

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY	§	
	§	
Proposed general increase in electric rates,	§	DOCKET NO. 05-0597
General restructuring of rates, price unbundling	§	
Of bundled service rates, and revision of other	§	
Terms and conditions of service	§	

**THE CHICAGO TRANSIT AUTHORITY'S AND METRA'S
EXCEPTIONS TO THE PROPOSED ORDER ON REHEARING**

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**THE CHICAGO TRANSIT AUTHORITY’S AND METRA’S
EXCEPTIONS TO PROPOSED ORDER ON REHEARING
WITH PROPOSED SUBSTITUTE LANGUAGE**

The Chicago Transit Authority (CTA) and the Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra (Metra) (collectively, Railroad Class) file these Exceptions to the Administrative Law Judges’ (ALJs’) Proposed Order on Rehearing (Rehearing Order) regarding the analysis and conclusions for Rider NS as it pertains to standard service and reserved capacity.

Separately, in addition, the CTA joins with the City of Chicago, the Cook County State’s Attorney’s Office and the Board of Education in their exceptions to the finding in the Proposed Order that the Public Utilities Act does not require the continuation of Rider GCB.

I. Proposed Rehearing Order Ignores Mandate from Commission to Leave Contracts Intact.

The CTA and Metra raised two issues concerning Rider NS in their Motion for Rehearing where Commonwealth Edison Co. (ComEd or Company) in its compliance tariff filing unilaterally rewrote material provisions of the CTA and Metra contracts to the detriment of the Railroad Class. This rewriting was in direct conflict with the finding by

the Illinois Commerce Commission (ICC or Commission) in its initial Final Order¹ at 189 where it stated: “The Commission takes contractual obligations seriously and tries to leave them in tact [sic] whenever possible.”

Despite the clear guidance from the Commission, the proposed Rehearing Order disregards the Commission’s language. Instead, the Proposed Order adopted ComEd’s argument that “Rate BES-RR *appropriately contains language superseding conflicting provisions in the CTA and METRA contracts* and incorporating provisions of Rider NS and ComEd’s General Terms and Conditions.” Rehearing Order at 46. (Emphasis added.) Thus even though ComEd admits, and the Proposed Order tacitly agrees, that the new language in Rate BES-RR and Rider NS are in conflict with the existing long-standing contracts, the Proposed Order nonetheless decides that these contractual obligations are not to be taken seriously and can be disregarded by the Commission. There is neither a legal nor a factual basis to support ComEd’s action or the Proposed Order approving it.

Rate BES-RR is the all-encompassing tariff for the Railroad Class. ComEd attempts to use Rate BES-RR to change the CTA and Metra contracts in two significant ways. First, Rate BES-RR substantially changes the definition of standard service provided to the railroads. Second, Rate BES-RR imposes a new reserved capacity on the Railroad class through Rider NS. Both changes are inappropriate and not supported by the record. The Proposed Order must be amended to reject these concepts.

¹ Final Order in Docket No. 05-0597 dated July 26, 2006 and served upon the parties on July 28, 2006.

The first CTA/Metra Exception pertains to standard service, that is, the level of minimum service that ComEd is to provide to its customers. Every customer is provided a minimum connection to the ComEd system at the Company's cost. The type of connection varies by the service provided to the customer. Both historically and contractually the standard service for the railroads is for ComEd to provide at ComEd's cost at least one distribution feeder line to each traction power substation.²

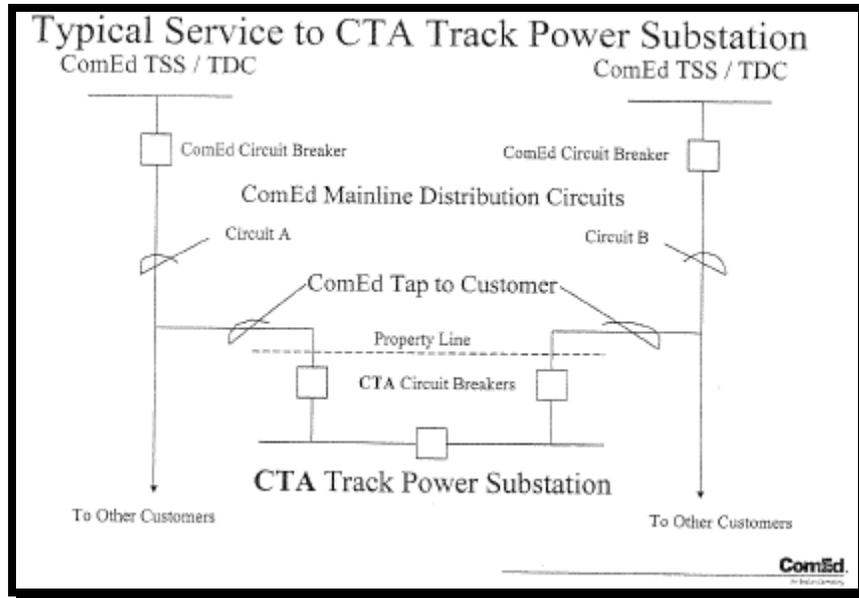
The second CTA/Metra Exception pertains to the imposition of a new "reserved capacity" charge on the Railroad Class. Not only does ComEd want to charge the railroads for constructing all facilities to the traction power substation, but also ComEd wants to charge the customers for "reserving" this capacity, that is, charging the railroads twice—once through a construction charge and again through a reserved capacity charge—for the same facilities.

