**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| COMMONWEALTH EDISON COMPANY | ) | |
| | ) | Docket No. 10-0467 |
| Proposed general increase in electric rates | ) | |

# **REPLY BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS**

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# I. RESPONSE TO COMED INTRODUCTION AND STATEMENT OF THE CASE

## A. Notwithstanding ComEd's Unhappiness With the Result, The Commission's Application of Its Rules Results in Predictability and Consistency.

ComEd presents its request for $326 million, or 15.9% more revenue, as driven by investment, pension and medical benefits costs, and flat (as opposed to growing) load. ComEd In. Br. at 1. It complains that while no party has questioned the prudency of the overwhelming majority of its investments,[1] both the ICC Staff and the People of the State of Illinois and the Citizens Utility Board (AG/CUB) recommend significant disallowances. ComEd In. Br. at 2. While ComEd attempts to color these disallowances as "arguments and mathematical artifice," ComEd In. Br. at 2, in fact, the adjustments recommended by AG/CUB are grounded in basic test year and regulatory accounting principles and incorporate recent Commission and Court decisions. This is not "mathematical artifice."

ComEd quotes its witness Philip O'Connor that "the ultimate test of a proposed disallowance is whether it brings the utility's revenue request more in line with its prudent and reasonable costs." ComEd In. Br. at 2. The adjustments and disallowances recommended by the experts reviewing the details of ComEd's filing represent their view of the proper way to account for the costs and investments ComEd has identified The evidence shows that the Company's proposed revenue requirement includes significant overstatement of pro forma plant additions, cash working capital requirements, pension and rate case expenses and the cost of equity, to

[1] ComEd asserts that "with the exception of a single capital project amounting to less than 0.25% of ComEd's requested revenue increase, no witness challenges that ComEd has invested and spent prudently or denies that the assets ComEd invests in are used and useful to customers." ComEd In. Br. At 1-2.

name a few. This evidence, discussed below and in the AG Initial Brief, points to ComEd as the party engaged in "mathematical artifice."

ComEd complains that the Staff and AG/CUB objected to including in its rate increase request costs for "corrective maintenance" for the period January 1 – June 30, 2011 and for investments between April 1 and June 30, 2011. What ComEd fails to mention is that ComEd itself *chose a historical 2009 test year*. The Commission's test year rules establish how "out of test year" costs are to be treated and require these costs to be specifically proven as "known and measureable", and further, give the utility the opportunity to present a future test year if historical costs are not indicative of costs during the period that rates are to be in effect. 83 Ill. Admin. Code 287.20 & 287.40. ComEd ignores the very rules that provide predictability to the ratemaking process while carping on the need for "[c]onsistent, steady and predictable regulation." ComEd In. Br. at 4, quoting ComEd Ex. 26.0 Rev. at 8. The individual adjustments and disallowances proposed by AG/CUB witnesses and others will be specifically addressed in the sections of this brief on rate base and operating expenses.

### B. ComEd's Argument That Its Proposed Rates Are Reasonable Is Inapposite Because It Includes Supply Charges That Are Not Part Of ComEd's Revenue Requirement and Ignores That Regulation of Its Rates Gives It The Opportunity But Not the Right To Earn Its Allowed Return on Equity.

ComEd argues that it provides service at a reasonable cost, "factoring in changes in supply rates." ComEd In. Br. at 4. However, the Commission is not considering supply rates, which are determined through a process overseen by the Illinois Power Agency. 20 ILCS 3855/1-1 *et seq.*; 220 ILCSD 5/16-111.5. The question before the Commission is the revenue level consumers should provide ComEd for *delivery* services. If that revenue is overstated, consumers will be denied the benefits of lower costs for electric supply delivery.

Notwithstanding the inapposite comparison of delivery rate increases to total bill effects, evidence submitted by the Roger Colton, on behalf of the People, demonstrates that notwithstanding the lower supply charges of recent years, large segments of ComEd ratepayers do not have sufficient incomes to cover their basic expenses. AG Ex. 5.0R at 16, 19 & Sch. RDC-5 & 7. Consumers should not pay more than necessary to cover the costs of delivering electricity irrespective of the fluctuations in the cost of electric supply or ComEd's vague claims about the potential for job creation higher rates would engender.

