

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
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Proposal to implement a competitive	:	05-0159
procurement process by establishing	:	
Rider CPP, Rider PPO-MVM, Rider	:	
TR-CPP and revising Rider PPO-MI.	:	
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REPLY TO BRIEFS ON EXCEPTIONS
BY THE PEOPLE OF THE STATE OF ILLINOIS

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The People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, file this Reply to Briefs on Exceptions, pursuant to Section 200.830 of the Commission’s Rules of Practice, 83 Ill. Admin. Code § 200.830, in response to the Briefs on Exceptions filed by Commonwealth Edison Company (“ComEd”), the Staff of the Illinois Commerce Commission (“Staff”) and Midwest Generation, on December 19, 2005, in the above-captioned docket. The People respectfully request that the Commission reject the exceptions proposed by ComEd, Staff and Midwest Gen (“Midwest Gen”) that are discussed herein and, instead, adopt the exceptions to the Proposed Order filed in this Reply and in the People’s Exceptions and Brief on Exceptions.

SUMMARY OF POSITION

Throughout this proceeding, the Attorney General has lamented the failure of retail competition to develop in Illinois in the manner anticipated when the Public Utilities Act (“PUA”) was amended in 1997¹ and has vigorously defended the rights of captive customers – who are entitled to the continued protections afforded by the regulatory safeguards specified in the PUA, until the advent of retail competition. Our Reply to Briefs on Exceptions urges the Commission to reject ComEd’s claims that the proposed auction will advance competition, because there is no record evidence to support that claim. This Reply also asks the Commission to reject ComEd’s efforts to strip the Proposed Order of essential language requiring annual prudence reviews and reconciliation proceedings, in accordance with PUA Section 9-220. Finally, we ask that the Commission revise the Proposed Order to clarify that ComEd’s tariff filing plainly states that it is a submission pursuant to Article IX of the PUA.

REPLY TO COMMONWEALTH EDISON

ComEd’s December 19, 2005 Brief contains extensive exceptions to the Proposed Order -- and even more extensive and wide-ranging arguments, which

¹ The 1997 Amendments express confidence that competition can lead to lower prices and recognize that regulation is necessary to protect consumers in the absence of competition. Specifically, the General Assembly found:

A competitive wholesale and retail market must benefit all Illinois citizens. The Illinois Commerce Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. **Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable, and environmentally safe electric service.**

ComEd has styled as a “Summary of Position.” ComEd BOE at 1-12. The mislabeled “Summary” section contains new, irrelevant, and inappropriate arguments and offers extraneous actions that it now suggests it would be willing to take if its auction proposal is adopted according to ComEd's terms. The “Summary” section should be disregarded by the Commission, as it adds nothing to help the Commission resolve the issues presented by ComEd’s proposal.

The Commission should reject ComEd’s Claim That the Auction Would Advance Competition because there is No Record Evidence to Support the Claim

ComEd claims, without citation to the record, that its proposal will promote competition in Illinois. ComEd BOE at 1-2. It attempts to characterize its auction proposal as “a critical milestone in the restructuring process.” ComEd BOE at 2-3. What ComEd fails to mention, however, is its obligation to continue to provide just and reasonable rates for electricity for the vast majority of customers who have no option but to continue to purchase electricity from ComEd. The Commission’s goal, for the period after the end of the mandatory transition period and rate freeze and before the development of retail competition for residential and small commercial consumers, is to continue to assure access to “safe, reliable, affordable, and environmentally safe electric service.” 220 ILCS 5/16-101A(d). Although ComEd sings the praises of competition in the abstract, the subtext of its BOE is that prices will go up notwithstanding that the General Assembly “found that lower costs would follow from retail and wholesale competition.” ComEd BOE at 1, 10.

ComEd touts the more than \$3 billion savings realized by Illinois residential consumers as a result of the 1997 Amendments. ComEd BOE at 2. The rate decreases giving rise to these savings, however, were required by section 16-111, which mandated a series of rate reductions, and did not result from competitors offering consumers lower prices. Aug. 29, 2005 at 290-291 (Juracek).

When the 1997 Amendments were passed, ComEd was one of the highest priced electric utilities in the country. The rate reductions mandated by the law were necessary to bring ComEd prices to more acceptable levels. Maintaining average, if not low, rates for ComEd's Illinois consumers was a goal of the 1997 Amendments.

ComEd's proposal, while claiming to be the next step in the transition to competition, would sacrifice reliable and affordable service by ceding all procurement decisions to an auction process that was not designed to produce low prices (see Tr. Sept. 8, 2005 at 871 - 72²). ComEd's extra-record offer in its

² ComEd witness LaCasse testified as follows:

Q. On page 21 of your Direct Testimony at lines 1298 to 1310, you state what you believe to be the objectives of the Illinois auction proposal?

A. Yes.

Q. Are any of those objectives that the auction obtain the lowest price for customers?

A. Again, it's reliable supply at competitive market prices.

Q. But not the lowest price for consumers?

A. Correct.

Q. Are any of the objectives that the price be a lower price for customers?

A. Lower than what?

Q. Lower than they're currently paying?

BOE to cap and defer a 20% increase would undo the benefit of the 1997 Amendments, shows that ComEd does not expect the auction to meet the General Assembly's goal of competition leading to reduced electric costs.

The Commission Should Reject ComEd's Erroneous Suggestion That The Post 2006 Initiative Reached Consensus On The ComEd Proposal As Contrary To The Evidence And Wrong.

ComEd disingenuously suggests that its auction proposal "is a direct result of the Commission's Initiative and the recommendation by the Commission Staff," implying that the Commission has already approved the ComEd plan. ComEd BOE at 4. Not only does this misrepresent the discussions of the Post 2006 Initiative, it misrepresents ComEd's corporate adoption of its auction proposal before the Post 2006 Initiative meetings and its goal of getting support for that plan in the Post 2006 Initiative workshops. Tr. August 29, 2005 at 156; CUB/CCSAO Ex. 2.0 at 8-9 (no consensus on procurement method).

