

Docket Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008,  
1-08-3030, 1-08-3054 and 1-08-3313 (cons.)

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IN THE ILLINOIS APPELLATE COURT  
SECOND DISTRICT

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|----------------------------------|---|------------------------|
| COMMONWEALTH EDISON CO., ET AL.  | ) |                        |
| <i>Petitioners</i>               | ) | On Direct Appeal of    |
| v.                               | ) | Orders of the Illinois |
|                                  | ) | Commerce Commission    |
| ILLINOIS COMMERCE COMMISSION, ET | ) |                        |
| AL.                              | ) | Ill.C.C. Docket No.    |
| <i>Respondents</i>               | ) | 07-0566                |
|                                  | ) |                        |

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**BRIEF OF THE RESPONDENT**  
**ILLINOIS COMMERCE COMMISSION**

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**CERTIFICATE OF COMPLIANCE follows the CONCLUSION.**

## ARGUMENT

### **I. SCOPE AND STANDARD OF REVIEW**

In reviewing a Commission decision under the Public Utilities Act, 220 ILCS 5, the Commission's order is to be considered *prima facie* reasonable. 220 ILCS 5/10-201(d). In seeking to overturn such an order, the party appealing the Commission's decision has the burden of proof on all issues. *Id.* Review of the order is limited to the following questions: whether the Commission acted within its authority, whether it made adequate findings to support its decision, whether the decision is supported by substantial evidence, and whether constitutional rights have been violated. 220 ILCS 5/10-201(e)(iv). *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 469 (1973).

In analyzing the Commission's order, it is firmly established that the Commission is entitled to great deference from the reviewing court because it is an administrative body possessing expertise in the field of public utilities. *Archer-Daniels-Midland Company v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998) and *United Cities Gas Co. v. Illinois Commerce Commission*, 163 Ill. 2d 1, 12 (1994). Thus the reviewing court must not put itself in the place of the Commission and conduct an independent investigation or substitute its judgment for the Commission. *Produce Terminal Company v. Illinois Commerce Commission*, 414 Ill. 528, 589 (1953).

As recognized by the Supreme Court, where the propriety of the means or methods used by the Commissioners in the exercise of clearly conferred power is questioned, all doubts should be resolved in favor of the Commissioners in the interest

of the administration of law. *State Public Utilities Commission v. Springfield Gas Company*, 291 Ill. 209, 216 (1920). In fact, the Illinois Supreme Court has declared that deference to the Commission's judgment is "especially appropriate" on rate issues. *Iowa-Illinois Gas & Electric Company v. Illinois Commerce Commission*, 19 Ill. 2d 436, 442 (1960).

While the Commission's interpretation of a legal question is not binding on a reviewing court, where the legislature delegates the administration of a broad statutory standard to an agency's discretion, "courts shall rely upon the agency's interpretation where there is reasonable debate as to the statute's meaning." *Business and Professional People v. Illinois Commerce Commission*, 171 Ill. App. 3d 948, 957 (1<sup>st</sup> Dist. 1988) and *State of Illinois v. Church*, 164 Ill. 2d 153, 162 (1995). The interpretation of a statute by the agency charged with the administration of the statute is entitled to substantial deference, and such construction should be and normally is persuasive. *Milkowski v. Dept. of Labor*, 82 Ill. App. 3d 220, 222 (1<sup>st</sup> Dist. 1980). The same rule adheres to an agency's interpretation of its own rules. *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 537 (1<sup>st</sup> Dist. 2002). Where the issues in the case involve the Commission's interpretation and application of provisions of the Public Utilities Act, courts will give weight to such administrative interpretations, up to equal weight with judicial construction. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 514 (1953) and *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 Ill. App. 3d 1008, 1012 (1<sup>st</sup> Dist. 1988).

Regarding evidentiary challenges, reviewing courts have determined that substantial evidence may support more than one possible finding, and possibly several.

The evidence only need be such that a reasoning mind would accept as sufficient to support a particular conclusion. *CIPS v. Illinois Commerce Commission*, 268 Ill. App. 3d 471, 479 (4<sup>th</sup> Dist.1994) In fact, merely showing that the evidence presented can support a *different* conclusion than the one reached by the Commission is not sufficient. Rather, appellants must affirmatively demonstrate that the conclusion *opposite* to the one reached by the Commission is "clearly evident." *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1<sup>st</sup> Dist. 1994).

This Brief will demonstrate that the various petitioners have failed to carry their burdens of proof. Their allegations of error are unpersuasive and fall short of overcoming the presumption of reasonableness accorded Commission orders. An affirmance of the Commission is, therefore, warranted.

## **II. RESPONSE TO THE PEOPLE and CUB (“GC PETITIONERS”) and ABBOTT LABORATORIES, ET AL. (“IIEC”)**

### **A. Accepting GC Petitioners’ and IIEC’s Proposed Depreciation Adjustment Would Result in a Violation of the Test Year Rules**

#### ***1. Overview of the Facts Involving the Pro Forma Capital Adjustments***

In setting base rates, the Commission employs a test year. The purpose of a test year is to prevent a utility from overstating its revenue requirement by mismatching low revenue data from one year with high expense data from a different year. *Business and Professional People for the Public Interest v. Illinois Commerce Commission (“BPI II”)*, 146 Ill. 2d 175, 238 (1991) and *Business and Professional People for the Public Interest v. Illinois Commerce Commission (“BPI I”)*, 136 Ill. 2d 192, 219 (1989). For purposes of this case, the use of a 2006 historical test year, ending

December 31, 2006, was uncontested (R. Vol. 81, C19802 and C20032; Order, pp. 5 and 235).

The 2006 test year data were based on ComEd's actual 2006 revenues, expenses, and rate base items, subject to appropriate adjustments (*See generally* R. Vol. 33, C08144 - C08197, ComEd Ex. 7.0 corrected). The purely historic rate base of ComEd (original cost less depreciation reserve, plus other test year adjustments) for the 2006 test year is also not in dispute (R. Vol. 2, C00289, ComEd Ex. 7.1, Sch. B-1). ComEd also sought recognition, *inter alia*, for certain *pro forma* capital additions, pursuant to 83 Ill. Adm. Code 287.40 (*Id.*, C00290, ComEd Ex. 7.1, Sch. B-2 and R. Vol. 33, C08181-C08182). That provision states:

Section 287.40 Pro Forma Adjustments to Historical Test Year Data. A utility may propose pro forma adjustments (estimated or calculated adjustments made in the same context and format in which the affected information was provided) to the selected historical test year for all known and measurable changes in the operating results of the test year. These adjustments shall reflect changes affecting the ratepayers in plant investment, operating revenues, expenses, and cost of capital where such changes occurred during the selected historical test year or are reasonably certain to occur subsequent to the historical test year within 12 months after the filing date of the tariffs and where the amounts of the changes are determinable. Attrition or inflation factors shall not be substituted for a specific study of individual capital, revenue, and expense components. Any proposed known and measurable adjustment to the test year shall be individually identified and supported in the direct testimony of the utility. Each adjustment shall be submitted according to the standard information requirement schedules prescribed in 83 Ill. Adm. Code 285. 83 Ill. Adm. Code 287.40 (emphasis supplied)<sup>1</sup>

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<sup>1</sup> The entirety of 83 Ill. Adm. Code 287 can be found on pp. A1-A6 in the Separate Appendix of the Commission ("Comm. App.")

Only one witness questioned whether ComEd's claimed *pro forma* capital additions were known and measurable, Staff Witness Griffin (R. Vol. 53, C13096-C13099 and C13117, Corrected Staff Ex. 2.0, pp. 5-8, and Schedule 2.1, admitted R. Vol. 87, Tr. 667). Mr. Griffin, however, withdrew his objection to the *pro forma* capital additions (January to June 2008), after receiving certain actual data which supported the amounts proposed by ComEd. (R. Vol. 56, C13852-C13856, Corrected Staff Ex. 15.0, pp. 5-9, admitted R. Vol. 87, Tr. 667). Based on this evidence, Staff entered into a stipulation with ComEd on this and certain other issues (Staff-ComEd Joint Ex. 1.0, pp. 3-7 (R. Vol. 61, C14980-C14984, admitted R. Vol. 87, Tr. 2211 [5/5/08 hearing]). ComEd gave up its claims to post-June 2008 *pro forma* capital additions and the Commission accepted the lowered *pro forma* capital adjustment number, based on the evidence (Order pp. 27-28, R. Vol. 81, C19824-C19825).

Government and Consumer Petitioners' ("GC Petitioners")<sup>2</sup> (Brief p. 27) and IIEC's (Brief, pp. 16-18) arguments notwithstanding, depreciation associated with the *pro forma* capital additions was included for these capital additions (R. Vol. 33, C-08182, ll. 689-693 and Vol. 2, C00291). The argument that the Commission used a gross plant amount is refuted at page 51 of the Commission order (R. Vol. 81, C19848). IIEC (Brief, pp.18 and 24) mischaracterizes Mr. Griffin's cross-examination wherein he was asked about how one would determine net plant for a hypothetical 2008 historical test year and not the 2006 historical test year of the present case (R. Vol. 87, Tr. 676-

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<sup>2</sup> The GC Petitioners are the People of the State of Illinois, ex rel. Lisa Madigan, Attorney General of Illinois ("People") and the Citizens Utility Board ("CUB"). GC Petitioner Br. p. 1.

679). Mr. Griffin did not question the determination of net plant in this case (*Id.*, Tr. 668 and 679-681).