² The CTA contract was amended in 1998 for ComEd to provide at its cost the first line to each traction power substation and for the CTA to pay for any additional lines. Ex. 3.03. For Metra, ComEd is contractually obligated to provide all lines to the Metra traction power substations. Metra Ex. 3.01.

- II. Standard Service to Railroads Requires ComEd to Provide Lines to Each Traction Power Substation at ComEd's Cost.**
 - A. ComEd wrongly asserts Rate BES-RR language 'supersedes' conflicting contract provisions.**
 - 1. Contracts obligate ComEd to build facilities to traction power substations.**

The CTA and Metra contracts are lengthy negotiated documents. The CTA contract has been in existence since 1958. CTA Ex. 3.02. Metra's contract also has been in existence for decades. Metra Ex. 3.01. Both contracts cover such items as ownership of substations and lines, use of the railroads' rights of way by ComEd, conflict resolution through arbitration, and rates. The issues raised on rehearing are not rate issues but rather fundamental construction issues that have been, and should be, dealt with in the contracts and through negotiations by the parties to the agreements.

The CTA and Metra traction power substations are served by ComEd with at least two lines interconnected in the customer-owned substation with a breaker that is operated in the closed position. This means power and energy can flow to, from and over the breaker back out onto ComEd's distribution system as shown by the following diagram:



CTA Ex. 3.01.

Under its contract with the CTA, ComEd originally built and paid for all the feeder lines to the CTA traction power substations. CTA Ex. 3.02. ComEd built and paid for all the substations and feeder lines to the substations for Metra. Under the Metra contract, the ComEd traction power substations were sold to Metra. Even after the substations were acquired by Metra, ComEd continued to build all facilities to the Metra substations. Metra Ex. 3.01. In 1998 the CTA and ComEd, by contract amendment, modified the CTA arrangement. Now ComEd provides the initial line to the substation and the CTA pays for the second line. CTA Ex. 3.03. Metra's contract was not amended in this regard. It continues to require ComEd to build and to pay for all lines to Metra's substations.

2. Commission's rewriting of contractual provisions violates U.S. and Illinois constitutions.

ComEd in its compliance tariff attempted to change these contract provisions by inserting language that it says "supersedes" the CTA and Metra contract language. The Proposed Order's adoption of ComEd's position is both factually and legally wrong. The Proposed Order goes well beyond the jurisdiction of the Commission. The Commission's rewriting of these material provisions would violate the U.S. Constitution art. 1, Sec. 10 that provides:

No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . .

The Illinois Constitution art. I, Sec. 16 similarly states: "No . . . law impairing the obligation of contracts . . . shall be passed." The Illinois Supreme Court applies federal case law to interpret the Illinois Contracts Clause, so the two provisions are interpreted similarly. *Dowd & Dowd Limited v. Gleason*, 181 Ill.2d 460, 693 N.E.2d 358 (Ill. 1998).

In inquiring whether an action by a state agency operates as a substantial impairment of a contractual relationship, three components must be considered: "whether there is a contractual a relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp. v. Evert Romein*, 503 U.S. 181, 187, 112 S. Ct. 1105, 117 L.Ed.2d 328 (1992).

While the Contract Clause does not obliterate the police powers of the States, "it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243, 98 S. Ct. 2716, 57 Led. 727 (1978). In *Allied Structural Steel*, the court noted:

Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

438 U.S. at 247. The court said that laws intended to affect contractual relationships should be precisely drafted and “reasonably designed to meet a grave, temporary emergency in the interest of the general welfare.” *Id.* at 244. In *Allied Structural Steel*, the court struck down as violating the Contracts Clause a Minnesota statute that attempted to regulate certain aspects of an existing pension plan. Concerning the statute, the court said “[i]t did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively.” *Id.* at 251.

