STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	**ICC Docket No. 07-0566**
Proposed General Increase in Rates.	:	

REPLY BRIEF ON EXCEPTIONS
OF
THE COALITION TO
REQUEST EQUITABLE ALLOCATION OF COSTS TOGETHER

REACT

COMPRISED OF:

A. FINKL & SONS, CO.
ALSIP PAPER CONDOMINIUM ASSOCIATION
AUX SABLE LIQUID PRODUCTS, LP.
THE CITY OF CHICAGO
COMMERCE ENERGY, INC.
FLINT HILLS RESOURCES, LLC
INTEGRYS ENERGY SERVICES, INC.
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO
PDV MIDWEST REFINING LLC
UNITED AIRLINES, INC.
WELLS MANUFACTURING, INC.

Christopher J. Townsend
Christopher N. Skey
Amanda C. Jones
DLA Piper US LLP
203 North LaSalle Street, Suite 1900
Chicago, Illinois 60601

July 31, 2008

TABLE OF CONTENTS[1]

Page

I. INTRODUCTION 2

VII. NEW RIDERS 5

B. Rider SMP 5

VIII. COST OF SERVICE AND ALLOCATION ISSUES 7

A. The Proposed Order Properly Rejects ComEd's ECOSS As A Legitimate Basis For Setting Rates 7

1. ComEd's Reliance On Past Commission Decisions Is Unpersuasive 7

2. Overwhelming Record Evidence Supports The Proposed Order's Conclusion To Reject The ECOSS 10

3. The Commission Should Accept Parties' Recommendations That ComEd Be Required To Perform Individualized Cost-of-Service Study 10

B. Interclass Allocation Issues 11

C. Supply vs. Delivery Services Allocation Issues 14

1. The Proposed Order Properly Recognizes That ComEd Inappropriately Has Allocated Supply-Related Costs To Its Delivery Services Rates 14

2. ComEd's Characterization Of The Testimony Related To Its Improper Allocation Of Customer Care Costs Is Unpersuasive 14

3. ComEd's Alternative Proposal For An "Avoided Cost Study" Has No Basis In The Record And Is Contrary To Proper Cost Allocation Methodology 19

4. The Proposed Order Should Be Revised To Require Proper Allocation Of Customer Care Costs In This Proceeding 20

[1] This Reply Brief on Exceptions follows the outline format used in the July 10, 2008 Proposed Order.

IX. RATE DESIGN 22

A. Overview..22

D. Existing Riders..22

1. Rider ACT..22

E. Distribution Loss Factors..23

F. Recovery Of Supply-Related Costs 23

G. Competitive Retail Market Development Issues 23

1. ComEd Fails To Engage On The Competitive Market Issues That Are Plainly Relevant To This Case..23

2. The Commission Should Resolve The Competitive Market Issues Consistent With Its Statutory Obligation to Promote Customer Choice..24

XII. CONCLUSION..26

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	**:**	
	:	**ICC Docket No. 07-0566**
Proposed General Increase in Rates.	**:**	

REPLY BRIEF ON EXCEPTIONS OF THE COALITION TO REQUEST EQUITABLE ALLOCATION OF COSTS TOGETHER

The Coalition to Request Equitable Allocation of Costs Together ("REACT"), comprised of A. Finkl & Sons, Co., Alsip Paper Condominium Association, Aux Sable Liquid Products, LP, the City of Chicago, Commerce Energy, Inc., Flint Hills Resources, LLC, Integrys Energy Services, Inc., the Metropolitan Water Reclamation District of Greater Chicago, PDV Midwest Refining LLC; United Airlines, Inc., and Wells Manufacturing Company. through its attorneys DLA Piper US LLP, pursuant to Section 10-111 of the Public Utilities Act (the "Act") and Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission") (83 Ill. Admin. Code 200.830), hereby submits its Reply Brief on Exceptions relating to the July 10, 2008 Proposed Order regarding the proposed general increase in rates of Commonwealth Edison Company ("ComEd" or the "Company").[2] A copy of the Proposed Order containing replacement language suggested by REACT was attached to REACT's Brief on Exceptions as Appendix A.

[2] Positions stated herein do not necessarily represent the positions of any particular member of REACT.

I. INTRODUCTION

Incredibly, ComEd continues to advocate positions that simultaneously would impose huge, disproportionate rate increases upon its largest customers while also thwarting customer choice for its smallest customers. ComEd irrationally clings to a now-thoroughly discredited Embedded Cost of Service Study ("ECOSS") that would result in massive rate increases for its largest customers. At the same time, ComEd inexplicably persists in asserting that supply-related Customer Care Costs should be recovered through delivery services rates; a position that would be a devastating blow to the development of competition for residential customers. ComEd's myopic opposition to the straight-forward conclusions in the Proposed Order on these issues is particularly surprising given that the policy decisions on these issues should not reduce ComEd's revenue stream.

In stark contrast to ComEd's positions, the Briefs on Exceptions submitted by a diverse collection of government, private, and public interest groups demonstrate expanded, robust support for the following conclusions in the Proposed Order:

- **ComEd's ECOSS is fundamentally flawed**, and should not be used as a basis for allocating the rate increase. The Proposed Order carefully evaluates and criticizes numerous aspects of the ECOSS and prudently rejects the ECOSS as a basis for the cost allocation that ComEd proposes. Those conclusions find active support or non-opposition from: Staff, REACT, the Attorney General, IIEC, DOE, Constellation, BOMA, Metra, CTA, CUB, Kroger, RESA, the City of Chicago, AARP, and Nucor.[3] ComEd stands alone with only the Commercial Group in favoring the ECOSS, and even the Commercial Group suggests that the ECOSS should not be used to set rates for the over-10 MW customers.

[3] DOE, Constellation, and Nucor did not file Briefs on Exceptions. Each has been an active party in the instant proceeding, and their respective decisions to decline taking exception to the Proposed Order is fairly interpreted as non-opposition to, if not outright support for, rejection of the ECOSS. This is particularly true of DOE and Nucor, both of which actively opposed the ECOSS or substantial parts of it. (*See, e.g.*, DOE Init. Br. at 3-12; Nucor Init. Br. at 7-11.)

- **An Across-the-Board Rate Increase is appropriate.** ComEd's proposal to impose rate increases that diverge widely from class to class is overwhelmingly unsupported. ComEd's president and COO testified that ComEd's current rates do not contain cross-subsidies. (*See* Tr. at 108:3-9.) The Proposed Order prudently implements an across-the-board increase in the interest of fairness and equity. The across-the-board approach finds active support or non-opposition from: Staff, REACT, the Attorney General, IIEC, DOE, Constellation, Metra, CTA, CUB, RESA, the City of Chicago, AARP, and Nucor. *Only* ComEd and commercial customers take exception to the across-the-board increase approach.

