STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
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Approval of the Energy Efficiency and Demand-Response Plan Pursuant to Section 8-103(f) of The Public Utilities Act	:	**Docket No. 10-0570**
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THE ILLINOIS POWER AGENCY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

Dated: December 8, 2010

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The Illinois Power Agency ("IPA"), pursuant the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Admin. Code Part 761.010 *et seq.*, states as follows for its Exceptions and Brief on Exceptions to the Administrative Law Judge's ("ALJ") Proposed Order issued December 3, 2010 ("Proposed Order").

The Proposed Order makes a serious mistake in adopting Commonwealth Edison's ("ComEd") flawed statutory construction simply to approve a short-sighted settlement proposal. The Proposed Order not only relieves ComEd of the obligation to meet the statutory energy efficiency ("EE") and demand response ("DR") goals set forth in Section 8-103 of the Illinois Public Utilities Act ("PUA"), for the years 2011, 2012 and 2013, it creates a framework that gives ComEd unbridled flexibility for future plans. The legal conclusions adopted by the Proposed Order will significantly impair the Commission's ability in the future to hold ComEd and other gas and energy utilities from meeting the statutorily required energy efficiency and demand response goals set by the Illinois legislature in Section 8-103. If the language of the Proposed Order is adopted, the Commission will not be able to put the proverbial genie back in the bottle. However, if the Commission adopts the IPA's proposed exceptions to the Proposed

Order, as set forth herein, the Commission can both adopt the proposed stipulation, and maintain control over ComEd and other utilities' EE and DR programs in future plan years.

The Proposed Order acknowledges that ComEd is required by Section 8-103(b) to "implement cost-effective energy efficiency measures to meet the following incremental annual energy savings goals: … (4) **0.8%** of energy delivered in the year commencing June 1, 2011; (5) **1.0%** of energy delivered in the year commencing June 1, 2012; [and] (6) **1.4%** of energy delivered in the year commencing June 1, 2013 . . ." 220 ILCS 5/8-103(b). Proposed Order at 2 [emphasis added.] Further, ComEd is required to "implement cost-effective demand-response measures to reduce peak demand by **0.1%** over the prior year for eligible retail customers." *Id.* [emphasis added.] Because the costs of the EE and DR programs may be recovered from ComEd's customers, 220 ILCS 5/8-103(e), these minimum goals are subject to a spending cap, which limits the effect on rates. 220 ILCS 5/8-103(d).

For the Plan Years ("PY") 4 through 6 (years 2011 through 2013), ComEd asserts that Sections 8-103(b) and 8-103(c) require it to implement a three-year Plan that will achieve the following EE and DR savings:

	2011/PY4	**2012/PY5**	**2013/PY6**
Demand Response			
ComEd	10.5	10.7	10.8
Energy Efficiency			
Statutory Obligation	727,985	920,987 kWh	1,294,739 kWh
ComEd Portion	618,787	618,787	618,787
DCEO Portion	109,198	109,198	109,198

ComEd Ex. 1.0 at 6-7; ComEd Ex. 2.0 at 5, 9.

The Proposed Order discusses a Proposed Stipulation among several parties that would relieve ComEd of these statutory obligations, and would reduce the energy savings goals in PY5 and PY6 to 1% of customer electricity usage, or approximately 920,987 kWh, the PY5 statutory goal. Proposed Order at 18. However, the Proposed Order never mentions how the Joint Stipulation allows ComEd to satisfy that stipulated savings target. The IPA cautions the Commission to take a close look at the numbers, because ComEd will ***not*** actually be saving customers 920,987 kWh in PY5 or PY6. Under the Stipulation, ComEd will only be generating EE savings of 781,074 kWh in PY5 and 774,596 kWh in PY6. ComEd claims to get to the 920,987 PY5 target (for both PY5 and PY) by carrying forward EE savings from 2008, 2009, 2010, and 2011 in order to reach the modified target. Under the Stipulation, ComEd's modified statutory obligations and projected EE savings are as follows:

