

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 : No. 07-0531
Petition for Approval of Tariffs Implementing :
A New Competitive Procurement Process and :
Recovering Procurement Costs :

**COMED’S REPLY IN SUPPORT OF ITS PROPOSED
TARIFFS IMPLEMENTING A NEW COMPETITIVE PROCUREMENT
PROCESS AND RECOVERING PROCUREMENT COSTS**

Commonwealth Edison Company (“ComEd”) submits this reply in accordance with the schedule approved by the Illinois Commerce Commission (the “Commission”) and the Administrative Law Judge (“ALJ”).

Introduction

This docket concerns approval of tariffs that implement for ComEd and its customers the new planned procurement process established by Public Act 95-0481 (“PA 95-0481”). As called for by law (220 ILCS 5/16-111.5(l)), ComEd initially proposed tariffs when it filed its procurement plan. Other parties commented, and ComEd materially revised its proposed tariffs in response. Additional responsive comments (“R. Comm.”) have now been filed by the Illinois Attorney General (the “AG”) and the Commission’s Staff.

As a result of the comment process, of compromise by parties, and of constructive consideration of others’ positions, only a handful of unresolved tariff issues remain. Many issues – for example, Staff’s concerns about internal audits and uncollectibles – were addressed and no additional tariff revisions in those areas are proposed. ComEd believes that the remaining issues, which are reflected in the specific tariff revisions that Staff proposes (Staff R. Comm. at 13 – 15), can be resolved constructively and in accordance with the law. In a few cases, differences

of opinion as to the meaning of portions of PA 95-0481 may remain, but those differences need not be resolved now, in the abstract and in the tariffs themselves. Rather, as Staff also suggests, ComEd believes that the tariffs can reflect – in neutral language – the rights established by law, and that the other remaining issues are, comparatively, small.

Therefore, with respect to Staff’s suggested tariff amendments, ComEd proposes:

- Rider AAF. Staff recognizes that ComEd may properly recover its remaining CPP-A costs, but objects to ComEd’s recovering these costs from other customers groups. ComEd accepts Staff’s [alternative] proposal to recover these costs only from CPP-A customers and proposes revised tariff language to do just that.¹
- Cost Recovery Language from PA 95-0481. Staff is concerned that ComEd may be seeking greater rights to cost recovery than the law provides. That is not ComEd’s intent. To remove all doubt, ComEd will revise its tariffs, in part as proposed by Staff, to make clear that its tariffs implement cost recovery as provided by the law. ComEd understands that there also may be some disagreement about exactly what that law means, especially with respect to balancing energy costs, contingency costs, and Illinois Power Agency (“IPA”) costs that ComEd is compelled to pay. However, those issues need not be resolved in these tariffs. ComEd does not intend to incur costs that are unreasonable under the approved plans. But, should such a controversy arise, tariff language that simply and fairly quotes or refers to the statute preserves all parties’ rights and assures

¹ ComEd filed redlined and clean versions of its originally proposed tariffs as Attachments A and B to its Petition, and revised redlined and clean versions with its initial responsive comments as Attachments D and E. Attachment F hereto shows in redline the additional changes ComEd proposes (based on Staff’s most recent comments). Attachment G is a final, clean version of all proposed revised sheets.

the Commission that it can consider the issue, if it arises, on a full record, with actual facts and circumstances before it.

- Review of Other Costs. ComEd acknowledges Staff's concerns about unreviewed administrative costs. At the same time, however, test year costs from a prior rate case are simply not representative of the costs of administering the new procurement structure, and tying ComEd's rates to obsolete administrative costs is not consistent with the Act. To balance these concerns, ComEd proposes a revised version of Staff's language assuring that its administrative costs will be reviewed by the Commission and making clear that recovery of current costs is subject to full refund pending that review. ComEd also proposes to make clear that in the unforeseen and unlikely event that any procurement activities are inconsistent with or contrary to a procurement plan, those costs must be independently reviewed and approved by the Commission to be recoverable. This strikes the correct balance. In those unforeseen circumstances, it may be entirely prudent and reasonable for ComEd to take an action also not foreseen in the plan, and penalizing ComEd for doing so by automatically denying it all cost recovery – even if its actions were prudent and reasonable – is not lawful, fair, or in the public interest. Ensuring that such costs are not passed on to customers without Commission approval is.
- Collateral / Security Costs – ComEd understands Staff's concern about the potential for credit security costs unrelated to procurement activities to be included in the tariff and proposes tariff revisions that assure that only those costs solely related to procurement activities are recovered through the procurement rider. In addition, ComEd offers new language to assure Staff that ComEd will review its procurement-related collateral and security plans with Staff, each procurement cycle, in advance.