- **ComEd Misallocated Customer Care Costs.** ComEd maintains that 100% of its Customer Care Costs are attributable to delivery services and that 0% of those costs should be allocated as supply-related costs. The Proposed Order rejects that highly suspect argument and properly concludes that ComEd failed to allocate a percentage of Customer Care Costs to supply-related charges. The Proposed Order's conclusion finds active support and/or non-opposition from Staff, the Commercial Group, REACT, and *every* other party. Only ComEd argues otherwise.

The Proposed Order is correct on these points; the Proposed Order's conclusions are solidly supported by the record evidence, particularly when viewed in light of the applicable burden of proof. (*See, e.g.*, REACT Init. Br. at 2-3, 5-8, 10, 25-31, 41-42, 49-60, 68-69; REACT Reply Br. at 2-7, 10-18, 22-23, 25-34, 39-41; Staff Init. Br. at 96-101, 106; Staff Reply Br. at 74-76; 220 ILCS 5/9-201(c).)

REACT continues to believe that several modifications to the Proposed Order would ensure appropriate implementation of the proper policy guidance contained in the Proposed Order. Of particular importance are, two cost allocation issues:

- **As a matter of fundamental fairness, the Commission should direct ComEd to determine the actual costs of the facilities that are used to serve its 79 largest customers.** Having concluded that ComEd failed to accurately account for the costs associated with serving its largest customers, the Proposed Order nonetheless suggests that performing individualized cost of service studies for the 79 largest customers prior to the next rate case is unduly burdensome. (*See* Proposed Order at 202.) This suggestion is not supported by, and is contrary to, the evidence in the record, and also is contrary to other conclusions in the Proposed Order. Although the 79 over-10 MW customers represent only a tiny fraction of a percent of ComEd's 3 million customers, ComEd proposed that they bear well over 10% of requested the rate increase, an increase of more than $41.5 million per year. (*See* ComEd Ex. 13.2 at 1, 2.) With the amount of money at stake, and given the disproportionate result of ComEd's proposed cost study, all 79 of

ComEd's largest customers deserve to see the actual costs ComEd claims it incurs to provide delivery services to each such customer.

- **The Commission should direct ComEd to reallocate at least $64.8 million in Customer Care Costs from its delivery services rates to its supply rates.** Although the Proposed Order recognizes that ComEd has failed to properly allocate the Customer Care Costs between its supply function and its delivery services function (*see* Proposed Order at 200), the Proposed Order fails to take the logical and necessary step of specifically excluding the $64.8 million of misallocated Customer Care Costs from the amount ComEd is entitled to recover under the delivery services rates being approved in this proceeding. On this point, RESA explicitly supports REACT's precise proposal (*see* RESA BOE at 1-4); the Commercial Group actively supports an appropriate allocation (*see* Commercial Group BOE at 5 n.2); and no other party has opposed REACT's view, except ComEd, which stands alone in favoring a 100% allocation of Customer Care Costs to delivery services. As Mr. Merola testified, "[I]f the Commission wants to promote retail competition for the benefit of all customers, **a 'business as usual' approach is a recipe for failure**." (REACT Ex. 7.0 at 10:207-08)[4] (emphasis added).

Additionally, on some secondary issues, the Commission likewise should take additional steps to follow through in the same direction suggested by the Proposed Order:

- **The Commission should provide further guidance regarding the SMP process to address issues unique to over-10 MW customers and important to the competitive market.** The Proposed Order properly limits the scope of Rider SMP (*see* Proposed Order at 135), but fails to direct ComEd to take into consideration the competitive market issues and unique circumstances related to over-10 MW customers that already have installed "smart grid" technology at their own expense. It is clear from the various Briefs on Exceptions that the Proposed Order's very limited approval of Rider SMP could be improved by adding some clarifications. (*See, e.g.*, Staff BOE at 39-50.) No party argues that the competitive market issues that REACT has articulated should not be included in those clarifications.

- **The Commission should direct ComEd to retain Rider ACT in its current form, and direct an across-the-board increase in Distribution Loss Factors.** The Proposed Order suggests that the Commission accept ComEd's modified positions on Rider ACT and Distribution Loss Factors even though ComEd has failed to satisfy its burden of proof on these issues. (*See* Proposed Order at 220, 224.) No party other than ComEd argued against REACT's position.

- **The Commission should further address competitive market issues.** While the Proposed Order implicitly recognizes that competitive market issues are relevant to the

[4] All citations herein to REACT Exhibits 3.0, 4.0, and 7.0 are to the "Corrected" versions of such exhibits filed on eDocket on May 6, 2008.

instant proceeding, the Proposed Order should be revised to make findings related to ComEd's incentives to block the development of competition for its smallest customers and requiring ComEd to address competitive market issues in its next rate case. (*See* Proposed Order at 225.) Again, only ComEd argued against REACT's position.

REACT respectfully requests that the Commission accept the Proposed Order's conclusions on (1) rejection of the ECOSS, (2) implementation of an across-the-board increase, and (3) rejection of ComEd's misallocation of Customer Care Costs; and enter an Order consistent with the arguments outlined herein, in its Brief on Exceptions and in Appendix A attached thereto, and its previously filed briefs and testimony.

VII. NEW RIDERS

B. Rider SMP

The Proposed Order endorses a very limited version of Rider SMP. (*See* Proposed Order at 135.) Specifically, the Proposed Order recommends directing ComEd to implement Phase 0 of AMI deployment, together with a direction for initiation of a workshop process to begin to examine smart grid issues; subsequently, a Commission docketed proceeding would be initiated to adopt specific goals relating to smart grid issues, at which time ComEd could refile its request for rider recovery related to smart grid investment. (*See id.*) Several parties strongly object to even this limited approval of Rider SMP, while ComEd ignores the positions of every other party to the proceeding and reiterates its request for a much broader rider. (*See, e.g.,* AG BOE at 14-52; IIEC BOE at 1, 8-10; BOMA BOE at 5-7; Metra BOE at 1-7; CTA BOE at 1-10; CUB BOE 14-24; AARP BOE at 1-3.)[5] REACT does not object to the Proposed Order's limited approval

[5] Of course, private, governmental, and public interest stakeholders have opposed Rider SMP outright for myriad reasons throughout the instant proceeding. (*See, e.g.,* REACT Init. Br. at 12-18; Staff Init. Br. at 69-81; AG Init. Br. at 1, 23-65; IIEC Init. Br. at 44-50; Metra Init. Br. at 7-12; CTA Init. Br. at 5-13; Commercial Group Init. Br. at 4-5; CUB Init. Br. at 36-46; Kroger Init. Br. at 2-4; AARP Init. Br. at 3-11; Nucor Init. Br. at 1-6; s*ee also* REACT Ex. 5.0 at 14-16:281-

of Rider SMP, provided that the issues relating to prior investment by the over-10 MW customers and potential anti-competitiveness are addressed through the various formal and informal proceedings that the Proposed Order envisions. No party has opposed REACT's positions on these issues.