## **2. IIEC's Challenge of the Stipulation is Meritless**

In addition to his challenge to ComEd's *pro forma* capital adjustments pursuant to 83 Ill. Adm. Code 287.40, Mr. Griffin had originally proposed in his direct testimony to restate the depreciation for embedded plant to December 2007, *i.e.*, one year after the end of test year (R. Vol. 53, C13099, ll. 151-162 and C13118, Corrected Staff Ex. 2.0, p. 8, and Schedule 2.2). Mr. Griffin later withdrew this adjustment, testifying that, with the limitation of the *pro forma* capital additions to June 2008, the new proxy was reasonable for the known and measurable amount of plant additions by the end of September 2008, and the restatement of the depreciation on the embedded plant was no longer necessary in his opinion (R. Vol. 56, C13855-C13856, ll. 155-171, Corrected Staff Ex. 15.0, pp. 8-9), admitted R. Vol. 87, Tr. 667 [4/29/08 hearing]. This evidentiary position was carried into the stipulation [Staff-ComEd Joint Ex. 1.0, pp. 3-7 (R. Vol. 61, C14980-C14984)]. Mr. Griffin's rebuttal testimony is consistent with the reasoning of the 2003 Ameren case, *infra*, 2003 Ill. PUC LEXIS 824, \*21-\*22, Comm. App., p. A40-A41 [issue is whether *pro forma* capital adjustments, if allowed, will overstate the rate base].

Nonetheless, IIEC challenges the stipulation (Brief, pp. 37-40). No party herein is challenging the *pro forma* capital additions that were accepted or withdrawn by the stipulation as being contrary to 83 Ill. Adm. Code 287.40, which was the dispute decided in the stipulation. IIEC's witness, Mr. Gorman, did not challenge the propriety of ComEd's *pro forma* capital additions under 83 Ill. Adm. Code 287.40 (IIEC Ex. 2.0,

pp. 54-59, R. Vol. 38, C09272-C009277 and IIEC Ex. 6.0, pp. 14-20, R. Vol. 52, C12760-12766). IIEC's position herein is not based on Mr. Griffin's direct testimony.

The Commission order [pp. 27-28, R. Vol. 81, C19824-C19825] was made on the merits, in conformance with the requirements of *BPI I, supra*, 136 Ill. 2d at 216-7, (R. Vol. 56, C13853-C13856, Corrected Staff Ex. 15.0, pp. 6-9; R. Vol. 56, C13786-C13791, Corrected ComEd Ex. 40.0, pp. 3-8; and R. Vol. 54, C13398-C13399, ComEd Ex. 40.01, Schedule RB-1, columns (I) through (J), and Schedule RR-1, columns (E) through (I)). The Commission did not merely adopt the stipulation without making a determination on the merits of the proposal, the approach held to be impermissible by the Supreme Court in *BPI I, supra*. Most of IIEC's arguments presume that, whenever a utility exercises its right to seek recognition of *pro forma* capital improvements under 83 Ill. Adm. Code 287.40, depreciation on the **embedded** utility plant is used as an attrition factor to the last date that *pro forma capital* improvements are recognized. *But see BPI II, supra*, 146 Ill. 2d at 239-241 (1991) [annual depreciation is recognized]. Such a general restatement of the depreciation on rate base in a historical test year case is not supported by Commission test year rules, Illinois law or applicable Commission decisions, as will be discussed in the following subsection of this brief.

The Commission has the right to rely on Mr. Griffin's rebuttal testimony which withdrew the proposed restatement of depreciation as inappropriate in view of the additional evidence and the withdrawal by ComEd of a portion of its original claim. *United Cities Gas Co. v. Illinois Commerce Commission*, 47 Ill. 2d 498, 500-1 (1970) and *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 283 Ill. App. 3d 188,

200-201 (1996). IIEC's argument that the Commission decision is based on the stipulation and not the evidence of record is contrary to the record in this case.

The Commission properly followed the law in relation to the matters contained in the stipulation. IIEC's arguments should be rejected.

**3. GC Petitioners' and IIEC's Quid Pro Quo Argument is Contrary to Illinois Law**

GC Petitioners (Brief, pp. 29-38) and IIEC (Brief, pp. 15-40) argue, as has been argued to and uniformly rejected by the Commission in several cases that, whenever a public utility seeks *pro forma* capital additions under 83 Ill. Adm. Code 287.40 in a historical test year rate case, the depreciation of the utility's embedded rate base (or recognized investment in utility plant) must be restated to some later date past the test year. *Commonwealth Edison Co. ("2002 Interim Order")*, Ill.C.C. Docket No.01-0423, Interim Order of April 1, 2002, pp. 42-45, 2002 Ill. PUC LEXIS 563, \*101-\*108, 216 P.U.R.4th 91, --, Comm. App., pp. A12-A15; *Commonwealth Edison Co. ("2006 ComEd case")*, Ill.C.C. Docket No. 05-0597, Order of July 26, 2006, pp.12-15, 2006 Ill. PUC LEXIS 43, \*24-\*33, 250 P.U.R.4th 161, --, Comm. App., pp. A16-A20; and *North Shore Gas Co. and Peoples Gas, Light & Coke Co.*, Ill.C.C. Docket Nos. 07-0241 and 07-0242 (cons.), Order of February 5, 2008, pp. 7-17 Comm. App., pp. A21-A32. Presumably GCI's and IIEC's current position in this cause is to seek a restatement of the depreciation on the historical rate base to June 30, 2008, the last day to which the Commission granted capital additions. *But see Illinois Power Co.*, Ill.C.C. Docket 01-0432, Order of March 28, 2002, pp. 20-21, 2002 Ill. PUC LEXIS 366, \*37-\*41, Comm. App., pp. A34-A36 (GC Petitioners sought restatement of the depreciation on the rate base to June 2002, although the *pro forma* capital additions were sought and

allowed to September 2001; Commission rejected this mismatched restatement as an overstated adjustment).

Although GC Petitioners' Brief (p. 9) and IIEC's Brief (p. 25) note the significant amount of *pro forma* capital additions, neither of their witnesses challenged the amount of *pro forma* capital additions as not being known or measurable. The Commission is not authorized to ignore such changes. *Commonwealth Edison Co. v. Illinois Commerce Commission*, 322 Ill. App. 3d 846, 853 (2<sup>nd</sup> Dist. 2001); *Central Illinois Public Service Co. (AmerenCIPS), et al.*, ("2003 Ameren case"), Ill.C.C. Docket Nos. 02-0798, 03-0008, & 03-0009 (cons.), Order of October 22, 2003, pp. 6-7 and 10 (limited significant items but not all rate base items may be adjusted for known and measurable changes under former 83 Ill. Adm. Code 285.150), 2003 Ill. PUC LEXIS 824, \*12-\*15 and \*20-\*21, Comm. App., pp. A37-A38 and A40-A41. The 1990 version of repealed 83 Ill. Adm. Code 285.150(e) can be found at Comm. App., pp. A10-A11.

However, GC Petitioners and IIEC are wrong in claiming that there is a *quid pro quo* rule, *i.e.*, that, when a public utility receives a proper *pro forma* capital addition decision under 83 Ill. Adm. Code 287.40, the utility's rate base (or the depreciation on the embedded test year plant) is restated to the last date of the recognized *pro forma* capital addition. The gist of their argument is that, because ComEd has exercised its right to seek recognition of known and measurable changes which are subject to 83 Ill. Adm. Code 287.40, the test year should be ignored and additional depreciation should be added to the test year rate base. However, in the absence of a rule change, the Commission is not authorized to create such a selective two and a half year test year

rule for depreciation on the historical rate base. *BPI I, supra*, 136 Ill. 2d at 219-228 [5-year test year not authorized under current Commission test year rules] and *BPI II, supra*, 146 Ill. 2d at 239-241 (1991) [annual depreciation is recognized].

GC Petitioners and IIEC ignore the fundamental fact that what they are proposing is contrary to Illinois law, the Commission's rules, and previous Commission decisions. Such a restatement of the depreciation on the historical test year rate base violates the concept of a historical test year (Order, p. 29, R. Vol. 81, C19826). Essentially, GC Petitioners and IIEC are seeking a two and one half year test year for depreciation on the embedded rate base in this cause (January 2006 to June 2008). 83 Ill. Adm. Code 287.20 [Historical test year is a consecutive 12 month period]. However, in the absence of a rule change, the Commission is not authorized to create such a selective two and half year test year rule for the rate base. *BPI I, supra*, 136 Ill. 2d at 219-228 [5-year test year not authorized under current Commission test year rules]. The issue is not net plant versus gross plant or the inclusion of all known and measurable changes; the issue is the date to which the historical test year rate base is measured.

Thus, IIEC's reliance (Br. pp. 15-16, 19-21, 32) on 220 ILCS 5/9-211 is unavailing. The issue herein is to what date is the value of the utility's rate base measured. 220 ILCS 5/9-211 has not been interpreted to abolish the test year rules. *City of Chicago v. Illinois Commerce Commission*, 133 Ill App. 3d 435, 440-1 (1<sup>st</sup> Dist. 1985) [property held for future use properly included in rate base; embedded test year rate base was not restated to a later date]. To the extent IIEC's or GC Petitioners' value of the rate base argument is a matter of evidence, it is the Commission that is the expert

body which weighs the evidence. *Iowa-Illinois Gas & Electric Co. v. Illinois Commerce Commission*, 19 Ill. 2d 436, 443 (1960) and *South Chicago Coal Co. v. Illinois Commerce Commission*, 365 Ill. 218, 224-5 (1937). The Commission could accept the evidence of ComEd and Staff and reject the witnesses for GC Petitioners and IIEC. *United Cities Gas Co. v. Illinois Commerce Commission*, 47 Ill. 2d 498, 500-1 (1970).

Similarly, the existing Commission rule specifically forbids the use of a general attrition factor to base a *pro forma* adjustment. 83 Ill. Adm. Code 287.40. Yet that is all that GC Petitioners and IIEC are doing, moving the measurement of depreciation for the 2006 test year rate base to June 2008 (Order, p. 29, R. Vol. 81, C19826 [“the proposed adjustments do not correlate with any *pro forma* adjustments”]). The interpretation of a rule by the issuing agency is entitled to substantial deference, and the agency’s construction should be and normally is persuasive. *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529,537 (1<sup>st</sup> Dist. 2002). *Cf. Milkowski v. Dept. of Labor*, 82 Ill. App. 3d 220, 222 (1<sup>st</sup> Dist. 1980) [the same rule adheres to an agency’s interpretation of the statutes the agency administers].