In *Pepsico, Inc. v. Marion Pepsi-Cola Bottling Co.*, 2003 U.S. Dist Lexis 20060, the Illinois Soft Drink Industry Fair Dealing Act was declared unconstitutional because it violated both the U.S. and Illinois Constitutions’ contract clauses. In *Pepsico*, the parties had various long term agreements that were to be regulated by the new Soft Drink Act. The court adopted the three criteria in *General Motors* and the test in *Allied Structural Steel* that “a law works a substantial impairment if it abridges legitimate expectations upon which the parties reasonably relied in contracting.” Because the Soft Drink Act imposed new terms and conditions as part of the contract, it created a substantial impairment of the existing agreements and therefore the law was unconstitutional.

Here, the three requirements set out in *General Motors* are met. (1.) There is a contractual relationship between the CTA and ComEd and between Metra and ComEd. (2.) The Proposed Order impairs that contractual relationship. (3.) The impairment is substantial. Thus, as was the case in *Pepsico*, the Proposed Order as it attempts to unilaterally rewrite the CTA and Metra contracts with ComEd violates the U.S. and Illinois Constitutions.

3. Commission's rewriting of contract provisions violates Public Utilities Act.

Not only does the Proposed Order violate the Contracts Clause, but it also violates the Public Utilities Act that states:

Existing contracts not affected. Nothing in this Article XVI shall affect the right of an electric utility to continue to provide, or the right of the customer to continue to receive, service pursuant to a contract for electric service between the electric utility and the customer, in accordance with the prices, terms and conditions provided for in that contract. Either the electric utility or the customer may require compliance with the prices, terms and conditions of such contract.

220 ILCS 5/16-129.

The Commission has no more authority to change who is to pay for construction of the lines as it does to change the ownership of the facilities in the substations or the ownership of the land beneath the substations. Thus for the Commission now to declare that it can unilaterally insert language "superseding conflicting provisions" in the customers' contracts is impermissible under both the Contract Clauses of the U.S. and Illinois Constitutions but also under the Public Utilities Act. The Proposed Order language must be changed to comply with the law.

4. Contract changes negotiated between parties may be subject to Commission review.

The Proposed Order notes that ComEd argued that it is entitled to unilaterally rewrite the contracts because the CTA and Metra contracts contain language that make the contracts subject to the approval of the Commission. Proposed Order at 46. ComEd's interpretation of the contract language is wrong.

The language provides that modifications to the contracts are subject to Commission review. This does not mean that any party to the contract can simply come to the Commission and file a unilateral change that the Commission then incorporates into the documents. Under such an interpretation, only ComEd could amend the contracts since neither the CTA nor Metra are public utilities that can file tariffs with this Commission. This is an absurd and patently unfair result. ComEd's abuse of the Commission filing process also would violate the Contracts Clause.

It has been the practice between the CTA and ComEd to negotiate changes to the 1958 agreement such as the 1998 amendment. This amendment, upon which ComEd relies heavily for its argument to change the standard of service for the Railroad Class, never was submitted to the Commission under the provision ComEd cites. When asked about the 1998 CTA-ComEd contract amendment, ComEd's Mr. Alongi testified:

- Q. And was the 1998 agreement submitted to the Commission for approval?
- A. No. It was a provision that—at the time before ComEd was an integrated distribution company and after the time of the customer choice law being enacted in December 1997, that provision in the act—and I think it's 16-116B—allowed ComEd to enter into a contract agreement with a customer without specific Commission approval. And that's how that amendment came about.

Q. And that amendment was negotiated between ComEd and the CTA; is that correct?

A. That's correct.

Tr. at 2153/18-2154-8.

The only filings with the Commission that ComEd has made regarding the Metra contract were to change the rate for electricity. Tr. at 2155/9-12. The filing provision of the contract has not been used by ComEd to change material provisions of Metra's agreement.

ComEd is wrong in insisting that it can unilaterally rewrite the CTA and Metra contracts by merely filing what the Company wants with the Commission. The Proposed Order errs by following ComEd's direction.

B. Leaving contract provisions intact does not create any 'subsidy' to railroads.

ComEd erroneously argues that it is justified in making this change because the Commission's Initial Order "created a large subsidy for CTA and METRA." Proposed Order at 45. There was no large subsidy created by the Final Order for the Railroad Class. The Final Order merely corrected a previous inequity that set the retail distribution rate artificially high and prevented the railroads from obtaining economic power from third parties. The Final Order correctly found that the load for the Railroad Class members should continue to be aggregated for the Delivery Facilities Charge. This aggregation makes the Railroad Class members eligible for the over 10 megawatt delivery service rate. The Railroad Class members are paying no more or no less than the proper over 10 megawatt rate. This finding in the original Final Order is not an issue in

this rehearing. Thus ComEd's argument concerning the delivery service charge "subsidy" is a red herring.

