STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
	)	**Docket No. 05-0597**
Proposed general increase in rates for	)	
delivery service	)	

REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

_____

SEAN R. BRADY
JOHN C. FEELEY
CARMEN L. FOSCO
CARLA SCARSELLA
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
sbrady@icc.illinois.gov
jfeeley@icc.illinois.gov
cfosco@icc.illinois.gov
cscarsel@icc.illinois.gov

Counsel for the Staff of the
Illinois Commerce Commission

June 26, 2006

Table of Contents

Page

I. ARGUMENT ON CONTESTED ISSUES 2
A. RATE BASE 2
1. Procurement Case Expenses [Rate Base Effect]; Rate Case Expenses [Rate Base Effect] 2
B. OPERATING EXPENSES AND REVENUES 2
1. Administrative & General Expenses 2
a. Corporate Governance Expenses 2
2. Incentive Compensation 3
3. Uncollectibles Expenses 7
4. Charitable Contributions 8
C. RATE OF RETURN 8
1. Capital Structure 8
a. The Proposed Order's Rejection of ComEd's Proposed Capital Structure Was Proper 8
b. ComEd's Alternative Language Should Not Be Accepted 22
2. Cost of Common Equity 23
D. COST OF SERVICE ISSUES 27
1. Minimum Distribution System 27
E. RATE DESIGN 29
1. Rider ECR 29
2. Real Time Pricing Meters and Energy Smart Pricing Plan 31
II. CUSTOMER CHOICE AND RETAIL SUPPLIER ISSUES 32
A. Utility Consolidated Billing with Purchase of Receivables 32
III. STAFF REPORTS ON COMED'S PERFORMANCE 35
IV. CONCLUSION 37

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
	)	**Docket No. 05-0597**
Proposed general increase in rates for delivery service	)	
	)	

REPLY BRIEF ON EXCEPTIONS OF THE

STAFF OF THE ILLINOIS COMMERCE COMMISSION

Now comes the Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned attorneys, and pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Adm. Code Section 200.830, respectfully submits this Reply Brief on Exceptions to the briefs on exceptions filed by Commonwealth Edison Company ("ComEd BOE"), the People of the State of Illinois ("AG BOE"), the Illinois Industrial Energy Consumers ("IIEC BOE"), the Building Owners and Managers Association of Chicago ("BOMA BOE"), the City of Chicago and the Cook County States Attorney's Office ("CITY BOE"), the Citizens Utility Board, the Cook County States Attorney's Office and City of Chicago ("CCC BOE"), and the Coalition of Energy Suppliers ("CES BOE") in response to the Administrative Law Judges' Proposed Order ("Proposed Order" or "PO") issued June 8, 2006.

I. ARGUMENT ON CONTESTED ISSUES

A. RATE BASE

1. Procurement Case Expenses [Rate Base Effect]; Rate Case Expenses [Rate Base Effect]

ComEd's BOE inappropriately cites to the summary section of ComEd's position as justification that the PO intended to reject Staff's $626,000 rate case expense adjustment for estimated amounts not substantiated by ComEd. (ComEd BOE, p. 9) There is no basis in *the Proposed Order's* Commission Analysis and Conclusion section for this conclusion. Staff's BOE correctly outlines the necessary corrections needed to the PO to make the section "Procurement Case Expenses [Rate Base Effect]; Rate Case Expense [Rate Base Effect]" more clear, and Staff stands by its proposed language. (Staff BOE, pp. 28-33)

B. OPERATING EXPENSES AND REVENUES

1. Administrative & General Expenses

a. Corporate Governance Expenses

ComEd's BOE presents no new argument for its position on Corporate Governance Expense. (ComEd BOE, p. 13) Rather, it has merely repeated the same arguments which the PO properly dismissed at page 73 wherein the PO states, "In reviewing the arguments above, the Commission agrees with Staff in making this adjustment based on actual costs." Staff's full response, then, to the arguments in ComEd's BOE can be found in Staff's Initial Brief at pages 48-51. ComEd specifically, though, criticizes Staff's reasonableness analysis and its relationship to the calculation of its Corporate Governance Expense adjustment. (ComEd BOE, p. 13) This criticism

is not new and it has been considered by the PO, and, therefore, there is no need to change the PO as originally written.

2. Incentive Compensation

The PO correctly finds that the Company's incentive compensation costs should not be recovered in base rates. The Commission has spoken for itself regarding the kind of evidence it needs to see when deciding what portion, if any, of incentive compensation costs should be recovered consistently in recent rate cases. In its BOE, the Company continues to resurrect its previously asserted arguments for recovery of its incentive compensation costs in base rates. However, the record is clear that ComEd has not satisfied the Commission's test for recovery of incentive compensation costs. Furthermore, ComEd has provided nothing that would cause Staff to recommend the Commission hold ComEd to a lower standard in this case. (ICC Staff Exhibit 13.0, pp. 12-17) When asked to provide the quantification of those reductions which lowered the amount of the requested rate increase, Company witness Hill was unable to do so (Tr., pp. 829 – 830).

The Company claims that the PO is "[d]riving ComEd to eliminate these types of incentive plan goals". (ComEd BOE, p. 5) What Staff noted, and the PO reinforced, is that the determining factor for the recovery of incentive compensation is not related to whether a plan should be offered but rather to who should bear the cost of that plan. (ICC Staff Exhibit 2.0, pp. 17-18) The Company's attempt to discredit Staff's position fails because ComEd continued to pay its incentive compensation even though the Commission's Order in ComEd's last delivery services rate case disallowed $24.5

million of incentive compensation expense. (ICC Staff Cross Exhibit 10; ICC Docket 01-0423, Order dated March 28, 2002, pp. 121-122)

ComEd claims that the record establishes that performance has improved and that incentive compensation is a factor in achieving that improved performance. (ComEd BOE, p. 22) The Company then itemizes a number of other factors which could be the reason for the improvements in performance: weather, use of new technologies, better managers, more focused and efficient worker effort. (ComEd BOE pp. 30 – 31) This acknowledgement by the Company that improvements in performance have not been traced to the goals of the incentive compensation plan only further supports the PO's conclusion disallowing incentive compensation costs.

The Company claims that Ms. Ebrey testified that the O&M measure is a financial goal and only cited a 12 year old Commission Order supporting her position. (ComEd BOE, p. 20) In addition, ComEd claims that at least 50% of the total amount of incentive compensation expense is based on meeting operational goals. (ComEd BOE, p. 17) However, the Company's own plan summary states that the **only** operational key performance indicators are CAIDI and SAIFI and they only account for 25% of the total possible incentive compensation. Furthermore, the Company's own documentation specifically refers to the O&M Costs measure as a financial goal. (ICC Staff Cross Exhibit 4) While ComEd continues to cite its most recent delivery services rate case (ComEd BOE, p. 25), Staff notes that each case should be judged on its own merits; the evidence in this case, specifically the Company's plan summary (ICC Staff Cross Exhibit 4), was not part of the evidence evaluated in ComEd's most recent delivery service rate case (Staff RB, p. 39).

The Company also continues to complain that disallowing incentive compensation costs leaves ComEd with rates that hinder it from attracting and retaining qualified employees (ComEd BOE, p. 5). However, when asked about why employees have left ComEd, Company witness Mitchell stated that he had no way to know why any individual employee left employment (Tr., p. 2439) nor was he aware of the basis for a potential employee turning down a job offer (Tr., p. 2440). The Company's witness did not have the knowledge needed to support the assertion the Company made. There simply is no record evidence to support the Company's assertion.