GC Petitioners (Br. p. 34) and IIEC (Br. pp. 10, 11, 20-22, 30-32, etc.) rely on a previous Commission decision which does not support their position. In the *2003 Ameren case*, for the utilities therein, there was decreasing or level net plant in service. *2003 Ameren case, supra*, 2003 Ill. PUC LEXIS 824, \*15-\*16 and \*20, Comm. App., pp. A38-A40. It was the declining or relatively static amounts of historical net plant in service which led to the further analysis test in *2003 Ameren case*, 2003 Ill. PUC LEXIS 824, \*20, Comm. App., p. A40, which then led to the addition of some post test

year depreciation on the embedded rate base 2003 Ill. PUC LEXIS 824, \*21-\*22, Comm. App., pp. A40-41.

Given that the *2003 Ameren case* was entered after the *2002 Interim Order, supra*, Comm. App., pp. A13-A15 wherein GC Petitioners' and IIEC's present claims were first rejected, the *2003 Ameren case* represents a narrow exception concerning the restatement of the depreciation related to embedded test year rate base. The present case is factually distinguishable from the situation in the *2003 Ameren case*, since it is uncontested that the net plant in service of ComEd is increasing (Order, p.29, R. Vol. 81, C19826).

IIEC also cites (but makes no substantive argument) to *Illinois Power Co.*, Ill.C.C. Docket 01-0432, Order of March 28, 2002, pp. 20-21, 2002 Ill. PUC LEXIS 366, \*37-\*41 Comm. App., pp. A35-A36. However, in that case, the utility, per an agreement with Staff and without objection from the other parties, included depreciation on the rate base for 9 months past the test year. *Illinois Power Co., supra*, Order of March 28, 2002, p. 20, 2002 Ill. PUC LEXIS 366, \*38-\*39, Comm. App., p. A35. Thus, IIEC's claims concerning Ill.C.C. Docket 01-0432 on page 26 of its Brief are in error: Illinois Power proposed a restatement of the accumulated depreciation, and its proposal was accepted. The limited persuasiveness of the *Illinois Power* case was noted on page 29 of the Order herein (R. Vol. 81, C19826).

Given that the Commission has never adopted the treatment urged by GC Petitioners and IIEC, the Commission has acted consistently over the decades in failing to restate the depreciation on the embedded rate base to a point after the historical test year merely because a public utility seeks recognition of *pro forma* capital adjustments

under the Commission rules. To have adopted the GC Petitioners/IEEC position on this issue at this late date would be merely arbitrary as the Commission itself found (Commission Order, p. 30, R. Vol. 81, C19827). *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 132 (1995) [Commission is unauthorized to depart drastically from practices established in earlier orders] and *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 514 (1953) [long-term consistent inactions by the Commission can constitute a binding statutory construction].

In *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 118-119 (1995), the Commission had initiated a generic proceeding investigating the recovery of coal-tar expenses. While that generic proceeding was pending, the Commission was required to address the coal tar remediation issue in the context of a few pending individual rate cases. In those individual rate cases the Commission allowed complete recovery of the utilities' coal-tar remediation expenses. Upon review of the Commission's Order in the generic proceeding, the Illinois Supreme Court ruled that the Commission could not adopt a five-year, interest free amortization requirement which effectuated a sharing of the coal tar remediation costs between utility shareholders and ratepayers without articulating a reasoned basis for the change and in the absence evidence to support the significant change. *Citizens Utility Board, supra*, 166 Ill. 2d at 132; *Illinois Power Co. v. Illinois Commerce Commission*, 339 Ill. App. 3d 425, 438-440 (5<sup>th</sup> Dist. 2003) [Commission requirement of a PVRP study to determine prudence of the utility's action given four prior Commission decisions was arbitrary]; and *United Cities Gas Co. v. Illinois Commerce Commission*, 225 Ill. App. 3d 771, 782-783 (4<sup>th</sup> Dist. 1992) [the Commission may not depart from prior practices

and customs in interpreting its procedural rules, especially where there may have been detrimental reliance on the prior interpretations of its rules]. To have accepted GC Petitioners' and IIEC's adjustment which has never been followed to anyone's knowledge and had been uniformly rejected since the 2002 *Interim Order, supra*, in this case would be merely arbitrary.

Although both GC Petitioners and IIEC cite to the November 7<sup>th</sup> dissent herein (R. Vol. 84, C20609-C20626), the Court should note that (1) the Commission itself has consistently rejected this shifting of depreciation related to the embedded rate base from test year (R. Vol. 81, C19824-C19825) and (2) no amendment of 83 Ill. Adm. Code 287.40 has been made. *BPI I, supra*, 136 Ill. 2d at 219-228 [rule change is necessary to vary from one year test year rule].

It should also be noted that it is the dissent in this case which raised issues concerning the Bender Series on Public Utility Accounting (R. Vol. 84, C20615, C20616, and C20621) and not the witnesses for GC Petitioners and IIEC in the case (R. Vol. 37, C09044-C09049, AG/CUB Ex. 2.0, Vol. 38, C09272-C09277, IIEC Ex. 2.0, Vol. 50, C12287-C12302, AG/CUB Ex. 5.0, Vol. 52, C12760-C12766, IIEC Ex. 6.0, Vol. 53, C13176-C13182, AG/CUB Ex. 8.0). Thus, there was no discussion of an "accounting" dispute within either the proceeding or the much earlier issued Commission order. The various references to the "Bender Series", *e.g.* IIEC Brief, pp. 17 and 22 "departure from standard regulatory accounting," etc., and GC Petitioners Brief, pp. 31 and 33, which attempt to raise factual accounting issues are outside the record of this case. 220 ILCS 5/10-201(d); *City of Chicago v. Illinois Commerce Commission*, 4 Ill. 2d 554, 556 (1955) [additional evidence was outside the record and

could not be considered] and *Illinois Independent Telephone Assn. v. Illinois Commerce Commission*, 183 Ill. App. 3d 220, 233 (4<sup>th</sup> District 1989) [tariff issues not properly raised where tariffs were not introduced into the record]. The Commission also notes that the applications for rehearing (R. Vol. 82, C20113-C20124 and C20137-C20148 and Vol. 83, C20314-C20322) do not raise any accounting issues and so any such issue is barred. 220 ILCS 5/10-113(a) and 10-201(b). *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 134-136 (1995) and *Abbott Laboratories Inc. v. Illinois Commerce Commission*, 289 Ill. App. 3d 705, 710 (1<sup>st</sup> Dist. 1997).

Both GC Petitioners and IIEC strenuously claim that the Commission is violating its test year rules, but it is they who are seeking a significant mismatch. If their position was adopted, ComEd would be given revenues and expenses (with appropriate adjustments) for a historical 2006 test year and a rate base effectively restated to June 2008. This is the kind of mismatch condemned in *BPI I, supra*, 136 Ill. 2d at 219 and 225-229 and *BPI II, supra*, 146 Ill. 2d at 237-243.

GC Petitioners' and IIEC's proposed restatement of the depreciation on the embedded utility plant to a period beyond the historical test year was properly rejected. The Commission order should be affirmed.

**B. The Adoption of Rider SMP was an Appropriate Exercise of the Commission's Discretionary Ratemaking Authority.**

ComEd proposed a system modernization adjustment rider ("Rider SMP") that would allow it to recover the incremental cost of Commission-approved System Modernization Projects (costs which were not included in ComEd's rates in this proceeding) pending the inclusion of those costs in ComEd base rates in a subsequent rate case (R. Vol. 55, C-13584, ComEd Ex. 4.0, p. 24). As explained by ComEd

witness Williams, the costs to be recovered through Rider SMP are real costs of investments which can benefit customers but are costs that would otherwise go unrecovered between rate cases. *Id.* The costs of approved SMP projects would be recoverable through the SMP rider until such time as the remaining costs of these projects can be included in ComEd's proposed base rates in a general rate proceeding.

The types of "smart grid" projects ComEd anticipated applying Rider SMP treatment to included: advanced metering infrastructure ("AMI") implementation, automatic reclosers, advanced cable spacers, underground cable replacement, a new communications system (the "900 MHz System"), and various mobile dispatch systems (R. Vol. 55, C13585 – C13588, ComEd Ex. 4.0, pp. 25-28). These types of projects are aimed at improving future service to customers as opposed to being essential to providing safe, adequate, and reliable service currently or in the relatively near term (R. Vol. 55, C13589, ComEd Ex. 4.0, p. 29). For example, one of these projects, AMI, may provide real time monitoring of customer usage, capture interval energy data in 15 minute increments, remotely disconnect/reconnect service, notify the utility of power outages and restorations, and enable web-based delivery of usage information to market participants (R. Vol. 2, C00222, ComEd Ex. 6.0, p. 14). Benefits to customers may include lower bills and improved reliability, increased competition and provision of improved data to support better planning and utilization of resources.

Based on the record, the Commission decided to approve Rider SMP as a pilot program with the very limited purpose of implementing a scaled deployment of AMI ("Phase 0")(Order p. 143, R. Vol. 81, C19940). The Commission, however, made Rider SMP subject to numerous conditions proposed by Staff witness Hathhorn, and revised

and accepted by ComEd (Order p. 138, R. Vol. 81, C-19935). The Commission specifically cautioned that Phase 0 is only the first step and that a broader plan is needed to develop a policy framework and to address parties' concerns that there is no well-structured plan with identified costs and benefits. *Id.* Of the various party proposals to address the need for a broad plan, the Commission determined that the Citizens Utility Board outlined the best proposal for a statewide smart grid collaborative. *Id.*

The People of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of Illinois ("People") and the Citizens Utility Board ("CUB") (together "Government and Consumer Petitioners" or "GC Petitioners") contend the Commission committed legal error in failing to reject outright Rider SMP. They are mistaken. The Commission's decision is fully within its authority and supported by substantial evidence.

