STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY,	)	
	)	
	)	Docket No. 10-0091
Approval of the On-Bill Financing Program Pursuant to Section 16-111.7 of the Public Utilities Act.	)	
	)	
	)	

REPLY BRIEF ON EXCEPTIONS OF COMMONWEALTH EDISON COMPANY

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Date: May 3, 2010

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I. INTRODUCTION

The Briefs on Exceptions filed by other parties ignore the statute and ask the Illinois Commerce Commission ("Commission") to instead approve individual preferences that either depart from or directly contradict the statutory framework. Having repackaged the same baseless arguments made in their Initial and Reply Comments, intervenors offer no new arguments or support for their claims. As explained in more detail in Section III *infra*, a careful review of the governing statute, the actual record and the Proposed Order ("PO") itself shows that the Proposed Order in fact fairly reflects the applicable law and the evidentiary facts.

For these reasons, Commonwealth Edison Company ("ComEd") urges the Commission to deny the Staff of the Illinois Commerce Commission's ("Staff") and intervenors' exceptions and the Attorney General's ("AG") request for oral argument, and adopt the Proposed Order as modified by ComEd's Brief on Exceptions.

II. REPLY TO REQUEST FOR ORAL ARGUMENT

The only party to request oral argument in this docket is the AG, which requested in its Brief on Exceptions that it "be given the opportunity to present oral argument on the issues of a Budget Cap (to estimated Program costs), Underwriting Criteria (credit checks), and Security Interest." (Brief on Exceptions of the People of the State of Illinois at 1 ("AG BOE").) As an initial matter, the AG improperly submitted its request "pursuant to Section 9-201(c) of the Public Utilities Act", which applies only to "a proceeding initiated under this Section [9-201]." In such proceedings, "[t]he utility, the staff of the Commission, the Attorney General, or any party to a proceeding initiated under this Section who has been granted intervenor status and submitted a post-hearing brief must be given the opportunity to present oral argument if requested no later than the date for filing exceptions…." 220 ILCS 5/9-201(c). The present

docket, however, was initiated under Section 16-111.7 of the Act in response to its requirements (*see* Verified Petition of Commonwealth Edison Company for Approval of its On-Bill Financing Program and Tariff Revisions at 1 ("Petition")), not under Section 9-201, and therefore the Commission is not required to grant the AG's request for oral argument.

Because the oral argument provision of Section 9-201(c) does not apply here, the decision of whether to grant oral argument is left to the Commission's discretion. The AG, however, does not suggest any way in which oral argument would aid the Commission in resolving these issues. With respect to each of the three issues raised by the AG – Budget Cap, Underwriting Criteria and Security Interest, the AG has repeated the same arguments on three different occasions and the exceptions raise no new issues.[1] ComEd thoroughly addressed and rebutted these issues in its Program Design Document (ComEd Attach. A), Request for Proposals (ComEd Ex. A.2), Direct Testimony (ComEd Ex. 1.0; ComEd Ex. 2.0), Verified Reply Comments of Commonwealth Edison Company at 19-21, 24-27, 28-33 ("ComEd Reply Comments") and now, again, in this Reply Brief on Exceptions. Staff and other intevenors have also replied at length to these issues.[2] As discussed in more detail below, the Proposed Order thoughtfully considered and analyzed each of these issues in support of its conclusions. Given that the AG has provided no justification for why additional argument is needed on any of these issues, ComEd believes that granting the AG's request would be an inefficient use of the parties' and administrative resources, especially in light of this expedited docket. For these reasons, ComEd urges the Commission to deny the AG's request.

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[1] *See* Revised Initial Comments of the People of the State of Illinois at 3-5, 7-9, 9-11 ("AG Init. Comments"); Verified Reply Comments of the People of the State of Illinois at 3, 4-5, 6-8 ("AG Reply Comments"); AG BOE at 4-7, 10-12, 13-15.