Distinct from Staff, the AG contests ComEd's right to recover even the basic cost of contracts for supply entered into pursuant to the Commission-approved procurement plan and over which ComEd has no discretion. The AG's claims that these costs: (a) should be second-guessed because the procurement plan was this year first initiated by utilities, and (b) can be legally second-guessed under federal law, are both incorrect and should be rejected. The AG proposes no specific tariff amendments, so no tariff language issues are involved. Moreover, properly rejecting these arguments does not limit the scope of the review that ComEd and Staff each acknowledge the Commission may undertake.

Procedural Issues

ComEd agrees with the good sense of the Commission that this proceeding, and the companion procurement plan proceeding (Docket No. 07-0528), should be resolved on the papers. ComEd also believes that most, if not all, other parties concur. To implement this approach, ComEd urges the ALJ to secure the stipulation of all parties to proceed with a paper hearing as outlined in 83 Ill. Admin. Code § 200.525. If consent is not obtained, ComEd would urge that cross be allowed. These safeguards will remove any doubt that all due process requirements have been satisfied.

I. Staff's Proposed Tariff Amendments

Staff proposed alternative tariff language shows that Staff and ComEd now have many points of agreement, and are not far apart in their respective positions. Staff Comm. at 13-14. Both Staff and ComEd agree that ComEd's tariffs are to implement Section 16-111.5(l) of the Act. 220 ILCS 5/16-111.5(l). Both agree that ComEd's procurement costs include both supply and administrative costs. Both agree that the procurement costs are subject to Commission review, either as part of the plan approval process or after the procurement plan is implemented.

There are still a few areas where Staff and ComEd are not in agreement. In an effort to bridge these remaining gaps, ComEd suggests compromise, alternative language, and/or clarification in each area. With these suggestions, ComEd believes that the Commission will be able to approve tariffs that faithfully implement the procurement process envisioned by the General Assembly in PA 95-0481 and that address those valid concerns raised by Staff.

A. Proposed Rider AAF – Accuracy Assurance Factor

In its responsive comments, Staff no longer objects to ComEd’s right to recover, or credit to customers, the remaining AAF balances relating to the 400 kW and greater customer group under the current auction procurement structure. Staff R. Comm at 6. The prospect that it could be denied cost recovery under Staff’s original proposal was a primary concern to ComEd, as the law is clear that ComEd’s rates must allow a utility to recover these prudently and reasonably incurred costs. Staff recommends that Rider AAF be amended “to continue a separate over or under true-up mechanism for 400 kW and greater customers beyond May 2008, until just after the settlement of May 2008 costs are determined and charged (the month of September).” Staff R. Comm. at 6. ComEd accepts Staff’s revised proposal and has proposed tariff language accordingly. *See* Rider AAF, Attachment F, Orig. Sheets 659, 660, 662, and 664; *see also* conforming revisions to Rate BES, Rate RDS, and Rate BES-H, Orig. Sheet 652, 4th Rev. Sheet 372, and Orig. Sheet 334.6, respectively. The revised tariffs provide ComEd the ability to recover any remaining unrecovered costs in accordance with law and allows customers to recover any remaining credits, in each case according to cost causation. ComEd has discussed this approach with Staff and Staff does not object to its approval.

In her responsive comments, the AG recommends that the Commission approve either of Staff’s original proposals as set forth in its November 13 Response. The AG argues that “any

and all costs incurred on behalf of a utility's large commercial customers should follow those customers after they leave the utility, without limitation." AG R. Comm. at 4. The AG's argument for an absolute rule must be rejected for the same reasons set forth in ComEd's Response filed on November 20, 2007 ("ComEd's Response") at 17-19. An absolute rule would be contrary to ratemaking principles and practice, and the AG utterly fails to rebut any of the arguments set forth in ComEd's Response. Moreover, the AG's comment is moot, as ComEd has accepted Staff's proposal.

B. Recovery Of Procurement Costs And Appropriate Post Hoc Reasonableness Review

Section 16-111.5(l) makes clear that ComEd's tariffs must reflect its right to recover various procurement costs. As ComEd's Response (at 6-16), Section 16-111.5(l) specifies the costs that ComEd is entitled to recover in its procurement tariffs, treating ComEd's supply costs differently from its internal costs of administration. Section 16-111.5(l), for instance, unambiguously provides that ComEd "shall recover its costs of procuring power and energy" pursuant to that section. 220 ILCS 5/16-111.5(l). When ComEd procures in conformance with a Commission-approved plan, its supply costs are recoverable without a second *post hoc* review. At the same time, Section 16-111.5(l) provides that ComEd's tariffs recover "any just and reasonable costs that the utility incurs in arranging and providing for the supply of electric power and energy." 220 ILCS 5/16-111.5(l). This provision allows the Commission to determine the reasonableness of ComEd's administrative costs, including in periodic review proceedings. ComEd's proposed tariffs incorporate all of these points.