In its attempt to recover its entire incentive compensation costs, the Company avoids the distinction between the two plans it offers in its BOE. (ComEd BOE, p. 17, footnote) The Company's arguments presented in its BOE all address the Company's annual incentive compensation plan ("AIP"). In reality, the Company offers a second plan, the Long Term Incentive Plan ("LTIP"). The very language from the LTIP plan document quoted in Staff's direct testimony (ICC Staff Exhibit 13.0, pp. 13-14, lines 250 – 269) specifically states that the plan benefits shareholders. Staff's adjustment clearly shows the expense portions of the AIP and LTIP as well as the capitalized portions of both plans. (ICC Staff Exhibit 13.0, Schedule 13.2)

ComEd references the testimony of two of its witness, Mr. Meischeid, and Mr. Costello, as support for the recovery of its total incentive compensation expense. (ComEd BOE, pp. 32-33) The testimony cited is all of a general nature regarding incentive compensation plans and offers nothing specific regarding the actual savings resulting from the Company's current plans. Thus, this testimony should be given little weight in the conclusion reached on the specific evidence in this case.

Since the PO's conclusion correctly disallows incentive compensation from recovery in base rates, the Company's exceptions should be disregarded.

Finally, while ComEd tries to gather reversible error rain clouds over the Proposed Order, actually, the PO's forecast is *much* clearer. In its BOE, ComEd argues that the PO's request for documentation substantiating the costs savings or other tangible benefits to ratepayers commits reversible error because it ignores ComEd's sworn testimony. (ComEd BOE, p. 27) In support of its argument, the Company cites *Commonwealth Edison Company, v. Illinois Commerce Commission* (322 Ill. App. 3d 846 (2001). In *Commonwealth Edsion Company*, the Court held as follows:

> A fair reading of the Commission's order clearly reveals that the Commission treated sworn testimony as legally incompetent evidence under DST.160. Indeed, the order contains no indication that the Commission weighed or in any way considered the substance of ComEd's sworn testimony. On the contrary, [*852] the Commission simply rejected that testimony outright because it was not in the nature of "actual expenditures, written contracts, purchase orders, job orders, invoices or other similar evidence of reasonable certainty." This was error.

(*Id.*, p. 851) This is simply not true of the PO in this proceeding for several reasons.

First, while ComEd may like to look at the record and only see its own sworn testimony, the record actually contains the sworn testimony of Staff witness Ebrey (ICC Staff Exhibit 2.0; ICC Staff Exhibit 13.0) and AG witness Effron (AG Exhibit 1.0) relating to incentive compensation costs. Therefore, ComEd's sworn testimony is **not** the only evidence in the record. Second, Staff witness Ebrey refutes point by point the deficiencies in the ComEd witnesses' claims relating incentive compensation costs. (ICC Staff Exhibit 2.0, pp. 14-24; ICC Staff Exhibit 13.0, pp. 12-21)) Contrary to ComEd's suggestion, neither Ms. Ebrey nor the PO simply disregarded ComEd's sworn

testimony because it was sworn testimony. Such an allegation does a disservice to Staff and its thorough and thoughtful analysis of ComEd's filing in this proceeding.

Third, it is obvious from the PO's language that ComEd's sworn testimony was considered *along with* the sworn testimony of all witnesses in this proceeding and was found to be deficient. The PO's conclusion states as follows:

> The Commission finds that, while the Company has argued that there are many benefits to the incentive compensation program in place at ComEd, it has failed to provide any documentation substantiating the cost savings or other tangible benefits to ratepayers. It appears to the Commission from the information provided by the Company that shareholders, not ratepayers, are the real beneficiaries of ComEd's incentive compensation program. Therefore, the Commission agrees with Staff and the AG that the incentive compensation expense as proposed by ComEd should not be included in the revenue requirements.

(PO, pp. 92-93) It is clear that **all** the sworn testimony in the record was weighed and the Commission found that "the information provided by the Company [indicates] that shareholders, not ratepayers, are the real beneficiaries of ComEd's incentive compensation program". Therefore, no reversal error has been committed.

3. Uncollectibles Expenses

The PO correctly approves Staff's proposed uncollectibles rate of .72% for this proceeding. While the Company complains that Staff's proposal for uncollectibles expense and the related uncollectibles percentage is 1) less accurate, 2) based on total revenues rather than jurisdictional figures, and 3) allegedly does not consider the Company's improved policies and practices for managing uncollectibles expense (ComEd BOE pp. 33-34), the .72% uncollectibles percentage, which is the basis for Staff's proposed uncollectibles expense, is the same as the Company's overall uncollectibles as a percentage of base rate revenue. (ICC Staff Exhibit 13.0,

Attachment A, page 2 of 2) This fact is unrebutted. Staff's five-year average and the Company's direct assignment of uncollectibles expense yields the same overall uncollectibles percentage. Therefore, the PO correctly accepts Staff's adjustment with respect to uncollectibles expense.

4. Charitable Contributions

ComEd's BOE presents no new argument for its position on Charitable Contributions. (ComEd BOE, p. 34) Rather, it has merely repeated the same mantra that its Illinois Manufacturers' Association contribution was charitable in nature rather than lobbying. ComEd quotes Section 9-227 of the Public Utilities Act ("the Act") which allows for rate recovery of reasonable charitable contributions. (ComEd BOE, p. 35) Notably, though, ComEd is silent concerning Section 9-224 of the Act, the basis for Staff's position and the PO's proper conclusion. The PO has already considered ComEd's claims, weighed the evidence, and found in favor of Staff. (PO, p. 97) Staff's full response, to the arguments in ComEd's BOE can be found in Staff's Initial Brief at pages 57-58. There is nothing in ComEd's BOE not previously considered by the ALJs in this case, and no need to change the PO as originally written.

C. RATE OF RETURN

1. Capital Structure

a. The Proposed Order's Rejection of ComEd's Proposed Capital Structure Was Proper

ComEd contends that the Proposed Order should be revised to approve its proposed capital structure. (*See* ComEd BOE, pp. 36-44) To the contrary, the Commission's final order should continue to reflect the rejection of ComEd's proposed capital structure as set forth in the Proposed Order. The Proposed Order's conclusions

in this regard are both factually and legally correct, and ComEd's assertions to the contrary lack merit.

ComEd begins by noting that the Proposed Order concludes that the Company's proposed capital structure violates Section 9-230 of the Public Utilities Act ("Act"), 220 ILCS 5/9-230. (*Id*., 36) ComEd also asserts that "the Proposed Order does not conclude that ComEd's [proposed[1]] 54.2% common equity ratio is unreasonable or would produce rates that are unjust or unreasonable." (*Id*.) While it is true that the Proposed Order concludes that ComEd's proposed capital structure violates Section 9-230, ComEd is completely wrong to suggest (i) that this violation of the Act is the only basis for the Proposed Order's ruling and (ii) that the Proposed Order did not find ComEd's proposed capital structure is unreasonable or would produce unjust or unreasonable rates. To the contrary, the Proposed Order finds that ComEd's 54.2% common equity ratio would produce unjust and unreasonable rates, and explains that the basis for that finding is that ComEd's proposed 54.2% common equity ratio includes an amount equivalent to the add back of plants that the Company no longer owns:

> The foregoing determination is confined to the unjustness and unreasonableness of ComEd's proposal to recover a return on billions of dollars of plant it does not own through a mechanism that the Company admits it did not have to use. It also reflects the Commission's concurrence with Staff that the "actual" capital structure proposed by ComEd in this case is distorted relative to original cost rate base.

(PO, p. 129)

[1] ComEd's BOE also characterizes the Company's proposed capital structure as its "actual" capital structure. As explained in Staff's prior briefs, all of the capital structures proposed in this proceeding – including ComEd's – are adjusted capital structures. (*See* Staff RB, pp. 45-47) ComEd's portrayal of its proposed capital structure as "actual" and Staff's and Intervenors' proposed capital structure as artificial (See ComEd BOE, pp. 3-4) grossly mischaracterizes the proposals of the parties in an attempt to artificially undermine this aspect of the Proposed Order.