[2] *See, e.g.*, Verified Reply Initial Comments of BlueStar Energy Services, Inc. at 2; Brief on Exceptions of the Staff of the Illinois Commerce Commission at 3-6 ("Staff BOE") (Security Interest at 3-6); Brief on Exceptions of the Citizens Utility Board and City of Chicago at 3-4 ("CUB/City BOE").

In the event the Commission grants the AG's request for oral argument, however, ComEd will address or take questions on those issues of interest to the Commission.

III. REPLY TO EXCEPTIONS

A. There Is No Basis in Law or Fact to Disallow Any Costs at This Time.

The Proposed Order correctly denied the "AG's request to cap Program Fees at 10% of the program dollars", concluding that "[i]t is contrary to the express statutory language that the utilities are allowed to recover all of their prudently incurred costs." (PO at 34.) The Proposed Order goes on to note that "[a]ll costs that the utilities seek to recover from ratepayers will be subject to a prudency review in the annual reconciliation proceeding for the utility's automatic adjustment clause rider", and clarifies that ComEd's preliminary estimates are only informational and not for approval in this docket. (*Id.*)

The AG is the only party to take exception to the Proposed Order's conclusion denying a cap. (AG BOE at 4-8.) After sifting through the AG's confused and unsupported arguments based on misapplied or made-up standards and rules, one thing is clear – the only standard that is relevant to and governs the costs ComEd will incur related to its On-Bill Financing Program ("OBF Program" or "Program") is the prudence standard set forth in Section 16-111.7(f), which provides that "[a]n electric utility shall recover *all of the prudently incurred costs* of offering a program approved by the Commission pursuant to this Section, including, but not limited to, all start-up and administrative costs and the costs for program evaluation." 220 ILCS 5/16-111.7(f) (emphasis added). The AG's arguments therefore should be rejected.

1. Costs incurred in offering an OBF Program are subject to a statutorily mandated after-the-fact prudence review.

As the AG correctly states in its Brief on Exceptions, "it is important to keep in mind that Section 16-111.7 of the Act permits the utilities to recover 'all of the prudently incurred costs of offering a program approved by the Commission pursuant to this Section, including, but not limited to, all start-up and administrative costs and costs for program evaluation.'" (AG BOE at 6 (quoting 220 ILCS 5/16-111.7(f)).) Ironically, the only party in this proceeding that does not keep this in mind is the AG. The Proposed Order and every other participant in this docket agree that this language sets a prudence standard for the review of ComEd's costs, which precludes the establishment of any upfront cap or disallowance in this docket. As Staff summarized in its Reply Comments:

> First, Staff agrees with the AG that the laws do not establish a cap on expenses. Moreover, the only statutory limitation on the recovery of expenses is set forth in Subsection (f) of each of the laws, which states in pertinent part that:
>
> > An electric utility shall recover *all* of the prudently incurred costs of offering a program approved by the Commission pursuant to this Section, including, but not limited to, *all* start-up and administrative costs and the costs for program evaluation.
>
> Consequently, in Staff's view, the Commission does not have the statutory authority to impose a cap on administrative expenses as urged by the AG.... Staff cautions against any attempt to *impose* a cap in light of the statutory language.

(Verified Reply Comments of the Staff of the Illinois Commerce Commission at 3-4 ("Staff Reply Comments").) Indeed, because ComEd submitted preliminary cost *estimates* for information purposes only, Staff correctly noted that it is impossible to make any prudence determinations in this docket: "[t]he prudency of expenses cannot be determined based on a hypothetical budget proposed in advance of any expenditure." (*Id*. at 4.)

2. The AG's attempts to set new standards contradict the statute, are unsupported and should be rejected.

Not to be outdone by a clear and unambiguous statute, the AG resorts to invoking "standards" that are either wholly made-up or inapplicable in this instance. First, the AG claims that the Commission may only approve "cost-effective on-bill financing programs." (AG BOE at 6.) The AG provides no support or citation for this "standard", much less explains what it means. In fact, the only way in which Section 16-111.7 uses the term "cost-effective" is to describe the "cost effective energy efficiency measures" that will be made available under the OBF Program. 220 ILCS 5/16-111.7(a).