ComEd further argues that CTA and Metra are seeking "an even larger subsidy by requesting standard service for railroads that is significantly greater than the standard service for Over 10 MW customers." Proposed Order at 46. The railroads are not requesting any discount or subsidy but rather only are seeking to maintain the status quo as provided in their written contracts. ComEd is grossly distorting the facts concerning standard service for the railroads.

As noted above, the standard service today for railroads as reflected in the CTA and Metra contracts is for ComEd to pay for the service lines to the traction power substations, and to provide two interconnected lines to avoid unnecessary shutdown of the transit and rail lines that are the backbone of the Chicago public transportation system. By seeking to charge the railroads for expenses previously provided by ComEd, the Company is creating a new source of funds at the railroads' expense and contrary to the written contracts. Any funds that ComEd collects from the railroads for construction have not been included in this case, so all of the funds ComEd collects from the Railroad Class immediately will go directly into ComEd's pockets. ComEd has presented no testimony as to how much of ComEd's construction costs now in rate base would be reduced as a result of this significant change. The Proposed Order inappropriately allows ComEd to double dip for these costs. This error must be corrected.

C. ComEd’s proposed BES-RR language does not ‘mirror’ either the CTA’s or Metra’s contract.

The Proposed Order also adopts ComEd’s argument that “the CTA contract, as amended in 1998, mirrors Rate BES-RR.” This statement is wrong. ComEd is referring to Sec. 8.08 of the 1998 Amendment that states:

Notwithstanding the provisions contained in Sections 3.03 and 3.05, for any future Points of Supply, or for any modifications made to existing Points of Supply, CTA shall pay Edison any and all amounts for optional facilities as deemed to be in excess of standard facilities for such Points of Supply as determined under Rider 8—Optional or Non-Standard facilities.

CTA Ex. 3.03.

This paragraph must not be read in a vacuum but rather in conjunction with the defined terms in the 1959 CTA-ComEd agreement.

“Points of Supply” is a defined term under the 1958 CTA-ComEd contract. It means:

(26) “Point of Supply” means a CTA Substation or an Edison Joint Substation at which electricity is delivered to CTA hereunder. If there are two or more Edison Supply Facilities to serve a single substation, such substation shall nevertheless be a single Point of Supply

CTA Ex. 3.02 at 4, Paragraph (26). The plain reading of this provision is that a “point of supply” is “*a* CTA Substation” or “*an* Edison Joint Substation.” Substation is singular, not plural. Thus, the point of supply is determined on a substation by substation basis.

A CTA substation is defined under the contract as “a substation owned by CTA.”

CTA Ex. 3.02 at 5, Paragraph (29). Again, it is an individual substation, not the total CTA substations.

A “Point of Delivery” under the contract is defined in Sec. 4.01, which states:

SECTION 4.01. The Point of Delivery of electricity supplied hereunder shall be (a) at each CTA Substation, the point or points at which Edison's Supply Facilities enter CTA's premises and (b) at each Edison Joint Substation, the point or points at which the Joint Facilities connect with the Conversion Facilities.

CTA Ex. 3.02 at 7. Again, it is *each* substation.

According to ComEd, these cited provisions are "mirrored" in Rate BES-RR that states:

Notwithstanding the preceding provisions of this Service and Facilities subsection, if larger, more, or different services or distribution or meter-related facilities than those needed to provide standard electric service to the nonresidential retail customer are in place, required or requested by such nonresidential retail customer, and such services or facilities are reasonably and technically feasible, and can be furnished, installed, operated, replaced, and maintained with no significant adverse impact on the Company's system with respect to reliability or efficiency, such services or facilities are furnished, installed, owned, operated, replaced and maintained by the Company, provided the Company is allowed to recover from the nonresidential retail customer the costs of furnishing, installing, owning, operating, replacing, and maintaining such services or facilities in accordance with its provisions for providing nonstandard services and facilities in the Company's Schedule of Rates, including but not limited to the provisions of the General Terms and Conditions, Rider DE—Distribution Extensions (Rider DE), Rider NS—Nonstandard Services and Facilities (Rider NS), and Rider ML—Meter-related Facilities Lease (Rider ML).

1st Revised Sheet No. 346.