Rider SMP is open-ended, unnecessary, confusing, procedurally inappropriate and burdensome, and potentially anti-competitive. (*See* REACT Init. Br. at 12-17; REACT Reply Br. at 9.) Additionally, Rider SMP poses particular issues for over-10 MW customers. (*See id*.) Many over-10 MW customers previously invested their own money in the very type of advanced technology for which ComEd now seeks guaranteed before-the-fact recovery of costs, a point that ComEd has not addressed in any of its discussions of Rider SMP. (*See generally* ComEd Init. Br. at 66-83; ComEd Reply Br. at 85-93.)

REACT has identified several modest revisions to the process outlined in the Proposed Order, including:

- **Rider SMP should account for <u>prior</u> <u>investment</u> made by ComEd's over-10 MW customers.** (*See* REACT Init. Br. at 13-15; REACT Reply Br. at 9-10.)

- **Rider SMP should provide a credit for the <u>system-wide</u> <u>benefits</u> that all customers have received from the over-10 MW customers' previous investment in advanced meter technology.** (*See* REACT Init. Br. at 16; REACT Reply Br. at 9-10.)

- **Rider SMP should be implemented in an anti-competitive manner.** (*See* REACT Ex. 5.0 at 16:317-23.)

- **Steps should be taken to minimize the minimize procedural burdens of multiple, simultaneous, overlapping Commission informal and formal proceedings.** (*See* REACT Init. Br. at 16-17.)

331; ICC Staff Ex. 21.0 at 1:15-16; AG/CUB Ex. MLB-4.0 at 4:1-10; IIEC Ex. 5.0 at 19:359-70; AARP Ex. 2.0 at 2:15-20.)

REACT respectfully requests that the Commission modify the Proposed Order to ensure that any future proceedings relating to, and any future incarnations of, Rider SMP take into account the particularized concerns of over-10 MW customers and competitive market issues.

VIII. <u>COST OF SERVICE AND ALLOCATION ISSUES</u>

A. The Proposed Order Properly Rejects ComEd's <u>ECOSS As A Legitimate Basis For Setting Rates</u>

Opposition to ComEd's ECOSS remains overwhelming. (*See generally* Briefs on Exceptions of AARP, the AG, the City of Chicago, CTA, CUB, IIEC, Kroger, Metra, REACT, RESA and Staff.) At this point, only ComEd and the Commercial Group affirmatively support the ECOSS, and even the Commercial Group suggests that it might not be appropriate to rely upon the ECOSS to determine the size of the rate increase for the over-10 MW customers. (*See* ComEd BOE at 47-52; Commercial Group BOE at 6-7.)

The Proposed Order properly concludes that ComEd's ECOSS is fundamentally flawed, and cannot be relied upon as a basis to allocate ComEd's proposed rate increase. (*See* Proposed Order at 198-200, 228-29.) Nothing in ComEd's Brief on Exceptions calls that conclusion into question.

1. ComEd's Reliance On Past Commission Decisions <u>Is Unpersuasive</u>

ComEd responds that the ECOSS is supported by three prior Commission orders. (*See* ComEd BOE at 10, 48-49.) ComEd's position is unpersuasive, particularly as it relates to the over-10 MW customers.

As an initial matter, the orders cited by ComEd do not conclude that it is appropriate for ComEd to use its ECOSS as a basis to assign costs to its over-10 MW customers. (*See* ICC

Docket No. 99-0117, August 26, 1999 Order; ICC Docket No. 01-0423, March 28, 2003 Order; ICC Dockert No. 05-0597, July 26, 2006 Order at 196.)

That is, the Commission has previously *explicitly questioned* the application of the ECOSS for over-10 MW customers. As recently as ComEd's last rate case, the Commission questioned the ECOSS approach as applied to over-10 MW customers, and expressly invited the use of alternative approaches, stating:

> [T]he Commission would be interested in whether any party believes that considering marginal cost of distribution service has any place in setting electric distribution rates. The Commission invites parties to address this subject in ComEd's next rate case.

(ICC Docket No. 05-0597, July 26, 2006 Order at 160.)

The Commission's questioning of the ECOSS approach was motivated, at least in part, by none other than ComEd itself. The Company's own skepticism toward the ECOSS approach was summarized in the Final Order as follows:

> **ComEd also notes that for purposes of establishing delivery service charges, ComEd generally supports the use of a marginal cost of service study**. Crumrine Dir., ComEd. Ex. 9.0 Corr., 43:925-36. ComEd explains, however, that in light of the Commission's approval and use of an ECOSS in the last two ComEd delivery services rate cases (ICC Dockets 99-0117 and 01-0423), and in the interest of narrowing the issues in this case, it proposes the use of an ECOSS for both interclass revenue allocation and rate design purposes. Id. **Notwithstanding this proposal, ComEd notes that it continues to reserve the right to propose the use of a marginal cost study in future proceedings**.

(*Id.* at 156) (emphasis added.) Further, ComEd itself petitioned the Commission to reject the ECOSS as applied to its over-10 MW customers in that proceeding. (*See* ICC Docket No. 05-0597, July 26, 2006 Order at 156; December 20, 2006 Order on Rehearing at 65-67.) ComEd's own Brief on Exceptions rather obscurely acknowledges this point, noting that some but not all existing rate classes currently have delivery services rates that are *not* a product of the ECOSS in the last rate case. (*See* ComEd BOE at 48.) Likewise, the Commercial Group's Brief on Exceptions explicitly acknowledges that the most recent Commission Order rejected the ECOSS as a basis to set rates for the over-10 MW customer classes. (*See* Commercial Group BOE at 4; ICC Docket No. 05-0597, July 26, 2006 Order at 196.)

Additionally, as ComEd undoubtedly knows, prior Commission orders do not serve as binding precedent. (*See Abbott Laboratories, Inc. v. Ill. Commerce Comm'n*, 289 Ill. App. 3d 705, 715, 682 N.E.2d 340, 349 (1st Dist. 1997); ICC Docket No. 00-0393, *Re: Ill. Bell Tel. Co.*, March 28, 2002 Order on Second Rehearing at 21.) Instead, the Commission is bound to decide the issues before it based solely upon the record evidence in the instant proceeding. (*See* 200 ILCS 10-103 ("In all proceedings . . . by the Commission, . . . any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case . . .."); 220 ILCS 5/10-201(e)(iv)(A) (The appellate court "shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that: The findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented . . ..").) Thus, while prior Commission orders may be a valid basis for interpreting and implementing appropriate policy considerations and other guiding principles, those prior orders are not determinative of whether the ECOSS in the instant proceeding is valid.