MWh Savings	**PY4**	**PY5**	**PY6**
Section 8-103 Statutory Goal	**727,985**	**920,987**	**1,294,739**
Stipulated Goal	**727,985**	**920,987**	**920,987**
Plan Projection		781,074	774,596
Plan Adjustments[1]		(85,541)	(104,111)
Total EE Savings without Banked Savings	865,615	865,615	878,707
Banked MWh Savings		55,372	42,280
EE Savings w/ Banked Savings		920,987	920,987

The Proposed Order adopts a banking system whereby EE savings that were earned in excess of the statutory obligations in 2008 through 2010 are credited in 2012 and 2013 to satisfy the stipulated goal (920,987 kWh.). Taking credit in 2012 for EE savings earned in 2008 is not

[1] These adjustments relate to 1) the carryover of compact fluorescent light ("CFL") credits, 2) funding from PJM energy capacity auctions, 3) savings from the commercial and industrial program elements, and 4) an increase in the Net-to-Gross (NTG) calculations.

specifically authorized by Section 8-103, and while the Commission can accept the stipulation in this one instance, the Commission should not adopted language from the Proposed Order that endorses banking/credit over such a broad span of years.

The Commission's Order in Docket 07-0540 correctly held that "[t]he plain language of [Section 8-103] does not allow utilities or DCEO to 'carry over' excess energy savings" into future years. 07-0540 Order at 40. While the Commission recognized that there is some inevitable *de minimis* carry over from one year to the next year within a Plan, the Commission "struck a balance" to permit ComEd to apply up to 10% of savings from a prior year to satisfy a statutory savings target in the immediate following year. *Id.* The Proposed Order would modify this limitation, not only for the instant case, but for all future cases as well. The Proposed Order concludes that "[b]anked savings represent an important means for ComEd to achieve its savings goals effectively and efficiently be encouraging the steady flow of programs in the marketplace and ensuring that retail customers' investments in energy efficiency are not wasted." Proposed Order at 54. The Proposed Order further quotes the Stipulation to provide that:

- ComEd's request to accumulate and apply "banked" kWh savings across years – specifically from PY1 through PY4 for application in PY5 – is approved.
- Consistent with the above, applying any banked savings or CFL carryover from PY1 through PY5 to PY6 is also approved.
- The above banking provisions are subject to the following restrictions:
    - In any given Plan year, no more than 15% of that year's compliance obligation should be met with banked savings from previous Plan years.

Propose Order at 19.

The Proposed Order bases its conclusion that banking is permissible on ComEd's tortured statutory construction. ComEd claims that Section 8-103(f) only provides that it must file an energy savings plan every three years, and says nothing about requiring each annual year to meet the statutory savings goals outlined in Section 8-103(b). Proposed Order at 53. According to

ComEd, while it is required to file a three-year plan, there is nothing in the Act that prevents ComEd from meeting EE savings required in PY6, with EE savings paid for by consumers and earned in PY1. *Id.* Notwithstanding this argument, ComEd concedes not only that the EE and DR savings goals are "annual energy efficiency goals that increase year-over-year without any reference to three year plans," but also that "subsection (i) provides for an ***annual review*** of whether the utility met the ***annual energy*** efficiency standard specified in subsection (b) . . . ." *Id.*

What is clear is that Section 8-103 requires ComEd to (1) spend a certain amount of money on EE and DR in an annual year (§ 8-103(d)), (2) maximize that spending to achieve ***annual energy*** EE and DR savings for those customers that have paid for those savings, and (3) evaluate ComEd's compliance with the savings targets on an annual basis. Section 8-103(b) requires ComEd to "meet the following ***incremental annual*** energy savings goals. . ." by a fixed percent in each specified year (*i.e.* 1.4% for the period from June 1, 2013 to May 31, 2014.) 220 ILCS 5/8-103(b). Thus, each year's goals are based on the results of the previous year's goals. If kilowatt hour savings are carried over or banked, the goals are not being implemented in an incremental manner. Section 8-103(d) further provides that "[n]otwithstanding the requirements of subsections (b) and (c) …, an electric utility shall reduce the amount of energy efficiency and demand-response measures implemented **in any single year** by an amount necessary to limit the estimated average increase in the amounts paid by retail customers in connection with electric service . . ." by a fixed percent in each specified year. "The portfolio of measures, administered by both the utilities and the Department, shall, in combination, be designed to achieve the annual savings targets . . .." 220 ILCS 5/8-103(e). ComEd is permitted to recover the costs associated

with its plans through an automatic adjustment clause tariff and "[e]ach year the Commission shall initiate a review" to determine if a reconciliation is required. *Id.*