Finally, ComEd implies that somehow the corrections and disallowances recommended by Staff and AG/CUB would "hold rates below costs." ComEd In. Br. at 5-6. The argument that the Commission's failure to approve ComEd's revenue requirement request without adjustment means that the Company will not recover its costs ignores the fundamental purpose of the regulatory process. When a utility files tariffs requesting rate increases, the Commission has the statutory obligation to review the utility's filing to determine what "just and reasonable" levels of cost and revenue are. The Commission properly reduces ComEd's cost and revenue levels when the Company applies test year rules incorrectly, for example by failing to match accumulated depreciation, accumulated deferred taxes (ADIT), and plant additions over the same time period, resulting in an unreasonably high and inaccurate accounting of post-test year plant additions. See *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 937 N.E.2d 685 (2d Dist. 2010).

The Commission is obligated to determine, for example, whether rate case expenses or charitable contributions are excessive, and whether late payment charges are inaccurately allocated to non-jurisdictional operations, depriving ComEd customers of the benefit of those revenues. See People's In. Br. at 49, 80, 92. These adjustments do not result in "holding rates below costs." Instead, they assure that consumers only pay for a just and reasonable level of expenditures. The Company responds to Commission-approved rates by either matching its spending to reasonable cost levels, or reducing the amount of revenue available to pay for equity. This process protects consumers while assuring the Company adequate revenues to properly manage its operations.

Moreover, when ComEd speaks of recovering its "cost of service", it is important for the Commission to understand what the Company includes in that phrase. In asserting that adjustments to its claimed costs will affect reliability and investment, ComEd includes its entire claimed cost of equity, including the 40 basis points adder requested by ComEd witness Trpik and Tierney. See, e.g., Tr. 114-115 (Guerra). The Company's ambition to guarantee revenue streams to recover these alleged costs likewise includes its request for Commission adoption of a straight fixed variable residential rate design. However, it is well established that in setting rates the Commission gives the Company an *opportunity* – not the right -- to earn a profit. It is up to the utility to manage its operations and investments to achieve the best return it can. Many factors can result in a discrepancy between what the Company identifies as its costs and the revenue requirement ultimately allowed, including the application of accounting principles, the Company's voluntary removal of certain items from its proposed revenue requirement (e.g. cost of corporate jets), the utility's recognition of good will in the capital structure, and the allowed cost of debt and equity. Such a discrepancy exists in practically every rate request,[2] and does not indicate that "rates are artificial and fundamentally in conflict with the real level of company operations expected by the Commission." ComEd In. Br. at 2.

[2] In none of the following rate increase requests did the revenue requirement equal the amount requested by the Company: Dockets 09-0319 (Illinois American Water Co.); 09-0306-0311 (Ameren Utilities); 07-0566 (ComEd); 07-0241/0242 (Peoples Gas/North Shore).

In the past the Commission's review included costs and investments associated with both delivery and generation of electricity (see, e.g., *Hartigan v. Illinois Commerce Comm'n*, 117 Ill.2d 120 (1987); *Business and Professional People in the Public Interest v. Ill. Commerce Comm'n*, 146 Ill.2d 175 (1991). Now, however, ComEd is a delivery-only company, and the portion of its operations subject to regulatory review is significantly reduced. Nevertheless, the regulatory bargain has not fundamentally changed. It authorizes the recovery of only "just and reasonable" costs, and provides the Company with the opportunity – not the guarantee – of profit.

# II. OVERALL REVENUE REQUIREMENT AND REVENUE DEFICIENCY

# III. TEST YEAR

# IV. RATE BASE

## A. Overview

## B. Potentially Uncontested Issues

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## C. Potentially Contested Issues

### 1. Post-Test Year Adjustments

#### a. Pro Forma Capital Additions

ComEd is requesting that its new rates include recovery of *pro forma* capital investment for 18 months following the end of the 2009 test year, through June 30, 2011. ComEd In. Br. at 7. ComEd's assertion that AG/CUB supports the inclusion of the first 12 months of these *pro forma* capital additions as an adjustment to its test year rate base is untrue and contradicted by record evidence. Although the Company's Initial Brief alleges that AG/CUB "accepts every dollar of investment that ComEd projected to place in service through December 31, 2010," ComEd In.Br. at 8, the evidence does not indicate any such support. In fact, AG/CUB explicitly challenged ComEd's *pro forma* capital additions for December 2010 as disproportionately large compared to its average monthly capital additions for the previous 11 months of the test year. ComEd's forecast of plant additions of $100.8 million for December 2010 is nearly twice the level of actual monthly plant additions for the first eleven months of 2010.