ComEd's bare citation to the prior orders is not persuasive. Even if it were true that the Commission is bound by prior rate case rulings, which it is not, ComEd's argument would still be unpersuasive – plainly the Commission did not accept the ECOSS as a basis to set rates for the over-10 MW customers in ICC Docket No. 05-0597. The Commission need not, and should not, accept the ECOSS as a basis for allocating the rate increase in the instant proceeding.

2. Overwhelming Record Evidence Supports The Proposed Order's Conclusion To Reject The ECOSS

ComEd argues that the ECOSS is justified and defensible. (*See* ComEd BOE at 47-52.) ComEd seems to largely ignore the numerous questions and problems that have been identified with the ECOSS. (*See* REACT Init. Br. at 26-29; REACT Reply Br. at 13; REACT BOE at 6-7; IIEC Init. Br. at 52-70, 79-81; IIEC Reply Br. at 25-26; DOE Init. Br. at 2-12; Metra Init. Br. at 13-24; CTA Init. Br. at 17-25; *see also* REACT Ex. 2.0 at 12-19:243-393; REACT Ex. 6.0 at 5-6:103-21, 14-17:290-374; Staff Ex. 18.0 at 18:402-03; IIEC Ex. 5.0 at 3-4:24-44, 7-8:122-31; IIEC Ex. 7.0 at 2-3:15-41; City of Chicago Ex. 2.0 at 3:69-73, 5:116-18; DOE Ex. 2.0 at 2-3:21-23, 26-59; Metra/CTA Ex. 3.0 at 4:10-25; BOMA Ex. 5.0 at 4:35-38.) ComEd itself historically has questioned the use of an ECOSS to set rates. (*See* REACT Init. Br. at 26; REACT Reply Br. at 13.) In light of this overwhelming record evidence, the Proposed Order is correct to reject the ECOSS as a valid basis for setting rates. This conclusion is driven home by the noticeable paucity of record evidence cited by ComEd in its Brief on Exceptions to defend the ECOSS. (*See, e.g.*, ComEd BOE at 49-53.)

3. The Commission Should Accept Parties' Recommendations That ComEd Be Required To Perform Individualized Cost-of-Service Studies

The Proposed Order rejects REACT's request that ComEd perform individualized cost-of-service studies for all 79 of its over-10 MW customers. (*See* Proposed Order at 202.) ComEd does not comment on this finding. CTA and Metra agree with REACT that individualized cost-of-service studies should be performed. (*See* CTA BOE at 11-12; Metra BOE at 7-9.) For the reasons stated in its Brief on Exceptions, REACT respectfully disagrees with the Proposed Order and agrees with the positions of CTA and Metra. (*See* REACT BOE at 8-12.) Accordingly, REACT respectfully requests that the Proposed Order be modified to direct ComEd to perform individualized cost-of-service studies for its 79 largest customers and to work with those customers in developing its cost study prior to its next rate case.

B. <u>Interclass Allocation Issues</u>

The Proposed Order appropriately determines that an across-the-board rate increase is the only fair and equitable approach to an increase given the record evidence and the circumstances of the instant proceeding. (*See* Proposed Order at 205.) REACT agrees. By not taking exception to the Proposed Order's across-the-board rate increase in their Briefs on Exceptions, Staff, the Attorney General, IIEC, Metra, CTA, CUB, RESA, the City of Chicago, and AARP all likewise agree.

ComEd opposes the across-the-board increase, and is particularly critical of that approach on the basis that it is "not setting rates based on cost." (ComEd BOE at 46.) This criticism falls flat – as has been repeatedly articulated during the course of the instant proceeding, if there is no valid cost study, there can be no valid basis for setting rates "based on cost." (*See, e.g., generally* Tr. at 2097-99; Tr. at 2250:4-14 (Mr. Alongi); REACT Ex. 6.0 at 23:509-19; Tr. at 1558:17-20 (Mr. Bodmer; Tr. at 1644:4-10 (Mr. Baudino).) The Proposed Order makes quite clear that ComEd's ECOSS is invalid. (*See, e.g.*, Proposed Order at 198-205 ("There are substantial deficiencies in specific elements of the ECOSS…").) Accordingly, ComEd's criticism of the across-the-board increase is illogical, at best.

ComEd's assertion that an across-the-board increase will "exacerbate cross-subsidies" among rate classes similarly rings hollow. The President and COO of ComEd, Mr. Mitchell, testified unambiguously that ComEd's existing rates do not contain cross-subsidies:

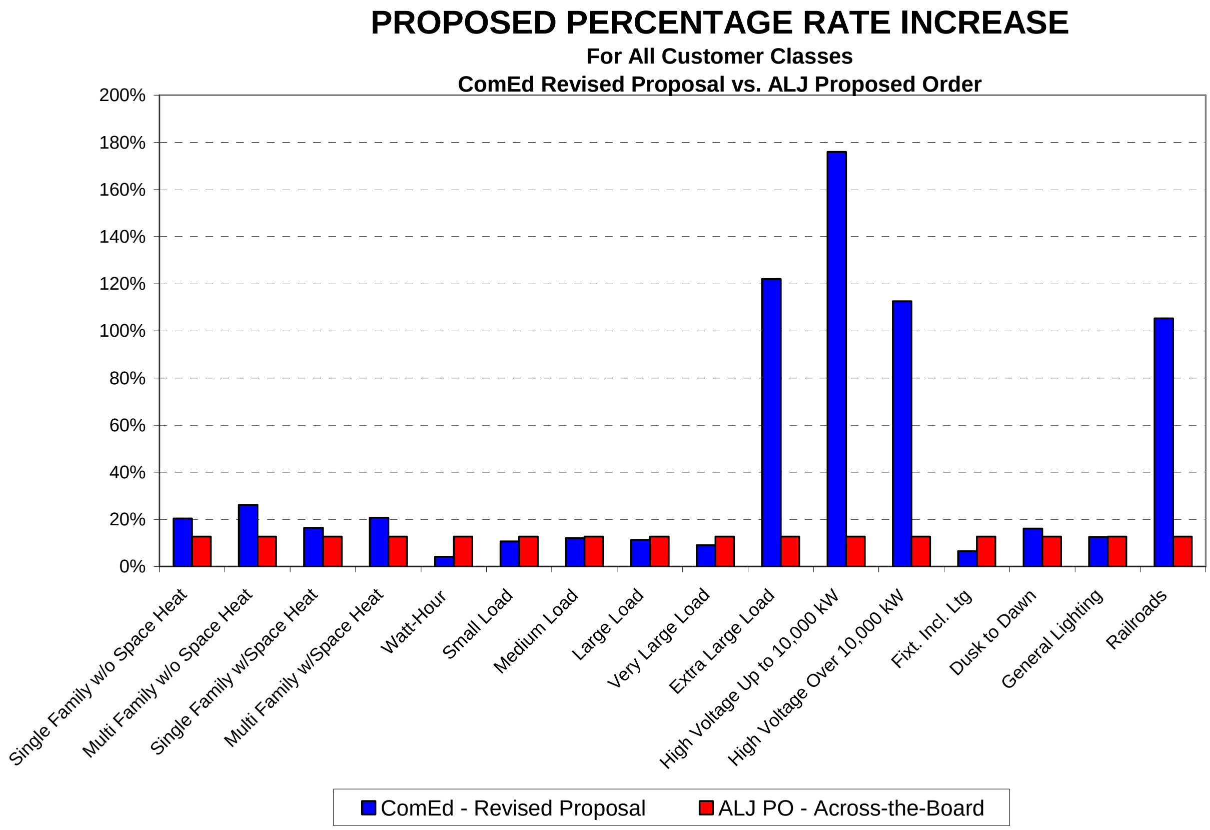
Q. Do you believe that ComEd's current rates have avoided cross-subsidies between classes?
A. In the current rates, I believe that it's a fair allocation amongst our customers, our classes of customers.