In addition, ComEd's assertion that its proposed 54.2% common equity ratio falls within the S&P equity ratio guidelines for A-rated electric utilities with ComEd's business profile score similarly suffers from significant omissions. (ComEd BOE, p. 37) ComEd ignores and fails to mention that Staff presented testimony showing that ComEd's proposed capital structure would produce other more relevant ratios consistent with an AA credit rating. As explained in Staff's Reply Brief:

> . . . Staff has shown that the capital structure proposed by the Company leads to an excessively expensive degree of financial strength. ComEd itself has continued to claim that it targets an "A-" credit rating. Therefore, ComEd's proposed capital structure is contrary to its target.

(Staff RB, p. 67) Table 1 below is based on Staff's testimony and presents the coverage ratios resulting from ComEd's and Staff's proposed capital structures and capital costs:

Table 1

	AA	A	BBB
Financial Guideline Ratios			
FFOIC	4.2-5X	3.5-4.2X	2.5-3.5X
FFO/Debt	28-35%	20-28%	12-20%
Staff Proposal			
FFOIC		3.78X	
FFO/Debt			18.04%
ComEd Proposal			
FFOIC	5.42X		
FFO/Debt	28.62%		

(Staff IB, pp. 71-72; PO, pp. 119-120) Table 1 illustrates that ComEd's proposed capital structure results in ratios that are commensurate with an "AA" credit rating, instead of the "A-" credit rating ComEd purports to target. (ICC Staff Ex. 15.0 2nd Corrected, pp. 2-3, ComEd Ex. 20.0, p. 6) This evidence provides an ample basis for finding that

ComEd's proposed capital structure is not reasonable, independent of the other problems explained in the Proposed Order.

Continuing with assertions that are inaccurate or misleading by virtue of their omissions, ComEd asserts that "[t]he Proposed Order also ignores that the sample of electric utilities that even Staff concluded is most like ComEd has average current and forward-looking equity ratios of between 49% and 52%." (ComEd BOE, p. 37) That statement is both factually incorrect and misleading. To begin with, as explained in more detail in Section I. C. 2. below (last paragraph), the average equity ratio for Staff's sample is 48.8% even when short-term debt is excluded; thus, it is not between 49% and 52%.[2] Moreover, the equity ratio falls to 45.19% when short-term debt is properly included, as required for a true apples-to-apples comparison to ComEd in this proceeding. (See discussion in Section I. C. 2. below, last paragraph) In short, the so-called evidence that ComEd claims the Proposed Order ignored does not support ComEd's assertions when viewed in the proper context.

ComEd continues by boldly asserting that "the Proposed Order is contrary to the **undisputed record evidence** demonstrating that ComEd's actual capital structure with a common equity ratio of 54.2% is reasonable." (ComEd BOE, p. 37 (emphasis added)) ComEd then reviews the Proposed Order's rejection of Staff's proposed capital structure and asserts that "[t]he absence of a similar finding or evidence on which ComEd's actual 54.2% common equity ratio could be rejected makes the Proposed Order's failure to adopt ComEd's actual capital structure depend entirely on (a) the

[2] The 52% upper end the Company cites is based on a projection by Value Line (ComEd Exhibit 21.2), which is speculative and, thus, should not be used for rate setting purposes.

supposed application of Section 9-230 and (b) the Proposed Order's related contention that ComEd seeks to recover the costs of an unregulated generating affiliate." (*Id*., pp. 37-38) The foregoing synopsis of the testimony and arguments presented by Staff regarding the unreasonableness of ComEd's proposed capital structure clearly demonstrates that the reasonableness of ComEd's proposed capital structure was highly disputed through testimony and briefs, and that the record is full of evidence supporting the rejection of ComEd's capital structure as unreasonable. Thus, ComEd's preliminary assertions are completely lacking in merit, and its exceptions to the Proposed Order in this regard must be rejected.

Having inaccurately described the record and the Proposed Order, ComEd proceeds to attack the Proposed Order's reliance on Section 9-230 by claiming it is inapplicable as a matter of law. (ComEd BOE, p. 38) ComEd claims that the capital structure approved in its last rate case (ICC Docket No. 01-0423) included the common equity balance at issue here without applying Section 9-230. (*Id*.) ComEd argues that "[t]he Commission made no analysis of Section 9-230 in ICC Docket 01-0423 and was prohibited from making such an adjustment because Section 16-111(g) specifically makes Section 9-230 inapplicable, providing that the authorizations in the reorganization provision of the 1997 Law are effective 'notwithstanding any other provision of this Act….' 220 ILCS 5/16-111(g)." (ComEd BOE, p. 38 (ellipsis in original)) This argument is completely off the mark and totally lacking in merit.

First, Section 16-111(g) make no mention whatsoever of Section 9-230. Second, Section 16-111(g) authorizes certain transfers to be made subject to limited Commission review, but says nothing about the ratemaking impacts of those transfers.

Finally, but most importantly, Section 16-111(g) is a statute that authorizes electric utilities to engage in certain transactions "without obtaining any approval of the Commission other than that provided for in [that] subsection", and the "notwithstanding any other provision of this Act" clause in Section 16-111(g) is specifically and literally limited to other provisions "that would require such approval":

> (g) During the mandatory transition period, an electric utility may, without obtaining any approval of the Commission other than that provided for in this subsection and **notwithstanding any other provision of this Act or any rule or regulation of the Commission that would require such approval**:
>
> * * *
>
> (3) sell, assign, lease or otherwise transfer assets to an affiliated or unaffiliated entity and as part of such transaction enter into service agreements, power purchase agreements, or other agreements with the transferee; provided, however, that the prices, terms and conditions of any power purchase agreement must be approved or allowed into effect by the Federal Energy Regulatory Commission; or
>
> * * *

(220 ILCS 5/16-111(g)(3) (emphasis added)) Section 9-230 is not a provision of the Act or a rule or regulation of the Commission that would require approval of the transactions set forth in Section 16-111(g). Thus, the "notwithstanding any other provision" clause of Section 16-111(g) is inapplicable and there is no conflict between Section 16-111(g) and Section 9-230. Moreover, neither Section 16-111(g) nor proceedings conducted under Section 16-111(g) compel any particular ratemaking result, as such issues are simply beyond their scope.

While ComEd's argument has been expanded some from its initial invocation to make note of the "notwithstanding any other provision of this Act" language in Section 16-111(g), the legal arguments set forth in Staff's Reply Brief continue to be applicable,

provide additional reasons to reject ComEd's argument, and will be repeated here for the convenience of the Commission:

> . . . ComEd's legal argument again lacks merit as there is no basis to claim that the Commission has ever approved a specific ratemaking treatment for the common equity effect of the entries made to record the transfer. First, Section 16-111 nowhere provides for such a ruling compelling a specific ratemaking effect, and such a ratemaking ruling could not be made other than in accordance with the ratemaking provisions of Articles IV and XVI of the PUA (which ComEd does not claim occurred in the transfer proceeding) Second, the Commission's authority to review such transfers is more narrow than ComEd's argument presumes. The Commission's authority to prohibit a proposed transfer is limited to its ability to find "(1) that the proposed transaction will render the electric utility unable to provide its tariffed services in a safe and reliable manner, or (2) that there is a strong likelihood that consummation of the proposed transaction will result in the electric utility being entitled to request an increase in its base rates during the mandatory transition period pursuant to subsection (d) of this Section." (220 ILCS 5/16-111(g)(vi)) Neither of these bases allow the Commission to reject a proposed transfer due to the potential post-transition period ratemaking effect of the proposed transaction, and as a result the issue ComEd contends was decided was simply beyond the scope of that proceeding. Finally, while the entries to be made to implement the transaction were reviewed, that review was only to confirm that such entries were "in accord with generally accepted accounting principles [("GAAP)]" (220 ILCS 5/16-111(g)(i)), not to determine the reasonableness of those entries on ComEd's capital structure for ratemaking purposes. Compliance with GAAP is not determinative of the ratemaking treatment of those entries.
>
> In addition, it is well established under Illinois case law that *res judicata* does not apply to Commission orders and that *collateral estoppel* cannot apply if the issues presented are not identical. In *Metro Util. Co. v. Illinois Commerce Comm'n*, 262 Ill. App. 3d 266, 270 (2nd Dist. 1994) the utility claimed that the Commission's determination in a proceeding to impose penalties for failure to obtain approval of an affiliate contract precluded it from subsequently making a determination of the ratemaking effect regarding the costs resulting from that same contract. The Court rejected the utility's argument, and held that the Commission was not precluded from making its subsequent ratemaking determination:
>
>> On appeal, the Commission contends that *collateral estoppel* does not apply to the ratemaking orders because the law is well settled that a Commission order, such as that in Docket No. 90-0026, has no res judicata effect. We agree.

> The Commission is not a judicial body, and its orders are not *res judicata* in later proceedings before it. (*Mississippi River Fuel Corp. v. Illinois Commerce Comm'n* (1953), 1 Ill. 2d 509, 513, 116 N.E.2d 394.) "The concept of public regulation includes of necessity the philosophy that the commission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in the past." 1 Ill. 2d at 513.
>
> Even if *collateral estoppel* applied to Commission orders, we conclude that it would not apply in this case because the issues in question were not identical. The issue before the Commission in Docket No. 90-0026 was whether it should impose civil penalties on Metro for, inter alia, Metro's failure to obtain approval for contracts with an affiliate. The issue before the Commission in the ratemaking proceeding was whether Metro's failure to obtain approval for contracts with an affiliate should impact the ratemaking proceeding.
>
> For these reasons, we determine that *collateral estoppel* did not preclude the Commission from reviewing the expenses arising from the contracts in question.

(*Id*., p. 271)

The holding in *Metro* is clearly relevant to the present issue and compels rejection of ComEd's argument. The issue in the transfer proceeding was whether the Commission should approve or reject ComEd's then proposed transfer. The issue in the instant proceeding is the appropriate ratemaking effect or treatment of the entries made to record the transfer in connection with ComEd's current proposal to reverse certain purchase accounting entries. Like the issues presented in the two proceedings considered in *Metro*, the issue in the transfer proceeding is in no way identical to the issues presented in the instant rate case. (*Id*.) Accordingly, ComEd's argument is contrary to the law and must be rejected.

(Staff RB, pp. 57-60)

Finally, the Commission itself has had an opportunity to consider the ratemaking impact of its orders issued in Section 16-111(g) proceedings, and concluded that such orders do not compel a particular ratemaking treatment:

> . . . Although IP has sold its generation assets and exited the generation business, as permitted under the Act, the Commission's approval in and of

> itself does not mean that the Commission has approved the accounting allocations made or that the amount of assets that were transferred are proper. The role of the Commission in divestiture of generation is limited by 16-111 (g). The Commission is of the opinion that IP can be required to continue to allocate a portion of its G&I plant investment to "generation" for purposes of setting its distribution rates.

(*Illinois Power Company, Proposed Revisions to delivery services tariff sheets and other sheets*, Docket No. 01-0432, Order, pp. 17-18 (March 28,2002); affirmed *Illinois Power Co. v. Illinois Commerce Com.*, App. Ct. Dkt. 5-02-0466 (ICC Dkt. No. 01-0432) 5th Dist. App. Ct. (May 22, 2003))

ComEd characterizes certain findings and conclusions of the Proposed Order as contentions, and describes them as follows:

> … the Proposed Order contends that, in this case, ComEd's proposed capital structure should be rejected because it would allow "recovery of the cost of plant owned by an unregulated generating affiliate," constitute "a double recovery" and provide "a return on billions of dollars of plant [ComEd] does not own." Proposed Order at 128, 129."

(ComEd BOE, p. 39) ComEd then asserts that "[t]he evidence in the record establishes that these contentions are without any basis." (*Id*.) To the contrary, a review of ComEd's assertions reveals that it has mischaracterized the Proposed Order and takes statements in the Proposed Order out of context to make its invalid points.

ComEd states that it "has not included any generation plant or any goodwill in the rate base on which a return will be earned." (*Id*.) While Staff does not contest this statement, it does nothing to undermine or contradict the statements in the Proposed Order that ComEd attacks. To understand the fallacy in ComEd's assertion, it is necessary to review some basic regulatory concepts. In Citizens Utilities Company v. Illinois Commerce Commission, 124 Ill. 2d 195 (1988) the Illinois Supreme Court explained how the Commission establishes rates for public utilities, setting forth the

classic ratemaking formula R (revenue requirement) = C (operating costs) + Ir (invested capital or rate base times rate of return on capital):

> In establishing the rates that a public utility is to charge its customers, the Commission bases the determination on the company's operating costs, rate base, and allowed rate of return. A public utility is entitled to recover in its rates certain operating costs. A public utility is also entitled to earn a return on its rate base, or the amount of its invested capital; the return is the product of the allowed rate of return and rate base. The sum of those amounts -- operating costs and return on rate base -- is known as the company's revenue requirement. The components of the ratemaking determination may be expressed in the classic ratemaking formula R (revenue requirement) = C (operating costs) + Ir (invested capital or rate base times rate of return on capital). (City of Charlottesville, Virginia v. Federal Energy Regulatory Comm'n (D.C. Cir. 1985), 774 F.2d 1205, 1217, citing T. Morgan, Economic Regulation of Business 219 (1976).) The same formula is used by the Commission in ratemaking determinations for Illinois. The revenue requirement represents the amount the company is permitted to recover from its customers in the rates it charges. . . .

(*Id*., pp. 200-01)

ComEd's assertion that it "has not included any generation plant or any goodwill in the **rate base** on which a return will be earned" is irrelevant to consideration of whether those items are inappropriately reflected in its capital structure supporting delivery services so as to increase the return on capital that is applied to rate base. Increasing the "return on capital" and increasing "rate base" both increase rates. The issue at hand involves determination of ComEd's "capital structure", which impacts ComEd's return on capital but does not impact rate base. (*See Central Ill. Pub. Serv. Co. v. Illinois Commerce Com.*, 243 Ill. App. 3d 421, 440-441 (4th Dist. 1993) (Utility's capital structure used to determine weighted cost of each individual capital component based on the ratio of each component to the total capital structure, the sum of which is used as the overall allowed rate of return on the rate base.))

The Proposed Order clearly recognized (1) that it was addressing ComEd's capital structure, not its rate base, and (2) that increasing the equity component of ComEd's capital structure would raise its rate of return and the resulting rates charged to ratepayers:

> . . . ComEd's equity figure contains the net $2.634 billion in goodwill generated from the transfer of its plants. Including this figure in equity necessarily will raise the required rate of return, and therefore the rates set herein.

(PO, p. 128) Thus, ComEd manufactures an inconsistency in the Proposed Order where none exists. When the Proposed Order finds that ComEd's proposed capital structure should be rejected because it would allow "recovery of the cost of plant owned by an unregulated generating affiliate," constitute "a double recovery," and provide "a return on billions of dollars of plant [ComEd] does not own", those findings are clearly made with reference to the increased rate of return and rates that would result from overstating the amount of equity in ComEd's capital structure supporting delivery services by accepting ComEd's equity adjustments for plant it no longer owns.

