

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY) NO.: 10-0467

Proposed general increase in electric rates.

METRA'S INITIAL POST-HEARING BRIEF

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The Northeast Regional Commuter Railroad Corporation, d/b/a Metra (“Metra”) submits this initial post-hearing brief pursuant to the scheduling order issued by the Administrative Law Judges.

I. INTRODUCTION/STATEMENT OF THE CASE

A. Background Information Concerning Metra And The Railroad Class

Metra is a local public entity and unit of local government that provides commuter rail service over 500 track miles that serve approximately 240 stations in the Counties of Cook, DuPage, Lake, Will, McHenry and Kane. [R. Capra Direct, Metra Ex. 1.0 at 3]. Metra is governed by the Commuter Rail Board under the Regional Transportation Authority Act, 70 ILCS 3615. In 2009, Metra provided 82.3 million passenger trips. [Id.] Part of Metra’s system consists of electric train service. Metra’s electric train service district is powered by electricity delivered by Commonwealth Edison Company (“ComEd”) and commonly known as traction power. [Id.] The electricity delivered to Metra’s electric train service district is billed by ComEd pursuant to the rates established for the Railroad Delivery Service Class. [Id.] The remainder of

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Metra's passenger service utilizes diesel locomotives to pull and push the trains. [Id. at 4]. Electricity delivered to Metra facilities other than the electric train service district is billed at ComEd's generally applicable rates governing service at that particular delivery point.

Metra is one of two members of the Railroad Class. The Chicago Transit Authority ("CTA") is the other member.

B. The Commission Has Repeatedly Directed That Public Interest Considerations Must Be Taken Into Account In Setting The Railroad Class' Rates.

The Commission has recognized in three separate dockets, Dockets 05-0597, 07-0566 and 09-0263, that there are public interest considerations that must be taken into account in setting the rates of the Railroad Class to avoid adverse effects of increased ComEd rates. The final orders in each docket emphasized the Railroad Class' rates should be set in a manner that takes into account public interest considerations associated with affordable public transportation and the benefits that mass transit provides to the overall reduction in energy consumption and adverse environmental impacts. Relevant excerpts from the Commission's final orders in these dockets are set forth below:

Docket 05-0597:

The Commission is very concerned that any changes to the provisions of service providers of mass transit will not unduly burden the millions of passengers who depend on public transportation. The Commission also believes that it must consider the public policy implications of establishing delivery service rates that encourage energy conservation and encourage electric usage during off peak periods. While the Commission is not prepared to disregard cost of service, the Commission believes that important public policy considerations cannot be ignored. [ICC Dkt. 05-0597, Final Order at 189 (July 26, 2006)].

In addition, the Commission must consider the potential adverse impact of utility rate increases on entities that provide public transportation. The

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Commission desires to encourage the efficient use of energy and conservation of scarce resources. The conclusions reached in this portion of the Order are, in the Commission's view, important policy issues and are in the public's best interest. Accordingly, the Commission finds that minimizing the change to existing contractual terms as necessitated by the post-2006 market changes, as well as avoiding rate shock to the railroad customers, is in the public's best interest. [Id. at 190].

Docket No. 07-0566:

Our commitment to a policy of encouraging conservation, efficient energy use and the environmental benefits of affordable public transportation has not lessened since the July 26, 2006 Final Order in Docket 05-0597. We find that the modified rate proposal fails to comport with our explicit direction in the last rate case to avoid rate shock to the Railroad Delivery Class. Docket 05-0697, Order at 190. We direct ComEd to take this policy directive into account in preparing for the next rate case. [ICC Dkt 07-0566, Final Order at 223 (Sept. 10, 2008)].

Docket No. 09-0263:

With regard to imposing the cost of this pilot program upon the Railroad Delivery Class, (the CTA/Metra) this Commission has previously rejected imposition of those costs in rate cases upon the Railroad Delivery Class. As the CTA and Metra note, the railroads already have systems in place that equate to, or, are indeed superior to, the ones that will be included in the pilot program here. And, this pilot program concerns, primarily, residential customers, with some small businesses also being tested. Imposing the cost of this pilot program upon the CTA and Metra, when they are not the cost-causers, is unfair. Additionally, imposing more costs upon these two entities runs counter to this Commission's policy of encouraging the use of public transportation for environmental reasons. Therefore, the Railroad Delivery Class shall not be included in any Rider recovery for the cost of the project that is the subject of this docket. [ICC Dkt. 09-0263, Final Order at 43 (Oct. 14, 2009)].

There also is unrebutted testimony in this case concerning the congestion mitigation and environmental benefits of the public transportation services provided by Metra and the CTA. [L. Ciavarella Direct Testimony, Metra Ex. 2.0 at 2-5; E. Ziring Direct Testimony, CTA Ex. 2.0 at 2-6].

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C. Cost Of Service And Other Rate Design Issues Addressed By Metra

Metra has participated only in the rate design part of this case. It has not offered any testimony concerning ComEd's revenue requirements.

Metra's principal concerns and arguments are summarized below.