The language in Rate BES-RR does not mirror the 1998 CTA amendment. It is contrary to the concept that each substation is a separate point of supply and point of delivery as articulated in the CTA contract. Optional facilities are to be determined on a substation-by-substation basis, not under ComEd's new hypothetical super substation basis.

Moreover, ComEd is understandably silent as to what provision of the Metra contract is “mirrored” in Rate BES-RR for the simple reason that there is no provision in the Metra contract that allows ComEd to abdicate its contractual obligation to build and to pay for all lines to Metra traction power substations.

The Proposed Order is in error in accepting ComEd’s argument.

D. Rehearing Order creates a new payment obligation based on an unrealistic hypothetical, not reality.

The Proposed Order finds that the standard of service for the railroads “consists of facilities at a single point of delivery that are adequately sized for each railroad’s entire traction power system.” Proposed Order at 48. This conclusion inappropriately suggests that railroads are to pay ComEd based not on reality but on an unrealistic hypothetical.

This conclusion ignores the CTA and Metra contracts and the physical construction that exists on the ground. As noted above, there is no “single point of delivery” for traction power for either the CTA or Metra that serves the “entire traction power system.” For one substation to be “adequately sized” would mean that ComEd would have a substation for the CTA that has three 50 MVA transformers. There is no such substation. As ComEd witness Mr. Alongi testified at the initial hearing:

Q. And do you know where those 350 [sic] MVA transformers are located?

WITNESS ALONGI: They are a standard service that we allow for that size load, but CTA takes service through a number of different 12 kV lines through a number of different substations.

Q. So am I correct that when you talk about a standard installation being 350 [sic] MVA transformers, that really doesn’t exist?

WITNESS ALONGI: That's correct.

Tr. at 1373/7-16.

Using this hypothetical substation to determine what facilities ComEd is to provide and pay for is contrary to the contract provisions cited above.

Any rate or charge set by the Commission, assuming that it has authority in this area, must be based on facts, not a fanciful hypothetical offered by ComEd. If the Commission were to base rates on hypotheticals, then there would be no need for utilities to conduct cost-of-service studies. Rather, all rates would be based on theory. This is contrary to all public utility ratemaking principles and the Public Utilities Act.

E. When it is to ComEd's benefit, ComEd wants conflicting provisions in agreements to apply.

The Proposed Order also allows ComEd to pick and choose which provisions of the contracts it wants. As noted above, this is contrary to the sanctity of contracts and the Commission's earlier ruling. In finding that ComEd can unilaterally reject the CTA and Metra contracts, the Proposed Order additionally ignores ComEd's own inconsistency in Tariff Sheet No. 346 that states:

For a situation in which the Company relocates or removes Company facilities in accordance with a nonresidential retail customer's requirements or request, such relocation or removal is performed in accordance with the provisions for providing nonstandard services and facilities. *For a situation in which the previous provisions of this paragraph conflict with the provisions contained in the CTA Agreement or the NIRCRC Agreement, as applicable, the terms of such applicable agreement apply.*

1st Revised Sheet No. 346. (Emphasis added.)

In other words, ComEd wants some of the contract language thrown out, but when the provisions may work to ComEd's benefit, then "the terms of such applicable agreement apply." The Commission should consistently require the terms of the agreements to apply and modify the Proposed Order so that the historical, existing standard service as set out in the "applicable agreement" applies.

This ability of ComEd to pick and choose what contract provisions it will follow must be rejected.

III. Proposed Order Incorrectly Assesses a Reserved Capacity Charge on Railroad Class's Standard Service.

A. Reserved capacity charge ignores the benefits the railroads' looped services provide to ComEd's other customers.

The CTA's and Metra's second exception concerns the imposition of a reserved capacity charge. The Proposed Order erroneously finds that the issue involves "a non-standard service." Proposed Order at 49. To the contrary, as noted above, standard service for the railroads is service to traction power substations provided by two or more lines connected by a breaker operated in the closed position.

The Proposed Order erroneously states that "real costs are incurred in providing this automatic load transfer service." Proposed Order at 49. This statement ignores the record evidence that the looped service provided by the railroads is a benefit to ComEd for which the railroads receive no compensation.

"Because the automatic switches are operated in the closed position, power and energy flow through the CTA substations to serve ComEd load on both lines." CTA Ex. 3.0 at 16/393-395. ComEd witness Mr. DeCampli agreed that at the CTA substations, at

any given instant in time, power could be flowing into the substation on one line and some power and energy could be flowing out of the substation on the other line. Tr. at 1002/19-1003/2. This is because ComEd cannot control where electricity goes. It just flows to the point of least resistance. Tr. at 1003/7-11. Thus, the power flowing through the CTA substation could be going to another ComEd customer. Tr. at 1003/21-1004/7. When the power flows through CTA-owned facilities and back out onto the ComEd system, the configuration adds reliability to the ComEd system.