In the AG Exceptions and Brief on Exceptions, the AG pointed out that one of the problems with relying on the Post 2006 Initiative workshops in this proceeding is that parties are put in the untenable position of arguing about *what really happened* at the workshops. The record is plain that: (1) the Commission promised that Post 2006 Initiative discussions would not be used in subsequent

A. No.

Q. Are any of the objectives that rates be reasonable?

A. Not in the objectives that are stated here.

Tr. Sept. 8, 2005 at 871-872.

litigation³; (2) there was no consensus among stakeholders on a procurement method, CUB/CCSAO Ex. 2.0 at 8-9 ; ComEd Ex. 1.2 at 6(Staff Report); and (3) ComEd investigated the auction model before the Post 2006 Initiative workshops and actively promoted it in the workshops. Tr. August 29, 2005 at 156 (Clark). Nevertheless, ComEd continues to argue to the Commission that its auction proposal is the result of the Commission's own process, suggesting that it is not a ComEd and Exelon proposal.

ComEd's stubborn insistence that the Post-2006 Initiative produced a "consensus" in support of the auction is clearly at odds with ComEd's statement that the AG and other consumer representatives "declined to participate in the collaborative efforts to improve this auction." (ComEd BOE at 5) Is this, at long last, an admission that ComEd recognizes that the consumer representatives who did not simply walk away in frustration from the Post-2006 procurement workshops, never joined a consensus in favor of the auction or agreed to try to improve it -- despite being outnumbered and brow-beat by ComEd representatives advocating the auction? If not, the statement ignores the

³ At the inception of the process, the Commission provided that the Post 2006 Initiative discussions could not be used by stakeholders in subsequent litigation before the Commission. The Workshop Preamble states:

In order to facilitate **free and open discussions** the stakeholders wish to assure that **statements made, positions taken, and documents and papers provided by the stakeholders in the Post 2006 Initiative Process will not be used by the stakeholders in any subsequent litigation, including administrative proceedings before the Illinois Commerce Commission**, the Federal Energy Regulatory Commission, and other federal, state, or local government authorities.

<http://www.icc.illinois.gov/ec/docs/040511ecPostPreamble.pdf>

alternative procurement mechanisms discussed in testimony and briefs submitted by the AG that constitute efforts to improve ComEd's proposal. ComEd's complaint demonstrates that ComEd tolerates nothing less than blind devotion to its preferred alternative.

The Commission should reject ComEd's efforts to present its proposal as the result of the Post 2006 Initiative and to marginalize and discredit parties who disagree with its position by arguing that they are outside the Post 2006 Initiative "consensus."⁴ The assertion that the AG and other consumer representatives have failed to cooperate is at best irrelevant and could be interpreted as an improper reference to settlement discussions -- which should be stricken and cannot be lawfully presented to the trier of fact⁵, see Winchester Packaging, Inc. v. Mobil Chemical Co. 13 F.3d 316 (7th Cir. 1994); Commentary to Fed. R. Evid. 408. Moreover, no party is obligated to "improve" a process that is illegal, unnecessary, costly, and designed to benefit the utilities' affiliates rather than consumers.

Even though it is not necessary to offer "alternatives" to the ComEd request to pre-approve a radically new and difference procurement process in this docket, the AG and CUB and the Cook County State's Attorney's Office in fact did offer alternatives to the auction proposal. These alternatives include that

⁴ The Staff Report was explicit in stating that: "The Commission should remain receptive to more than just one procurement plan" and that the "Commission should clarify its authority to implement the use of any given procurement methodology, in general, and a vertical tranche auction, in particular." ComEd Ex. 1.2 at 18.

⁵ The ComEd BOE does not provide any cite to its assertion that some parties declined to collaborate with it. ComEd Ex. at 5. This is not surprising because, as it should be, there is no record evidence about negotiations.

current bundled rates remain in place until and unless a rate increase is justified by increased costs; use of the uniform fuel adjustment clause for purchased power if power costs become erratic; and continuation of utility management and purchase of electricity, which is being done so successfully under the current price cap.

AG witness Dr. Philip Reny went so far as to analyze the auction proposal and recommend that the buyer become more active in the auction to drive prices down for the benefit of consumers. AG Ex. 4.0 (Reny, the industry's asymmetrical cost structure provides opportunities for buyers to reduce prices below a uniform price). AG witness Harvey Salgo, who regularly assists large power users with electricity purchases, discussed the benefits of active portfolio management⁶, as did CUB/CCSAO witness William Stienhurst. See AG Ex. 2.0 and CCSAO Ex. 2.0 and 4.0. The Commission should disregard ComEd's complaints that opponents of its proposals did not work with it "to improve the auction" as self-serving and irrelevant to whether its proposal is a lawful, least cost method to obtain and price electricity.

The Commission should disregard ComEd's attempts to create a (false) impression that FERC has "approved" the proposed auction

ComEd also inappropriately uses the "Summary of Position" section of its brief as a soapbox from which to hurl invective designed to cloud the record and create an impression that FERC has approved the proposed auction. (ComEd

⁶ ComEd did not offer any additional information in response to Mr. Salgo's testimony. It effectively admitted that it did not intend to justify its abandonment of active portfolio management, its use of high risk strategies such as a single annual procurement and full requirements contracts, or its relinquishment of its power as a major buyer to obtain lower prices for consumers.

BOE at 6-8). FERC has done no such thing – and ComEd’s efforts to exaggerate the scope of the findings in a recent FERC Order, to mischaracterize the AG’s position in that FERC docket, and to confuse the lines between federal and state jurisdiction have no place in the instant proceeding. However, since this is only the opening salvo in a campaign that includes a total of 61 references to FERC, the AG here notes only that ComEd’s commentary regarding federal regulation of wholesale rates is wholly inappropriate and completely irrelevant in a state proceeding to review retail rates -- and refers the Commission to our consolidated Reply to ComEd’s other FERC-related arguments, which appears at 19, *infra*.

ComEd’s Offer To Act On Renewables And Other Undefined Consumer Protections Should Be Rejected As Extraneous, Irrelevant, And Designed To Divert Attention From Whether Its Proposal Will Result In Just And Reasonable Rates For Consumers.