As pointed out in both Attorney General and Staff Initial Briefs, the Company's forecasts of plant additions have not been reliable. Staff Witness Ebrey went so far as to observe that the Company's forecast of $100.8 million of plant additions in December 2010 as "probably not reasonable." Tr. 730-31. Whether the adjustment for *pro forma* plant additions is cut off as December 31, 2010 (as proposed by Staff) or as of March 31, 2011 (as proposed by the Attorney General), the Company's forecast of plant additions must be trued up to the actual balance of plant additions.

ComEd also mischaracterizes the Attorney General's testimony on this issue. According to ComEd, Mr. Effron argues that the forecast of plant additions planned for the second quarter cannot be characterized as "known" and "measurable" with any reasonable degree of certainty. ComEd In.Br. at 9. What Mr. Effron actually argued is that "the extent to which plant additions will exceed concomitant growth in the depreciation reserve and ADIT in the second quarter of quarter of 2011 cannot reasonably be characterized as known and measurable with any reasonable degree of certainty." AG/CUB Ex. 8.0 at 2.

In defense of the accuracy of its forecasts of its plant additions, ComEd cites the testimony of Mr. Donohue, ComEd In.Br. at 12. Donohue analyzed ComEd T&D plant expenditures for five eighteen-month periods. But the actual T&D capital expenditures were less than the Company's forecasts in *every one* of those eighteen month periods. ComEd Ex. 35.5.

The voluminous documentation ComEd offers in support of its forecasted plant additions is all beside the point. Everyone agrees that ComEd will be making additions to its plant in service in 2011. Staff is now proposing that the Commission allow the inclusion of the Company's *pro forma* capital additions only until December 31, 2010 (although Staff witness Ebrey testified that even the forecasted plant addition of $100.8 for December 2010 was probably "not reasonable." Tr. 730-31.) Regardless of the cutoff date, the Company's forecast should be trued up to the actual plant balance in order to determine whether the *actual* additions will exceed concomitant growth in the depreciation reserve and ADIT, as explained below.

#### b. Accumulated Provisions for Depreciation and Amortization Related Provisions for Accumulated Depreciation

ComEd claims that a roll forward of depreciation and ADIT "is not needed to ensure that the rate base is not overstated because ComEd will continue to make significant capital investments during the period when rates set here will be in effect, in amounts that will exceed the continuing accrual of depreciation." ComEd In.Br. at24. However, ComEd witness Houtsma admitted that the Company's own forecasts show that the Company's net plant in service in 2011 will be $440 million less than the *pro forma* test year net plant in service that it is proposing in this case. ComEd Ex. 6.3, p. 2; Tr. 2360.

The Company's admission that its *pro forma* test year net plant in service is greater that the net plant in service it has forecasted for 2011 undermines its request for *pro forma* additions for a variety of reasons. The available evidence demonstrates that the plant additions in 2011 will *not* exceed concomitant growth in the depreciation reserve and ADIT. First, ComEd witness

Houstma confirmed that the Company has been adding plant in service at rate of approximately $50 million per month. AG Cross Ex. 25; Tr. 2397-2398. Second, Houtsma also confirmed that the reserve for accumulated depreciation has been growing at a rate of approximately $35 million per month. AG Cross Ex. 26; Tr. 2400. Third, Houtsma's surrebuttal testimony acknowledges the impact of bonus depreciation on capital additions in 2010 and 2011. Under cross-examination, she agreed that tax deductions associated with *pro forma* plant additions were accelerated under the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010[3] so that the Company can deduct 100% of capital additions for income tax purposes. Tr. 2401; ComEd Ex. 55.0 (2nd Revised) at 6. With the 2011 plant additions qualifying for 100% bonus depreciation, the growth in Accumulated Deferred Income Taxes ("ADIT") would be approximately $20 million (39.745% tax rate X $50 million) per month. Thus, if the plant additions in 2011 continue at a rate of $50 million per month, the growth of plant in service will be *less* than the combined monthly growth in depreciation reserve of $35 million and ADIT of approximately $20 million ($35 million + $20 million = $55 million).