***1. Rider SMP is an Appropriate Vehicle for Recovering ComEd's Revenue Requirement***

The Commission's decision to establish rider recovery for pilot SMP costs is an evidentiary conclusion, supported by substantial evidence, which is owed deference by this court. *Abbott Laboratories, Inc. v. Illinois Commerce Commission*, 289 Ill. App. 3d 705, 713 (1<sup>st</sup> Dist. 1997). GC Petitioners are simply wrong in maintaining that rider recovery mechanisms such as allowed by the Commission in this case are "extraordinary relief." GC Petitioners Br. p. 47. To the contrary, as the Supreme Court noted long ago, the Commission's decision whether to allow the recovery of costs through an automatic adjustment rider "is a question of preferable techniques in utility regulation which, in the absence of an abuse of discretion, is not within the scope of the

judicial process.” *City of Chicago v. Illinois Commerce Commission*, 13 Ill.2d 607, 618 (1958).

In declaring that ComEd has not proven that Rider SMP is “needed, and therefore reasonable” (GC Petitioners Br. p. 47), GC Petitioners misstate the standard applied by the Supreme Court. As described by the Supreme Court, the Commission had the discretionary “ability to approve direct recovery of unique costs through a rider when circumstances warrant such treatment.” *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 138 (1995). There is no requirement that such rider treatment be “necessary”, only that circumstances warrant rider treatment.

Even if there be some sort of “necessity” test for rider implementation, there is substantial evidence in the record to support the conclusion that approval of Rider SMP is both “necessary and reasonable.” ComEd Ex. 18.0, pp. 13-20, R. Vol. 43, C10544 – 10551. It would allow ComEd to invest in most if not all of the types of investments GC Petitioners’ own witness envisions as important for bringing ComEd customers the benefits of a smart grid. ComEd Ex. 18.0 pp. 13-14. There is ample evidence of the value of investment in smart grid technologies as well as of some sort of collaborative process to ensure that the appropriate architecture is in place to enable a smart grid to evolve over time. *Id* at 14. Without approval of Rider SMP, ComEd witness Tierney believed there would not be substantial investment in advanced metering and/or other smart-grid technology. *Id* at 15. This is because of uncertainty about Commission support for specific modernization programs and limits on utility access to capital to fund these discretionary investments at the same level of priority as investments necessary to provide reliable, safe, adequate electricity service. *Id* at 15-16.

When looking at whether something is “necessary” in a regulatory sense it is neither required nor appropriate to equate the term “necessary” with “indispensably requisite.” See *Campbell v. Illinois Commerce Comm’n*, 334 Ill. 293, 296 (1929). As the *Campbell* Court explained:

. . . The Commerce Commission has a right to, and should, look to the future as well as to the present situation. Public utilities are expected to provide for the public necessities not only to-day but to anticipate for all future developments reasonably to be foreseen. The necessity to be provided for is not only the existing urgent need but the need to be expected in the future, so far as may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community.

The Commission in this docket is faced with the precise situation envisioned by the *Campbell* Court’s reasoning. Even if there is no “urgent need” ComEd is looking to the anticipated future needs of its customers. Rider SMP would allow for recovery of incremental SMP capital projects approved by the Commission and invested in by ComEd in the future. Thus, the approval of Rider SMP, in pilot form, is a reasonable exercise of Commission rider authority.

## ***2. Rider SMP is consistent with ratemaking principles***

The Commission has very broad discretionary power to design rates which will compensate utilities for rendering service. In entrusting the Commission with the power to set utility rates the General Assembly did not confine the Commission to a particular methodology. It neither mandated recovery purely through base rates nor purely through riders nor through any particular mix of the two. In fact, the only statutory admonition to the Commission in designing rates is that rates and charges are to be “just and reasonable.” 220 ILCS 5/9-101. The Illinois Supreme Court long ago

explained that what is a just and reasonable rate is a question of sound business judgment based upon the evidence and not one of “mere legal formula.” *State Public Utilities Commission v. Springfield Gas Company*, 291 Ill. 209, 218 (1920). The goal of ratemaking is “permit the utility to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made . . . on investments in other business undertakings which are attended by corresponding risks and uncertainties.” *Bluefield Waterworks & I. Co. v. Public Service Commission*, 262 U.S. 679, 692 (1922).

GC Petitioners’ fail to explain how Rider SMP conflicts with consumer rights to adequate service at rates which reflect the long-term cost of such services. With little or no explanation, they complain that Rider SMP turns ratemaking principles on their head. GC Petitioners Br. p. 40. At best, they argue that Rider SMP shifts investment risk for Smart Grid technologies onto consumers even though these projects are discretionary and not necessary for ComEd to provide “safe, reliable, efficient distribution service.” GC Petitioners Br. p. 39. GC Petitioners cite no authority whatsoever for the proposition that rider recovery is limited to projects “necessary” for ComEd to provide safe, reliable, efficient distribution service.

Given that the Rider SMP allowed by the Commission is circumscribed in scope and will develop to its full potential only over the course of time with appropriate scrutiny by stakeholders in the Illinois regulatory process, ratepayers are fully protected in the traditional sense of not paying more for their service than it is reasonably worth. Nor is ComEd being allowed to charge rates which return to it more than its reasonable costs of service. GC Petitioners’ arguments that Rider SMP violates settled ratemaking

principles and are without merit and should be rejected by this Court. GC Petitioners Br. p. 40.

***3. Rider SMP does not Violate Strictures Against Single-Issue Ratemaking***

The prohibition against single issue ratemaking flows from the regulatory principle that a utility's revenue requirement should be based on the aggregate costs and demand of the utility. *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175 (1991). Accordingly, when the Commission sets about to establish a utility's revenue requirement in a general rate case, such as the present case, it is improper for the Commission to consider changes to components of the revenue requirement in isolation. *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 136-137 (1995). It is perfectly acceptable to address a single type of cost in isolation from base rates where the costs at issue are removed from base rates. For example, in *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill. App. 3d 617, 629 (1<sup>st</sup> Dist. 1996), the Court affirmed a Commission Order which removed local franchise fees and other franchise costs from ComEd's base rates for all its customers and to localize recovery of those costs by adding a separate line-item charge on the bills of customers who reside in the municipality charging the fee. This was not done within a base rate case. Rather, it was a proposed restructuring -- a reallocation which did not have any impact whatsoever on ComEd's overall revenue requirement. The Court noted that the franchise fees were already included in ComEd's overall rate structure and that the Commission's order simply redistributed them. *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill. App. 3d at 629. Because the rider in that case "merely facilitate[d] direct recovery of a particular cost, without

direct impact on the utility's rate of return” it was not an abuse of discretion, or a violation of single-issue ratemaking principle, for the Commission to employ a rider as the mechanism of cost recovery. *Id.*

The instant case does not run afoul of single-issue ratemaking prohibitions for the simple reason that the Commission established ComEds’ revenue requirement in the traditional way, based on a test year and ComEd’s total costs of service confined, with certain allowable exceptions, to that test year. GC Petitioners do not suggest that ComEd’s revenue requirement was otherwise determined. GC Petitioners’ complaint lies not with the establishment of ComEd’s revenue requirement but with the rate design mechanisms the Commission has implemented to recover that revenue requirement and the particular costs of SMP projects such as AMI.

***4. Rider SMP does not Violate Strictures Against Retroactive Ratemaking***

Retroactive ratemaking occurs where the Commission revisits rate treatment granted in a previous order and attempts to correct mistakes in that order by making a retroactive adjustment. *Citizens Utilities Co. v. Illinois Commerce Commission*, 124 Ill. 2d 195, 206-07 (1988). In other words, the Commission cannot in one rate order retroactively deny rate treatment granted in a previous order. As designed by the Commission, Rider SMP does not disturb any of the Commission’s prior orders. GC Petitioners do not claim otherwise. Nor does Rider SMP disallow charges or benefits previously ordered. All Rider SMP accomplishes is that a particular category of costs, which costs are not included in rate base, are allowed to be recovered through a rider prior to their inclusion in rate base in a later rate proceeding. The cost recovery is subject to the limitation that if application of ComEd’s rates result in revenues which

exceed those needed to earn its established rate of return, and also recover its Rider SMP costs, that ComEd will limit its Rider SMP cost recovery.

There will be no “refund for overcharges” as postulated by GC Petitioners (Br. p. 45). There will be no overcharge. Rather, Rider SMP will allow pass through, subject to reconciliation, of only those costs subject to the Rider. The costs subject to the Rider are those that ComEd expends on SMP projects that are not accounted for through earnings above the established rate of return. In other words, if ComEd is earning above its designed rate of return, cost recovery through Rider SMP is limited. The Rider does not lower or affect the designed rate of return. It instead operates as a limitation on cost recovery. As that cost recovery scheme is being established to operate prospectively, there is no retroactive ratemaking. The Rider simply establishes the formula for cost recovery allowed in Rider SMP, i.e. actual SMP costs less amount reported earnings exceed established rate of return.

The problem with retroactive ratemaking, as identified by the court in *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 209 (1989), is that if the utility’s earnings (in that case Commonwealth Edison Company) are excessive in any particular year, the Commission could order a refund in the following year. The Rider in this case does not attempt to adjust ComEd’s rates to reflect excess or insufficient earnings. It merely adjusts the amount of allowable SMP cost recovery to the extent actual earnings exceed designed earnings.

#### **5. *Rider SMP is Consistent with Test-Year Principles***

The purpose of a test year is to prevent a utility from overstating its revenue requirement by mismatching low revenue data from one year with high expense data

from a different year. *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175, 238 (1991); *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 219 (1989). The rates established by the Commission in this case were generated, just as in any other traditional general rate case proceeding, by examining the costs and expenses submitted in compliance with the Commission's test year rules and establishing a revenue requirement. There was no mixing and matching of revenue and expense items from other test years. Rider SMP allows costs which are not in base rates to be recovered as a separate item. There is no test year violation.

The base rates that are approved in this case have been evaluated in accordance with the appropriate test year protections. The fact that a portion of the revenue requirement will be recovered through a rider and not through base rates does not alter the situation. *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 139 (1995)(Test-year rule seeks to avoid a problem not present when expenses are recovered through a rider).