Staff does not generally challenge this view of Section 16-111.5(l) by arguing for *post hoc* review of basic supply costs, such as costs of RFP procurement contracts themselves. Staff R. Comm. At 10. Staff does express concern, however, about the ability to review some supply

costs. In its Response (at 6), ComEd notes that supply costs include those for energy, capacity, ancillary services, collateral and other security, load balancing, contingency plans, and IPA fees charged to ComEd. Staff does not quarrel with the first three. ComEd addresses the fourth – collateral and other security – below and believes this issue may be resolved. The final three may be the subject of disagreement over what the law means. ComEd’s positions on these costs are set forth in its response (at 6, 8, 15-16); Staff’s are described in its responsive comments (at 9-10, 14-15).

However, as noted in the introduction, ComEd agrees that it is not necessary to resolve the potential legal questions with respect to load balancing, contingency plan costs, and IPA fees now, in the abstract, and in the context of approving tariffs rather than considering any such costs if any when they are incurred. A dispute over the prudence of these costs may, in fact, never arise. Nor is resolving these question in the tariffs necessary for those tariffs to implement Section 16-111.5, as called for by subsection (l) thereof. ComEd therefore proposes that the tariff language concerning load balancing, contingency plan costs, and IPA fees be replaced either by a neutral direct quotation of the whole sentence of Section 16-111.5(l) that addresses those costs or a reference to that section. This preserves all parties’ rights on these questions and assures the Commission that it can consider recovery of the costs of load balancing, contingency plans, and IPA fees based on a full record with actual facts and circumstances before it.

What Are Costs Under The Plan?

Although Staff and ComEd are generally in accord on what are costs incurred under a Commission approved plan, ComEd’s proposed tariffs make this clear. In particular, Staff describes such costs as “not involving utility discretionary action incurred pursuant to and in strict adherence” with the plan. Staff R. Comm. at 10. While ComEd believes it understands

Staff's intent, the meaning of this language is not entirely clear. Procurement plans by their very nature will not literally define steps that a utility can execute, i.e., "buy xx megawatt-hours of energy in yy hour." They define a procurement process. And, the law itself requires some decisions to be made by an administrator. *See* 220 ILCS 5/16-111.5(c), (e). ComEd understands that if it incurs costs when faithfully implementing the plan, then those costs should be recoverable as provided in the law. For this reason, ComEd suggests that the Commission not adopt language in Rider PE that would limit supply costs, beyond their statutory definitions, to costs "specifically approved in the Commission-approved procurement plan" (Staff R. Comm. at 14). The plan will approve a procurement process, it will not approve specific costs. However, ComEd has proposed alternative revised language that is designed to meet Staff's objective of assuring that these costs are, in fact, incurred in implementing the plan and are not related to activities that are unauthorized by or contrary to the plan.

ComEd is also concerned that Staff appears to propose language that would absolutely bar recovery of any procurement costs resulting from activities outside the plan. While ComEd intends to follow the Commission-approved plan, if there is an unforeseen circumstance where doing so is impossible because, for example, of an emergency, it should not automatically lose the ability to recover any costs related to those actions. ComEd certainly understands Staff's concern that in such a circumstance ComEd's actions are not entitled to deference under Section 16-111.5(l), but if the Commission later determines that ComEd acted reasonably and prudently under the circumstances, there is no legal or policy reason to deny ComEd any prospect of cost recovery in advance. ComEd, accordingly, has proposed language making clear that in such case, ComEd cannot rely on the plan and can recover only those costs that the Commission independently determines to be reasonable and prudent.

Use Of Statutory Language In Tariffs

Staff correctly recognizes that “the law does not prohibit” the use of statutory language in tariffs. Staff R. Comm. at 8. In fact, Staff includes excerpts from the statutory language in its own proposed revisions to ComEd’s Rider PE. Staff R. Comm. at 13-14. However, Staff does raise a couple of questions regarding the use of statutory language. First, Staff states that the absence of any prohibition on using statutory language is not a “compelling argument” for its inclusion. Staff R. Comm. at 8. ComEd agrees. But, in this case, there is good reason for incorporating language from Section 16-111.5(1). This section requires ComEd to file implementing tariffs, which need to be consistent with the statute to implement it. 220 ILCS 5/16-111.5(1). Especially by incorporating the neutral language that ComEd accepts, consistency is assured.