Second, the AG's Brief on Exceptions improperly invokes Article IX's just and reasonable standard to attack the preliminary cost estimates, concluding that "[t]he Proposed Order should be revised to provide for just and reasonable program costs associated with ComEd's Program." (AG BOE at 8.) This is simply wrong and an obvious rewrite of the statute. Section 16-111.7 provides for a review of the *prudence* of Program costs, not the justness and reasonableness of Program costs. The AG appears to be confusing the "just and reasonable" standard applicable to the approval of rates and charges with the prudence standard applicable to a review of utility costs. Although the AG fails to articulate what it would mean to apply a "just and reasonable" standard to a review of preliminary cost estimates, the AG implies the standard would support its argument for an upfront disallowance or cap. (AG BOE at 8.) This interpretation is wholly unsupported.[3]

[3] ComEd further objects to the AG's inappropriate attempt to cite to principles of statutory construction. (AG BOE at 3.) As the Appellate Court stated in the case cited by the AG, "[t]he statutory language itself is the best indication of the intent of the drafters, and where that intent can be gleaned from the plain language of the statutory enactment, the courts will give it effect without resorting to other aids for construction." *People v. Mullinex*, 125 Ill. App. 3d 87, 89 (2d Dist. 1984). Here, the language is clear and unambiguous, and accordingly there is no basis for invoking principles of statutory construction. And, in any event, the AG has failed to provide any evidence in support of its "absurdity" allegations. (*See* Section III.A.3 *infra*.)

After a while, however, even the AG gives up on these ill-formed and ill-fitting "standards." In a last ditch effort, the AG admits the statute does not impose a cap and instead appeals to some vague Commission "duty": "[w]hile not *specifically* provided in Section 16-111.7, it is the Commission's duty to establish limits *up front* some sort of guidance on permissible spending for administrative costs of the program so that a utility has some idea as to what amount can and should be spent on a proposed on-bill program." (AG BOE at 6; *see also id*. at 7 ("…Section 16-111.7 provides no *explicit cap* on the administrative costs of an on-bill financing program…").) The AG is not just requesting guidance, however, but a radical 10% cap on administrative costs based on the total amount financed under the Program. (AG BOE at 8.) Indeed, if the AG were really just requesting guidance, it would have to admit that the General Assembly and Commission are providing very specific guidance in ensuring that all of the specific and lengthy requirements of Section 16-111.7 are satisfied. The statute tightly prescribes the components and requirements of on-bill financing programs, and each proposed program must be filed with and approved by the Commission. All costs incurred related to the Program that flow through the utility's automatic adjustment clause tariff are then subject to a prudence review. In no sense do the OBF Programs represent a blank check.

The only alleged support the AG offers for its "duty" argument is to cite to two wholly inapposite Commission orders, which the AG falsely claims are examples of "plenty of Commission precedent" in support of its position. (AG BOE at 7-8.) Indeed, ComEd distinguished the first of these orders in its Reply Comments. *See In re North Shore Gas Co. and Peoples Gas Light & Coke Co.* Dkt. No. 07-0241 & 07-0242 (Consol.), (Feb. 5, 2008) ("*North Shore Gas*"); ComEd Reply Comments at 30-31. With respect to *North Shore Gas*, ComEd explained that it is disingenuous to claim the Commission "capp[ed] administrative costs." (AG