- All of the cost of service studies that ComEd has offered for use in setting the Railroad Class' rates produce inflated and inaccurate costs of service for the Railroad Class. The Railroad Class only takes service at 12 kV, yet ComEd's cost of service studies all seek to recover from the Railroad Class costs of facilities carrying voltage less than 12 kV. One of ComEd's three primary distribution networks utilizes the 4 kV lines and facilities, which lines and facilities are not used by the Railroad Class but whose costs nevertheless are allocated to the Railroad Class.
- ComEd has proposed a ten step process in which ComEd would move the Railroad Class to full cost based rates over the next ten rate cases, with a 10% movement in this case. Metra strongly supports the gradual nature of the future rate increases suggested by ComEd and believes that it could provide mitigation for rate increases. However, Metra submits that: (1) the Railroad Class' rates must be based on an accurate cost of service for the Railroad Class in order for ComEd's proposal to work as intended; and (2) cost based rates for the Railroad Class should not be the end goal given the public interest benefits afforded by the Railroad Class.

- Metra agrees with ComEd that the Railroad Class is entitled to compensation for ComEd's use of Railroad Class equipment, but believes that the compensation should be higher than that offered by ComEd. Metra believes the adjustment to the cost of service for the Railroad Class to account for ComEd's use of Railroad Class facilities to improve reliability and serve other ComEd customers should be at least \$678,104, if not \$1,356,207, rather than the \$452,069 adjustment proposed by ComEd.
- Metra is opposed to ICC Staff's suggestion that the Commission should mandate a fixed schedule for the reconfiguration of Railroad Class substations to eliminate ComEd's reliance on Railroad Class facilities for service to other customers. There is no operational need for the suggested changes, and they would cost ComEd and the Railroad Class millions of dollars in unnecessary expense.
- ComEd has proposed significantly altered limitation of liability language that would only hold ComEd to a gross negligence standard and in some cases would require Metra and other customers to indemnify ComEd for ComEd's own negligence. ComEd's request is directly contrary to public policy considerations recognized in a variety of areas of Illinois law. Public policy requires that parties engaged in potentially dangerous activities, such as the delivery of electricity, should never be held to a lower standard of care because public policy requires that the law should provide every incentive for that party to conduct its affairs as safely as possible. Moreover, the record is devoid of any evidence to support

deviation from law and well recognized public policy safety considerations. ComEd's request should be summarily rejected.

- In the Final Order in Docket No. 09-0263 of page 43, ComEd was instructed that it could not charge the Railroad Class for any of the costs of the Advanced Metering Infrastructure (“AMI”) pilot project pursuant to the rider approved in that case. In this docket, ComEd is seeking to allocate and recover AMI pilot project costs from the Railroad Class. Metra believes that ComEd should be required to comply with the prior Commission order barring recovery of AMI pilot project costs from the Railroad Class.

Each of those issues is discussed below in greater detail with more extensive record citations.

VI. OPERATING EXPENSES

C. Potentially Contested Issues

4. AMI Pilot Expenses

The allocation of costs for AMI pilot project expenses to the Railroad Class is discussed below under the category of Cost of Service and Allocation Issues.

VIII. COST OF SERVICE AND ALLOCATION ISSUES

C. Potentially Contested Issues

1. Embedded Cost of Service Study Issues

b. Primary/Secondary Split

(ii) Other Primary/Secondary Split Issues

(a) 4 kV Facilities Allocation

II. COMED'S ECOSSE PRODUCES INFLATED RATES FOR THE RAILROAD CLASS BECAUSE IT ALLOCATES COSTS TO THE RAILROAD CLASS OF 4 KV FACILITIES NOT USED TO PROVIDE SERVICE TO THE RAILROAD CLASS.

ComEd's embedded cost of service studies historically have consistently produced inflated costs of service for the Railroad Class. ComEd's embedded cost of service study in this case also produces inflated costs of service for the Railroad Class. It therefore cannot be relied upon to produce cost-based rates for the Railroad Class, nor is it reasonable to use ComEd's numbers for comparative purposes as actual cost-based rates.

In the last two ComEd rate cases and in the special investigation of rate design docket, Metra and the CTA have argued that ComEd's embedded cost of service studies produced inflated rates for the Railroad Class and therefore could not be relied upon as a source of cost-based rates absent substantial refinement and revision of ComEd's embedded cost of service study. Thanks in part to revisions that the Commission has ordered ComEd to make in the last ComEd rate case, which was ICC Docket 07-0566, and in the Special Investigation of Rate Design docket, which was ICC Docket 08-0532, ComEd's calculated cost to serve the Railroad Class has decreased significantly. In the 2005 ComEd rate case, ComEd calculated that the cost to serve the Railroad Class was just over \$8.5 million. [L. Alongi, 1/19/11 Tr. at 2053:19 to 2054:11, ICC Dkt. 05-0597, ComEd Ex. 10.9]. In the 2007 ComEd rate case, ComEd calculated that the cost to serve the Railroad Class was almost \$8.6 million. [L. Alongi, 1/19/11 Tr. at 2056:2-11 and 2056:16 to 2057:1; ICC Dkt. 07-0566, ComEd Ex. 32.2]. After implementing Commission ordered refinements,¹ in this docket ComEd's calculated cost to serve the Railroad Class is less than \$6 million in ComEd's two exemplar studies, and is \$6.35 million in the other

¹ According to ComEd's Mr. Alongi, the principal changes in ComEd's cost of service study relevant to the Railroad Class in ComEd's traditional cost of service study were "to allocate the cost of primary distribution to substations based upon coincident peak rather than noncoincident peak, which is how we had previously allocated those costs, and to include the differentiation between primary and secondary distribution system costs." [L. Alongi, 1/19/11 Tr. At 2058:21 to 2059:4].

cost of service study proffered. [L. Alongi, 1/19/11 Tr. at 2058:10-14 and 2060:1-10; ComEd Ex. 73.1, 73.2 and 73.3]. However, even with those reductions, ComEd's calculated cost to serve the Railroad Class is inflated because the Railroad Class is being assessed costs for 4 kV facilities that are not used to provide service to the Railroad Class.