Clearly going beyond the record and beyond merits of its proposal, ComEd offers that if its auction proposal is approved, it will be willing “to proceed to implement in pending and new proceedings, additional consumer protections” and “to proceed with two major initiatives that are currently on hold,” i.e. renewable energy and energy efficiency programs. ComEd BOE at 3, 9-11. Not only are these extraneous offers not supported by any testimony or evidence in the record, but they are irrelevant to the questions before the Commission⁷ and

⁷ The questions before the Commission include: Is ComEd's requested procurement plan lawful? Is its plan least cost and designed to produce just and reasonable rates? Does the ComEd proposal capture competitive savings for consumers and advance retail competition?

represent an unprecedented and inappropriate attempt to manipulate the regulatory process.

ComEd has chosen not to support its proposal on the merits or on the record, but to engage in "Let's Make a Deal" regulation, where it promises (1) cooperation in the development of a statewide renewable and energy efficiency plan; (2) an undefined, "phased in" rate increase; and (3) "appropriate support" for consumers "to whom a rate increase creates the greatest financial hardship" if its proposal is accepted. ComEd BOE at 3, 9-11. The Commission should reject ComEd's shocking effort to hold renewable and energy efficiency planning hostage to its auction proposal, and to dangle unspecified and unilateral consumer protections before the Commission to justify a plan that will unfairly and unnecessarily increase rates to more than 3.7 million Illinois electric customers. ComEd's "Summary of Position" contains no evidentiary or legally valid grounds to support its proposal, and should be given no weight`´.

The Commission Should Reject ComEd's Claim That "It Is Time To Proceed" On A Procurement Plan As Contrived And Contrary To The Best Interests Of Consumers.

ComEd argues that "[i]t is time to proceed." ComEd BOE at 11. The AG has demonstrated that in fact it is not necessary to proceed on ComEd's procurement method and that the need to act is contrived by ComEd. The 1997 Amendments do not require a change in procurement strategy from that used during the transition period, nor do they indicate an expectation that rates would automatically increase upon the expiration of the rate freeze. Rather, the law clearly states that the utility will continue to offer a bundled rate and that the

consumer protections contained in the Public Utilities Act continue to apply after the expiration of the mandatory transition period. See 220 ILCS 5/16-101(A); 16-103; 9-201; 9-220. Notwithstanding ComEd's promotion of its procurement plan in the Post 2006 Initiative, even the Staff's Report tempered its support of the ComEd auction by questioning whether there was valid the statutory basis for it. ComEd Ex. 1.2 at 18.

ComEd's management of its electricity supply during the mandatory transition period has demonstrated that it can maintain reasonable prices even though it is purchasing all of its needs from the wholesale market. The Commission may justifiably question ComEd's decision to abruptly end the contracts that have enabled it to maintain the price freeze, realize its allowed rate of return, and provide a generous return to its suppliers in the absence of a demonstration that its costs exceed its revenues. See AG Ex. 3.0.

In this situation, one could believe that ComEd dropped all existing contracts and did not attempt to negotiate new contracts for supply to create a December 31, 2006 deadline to force the Commission's hand. If the termination of existing contracts, and the transfer of generation facilities are not enough, ComEd is ready to bargain state policy on renewable energy and energy efficiency and an unspecified and unilateral residential consumer protection plan to compel the Commission to accept its plan.

The Commission should reject this blatant attempt to avoid assessment of ComEd's costly auction proposal on its merits and reject ComEd's shameless offers to bargain renewable energy policy, energy efficiency planning, and

consumer rate mitigation for approval of the auction. The Commission should disabuse ComEd of its belief that it has put the Commission in a corner where public policy initiatives and consumer protections will not proceed without the demanded auction.

ComEd’s proposed revisions to the prudence review provisions in the Proposed Order should be rejected (ComEd Exception 1)

ComEd’s first exception to the Proposed Order seeks to eliminate or, in the alternative, to eviscerate the finding that “power purchases made pursuant to the auction should be subject to an annual reconciliation proceeding to determine prudence as outlined in Section 9-220.” (PO at 53) In the first instance, ComEd seeks to strike all references to “prudence” on pages 50– 53 of the Proposed Order. (ComEd BOE at 18– 21) Alternatively, ComEd proposes fallback language that seeks to place limits on the prudence review process that are contrary to PUA Section 9-220 and that violate the rights of ComEd’s customers. (ComEd BOE at 21 – 25)

ComEd attempts to justify this first exception by selectively quoting portions of the Proposed Order, without acknowledging that the Proposed Order expressly conditions approval of the auction on implementation of significant safeguards to protect consumers.⁸ (ComEd BOE at 12, citing PO at 53 and 60.) The Proposed Order clearly states: “The Commission concludes that the auction process approved herein *with safeguards adopted* is an appropriate method of procuring electricity.” (Proposed Order at 60, emphasis added.) The prudence

⁸ Although most of the arguments in support of this exception are based on an incomplete and, consequently, incorrect interpretation of the Proposed Order, ComEd also throws in a couple of incongruous references to FERC. (ComEd BOE at 13 – 14,) ComEd’s numerous *non sequiturs* relating to FERC in connection with the first exception are addressed at 19, *infra*.

review process, which ComEd attacks in this exception, is one of the “safeguards adopted” only a few pages (PO at 53) before this conclusion appears in the Proposed Order.

Nonetheless, ComEd’s exegesis of pages 53 and 60 of the Proposed Order omits all mention of “safeguards” and concludes with the illogical, but expedient assertion that:

Having reviewed in detail the [auction] process and determined that it is reasonable, it follows that the commission need do no more to satisfy itself that purchases of supply are prudent purchases made ‘in accordance with the auction process.’

(ComEd BOE at 12.) This interpretation is contrary to the plain words and sound reasoning that appear on pages 53 and 60 of the Proposed Order.

For these reasons and, those discussed in more detail below, ComEd’s first exception and suggested revisions (the first version *and* the fallback alternative) to the Proposed Order must be rejected. The Proposed Order makes clear that there can be no approval of the auction without safeguards – including the prudence review. ComEd’s first exception should be rejected because, *inter alia*, it ignores this fundamental point.

The PUA requires annual prudence reviews of power purchases

ComEd wrongly asserts that the PUA does not require annual prudence reviews of power purchases made through an auction – and compounds this inaccuracy by erroneously suggesting that the Proposed Order “confirms” ComEd’s misstatement of the law:

The Proposed Order confirms that no provision of the Public Utilities Act requires the Commission to conduct annual proceedings to review the prudence of auction purchases

when the Commission has already determined that the auction process is prudent.