ComEd also makes the conclusory assertion that its proposed "common equity ratio cannot be found unreasonable simply because ComEd has a generation affiliate that happened to acquire plants that could just as easily have been sold to an unaffiliated party – by ComEd or by ExGen after the transfer." (ComEd BOE, p. 39) While it is unclear why this assertion would be a persuasive basis to reject the Proposed Order's conclusions, ComEd's underlying assertion is neither correct nor complete. While it may be true that ComEd could have transferred its generation assets to any entity it desired, it in fact chose to transfer the plant assets at issue to an affiliate. ComEd cannot claim exemption from the affiliated interest provisions of Section 9-230

simply because it did not have to transfer its plant assets to an affiliate. Moreover, while the transfer did distort the relationship between ComEd's capital structure and the capital structure supporting its depreciated original cost rate base, it is ComEd's proposal in this case to adjust its common equity balance for plant transferred to an affiliate that runs afoul of Section 9-230. (*See* PO, pp. 117, 126) ComEd's argument in this regard amounts to nothing more than an assertion that the Commission should simply ignore the subtle and complex manner in which ComEd's transfer of its nuclear generation plants to an affiliate is being used in this proceeding -- through an adjustment for that transferred plant -- to increase its cost of capital. While there are multiple bases to reject ComEd's proposed capital structure, the Proposed Order correctly relies on Section 9-230 as one of those bases.

While not explained in any way, Staff notes that ComEd also asserts (in connection with the above-described argument) that its affiliate could have sold those assets to an unaffiliated entity after the transfer from ComEd. (ComEd BOE, p. 39) Again, what could have happened and what did happen represent two different scenarios, and ComEd's non-existent hypothetical scenario is irrelevant. More importantly, as explained above, it is ComEd's proposal in this case to adjust its common equity balance for plant transferred to an affiliate that runs afoul of Section 9-230, and that violation is not dependent on the current owner of the transferred plant. To the extent that ComEd's argument is meant to focus on the Proposed Order's observation that ComEd's proposed capital structure would result in the recovery of costs related to the transferred plants currently owned by an affiliate, the Proposed Order is correct. This observation in no way undermines the Proposed Order's

determination that ComEd's proposal to adjust its capital structure for plant transferred to an affiliate contravenes Section 9-230 and inflates its equity balance by $2.634 billion.

ComEd also criticizes the Proposed Order for making the statement that "[t]he Court also stated in the *CUB* case [*CUB v. ICC*, 276 Ill. App. 3d 730(1995)] that "[c]urrent ratepayers should pay for only that plant which produces current benefits." (276 Ill. App. 3d at 741.)" (*See* ComEd BOE, p. 40, fn. 7) ComEd's specific criticism is that the *CUB* case made this statement in connection with its review of an issue concerning depreciation. (*Id.*) The Proposed Order does not indicate otherwise, and ComEd's argument fails to explain why the Proposed Order or the Commission should not or could not rely on this accepted proposition in further support of its determinations regarding ComEd's proposed capital structure. The truth of the matter is that ComEd's proposed capital structure seeks to require current ratepayers to pay a higher rate of return based on reflection of capital supporting that transferred plant in its capital structure. Such a proposal is contrary to many regulatory principles, including that principle that current ratepayers should not pay (whether through rate base or rate of return determinations) for plant that is not used to provide current service to ratepayers.

ComEd also makes what appear to be technical criticisms of the Proposed Order. Specifically, ComEd asserts that the Proposed Order errs in asserting "that the capital structure dispute centers on 'whether to include or exclude for ratemaking purposes a net $2.634 billion goodwill asset,' which the Proposed Order asserts was part of '$4.791 billion in goodwill generated by the transfer of the nuclear power plants formerly owned by ComEd.' Proposed Order at 126." (ComEd BOE, p. 40) While Staff

does not disagree that ComEd booked approximately $4.791 billion as a goodwill asset as a result of the application of purchase accounting at the time of the merger between PECO and Unicom, the Proposed Order's underlying point remains valid and any modification of this portion of the Proposed Order must preserve the Proposed Order's ultimate conclusions. The $4.791 billion represents the amount by which ComEd's now transferred assets were written down pursuant to purchase accounting, and the amount by which ComEd now proposes to adjust its common equity. (See PO, pp. 115-117) Staff would not oppose modifying the Proposed Order to provide as follows:

> The net $2.634 billion amount reflects Staff's elimination of ComEd's proposal to reverse the $4.791 billion write down ~~in goodwill generated by the transfer~~ of the nuclear power plants formerly owned by ComEd and funded by ratepayers through rate base. The plants are now owned by an unregulated affiliate, either directly by ComEd's parent Exelon or through another Exelon subsidiary. The net $2.634 billion amount also reflects Staff's elimination of ComEd's proposal to reverse the related $2.157 billion increase to deferred income taxes and ITC's ~~adjustment to set certain costs related to the merger of Unicom and PECO (into Exelon)~~ to reflect original cost. (ComEd had already excluded from its proposal $2.292 billion in common equity created by ~~goodwill related to~~ the Unicom/PECO merger.) The $2.634 billion also corresponds to the difference between the goodwill recorded on ComEd's books as a result of the merger of Unicom and PECO (into Exelon) and ComEd's proposal to exclude the $2.292 billion.

ComEd also chastises the Proposed Order for its description of the issue at hand:

> Second, the dispute over capital structure does not turn on "whether to include or exclude for ratemaking purposes a net $2.634 billion goodwill asset." A utility's capital structure includes debt and equity. Capital structures do not include or exclude "assets." The only issue in this proceeding concerning goodwill is whether the debt and equity balances in ComEd's actual capital structure were affected by the goodwill that was recorded on ComEd's books through the application of purchase accounting in connection with the Unicom/PECO merger. The evidence was undisputed that the debt and equity balances in ComEd's actual structure were not the result of or affected by goodwill because ComEd eliminated the entire capital structure impact of purchase accounting.

> Mitchell Sur., ComEd Ex. 37.0 2nd Corr., 12:248-251 . If the effects of goodwill and the other purchase accounting effects on ComEd's common equity balance had been included, ComEd's capital structure would have had a common equity ratio of 63%, rather than 54.2%. Mitchell Reb., ComEd Ex. 20.0 lines 37-42.

(ComEd BOE, p. 41) First, ComEd's assertions that certain evidence was "undisputed" and its reference to its proposed adjusted capital structure as ComEd's actual capital structure are just plain wrong as explained above. The Proposed Order fully describes why ComEd's reversals of purchase accounting entries for plant it no longer owns distorts the relationship between ComEd's proposed capital structure and the capital structure supporting its depreciated original cost rate base. Second, while it is true that ComEd's capital structure consists of debt and equity (and not assets), it is also true that ComEd's equity reported on its balance sheet is equal to its assets less its liabilities. Accordingly, ComEd cannot deny that inclusion or exclusion of a goodwill asset has a direct dollar for dollar impact on its reported equity. While there may be multiple ways of expressing this issue, ComEd's rebuke of the Proposed Order for focusing on the goodwill asset is inappropriate and lacking in merit.