ComEd delivers electricity to customers using distribution facilities that operate at three principal voltages, 4 kV, 12 kV and 34 kV. [L. Alongi, 1/19/11 Tr. At 2216:18 to 2217:1].² As described at length in the testimony of James Bachman, the Railroad Class is served uniformly and exclusively at 12 kV. [See, e.g., J. Bachman Direct, CTA/Metra Jt. Ex. 1.0 at 5-6 and 20-21; J. Bachman Rebuttal, CTA/Metra Jt. Ex. 2.0 at 5-9]. ComEd's cost of service study expert, Alan Heintz, repeatedly acknowledged that the 4 kV lines do not support or provide service to the Railroad Class. [A. Heintz, 1/11/11 Tr. at 699:3-5, 701:9-11, 703:6-10, and 704:5-8]. The costs assigned to the Railroad Class include costs of ComEd facilities carrying voltages at less than 12 kV, including the 4 kV distribution network. [See, e.g., J. Bachman Direct, CTA/Metra Jt. Ex. 1.0 at 5-6 and 20-21; J. Bachman Rebuttal, CTA/Metra Jt. Ex. 2.0 at 5-9]. ComEd has made claims in testimony in this case that for the Railroad Delivery Class, the annual delivery service revenue is well below the cost incurred to provide service to the class. [L. Alongi Direct, ComEd Ex. 16.0 2d Rev. at 13]. The testimony of Dr. Ross Hemphill, ComEd's Rates and Regulatory Strategies Director, illustrates the fallacy in ComEd's logic and analysis. Dr. Hemphill testified at the hearing that based on ComEd's embedded cost of service he believed that the Railroad Class was receiving a subsidy. [R. Hemphill, 1/10/11 Tr. at 337:20 to 338:8]. When pressed on

²The parties and witness refer interchangeably to 12 kV and 12.5 kV when describing 12.5 facilities and also refer interchangeably to 34 kV and 34.5 kV facilities when describing 34.5 kV facilities.

cross examination, Dr. Hemphill admitted that the calculation of the alleged subsidy that the Railroad Class purportedly receives had been reduced by approximately \$2.5 million as a result of refinements ComEd had made to its cost of service study. [R. Hemphill, 1/10/11 Tr. At 339:21 to 340:6]. Furthermore, Dr. Hemphill testified that if the cost of service study were further refined so that the 4 kV distribution facilities were removed from the Railroad Class' costs, there might not be a subsidy:

Q. Do you know whether—if the 4 kV distribution facilities were eliminated from the costs assigned to the railroad class, whether you could still testify that the railroad class was indeed, receiving a subsidy?

A. I would have to look at it. I don't know.

[R. Hemphill, 1/10/11 Tr. at 343:4-9].

ComEd and two other parties in this proceeding have advocated various processes for increasing the Railroad Class' rates so that ComEd eventually recovers 100% of its cost to serve the Railroad Class. The problem with all three parties' proposals is that ComEd's calculation of the cost to serve the Railroad Class includes costs of the 4 kV distribution lines and related facilities that are not used to serve the Railroad Class, and ComEd's cost of service analysis therefore will produce inflated and improper rates for the Railroad Class. It is Metra's position that if the Commission's prior directives concerning the public interest implications of inflated rates for the Railroad Class are to have meaningful content, they require at a minimum that the Railroad Class should not be assigned inflated costs or charged inflated rates, and that ComEd should be required to calculate the costs to serve the Railroad Class as accurately as reasonably possible. Metra requests that the Commission direct ComEd to work with the Railroad Class in a

collaborative study designed to enable ComEd to produce a cost of service study in its next rate case that eliminates from the cost to serve the Railroad Class all costs associated with facilities carrying voltage less than 12.5 kV.

VIII. COST OF SERVICE AND ALLOCATION ISSUES

C. Potentially Contested Issues

1. Embedded Cost of Service Study Issues

l. Other Issues

III. COMED SHOULD BE DIRECTED TO FOLLOW THE COMMISSION'S PRIOR ORDER AND SHOULD NOT RECOVER AMI PILOT PROJECT COSTS FROM THE RAILROAD CLASS.

ComEd is seeking recovery from the Railroad Class in this proceeding for costs associated with the AMI pilot project. ComEd was previously instructed by the Commission in the Final Order issued in ICC Docket 09-0263 at page 43 that it is not entitled to recover AMI pilot project costs from the Railroad Class:

With regard to imposing the cost of this pilot program upon the Railroad Class, (the CTA/Metra) this Commission has previously rejected imposition of those costs in rate cases upon the Railroad Class. As the CTA and Metra note, the railroads already have systems in place that equate to, or, are indeed superior to, the ones that will be included in the pilot program here. And, this pilot program concerns, primarily, residential customers, with some small businesses also being tested. Imposing the cost of this pilot program upon the CTA and Metra, when they are not the cost-causers, is unfair. Additionally, imposing more costs upon these two entities runs counter to this Commission's policy of encouraging the use of public transportation for environmental reasons. Therefore, the Railroad Class shall not be included in any Rider recovery for the cost of the project that is the subject of this docket.