B. Contrary to the law, filing by ComEd contains no rate or way to determine the charge to the customers.

In addition, the Proposed Order sidesteps the fundamental issue that ComEd has provided no rate for reserved capacity. The Proposed Order states that “reservation of distribution capacity will be treated as a non-standard service on a case-by-case basis.” Proposed Order at 49.

The Public Utilities Act, 220 ILCS 5/10-201 requires that there be a rate in the tariff. In *Citizens Utility Board et al v. Illinois Commerce Commission*, 275 Ill.App.3d 329, 655 N.E.2d 961 (1st Dist. 1995), the Commission was requested by ComEd to approve an uneconomic bypass rate that was to be negotiated between ComEd and the customer. The appellate court found that filing was inadequate because the rate must contain a charge. The court said:

In light of the fact that there were no rates at the time Edison filed Rate CS because the contracts containing those rates did not yet exist, we find that Rate CS does not comply with section 9-102 of the Act. For this reason alone, the Commission’s order approving the tariff must be reversed.

655 N.E.2d at 968.

Not only is there no rate for reserved capacity in Rider NS, all references to reserved capacity were taken out of the compliance filing by ComEd.

In the Final Order, the Commission correctly found that the original language in Rider NS pertaining to the reserved capacity charge was “problematic” and rejected the charge, stating:

ComEd failed to adequately explain the exact nature of the service it would provide when it sells reserve capacity to retail customers. Reserved capacity is a term that is commonly associated with open access to pipelines and transmission lines in wholesale natural gas and electricity markets. In general, suppliers purchase reserved capacity on pipelines and transmission lines to ensure delivery of commodity to the local distribution utility where the commodity is then delivered to the retail customer. At the distribution level, retail customers, such as the customers served by ComEd, pay for their share of capacity on the distribution system through non-bypassable delivery service charges, which are at issue in the instant proceeding. The Commission is concerned that the reserved capacity charge language in ComEd’s proposed Rider NS would permit ComEd to charge what, in effect, would amount to additional delivery service charges that are not approved by the Commission. *The Commission rejects the language in ComEd’s proposed Rider NS related to reserved capacity charges* and finds that the remaining provisions are adequate for ComEd to recover the cost of additional facilities necessary to provide non-standard service.

Final Order at 226. (Emphasis added.)

In its original request for Rider NS, ComEd included the following paragraph:

If a retail customer requests or requires the company to *reserve* distribution or transmission system capacity in order to serve such retail customer’s electric power and energy requirements, and *such reservation* is reasonably and technically feasible and has no significant adverse impact on the Company’s system with respect to reliability or efficiency, such distribution or transmission system capacity is *reserved* by the Company for such retail customer provided the Company is allowed to recover the costs of *reserving* such distribution or transmission system capacity from such retail customer. Such *reservation* is also considered to be providing nonstandard services and facilities.

Metra Rehearing Cross Ex. 1. (Emphasis added.)

In its compliance filing for Rider NS, ComEd eliminated the entire paragraph. In fact, there is no longer any mention or use of the term “reserve capacity,” “reservation,” or “reserved” in Rider NS. Even though ComEd eliminated the language referencing reserved capacity, Mr. Alongi said it is ComEd’s intent to impose a reserved capacity charge under the new Rider NS. Mr. Alongi testified that

WITNESS ALONGI: Rider NS is designed to recover costs for nonstandard services and facilities.

ComEd’s position is that request for automatic transfer service results in ComEd incurring costs that we should recover.

Q. I would like to—can you answer yes or no as to whether Rider NS—whether ComEd under Rider NS would charge for a reserve capacity distribution costs?

WITNESS ALONGI: Reserve capacities [sic] is required when a customer requests automatic transfer equipment and ComEd, as a result, has to build its system accordingly. So we incur costs that for those nonstandard facilities that we need to recover. So the answer is yes.

Rehearing Tr. at 387/18-388/10.

A tariff that excludes all references to the item being charged (in this case, reservation of capacity) and contains no rate is in violation of the Public Utilities Act. It is precisely what the court in *Citizens Utility Board*, 655 N.E.2d at 968, prohibited when the court said “the Commission may not approve a tariff which permits a utility to set its own rates, in futuro, subject only to the condition that the rates contribute to the utility’s fixed costs.” The Proposed Order must be modified to reject ComEd’s reserved capacity proposal.

