neglected to mention the Commission's later Order in Docket 97-0110, where, as stated above, the Commission approved of TLG's use of contingency factors.

Mr. Efron also testified that the collection of costs related to contingency amounts was inappropriate in the present situation where ComEd planned to transfer its nuclear units to "a nonutility affiliate." (Attorney General Ex. 1 (Efron Direct) at 13.) He had testified that "the application of a contingency allowance for unspecified costs . . . that may never be incurred . . . has the potential to confer a substantial windfall to investors, at the expense of ratepayers." (Id.)

After Mr. Efron's testimony was filed, however, Mr. Berdelle submitted testimony clarifying and providing that ComEd through this proceeding will ensure the return of any surplus that remains in the decommissioning trust funds after the completion of decommissioning work to ratepayers. (ComEd Ex. 8 (Berdelle Rebuttal) at 2.) This commitment eliminates any risk that a windfall would accrue to the benefit of ComEd's investors if contingency factor amounts were included in ComEd's proposed decommissioning collections.

### **C. Commission Conclusion**

The Commission has previously approved of the inclusion of contingency factors in the TLG decommissioning cost studies. (Order, ICC Docket 97-0110, February 19, 1998, at 9.) Including the contingency factor amounts in the decommissioning estimates is necessary to ensure that there are adequate funds available for decommissioning.

## **XI. SITE RESTORATION**

### **A. ComEd's Position**

ComEd argued that for safety and economic reasons, non-radiological decommissioning is a necessary part of the decommissioning process. (ComEd Ex. 13 (Thayer Rebuttal) at 8; ComEd Ex. 10 (LaGuardia Rebuttal) at 9-10.)

### **B. Staff and Intervenors' Position**

Staff and other intervenor witnesses argued that non-radiological decommissioning costs should not be considered by the Commission because there is no statutory requirement to restore the site, therefore, Genco will either not restore the site, or will delay site restoration as long as possible. Staff also showed, that despite ComEd's assertions to the contrary, Genco has a monetary incentive to delay site restoration because it is cheaper to delay site restoration than to do it immediately. (Staff Initial Brief, pp 13-15)

After Staff and intervenors had filed their testimony, ComEd pledged that if ComEd's proposal is approved, the funds in the decommissioning trust will be used for both radiological and, to the extent available, non-radiological decommissioning. (ComEd Ex. 8 (Berdelle Rebuttal) at 2.) Staff noted that this commitment provides very little additional assurance because ComEd will only fund the trusts to a level sufficient to perform radiological decommissioning, as required by the NRC, and will have no excess funds to perform site restoration.

### **C. Commission Conclusion**

The Commission agrees with Staff and other parties that it is inappropriate to collect site restoration costs from ComEd's customers. The Commission finds that ComEd has not shown site restoration costs to be reasonably certain to be incurred after the transfer of the nuclear stations to Genco. The Commission finds Staff's argument that Genco will not fund the trusts at a sufficient level to allow site restoration and that Genco has an economic incentive to delay site restoration, to be compelling.

## **XII. POWER PURCHASE AGREEMENT**

### **A. Generally**

Under its proposal, ComEd will transfer the Nuclear Stations to the Genco. Robert K. McDonald, Vice President of Exelon, testified that a central feature of the transfer is the PPA under which the Genco will sell power and energy to ComEd. (ComEd Ex. 3 (McDonald Direct) at 5.) Mr. McDonald testified that the provisions of the PPA provide substantial benefits including a fair price, and a reliable source of power and energy for customers during the six-year contract term.

Mr. McDonald explained the key prices, terms and conditions of the PPA:

- Term and Quantities. Under the PPA, Genco will supply all of ComEd's requirements from the date of the Transfer through December 31, 2004 (the "Initial Term"). Subsequent to the Initial Term, in 2005 and 2006, Genco will serve ComEd's energy and capacity requirements up to the available capacity of the transferred nuclear units. (ComEd Ex. 3 (McDonald Direct) at 5-6.)
- Pricing. ComEd will pay only an energy charge, with no separate capacity charge. The PPA sets forth a schedule of energy prices, on- and off- peak, by month for the Initial Term. Prices for the years 2005 and 2006 will be set at then-prevailing market rates, and will be filed with the FERC for the FERC's approval. (ComEd Ex 3 (McDonald Direct) at 6.)
- Reliability. Genco will be able to serve ComEd from the same resources that ComEd has today: the ComEd nuclear units, the various Fossil Plant Agreements and market sources. The Transfer will not limit or reduce the resources available to serve ComEd and its customers. (ComEd Ex 3 (McDonald Direct) at 8.)