As Railroad Class witness James Bachman testified both in that proceeding and in this case, the AMI pilot project offers no benefits to the Railroad Class. Both Metra and the CTA

have spent millions of dollars installing their own Supervisory Control and Data Acquisition (SCADA) systems so that they know instantaneously how power is flowing on their traction power systems. [J. Bachman Direct, CTA/Metra Jt. Ex. 1.0 at 23-25; ICC Dkt. 09-0263, Final Order at 38-39, 43 (October 14, 2009)].

In wholesale disregard for the Commission's Final Order in Docket 09-0263 and a waste of resources, ComEd apparently installed six AMI pilot project meters on Railroad Class' facilities and is now seeking to allocate and annually recover \$1212 for AMI pilot project costs from the Railroad Class. There is no evidence that the Railroad Class requested the meters or can benefit from the "smart meters" in any way. Remarkably, ComEd's Manager of Regulatory Strategies and Solution, Robert Garcia, offered the lame excuse to try and justify allocation of meter costs that "the Commission never directed ComEd through its Order in Docket No. 09-0263 not to install the enhanced meters that are presently serving railroad facilities." [R. Garcia Surrebuttal, ComEd Ex. 74.0 at 4:90-91].

In the prior AMI docket, ComEd proposed to install six meters to measure electricity delivered to Railroad Class facility. [ICC Dkt. 09-0263, Final Order at 39 (October 14, 2009)]. The Commission's order denying ComEd rider recovery for AMI pilot project costs, including the costs of those meters, was based on two fundamental policy considerations: (1) there was no evidence that the Railroad Class would benefit from AMI pilot project meters, and therefore no justification to allow any cost recovery from the Railroad Class; and (2) public policy considerations weigh in favor of keeping costs to the Railroad Class low. [*Id.* at 43].

In the recent *North Shore and People's Gas* consolidated rate case final order, the Commission emphasized that "unless there are clear and distinguishable reasons for deciding a

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case differently, the Commission will follow in line with precedent. To do otherwise risks a charge of arbitrary and capricious action.” [ICC Cons. Dkts. 07-241 and 07-242, Final Order at 16 (Feb. 5, 2008)]. ComEd’s witnesses and evidence in this do not even attempt to meet this standard. ComEd has not suggested that there has been a change in the applicable public policy considerations, nor has ComEd tendered any evidence to show that the Railroad Class would benefit from the six AMI meters in question. In fact, when ComEd’s witness on this issue, Robert Garcia, was questioned about the AMI meters, he testified he did not know whether the meters were installed at Metra or CTA facilities and had no idea what information the meters would even provide to the Railroad Class. [R. Garcia, Tr. at 2270:10-14].

ComEd’s cavalier disregard for a Commission order entered only eight months prior to ComEd’s rate case filing should not be countenanced by the Commission. ComEd should be instructed that it may not recover AMI meter costs from the Railroad Class in this case. ComEd should further be instructed by the Commission to follow prior Commission precedent unless ComEd can cite clear and distinguishable reasons why the Commission should not follow its prior precedent.

IX. RATE DESIGN

C. Potentially Contested Issues

4. Non-Residential

a. Movement Toward Cost-Based Rates

(ii) Railroad Customer Class

IV. IF THE COMMISSION IS INCLINED TO MOVE THE RAILROAD TOWARD RATES BASED ON COMED’S ECOS, THE COMMISSION SHOULD ADOPT THE GRADUAL MOVEMENT ADVOCATED BY COMED.

ComEd has suggested moving the Railroad Class 10% toward cost based rates based at least in part upon the Commission’s prior recognition of the public interest considerations in

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seeking the Railroad Class' rates. [L. Alongi Direct, ComEd Ex. 16.0 2d Rev. at 13-14.] The IIEC's Mr. Stephens suggested a 33% movement toward cost based rates, coupled with a limit of 1.5 times the system average increase. [R. Stephens Rebuttal, IIEC Ex. 5.0 at 10-12.] The ICC Staff's Mr. Boggs appears to suggest an increase in excess of 35% of the amount required to move to cost based rates, although his testimony uniformly was confusing to other parties. [C. Boggs Direct, ICC Staff Ex. 13.0 at 12. See, e.g., R. Stephens Corrected Rebuttal, IIEC 5.0-C at 4-9; L. Alongi Rebuttal, ComEd Ex. 49.0 at 9-10].

As noted above, the problem with all of these proposals is that ComEd's current cost of service study produces inflated rates for the Railroad Class. Thus, using the current ComEd cost of service study to set rates based on a percentage of ECOSS based rates would produce higher rates than intended or warranted.

If the Commission is inclined to approve rates for the Railroad Class based upon a percentage of the amount required for rates that would reimburse ComEd for the cost of service calculated using ComEd's current cost of service study, than Metra supports ComEd's approach. ComEd's proposal makes the most sense because it is very gradual, thus avoiding rate shock, and accords due respect to the public policy considerations that the Commission has repeatedly emphasized must be taken into account in setting the Railroad Class' rates. Furthermore, given that ComEd's ECOSS produces inflated rates for the Railroad Class, using the more gradual increase advocated by ComEd makes it less likely that the rate set will exceed the proper,

currently unknown cost based rate in which 4 kV facilities' costs are not allocated to the Railroad Class.³

IX. RATE DESIGN

C. Potentially Contested Issues

4. Non-Residential

c. Railroad Customers-Utilization of Railroad Customers' Facilities

V. THE RAILROAD CLASS IS ENTITLED TO A COST CREDIT DUE TO COMED'S USE OF RAILROAD CLASS FACILITIES TO SERVE OTHER CUSTOMERS.