In sum, the Company's position on the growth of its net plant in service is unreasonable and would result in a substantial overstatement of the Company's rate base.

**c. Accumulated Deferred Income Taxes**

See Section IV.C.1.b above.

**2. Construction Work in Progress**

ComEd claims it should be permitted to include $12.6 million in construction work in progress ("CWIP") on short-term investments not eligible for AFUDC in its proposed rate base.

[3] The 2010 Act applied retrospectively to September 2010 and prospectively to all of 2011.

ComEd In. Br. at 25. It argues that AG/CUB witness Brosch's objection to this rate base inclusion runs counter to Section 9-214(e) of the Act, which permits such treatment, and is contrary to prior Commission orders authorizing the inclusion of CWIP in rate base. The Company also cites the case of *Citizens for a Better Env't v. Illinois Commerce Comm'n,* 103 Ill. App.3d 133, 430 N.E.2d 684 (4th Dist. 1981) ("CBE") for the proposition that its requested CWIP amounts should be included in rate base.

These arguments miss the mark for several reasons. First, as noted in the AG Initial Brief, Section 9-214(e) of the Act does not *guarantee* or *require* the Commission to include short-term CWIP in rate base. 220 ILCS 5/9-214(e). The Company maintains the burden of proving that it is appropriate to include the amounts in rate base so that ratepayers pay for the return owed its shareholders on the investment. ComEd has failed in that burden. As noted in the AG Initial Brief, ComEd's "case" for including these short-term projects in rate base is that "the overall level of CWIP that does not accrue AFUDC as of December 31, 2009 is included, and is *a reasonable proxy* for the amounts expected to be incurred in future periods."[4] This vague reference to a "reasonable proxy" provides the Commission with no evidence or assurance that these unnamed projects are or will be in service.

Second, the reference to the *CBE* case is inapposite. In *CBE*, the Court addressed the question of whether Illinois Power's request to include in its rate base $240,000,000 attributable to an atomic generating station which had been under construction near Clinton, Illinois, since 1975 was permissible and consistent with the "used and useful" language of the Act. The record demonstrated that at December 31, 1978, IP had invested some $443,000,000 in the Clinton I nuclear plant, which had been acquired for the most part through the sales of securities.

[4] ComEd Ex. 6.0 Revised, page 26, lines 523-533.

Projections indicated that for construction during the period 1978-1982 over $1,450,000,000 would be required, of which about $1,230,000,000 would be raised through the sale of new securities. No date upon which the Clinton station would become operational was indicated, but it would appear to be several years away. Meanwhile, fresh infusions of cash would be needed. IP's position was that the servicing of such a large burden of securities which generated no cash earnings was damaging its financial condition and credit-worthiness, so that it would be more difficult to raise additional capital to complete the Clinton station. IP therefore requested that the $240 million mentioned above be included in its rate base. *CBE,* 430 N.E.2d at *687.* In its order, the Commission allowed $97 million worth of CWIP in the Company's rate base.

In its ruling, the court held that it was "undisputed that the Clinton station is owned by IPC and is being prepared to carry out the purposes of the utility, the generation and distribution of electric current. It is therefore actually being used, and is "used and useful" within the meaning of section 36." *Id.* at 689.

Unlike the details provided in the record at issue in the *CBE* case that demonstrated (1) the kind and size of the investment (a nuclear power plant); (2) the use of outside funding and cash infusions to finance the plant; and (3) the demonstrated need for ratepayers providing a return on the investment, the record in this case provides no such evidence. Again, the Commission is told that the requested CWIP amount to be included in rate base is "*a reasonable proxy* for the amounts expected to be incurred in future periods."[5] The Commission is unaware of what these projects are specifically (given the proxy status of the amount) and there has been no evidence that investor-supplied funds were necessary to finance the illusory projects. Thus while Section 9-214(e) suggests a more liberal definition of "used and useful" apply for CWIP

[5] ComEd Ex. 6.0 Revised, page 26, lines 523-533.

projects, it remains discretionary, and the utility still retains the burden of proving such ratepayer financing (through the addition of the amounts to rate base) is appropriate.