Q. And that they have avoided cross-subsidies?
A. I believe so.

(Tr. at 108:3-9.) ComEd's President and COO testified that there are no cross-subsidies – ComEd has not withdrawn or called into question Mr. Mitchell's testimony. The Commission is entitled to take that testimony at face value. Doing so undermines completely ComEd's assertion that an across-the-board rate increase would somehow exacerbate cross-subsidies.

Substantial evidence in the record demonstrates that until a much more fundamental change is made to the ComEd cost-of-service study approach with respect to the over-10 MW classes, the Commission should simply limit the percentage rate increase of this class to the overall system-wide average increase. (*See* REACT Init. Br. at 41-42; REACT Ex. 6.0 at 6,:125-32.) The Attorney General, who does not explicitly question the ECOSS, offers no objection to the across-the-board approach. (*See generally* AG BOE; AG Ex. (SJR) 6.0 at 7:159-61.) Even ComEd witness Mr. Alongi – who *does* support the ECOSS – admitted that an across-the-board increase was the preferable alternative in the event of an invalid ECOSS. (*See* Tr. at 2091:16-2092:11.)

The Proposed Order's focus on fairness is prudent and appropriate. (*See* Proposed Order at 2-5.) This is particularly the case with respect to over-10 MW customers. The following chart, which compares ComEd's proposed increase (adjusted to reflect its Stipulation with Staff) against the across-the-board approach endorsed by the Proposed Order, demonstrates vividly the enormous disparity and inequity involved in ComEd's proposal:



(*See* ComEd Ex. 13.1, Schedule 2a; Staff-ComEd Joint Ex. 1.0; Proposed Order App. 1 at 1.)

It is clear that the Proposed Order is exactly correct in concluding:

> We agree with Commission Staff that the fairest allocation in this case is an across the board increase. There are substantial deficiencies in specific elements of the ECOSS that we have directed ComEd to address in its next rate filing. Moreover, given the significant recent increases in the cost of electricity, aside from this case, **picking winners and losers in this Docket might well have a significant impact on one or more customer groups that they can ill afford [], made on the basis of a flawed cost of service study**.

(Proposed Order at 205.) The chart above bears out the Proposed Order's equitable and prudent view plainly and obviously.

The Proposed Order correctly conclude that any rate increase should be applied across-the-board. ComEd fails to articulate any evidentiary basis for a contrary result.

C. **Supply vs. Delivery Services Allocation Issues**

1. **The Proposed Order Properly Recognizes That ComEd Inappropriately Has Allocated Supply-Related Costs To Its Delivery Services Rates**

The Proposed Order accurately concludes that ComEd has failed to properly exclude its supply-related costs when calculating its delivery services-related costs. (*See* Proposed Order at 200.) In particular, the Proposed Order criticizes ComEd's failure to allocate any Customer Care Costs to the supply function, and instead to allocate 100% of those Customer Care Costs to delivery services. (*See id.*) REACT strongly supports the Proposed Order's analysis on this point.

2. **ComEd's Characterization Of The Testimony Related To Its Improper Allocation Of Customer Care Costs Is Unpersuasive**

ComEd suggests that the ALJs failed to undertake a "careful reading" of Mr. Crumrine's testimony. (ComEd BOE at 53.) However, a survey of the evidence, from both Mr. Crumrine and other sources, demonstrates that the Proposed Order's conclusion that ComEd has misallocated Customer Care Costs is well grounded in the record and is, in fact, supported by overwhelming evidence.

As a preliminary matter, the ALJs were present in person for the cross-examination of Mr. Crumrine and are fully qualified to determine whether Mr. Crumrine admitted that ComEd has misallocated some percentage of costs – that evaluation of the testimony and the credibility and demeanor of a witness is the precise function of the trier of fact. (*See*, *e.g.*, *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 865 N.E.2d 385 (1st Dist. 2007) ("[T]he trier of fact determines the credibility of witnesses, resolves conflicts in the evidence and attaches relevant weight to the witness testimony"); *see also Lefton Iron & Metal Co. v. Ill. Commerce Comm'n*, 174 Ill. App. 3d 1049, 1060, 529 N.E.2d 610, 617 (1st Dist. 1988). ("[T]he credibility of expert witnesses and the weight to be given their testimony are matters for the Commission as the finder of fact.").)

Additionally, ComEd's characterization of the transcript of testimony is undercut by what Mr. Crumrine actually said. At the hearing, Mr. Crumrine initially stated:

> **Q. So it's your position that a hundred percent of the customer care costs are attributed to delivery services?**
> **A. Yes.**
>
> **Q. Zero percent to supply?**
> **A. Yes.**

(Tr. at 1330:8-13; *see also* ComEd Ex. 30.0 at 58:1300-01.) Eventually recognizing the futility of his earlier statement, Mr. Crumrine recanted, admitting: "**You're right. It's not absolute zero.**" (Tr. at 1339:6-7.)

Mr. Crumrine then admitted that some percentage of Customer Care costs should be assigned to ComEd's supply rates:

> **Q. So ComEd agrees that some customer records and collections expenses should be assigned to the supply side of the equation. It's just a question of how much should be assigned, correct?**
> **A. Yes.**

(Tr. at 1339:20-1340:2.)