Mr. McDonald explained that during the Initial Period the PPA will have no rate impact on ComEd customers. This is because base rates are frozen at reduced levels required by Article XVI of the Act during the Mandatory Transition Period provided by the Act, through January 1, 2005. In addition, ComEd does not have a fuel adjustment clause to flow through actual costs of power and energy. Accordingly, ComEd bears any risk of price variations. There also will not be any unreasonable impact on the price of power and energy paid by customers during the years 2005 and 2006. The price of energy under the PPA during those two years would be the prevailing market price, subject to Federal Energy Regulatory Commission approval. (ComEd Ex 3 (McDonald Direct) at 6.) The rates charged to retail customers will be subject to approval by the Commission.

Staff and certain Intervenor witnesses objected to the 6 year term because ratepayers should not have to pay if ComEd does not actually purchase power from the Genco in 2005 and 2006. (See, e.g., ICC Staff Ex. 2 (Riley Direct) at 10.) After this testimony was submitted, ComEd clarified and revised its proposal to provide that if ComEd does not purchase power from the Genco in 2005 and 2006, ComEd will not collect decommissioning funds from ratepayers for those years. However, Staff countered that to allow further collections based merely on extension of the agreement would provide great incentive for ComEd and Genco to agree to almost any price.

## **B. Timing Of Collections By ComEd And Distributions To Genco/Trust**

ComEd's witnesses testified that ComEd's proposal provides for a simple and straightforward method of collecting customers' contributions for decommissioning costs,

and distributing funds to the decommissioning trusts. ComEd Vice President and Comptroller Robert E. Berdelle explained that:

- Upon transfer of the Stations to the Exelon Genco, ComEd's existing obligations for decommissioning will be assumed by the Genco.
- To provide the Genco with a portion of the funds needed for decommissioning, the assets in ComEd's decommissioning trusts will be transferred to the Genco along with the Stations.
- ComEd will collect the decommissioning amounts approved by the Commission in this proceeding under the provisions of the Public Utilities Act and the Special Decommissioning Rider.
- ComEd will turn over such decommissioning amounts to the Genco, which will pay such funds into the decommissioning trusts for use in decommissioning, consistent with the provisions of the decommissioning trust agreements.

(ComEd Ex. 2 (Berdelle Direct) at 4-6.)

After approval of ComEd's proposal and closing of the Contribution Agreement, ComEd will also accelerate other payments it is already committed to make to the decommissioning trust funds. As Mr. Berdelle explained, in accordance with the Commission's order in Docket 88-0928, decommissioning costs collected prior to September 12, 1988 ("pre-1989 collections") are contributed to the decommissioning trusts in equal annual installments over the remaining NRC operating lives of each station. Upon approval of its proposal, ComEd will accelerate this schedule by contributing the remaining pre-1989 collection balances to the decommissioning trusts over the six-year period after the Stations are transferred, thereby increasing contributions for pre-1989 collections from \$5.9 million to approximately \$11.0 million per year. (ComEd Ex. 2 (Berdelle Direct) at 12.)

### **C. Commission Conclusion**

The evidence concerning the PPA supports approving ComEd's decommissioning proposal for a period of four years. The PPA has a firm commitment for four years after which a two year extension hinges on the ability of the parties to reach agreement on price. The Commission agrees with Staff that this provides a \$120 million incentive to agree on a price. The Commission finds that if ComEd agrees to an extension of the contract, nuclear decommissioning expense should be included in the market price and not collected in a separate rider.

### **XIII. SPENT FUEL COSTS AND DEPARTMENT OF ENERGY ISSUES**

#### **A. Intervenors' and Staff's Position**

Under the Nuclear Waste Policy Act of 1982, the DOE was obligated to begin disposing of spent nuclear fuel by January 31, 1998. 42 U.S.C. § 10222(a)(5)(B). The DOE failed to meet its obligation, and has publicly stated that it will not begin to remove spent fuel from any reactor site until at least 2010. (ComEd Ex. 12 (Speck Rebuttal) at 21.) Nuclear utilities, including ComEd, have asserted claims to recover damages from the DOE for its failure to comply with its spent fuel disposal obligation.

Under the Contribution Agreement, Genco will receive any amounts recovered from the DOE as damages for its non-performance. (ComEd Ex. 2 (Berdelle Direct) Exh. 1, Section 2.1(f)(4), Schedule 2.1(f)(4).) Coalition witness Bodmer objected that this provision unfairly benefited Genco. He noted that PECO recently settled with the DOE, reportedly saving Pennsylvania customers \$80 million over the next 10 years. (Coalition Ex. 1 (Bodmer Direct) at 9.) Additionally, Staff witness Riley argued that recovery of \$71.7 million of spent fuel storage costs at the Zion Station should be eliminated from the decommissioning costs of service and claims this results in a decline of \$1.9 million. (ICC Staff Ex. 2 (Riley Direct) at 2, 5.)