(ComEd BOE, at 13)

In fact, the Proposed Order makes clear that PUA Section 9-220 requires the Commission to hold annual public hearings to determine the actual costs of purchased power “to determine whether such purchases were prudent . . .” (PO at 52, citing 220 ILCS 9-220) The Proposed Order also specifically finds that the “[w]hile the instant proceeding and the Commission review during the three-day post-auction window are important tools in terms of prudence, they do not constitute annual public hearings within the meaning of 9-220.” (PO at 52-53) ComEd’s statements to the contrary are, therefore, demonstrably wrong and the Commission should reject ComEd’s proposal to strike all of the findings in the Proposed Order requiring an annual prudence review. (ComEd BOE at 18 – 21)

Since PUA Section 9-220 expressly requires that the Commission hold annual “public hearings” to determine the prudence of power purchases, the Commission must also reject ComEd’s proposed fallback language, seeking to limit participation in prudence reviews by the AG and other customer representatives.⁹ A prudence review that involves Staff but limits participation by the Attorney General and other customer representatives is not a *public* hearing and violates section 6.5 of the Attorney General Act, adopted with the 1997 Amendments, that specifically grants the Attorney General “the power and duty on behalf of the people of the State to intervene in, initiate, enforce, and defend

⁹ ComEd proposes that “. . . the company will be presumed to have acted prudently absent evidence produced *by Staff* . . .” (ComEd BOE, at 23.)

all legal proceedings on matters relating to the provision, marketing, and sale of electric ... service whenever the Attorney General determines that such action is necessary to promote or protect the rights and interests of all Illinois citizens, classes of customers, and users of electric ... services.” 15 ILCS 205.6.5(c). ComEd’s alternative/fallback proposal is, therefore, contrary to the plain language of PUA Section 9-220 mandating public hearings, would violate the Attorney General Act, and should not be adopted by the Commission.

Although the AG disagrees with the substance of ComEd’s suggested revisions to the Proposed Order, there is no disagreement with ComEd on the point that the Proposed Order should be “modified to avoid any confusion about the basis for the Commission’s ruling.” In that regard, ComEd could have and should have provided language to clarify the discussion of Section 9-220 where the Proposed Order states: “Since the instant proceeding was not filed pursuant to Section 9-220 . . .” (PO at 52) ComEd should have pointed out that, the original tariff filing contradicts this statement. Indeed, the “Supplemental Statement” filed in connection with the tariffs states that “ComEd is filing these tariffs pursuant to *Article IX* and Sections 16-108, 16-109A, 16-111 and 16-112 of the [Public Utilities] Act.” *Supplemental Statement, ICC Docket No. 05-0159 (February 25, 2005) at 4, emphasis added.*

In light of ComEd’s clear statement in the record, that the tariff was filed pursuant to Article IX of the PUA (which includes Section 9-220), the Proposed Order should be amended at page 52 as follows:

Since the instant proceeding was not filed pursuant to Article IX of the Public Utilities Act, Section 9-220 and ComEd presently has no fuel

~~adjustment clause in effect~~, there ~~may~~ can be some no question as to whether Section 9-220 is directly applicable to the instant proposal, ~~although as~~ AG, CUB and CCSAO claim it is. ~~What is clear is that t~~The section speaks directly to “changes in the cost of purchased power”, and where applicable, it requires annual hearings to consider the prudence of power purchases being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the supply acquisitions in question are in fact “purchased power.”

~~Although ComEd currently has no fuel adjustment clause in effect~~ All ~~things considered~~, the Commission believes that ~~while~~ the Commission is not precluded from authorizing pass-through of procurement costs without formal reinstatement of a FAC and Section 9-220 provides . . .

(See PO at 52)

Annual prudence reviews are necessary to protect consumers

ComEd proclaims that “[a]nnual *post hoc* prudence proceedings would serve no purpose.” (ComEd BOE, at 15.) The Proposed Order and the PUA Section 9-220 say otherwise. (PO at 52 – 53 and 220 ILCS 9/220) If ComEd wants to change the law, the proper forum in which to raise that issue is the General Assembly – not this proceeding.

Unless or until the PUA is amended, prudence reviews of power purchases will continue to be conducted in order to assess “management planning and decision-making” by utilities. *Business and Prof. People for the Pub. Interest v. Illinois Commerce Comm’n*, 279 Ill.App.3d 824, 831, 665 N.E.2d 553, 558 (1st Dist. 1996). The prudent management standard will continue to apply “not only to the actual purchase amounts but to the reasons for those purchases,” based on what the utility knew or should have known. *United Cities v. Illinois Commerce Commission*, 163 Ill.2d 1, 643 N.E.2d 719, 728 (1994), citing with approval, *Business and Professional People for the Public Interest v.*

Illinois Commerce Commission, 171 Ill. App.3d 948, 525 N.E.2d 1053 (1988)
("1988 BPI case").

Contrary to ComEd's assertions, the instant case, a three-day post-auction review and FERC approval of an affiliate wholesale contract are *not* "adequate" to ensure that consumers pay only those costs that are prudently incurred. (ComEd BOE at 16.) In fact, unless utilities continue to be held accountable through prudence reviews, they will have no incentive to make plans or decisions that minimize risks and costs to consumers. A *post hoc* review to investigate management decisions and to determine whether costs were prudently incurred is necessary to protect the right of the public to "pay no more than the reasonable value of utility services." Citizens Utility Board v. ICC, 276 Ill. App.3d 730, 736-737, 658 N.E.2d 1194, 1200 (1st Dist. 1995).

Annual prudence reviews would reduce, not raise, the cost of supply

ComEd asserts that a prudence review would drive up the cost of supplying electricity. (ComEd BOE at 17) That assertion flies in the face of common sense, basic economic principles and ComEd's own claims about the proposed auction. In the absence of a prudence review, there would be no incentive for ComEd or ComEd's suppliers to minimize cost or price -- because they could assume that ratepayers would cover 100 percent of *whatever* price ComEd and the suppliers charged for electricity. In contrast, a prudence review would provide an appropriate incentive for ComEd and ComEd's suppliers to minimize their costs and prices to increase the likelihood that they will be found prudent and to increase the likelihood of 100 percent recovery. If a declining -

clock uniform-price auction actually ensures that ComEd pays the lowest possible market price for electricity, as ComEd claims (see, e.g., ComEd BOE at 9), then neither ComEd nor suppliers planning to bid should be concerned about a prudence review.