The Proposed Order thus accurately states that "ComEd witness Crumrine reluctantly acknowledged that some unknown percentage of these costs should be assigned to 'supply only' customers." (Proposed Order at 200.) Although ComEd apparently does not like that finding, that finding is well supported by Mr. Crumrine's testimony.

ComEd witness Ms. Clair also provided testimony that undercuts ComEd's argument that Customer Care Costs are 100% delivery services-related. When presented with a hypothetical in which the delivery services function and procurement function are provided by wholly separate entities, Ms. Clair admitted that the procurement entity *would* incur Customer Care Costs, including costs beyond just information technology costs. (*See* Tr. at 281:17-282:14.) Ms. Clair also admitted that to her knowledge all ComEd customer call center expenses are recorded as delivery services expenses, even though the ComEd customer call center handles calls that can be solely related to supply issues. (*See generally* Tr. at 287:21-289:6.) In other words, again, it is not a question of whether ComEd has misallocated Customer Care Costs; it is just a question of how much. Of course, REACT witness Merola quantified how much: at least $64.8 million. (*See* REACT Ex. 7.0 at 21:453-54.)

ComEd next admits that the Proposed Order is accurate in stating that ComEd did not offer "any alternative numerical value for the percentage of customer care costs assignable to distribution customers." (*See* ComEd BOE at 53, *quoting* Proposed Order at 200.) ComEd's surprising explanation for this evidentiary black hole is that: "ComEd did not make such an offer [of evidence] because it did not have to: ComEd properly allocated Customer Care Costs between its distribution and supply functions in the first instance." (ComEd BOE at 54.) The testimony cited above certainly does not support that explanation. On the contrary, the ComEd's own testimony unambiguously supports the conclusion reached in the Proposed Order – that ComEd has failed to properly allocate some percentage of Customer Care Costs to the supply function. (*See* Proposed Order at 200.)

Finally, ComEd suggests that REACT's proposed 40% allocation of Customer Care Costs "has no basis and in fact, relies on a series of inapplicable assumptions, and is not remotely related to ComEd's actual costs." (ComEd BOE at 54.) This statement is complete hyperbole, consistent with the tone and content of ComEd's earlier attacks on REACT witness Mr. Merola.

Mr. Merola is an ***expert*** witness, with over 17 years of diversified experience in the energy industry, including substantial experience analyzing competitive energy issues and testifying in a variety of forums – ComEd did not and cannot question his qualifications. Mr. Merola's expert analysis was conservative and reasonable based on the available data, particularly when keeping in mind that ComEd refused to provide additional data and does not track meaningful statistics relevant to the analysis. Certainly, given that backdrop, ComEd should not now be permitted to criticize Mr. Merola's analysis for lack of data.

ComEd does not and cannot deny that Mr. Merola's approach is entirely consistent with the embedded cost approach that ComEd has proposed for other cost allocation issues: examining actual historic costs and making reasonable assumptions regarding usage of specific assets for different customers. (*See generally* REACT Ex. 7.0 at 18-22.)

Further, ComEd does not and cannot deny that Mr. Merola's analysis adopted a conservative approach:

- Mr. Merola explained that one rational means of allocating these costs would be based on the share of revenue associated with supply compared to the share of revenue associated with distribution. Clearly, supply represents a much higher percentage of a customer's bill than does distribution, and under that methodology the allocation factor would likely be in the range of 67%. (*See id.* at 20:436-41.)
- However, instead of applying such a rough allocator for these costs, Mr. Merola adopted a more conservative, analytic approach to determine a reasonable allocation of ComEd's $162,150,019 Customer Care Cost revenue requirement for fixed-price bundled customers, concluding that 40%, or $64,860,008, of ComEd's Customer Care Costs should be allocated to the supply function. (*See id.* at 20-21:441-54.)
- As Mr. Merola explained, his analysis was conservative in a number of ways, fully removing costs attributable to meter reading and the establishment of delivery services, and, again in the absence of ComEd providing actual data or meaningful assumptions of its own, making a very reasonable assumption based upon his extensive experience in the industry regarding the percentage of Customer Care Costs that are associated with providing supply. (*See id.* at 20-21:436-48.)

- Mr. Merola also confirmed that his methodology captured some costs associated with ComEd's use of Exelon Business Services Company to support its supply function, but was careful not to double count this expense. (*See id.* at 21-22:465-86.)
- Finally, Mr. Merola investigated how other utilities that are providing service in competitive markets in other states calculate their supply administration costs, and concluded that the allocation of 40% of the Customer Care Cost to a bypassable supply charge would be fully in line with the treatment of this issue by the other similarly-situated utilities. (*See id.* at 23-27:492-580.) He concluded that ComEd's supply-related charges are "far lower" than the supply administration rates set by the other utilities he examined, confirming his concern that ComEd's proposed recovery of supply-related administrative costs appears to be "artificially low." (*Id.* at 26:540-42.)

Again, the Proposed Order accurately notes ComEd's failure to respond to this evidence. (*See* Proposed Order at 200.) ComEd had the opportunity to develop actual data allocating Customer Care Costs between supply and delivery; ComEd had the opportunity in testimony and on cross-examination to challenge Mr. Merola's qualifications; ComEd also had the opportunity in its surrebuttal to challenge Mr. Merola's allocations by providing allocation factors of its own. ComEd did none of these things. Instead, ComEd chose to stand by its original position that there is **nothing** to allocate. (*See* ComEd BOE at 54.)

The Proposed Order is obviously observant of the fact that ComEd bears the burden of proof in the instant proceeding. (*See, e.g.,* Proposed Order at 42; 220 ILCS 5/9-201(c).) Thus, ComEd's position that it incurs zero supply-related Customer Care Costs, and that it need give no evidentiary basis to rebuff credible evidence from Mr. Merola, cannot withstand scrutiny – particularly given ComEd's own witnesses' admissions. (*See* Tr. at 282:6-15; Tr. at 1382-87; REACT Init. Br. at 50-56.)

Customer Care Costs are related to both supply and delivery services – a concept that REACT has proven, that ComEd eventually admitted, and that the Proposed Order endorses. (*See* REACT Reply Br. at 25-30; *e.g.,* Tr. at 287:15-289:6; Tr. at 1387:14-1388:5; Tr. at

1389:16-1390:2; ComEd Init. Br. at 118-19; Tr. at 282:6-15; Tr. at 1382-87; Proposed Order at 200.) Contrary to ComEd's earlier assertions, far from claiming that Customer Care Costs are "solely supply-related," Mr. Merola testified that **only 40%** of those costs should be allocated to ComEd's supply rates. (*See* REACT Init. Br. at 53-56.) Thus, contrary to ComEd's false charge, REACT has explained that, based on the current information, 60% of the Customer Care Costs appear to be properly allocated to delivery services.