C. Rider NS's formula does not calculate a reserved capacity charge.

In place of the language on reserved capacity, ComEd included a new formula. However, when ComEd's Mr. Alongi was asked to point out "which portion of that equation does the calculation as to determining that capacity that's being reserved?" he answered, "That is not part of this calculation. This calculation calculates the cost of the facility that's being installed as the required cost, cable, material, et cetera." Rehearing Tr. at 391/17-392/2. In fact, nowhere in Rider NS can you find a formula or calculation to determine what is being reserved. As Mr. Alongi admitted:

The calculation of how much we reserve is not part of this rider, but that calculation of the cost to build the facility that replaces that capacity is what's in the rider.

Rehearing Tr. at 393/7-10.

The Final Order only authorized ComEd to file a formula "to determine the cost of providing non-standard services and facilities." Final Order at 227. The formula was to be restricted to "determining the cost of furnishing a distribution system extension," not a reserved capacity charge. Final Order at 227. In determining a reserved capacity charge, Mr. Alongi testified that there are "no feeder ratings in Rider NS that are needed to determine what the capacity of the line is." Rehearing Tr. at 392/3-11. Rider NS does not contain the normal allowable rating for the line, nor the customer's maximum demand on the circuit, which are required to calculate reserved capacity. Rehearing Tr. at 392/12-392/8. The complexity of determining a calculation for reserved capacity is demonstrated in CTA Ex. 3.05. The exhibit is a 23-page memorandum that attempts to

present various formulae to determine reserved capacity. Inexplicably, none of those formulae are included in Rider NS.

The only purpose of the formula included in Rider NS is to determine construction costs. Moreover, Mr. Alongi testified that under his interpretation of the compliance tariff, ComEd could charge the Railroad Class members for lines that “may not run directly to the customer’s premises.” Rehearing Tr. at 394/15-20.

The Final Order in its discussion of Rider NS stated that the “Commission is not willing to authorize ComEd to assess charges with essentially no regulatory oversight.” Final Order at 227. This issue was not addressed in the Proposed Order. It is a significant omission. As currently drafted, Rider NS gives ComEd the ability to assess charges with no regulatory oversight. The rate does not appear in the tariff, ComEd can impose the fee with impunity and there is no appeal of ComEd’s decision. This result is not what the Final Order intended.

The lack of regulatory oversight is critical especially in light of the fact that in the past, ComEd attempted to charge a reserved capacity charge that substantially was in excess of the construction costs on the project.

For the CTA Blue Line reconstruction, for one CTA traction power substation, ComEd submitted an estimate for construction of \$109,868 and a reserved capacity charge of \$1.2 million. . .The CTA declined to pay for the reserved capacity charge and ComEd eventually removed it from the estimate.

CTA Ex. 4.0 at 10/258-262. In other words, the “reserved capacity” charge was to be over 10 times the cost to build the facility in the first place.

The Proposed Order must be changed to reject ComEd's proposed reserved capacity charge.

IV. The Public Utilities Act Requires that Rider GCB be Retained.

The CTA joins in the Exceptions filed by the City of Chicago, the Cook County State's Attorney's Office and the Board of Education concerning the Proposed Order's analysis and conclusions reversing the Final Order's decision to maintain Rider GCB and substituting Rider GCB7 in its stead.

V. Proposed Substitute Language Is Attached.

The CTA and Metra have included Attachment A to these Exceptions which contains the proposed substitute language for the exceptions regarding Rate BES-RR and Rider NS.

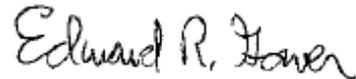
The CTA adopts the proposed substitute language submitted by the City of Chicago, the Cook County State's Attorney's Office and the Board of Education for Rider GCB.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard C. Balough, do hereby certify that a true and correct copy of the foregoing Chicago Transit Authority's and Metra's Exceptions to Proposed Order on Rehearing has been sent via electronic means to the service list for this Docket on this 12th day of December 2006.

_____/s/_____
Richard C. Balough

ATTACHMENT 'A'

PROPOSED SUBSTITUTE LANGUAGE

3. Rider NS

a. Standard Service

Commission Analysis and Conclusion

~~_____ The Order correctly approves ComEd's Rate BES RR incorporating provisions of Rider NS in ComEd's General Terms and Capital Conditions that provide for a standard of service for each railroad that consists of facilities at a single point of delivery that are adequately sized for each railroad's entire traction power system. Nothing presented on rehearing requires any change in that decision.~~

_____ The Commission reaffirms its finding in the Original Order in this Docket that the Commission takes contractual obligations seriously and tries to leave them intact whenever possible. The Commission finds that there is no reason for the Commission to rewrite the contracts between the CTA and ComEd and Metra and ComEd. Both the CTA and Metra provide mass public transportation to this area that is vital to the economic well being of the region.