The Commission should reject all of the language stricken and added to the Proposed Order in connection with ComEd's first exception

For the reasons stated above, the Commission should reject all of the language stricken and added to the Proposed Order in connection with ComEd's first exception. (ComEd BOE at 18– 26) Instead, the Commission should revise the Proposed Order to clarify that ComEd *did* file the proposed tariff pursuant to Article IX of the PUA, as discussed above:

Since the instant proceeding was ~~not~~ filed pursuant to Article IX of the Public Utilities Act, Section 9-220 and ComEd ~~presently has no fuel adjustment clause in effect~~, there ~~may~~ can be ~~some~~ no question as to whether Section 9-220 is directly applicable to the instant proposal, ~~although~~ as AG, CUB and CCSAO claim it is. ~~What is clear is that t~~The section speaks directly to “changes in the cost of purchased power”, and where applicable, it requires annual hearings to consider the prudence of power purchases being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the supply acquisitions in question are in fact “purchased power.”

~~Although ComEd currently has no fuel adjustment clause in effect! All things considered,~~ the Commission believes that ~~while~~ the Commission is not precluded from authorizing pass-through of procurement costs without formal reinstatement of a FAC and Section 9-220 provides . . .

(See PO at 52)

The Commission should reject ComEd's suggested revisions to the language in the Proposed Order relating to FERC (ComEd Exception 8)

Throughout this proceeding, including in the Brief on Exceptions submitted on December 19th, ComEd has repeatedly discussed FERC's authority to

regulate wholesale electric rates – without once establishing the relevance of that topic to the instant proceeding. (ComEd BOE at 6 – 8, 13 – 14, and 60 – 61)

This preoccupation with FERC is remarkable – since no party has raised a question about FERC’s wholesale rate authority, since no party has suggested that the ICC take any action that would interfere with FERC’s exercise of its wholesale rate authority, and since the ICC has exclusive jurisdiction to regulate the retail rates that are the subject of this proceeding.

Prior to filing Briefs on Exception, the apparent purpose of this ritual was to insinuate, without any legal basis, that federal authority in some way pre-empts ICC regulation of retail rates (including rates set through an auction) and that FERC must approve the auction. Although disingenuous, this tactic proved so effective that the Proposed Order states that: “The Commission notes that FERC must approve the auction.” (PO at 64) As ComEd now admits, however, this statement is incorrect and should be removed from the Proposed Order. (ComEd BOE at 60)

The People share ComEd’s view that the sentence relating to FERC approval of the auction should be removed from the Proposed Order – and, on page 19 of our Brief on Exceptions, we also proposed striking this language. ComEd’s proposed substitute language is another matter. (ComEd BOE at 61) The People strenuously object to this substitute language.

ComEd has proposed substitute language that is a transparent attempt to replace the (inaccurate) statement that “FERC must approve the auction” with statements crafted to create an impression that FERC has *already* approved the

auction. *Id.* For instance, ComEd asserts that FERC has determined that “. . . terms under which winning auction participants will sell supply to ComEd are just and reasonable even for sales by affiliates, such as Exelon Generation.” *Id.* Similar language, which grossly exaggerates the scope of FERC’s recent ruling approving affiliate contracts and service agreements between Exelon and ComEd, are scattered throughout ComEd’s Brief on Exceptions (See, e.g., ComEd BOE at 13 (“FERC has now established at the wholesale level that the auction will result in ComEd paying rates for supply that are just and reasonable”) and at 14 (“FERC has likewise concluded that the process will result in ComEd paying just and reasonable rates for supply.”))

The FERC Order that ComEd trumpets in these sections of the Brief on Exception does not make any of the grand pronouncements that ComEd claims. Indeed, the scope of the FERC Order is limited to the review of proposed affiliate contracts between ComEd and Exelon. The Order does not purport to address the market-based or regulated rates on which other wholesale suppliers may base their bids in an Illinois auction – if such an auction is held.

In response to the AG’s prediction that ComEd would try to use a FERC Order on affiliate contracts to try to influence the ICC’s review of the auction proposal, FERC states:

As discussed above, the issue before this Commission is whether the IAP satisfies the Commission’s affiliate abuse concerns . . . The appropriate parameters of the IAP itself are matters currently being considered by the Illinois Commission and nothing in this order is intended to foreclose the AG from presenting its arguments to the Illinois Commission in the pending state case on whether the Illinois Commission should approve the Applicants’ proposed IAP.

Commonwealth Edison Company, docket no. ER05-43, 113 FERC ¶ 61,278; 2005 FERC Lexis 3026 (December 16, 2005) at paragraph 42.

Nonetheless, in an apparent attempt to intimidate the ICC with these overblown characterizations of FERC's finding in docket no. ER06– 43, ComEd churlishly warns: "The Commission is not free to ignore this finding." (ComEd BOE at 13) In fact, the ICC is free to ignore this finding because, as FERC itself recognizes, its Order "is not intended to prejudge any issues before the Illinois Commission." *Id. at para. 46.* The Commission has exclusive jurisdiction over the *retail* rates ComEd charges consumers. *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission, 465 A.2d 735, 738 (PA 1983).* FERC's jurisdiction extends "only to those matters that are not subject to regulation by the States." *Id.* FERC's wholesale ratemaking authority and the state's retail ratemaking authority:

. . . do not overlap, and there is nothing in the federal legislation which preempts [a state commission's] authority to determine the reasonableness of a utility company's claimed expenses. In fact . . . the Federal Power Act . . . expressly preserve[s] that important state authority.

Pike County, 465 A2d at 738.

The ICC's authority to review costs incurred by electric utilities, to determine whether they are just, reasonable and prudently incurred, extends to review of the cost of electricity procured under wholesale rates established by FERC. *Id.* According to the Illinois Supreme Court: "States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge."

General Motors Corporation v. Illinois Com.Comm'n, 143 Ill 2d 407, 421-22; 574 NE2d 650, 658 (1991) (summarizing the holding of *Pike County* as construed by the U.S. Supreme Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* (1988), 487 U.S. 354, 108 S.Ct. 2428, 1010 L.Ed.2d 322 and *Nantahala Power & Light Co. v. Thornburg* (1986), 476 U.S. 953, 106 S.Ct. 2349, 90 L.E.2d 943.)