Staff also expressed a concern that ComEd is seeking “an extra layer of protective language.” Staff R. Comm. at 8. ComEd has, we trust, made clear that it seeks no added protection and, by proposing clear neutral language, hopes to have addressed that concern. Incorporating or referring to that statute in this way promotes consistency between the tariff and the statute.

C. Supply Administration Costs

In its responsive comments, Staff proposes that Rider PE limit ComEd’s supply administrative costs based on the costs in either ComEd’s last rate proceeding or in another subsequent proceeding. Staff R. Comm. at 11. Staff argues that this limitation is needed to ensure review of ComEd’s administrative costs, and proposes to do so in either a rate case proceeding or subsequent proceeding. ComEd does not dispute that the Commission should review these costs. However, at the same time, to limit those administrative costs to test year

costs is both unfair to ComEd and contrary to Section 16-111.5(l)'s requirement that (so long as they are just and reasonable) ComEd's actual costs be recovered. ComEd rate case supply administration costs are 2006 test year costs under ComEd's current rate case (Docket No. 07-0566). In 2006, ComEd managed no supply portfolio and acquired its supply requirements from Exelon Generation LLC. Its 2006 supply administration costs are necessarily unrepresentative of the costs of portfolio management under the new procurement structure, and basing recovery on past costs is not consistent with the Act.

To balance the concern that supply administration costs be reviewed with the need for rates to reflect actual current costs, ComEd proposes to accept a revised version of Staff's language assuring that any administrative costs will be reviewed for reasonability and that recovery of current costs pending that review is subject to a full refund through the adjustment process set out in the tariff. In addition, ComEd makes clear that the internal and administrative costs that that will flow through the rider are those incurred solely as a result of ComEd meeting its statutory procurement obligations. For example, ComEd would not recover in the rider either the costs of employees who are not devoted to procurement functions or allocated overhead costs. These limitations should resolve the concerns Staff has raised.

D. Collateral Costs

In its responsive comments, Staff objects to collateral and other security costs "being recovered from ratepayers pursuant to Rider PE to the extent that ComEd cannot establish that the costs are related to non procurement activities." Staff R. Comm. at 11. Staff is concerned that without further specificity, ComEd could attempt to recover through Rider PE costs that are unrelated to power procurement. *Id.* at 12.

While its only intended purpose was to recover collateral costs arising from power procurement, ComEd acknowledges Staff's concern. Accordingly, ComEd has revised its tariffs to expressly provide that only collateral and other security costs incurred solely as a result of ComEd's procurement activities can be recovered through Rider PE. Such costs will also be subject to review in the annual reconciliation proceeding. Further, ComEd proposes language that will obligate it, each procurement cycle, to review its collateral security plan with Staff's Finance Department. *See* Attachment F, Original Sheet No. 637. Thus, ComEd asks that the Commission approve Rider PE as modified in Attachment F. With these revisions, Rider PE addresses both ComEd's ability to recover appropriately its procurement-related collateral and other credit costs and Staff's concern that non-procurement related costs not also be recovered.

II. The AG's *Post Hoc* Reasonableness Review Of All Initial Procurement Plan Costs Would Be Unlawful

The AG claims that all of ComEd's costs for the initial procurement in 2008, including its supply costs, should be subject to a *post hoc* reasonableness review by the Commission. AG R. Comm. at 4-6. Although ComEd agrees that some costs are subject to such a review, many are absolutely not. Indeed, as discussed in more detail in ComEd's Response (at 12-16), a Commission *post hoc* review of the reasonableness of supply contract and ancillary service costs would be illegal under both state and federal law.

At the state level, Section 16-111.5(l) provides that "[a]n electric utility shall recover its costs of procuring power and energy under this Section [16-111.5]." It requires ComEd to file tariffs "through which its costs of procuring power that are incurred pursuant to a Commission-approved procurement plan ... will be recovered," and requires the tariffs to include a "formula rate or charge designed to pass through ... the costs incurred by the utility in procuring a supply of electric power and energy...." 220 ILCS 5/16-111.5(l). These provisions are unequivocal,

allowing full recovery of supply costs incurred under the plan. They provide for no *post hoc* review of those costs.

On the federal level, such review is flatly prohibited. The justness and reasonableness of wholesale supply costs and ancillary transmission service rates is not within the Commission's jurisdiction; but is exclusively within FERC's jurisdiction. Federal regulation of such wholesale electricity transactions is supreme and exclusive. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 964 (1986). The Federal Power Act thus explicitly provides that "Federal regulation" shall govern "the sale of electric energy at wholesale in interstate commerce," and the U.S. Supreme Court has declared that "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." 16 U.S.C. § 824(a), (b); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988).