ComEd also asserts that Mr. Brosch's point that the Company will not need a return for investors to finance the projects is "not well taken, because any 'vendor financing' will finance the investment for a period of weeks at most, until the invoices are paid." ComEd In. Br. at 26. The Company notes that accounts payable "cannot be a long term permanent source of financing this investment." *Id.* This argument, too, is faulty.

The CWIP assets that the Company proposes to include in rate base are smaller construction projects that are charged to blanket work orders and that have a construction completion period shorter than 30 days.[6] This is "short term CWIP." *Id.* at 18. While not eligible for AFUDC, a large percentage of ComEd's recorded short-term CWIP has likely not been paid for in cash and therefore need not be allowed a rate base return. Thus, in addition to not being used and useful, the Company has not shown that it has any significant actual CWIP investment that has been funded by investors (rather than vendors) and that merits any rate base return. *Id.*

The Company's comment about vendor financing not being "a long term permanent source of financing this investment" actually supports Mr. Brosch's position. The Company admits these are short-term projects. The point is these are short term projects that roll over continuously, and therefore do not require long term, permanent financing.

The Company also asserts that Staff witness McNally has proposed ComEd's long-term debt and equity balances to account for any third-party CWIP financing. ComEd In. Br. at 51-52. This argument should be rejected because, as noted by Mr. Brosch, Mr. McNally's

[6] ComEd response to Data Request No. AG 7.08.

adjustments are to align the capital balances with the capital sourcing assumptions employed within the Allowance for Funds Used During Construction ("AFUDC") formula. Reductions to capital balances have been made by Staff to not double count the assignment of certain capital that is assumed to be supportive of long-term CWIP and that is allowed to accrue an AFUDC return. None of these adjustments are associated with short-term CWIP that does not earn AFUDC. In fact, it is the absence of AFUDC that is the basis for including any CWIP in rate base. On this point, Ms. Houtsma's arguments are again invalid. AG/CUB Ex. 7.0 at 28.

The Company finally argues that Mr. Brosch's suggestion that the CWIP could be excluded from rate base and continue to accrue AFUDC, "would have the same impact as the current practice", which should make customers economically indifferent to the approaches. ComEd In. Br. at 27. Mr. Brosch explained that the inclusion of short-term CWIP in rate base, as proposed by ComEd, immediately increases the revenue requirement. If ComEd accrues AFUDC on such balances instead of including the costs in rate base, ratepayers will be better off because the Company's incremental cost of capital is generally lower than ratepayers' marginal cost of capital.[7] That is because CWIP is presumed to be financed first with available short-term debt. The cost of ComEd's short-term debt in Schedule D-1 (ComEd Ex. 30.1) is only 0.39%. If the short-term CWIP balances are reduced for vendor-provided working capital (accounts payable), there may be no significant remaining balances that would accrue any AFUDC at all. *Id.*

As noted in the AG Initial Brief, the Company has both failed to show that the short-term CWIP projects for which it seeks inclusion in rate base satisfy the Company's burden of proving

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[7] CWIP is presumed to be financed first with available short-term debt. The cost of ComEd's short-term debt in Schedule D-1 (ComEd Ex. 30.1) is only 0.39%.

– even with Section 9-213(e) of the Act – that its proposed rate treatment is just and reasonable and used and useful. Its claim that the requested CWIP amounts constitute "a reasonable proxy for the amounts expected to be incurred in future periods" is not the kind of evidence that satisfies the burden of proof inherent in Section 9-201 and the requirements of Section 9-211 of the Act. Moreover, the Company has not shown that it has any significant actual CWIP investment that has been funded by investors (rather than vendors) and that merits any rate base return. The request should be denied.

### 3. Specific Plant Investments

#### a. West Loop project repair disallowances
#### b. Plymouth Court Feeders
#### c. Underground Cable

ComEd claims that "Nothing in the Final Order in Docket No. 07-0566 provided or suggested that the $18.7 million of underground cable costs would be excluded from ComEd's rate base in future proceedings." ComEd In. Br. at 35-37. Similarly, nothing in the Final Order in Docket No. 07-0566 provided or suggested that the $18.7 million of underground cable costs was only temporary or could be included in ComEd's rate base in future proceedings.