#### **B. ComEd's Position**

In response Mr. Berdelle argued that allowing Genco to receive any recovery from the DOE is just and reasonable because, in Docket 97-0110, the Commission denied ComEd the right to recover spent fuel storage costs arising from the DOE's failure to perform. (ComEd Ex. 8 (Berdelle Rebuttal) at 10-13.) ComEd argued that since it was denied recovery of the storage costs, since Genco will incur and pay those costs after the transfer, and since ComEd has not asked for these costs in its proposal, it is appropriate that Genco should receive any damages designed to reimburse all or some portion of these costs. In addition, the existence, timing and sufficiency of a recovery from DOE are all uncertain.

As to the Zion spent fuel costs, Mr. Berdelle explained that, using the 4.74% escalation rate proposed by Staff in Docket 99-0115 leads to an increase in the cost of service by \$.9 million, rather than a decline as Mr. Riley had maintained. (ComEd Ex. 8 (Berdelle Rebuttal) at 13.) In addition, Mr. Speck noted that differences between the circumstances at Zion and those at issue in the DOE/PECO settlement made that settlement an inappropriate comparison. (ComEd Ex. 12 (Speck Rebuttal) at 24.)

#### **C. Commission Conclusion**

The Commission finds that the record shows that, since Genco will incur the spent fuel storage costs after the transfer, it is appropriate that Genco should receive any damages designed to reimburse all or some portion of those costs including any amounts received from the DOE.

## **XIV. TRUST ACCOUNTS**

### **A. Generally**

As the owner of ComEd's nuclear stations, ComEd is presently also responsible for the decommissioning trusts for each of its nuclear stations. Each nuclear station has two decommissioning trusts. For each station one trust is a tax-qualified decommissioning trust and one trust is a non-tax qualified decommissioning trust. ComEd Vice President and Comptroller Robert E. Berdelle explained that such separate trust funds are maintained because there are limits on the amounts that can be contributed to the tax qualified funds. (ComEd Ex. 14, ComEd's Response to Hearing Examiner's Requests Items 1-9, Item 1.)

Following this Order, and upon the closing of the Contribution Agreement transaction through which ComEd will transfer the Stations to Genco, ComEd will also transfer "(1) all assets (including investments) held in the Decommissioning Trusts and (2) all funds collected, or to be collected, from ratepayers in respect of Decommissioning Costs...". (ComEd Ex. 2 (Berdelle Direct), Attachment 1, Contribution Agreement, at 8.)

As an NRC licensee, after the transfer Genco will be subject to NRC regulations regarding decommissioning planning, record keeping and reporting. The NRC will be the federal regulatory agency responsible for determining that Genco has provided reasonable assurance that funds will be available for the decommissioning process, as provided for in 10 CFR § 50.75 relating to financial assurance for decommissioning funding. (ComEd Ex. 14, ComEd's Responses to Hearing Examiners' Requests Items 1-9, Item 1.)

The source of authority for NRC regulations governing the decommissioning process is the Atomic Energy Act. Pursuant to these regulations, the NRC will continually monitor the amount of funds maintained in the decommissioning trusts to ensure that the funding levels are adequate. The NRC will require additional contributions to the funds if it determines that the funding levels are not sufficient to ensure that decommissioning will be performed. (ComEd Ex. 14, ComEd's Responses to Hearing Examiners' Requests Items 1-9, Item 1.)

### **B. Calculation of the amount transferred into the trusts on 1-1-01**

Under ComEd's proposal, the assets contained in the decommissioning trust funds will be transferred in their entirety to the Genco. ComEd explained that the exact amount of that transfer is not known, because the amount will depend upon a number of factors, including the investment returns on the trust fund assets up to the time of the transfer. ComEd emphasized that the precise amount to be transferred is not important to determine, and is not the subject of this proceeding. Rather, the key factor relating to the reasonableness of ComEd's proposal is that the trust funds, as presently constituted, are not sufficient without additional contributions over time to meet the future costs of decommissioning. Under ComEd's proposal, any such additional contributions after

payment of the amounts which are the subject of this proceeding will be the responsibility of the Genco.

### **C. Refunds Of Surplus In Trust Accounts**

Mr. Berdelle explained, that in accordance with this order, the trust agreements governing the use of decommissioning funds will provide the following:

Upon completion of decommissioning of the last (13<sup>th</sup>) ComEd nuclear unit, if any excess funds (after tax) ... remain in the decommissioning trusts, the trust agreements would direct distribution of such excess funds to ComEd for the limited purpose of ComEd refunding such funds to its then current ratepayers. The method for making any such refunds to ratepayers would be proposed by ComEd at that time subject to approval by the Illinois Commerce Commission.