Enforcement of ComEd's obligations also demonstrate that Section 8-103 does not permit ComEd to bank, borrow, lend or apply EE savings across three-year Plans. Enforcement of ComEd's compliance with Section 8-103 is also measured on a three-year Plan basis: if, "after 3 years, an electric utility fails to meet the efficiency standard specified in subsection (b) of this Section, as modified by subsections (d) and (e) . . . the responsibility for implementing the energy efficiency measures of the utility making the payment shall be transferred to the Illinois Power Agency. . . ." 220 ILCS 5/8-103(i).

Moreover, the Commission's Order in Docket 07-0540 confirmed that ComEd is required to "annualize" energy savings in each of its energy savings measures. 07-0540 Order at 28. ComEd is required to take credit for the anticipating savings associated with a proposed program in the year the money is spent, irrespective of when the installation of the EE savings measure takes place. *Id.* The Commission also determined that because the spending limits imposed by Section 8-103(d) are based on projections, and could increase or decrease within the three-year plan, ComEd is required to update its pending limits for each plan year. *Id.* at 29-30. The Proposed Order goes too far, and permits a utility to move the numbers around from year to year, in a manner that excuses them from ***annual*** statutory savings targets; the Proposed Order makes the annual savings targets set forth in Section 8-103(b) and 8-103(c) largely irrelevant.

The Commission should not permit this to happen; the Commission should modify the Proposed Order to permit the stipulation to go into effect, but to modify the Proposed Order in a manner that preserves the Commission's authority to hold utilities to the statutory EE and DR

savings targets for future years. The IPA recommends that the Commission modify the Proposed Order as follows:

IV. Settlement Stipulation [at pp. 18-21]

Joint Ex. 1.0 at 1. The Stipulation contains the following conditions:

* * *

- ComEd's request to accumulate and apply "banked" kWh savings across years – specifically from PY1 through PY4 for application in PY5 – is approved.
- Consistent with the above, applying any banked savings or CFL carryover from PY1 through PY5 to PY6 is also approved.
- The above banking provisions are subject to the following restrictions:
  - In any given Plan year, no more than 15% of that year's compliance obligation should be met with banked savings from previous Plan years.
  - Except that, in any Plan year for which the statutory target has been adjusted downward to accommodate the rate impact screen, if the availability of banked savings, including banked savings in excess of 15% of the current year's target, plus planned program savings, would allow ComEd to come closer to reaching the statutory target, the target shall be readjusted upward accordingly.

* * *

As set forth in more detail below, the Commission ~~finds that~~ **adopts** the Stipulation as a settlement among ~~some of~~ the parties in this case **pursuant to *In Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill.2d 192 (1989).** ~~is supported by the evidentiary record, reasonable, in the public interest, and comports with State law, including Section 8-103.~~ The Commission also believes that the Stipulation, as contemplated by its signatories, maximizes ComEd's ability to achieve the statutory or modified energy efficiency and demand response savings goals set out in subsections (b) and (c) of Section 8-103, as applicable, while at the same time ensuring that expenditures remain within the spending screens that Section 8-103 establishes for such measures. As a result, the Commission approves all of the conditions of the Stipulation, as set forth above. **However, the Commission does not adopt the legal premise of the Stipulation that Section 8-103 permits ComEd to "bank" or "carry forward" more than a *de minimis* EE and DR savings from one year to the next to satisfy the statutory or modified savings goals. The Commission affirms its prior ruling in the *EEDR Order* to only permit ComEd to bank and carry forward to the following Plan year, up to 10% of EE savings in excess of the statutory obligation imposed on Section 8-103. In future Plan years, ComEd should put forth a proposal to meet the minimum statutory savings obligations imposed by Sections 8-103(b) and 8-103(d),**

without relying on "banked" excess savings from prior plans beyond what was approved in the *EEDR Order.*

The Stipulation concerns different components of the Plan, as set out in Section 8-103(d)(1) – (7). In addition, there remain certain contested issues that the Stipulation did not address. This Order therefore discusses the different parts of the Stipulation below in Section V, along with those contested issues that the Stipulation did not address.