BOE at 7; ComEd Reply Comments at 30-31.) Rather, the Commission merely approved an agreement previously reached between the utilities and Staff. (ComEd Reply Comments at 30-31.) The overall context of *North Shore Gas* is entirely different from the present docket. In that case, the utilities were required to propose an energy efficiency program as a condition of a 2006 merger. (*Id*. at 30 (citing Order at 163, Dkt. No. 06-0540).) In compliance, the utilities presented their proposal for a rebate/incentive program in their 2008 rate case. Here, on the other hand, a statute requires that ComEd develop an OBF Program, and in turn guarantees recovery of all of the prudently incurred costs related to the Program. Moreover, unlike the relatively straightforward rebate program at issue in *North Shore Gas*, Section 16-111.7 requires the creation of a new and complicated consumer lending program that involves coordination with vendors and lenders and ongoing administration and evaluation. Finally, as noted above, in *North Shore Gas* Staff proposed, and the utilities consented to, a 5 percent cap on administrative expenses. The Commission therefore approved what was an uncontested issue. (*In re North Shore Gas* at 163-83; Surrebuttal Testimony of I. Rukis, North Shore/Peoples Gas Ex. IR 3.0 at 5 (September 5, 2007).) Here, consistent with the statute, there is no utility consent to such a cap. The AG addressed none of ComEd's arguments in its Brief on Exceptions.[4]

3. The AG failed to identify a single proposed cost that it believed to be imprudent or unreasonable.

Although the AG has made the broad assertion that ComEd's preliminary cost estimates are "absurd by any measure", there is nothing behind this claim. (AG Init. Comments at 5; AG

[4] The AG's characterization of the Northern Illinois Gas Company ("Nicor") rate case order is equally disingenuous. (ICC Docket No. 08-0363, Order of March 25, 2009 at 151, 156-59.) In that proceeding, Nicor sought approval of, among other things, a rider to recover its estimated $13 million in energy efficiency program costs. Staff was the only party that contested the voluntary energy efficiency program (Order at 160), claiming that the program simply was not necessary. (Order at 150.) The Commission approved the $13 million requested funding level over Staff's objection. (Order at 159.) However, contrary to the AG's mischaracterization, the 5% "cap" in this case was not opposed by Nicor, but rather proposed by Nicor in the first instance based on the unique nature of the programs it was proposing. The cap was entirely voluntary and the Commission simply approved it as part of the overall program. (Order at 151, 156-59.)

BOE at 5.) Indeed, the AG has failed to point to a penny of ComEd's cost estimates that it believes to be imprudent or unreasonable, much less provided any alternative proposals related to the start-up, implementation and administration costs of the Program. To the contrary, the AG actually proposes that the utilities take on the responsibilities of the lender and develop from scratch a wholly untested tiered credit approach, which would raise Program costs even more. (*See* Section III.C *infra*.) ComEd notes that only Staff submitted a data request to ComEd about its costs, and Staff took no issue with the Proposed Order's conclusion. (ComEd Reply Comments at 31.) The AG, on the other hand, submitted no data requests to ComEd about its costs estimates, and not surprisingly is unable to cite to a single proposed cost that it believes to be unreasonable or imprudent. (*Id.*)

Interestingly, the AG takes no issue with ComEd's explanation in its Reply Comments that it will incur certain fixed Program start-up and administrative costs regardless of whether the amount financed under the Program is $2.5 million or $25 million. (ComEd Reply Comments at 31.) ComEd is building this Program from scratch, and expects, like CUB/City, that the Program would continue after the initial three year period. ComEd has also explained that its preliminary estimates are conservative and subject to change, and do not currently take into account savings that could be realized if a lender were able to perform certain marketing or vendor functions. (*Id.* at 32.) Moreover, the preliminary budget estimates are contingent on the success of the Program and were based on fully utilizing the $2.5 million of funds available. Assuming participation ramps up over time, ComEd is committed to utilizing existing resources for as long as practicable. (*Id.*)

The AG also ignores the various ways in which ComEd has built-in to the Program components strategies and opportunities for lower costs, which include the following:

- Joint RFP process that consolidates five separate RFP processes into one.
- Lender evaluation criteria that emphasizes both low interest rates for participants and opportunities to lower overall Program costs by relying on, for example, the lender's ability to market the Program to its existing base or work with vendors regarding certification.
- Relying on the lender's expertise to select a credit check methodology rather than developing an undefined and unsupported "bill payment history" approach to creditworthiness without input from the lender, which would require substantial resources from the utility to staff and implement.
- A commitment to evaluate the existing vendor network established for its energy efficiency programs to determine if it may be leveraged in any way for the Program.