The Illinois Supreme Court explains that the U.S. Supreme Court's discussion of *Pike County* makes clear that:

. . . A State regulatory agency could find that purchase of a particular quantity of power from a particular source was unreasonable if lower cost power was available elsewhere, even if the cost of the purchased power had been approved by FERC, and therefore deemed reasonable. *Mississippi Power*, 487 U.S. at 373, 108 S.Ct. at 2440, 101 L.Ed.2d at 340; *Nantahala*, 476 U.S. at 972, 106 S.Ct. at 2360, 90 L.Ed.2d at 958.

General Motors Corporation v. Illinois Com.Comm'n, 143 Ill 2d at 422; 574 NE2d at 658. Unfortunately, ComEd refuses to acknowledge the ICC's well-established authority and clear duty to assess the reasonableness and prudence of those choices -- before allowing any of costs incurred as result of those choices to be recovered through rates. The *Pike County* doctrine and the Illinois Supreme Court's discussion of *Pike County* in *General Motors* are not mentioned even once in any of ComEd's filings in this docket.

The foregoing discussion of *Pike County* and *General Motors* demonstrates that FERC jurisdiction over wholesale rates do not in any way limit the ICC's jurisdiction over retail rates. Hence, ComEd's attempt to inject language relating to FERC findings into the Proposed Order is wholly in

appropriate. The Commission should reject the paragraph that ComEd proposes on page 61 of its Brief on Exceptions.

REPLY TO ICC STAFF AND MIDWEST GENERATION

The Staff, while accepting the annual prudence review and reconciliations contained in the Proposed Order, would have the Commission incorrectly find that the purchased power rider ComEd proposes in this docket is not governed by Section 9-220. The AG responds that ComEd's request that purchased power rates be collected in a rider falls squarely within Section 9-220, and that the language proposed by Staff should be rejected. Contrary to the Proposed Order, Staff further suggests that contingency purchases should be presumed prudent in the annual reviews. The AG urges the Commission to reject this argument, as well.

The Commission Should Reject Staff's Suggestion That The Purchased Power Rate ComEd Has Requested In This Docket Be Treated As A Section 9-201, Rather Than A Section 9-220 Rate And Amend The Proposed Order To Specifically Treat It As A Section 9-220 Purchased Power Adjustment.

Staff, as well as Midwest Generation, note that the Proposed Order adopted a prudence review that was not advocated by any party. Staff Exc. at 2, Midwest Gen. Exc. at 2. This point, while not particularly significant, ignores the fact that the AG, as well as the other consumer representatives such as the Citizens Utility Board and the Cook County State's Attorney's Office, have insisted throughout this proceeding that it is unlawful and bad policy to pre-approve rates derived from a new, untested procurement method and that a prudence review of ComEd's rates are necessary. See, e.g., CUB/CCSOA Ex.

4.0 at 8.. The Public Utilities Act contains specific procedures for addressing a change in rates, and the Proposed Order properly incorporates those statutory procedures into ComEd's proposal.

Without waiving objections and opposition to the proposed auction, the AG maintains that the Commission should reject Staff's suggestion that the Commission should authorize the auction rates under its general, section 9-201 ratemaking authority. Section 9-220 of the Public Utilities Act was the General Assembly's response to City of Chicago v. Illinois Commerce Commission , 13 Ill. 2d 607 (1958), where the Court allowed a rider for purchased gas costs under Section 9-201, the Commission's general ratemaking authority. Section 9-220 creates specific and definite procedures for reviewing the cost of gas, fuel costs, purchased power and other items that the utility purchases as components of utility service. Those procedures include annual reviews (1) to reconcile the amount collected from consumers with the costs incurred by the utility, and (2) to review the prudence of the costs passed on to consumers. 220 ILCS 5/9-220¹⁰.

By enacting Section 9-220 in response to City of Chicago, the General Assembly directed that purchased power, and other specified expenses, could be recovered either in base rates or separately in a rider, provided that an annual

¹⁰ Section 9-220 of the Public Utilities Act requires the Commission to initiate annual public hearings:

to determine whether the clauses reflect actual costs of fuel, gas, power, or coal transportation purchased to determine whether such purchases were prudent, and to reconcile any amounts collected with the actual costs of fuel, power, gas, or coal transportation prudently purchased. In each such proceeding, the burden of proof shall be upon the utility to establish the prudence of its costs of fuel, power, gas, or coal transportation purchases and costs.

5 ILCS 9-220(a). The Commission has also developed rules to further clarify utilities' obligations and the Commission's authority to review natural gas or fuel costs. 83 Ill. Adm. Code Part 525 (purchased gas); 83 Ill. Adm. Code Part 425 (electric fuel adjustment).

prudence review and reconciliation occur. 220 ILSC 5/9-220(a). It is an elementary principle of statutory construction that when a statute provides specific direction on how an expense should be treated, the Commission must follow the statute, as the specific always supercedes the general. County of Winnebago v. Davis, 156 Ill.App.3rd 535, 539 (2nd Dist. 1987) Notwithstanding ComEd's failure to fashion its request as a Section 9-220 rider, or UFAC, ComEd filed its request under Article IX generally, and the substance of ComEd's rate proposal places it squarely within Section 9-220.

Staff suggests that the Commission should not treat the rate produced by ComEd's proposal as a UFAC, governed by Section 9-220, because ComEd did not file its request under Section 9-220. Staff Exc. at 6. Irrespective of whether ComEd specifically fashioned its request under Section 9-220, it generally filed its tariffs under Article IX. The Proposed Order accurately evaluated the ComEd rate proposals as, in effect, a Section 9-220 rider, and properly imposed the annual reviews specified by the statute. The Commission Order should specify that the ComEd request to recover purchased power costs in a variable rider is, in substance, a UFAC and will be treated as such under Section 9-220.¹¹

The importance of treating ComEd's rate proposal as a purchased power rider is clear from the way ComEd has sought to avoid mandatory, statutory review by casting its proposal as a Section 9-201 rider, similar to the coal tar riders. Section 9-220 requires an annual prudence review -- which ComEd has

¹¹ Section 9-220 provides that a UFAC cannot be reinstated by an electric utility "during the 5 years following the date of the Commission's Order [eliminating the UFAC], but in any event no earlier than January 1, 2007." 220 ILCS 5/9-220(b). The reinstatement authorized in this docket would occur no earlier than January 1, 2007.

expressly sought to avoid. See ComEd BOE at 12-26. Section 9-220 also provides for an annual, docketed reconciliation of revenues and costs -- another consumer protection that ComEd has sought to avoid. See ComEd BOE at 27-36. ComEd may try to avoid the conditions found in Section 9-220 by calling its purchased power rider something else, but the Commission must enforce the law as written, and Section 9-220 governs purchased power riders irrespective of how ComEd has tried to characterize the rate.