_____ Standard service is the level of service that ComEd provides for customers to connect to the ComEd system. For the Railroad Class for over a half century, standard service has been for ComEd to build, to maintain and to pay for at least one line to each traction power substation. At the substation, the lines are interconnected via a breaker operated in the closed position.

_____ The specifics of the standard service for the Railroad Class are outlined in their contracts. These provisions are based on long-standing policies and negotiations. The provisions will not be disturbed by this Commission. The contract between the CTA and ComEd states that ComEd is to build and to pay for any new or rebuilt line to each individual traction power substation. Any additional lines are to be paid for by the CTA. The contract between Metra and ComEd provides that ComEd is to build and to pay for any line connecting the ComEd system to any Metra traction power substation.

_____ ComEd proposed to unilaterally change the standard service. To do so, ComEd created a "hypothetical" super-substation to determine which entity is to pay for the lines to the existing traction power substations. This novel approach is contrary to the Public Utilities Act and ratemaking principles. This Commission cannot and will not set tariffs based on hypotheticals. ComEd's proposal is rejected.

The Commission also finds that it legally cannot adopt ComEd’s proposal to rewrite the CTA and Metra contracts. The Commission is prohibited from doing so under the U.S. Constitution art. 1, Sec. 10 and the Illinois Constitution art. I, Para. 16. Both contract clauses prohibit a state from impairing contracts. ComEd’s proposal to have this Commission rewrite the CTA and Metra contracts would violate the principles set out by the United States Supreme Court in *General Motors Corp. v. Evert Romein*, 503 U.S. 181. The Commission finds that there are valid contracts between the CTA and ComEd and Metra and ComEd. ComEd’s proposal would impair those contracts and the impairment would be substantial.

While the CTA and Metra contracts do contain provisions to allow for the contracts to be modified, the obvious intent of the provision is for the Commission to approve changes to rates or other changes but only after the parties have agreed to such changes. The Commission finds these provisions inapplicable when one party to a contract seeks a unilateral change without negotiating with the other party.

ComEd is ordered to file tariff sheets for Rider NS and Rate BES-RR that accurately reflect the CTA and Metra contract provisions.

* * *

3. Rider NS

b. Reserved Distribution System Capacity.

Commission Analysis and Conclusion

~~The fundamental issue is who should pay for non standard service. The record demonstrates that real costs are incurred in providing this automatic load transfer service. In the original Order, the Commission directed ComEd to incorporate a formula to determine the cost of providing non standard services and facilities. (Order at 229) The Commission has considered the evidence on rehearing and rejects the request to depart from fundamental rate design principles requiring customers to pay for non standard service they request. The Order will remain as entered except that the Commission clarifies that reservation of distribution capacity will be treated as a non standard service on a case-by-case basis for situations in which the normal capacity rating of the feeder must be reduced to accommodate a customer’s request for automatic load transfer capability.~~

The Commission reaffirms its statement in the Original Order that it “rejects the language in ComEd’s proposed Rider NS related to reserved capacity charges.” (Order at 226).

As previously discussed in this Rehearing Order, the Commission finds that as to the Railroad Class, the standard service is for ComEd to provide multiple lines to the traction power substations. There is an overriding public interest in maintaining system reliability

for mass transit. The level of standard service to the Railroad Class has been in effect for at least 50 years and is reflected in the contracts that ComEd has with the CTA and Metra. As noted in the previous section, this Commission is disinclined to rewrite the valid contracts. In fact, this Commission is prohibited from such action by the U.S. and Illinois constitutions and the Public Utility Act.

ComEd has not demonstrated that it suddenly is incurring new costs that must be recovered through a reserved capacity charge. Even if there were costs that are not being recovered as a result of the Railroad Class's standard service, ComEd's approach to recovering such costs cannot be adopted. This Commission will not grant carte blanche authority for any utility to set its own rates and charges without Commission oversight. Rider NS as proposed by ComEd contains no rate or charge for the reserved capacity charge. Rider NS does not even use the term reserve or reservation. To adopt ComEd's proposal would be contrary to *Citizens Utility Board et al v. Illinois Commerce Commission*, 275 All.App.3d 329. The Commission will not ignore the appellate court in this regard.

ComEd is directed to file a tariff for Rider NS that excludes any charge for reserved system capacity.

* * *

GCB:

The CTA adopts the proposed substitute language submitted by the City of Chicago, the Cook County State's Attorney's Office and the Board of Education with their exceptions.