V. H. 4. e) Commission Analysis and Conclusion [at p. 54.]

The Commission finds that the agreement reflected in the Stipulation is supported by the record, reasonable and in the public interest. Banked savings represent an important means for ComEd to achieve its savings goals effectively and efficiently by encouraging the steady flow of programs in the marketplace and ensuring that retail customers' investments in energy efficiency are not wasted. The Stipulation furthers those goals.

The Commission **agrees with** ~~rejects~~ the IPA's contention that the statute prohibits **a utility from relying on more than 10% of the banked savings from a prior plan year to satisfy the statutory or modified savings targets. Section 8-103(b) and 8-103(c) require ComEd to satisfy the statutorily set or modified savings goals on an annual basis.** ~~banked savings from being carried over from a year that falls under one plan to a subsequent year that falls under another plan.~~ As **even** ComEd argues in its brief, ~~the IPA's position simply finds no support in the text.~~ Subsection 8-103(f), which governs the filing of plans, ~~merely~~ provides that plans should be filed to conform with subsections (b) and (c) of Section 8-103, and those subsections, in turn, refer to *annual* goals~~ only~~. Furthermore, banking of savings is directed at meeting subsection (i)'s evaluation requirements, and subsection (i) requires utilities to meet *annual* efficiency standards. In short, while Section 8-103 provides that a plan must be filed every three years, nowhere does it contemplate **that ComEd can bank and carry forward more than 10% EE or DR savings earned into a subsequent year, or even a subsequent 3-year plan.** ~~limitations on Plan evaluation and measurement as the IPA suggests.~~

~~IPA's argument would also run counter to the very reasons that this Commission approved banking under ComEd's first Plan.~~ In the *EEDR Order*, we explained that a banking allowance is necessary because of fluctuations in utilities' energy savings from year to year and to ensure that programs are not abruptly halted once goals are achieved, which would have a chilling effect on customer participation and enrollment:

> We note that DCEO's approach strikes a balance between the concerns expressed by ComEd, that it may not know when it reaches the statutory goal, and that expressed by Staff which is,

> essentially, that utilities should not be provided with a motivation to decrease spending on energy efficiency programs in the "banked" year(s).

EEDR Order, at 39-41. **However, when the Commission permitted ComEd to carry-forward up to 10% of the banked savings to be applied in the following year, we recognized that there had to be some limit and restriction on a utilities' use of these savings. Therefore, the Commission adopts the Stipulation as a settlement among the parties in this case pursuant to *In Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill.2d 192 (1989). However, the Commission does not adopt the legal premise of the Stipulation that Section 8-103 permits ComEd to "bank" or "carry forward" 15% of the EE and DR savings from one year to the next to satisfy the statutory or modified savings goals, or to rely on bank savings from Plan Years 1 through 4 to satisfy the savings targets in PY5 and PY6. The Commission affirms its prior ruling in the *EEDR Order* to permit ComEd to bank and carry forward to the following Plan year, up to 10% of EE savings in excess of the statutory obligation imposed on Section 8-103. In future Plan years, ComEd should put forth a proposal to meet the minimum statutory savings obligations imposed by Sections 8-103(b) and 8-103(d), without relying on "banked" excess savings from prior plans beyond what was approved in the *EEDR Order.***

~~The Commission therefore rejects IPA's arguments, and approves the banking provisions set out in the Stipulation.~~

Finally, we note that ComEd's proposal to annualize savings consistent with the *EEDR Order* is unopposed and therefore approved.

WHEREFORE, the Illinois Power Agency respectfully request that its proposed changes be adopted.

Dated: December 8, 2010

Respectfully submitted,

Illinois Power Agency

By: _____

One of its Attorneys

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NOTICE OF FILING

Please take notice that on December 8, 2010, I caused to be filed via the Illinois Commerce Commission's eDocket, the **ILLINOIS POWER AGENCY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER.** A copy of the foregoing documents are hereby served upon you.

Henry T. Kelly, attorney for the
Illinois Power Agency

CERTIFICATE OF SERVICE

I, Henry T. Kelly, an attorney, on oath state that I served a copy of the **ILLINOIS POWER AGENCY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER** on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on December 8, 2010.

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