Staff argues that ComEd's proposal is "undeniably different and distinguishable" from a Section 9-220 rider, and that therefore it should not be treated as a Section 9-220 rider. Staff BOE at 6. The Commission should reject this argument as an invitation to utilities to violate statutory consumer protections by simply ignoring them and requesting inconsistent regulatory treatment. Although Staff does not oppose a prudence review and reconciliation, by suggesting that the Commission treat ComEd's rate proposal as a Section 9-201 rate, it could negate ComEd's statutory duty under Section 9-220 and weaken the Commission's right to impose a prudence review and reconciliation. Staff's suggestion ignores the substance of ComEd's proposal and misapplies the Public Utilities Act by failing to apply Section 9-220 to a proposal for rider recovery of purchased power costs.

The Commission should reject Staff's exceptions and proposed language. The Proposed Order can be clarified to state that the Commission will apply Section 9-220 to ComEd's purchased power rate, notwithstanding ComEd's failure to formally identify it as a UFAC under that Section. The following

paragraph, found on page 53-54¹², should be amended as follows (in the event that the Commission allows the auction process and the monthly purchased power rate):

All things considered, the Commission believes that while the Commission is not precluded from authorizing a pass-through of procurement costs without formal reinstatement of a FAC, ComEd's proposal in this docket effectively adopts a purchased power adjustment rate, and Section 9-220 provides specific appropriate guidance with respect to the procedures that should be followed for reviewing the pass-through of purchased power costs, including purchases made pursuant to the auction. While the instant proceeding and the Commission review during the three-day post-auction window are important tools in terms of prudence, they do not constitute annual public hearings within the meaning of 9-220. Furthermore, while the purported lack of “discretionary conduct” by ComEd in making the auction-driven purchases may be relevant in the evaluation of the auction proposal and in the review of auction purchases, there is no language in Section 9-220 exempting “no discretion” purchases from the annual reconciliation process.

Contrary to the positions of Staff and ComEd, Contingency Purchases Should Be Expressly Subject To The Annual Prudence Review And Reconciliation, But The Presumption of Prudence Should Not Apply.

ComEd argues, as an adjunct to its prudence exception 1, that contingency purchases should only be subject to prudence review if “discretionary action by ComEd is involved.” ComEd. BOE at 25 (proposed language). The Staff does not oppose the Proposed Order's decision to conduct annual prudence reviews, that include contingency purchases. Staff Exc. at 15. However, Staff erroneously argues that the presumption of prudence that the Proposed Order would apply to the auction results should also apply to contingency purchases. Id. Although the AG does not agree that the Commission should approve the auction, or that a presumption of prudence is

¹² Changes to page 52 are proposed above to specify that ComEd filed its tariffs under Article IX.

appropriate, even if the Commission allows a presumption of prudence for auction purchases, contingency purchases should not be included in the presumption.

Contingency purchases are those that are made outside the auction. Under ComEd's plan, various circumstances can give rise to the need to purchase supply outside the auction, such as supplier default, insufficient supplier participation, or Commission rejection of results. See Proposed Order at 129-135. ComEd wants approval to take certain steps in response to these contingencies, but contingent purchases will of necessity involve non-auction, atypical purchases that will require the company to exercise judgment on behalf of consumers. Although ComEd's contingency purchases plan would have it purchase additional or replacement supply from PJM administered markets, ComEd's contingency purchasing decisions should be flexible and take full advantage of the opportunities presented in the wholesale market. Consumers are entitled to regulatory review of those purchases both to give ComEd the incentive to minimize its costs and to protect consumers from unanticipated events or actions.

The additional language proposed by Staff at pages 16-17 of its Exceptions should be rejected, and the following changes should be made to pages 55, 128, 129 and 144.

Page 55, 5. Prudency of Contingency Purchases, should be amended as follows:

5. Prudency of Contingency Purchases

As discussed elsewhere, ComEd may make “contingency” purchases as a result of a supplier’s default or for other reasons. Generally speaking, ComEd and Staff agree that no post-auction prudence review is necessary in situations that ComEd and Staff believe will not involve “discretionary action” by ComEd.

The AG disagrees, arguing, among things, that the situations in question, such as purchases from PJM-administered markets, are not free of judgment and discretion by ComEd. AG also contends that an annual review of contingency purchases is required by Section 9-220 of the Act.

As indicated above, Section 9-220, where applicable, requires annual hearings to consider the prudence of power purchases if those costs are being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the contingency acquisitions in question are “purchased power.” The Commission believes Section 9-220 provides ~~appropriate guidance with respect to~~ the procedures that should be followed for reviewing the pass-through of contingency power purchases. In the Commission’s opinion, if ComEd wants authorization in this docket to pass through, to ratepayers, the costs of contingency purchases, such purchases should be subject to annual prudence reviews as part of the annual reconciliation proceeding. These purchases, if necessary, would be made outside the auction, and therefore are not entitled to the presumption of prudence applicable to auction purchases.

The language on pages 128 and 129 should also be amended so that it is clear that electricity obtained under the contingencies are to be evaluated on their merits, and not be included in the presumption.

On page 128, paragraph 1.c., should be amended as follows:

[1.]c. Commission Conclusion

The evidence shows that the proposed volume reduction contingency and the plan to purchase any shortfall from the volume reduction at spot is reasonable and necessary. Accordingly, the Commission approves this contingency, with the clarification that in the event the Commission rejects the results of an auction, all of the tranches originally to be procured through the rejected auction will be handled pursuant to the rejection contingency provisions. However, the Commission does not want to preclude ComEd from using its best efforts to obtain low cost electricity for consumers in the event of volume reductions or other contingencies, and will review the rates for electricity

purchased outside the auction in the annual review under Section 9-220. No presumption of prudence will apply to these purchases.