For all of the foregoing reasons, ComEd's exceptions to the Proposed Order opposing the rejection of its proposed capital structure must be denied.

b. ComEd's Alternative Language Should Not Be Accepted

ComEd also offers an alternative exception to provide alternative support for the Proposed Order's imputed capital structure. (ComEd BOE, pp. 42-44) First, as explained in Staff Brief On Exceptions, the Proposed Order should be modified to accept Staff's proposed capital structure. (Staff BOE, pp. 48-54) Second, in the event the Commission declines to adopt Staff's proposed capital structure in favor of the

Proposed Order's adoption of an imputed capital structure, the imputed capital structure should not contain more than the 42.86% equity adopted in ComEd's last rate case since the Company has been able to maintain an investment grade credit rating based on that capital structure. (Staff BOE, pp. 48-49) Third, in the event that the Commission decides to adopt the imputed capital structure contained in the Proposed Order, Staff does not object to ComEd's proposal to reference Staff witness Ms. Kight's alternative analysis showing that the Company's equity ratio would need to be increased to approximately 45.5% to maintain an "A-" credit rating excluding the TFIs. Finally, even under the scenario where the Commission decides to adopt the Proposed Order's imputed capital structure, Staff does not favor supporting that capital structure via inferences from ComEd's cost of equity witness. Dr. Hadaway's testimony did not directly address the appropriate capital structure for ComEd – much less the alternative imputed capital structure adopted in the Proposed Order – and Staff disfavors the after-the-fact manufacture of such support which (a) does not really exist and (b) is based on inferences from testimony not purporting to address capital structure. Such a practice would give the inappropriate impression that such testimony was actually considered on the merits based on the testimony of multiple experts, and would inappropriately encourage parties to avoid dealing with capital structure issues directly.

For all the foregoing reasons, Staff submits that ComEd's alternative exception language should also be rejected for the reasons stated herein.

2. Cost of Common Equity

ComEd claims that the 6.60% GDP growth rate estimate the Company used in its analysis reflects the long-term expectations the DCF model requires. Conversely, the

Company criticizes Staff's use of 5-year company-specific analyst growth rates, suggesting that they don't reflect long-term expectations as well. (ComEd BOE, p. 45) The PO already considered and properly rejected those same arguments, which Staff fully addressed in its Reply Brief. (Staff RB, pp. 70-73) The DCF model requires the best available estimate of the long-term, forward-looking expectations of the specific company or companies for which the cost of equity is being measured. The Company has failed to show that its GDP estimate, which is contrived from historical data, better reflects investors' expectations for the future than the 5-year forward-looking analyst estimates used by Staff. In fact, it is highly dubious to assume that investors expect 6.60% long-term future growth for the overall economy, much less for utilities specifically. In contrast, studies have shown securities analysts' growth rates to be more reliable estimates than growth rates derived from historical data, such as Dr. Hadaway's GDP growth rate, a conclusion consistent with the record evidence in this proceeding. (Staff RB, pp. 70-71)

Furthermore, the applicability of the Company's GDP estimate to the utilities in Dr. Hadaway's samples hinges on the assumption that those companies are average growth companies; the Company has provided absolutely no information to support that assumption. To the contrary, the data underlying Dr. Hadaway's own analysis suggests that the utility companies composing his samples are below average growth companies. Nevertheless, Staff demonstrated that, even if one ignores all of the foregoing arguments, the companies in Dr. Hadaway's samples cannot sustain a 6.60% growth rate given their current and forecasted dividend policies, even if one accepts the Company's unfounded supposition that investors might expect a return as high as

12.55%. The Company failed to properly model the shift in dividend payment policies that would be required before those utilities could sustain a 6.60% growth rate. That is, the Company effectively overstates ComEd's cost of equity by combining the higher dividend yield resulting from the lower actual current retention rate with the higher growth rate associated with a higher assumed future retention rate. (Staff IB, pp. 84-86) Based on the foregoing, the PO was clearly correct to reject the use of the Company's historical, economy-wide GDP growth rate and adopt Staff's use of analyst's forward-looking, company-specific growth forecasts.

The Company also continues to argue that returns authorized for other utilities support its 11.0% cost of equity. (ComEd BOE, p. 47) Staff has fully addressed this issue previously. (ICC Staff Exhibit 16.0, pp. 2-3) As the PO correctly concluded:

> ComEd may not simply adopt the cost of equity set for other utilities scattered around the country, for which the facts and circumstances are not necessarily similar. Rather, pursuant to Section 9-201 of the Act, ComEd must prove that its proposed cost of equity is just and reasonable.

(PO, p. 153) The Company provided no evidence to demonstrate that the facts and circumstances involved with the authorized returns it cites, including the risk level of the companies concerned, are comparable to those in the instant docket. Thus, any attempt to assess the appropriate return in this proceeding via comparison to the authorized returns the Company cites, whether as a check or as a direct measurement, is of no value. Nevertheless, a closer review of the underlying rate decisions the Company cites suggests that Staff's recommendation is, in fact, very similar to rates authorized specifically for electric distribution services and that, conversely, the Company's recommendation is overstated. (ICC Staff Exhibit 16.0, p. 3) Curiously, the Company also claims that Staff's cost of equity estimate represents a "departure from

the trend of rising capital costs," citing the 10.75% average authorized return for the fourth quarter of 2005. (ComEd BOE, p. 47) However, according to the Company's source document, the average authorized return for the fourth quarter of 2005 that composed that 1-quarter "trend" was actually lower than the average for the immediately preceding quarter. Further, the average authorized return for all of 2005 was lower than the average for the immediately preceding year. Both of those observations from the Company's own source refute the "trend of rising capital costs" the Company alleges. (ICC Staff Exhibit 16.0, Schedule 16.1, p. 2)

Finally, the Company argues that the cost of equity should be higher than the 10.19% the PO adopts, given the PO's adoption of a "capital structure at the leveraged end of the group of comparable companies used to calculate equity costs." (ComEd BOE, p. 47) The Company is wrong. The 46% equity ratio the PO adopts is not "at the leveraged end of the group of comparable companies used to calculate equity costs." As Staff explained, the average equity ratio for Staff's sample is 48.8% excluding short-term debt, but only 45.19% when short-term debt is included, as required for a true apples-to-apples comparison. Similarly, the equity ratios for the Company's samples averaged 47.96% excluding short-term debt; the inclusion of short-term debt for an apples-to-apples comparison would likely cause a similar reduction to the equity ratios of the Company's samples as it did for Staff's. (Staff RB, p. 74) Thus, a 46% equity ratio would not suggest a high degree of leverage relative to the samples from which the cost of equity estimates were derived, as the Company implies. Indeed, since ComEd's capital structure includes TFIs, which produces a debt ratio that makes the Company appear to be riskier than it really is, a 46% equity ratio is actually overly conservative.

(Staff RB, pp. 74-75) As Staff previously explained, without TFIs, ComEd's equity ratio would be around 45%. (Tr., p. 1846) However, ComEd's TFIs are properly included in the capital structure for rate setting purposes, producing a capital structure with 37.11% equity. As Staff explained, that capital structure is appropriately combined with Staff's 10.19% cost of equity recommendation for ComEd in this proceeding. (Staff IB, pp. 69-75; Staff BOE, pp. 48-52) Indeed, if the Commission were to adopt a capital structure with more than 37.11% equity, a downward adjustment to the cost of equity would be required to reflect the reduced financial risk. (Staff BOE, pp. 56-57)

D. COST OF SERVICE ISSUES

1. Minimum Distribution System

The exceptions filed by BOMA and the IIEC, concerning the PO's rejection of the minimum system approach, lack any persuasive weight that justify changing the PO's findings. Their request that ComEd be ordered to file a cost of service study incorporating the minimum system in its next delivery service case should not be granted.