The Proposed Order properly takes ComEd to task for failing to come forward with any analytical evidence to attempt to rebut Mr. Merola. (*See* Proposed Order at 200.)

3. ComEd's Alternative Proposal For An "Avoided Cost Study" Has No Basis In The Record And Is Contrary To Proper Cost Allocation Methodology

ComEd suggests that if the Commission finds that ComEd has misallocated Customer Care Costs, the Commission should direct ComEd to prepare an "avoided cost study" in its next rate case. (ComEd BOE at 54.) ComEd's suggestion is made without citation to any record evidence, and has no basis in the cost allocation methodology that the Commission repeatedly has endorsed. (*See id.*)

There is absolutely no record evidence about an "avoided costs study" in this proceeding. For the first time, ComEd in its Brief on Exceptions provides the following one-sentence explanation: "Such a study would examine whether ComEd can avoid any additional Customer Care costs when a customer decides to take supply for an alternative supplier." (*Id.*) ComEd's last minute suggestion is not well taken, and should be dismissed by the Commission out of hand..

At its base, ComEd's suggestion is based upon a misunderstanding or mischaracterization of the manner in which the Commission has directed ComEd to calculate its supply-related costs.

The test is not, and never has been, whether ComEd avoids a particular cost as a result of a customer taking service from a competitive supplier. If this were the test, then costs such as ComEd's legal fees associated with the procurement proceedings and the costs associated with employees who administer ComEd's procurement process would be categorized as "delivery services" costs. Of course, such costs are not "delivery services" costs, because that is not the test. (*See, e.g.*, ICC Docket No. 05-0597 July 26, 2006 Order at 50; *see also* REACT Init. Br. at 25-32; REACT Ex. 3.0 at 6:106-7:123; Staff Init. Br. at 106.) Rather, the Commission has directed ComEd to determine whether the cost that ComEd incurs is related to ComEd's supply function; to the extent that all or some portion of that cost is related to ComEd's supply function, it should be removed from ComEd's delivery services rate calculation, and included in ComEd's supply rates.

Further, as discussed above, ComEd's witnesses *in this proceeding* have admitted that ComEd has misallocated supply-related Customer Care Costs. There is no need to study whether ComEd "can avoid additional" Customer Care Costs – that is not the issue in the instant proceeding, and should not be the issue in future proceedings. It is now established as a matter of record evidence that ComEd *has misallocated* supply-related Customer Care Costs. The question is what to do now. As discussed in REACT's Brief on Exceptions at 18-20, and briefly reiterated below, the appropriate remedy is to remove $64.8 million from the delivery services charges that ComEd seeks to recover.

4. The Proposed Order Should Be Revised To Require <u>Proper Allocation Of Customer Care Costs In This Proceeding</u>

Given the uncontradicted record evidence regarding misallocation of supply-related Customer Care Costs, the Proposed Order should take the logical and necessary step of specifically excluding $64.8 million of misallocated Customer Care Costs from the amount

ComEd is entitled to recover though delivery services rates. Mr. Merola stated the reason directly:

> As the Commission is well aware, retail competition for residential and small commercial customers has not developed in Illinois. As a result, if the Commission wants to promote retail competition for the benefit of all customers, a "business as usual" approach is a recipe for failure. A key impediment to retail choice for these customers is the improper allocation of supply procurement costs to delivery services rates. The question of appropriate cost allocation for providing services to residential and small commercial customers must be confronted if the Commission wants a vibrant and sustainable competitive retail electric market to develop where competitive suppliers, not the regulated utility, provide retail electric service to consumers.

(REACT Ex. 7.0 at 10:205-14.) Failure to adjust this allocation now will have immediate, negative impacts upon the development of the competitive market for residential and the smallest commercial customers.

Finally, inclusion of the $64.8 million in the delivery services rates would result in an overstatement of ComEd's delivery services revenue requirements. The Proposed Order correctly concludes that the continued inclusion of 100% of the Customer Care Costs in ComEd's delivery services rates is not justifiable, and that ComEd presented no figure to contradict the expert analysis presented by REACT that concluded 40% of those costs should be allocated to supply rates. (*See* Proposed Order at 200.) To permit ComEd to continue to recover the $64.8 million through delivery services rates would be in direct conflict with the conclusion that the allocation is invalid – it would give ComEd a free pass for having failed to meet its evidentiary burden.

Only by excluding the misallocated $64.8 million from ComEd's delivery services rate calculation now, will the Commission implement an effective measure to avoid the anti-competitive effects that the Commission has in previous rate cases recognized and cautioned against. (*See, e.g.*, ICC Docket No. 01-0423, March 28, 2003 Order at 24-25 ("[A]n effectively competitive and efficient electricity market for residential and non-residential deliver services is an integral policy consideration."); ICC Docket No. 05-0597, July 26, 2006 Order at 294 ("Now is the time for the Commission to seriously assume the responsibility to promote retail competition. . . . Th[e] Commission needs to take the appropriate steps to encourage more RESs to enter the Illinois market, especially to offer choices to the mass market customers.").)

IX. Rate Design

A. Overview

REACT reiterates and incorporates herein its support for the Proposed Order's endorsement of an across-the-board increase rather than the rate increase structure proposed by ComEd. (*See* Proposed Order at 205.) REACT also reiterates and incorporates herein its arguments in favor of requiring ComEd to perform individualized cost-of-service studies for its 79 over-10 MW customers. (*See, e.g.*, REACT Init. Br. at 31-35; REACT Reply Br. at 16-18; REACT BOE at 7-12.)

D. Existing Riders

1. Rider ACT

The Proposed Order improperly endorses ComEd's modified proposal on Rider ACT. (*See* Proposed Order at 220.) ComEd, not surprisingly, supports that conclusion. (*See* ComEd BOE at 60.) For the reasons stated in its Brief on Exceptions, REACT respectfully disagrees with the Proposed Order and with ComEd. (*See* REACT BOE at 22-23.) Accordingly, REACT respectfully requests that the Proposed Order be modified to direct ComEd to retain Rider ACT in its current form.

E. <u>Distribution Loss Factors</u>

The Proposed Order accepts ComEd's proposal regarding increasing the Distribution Loss Factors ("DLF"). (*See* Proposed Order at 224.) ComEd does not comment on the issue in its Brief on Exceptions. For the reasons stated in its Brief on Exceptions, REACT respectfully disagrees with the Proposed Order and with ComEd. (*See* REACT BOE at 23-24.)

Consistent with the Proposed Order's conclusion that the rate increase in the instant proceeding should be implemented on an across-the-board basis, REACT respectfully requests that the Commission modify the Proposed Order to direct ComEd to implement an across-the-board increase of the DLF in the instant proceeding, and to order ComEd to perform an individualized study of DLF as it relates to each over-10 MW customer prior to its next rate case.