ComEd has proposed a credit reduction of approximately \$452,000 to the cost to serve the Railroad Class because, as a result of a joint study conducted with the Railroad Class, ComEd has concluded it utilizes facilities owned by the Railroad Class to serve other customers. No party to this proceeding has challenged that such a credit is appropriate. The only substantive issue is raised by ICC staff witness Greg Rockrohr, who has testified that he believes good policy requires ComEd to present a plan to eliminate the use of Railroad Class' facilities on a set schedule. [G. Rockrohr Rebuttal, ICC Staff Ex. At 19:404-08 and 22:462-69].

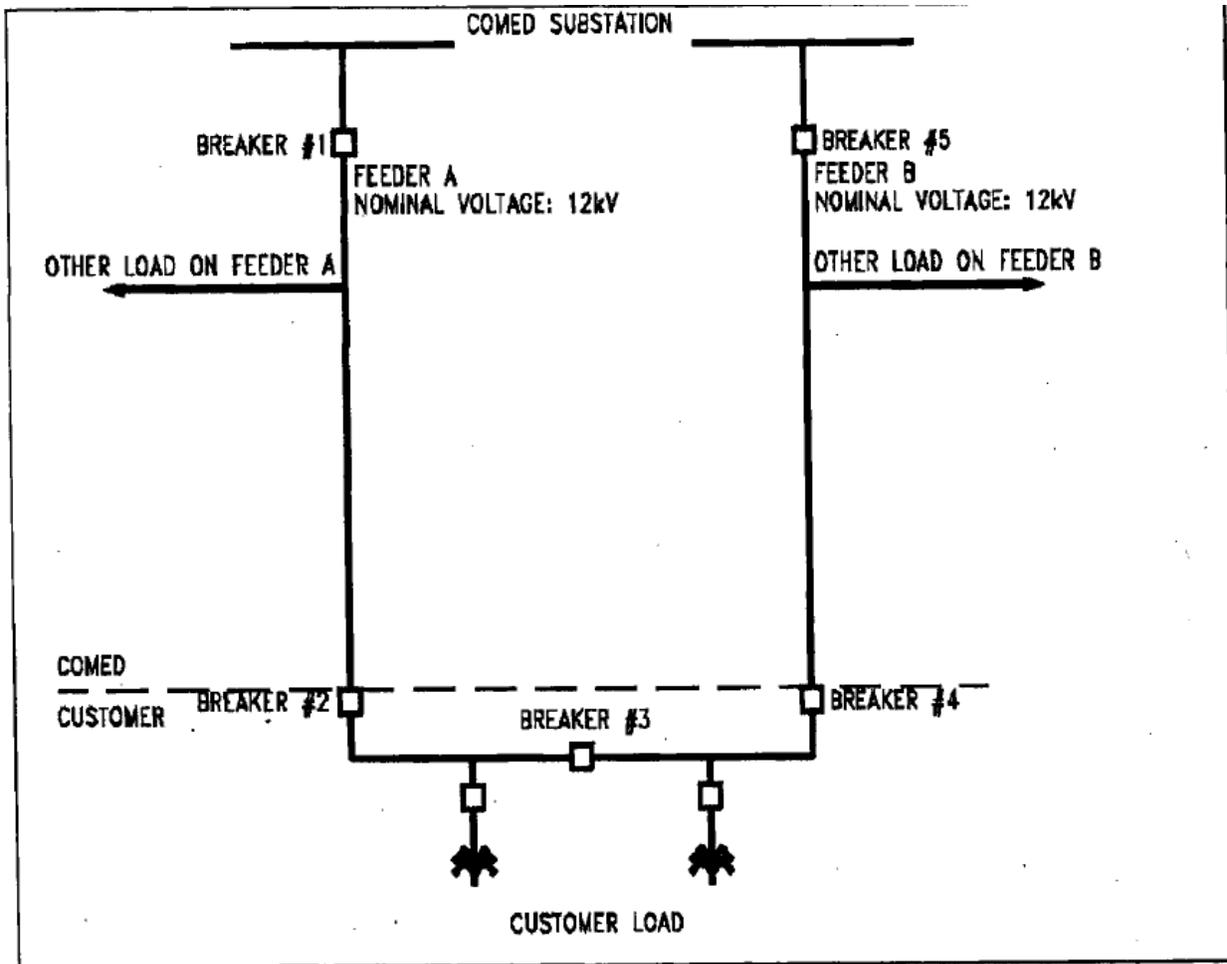
As discussed below, Metra believes that the credit should be \$678,000 or \$1,356,000 rather than the \$952,000 proposed by ComEd. With respect to Mr. Rockrohr's suggestion, there is no operational need to make any changes. Since alteration of the current facilities design will cost millions for the Railroad Class and ComEd, Metra agrees with ComEd that the most

³ However, Metra also challenges whether the long term goal should be to require the Railroad Class to pay fully cost based rates given the public interest considerations associated with rate setting for the Railroad Class.

reasonable approach would be to make alterations as Railroad Class substations are replaced or redesigned where the alterations are cost justified.