Because of this exclusive federal jurisdiction, the AG's suggestion that the Commission may reevaluate the prudence or reasonableness of ComEd's wholesale procurements of electric power must be rejected. AG Comm. at 4-6. In *Nantahala*, the U.S. Supreme Court held that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." 476 U.S. at 965. Similarly, in *Mississippi Power*, the Court ruled that state authorities may not issue an order "'trapping' the costs" of wholesale power purchases by a local utility, including by conducting a "prudence review" to determine whether those costs will be passed on to utility customers or disallowed. 487 U.S. at 372 & n.12. *See also General Motors v. Illinois Commerce Comm'n*, 143 Ill. 2d 407, 423 (1991) (holding that "[t]he ICC is not empowered, through the artifice of a prudence review, to trap federally mandated costs").

The logic and rationale of the decisions in *General Motors*, *Nantahala*, and *Mississippi Power* apply squarely in this case. The “reasonableness review” sought by the AG is directed at the “reasonableness” of the costs of resources that ComEd must acquire to serve its customers, and that ComEd must acquire at rates governed exclusively by federal law. In effect, the AG is seeking a Commission determination of the reasonableness of supply costs incurred under a FERC-approved rate – something that the Commission simply cannot do. The Commission may not prevent ComEd from recovering the costs of those wholesale purchases “through the artifice of a prudence review.” *General Motors*, 143 Ill. 2d at 423; *see Nantahala*, 476 U.S. at 965; *Mississippi Power*, 487 U.S. at 372 & n.12.

The AG attempts to evade this law in three ways. All of them fail fail. First, the AG claims that a *post hoc* review would fall within the “*Pike County* exception.” AG R. Comm. at 5-6. But as the passages cited by the AG themselves make clear, the limited *Pike County* exception does not apply here. In *Nantahala*, the Supreme Court explained the logic that defines this exception: “Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*.” *Nantahala*, 476 U.S. at 972 (emphasis in original) (citing *Pike County Light Power Co. v. Pa. Pub. Util. Comm’n*, 465 A.2d 735 (Pa. Commw. Ct. 1983)); *see also Mississippi Power*, 487 U.S. at 373-74. As a number of the passages cited by AG (at 5-6) underscore, the key is whether “lower cost power is available elsewhere.” *Nantahala*, 476 U.S. at 972. In the *Pike County* case, the utility had made no effort even to consider whether “lower cost power” was available from suppliers other than its own parent. It was in that context that, as the AG itself points out, the court noted that a state

commission could compare costs at FERC-approved rates with costs of alternatives. AG R. Comm. at 5.

Here, in contrast, ComEd will no such choice about the quantity procured or how to acquire it. The Commission-approved plan will set out what resources to purchase and how to acquire them. Moreover, *Pike County* did not approve *post hoc* review. The Commission review process is expressly designed to address the underlying issue of whether cheaper alternatives are available at the time of contracting – that is, at the time when a *Pike County* exception could apply. The question of whether the cost of the wholesale products called for by the approved plan was reasonable is exclusively within the jurisdiction of FERC. Nothing in *Pike County* even remotely suggests that a state commission could ever review the reasonability of wholesale costs themselves.

Second, the AG claims, without citation to law, that review of the initial procurement plan is “necessary and proper” because the 2008 procurement plan was initiated by utilities, not the Illinois Power Agency. AG R. Comm. at 4. The AG misses the point. The initial procurement, like subsequent procurements, will be conducted pursuant to a Commission-approved plan. The time to review that plan is now, during the review process. The fact that the law required utilities to propose the first plan does not make the Commission’s review any less robust, nor its approval any less meaningful. In any event, the fact that the utility proposed a procurement plan cannot change the fact that the reasonableness of the prices for the wholesale products purchased is not a matter that the Commission may lawfully review.

Finally, the AG asserts that ComEd will be exercising discretion during the initial procurement. AG R. Comm. at 4-5. Yet, the AG fails to name any specifics, let alone offer any evidence to support them. Nor can it explain how ComEd will exercise any greater discretion in

implementing the first plan than in implementing subsequent plans initially penned by the IPA. ComEd will be following a Commission-approved plan in each case.

Conclusion

For the foregoing reasons, ComEd requests that the Commission enter an order, as required by Section 16-111.5(j)(ii), approving the proposed tariff sheets attached hereto as Attachment G. These tariffs meet the requirements of PA 95-0481 and reflect the modifications made during the course of this proceeding. They should be approved.

Dated: November 30, 2007

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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