(*Id.*)

B. Consumer Education

In response to Staff's proposal that ComEd make a commitment to develop consumer information about the Program, the Proposed Order directed ComEd to undertake such an effort. (PO at 19.) Although ComEd does not object to the AG's proposal to modify the Proposed Order to clarify that the costs incurred in developing customer information must be reasonable, ComEd objects to the other modifications proposed by the AG in its Exception #5. These changes would add language to the Proposed Order stating that "<u>The On-Bill Financing Statute has no provision for requiring ComEd to develop customer education or to provide such information to its customers.</u>" (AG BOE at 16.) Oddly, the point of the AG's language is only to highlight what it claims to be an inconsistency between this section and the section rejecting its proposed cap. The AG argues that the statute does not require ComEd to develop customer

education but the Commission directs it to do so anyway. The AG then erroneously attempts to apply this logic to its proposed cap, arguing that the fact the statute does not mention a cap is not grounds for denying it. (AG BOE at 6, 7.) For the reasons described below, this exception should be denied.

There are two obvious flaws with the AG's argument. First, the statute does explicitly prohibit a cap when it provides that a utility is entitled to recover "all of the prudently incurred costs of offering a program approved by the Commission pursuant to this Section, including, but not limited to, all start-up and administrative costs and costs for program evaluation." 220 ILCS 5/16-111.7(f) (emphasis added). Second, the entire statute is premised on offering on-bill financing programs to consumers, and accordingly provides for the development of "sample documents" and directs the utility to work with others "to establish the terms and processes pursuant to which a participant can purchase eligible electric energy efficiency measures using the financing obtained from the lender." 220 ILCS 5/16-111.7(b-5) and (c)(3). That the AG would claim the utility cannot develop and provide information about the Program to the customers to whom the Program will be offered strains credulity.

C. Credit Check Methodology

With respect to the credit check methodology that will be applied to applicants, the Proposed Order analyzed the options proposed to determine creditworthiness, including deferring to the lender's expertise and established credit check methodologies and mandating a bill payment history approach. The Proposed Order ultimately agreed with the statute, ComEd and Staff that the matter is best left in the most capable hands of the financial institutions. (PO at 33.) Indeed, Section 16-111.7(c)(4) provides that "*[t]he lender* shall conduct credit checks or undertake other appropriate measures to limit credit risk, and shall review and approve or deny

financing applications submitted by customers." 220 ILCS 5/16-111.7(c)(4) (emphasis added). Although this approach leaves it to the discretion of the lender as to whether it will use bill payment history to conduct credit checks, CUB/City and the AG continue to demand that their undefined credit check processes be approved now without the experience or input of the lender.

Specifically, CUB/City advocate use of customer bill payment history as "the principal measure of [a] person's worthiness to obtain a loan under the program." (CUB/City BOE at 3.) And, as part of its vague and undefined "tiered-credit-check approach",[5] the AG also proposes the utility use bill payment history for measures under $1,000. (AG BOE at 12.) However, neither CUB/City nor the AG provides any suggestion as to how this single criterion would be applied. For example, it is unclear whether a missed payment in 1998 would disqualify a potential participant or how many late payments in a given period would result in a denial of the application. Further, despite the AG's concerns about ComEd's cost estimates, there is no acknowledgement of the additional expense ComEd would incur to develop a wholly undefined approach from scratch, including necessary information technology changes and additional staffing needed to set up a call center where retailers and lenders could obtain information during store hours. (ComEd Reply Comments at 20.) Indeed, it is ironic that the AG argues against an opportunity to reduce costs by leveraging existing and well established credit check processes that have been in place for decades, such as the Fair Isaac Corporation ("FICO") credit score. (*Id.* at 20-21.)