A. ComEd Does Use Railroad Class Facilities To Serve Other Customers.

ComEd provides traction power to all of the Railroad Class' substations via at least two separate circuits. [J. Bachman Direct, CTA/Metra Jt. Ex. 1.0 at 6]. The circuits are tied together with a circuit breaker that is owned by the relevant Railroad Class member. [Id. at 6]. The standard arrangement is depicted in the diagram below that was included in ComEd's response to ICC Staff Data Request GER 2.11:



The circuit breakers are typically operated in closed fashion, which allows electricity to flow from one circuit to the other. [Id.]. This effectively allows ComEd to use one of the circuits as a means of serving non-Railroad Class customers on the other circuit. [Id. at 10-11].

As a result of a dispute between ComEd and the Railroad Class members as to the benefits to ComEd, if any, of the use of the Railroad Class facilities to serve other customers, in the last ComEd general delivery services rate case, the Commission directed ComEd and the Railroad Class in the final order to conduct an appropriate study to determine whether and how much ComEd uses or needs the Railroad Class' facilities to serve other customers. [September

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10, 2008 Final Order in ICC Dkt. 07-0566 at 220]. The Final Order in that case also directed the parties to report the results of that study in ComEd's next rate case. Id.

ComEd and the Railroad Class members jointly cooperated in a load flow study that determined that ComEd does use the Railroad Class' facilities to serve other customers, including in some instances providing service when those customers had no other source of service on the ComEd system. [CTA/Metra Jt. Ex. 1.03]. ComEd evaluated the cost to construct facilities to avoid the need to use Railroad Class facilities to serve other customers, and has proposed that the cost to serve the Railroad Class should be reduced by approximately \$452,000. [L. Alongi Direct, ComEd Ex. 16.0 2d Rev. at 13]. That amount was computed by (1) estimating the installed cost of the railroad electric facilities through which power may flow, which is about \$10.721 million, (2) allocating 33% of that installed cost, \$3.57 million, as ComEd's share to reflect ComEd's use to serve other customers as being secondary to the railroads' primary use for traction power, and (3) multiplying by 12.65% to convert the resulting ComEd share amount to an annual revenue requirement. [Id.].

B. The Railroad Class Is Entitled to A Credit Of \$678,184 or \$1,356,207.

Metra agrees that an adjustment to the cost to serve the Railroad Class is appropriate given that Railroad Class facilities are being used to serve other customers. Metra believes, however, that it should receive credit of at least 50% and more reasonably 100% of the cost of replacement facilities, rather than 33%, which means the credit should be \$678,104 or \$1,356,207. [See J. Bachman Direct, CTA/Metra Jt. Ex. 1.0 at 16-19; J. Bachman Rebuttal, CTA/Metra Jt. Ex. 2.0 at 12-13]. The basis for Metra's position is that ComEd has been enjoying the free use of the Railroad Class' facilities for more than 40 years, and that when

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ComEd anticipates generating a benefit, such as through its Alternative Regulation proposal, ComEd proposes to keep 50% of the benefit. [Id.]

C. Ordering Reconfiguration Of The Existing Design Is Unwise Because There Is No Operational Need To Do So And It Will Cost Millions Of Dollars.

The only party or witness to raise any question or concern is ICC staff witness, Greg Rockrohr.⁴ Curiously, the ICC staff sat mute in the last two rate cases while Metra and the CTA complained that ComEd was using Railroad Class facilities to serve other customers without compensation. It was not until this rate case after ComEd worked cooperatively with the Railroad Class and determined that it was using the Railroad Class facilities and suggested it should compensate the Railroad Class for that use, that the ICC staff determined that it had policy concerns with respect to ComEd's indefinite continued use of Railroad Class facilities.

In his direct and rebuttal testimony, Mr. Rockrohr proposed several ideas to end ComEd's reliance and use of Railroad Class facilities. He suggested that ComEd buy from the Railroad Class the substations in which the switchgear is located. [G. Rockrohr Direct, ICC Staff Ex. 6.0 at 30:657 to 31:690]. Absent very significant compensation, that is not acceptable to the Railroad Class because ownership of the substations and transformers is critical to the reliability of the Railroad Class' service; in fact, Metra bought the substations from ComEd to

⁴ In his Direct Testimony, ICC Staff Witness Philip Rukosuev testified that he agreed that a cost allocation to reduce the Railroad Class' revenue requirement was appropriate. [P. Rukosuev Direct, ICC Staff Ex. 12.0 at 21:491 to 22:522]. However, Mr. Rukosuev recommended a downward adjustment in the cost allocation based upon his interpretation of Staff Data Requests PR 11.10(g) and PR 11.10(m)(v). Mr. Rukosuev interpreted ComEd's response to mean that it had made a math error, and that the correct adjustment amount should be \$319,437 instead of \$452,009. [Id. at 21:475-489]. ComEd responded to a data request in which it explained that there was no error in the calculation of the appropriate adjustment, and the proper cost adjustment remained at \$452,069. [See CTA/Metra Jt. Ex. 2.05]. As explained in Mr. Bachman's Rebuttal Testimony, Mr. Rukosuev mistakenly understood ComEd's earlier data response concerning an adjustment to Dusk to Dawn lighting to refer to the Railroad Class adjustment. [J. Bachman Rebuttal, CTA/Metra Jt. Ex. 2.0 at 12:254 to 13:273]. Mr. Rukosuev did not further address the issue either in his rebuttal testimony or his testimony at the hearing.

ensure the reliability of electricity supply to its stations. [J. Bachman Rebuttal, CTA/Metra Jt. Ex. 2.0 at 13:288 to 15:318]. ComEd also objected to this suggestion, asserting that it “would be an unnecessary use of a large amount of ratepayer funds to achieve a limited benefit.” [M. Born Rebuttal, ComEd Ex. 34.0 at 12:258 to 13:260].