BOMA complains that "ComEd's embedded cost of service study does not comply with NARUC guidelines with respect to FERC accounts 364-368" which reflect a minimum system approach. (BOMA BOE, p. 9) BOMA goes on to argue that it is not "problematic", as the Proposed Order suggests, to employ the minimum system approach because the methodology is presented in the NARUC guidelines. (BOMA BOE, p. 9)

IIEC, for its part, argues that the Company should be required to file a cost study based on a minimum system approach in its next case so that parties have a basis on which to argue the issue. (IIEC BOE, p. 22)

The PO is correct in rejecting these efforts to resuscitate the minimum system approach. The minimum system is a flawed concept that relies on a distant relationship between distribution costs and the number of customers as a basis to shift costs from the demand to the customer function and thereby benefit large customers at the expense of smaller customers on the system. (ICC Staff Exhibit 17.0 Corrected, p. 40, lines 998-1001) The current approach considers distribution level costs as demand-related given the weak relationship between these costs to the number of customers on the system. (ICC Staff Exhibit 17.0 Corrected, pp. 40-41, lines 1001-1008)

In this case, BOMA has presented no new evidence about the NARUC guidelines that would require the Commission to find any differently than the previous times it reviewed the NARUC guidelines. The NARUC manual supports the use of a minimum system approach for distributing costs among customer classes, however, since that manual was written in 1992 the Commission has consistently rejected the concept of a minimum system approach for Illinois utilities (*See* Order, Docket No. 01-0444 (MidAmerica), p. 19 (March 27, 2002); Order, Docket No. 00-0802 (Ameren), pp. 42-43 (Dec. 11, 2001); and Order, Docket No. 99-0121 (CIPS), p. 71 (Aug. 25, 1999)). As a result, no electric or gas utility in Illinois currently employs a minimum system for allocating costs. (ICC Staff Exhibit 17.0 Corrected, p. 41)

Requiring ComEd to file a cost study using the minimum system would serve no good purpose. Staff witness Lazare explained that the minimum system is a flawed

concept because it benefits large volume customers at the expense of small volume customers. (ICC Staff Exhibit 17.0 Corrected, p. 42) IIEC provides no facts that counter this flaw and justify a need for the Commission to review such information in ComEd's next rate case.

Thus, BOMA's and IIEC's exceptions on this issue should be denied.

E. RATE DESIGN

1. Rider ECR

The PO correctly concludes that Rider ECR is the appropriate mechanism for MGP related costs only. The Company offered testimony discussing the volatility of the non-MGP costs in its attempt to draw a favorable comparison between MGP and non-MGP environmental costs. However, during cross examination, Company witness Hill referred to Schedules 14 and 12 (ComEd Ex. 19.0 Revised), which show the volatility of other A&G costs that are recovered through base rates. (Tr., p. 837) Mr. Hill also agreed that storm restoration costs, which are included in operating expenses, are similar to those non-MGP costs the Company proposes to recover through Rider ECR. (*Id.*, pp. 889–893) Furthermore, while the Company attempted to graphically show that both MGP and non-MGP costs are similarly volatile (ComEd Exhibit 44.0, Attachment 1), the Company witnesses admitted during cross-examination that if the scale used for both graphs had been the same, the comparable volatility would be drastically different. (Tr., pp. 2105–2106) In addition, ComEd witnesses Fernandes & McCauley agreed that the information presented on Attachment 2 to their surrebuttal testimony (ComEd Exhibit 44.0) shows that the percentage changes in MGP costs range from a decrease of 74.25% to an increase of 103% while, except for the change between 2002 and

2003, the variation between any two periods for non-MGP costs is less than 20%. (Tr., pp. 2106–2109) Thus, the facts demonstrate that non-MGP costs are much less volatile than MGP costs. (ICC Staff IB, p. 101)

The Company takes issue with the PO's language concerning recovery of land acquisition costs through Rider ECR claiming that costs related to leasing land should be recovered under the Rider (ComEd BOE, p. 72). While the Company did address the subject of costs associated with land leases in surrebuttal testimony (ComEd Exhibit 40.0, p. 70), no explanation of why those would be costs related to MGP remediation is contained in the record. Since there is no explanation of how land lease costs would be associated with MGP site remediation, the PO should not be changed to allow recovery of such costs.

The PO correctly provides for insurance proceeds to be credited to ratepayers under Rider ECR. However, Staff agrees with the Company that the PO expands the language proposed by Staff (ComEd BOE, pp. 72-73) and would not oppose the change to limit insurance recoveries to those received after the effective date of the Rider as set forth in Staff's proposed Rider ECR language (ICC Staff Exhibit 13.0, Attachment C).

The Company poses two alternatives to the language in the PO disallowing non-MGP costs (ComEd BOE, p. 73). Both of these alternatives should be rejected. The first alternative which allows recovery of non-MGP costs is already addressed above. The second alternative, stating the Commission is "willing to consider rider recovery for non-MGP costs in a future proceeding" is unnecessary in this Order. If the Company wishes to petition the Commission for recovery of certain costs through a Rider mechanism, it may certainly do so without a Commission order stating that the petition

will be considered. Any petition filed with the Commission will be given its due consideration. Therefore both of the alternatives offered by the Company regarding non-MGP costs should be rejected.

The City of Chicago and the Cook County States Attorney's Office bring up a valid point in their BOE regarding the volatility of non-MGP costs in this proceeding (CITY BOE, p. 2). Staff concurs with the concern and offers alternative language for the first paragraph of the PO's conclusion:

> ComEd has demonstrated that its incremental MGP environmental costs are volatile and fluctuating. No party has disputed this. The Illinois Supreme Court has explicitly stated that "a rider mechanism is effective and appropriate for cost recovery when a utility is faced with unexpected, volatile, or fluctuating expenses." *See Citizens Util. Bd. v. Ill. Commerce Comm'n*, 166 Ill.2d 111, 138 (1995) (citing *City of Chicago v. Ill. Commerce Comm'n*, 13 Ill.2d 607 (1958)). Furthermore, this Commission, in the "Coal Tar Cases," designated cost-tracking riders as the preferred method for the recovery of MGP site remediation costs. Docket Nos. 91-0080 through 91-0095 (Cons), 1992 Ill. PUC Lexis 379 at *136 (Order, Sept. 30, 1992).

2. Real Time Pricing Meters and Energy Smart Pricing Plan

The Citizens Utility Board ("CUB"), the Cook County States Attorney ("CCSAO") and the City of Chicago ("City") (collectively, "CCC") take exception with the PO's conclusion that it is appropriate to determine the incremental impact on ComEd's revenue requirement due to the CUB/City proposal by the averaging of ComEd's "low estimate" of 30,000 Real Time Pricing ("RTP") customers and CUB/City's "high estimate" of 70,000 customers. CCC now recommend that ComEd be permitted to recover an amount of costs associated with the high estimate of 70,000 customers (CCC BOE, pp. 43-44), even though CUB/City initially recommended that ComEd should be responsible for the costs if its projection of RTP customers is too low (and keep the savings should the projection be too high). (CUB Exhibit 2.0, p.8, lines 163-

169) ComEd also recommends adoption of the cost estimate applicable to 70,000 customers, pointing out that no party proposed the averaging method. (ComEd BOE, p. 83)

The fact that no party proposed a method to determine the demand for residential RTP should not be surprising given that no party provided credible evidence concerning the number of customers that would participate. The record evidence consists of the speculation of CUB witness Thomas that up to 70,000 customers could be interested in real-time pricing. Mr. Thomas' figure was not based upon any studies but rather was based upon conversations with the Community Energy Cooperative. (Tr., pp. 1135-1136; CUB Ex. 2.0, p. 7, lines 144-147)

While Staff still recommends the rejection of CUB/City's proposal for the reasons previously set forth in Staff's briefs (Staff IB, pp. 128-133; Staff RB, pp. 93-95; Staff BOE, pp. 79-83), should such a proposal be adopted by the Commission, the PO's recommendation to average the high and low estimates is as reasonable as any other method to determine incremental RTP-related charges. Moreover, it is responsive to CUB/City's initial proposal. For the above stated reasons Staff recommends that CCC's and ComEd's exceptions on this issue be rejected.