Although the statute places the credit check function squarely on the lender, CUB/City's and the AG's proposal would effectively exclude the lender and its expertise from the credit

[5] For example, with respect to the "second tier", the AG proposes requiring the application of "a specific formula or methodology that does not inflate the interest rate or cause additional costs to be passed through as program costs for measures greater than $1,000." The AG provides no suggestion as to what this "specific formula or methodology" should be or how it would be applied to potential participants. (AG BOE at 8.)

check process. Specifically, these intervenors' proposals would foreclose the opportunity to solicit and rely on the lender's experience and expertise, including the wholesale preclusion of the use of standard industry practices to determine credit worthiness. In other words, the lender would be forced to forego established credit risk measures such as FICO scores and instead accept some undefined review of each applicant's utility bill payment history. It is unclear how the uncertainty surrounding this proposal would impact the willingness of lenders to respond to the RFP, and could result in a higher interest rate to reflect the increased uncertainty and any perceived risk. (*Id.* at 21.) That these proposals are undefined and unsupported is not surprising given CUB/City's and the AG's admission that neither has any experience or expertise in the area of consumer lending, which ComEd confirmed through data requests. (ComEd Reply Comments at 21.)

D. Loan Origination Fees

Concerning Staff's proposal that certain costs and fees related to loan origination should be borne by the individual participant rather than treated as Program administrative costs, the Proposed Order correctly concluded that "loan origination fees can be properly classified as 'administrative costs' as provided for by Section 16-117(f) of the Act and recovered through ComEd's Rider EDA." (PO at 32.) In its Brief on Exceptions, Staff repeats the same arguments it made in its Initial and Reply Comments that loan origination fees are "finance charges" and therefore properly charged to the participant. (Staff BOE at 4.) Staff, however, provided no support for its argument that the term "finance charge" includes loan origination fees, and, as ComEd pointed out and Staff admits, loan origination fees are typically paid up-front. (ComEd Reply Comments at 11.) Because Section 16-111.7(a) forbids any required upfront payment such as a loan origination fee, the Commission should reject Staff's attempt to fold such fees into

the finance charges, which does not change the nature of the fees. 220 ILCS 5/16-111.7(a) ("[p]rograms created pursuant to this Section will allow utility customers to purchase cost-effective energy efficiency measures *with no required initial upfront payment…*" (emphasis added).[6]

E. Security Interest

Section 16-111.7(c)(6) grants the utility a "security interest in the measure or measures purchased under the Program." 220 ILCS 5/16-111.7(c)(6). Only the AG takes exception to the Proposed Order's conclusion that "ComEd's proposal to work with the FI to determine when [perfecting the security interest] would be financially necessary is a reasonable approach. As Staff points out, perfecting the security interest may cost more than would be recovered." (PO at 34.) Although the statute only states that the utility retains a security interest in the measure and requires nothing further, the AG argues that "[i]t is up to ComEd to spell out their methodology to the FI through the RFP and associated contracts agreements as to when ComEd will require the FI to perfect a security interest, not the other way around." (AG BOE at 14.) As an initial matter, the statute does not require the methodology proposed by the AG. Further, similar to the AG's credit check methodology arguments, the AG again seeks to preclude the lender from assisting the utility in developing an approach for when to perfect a security interest. In the AG's view, the utility would ignore the expertise of the lender and instead embark on what could be the costly development of a security interest methodology, which would then be dictated to the lender. For these reasons, the AG's exception should be rejected.

[6] ComEd further notes that Staff's assertion "that non-recipients are already paying a large share of the costs of the OBF programs, including rebates issued through the EEDR programs established outside of this docket" is incorrect. (Staff BOE at 5.) In fact, ComEd's EEDR programs do not currently offer any rebates on energy efficient refrigerators.