F. <u>Recovery Of Supply-Related Costs</u>

REACT addresses the issues associated with ComEd's improper allocation of supply-related costs in its arguments in Section VIII.F of its Initial and Reply Briefs and Section VIII.E of its Brief on Exceptions, as well as Section VIII.C of the instant Reply Brief on Exceptions. Those arguments/positions are incorporated herein.

G. <u>Competitive Retail Market Development Issues</u>

1. ComEd Fails To Engage On The Competitive Market Issues <u>That Are Plainly Relevant To This Case</u>

Not surprisingly, ComEd agrees with the Proposed Order's general view that competitive market issues have nothing to do with this case. (*See* ComEd BOE at 60-61; Proposed Order at 224-25.) ComEd provides no rationale for its position, and, of course, has not provided any substantive explanation for its position at any point during the briefing stages of the instant proceeding.

In fact, the Proposed Order's correct conclusion regarding the misallocation of supply-related Customer Care Costs and the resulting inflated prices paid by distribution customers demonstrates that competitive market issues are interconnected with the rate issues presented in the instant proceeding. (*See* Proposed Order at 200; REACT BOE at 24-26.) ComEd's attempt to completely duck these issues is unpersuasive and disingenuous -- competitive retail market development issues are not new to ComEd's delivery services rate cases. Since the very first ComEd delivery services rate, competitive retail market issues have been central to the proceeding. (*See* ICC Docket No. 99-0117, Aug. 26, 1999 Order at 24, 52; ICC Docket No. 01-0423, March 28, 2003 Order at 24-25; ICC Docket No. 05-0597, July 26, 2006 Order at 272-94.) While ComEd may not want to engage on these issues, given the role it has played in suppressing competition, the fact is that competitive market issues must be considered in the context of the question of delivery services rates presented in the instant proceeding. (*See* REACT Reply Br. at 42.)

2. The Commission Should Resolve The Competitive Market Issues Consistent With Its Statutory Obligation To Promote Customer Choice

As discussed herein and in REACT's Brief on Exceptions, matters such as the proper allocation of Customer Care Costs have an effect not only on the proper setting of delivery services rates but also on the development of the competitive market for electricity. (*See* REACT BOE at 20-22, 25-26.) The Commission is charged with the promoting the development of that competitive market for all Illinois consumers. (*See* 220 ILCS 5/16-101A(d).) ComEd's Brief on Exceptions reflects ComEd's compartmentalized view that the Commission is prohibited from examining the interplay between rate design issues and the effects of those rate design issues on the competitive market. ComEd's approach elevates form over substance in a manner that would, for example, tie the Commission's hands even where, as here, a rate proposal implicates an anti-competitive result. Neither the letter nor the spirit of the Act so constrains the Commission.

The Electric Service Customer Choice and Rate Relief Law of 1997 envisions a competitive market that allows for customer choice for all customers, including residential customers. (*See* 220 ILCS 5/16-104(a)(4).) Yet, a decade later the competitive retail electric market for residential customers does not exist, and remains a relatively distant prospect according to ComEd. (*See, e.g.,* REACT Cross Ex. 7; Tr. at 1317:13.) The question is, why? REACT has demonstrated that ComEd and its related companies have both the means and the potential motive to undermine the development of residential competitive. (*See, e.g.,* REACT Ex. 7.0 at 5-6:110-22; REACT BOE at 20-22.) ComEd also presented the Commission with conflicting and contradictory information about when and whether it forecasts the development of residential competition, using this information in a way that will inhibit the development of the competitive market. (*See* REACT Cross Exs. 7, 10, 20; *see also* REACT Init. Br. at 70-73.) The Commission should not allow ComEd's attempt to sweep this record evidence away under the theory that this case is about something else. The Act requires the Commission to do more, and certainly does not constrain the Commission's ability to follow the evidence where it leads.

The Commission has a statutory duty to consider the impact of ComEd's proposals upon the continued development of the Illinois retail electric market. (*See* 220 ILCS 5/16-101A(d).) Accordingly, REACT respectfully requests that the Proposed Order be revised to conclude that competitive market issues are squarely and fully before the Commission in the instant proceeding, and that ComEd should address these issues in its next rate case.

XII. CONCLUSION

In the face of Proposed Order that is backed by a considerable consensus from a broad array of stakeholders, ComEd continues to advocate positions that would impose huge, disproportionate rate increases upon ComEd's largest customers while also improperly allocating Customer Care Costs in a manner that would block customer choice for residential customers.

The Proposed Order correctly rebuffs ComEd's approach on the ECOSS, the massive rate increase for over-10 MW customers, and the misallocation of Customer Care Costs. Nothing in ComEd's Brief on Exceptions justifies a retreat from those conclusions. On those points, the Proposed Order endorses sound ratemaking policies and the pro-competitive mandates of the Act previously embraced by the Commission.

REACT has proposed some additional modifications to the Proposed Order that are supported by the evidentiary record – again, nothing in ComEd's Brief on Exceptions undermines the validity of REACT's additional suggested changes. Embracing REACT's additional positions, each of which rests upon a solid evidentiary footing, will further advance fairness and pro-competitive policies.

Respectfully, the Commission should not retreat from the conclusions in the Proposed Order, as ComEd invites it to do. On the contrary, the Commission should take a *full step* toward implementing real and specific equitable cost allocation and pro-competitive positions. Specifically, on the primary issues addressed by REACT, the Commission should:

- Require individualized cost-of-service studies for all of the over-10 MW customers; and
- Require ComEd to exclude $64.8 million of Customer Care Costs from the delivery services rates that ComEd proposes.

Additionally, regarding the other issues addressed by REACT, the Commission should:

- Recognize that Rider SMP should take into account unique circumstances related to the over-10 MW customers and potential impacts upon competitive services;
- Require ComEd to maintain Rider ACT in its current form; and
- Order an across-the-board increase in the Distribution Loss Factors.

WHEREFORE, REACT respectfully requests that the Commission modify the Proposed Order and enter an Order in the instant proceeding consistent with the arguments herein, in Appendix A to REACT's Brief on Exceptions, and the previously-filed briefs and testimony of REACT.

Respectfully submitted,

THE COALITION TO REQUEST EQUITABLE ALLOCATION OF COSTS TOGETHER

By: *<u>/s/ Christopher J. Townsend</u>*
One of Their Attorneys

Christopher J. Townsend
Christopher N. Skey
Amanda C. Jones
DLA Piper US LLP
203 N. LaSalle Street, Suite 1900
Chicago, Illinois 60601
(312) 368-4000

DATED: July 31, 2008