(ComEd Ex. 8 (Berdelle Rebuttal) at 17.) Mr. Berdelle explained that accordingly, the Commission through its jurisdiction in this proceeding will obtain certainty that if there are any amounts left over in the decommissioning trusts after decommissioning, there is no possibility of any “windfall” to ComEd or the Genco. Rather, any such excess amounts will be refunded to ComEd’s then current ratepayers. (ComEd Ex. 8 (Berdelle Rebuttal) at 17.) Staff explained in its Initial Brief that Section 8-508.1(c)(3)(ii) imposes a condition on the trusts regarding excess funds which cannot be eliminated by ComEd and the transferee of the trust funds.

### **D. Commission Conclusion**

The evidence shows that ComEd’s proposal as modified by Staff’s proposal in this proceeding represents a fair and reasonable resolution of the decommissioning funding question. ComEd has provided assurances that, in the event that the funds in the trusts are in excess of the amounts necessary to decommission all of ComEd’s nuclear units, that excess amount will be returned to customers. (ComEd Ex. 8 (Berdelle Rebuttal) at 16.) ComEd’s assurance is consistent with the condition imposed on the trusts under Section 8-508.1(c)(3)(ii).

### **E. Effect On Trusts Of A Subsequent Transfer By Genco To A Third Party**

The NRC has the authority and obligation to review and to decide whether to grant a transfer of licenses to a proposed new licensee, for example through a sale or transfer of the Stations. One key element of that review is ensuring that the new licensee provides reasonable assurance that there will be adequate funds available to decommission the stations. In the case of the Exelon Genco, the NRC has approved transfer of the licenses for the ComEd stations to the Genco conditioned upon the Exelon Genco using the external sinking fund method of providing assurance of decommissioning funding. (ComEd Ex. 14, ComEd’s Responses to Hearing Examiners’ Requests Items 1-9, Item 2.)

In the event of a subsequent transfer of a station by the Exelon Genco to some other proposed licensee, such new proposed licensee would also have to provide reasonable assurance of decommissioning funding pursuant to 10 CFR § 50.75. Based upon ComEd's recent experience concerning transferring the NRC licenses to the Genco, this would need to be accomplished by transferring the decommissioning trusts to the new licensee or another method of providing financial assurance acceptable to the NRC.

D. Findings and Conclusions modification.

Argument

Consistent with the arguments set forth above the Findings and Conclusions section requires modification. As Staff witness Ebrey testified the estimated decommissioning adjustment proposed by ComEd of .141 cents per Kwh needs to be recalculated by the Company. Staff's proposed language includes a place holder of # cents per Kilowatt hour.

Proposed Modification

(HEPO, pp. 19-20)

**VIXV. FINDINGS AND CONCLUSIONS**

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is a corporation engaged in the generation and distribution of electricity to the public in Illinois, and, as such, is a public utility within the meaning of the Illinois Public Utilities Act;
- (2) the Commission has jurisdiction over ComEd and the subject matter of this proceeding;
- (3) the statements of fact and conclusions of law set forth in the prefatory portion of this Order are supported by the evidence in the record and are hereby adopted as findings of fact and conclusions of law;
- (4) ComEd's Petition as modified consistent with Staff's proposal is granted ~~denied~~ , for the reasons discussed herein;

(5) ComEd's proposed revisions to Rider 31 sought in the Petition as modified consistent with Staff's proposal are approved.

(6) The evidence and the record fully supports ComEd's right to recover the \$73 million each year for four years as proposed by Staff, which translates into a decommissioning charge of .#¢ per kilowatt hour. The Commission finds this charge to be a just and reasonable rate for purposes of Section 9-201 of the Act; and

IT IS FURTHER ORDERED by the Illinois Commerce Commission that the Petition submitted by Commonwealth Edison Company in this proceeding is granted with the modifications discussed herein.

IT IS FURTHER ORDERED that the Commission approves the decommissioning expense adjustment sought by ComEd in the Petition as modified consistent with Staff's proposal, and that ComEd is entitled to the recovery of the estimated costs of decommissioning its 13 nuclear units identified in the Petition with the modifications discussed herein.

~~IT IS FURTHER ORDERED by the Illinois Commerce Commission that the Petition submitted by Commonwealth Company of in this proceeding is denied.~~

IT IS FURTHER ORDERED that all motions, petitions, and objections made in this proceeding that remain undisposed of are hereby disposed of consistent with the ultimate conclusions reached herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code §200.880, this Order is final; it is not subject to the Administrative Review Law.

## **II. Conclusion**

WHEREFORE, for the reasons set forth, the Staff of the Illinois Commerce Commission respectfully requests that its modifications to the Hearing Examiners' Proposed Order be adopted.

Respectfully submitted,

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