ComEd also claims that denying recovery of the underground cable "will require a continued write-off by ComEd of these nearly $19 million in assets." ComEd In.Br. at 37. This is highly misleading. ComEd already wrote off the underground cable. AG/CUB Ex. 8.0 at 5. There will be no other write-off if the underground cable is removed from rate base in this case.

#### d. PORCB Costs
#### e. Allocation of G&I Plant
#### f. Other

### 4. Cash Working Capital

Under Section 9-201, ComEd carries the burden of proving its proposed expenses and rate base, including any asserted cash working capital requirements are reasonable and based on substantial evidence. As noted in the AG Initial Brief, ComEd has failed in its burden of proving that it requires a positive rate base allowance of $67.7 million for cash working capital requirements. *See* AG Initial Brief at 23-44. The figure presented by the Company is based on a hopelessly flawed lead/lag study. The most serious problem with the Company's study involves an estimated of the revenue collection lag that relies on (1) the arbitrary inclusion and exclusion of accounts receivable aging intervals for the various customer classes, and (2) arbitrary assumptions that customer payments will be received at the mid-point of these accounts receivable intervals, rather than any true measurement of how quickly ComEd customers actually pay their bills. As highlighted in the AG Initial Brief, there is no detail within the broad ranges in the various accounts receivable aging intervals that would indicate how many dollars within each range are at the low end, the middle or upper end of the range. No measurement of the collection lag was done by interval or within each interval. Tr. at 1081, 1082, 1084, 1086-1088, 1092. As a result, Mr. Subbakrishna adopted very gross assumptions to apply to the available data. For many of the ranges, an assumption was made that the average age of all of the receivables in the range was the mid-point of the range. AG Ex. 1.0 at 27-28; AG Ex. 1.6.

As discussed in the AG Initial Brief, AG/CUB witness Michael Brosch concluded that the ComEd study was hopelessly flawed, and concluded that the Commission should reject the ComEd (and Staff-accepted) lead/lag study and approve a zero CWC allowance -- the same amount adopted by the Commission in ComEd's last rate case. It should be noted that adoption of a zero or even a negative CWC amount is not unorthodox. The Commission, for example, approved a negative CWC amount for North Shore Gas Company in the 07-0241/07-0242 (cons.) rate case. ICC Docket Nos. 07-0241, 07-0242, Order of February 5, 2008 at 18. In other states, AG/CUB Exhibit 1.5 revealed negative CWC amounts that were being proposed by Arizona Public Service Company and Southwestern Public Service Company in Arizona and Texas, respectively.

In its Brief, ComEd presents no evidence that the broad assumptions employed in its lead/lag study are reliable or in any way substantiate its request for a $67.7 million rate base infusion. The Company blithely characterizes Mr. Brosch's rejection of the ComEd study as "arbitrary, inconsistent, and lack(ing) any valid basis". ComEd Brief at 44. Rather than supplying tangible evidence that the assumptions employed by Mr. Subbakrishna were reasonable and fact-based, the Company relied on the age-old argument that it doesn't have such data (Tr. at 1125-1128 ), and questions Mr. Brosch's expertise by stating that he has not prepared a lead/lag study. ComEd Brief at 44.

These strawman arguments should be rejected. First, Mr. Brosch has more than 30 years experience as a certified public accountant and utility analyst examining, analyzing and testifying on utility revenue requirement requests in more than 100 electric, gas, telephone, water, and sewer proceeding across the United States. AG/CUB Ex. 1.1. In particular, he also has substantial experience in the application of lead-lag study concepts and methodologies in the determination of a utility's working capital investment within that 33-year time frame. *Id.* An accountant need not prepare a lead/lag study on behalf of a utility to understand, analyze and uncover flaws in utility studies. By proving the many deficiencies in the ComEd lead/lag study, AG/CUB's witness does not inherit the burden of proof regarding how much CWC belongs in rate base.

Second, Commission acceptance, as ComEd proposes, of the utility's position that it simply doesn't have or maintain accurate accounts receivables data for purposes of analyzing when accounts receivables come in to the Company's coffers is a dangerous precedent for the review of utility filings and establishing reasonable rates. Rather than proving the reasonableness of his collection lag midpoint and other arbitrary assumptions, ComEd's witness referred repeatedly to a lack of accounts receivables records that prevented him from employing more accurate methods of calculation. *See* AG Initial Brief at 23-44. Presumably, any utility, for just about any proposed expense or capital cost, could argue that it doesn't have the data necessary for meaningful Commission review of the requested amounts. The Commission should reject such an accommodation.