F. Independent Evaluation

With respect to the requirement that the utility hire an independent evaluator to conduct an evaluation after three years of the Program's operation, CUB/City had argued that all utilities should be forced to use a single evaluator. (CUB/City BOE at 2.) Recognizing that a single statewide evaluator for all utilities may be more efficient but may not ultimately prove to be feasible, the Proposed Order properly concluded that ComEd and the other affected utilities must maintain the discretion to each retain an independent statewide evaluator. (PO at 20.) Although the Proposed Order recognizes the possibility that using one statewide facilitator may be more efficient, it does not, as CUB/CITY claim, concede that a single statewide evaluator *will* be more efficient. (CUB/City BOE at 2.) Indeed, the Proposed Order could not reach such a conclusion because CUB/City never provided any support for its assertion that utilizing a single statewide evaluator *will* be more efficient.

In reaching its well-reasoned conclusion, the Proposed Order cited approvingly to ComEd's Reply Comments, which explained that ComEd has consistently expressed a willingness to cooperate with other affected utilities to conduct joint RFP processes, such as the one being used to select the lender, and that ComEd believes that a joint RFP process for the evaluator may achieve lower costs and greater efficiencies. (PO at 20; ComEd Reply Comments at 36; ComEd Attach A at 20.) Indeed, ComEd pointed out in its Reply Comments that the discretion to retain a single or multiple statewide evaluators is grounded in the statute, which provides that "*[t]he electric utility* shall retain an independent evaluator". (ComEd Reply Comments at 36 (citing 220 ILCS 5/16-111.7(g)) (emphasis added).)

G. Evaluation Committee

Because the utilities have proposed to conduct a joint RFP process for the selection of the lender, the utilities set up an Evaluation Committee made up of the individual utilities. (PO at 33.) CUB/City and the AG, however, demanded that they be added to the Evaluation Committee. (CUB/City BOE at 4-7; AG BOE at 16-18.) The Proposed Order correctly concluded "that, pursuant to the statute, selecting the FI is the utility's responsibility and there is no basis for requiring the affected utilities to allow the workshop participants to participate in the selection process." (PO at 32.) Specifically, subsection (c)(2) of Section 16-111.7 states that the utility shall issue an RFP and that the "*utility* shall select the winning bidders based on *its* evaluation." (PO at 32 (citing 220 ILCS 5/19-140(c)(2) (emphasis added)).) Despite the statute's unambiguous direction that the utility selects the winning bidders and ComEd's voluntary offer to update stakeholders throughout the RFP process, CUB/City and the AG repeat in their Briefs on Exceptions the same arguments that they should also have a place on the utilities' evaluation committee. (CUB/City BOE at 5.) Their requests should be denied.

Relatedly, CUB/City continue to express confusion about the role of the Illinois Energy Association ("IEA"), and in particular whether the IEA will have veto authority over the FI final selection. (CUB/City BOE at 5-7.) As ComEd pointed out in its Reply Comments, however, CUB/City ignore the language of Section 1.1 of the RFP, which clearly states that the IEA "is conducting the RFP process acting *on behalf of and coordinating with* the Utilities jointly." (ComEd Ex. A.2 at 1 (emphasis added).) In other words, the IEA is an agent of the utilities that is subject to and works at the direction of the utilities. As ComEd explained in its Reply Comments, although CUB/City did not point to any specific language in support of their claim,

ComEd would not object to clarifying any language that appears to suggest that the IEA might have unilateral or unsupervised veto power.

H. Filing Requirements

The Proposed Order correctly concluded that ComEd's commitment to file standard loan documents once they are finalized with the FI as part of the joint RFP process satisfies the requirements of Section 16-111.7(d)(4), which requires the submission of sample Program documents. (PO at 17.) These documents will further supplement the sample documents ComEd already provided in its initial filing, including the draft RFP, the Preliminary Energy Efficiency Loan Term Sheet & Underwriting Guidelines and the Proposal Evaluation Worksheet. (*Id*.) Although Staff asked for clarification concerning ComEd's sample documents in its Initial Comments (Verified Comments of the Staff of the Illinois Commerce Commission at 17 ("Staff Init. Comments")), Staff did not take exception to the Proposed Order's conclusion, which incorporated ComEd's Reply Comments.