II. CUSTOMER CHOICE AND RETAIL SUPPLIER ISSUES

A. Utility Consolidated Billing with Purchase of Receivables

Staff in its initial brief and reply brief recommended that the Commission reject the Coalition of Energy Suppliers ("CES") Utility Consolidated Billing/Purchase of Receivables ("UCB/POR") proposal. Staff argued that ComEd could not be compelled to offer UCB/POR. Staff also expressed a concern that UCB/POR might encourage

RESs to market to customers that cannot meet their credit requirements since ComEd and its ratepayers would be responsible not the RES, for collecting from delinquent RES retail customers. (Staff IB, pp. 136-138; Staff RB, p. 100) The PO acknowledged Staff's second concern when it concluded that "[t]o implement the CES proposal would undoubtedly cause ComEd to incur significant costs that would ultimately be borne by ratepayers." (PO, p. 290) The PO appropriately rejects CES's proposal.

CES takes exception to the PO's conclusion addressing UCB/POR. CES argues that the PO misconstrues the CES proposal as seeking to require ComEd to provide a "competitive service" or a "new" service under Section 16-103 of the PUA. (CES BOE, p. 19) Staff disagrees with CES. Despite CES's claim, its UCB/POR proposal would be a new service and certainly is not a "standard service". As CES acknowledges in its Initial Brief, under its proposal, "ComEd would purchase the RES's electric commodity service accounts receivable and any utility pass-through charges at a discount on the receivable's face value." (CES IB, pp. 39-40) In its BOE, CES attempts to hide the important fact that ComEd would have to purchase the RES's receivables by stating that "the proposed POR program would require ComEd to continue to be responsible for collections from residential customers, despite taking service from a RES." (CES BOE, p. 19) The purchasing of RES receivables for the RES's own sales to its own retail customers and requiring ComEd to provide a bundled bill including those sales are not services that ComEd currently provides and are certainly not delivery services. That is, those services are not "necessary in order for the transmission and distribution systems to function so that retail customers located in the electric utility's service area can receive electric power and energy from suppliers other than the electric utility" and are

not "standard metering and billing." (220 ILCS 5/16-101) RESs have been operating in ComEd's territory during the transition period without these "services" and therefore the transmission and distribution systems have been functioning in a manner that has allowed retail customers to receive power and energy from RESs. In addition CES, when discussing metering and billing services in its BOE, ignores the clear requirement that the metering and billing services included in the definition of delivery services are "standard metering and billing services" (220 ILCS 5/16-101)(emphasis added).

CES further argues that:

> ComEd has not sought, and has never sought, to have this or any other of its billing services declared 'competitive' pursuant to Section 16-113 of the Act. (See 220 ILCS 5/16-113.) Therefore, as a matter of law, POR cannot be a 'competitive service.' (See id.)

(CES BOE, p. 23) This CES argument should be rejected as well. It is irrelevant whether "ComEd has not sought, and has never sought, to have this or any of its billing services declared 'competitive pursuant to Section 16-113 of the Act." Section 16-113 of the Act describes, among other things, the process and standard to apply for a utility to have a tariffed service declared competitive, but does not define the term "competitive service". However, Section 16-102 of the Act provides the definition of a competitive service. Pursuant to Section 16-102, competitive services include any one of the following three things:

> (i) any service that has been declared to be competitive pursuant to Section 16-113 of this Act, (ii) contract service, and (iii) services, other than tariffed services, that are related to, but not necessary for, the provision of electric power and energy or delivery services.

(220 ILCS 5/16-102) Because UCB/POR meets definition (iii) above, it is a competitive service and the Commission cannot require ComEd to offer competitive services. (220 ILCS 5/16-103(e)) For all the reasons set forth above and those previously stated in

Staff's briefs, Staff continues to recommend that CES's proposal concerning UCB/POR be rejected accordingly, and CES exception should be rejected.

III. STAFF REPORTS ON COMED'S PERFORMANCE

ComEd's request to insert language as a prologue or introduction to the "Staff Reports on ComEd Performance" section of the Order should be rejected. On page 91 of its BOE, ComEd requests that language from pages 155 to 156 of the Proposed Order it submitted be added to the PO between the "Staff Reports on ComEd Performance" section heading and the "Tree Trimming" section heading. (ComEd BOE, p. 91, exception 44) ComEd's exception should be rejected because there is no requirement that the language from a party's draft order be included in the final order, and the language as proposed by ComEd is of no substantive benefit to the final order.

Commission Orders, as a matter of course, only include the position statements of each party and rarely include an introduction to the section. Just because ComEd includes such an introduction in its Proposed Order does not mandate that it be included in the Order. In addition, ComEd's exception provides no insight or benefit to the Order, except to afford the utility an opportunity to insert pro-ComEd language outside of their position statements.

The language is not what you would find in an introduction – it is biased, and is essentially analyses and findings outside of the Commission Analysis and Conclusion section. The entire first paragraph, except the first sentence, is pro-ComEd. Such language is generally improper in an Order anywhere outside of the ComEd Position Statement or Commission Analysis and Conclusion section. Including findings, or

language that appears to be a finding, to the introductory paragraph would potentially confuse the reader.

Thus, to maintain the clarity of the Order, Staff requests that ComEd's exception be rejected and no introductory paragraph be inserted under the "Staff Reports on ComEd Performance" section heading. If the ALJ's find that the Order is deficient without an introductory paragraph for this section, then Staff proposes that the introductory paragraph ComEd proposes be modified to a more neutral tone and simply introduce the issues addressed within the sub-headings.

Recommended Language

If it is decided that an introductory paragraph is needed, then Staff suggests the following modifications to the language proposed by ComEd:

> ComEd
>
> Staff presented updates on two reports prepared by Staff. Staff presented its Assessment of ComEd's Reliability Report and Reliability Performance for 2004 (the "Reliability Assessment"). This Assessment, dated December 23, 2005, was prepared in accordance with 83 Ill. Adm. Code § 411.140, and supports Staff's findings regarding ComEd's Tree Trimming and Reliability Performance. Staff's report on Reliability Performance focused on ComEd's maintenance, its vegetation management, its operations of substation equipment and its customer satisfaction performance. ~~As ComEd explained, the Reliability Assessment identifies and discusses many of ComEd's efforts to improve system performance and reliability, the costs of which are included in rate base for those efforts that occurred during the 2004 test year. ComEd also observed that the Reliability Assessment demonstrated that ComEd is clearly doing more and spending more to meet customers' needs, and that no critical inquiry into ComEd's activities suggests that ComEd should cut back its activities or its service to customers. To the contrary, ComEd further noted, since the 2004 test year, at Staff's recommendation, ComEd has made certain modifications to its business processes that will increase ComEd's costs during the time frame in which the proposed rates will be in effect. *Costello Reb., ComEd Ex. 13.0, 41:916-32.*~~

~~In addition to its Reliability Assessment,~~The second report Staff presented was the~~its~~ conclusions from its November 14-16, 2005 electric meter shop inspection. Those conclusions were set forth in a December 6, 2005 letter to ComEd, as discussed in the testimony of Staff witness Greg Rockrohr Staff Ex. 11.0 (the "Meter Shop Inspection Report").

IV. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

*/s/*_____

SEAN R. BRADY
JOHN C. FEELEY
CARMEN L. FOSCO
CARLA SCARSELLA
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
sbrady@icc.illinois.gov
jfeeley@icc.illinois.gov
cfosco@icc.illinois.gov
cscarsel@icc.illinois.gov

Counsel for the Staff of the Illinois Commerce Commission

June 26, 2006