### **III. RESPONSE TO COMMONWEALTH EDISON**

#### **A. The Commission Appropriately Denied ComEd Full Recovery of Personnel Costs Where Personnel Handled Both Recoverable Utility and Unrecoverable Nonutility Business**

ComEd challenges a partial reduction of certain labor costs by the Commission wherein some of its employees handled both utility matters and other matters not recoverable as a utility expense, specifically merger issues involving Exelon Corporation and PSEG Corporation (ComEd Br. p.7). The employees involved are salaried employees, as admitted in ComEd's pleadings before the Commission, *e.g.*,

ComEd's Brief on Exceptions, p. 26 (R. Vol. 72, C17760). ComEd claims that the employees worked 100 percent on utility matters and for free (unpaid overtime) on the nonrecoverable matters (ComEd Br. p. 8). Therefore ComEd seeks recovery of 100 percent of the labor costs of the employees.

GC Petitioners objected to any recovery of the portion of ComEd's labor costs which were attributable to employees working on the merger as well as on utility business (R. Vol. 37, C09055-C09057, AG/CUB Ex. 2.0, pp.15-17; R. Vol. 50, C12307-C12308, AG/CUB Ex. 5.0, pp. 25-26). Despite ComEd's claims (Brief, pp.12-14), the grounds for GC Petitioners' proposed adjustment is clear on the record. ComEd had the right to cross-examine GC Petitioner witness Effron on this matter and chose not to (R. Vol. 87, Tr. 564-616).

The Commission, having considered the record, partially granted the GC Petitioners' proposal. (Order, p. 64, R. Vol. 81, C19861). (ComEd's Brief, p. 13, incorrectly cites to p. 62 of the Order as "A-000067" which is merely a summary of ComEd's arguments and not a Commission ruling on the evidence. R. Vol. 81, C19859). The Commission recognized, however, that not all of the costs should be disallowed as proposed by the AG and CUB because these employees performed delivery service work as well. Order p. 64, R. Vol. 81, C19861. Accordingly, one quarter of the pro forma test year adjustment proposed by the AG was granted.

The Commission's grant of partial recovery for the disputed costs is appropriate since, once a cost item is found, such as the labor costs related to the utility work performed by these employees, the Commission is not authorized to treat the expense as zero. *Central Illinois Public Service Co. v. Illinois Commerce Commission*

(“*CIPS*”), 5 Ill. 2d 195, 208 (1955). GC Petitioners do not challenge the partial rejection of their legal position.

Although the Commission partially rejected GC Petitioners’ proposed 100 percent disallowance of labor costs for employees who allegedly spent unpaid overtime working on the merger, this does not mean that the Commission is obliged to accept a ComEd position which strains credulity; that the work performed by these salaried ComEd employees on merger issues for ComEd and its related affiliates was somehow a matter unrelated to their employment. *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 16 (1958) [Commission is not required to accept even un rebutted evidence]. It is ComEd’s duty to provide sufficient evidence on the matter. 220 ILCS 5/9-201(c); *CIPS*, *supra*, 5 Ill. 2d at 210-211. The record is clear that these employees (or their successors) are ones who are called upon by their employer, ComEd, to handle both recoverable utility work and nonrecoverable matters. While it can be argued that specific merger issue is a happenstance of the test year, ComEd did not even attempt to prove that these employees (or their successors) will not in the future continue to handle both recoverable and nonrecoverable matters.

In the absence of any record evidence indicating an appropriate cost recovery in the range between 100% recovery and 100% denial, the Commission is authorized to choose an appropriate amount. In *DuPage Utility Co. v. Illinois Commerce Commission*, 47 Ill. 2d 550, 560 (1971), the Commission found that the annual salaries of the corporate officers were excessive and reduced them by 50%. The court sustained the reduction on a challenge of lack of evidentiary support, although the actual time the officers spent working for the utility was never submitted. Compare this *DuPage*

*Utility Co.* decision with *Candlewick Lake Utilities Co. v. Illinois Commerce Commission*, 122 Ill. App. 3d 219, 226 (2<sup>nd</sup> Dist. 1983), wherein the Commission denied the salary of the corporate president for lack of evidence. The court held that the Commission could not hold that the officer's salary was without value.

The Commission's right to exercise sound business judgment (on these labor costs) is beyond question. In *City of Alton v. Illinois Commerce Commission*, 19 Ill. 2d 76, 82 (1960), the Commission chose a 25% depreciation rate where the witnesses had recommended either 15% or 26%. In *People ex rel. Hartigan v. Illinois Commerce Commission*, 202 Ill. App. 3d 917, 951-953 (1<sup>st</sup> Dist. 1990), the Commission adjusted the auditors' calculation while rejecting the calculations of the auditors, Commission Staff, the Attorney General, and the Joint Intervenors. In *Institute of Shortening and Edible Oils, Inc. v. Illinois Commerce Commission*, 45 Ill. App. 3d 98, 100-1 and 104 (4<sup>th</sup> Dist. 1977), the Commission denied the gas company's curtailment petition and, instead, set higher rates for interruptible service. The Commission was sustained over a no evidence objection (45 Ill. App. 3d at 103-104).

The underpinning the long-recognized power of the Commission to make pragmatic adjustments is the judicial recognition that rate-making is not a matter of legal formula. *State Public Utilities Comm. v. Springfield Gas Co.*, 291 Ill. 209, 214-218 (1920) and *Amax Zinc Co. v. Illinois Commerce Commission*, 124 Ill. App. 3d 4, 11-12 (5<sup>th</sup> Dist. 1984). The Court should sustain the Commission's reduction of these labor costs by one-quarter as a pragmatic solution based on the rather large range (0-100%) supported by the evidence.

**B. The Commission Appropriately Allowed ComEd a Debt Return on its Employee Pension Plan Contribution**

In its July 26, 2006 rate order concerning ComEd's last rate relief request in Commission Docket 05-0597, the Commission rejected ComEd's proposal to add \$ 803 million to its rate base to account for an \$ 803 million contribution that ComEd parent Exelon made to ComEd in March 2005, purportedly to enable ComEd to "fully fund" its portion of the Exelon pension plan. *Commonwealth Edison Co.*, ICC Docket No. 05-0597, 2006 Ill. PUC LEXIS 43, \*67, \*\*99-100 (Order, July 26, 2006). The Commission based its conclusion on Staff testimony which determined that there was no pension asset. 2006 Ill. PUC LEXIS at \*99. Later, following rehearing, in that case, the Commission entered an Order allowing ComEd to recover the debt return at issue here and in Gen. No. 2-06-1284. *Commonwealth Edison Co.*, ICC Docket No. 05-0597, 2006 Ill. PUC LEXIS 101 (Order on Rehearing, December 20, 2006). The debt return proposal was offered by ComEd on rehearing as one of three alternatives and was characterized by ComEd as having "overwhelming record evidence" support and an "appropriate approach to provide at least partial recovery of the cost of the pension contribution." *Commonwealth Edison Co.*, ICC Docket No. 05-0597, 2006 Ill. PUC LEXIS 101, \*\* 40-45 (Order on Rehearing, December 20, 2006).

In accordance with the Commission's Order in Docket 05-0597, ComEd did not include the \$803 million pension contribution in rate base and instead, included an annual debt return on the pension 07-0566. As the Commission determined in its November 3, 2008 Amendatory Order, although ComEd did not re-litigate the merits of including the pension contribution in rate base it has appealed the Commission's decision in Docket 05-0597. R. Vol. 83, C20544. Accordingly, the Commission

determined that if the appellate court in Gen. No. 2-06-1284 sustains ComEd's position, ComEd has preserved this issue for appeal purposes in this case.

As ComEd did not actively re-litigate the pension asset issue in this case there is no record to support reversal of the Commission's Order. Given that its appeal in the current case is based wholly on its position in No. 2-06-1284, the Commission urges this Court to affirm the Commission's Order in this case should it affirm the pension cost issue pending before it in that appeal.

**C. The Commission Appropriately Denied Complete Recovery of Incentive Compensation Expenses for ComEd's Annual Incentive Plan and Long-Term Incentive Plan**

Over the testimonial objections of Commission Staff and the Governmental and Consumer Petitioners ("GC Petitioners"), ComEd sought to recover costs associated with several incentive compensation plans. While accepting the recoverability of certain of ComEd's incentive compensation plans, the Commission accepted Staff-recommended disallowances related to ComEd's Annual Incentive Plan ("AIP") and its Long-Term Incentive Plan ("LTIP") (R. Vol. 38, C09429 – C09434, Staff Ex. 1.0, pp. 11-16, R. Vol. 52, C12938 – C12947, Staff Ex. 14.0, pp. 6-15). Order p. 61, R. Vol. 81, C19858. Noting that it has repeatedly held that the cost of financial goals should not be paid by ratepayers, the Commission accepted Staff's proposed disallowances related to the AIP's financial net income goals which are financially based and primarily result in shareholder benefits. *Id.*

The Commission also determined that ComEd's Long-Term Incentive Plan should be adjusted to reflect Staff concerns that one-third of the LTIP was based upon financial goals and another one-third based upon legislative and regulatory goals. *Id.*

As the Commission explained, Staff was concerned that under the goals of the LTIP ratepayers would pay an incentive to ComEd to file more frequent rate cases, or to achieve results in those rate cases more favorable to ComEd, which in turn does nothing to benefit ratepayers. Order p. 61, citing Staff Init. Br. at 40. See R. Vol. 38, C09432 – C09434, Staff Ex. 1.0, pp. 14-16, The Commission’s conclusions are reasonable, lawful and supported by substantial evidence and should be affirmed.

At the outset, it should be noted that the Commission reiterated that, in Docket 05-0597, the parties agree on the standard that the Commission should apply when deciding whether to allow a utility to recover the cost of its incentive compensation program. Order p. 61, R. Vol. 81, C19858, citing *Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 97, 2006 Ill. PUC LEXIS 43, \*247-248 (Order, July 26, 2006) Docket 05-0597, Order at 95-96. In that case, the Commission determined that a utility can recover its expenses “when it can prove that the expenses are reasonable, related to utility services, and of benefit to ratepayers or utility service.” More specifically, the Commission in Order 05-0597 determined:

In ComEd's previous rate case, Docket 01-0423, we stated that such expenses should be recovered if the incentive compensation plan has "reduced expenses and created greater efficiencies in operations" and thus, it "can reasonably be expected to provide net benefits to ratepayers." Neither ComEd nor Staff nor the AG challenge the Commission's earlier pronouncements that "the plan must confer upon ratepayers specific dollar savings or other tangible benefits."

*Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 97, 2006 Ill. PUC LEXIS 43, \*247-248 (Order, July 26, 2006), citing and *Commonwealth Edison Co.*, Docket 01-0423, at 129, 2003 Ill. PUC LEXIS 311, \*319-320 (Order, March 28, 2003).

ComEd now maintains that the Commission's standards, as applied in Appeal No. 2-06-1284 are erroneous. ComEd Br. pp. 17-18. ComEd is wrong. The recoverability of incentive compensation costs has been a matter of contention in utility rate cases for many years. See *Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 97, 2006 Ill. PUC LEXIS 43, \*247 (Order, July 26, 2006); *Consumers Illinois Water Co.*, ICC Docket No. 03-0403, at 14-15, 2004 Ill. PUC LEXIS 382, \*25 (Order, April 13, 2004); *Northern Illinois Gas Co.*, ICC Docket No. 95-0219, 1996 Ill. PUC LEXIS 204, \*62, (Order, April 3, 1996); and *Commonwealth Edison Co.*, Docket 01-0423, at 129, 2003 Ill. PUC LEXIS 311, \*319-320 (Order, March 28, 2003). In fact, the issue of the recoverability of certain of ComEd's incentive compensation costs is pending before this Court in No. 2-06-1284. The issue arises because although the costs to be recovered in rates are those which are shown to be prudently and reasonably incurred (*Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111 (1995)) ratepayers are not required to pay any part of costs unless the utility shows that such costs directly benefit either ratepayers or the services the utility renders. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 482-83 (1973).

Thus, incentive compensation "expenses should be recovered if the incentive compensation plan has 'reduced expenses and created greater efficiencies in operations' and thus, it 'can reasonably be expected to provide net benefits to ratepayers.'" *Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 95, 2006 Ill. PUC LEXIS 43, \*247-48 (Order, July 26, 2006).

In this case, substantial Staff testimony supports the conclusion that the disallowed incentive program costs were unrecoverable based on the lack of ratepayer

benefits. With regard to AIP costs, Staff witness Hathhorn testified that: 1) the increase is not known and measurable; 2) the increase is duplicative; 3) the increase is contrary to ComEd's position that the reorganization is expected to be cost neutral to ComEd; and 4) the increase is based upon shareholder driven goals. (R. Vol. 38, C09426 – C09429, Staff Ex. 1.0, pp. 8-11) Ms. Hathhorn also testified that costs related to shareholder-oriented goals for the AIP (as reflected on her Schedule 1.7, page 3, R. Vol. 38, CC09473) should be disallowed (R. Vol. 38, C09432 – C09434, Staff Ex. 1.0, pp. 14-16).

Ms. Hathhorn proposed disallowance of 100% of AIP costs related to the net income goal which, in her view, primarily benefit shareholders. Her adjustment also disallowed 50% of ComEd's Total Costs goals. (R. Vol. 38, C09432 – C09434, Staff Ex. 1.0, pp. 11-12). She did not take exception to AIP amounts related to operation measure where ComEd quantified the effects of the goals.<sup>3</sup> She countered ComEd's rationale for including the cost of the AIP net income goal in its cost of service (ComEd executives are "encouraged to align revenues and expenditures to the extent possible and to monitor and control expenses while continuing to focus on reliability and safety. Customers benefit because appropriate returns provide the financial health and flexibility a utility needs to make further investments in the system." (R. Vol. 6, C01290, ComEd Ex. 9.0, page 24, lines 495-500).

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<sup>3</sup>Ms. Hathhorn did not take exception to the AIP amounts related to operational measures such as outage duration performance and outage interruption frequency (ComEd Ex. 9.0, p. 24, R. Vol. 6, C01265, as ComEd quantified the effect of the three types of AIP goals in its Attachment 8 to its response to Staff data request DLH-3.09. (Attachment B, page 4 to this testimony)

The Commission’s policy of disallowing recovery of utility expenditures based on earnings per share (“EPS”) funding measures is that “[T]he primary beneficiaries of increased earnings per share are shareholders, not ratepayers.” Order, Docket No. 05-0597, July 26, 2006, p. 96. (Emphasis added) In this case, Ms. Hathhorn testified that the net income metric proposed by ComEd is simply an input in calculating earnings per share, and therefore confers no more benefits to ratepayers than using EPS itself.

Ratepayers should not be required to fund incentive compensation plans linked to the financial performance goals of the Company. Linking incentive compensation to these types of goals introduces an inappropriate circular relationship between rates and the expenses such rates are designed to recover: the larger the rate increase granted the more success ComEd will have in achieving its earnings goals. (R. Vol. 38, C09431 – C09432, Staff Ex. 1.0, pp. 13-14). Thus, everything else held equal, a rate increase that includes incentive compensation costs will enhance ComEd’s ability to award incentive compensation under an incentive compensation plan linked to financial performance such as net income. Ms. Hathhorn concluded this circular process may provide benefits to the shareholders, but it provides little benefit to ratepayers. Because financial performance goals primarily benefit shareholders, the Commission has repeatedly ruled that shareholders should bear the cost of incentive compensation plans based on such goals. Just as with the AIP, Ms. Hathhorn recommended disallowance of the Long Term Incentive Plan because it primarily focused on shareholder driven goals. (R. Vol. 38, C09432 – C09434, Staff Ex. 1.0, pp. 14-16).

ComEd argues that its employee salaries are operating expenses and are fully recoverable as long as they are reasonably and prudently incurred, citing *Villages of Milford v. Illinois Commerce Comm'n*, 20 Ill. 2d 556, 565 (1960) and *Citizens Utilities Board v. Illinois Commerce Comm'n*, 166 Ill.2d 111 (1995). ComEd Br. p. 18. The cases cited, however, did not address unique situations involving discretionary incentive compensation programs. For example, *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill.2d 111, 121-23 (1995) makes it clear that the coal tar clean-up expenses were recoverable as mandated under federal law just like income taxes. Thus, the instant disallowed costs arise from discretionary programs meant to benefit shareholders under the guise of attracting an adequate workforce.

In fact, the law is clear that not all instances where utilities expend costs in compensating employees (for example free membership in clubs) are those costs recoverable. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 480-81 (1973). The Supreme Court recognizes that not all utility expenditures are operation expenses which are “cognizable for the purpose of ratemaking.” *Id.* at 481.

Clearly, while non-regulated companies may properly expend funds for an array of costs, subject only to recovery of their costs in their product sales, regulated utilities have always been held to a higher standard. The *Illinois Bell* court concluded that ratepayers are not required to pay any part of costs unless the utility shows that such costs directly benefit either ratepayers or the services the utility renders. *Illinois Bell Telephone Company, supra*, 55 Ill. 2d at 482-83. Thus, the *Illinois Bell* court disallowed proposed expenditures relating to lobbying because utility customers were

not given an opportunity either to advocate or decide which legislative proposals should be supported. That court also disallowed certain charitable expenditures as constituting an involuntary assessment on the utility's patrons. Finally, that court disallowed dues payments made on behalf of Company executives in organizations other than Chambers of Commerce, trade associations and industry organizations.

ComEd is flatly wrong that there is no customer benefit standard applying to incentive compensation costs. ComEd Br. p. 18. Under *Illinois Bell*, the customer benefit standard applies to all of ComEd's expenditures. It is not a "special" standard; it is "the" standard.

The utility bears the burden of establishing net benefits accrue to ratepayers in order to prove that the recovery of incentive compensation costs is just and reasonable. *Northern Illinois Gas Company*, ICC Docket No. 04-0779, 2005 Ill. PUC LEXIS 475, \*109-110 (Order Sept. 20, 2005). Thus, it is simply not the case that utility expenditures are considered just and reasonable in the absence of a proven benefit to ratepayers.

ComEd (Br. p. 18) claims that no one challenged ComEd's conclusory testimony that the Utilities' incentive compensation plans in fact benefit ratepayers. The simple answer is that the Commission is not required to accept testimony at face value or to accept as true all evidence not rebutted. *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 17 (1958). The fact of the matter is that there was no evidence whatsoever that it was necessary to restrict incentive compensation plans to those designed to benefit shareholders in order to attract and retain a motivated work

force. Moreover, there is no indication that incenting management to increase benefits to shareholders caused the lowering of the operating costs.

In the end, ComEd has failed to demonstrate that incenting employees to spend their time concentrating on providing shareholder benefits is necessary to attract and retain a motivated work force or that such devotion to shareholder benefits creates ratepayer benefits sufficient to allow cost recovery in the Utilities' rates.

Finally, ComEd urges the Court to reverse and remand the Commission's decision on incentive compensation costs in the event that it reverse the Commission's treatment of incentive compensation costs in Gen. No. 2-06-1284. ComEd Br. p. 19. This would be inappropriate given the fact that the two cases are based on different testimony and must be weighed separately.

#### **D. Response to ComEd's Potential Claim for Additional Pro Forma Capital Additions**

The Commission, as does ComEd, opposes the claims of GC Petitioners and IIEC seeking a rate base adjustment (This Brief, Section II.A., pp. 3-15). ComEd argues that, if GC Petitioners/IIEC are successful in having the Order reversed and the case remanded on such an issue, ComEd should get the additional quarter of *pro forma* capital additions (to September 2008) which ComEd forwent through a stipulation with Staff.