Only the AG, for the first time in this docket, takes exception to the Proposed Order's conclusion. And, in doing so, simply repackages Staff's comments.[7] However, as explained above, ComEd has provided sample documents in this proceeding, and will be filing additional sample documents once they are finalized with the selected lender. And, in any event, the AG should be foreclosed from making this argument for the first time in its Brief on Exceptions.[8] (AG BOE at 8-10.)

[7] In a misleading attempt to recast the conclusion of the Proposed Order, the AG claims the Proposed Order states that "ComEd's proposed program does not include sample contracts and agreements…." (AG BOE at 9; PO at 17.) However, the Proposed Order was merely reciting Staff's contentions with respect to ComEd's program. To clarify this, ComEd proposed alternative language in its Brief on Exceptions. (*See* Brief on Exceptions of Commonwealth Edison Co. at 5-6 ("ComEd BOE").)

[8] To the extent the AG otherwise argues that ComEd's Program filing lacks detail (*see* AG BOE at 4), ComEd objects to the AG's claims as undefined and too vague to allow ComEd to respond in any meaningful way.

I. Applicability of the Public Utility Fund Tax

After all parties had filed their Initial and Reply Comments, the ALJ requested that the utilities file additional comments regarding whether certain taxes such as the Public Utility Fund Tax ("PUF Tax") applied to the OBF Program amounts. Reflecting the fact that no party believed the PUF Tax applied to amounts financed under ComEd's OBF Program, the Proposed Order so concluded. (PO at 41.) However, because Staff filed the same Brief on Exceptions in each of the companion utility dockets, ComEd believes that Staff has inadvertently created some confusion on the tax issue. In fact, the Brief on Exceptions Staff filed in this docket appears to be intended for Nicor. (*See* Staff BOE at 2.) Staff argues in its Brief on Exceptions that the Commission erred in concluding that the PUF Tax is not applicable to On-Bill Financing amounts. (Staff BOE at 7-14.) However, Staff reached the exact same conclusion that the Proposed Order did in its Verified Additional Comments addressing the tax issues. Specifically, Staff took the following position in the electric utility dockets:

> Second, the Public Utility Fund Tax (220 ILCS 5/2-202) (hereinafter, the "PUF tax" or "PUF Act") appears to be implicated because the funds financed under the OBF programs and paid on utility bills by public utility customers may be considered "gross revenues" under the definition of such term set forth in Section 3-121 of the PUA. It is important to note that for purposes of imposing the PUF tax, Section 2-202(c) specifically exempts from "gross revenue" those revenues derived "from the production, transmission, distribution, sale, delivery, or furnishing of electricity." (220 ILCS 5/2-202(c)). Rather than paying PUF tax, electric utilities providing service to more than 12,500 customers in Illinois on January 1, 1995, contribute annually an aggregate sum, called a Public Utility Fund base maintenance contribution, which is based in part on the number of kilowatt hours delivered to retail customers for the prior year. (220 ILCS 5/2-203). <u>Accordingly, the PUF tax is not applicable to ComEd or to the Ameren entities providing electric service.</u>

(Verified Additional Comments of the Staff of the Illinois Commerce Commission at 4 (emphasis added).) ComEd can only surmise that Staff inadvertently submitted this exception in the electric utility dockets when it was only intended for the gas utility dockets. (*See* Nicor, Docket No. 10-0096; Ameren, Docket No. 10-0095; and Peoples/NS, Docket No. 10-0090). In any event, Staff's contrarian position should be rejected and the portions of the Proposed Order dealing with the PUF Tax should be adopted.

IV. CONCLUSION

For the reasons stated herein and in ComEd's Initial Filing, Reply Comments and Brief on Exceptions, ComEd respectfully requests that the Commission modify the Proposed Order as provided in ComEd's Exceptions.

Respectfully submitted,

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