The Illinois Supreme Court confirmed the necessity of utilities' proving reasonableness, rather than intervenors, when it noted, in its reversal of a Commission decision that incorporated certain costs of a nuclear plant in rate base that "relied on the presumption of reasonableness rather than an affirmative showing of reasonableness", that "the Commission is an investigator and regulator of the utilities, and "it may not rely on intervening parties to contest a rate increase or to challenge the evidence offered by the utility." *People ex rel. Hartigan v. Illinois Commerce Comm'n,* 117 Ill.2d 120, 510 N.E.2d 865, 871 (1987). Noting that "any participation by persons or groups opposing an increase is voluntary and purely fortuitous," the Court held that "(R)equiring intervenors to establish unreasonableness is therefore no substitute for requiring proof of reasonableness." *Id.*

In further defense of their flawed methodology that was adopted due to the IT limitations, the Company points to prior Commission orders that approved a collections lag methodology it characterizes as "using midpoints similar to those in ComEd's presentation." ComEd Brief at

45. In addition, the Company opines that Mr. Subbakrishna's assumptions were conservative and that if alternative assumptions had been employed by the ComEd witness, the calculations would have "resulted in a large increase in the revenue collection lag figure." *Id.*

These arguments, too, are hollow upon closer examination. First, as noted in the AG Initial Brief, there is no evidence that the methodologies cited by ComEd in other cases mirror the one employed by ComEd. Second, no where in these orders is an analysis or an endorsement of using mid-point assumptions for interval aging data, or a discussion as to which intervals should be even included in a lead/lag study, a point Mr. Subbakrishna confirmed. Tr. at 1121. Even if the methodologies were the same in those dockets (and there is no evidence that, in fact, they are), intervenors' failure to challenge a utility proposal in those dockets does not mean that the utility has met its burden of proving the reasonableness of its proposed adjustments to rates under Section 9-201 of the Act in this docket. ComEd has failed to identify any litigated case before this commission where accounts receivable aging with mid-point assumptions was affirmatively found to be acceptable by the Commission.

Second, the argument that Mr. Subbakrishna's presentation of an alternative to the mid-point methodology resulted in a large increase in the revenue collections lag figure (thereby suggesting that his proposed mid-point methodology is conservative) is a red herring. A review of Mr. Subbakrishna's testimony on this point shows that unlike his proposed lead/lag computation in his Direct Testimony, to construct the alternative calculations he re-inserted the previously excluded receivables balances that are (1) more than 365 days old; and (2) associated with inactive accounts, both of which have the effect of significantly lengthening the collections lag for purposes of this calculation. ComEd Ex. 57.0 at 9. While Mr. Subbakrishna argues such older receivables are appropriate to include in his alternative computation (*Id.* at 10), his previous decision to exclude them in his proposed revenue collection lag figure (which includes the arbitrary mid-point assumptions) suggests otherwise.

In fact, Mr. Brosch pointed out that Mr. Subbakrishna's decision to include accounts receivables from the very old active account balances in the 91-120 and 121-365 aging intervals is just as arbitrary, with significant consequences for ratepayers. ComEd's own data show that a significant fraction of the receivables in the 121-363 Days column are expected to ultimately be uncollectible. For example, ComEd's expectation is that about 44 percent of receivables this old associated with serving Residential and SCI customers will ultimately become uncollectible. AG/CUB Ex. 1.0 at 21.[8] Knowing this, it's important for the Commission to remember that CWC allowances should be based upon measurement of the timing of the utility's *cash flow*. Uncollectibles accounts are not cash flow and, therefore, provide nothing to measure. ComEd has overstated its collection lag by including accounts receivables balances that will later be written off and must therefore by excluded from any CWC cash flow timing analysis. Given these facts, there simply is no reasonable explanation for Mr. Subbakrishna's decision to include all accounts in the 91-120 and 121-365 day categories in his Direct Testimony presentation. His attempted inclusion of the over-365-day accounts in his rebuttal alternative calculation, highlighted in the Company's brief as proof of conservatism, is nothing more than a rhetorical slight-of- hand.