On page 128, paragraph 2.c., should be amended as follows:

[2.]c. Commission Conclusion

The evidence shows that this contingency, including its three plans, is reasonable and necessary. The Commission therefore approves it. However, the Commission does not want to preclude ComEd from using its best efforts to obtain low cost electricity for consumers in the event of supplier default or other contingencies, and will review the rates for electricity purchased outside the auction in the annual review under Section 9-220. No presumption of prudence will apply to these purchases.

On page 129, paragraph 3.c., should be amended as follows:

[3.]c. Commission Conclusion

The record shows that this multi-pronged proposal is reasonable and necessary. Accordingly, the Commission approves it. ~~Parties positions on the disputed issue of post-transaction prudency reviews of contingency purchases are addressed elsewhere in this order.~~ However, the Commission does not want to preclude ComEd from using its best efforts to obtain low cost electricity for consumers in the event of ICC rejection of the auction or other contingencies, and will review the rates for electricity purchased outside the auction in the annual review under Section 9-220. No presumption of prudence will apply to these purchases. This is consistent with the Commission's discussion of the parties' positions on the disputed issue of post-transaction prudency reviews of contingency purchases that are addressed elsewhere in this order.

Language on page 144, the conclusion to Section L. Regulatory Oversight and Review, also relates to the prudence review. The conclusion on that page appears to include resolution of the Nature and Timing of Prudency Review, including Contingent Purchases at pages 129-136 and Accounting Reconciliation issue discussed on pages 136-139. In addition to slightly changing the discussion of the AG's position on page 139, the conclusion on

page 144 should be amended to more clearly state that the annual review discussed at pages 50-53 applies to Staff's annual accounting reconciliation.

On page 139, change the last sentence of the second paragraph of "c. AG's Position" to say: "If ComEd's proposed auction process is allowed, the annual amounts collected from ratepayers must be ~~are~~ accurately accounted for."

On page 144, paragraph 3.i., the first paragraph should be modified as follows:

i. Commission Conclusion

Previously, in Section III.E., the Commission stated its conclusions regarding prudency reviews. The parties' positions as summarized here were considered in reaching those conclusions. As discussed on pages 50-53 above, the Commission agrees with the parties who maintain that an annual prudence review is necessary to protect consumer interests. This is particularly true when a utility passes-through costs to consumers and so lacks any incentive to keep costs low absent review. Further, the accounting reconciliation that Staff raised will occur in the course of the annual prudence review discussed on pages 50-53 above. This will provide the Staff and other parties' the opportunity to insure that there are no discrepancies between the amount ComEd charges ratepayers and the amount it pays suppliers.

As explained above, and in regard to the three day review of the auction itself, Constellation Energy Commodities Group urges the Commission to clarify the scope of the post-auction review so that it focuses on ensuring that the Commission's approved auction process is followed and that no "anomalies were found in the bids or process that would call into question the competitiveness of the bids received." That way, CCG reasons, the potential bidders would have confidence that the auction will result in executed SFCs.

ComEd’s Proposal To Create A Special And Limited Reconciliation Review Should Be Rejected And The Commission Should Affirm The Proposed Order’s Adoption Of Statutory, Annual Reconciliation Proceedings.

In its Exception 2, ComEd argues that the reconciliation of revenues and expenses approved in the Proposed Order is “unnecessary and would be unduly burdensome for ComEd, Staff, the Commission and interested parties.” ComEd BOE at 27. Essentially, ComEd complains that the reconciliation proceedings would cover all of the variable charges that ComEd wants to recover through the proposed riders, while ComEd would exempt certain charges such as the Supply Charges and the AAF¹³ charges/credits, ComEd BOE at 28, and transmission service charges (TS-CPP), *id.* at 34.

ComEd has made full recovery of all costs a key component of its tariffs. As a result, ComEd proposes monthly adjustments to ensure full recovery of its costs. Consumers, however, have the right to ensure that they do not pay ComEd more than ComEd has incurred in costs. An annual reconciliation is a well established procedure to ensure that costs and revenues match, and is required for purchased power riders under Section 9-220(a). The Commission cannot forego reconciliations and accept ComEd’s invitation to “trust me.” All variable rates associated with purchased power costs must be subject to annual reconciliation proceedings under Section 9-220.

ComEd suggests that it is unnecessary and burdensome to reconcile costs and revenues in the annual proceeding prescribed by Section 9-220(a). In

¹³ The AAF is the accuracy assurance factor, that would increase or decrease consumer rates to exactly match revenues and costs, and would apply when the translation mechanism ComEd has proposed does not result in perfect recovery of costs.

its place ComEd would create a parallel process for ComEd reconciliation, consisting of various reports, audits and informal meetings. ComEd BOE at 29-31. Although there is some overlap between the ComEd proposals and a statutory reconciliation proceeding, ComEd's proposals contain less stringent reporting (e.g., audits have no certification requirement) and would avoid docketed proceedings, with the discovery and other procedural protections attendant to a docketed case, unless the Staff requests a hearing within six months.

Further, ComEd's proposal would unfairly and improperly exclude other parties such as the AG from the reconciliation review. This would violate the Attorney General Act which specifically authorizes the Attorney General to participate in all legal proceedings related to the provision and sale of electric service. 15 ILCS 205/6.5. ComEd's special treatment would also put additional pressure on Staff to follow procedures unique to ComEd. ComEd's Exception 2 should be rejected.

ComEd's opposition to standard reconciliation is consistent with its efforts to to eliminate all regulatory oversight and shift risk to either consumers or suppliers. The Commission should reject ComEd's Exception 2, and conduct the annual reconciliation review as the law provides, rather than as tailored by ComEd. Following standard, statutory procedures for review and reconciliation of variable costs will provide predictability to consumers, to Staff, to the Commission and to the Company.

CONCLUSION

WHEREFORE, the People of the State of Illinois respectfully request that the Commission accept the arguments set forth herein opposing various exceptions proposed by ComEd, Staff and Midwest Gen, and instead adopt the exceptions to the Proposed Order filed with this Reply and in the People's Exceptions and Brief on Exceptions.

Respectfully submitted,

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