While the Commission does not oppose the remandment to the Commission of such an issue, assuming the Commission was reversed ultimately on the GC Petitioners/IIEC issue, the Commission does not agree that ComEd (Brief, pp. 21-22) should automatically get the additional quarter of *pro forma* capital additions. The Staff Witnesses had originally opposed all the 2008 *pro forma* capital additions as not

being known and measurable under the Commission rule, 83 Ill. Adm. Code 287.40 (R. Vol. 53, C13096-C1309, Corrected Staff Ex. 2.0, pp. 5-8). With additional information, the Staff Witnesses agreed that the *pro forma* capital additions for the first two quarters were appropriate (R. Vol. 56, C13852-C13856, Corrected Staff Ex. 15.0, pp. 5-9). However, it does not appear that the Staff Witnesses agreed with ComEd that the third quarter was known and measurable under 83 Ill. Adm. Code 287.40, since their evidence and the stipulation (R. Vol. 61, C14980-C14984) did not include that additional quarter of *pro forma* capital additions.

The Commission cannot know what position either the Staff Witnesses or the Commission would take if this issue were to be remanded. Therefore, to issue an order to the Commission (in the event of the proposed remandment) to grant the third quarter of the *pro forma* capital additions would invade improperly the ratemaking authority of the Commission. *People ex rel. Hartigan v. Illinois Commerce Commission*, 117 Ill. 2d 120, 142-143 and 145-146 (1987). *Cf. People v. Sales*, 195 Ill. App. 3d 160, 162-163 (2<sup>nd</sup> Dist. 1990).

If the Court decides to remand ComEd's *pro forma* capital additions issue as part of a reexamination of ComEd's rate base in this cause, the issue should be remanded to the Commission for further proceedings consistent with the Court's opinion. Any further instruction would be improper.

#### **IV. RESPONSE TO BOMA**

Before the Commission the Building Owners and Managers Association of Chicago ("BOMA") requested that the Commission approve a rate structure that differentiated between non-residential customers depending on whether or not they

used electricity for space heating. Declining to do so, the Commission explained that before the divestiture of ComEd's power generating assets, ComEd's former Rider 25 (the non-residential space heat rider) provided a subsidy to nonresidential electric space heating load customers in the form of a specific energy charge with no demand charges in the non-summer months. Order p. 217, R. Vol. 81, C20014. The Commission noted that Rider 25 was created at a time when the cost of power supply from ComEd's then existing generation was significantly lower in the off-peak seasons but acknowledged ComEd's argument that conditions have changed as a result of deregulation. *Id.* The Commission concluded:

. . . ComEd no longer has generating capacity and Rider 25 has been eliminated. Supply charges are not the subject of this proceeding. There is no evidence that delivery service costs vary seasonally. The record shows that distribution facilities must be planned and built to meet customers' maximum loads, regardless of when those may occur. There is no basis in this record to conclude that it costs ComEd less to serve nonresidential customers who use some of their electric service for space heating. Nor is there a public policy issue which would justify a deviation from a cost causing allocation.

Order p. 217, R. Vol. 81, C20014. Accordingly, the Commission rejected BOMA's proposal to establish a separate class or distribution charge for nonresidential electric space heat customers. Instead the Commission determined that customers in the non-residential space heating rate class were to be subject to the same general rate increase as other rate classes. Order p. 218, R. Vol. 81, C20015. This conclusion is fully supported by the evidence and should be affirmed.

**A. There is No Evidence of Discrimination Between Classes of Service**

BOMA claims that by not establishing separate rate structures for non-residential spaceheating and non-spaceheating, customers, while doing so for the

residential classes, the Commission violates the Act's prohibition against unlawful rate discrimination. BOMA Br. p. 20. There is no unlawful discrimination as that term is understood under the Act for the simple reason that BOMA has not demonstrated that nonresidential spaceheating customers are similarly situated with residential spaceheating customers. BOMA Br. p. 21 As BOMA describes itself, it represents the interests of the commercial office building industry in the City of Chicago. BOMA Br. p. 9. Its member included office, institutional and government buildings. Residential spaceheating customers, for the most part, can be assumed to be much smaller than nonresidential spaceheating customers such as office towers. As easily imagined, residential and non-residential spaceheating customers both use electricity for a variety of end-uses, one of which is space heating. The fact that they both have space heating does not prove that the other uses of these two groups are the same.

Section 9-241 of the Act provides there can be no "unreasonable difference" as to utility rates or charges. 220 ILCS 5/9-241. Thus, utilities may classify their service according to the amount used, the time when used, the purpose for which used, and other relevant factors. 220 ILCS 5/9-241. In general, the test to be applied in determining whether there has been a violation of the discrimination provisions of the Act is whether the difference is reasonable and not arbitrary. *Citizens Utilities Company v. Illinois Commerce Commission*, 50 Ill. 2d 35 (1971). When designing rates one of the goals of regulation is that the cost of supplying public utility services is allocated to those who cause the costs to be incurred. 220 ILCS 5/1-102(d)(iii). Where factors other than cost of service are considered in the Commission's decisions, the

General Assembly has determined that the rationale for that consideration is set forth by the Commission. 220 ILCS 5/1-102(d)(iv).

Here, the Commission's examination of the record indicated that distribution facilities must be planned and built to meet customers' maximum loads, regardless of when those may occur and that there was no basis in the record to conclude that it costs ComEd less to serve nonresidential customers who use some of their electric service for space heating. Order p. 217, Nor was there a public policy issue which would justify a deviation from a cost causing allocation. *Id.* The Commission's evidentiary conclusion in this matter is *prima facie* true (220 ILCS 10-201(d)) and entitled to substantial deference.

Simply because different groups of ratepayers receive service under different rate designs does not mean that there is unreasonable discrimination within the meaning of the Act. BOMA fails to meet the threshold of proving that residential and non-residential spaceheating ratepayers have similar characteristics to demonstrate there being discrimination in the first place much less unreasonable discrimination.

**B. There is no basis in the record to conclude that it costs ComEd less to serve nonresidential customers who use some of their electric service for space heating.**

The Commission determined that there was no basis in the current record to conclude that it costs ComEd less to serve nonresidential customers who use some of their electric service for space heating. Order p. 217, R. Vol. 81, C20014. BOMA argues that the rate design treatment approved by the Commission is not justified on the basis of cost because nonresidential customers were previously afforded "specific" rate design treatment (i.e. Rider 25), that such customers have allegedly received the

highest rate increases since deregulation, and that over a 30% “delta” in distribution costs at the residential level has been consistent for the past eight years. BOMA Br. pp. 21-22. None of these factors support the conclusion that the current nonresidential rate treatment is unjustified from a cost basis.

First, the fact that spaceheating BOMA members were previously accorded Rider 25 treatment which exempted them from demand charges for 8 out of 12 months does not support their argument that the former treatment was cost-based and the current treatment not. As the Commission determined in allowing the discontinuance of Rider 25 and its 8 month exemption, “purely on the basis of cost; a discount in the distribution facilities charge to nonresidential space heat customers is not justified.” *Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 97, 2006 Ill. PUC LEXIS 43, \*561 (Order, July 26, 2006) The Commission came to this conclusion having recognized that:

“over a period of many years, the Commission inadvertently allowed rates to be developed that are not reflective of cost causation. That is, it appears through Rider 25 nonresidential space heat customers were granted a discount on both the generation and delivery components of their demand charges. While the discount on generation demand charge was probably justified, the discount on the delivery component was not. Nevertheless, it made little difference until 1997 when restructuring of the Illinois electric markets began.

*Id.* Accordingly, the fact that the Commission had previously, inadvertently, allowed nonresidential space heating customers to receive rate treatment which was not cost justified does not support the conclusion that current costs justify a separate rate treatment, i.e. a return to non-cost based rates.

Second, whether or not nonresidential spaceheating customers have received above average rate increases in the past also is unrelated to whether current rates are

justified by costs. At most, BOMA's argument raises the question of whether the Commission's movement of nonresidential spaceheating customers to cost-based rates in past orders should, in the Commission exercise of its expertise, have been done in a series of steps as opposed to in one step. The fact is that the Order in this case makes the customers in the nonresidential spaceheating class subject to the same general rate increase as other rate classes. Order p. 218, C20015.

Finally, whether or not there is a cost-based reason for offering residential spaceheating customers their own separate rate treatment does not support the conclusion that costs incurred by nonresidential spaceheating customers have the same, or in fact any differential similar to residential customers. Evidence in the record supports the conclusion that there is no cost based difference to serve nonresidential space heat as opposed to non-space heating customers. In their surrebuttal panel testimony ComEd witnesses Alongi and Jones testified that there was "absolutely no cost based justification" to set nonresidential Distribution Facilities Charges as BOMA proposes. R. Vol. 54, C13208, Ex. 45.0, p. 13. Not only was the provision of a deep discount to non-residential electric space heating customers not cost-justified, the ComEd witnesses testified that it would be inappropriate to reinstitute a subsidy that was eliminated years ago. BOMA had the opportunity to cross examine ComEd witnesses Alongi and Jones (R. Vol. 93, Tr. 2190-2202) as well as ComEd cost of service witness Heintz who sponsored ComEd's Cost of Service Study ("ECOSS") regarding the asserted lack of cost base justification for BOMA's position and chose not to. See R. Vol. 92, Tr. 1972-1980.

While BOMA makes much of the difference in the cost of service for residential spaceheating and non-spaceheating customers, ComEd witness Alongi testifies that the difference was primarily due to the fact that the distribution facilities charge for residential customers is based upon kilowatt hours and electric space heating residential customers use more kilowatt hours. So their distribution facilities charge is less, but their cost of service is probably about the same. R. Vol. 93, Tr. 2193 Thus, even though there was a revenue requirement difference between residential space heat and non-spaceheating customers, the revenue requirement would have been different because the numbers of customers and their usage is different. *Id.*

Moreover, even if there is some sort of difference in cost of service as between residential spaceheating and non-spaceheating customers, BOMA fails to cite any record evidence to demonstrate that the same relationships exist for nonresidential spaceheating and non-spaceheating customers. BOMA Br. p. 24. While BOMA claims to have provided the Commission with “uncontroverted” evidence that parallels are apparent for the non-residential and residential customers (BOMA Br. p. 24) its citation in support of this claims leads not to the record but to its own initial Brief before the Commission. R. Vol. 64, C15860. There is no citation to record evidence on the cited page which supports BOMA’s contention. Moreover, it would take a leap of faith to assume that the same relationships exist for nonresidential spaceheating customers and non-spaceheating customers for residential spaceheating customers and non-spaceheating customers.