Mr. Rockrohr also suggested that another solution might be to ask the Railroads to operate their 12,000 volt buses with one of the breakers open. [G. Rockrohr Direct, ICC Staff Ex. 6.0 at 30:679-684]. The Railroad Class objected to this approach because the necessary reconfiguration changes for nonstandard service could cost millions of dollars. [See Harper Rebuttal, CTA 4.0 at 5:105 to 8:164]. ComEd is opposed to this proposal because it would have to construct feeder extensions and reconfigure feeders at a very high level preliminary estimated cost of \$2.1 million, which ComEd’s witness admitted was a the low end of the estimate range. [M. Born, 1/14/11 Tr. at 1712:8-22 and 1717:15-16]. Moreover, ComEd’s high level preliminary cost estimate did not include the Railroad Class’ costs that would have to be incurred, for example, to automate circuit breaker openings and closings at each ComEd delivery point. [M. Born Rebuttal, ComEd Ex. 34.0 at 11:224-235].

In his rebuttal testimony, Mr. Rockrohr also threw out the idea of requiring the installation of automatic throw-over switchgears so that the switching between ComEd circuits takes place on ComEd’s distribution system. [G. Rockrohr, ICC Staff Ex. 21.0 at 20:426-29]. Not surprisingly, Mr. Rockrohr did not even attempt to put a price tag on this idea.

At the hearing, Mr. Rockrohr testified that he did not particularly advocate implementation of any of his ideas. Instead, he testified that he simply thought there should be a

plan in place to eventually eliminate ComEd's reliance on the Railroad Class' facilities. [1/12/11 Tr. at 835:15-21].

The plain fact is that there is no operational reason to change the current configuration. Mr. Rockrohr acknowledged at the hearing that the current configuration has been in place for several decades. [Id. at 829:19-20]. Mr. Rockrohr also acknowledged that he was not aware of a single operational problem that has ever occurred as a result of ComEd's reliance upon the Railroad Class' equipment:

Q. But from an operational perspective, are you aware of a single problem that has occurred over the course of the last 40 years as a result of the—Commonwealth Edison's use of the type bus system at the railroad substations?

A. No.

[Id. at 830:14-19].⁵

Michael Born, ComEd's Principal Engineer in the Distribution Capacity Planning Department, agreed that there is no operational reason or advantage to changing the current configuration.

But [to] arbitrarily embark on a program to reconfigure service to these 70-some substations would be costly for ComEd, the railroad customers, and, frankly, would not result in a great improvement of service.

Yeah, I would agree there's—there is no significant operational advantage to doing this reconfiguration.

⁵ Mr. Rockrohr also testified that it was his understanding that ComEd had received free services from the use of the Railroad Class' equipment for the last 40 years. [Id. at 834:22 to 855:4].

[1/14/11 Tr. at 1705:1-5 and 1706:8-10. See also M. Born Surrebuttal, ComEd Ex. 67.0 at 3:61 to 4:70].

Mr. Rockrohr has suggested that the Commission should establish a schedule to require reconfiguration of the Railroad Class substations in a fixed period of time. However, the evidence in the record uniformly shows that there is no operational need for the reconfigurations and it would be quite costly for both ComEd and the Railroad Class. For that reason, both ComEd and the Railroad Class have opposed Mr. Rockrohr's suggestion of some type of a fixed schedule. Instead, ComEd and the Railroad Class have both agreed that the more reasoned approach is "to change the operations of the traction power substations when new ones are added or existing ones are renovated and the costs justify the change." [J. Bachman Rebuttal, CTA/Metra Jt. Ex. 2.0 at 16:355-358; M. Born Surrebuttal, ComEd Ex. 67.0 at 73-81].

There is no good reason for the Commission to issue an order regarding future reconfiguration of Railroad Class' facilities and services. To the extent the Commission is inclined to issue an order in that regard, the order should not adopt a fixed schedule, but should allow the parties to change the operations of the traction power substations as new substations are constructed or existing ones are substantially renovated, and the costs justify the change.

IX. *RATE DESIGN*

C. *Potentially Contested Issues*

8. *General Terms and Conditions*

b. *Limitation of Liability Language*

VI. COMED'S PROPOSAL TO REDUCE THE STANDARD OF CARE APPLICABLE TO ITS DELIVERY OF ELECTRICITY TO GROSS NEGLIGENCE IS A TERRIBLE IDEA THAT IS CONTRARY TO GOOD PUBLIC POLICY.