Whether or not nonresidential spaceheating customers have received “the largest increases in ComEd rates since the inception of electric deregulation” is not

relevant to BOMA's underlying position that it should receive a different rate design from other non-residential customers. Moreover, it is unsurprising that nonresidential spaceheating customers would receive higher than average rate increase following the passage of the Electric Service Customer Choice and Rate Relief Law of 1997. 220 ILCS 5/16-101 The elimination of Rider 25 ended the subsidy to nonresidential electric space heating load customers which came in the form of a specific energy charge with no demand charges in the non-summer months. It is not surprising that nonresidential spaceheating customers saw substantial and in fact the highest rate increases following the ending of the subsidy.

BOMA's spaceheating members are not alone in receiving above-system average rate increases. ComEd demonstrated that all nonresidential customers with demands between 400 kW and 3,000 kW experienced increases between 1999 and 2007 that were higher than the overall nominal 38% increase in the revenue requirement over those eight years. R. Vol. 48, C11744 – C11745, ComEd Ex. 32.0 Corr., pp. 20- 22, Table R7. ComEd also demonstrated that customers in these classes have had to shoulder the burden of the subsidies instituted for the benefit of customers in the high voltage and larger demand classes, as well as customers in the railroad class, thereby necessarily increasing their rates. *Id.* For example, ComEd's evidence showed that between 1999 and 2007 the change for the Over 10,000 kW class was an increase of just 28.8%, the change for the High Voltage Over 10,000 kW subclass was a decrease of 39.7%, and the change for the Railroad Delivery Class was a decrease of 29.5%. R. Vol. 54, C13222, ComEd Ex. 45.0, pp. 13-14. The increases for the remaining

nonresidential classes exceeded the overall increase of 38%, principally to offset these changes. *Id.*

In the end, in order to overturn a Commission finding of fact BOMA must prove that the conclusion opposite to that reached by the Commission (i.e. that there is no basis in this record to conclude that it costs ComEd less to serve nonresidential customers who use some of their electric service for space heating) is "clearly evident." *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1994). This BOMA has failed to do.

**C. BOMA Failed to Prove that Nonresidential Spaceheating Ratepayers Subsidize Non-Spaceheating Nonresidential Customers**

BOMA alleges that there is an interclass subsidy of non-spaceheating non-residential customers by spaceheating non-residential customers. BOMA Br. p. 26-27. It posits a scenario where two customers had the same non-coincident peak usage of 1,000 kW for their peak month but one had that peak every month but the other did not. Under the above scenario and assuming both customers were in the same rate class, ComEd would collect a different level of revenue from the first customer than from the second.

In order for this scenario to have any meaning there would have to be some sort of regulatory imperative that all customers in a rate class must be equally costly to serve. BOMA has not shown that all customers in a rate class must impose the same costs of service. It is difficult to imagine that all customers in a rate class are equally costly to serve. For example, residential customers who are away from their homes during peak usage hours would be expected, all other things being equal, to impose lower costs than residential customers who stay home all day. The ratemaking process

is lacking in precision and is not an exact science. *Amax Zinc Company, Inc. v. Illinois Commerce Commission*, 124 Ill. App. 3d 4, 11 (5<sup>th</sup> Dist. 1984).

In the end, BOMA's argument amounts to little more than a criticism of ComEd testimony that previous nonresidential spaceheating rates are not cost-justified, and are themselves subsidies which it is inappropriate to reinstate. BOMA Br. p. 27. However, that testimony is in the record and the Commission was entitled to rely on it when reaching its conclusions. BOMA claims to have provided evidence which purportedly undermines ComEd testimony that BOMA's proposed reinstatement of a rate design ComEd witnesses characterize as a subsidy. BOMA Br. p. 27. ComEd witness Alongi, in explaining his decision not to analyze whether BOMA's proposed discount was justified, testified that BOMA witness Zarumba's proposals were based on an outdated Cost of Service Study. R. Vol. 93, Tr. 2201.

While it is certainly possible that spaceheat customers subsidize non-spaceheat customers (BOMA Br. p. 27) there is no compelling evidence brought forward by BOMA which requires reversal of the Commission's decision not to grant nonresidential spaceheat customers a separate rate design. BOMA has not carried its burden of proving the Commission's determinations are unsupported by substantial evidence.

**D. The Commission Properly Considered all of the Evidence in Reaching its Conclusions in this Case.**

In reaching its conclusions in this case the Commission specifically noted that it had "considered the entire record" and was "fully advised in the premises . . ." Order p. 235. Disregarding this clear statement, the BOMA contends that there is no indicia in the record that BOMA's arguments were "duly considered" by the Commission.

BOMA Br. p. 28. BOMA goes so far as to suggest that BOMA's analysis and evidence was ignored by the Commission. BOMA Br. p. 28, citing *City of Alton v. Illinois Commerce Comm'n*, 19 Ill. 2d 76, 80 (1960). BOMA's arguments are without merit and reviewing courts routinely reject similar such arguments. See, for example, *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 283 Ill. App. 3d 188, 208 (2d Dist. 1996) citing *United Cities Gas Co. v. Illinois Commerce Commission*, 48 Ill. 2d 36, 40 (1971) and *People ex rel. Hartigan v. Illinois Commerce Commission*, 214 Ill. App. 3d 222 (3d Dist. 1991)(Order stating that the Commission reviewed all the evidence and determined appropriate costs reflects the fact that the Commission reviewed the evidence presented).

BOMA's further argues that the Commission made insufficient findings ("Commission's findings and conclusions wholly ignore [BOMA's] evidence.") BOMA Br. p. 28. Once again BOMA's argument must fail. The Order in this case provides this court with sufficient findings and analysis to support its conclusions and allow for informed judicial review, which is all that is required under the Act. See *Lefton Iron & Metal Company v. Illinois Commerce Commission*, 174 Ill. App. 3d 1049 (1st Dist. 1988); *Knox Motor Service, Inc. v. Illinois Commerce Commission*, 77 Ill. App. 3d 590 (1979).

It is well settled that the Commission is not required to make particular findings as to each evidentiary fact or claim. *United Cities Gas Company v. Illinois Commerce Commission*, 47 Ill. 2d 498 (1970). The Commission should not be required to, in effect, annotate to each finding the evidence supporting it or to disclose its mental operations by

which it reached its decision. *See Lefton*, supra, 174 Ill. App. 3d at 1055-1056, citing *Public Utilities Commission v. Federal Power Commission*, 205 F.2d 116, 119-20 (1953).

The Act merely requires that the Commission make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. 220 ILCS 5/10-110. Courts construe this requirement to mean that the order must sufficiently set forth the facts found which form the basis for the order to enable a court to intelligently review them on appeal. *Knox Motor Service, Inc. v. Illinois Commerce Commission*, 77 Ill. App. 3d 590 (4<sup>th</sup> Dist. 1979). In *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 595 (1945), in upholding the Commission's order reducing power companies' rates over a challenge by those companies that the Commission's findings on the allocation of costs were inadequate, the Supreme Court stated:

The findings of the Commission in this regard leave much to be desired since they are quite summary and incorporate by reference the Commission's staff's exhibits on allocation of costs. But the path which it followed can be discerned. And we do not believe its findings are so vague and obscure as to make the judicial review contemplated by the Act a perfunctory process.

Here too, the path followed by the Commission is clear. The Commission found that there is no evidence that delivery service costs vary seasonally. Order p. 217, R. Vol. 81, C200014. The Commission reasoned that distribution facilities must be planned and built to meet customers' maximum loads, regardless of when those may occur. Accordingly, the Commission found, as a factual matter, that there is no basis in the record to conclude that it costs ComEd less to serve nonresidential customers who use some of their electric service for space heating. Nor, is there a public policy issue which would justify a deviation from a cost causing allocation.

The foregoing findings are clearly sufficient for this Court to review the Commission's decision not to design a separate rate treatment for nonresidential spaceheating customers. First, there is no cost basis for doing so, and second, there is no public policy issue sufficient to justify deviating from cost based ratemaking. The only question becomes whether those two clearly sufficient findings are supported by substantial evidence. As shown above, they clearly are, and thus no differential rate treatment is appropriate for BOMA's members.

### **CONCLUSION**

For all the above reasons, the Commission Order of September 10, 2008, should be affirmed.

Respectfully submitted

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**Docket Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008,  
1-08-3030, 1-08-3054 and 1-08-3313 (cons.)**

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**IN THE ILLINOIS APPELLATE COURT  
SECOND DISTRICT**

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| <b>COMMONWEALTH EDISON CO., ET AL.</b>          | ) |                                |
| <i>Petitioners</i>                              | ) | On Direct Appeal of            |
| v.  | ) | Orders of the Illinois         |
|   | ) | Commerce Commission            |
| <b>ILLINOIS COMMERCE COMMISSION,<br/>ET AL.</b> | ) |                                |
| <i>Respondents</i>                              | ) | Ill.C.C. Docket No.<br>07-0566 |

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**CERTIFICATE OF COMPLIANCE**

I, James E. Weging, Special Assistant Attorney General, counsel for the Respondent, Illinois Commerce Commission, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

Dated June 30, 2009

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JOHN P. KELLIHER

**Docket Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008,  
1-08-3030, 1-08-3054 and 1-08-3313 (cons.)**

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| <i>Respondents</i>                              | ) | Ill.C.C. Docket No.    |
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**NOTICE OF FILING**

TO: Attached Service List

PLEASE TAKE NOTICE that I have, on this 30<sup>th</sup> day of June, 2009 A.D., filed with the Clerk of the Illinois Appellate Court for the Second District, the Brief of the Respondent, Illinois Commerce Commission along with a Separate Appendix in the above captioned cases, three copies of each of which are hereby served upon you.

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the attached Notice, together with three copies of both the Brief and the Separate Appendix referred to therein, have been served upon the parties to whom the Notice is directed by first class mail, proper postage prepaid, from Chicago, Illinois on the 30<sup>th</sup> day of June, 2009 A.D.

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JOHN P. KELLIHER