ComEd has proposed a revision to its general terms and conditions pursuant to which ComEd could only be held liable for gross negligence. Further, ComEd has proposed language

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which would require customers, such as Metra, to indemnify ComEd for damages resulting from occurrences on customers' property due to ComEd's own negligence. Thus, if a third party is injured on Metra's property due to ComEd's negligence, Metra has to indemnify ComEd for third party claims against ComEd due to ComEd's own negligence. [See L. Alongi Direct, ComEd Ex. 16.0 2d Rev at 42-43; ComEd Ex. 16.21 at Sheet No. 155].

The granting of civil privileges and immunities in favor of a party to alter its otherwise applicable common law duties, obviously operates to the disadvantage of other parties. Both the Illinois courts and the Illinois legislature have been very reluctant to grant civil privileges and immunities, or to allow the traditional standard of care to be altered, except in limited and carefully circumscribed circumstances. See, e.g., *People v. Illinois Highway Comm'n*, 3 Ill. 218, 224-27, 120 N.E.2d 35, 39-41 (1954) (sovereign immunity does not apply to Tollway as it is a local unit of government); Illinois Constitution of 1970, Art. XIII, § 4 (abolishing sovereign immunity except as established by statute); 705 ILCS 505/8 (limited Court of Claims jurisdiction for specified claims against the State); Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10 ("Tort Immunity Act") (recognizing certain privileges and immunities, and imposing a lower standard of care on local governments, in limited and specified circumstances); Construction Contract Indemnification for Negligence Act, 740 ILCS 35 (providing that contract provisions purporting to indemnify one for its own negligence in construction are void as against public policy). Typically, to the extent limited privileges and immunities have been recognized or established, they have been restricted to governmental entities. See Id.

The attempt by ComEd to reduce the standard of care and require for its own negligence is particularly egregious as applied to Metra, the CTA and other units of local government who enjoy the limited protection of the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10. As explained in the Direct Testimony of Metra’s Director of Risk Management, Richard Capra, the Tort Immunity Act grants Metra, among others, immunities and creates heightened liability standards for parties seeking to sue Metra in tort. [R. Capra Direct, Metra Ex. 1.0 at 11:289-290]. The Illinois Supreme Court has repeatedly emphasized that the General Assembly’s purpose in enacting the Tort Immunity Act was “to prevent the diversion of public funds to payment of damage claims.” *DeSmet Ex Rel. v. County of Rock Island*, 219 Ill. 2d 497, 505, 302 Ill. Dec. 466, 472, 848 N.E.2d 1030, 1037 (2006), quoting *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490, 256 Ill. Dec. 848, 854, 752 N.E.2d 1090, 1096 (2001) and *Bubb v. Springfield School Dist. 186*, 167 Ill. 2d 372, 378, 212 Ill. Dec. 542, 546, 657 N.E.2d 887, 891 (1995). As Mr. Capra pointed out in his testimony:

What ComEd is attempting to accomplish with its proposed limitation of liability language, which would divert public funds and redirect them from their intended public use to benefit ComEd’s private stockholders, is directly contrary to the public policy interests previously recognized and given effect by the General Assembly in the Tort Immunity Act and others like acts with provisions designed to protect the public funds in litigation.

[R. Capra Direct, Metra Ex. 1.0 at 11:252-57].

The initiative by ComEd also is directly contrary, for example, to the public policy considerations underlying the Construction Contract Indemnification for Negligence Act, which provides that contracts attempting to require indemnification for one’s own negligence in the construction contract. 740 ILCS 35/1. Just as public policy mandates that the law should

encourage safe construction practices, so too should the Commission encourage ComEd to follow safe electricity delivery practices.

The record in this case is devoid of any evidence to support, on public policy grounds, lowering the standard of care applicable to ComEd's delivery of electricity, or to justify shifting the consequences of ComEd's negligence to its customers. By its nature, electricity is a very dangerous commodity, particularly when it is delivered at 12,000 volts, as it is to the Railroad Class. If anything, ComEd should be held to a higher standard of care, not a lower standard of care, given that public policy considerations weigh in favor of making sure that ComEd exercises every possible safety precaution to protect ComEd customers and the public against the inherent and serious risk associated with the high voltage electricity that ComEd carries.

There is a reason why Illinois law imposes strict liability on those engaged in ultrahazardous activities. Illinois Pattern Jury Instructions, IPI Instruction 115.00 (Civil, 2006 ed.). That is because as a matter of public policy you want parties who are handling dangerous products to handle them as safely as possible.

Moreover, if ComEd really needed this extreme measure, one would expect to see evidence in the record that ComEd has sustained serious losses or been plagued by numerous lawsuits. There is nothing to that effect in this record.

This is most empathetically not an insignificant issue for Metra or other ratepayers. As Mr. Capra emphasized when asked if he could quantify the risk:

No, but in the Cook County court system, it only takes one jury verdict for damages for a really bad injury case to make this proposed risk transfer an extremely expensive proposition for Metra or any other ComEd ratepayer.

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[R. Capra Direct, Metra Ex. 1.0 at 12:310-312].

This limited liability request by ComEd is directly contrary to public policy recognized by Illinois law in a variety of contexts. Reducing the standard of care to which ComEd is held responsible, and requiring Railroad Class indemnification of ComEd for damages due to ComEd's own negligence, in order to benefit ComEd's private owners at the expense of Metra and its public transit riders also is contrary to public policy considerations recognized by the Commission in prior Commission final orders.

ComEd's limited liability proposal should be summarily rejected.

Respectfully Submitted,

/s/ Edward R. Gower

One of the Attorneys for Northeast Illinois
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