Mr. Brosch clearly demonstrated the significance of the Company's decision to include both the 91-120 and 121-365 Days aging categories to the calculation of the overall revenue lag. He testified that if these categories of aged receivables were excluded**,** the resulting collection

[8] A copy of the ComEd response to AG 3.22, which shows this data, is attached to Mr. Brosch's Rebuttal testimony as AG/CUB Ex. 7.5.

lag would decline from ComEd's 39.16 days to only 13.23 days. When this lower collection lag is inserted into the ComEd lead/lag study, the overall revenue lag changes from 57.32 days to 31.38 days and CWC requirement is reduced by about $140 million, to yield a negative $45 million.[9] Likewise, if receivables aging data in only the 121-365 day interval is excluded from the analysis, the resulting collection lag would decline from ComEd's 39.16 days to 17.66 days and the resulting CWC would be negative $21.2 million in place of ComEd's originally proposed positive $95.7 million CWC allowance.[10] These significant changes to the calculation of CWC argue against any Commission decision to adopt the unsupported assumptions inherent in ComEd's CWC lead/lag study, and the substantial effects on customer rates they engender. The other deficiencies in ComEd's lead/lag study were outlined in the AG initial brief and will not be repeated here, except to note that correction of these other problems would produce a CWC allowance that is even further negative. *See* AG In. Br. at 40-44.

While Staff witness Bonita Pearce's offered some minor revisions to the Company's CWC study (Staff Initial Brief at 22-27), her acceptance of the lion's share of the arbitrary collection lag aging period assumptions employed by ComEd witness Nagendra Subbakrishna are similarly unsubstantiated by fact or analysis. The Company's acceptance of Ms. Pearce's recommendation to further disaggregate the 121-365 aging category retained the same flawed mid-point assumptions with regard to the 0-30, 31-60, 61-90 and 91-120 aging blocks for all customer classes. The bottom line impact of this revision for the 121 to 365 day aging block is a reduction in the overall collection lag days estimate from 39.16 days to 36.32 days, or a net reduction of only 2.84 days. Staff Ex. 18.0 at 35. This change in no way fixes the principal defect in the ComEd lead/lag study: its arbitrary use of mid-point assumptions in the various

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9 AG/CUB Workpaper MLB-WP-1 summarizes this calculation; AG/CUB Ex. 1.0 at 33.

10 AG/CUB Workpaper MLB-WP-2 summarizes this calculation. AG/CUB Ex. 1.0 at 34.

aging categories and its equally arbitrary inclusion of uncollectible accounts receivables data. This change also completely fails to bring the ComEd revenue lag into conformance with the range of revenue lag days being experienced by large energy utilities in other states. (AG/CUB Exh. 1.5, page 1) Conspicuously absent from Staff's Brief is any discussion of the appropriateness of these arbitrary assumptions. Staff Brief at 22-27.

As noted in the AG Initial Brief, Ms. Pearce admitted that she performed no independent analysis to determine whether this revision of the aging category and the continued use of mid-point payment assumptions for each of these new buckets are any more reliable than ComEd's arbitrary inclusion of the 121-365 category and mid-point assumption. Tr. at 2542-2543. Ms. Pearce offered no support for this proposed revision beyond observing in testimony that it produces less overstatement of the collection lag than is originally proposed by ComEd, and that the 30-day intervals matched what ComEd had used in other aging intervals. Staff Ex. 18.0 at 35; Tr. 2542-2543. Even more troubling is the fact that like Mr. Subbakrishna, Ms. Pearce conducted no independent analysis to determine whether adoption of the mid-point assumptions employed in the various aging categories accurately reflect ComEd's revenue collection activities before she implicitly endorsed the assumptions. Tr. at 2536-2539.

Thus, the Company's eleventh hour adoption of this one small modification in no way cures the arbitrary nature of the key assumptions impacted revenue collection lag days, and the inherently unreliable results of its fatally flawed lead/lag study.

For all of the reasons stated above and in the AG Initial Brief, the Commission should adopt a zero CWC allowance in this case.

### 5. 2009 Pension Trust Contribution

ComEd states that "Mr. Effron would simply penalize ComEd for not doing sooner what it did in 2009." ComEd In.Br. at 48. But the Company would not be penalized. If the jurisdictional pension contributions in the years 2006-2008 had been more than $13.3 million the Company actually made, Tr. 2367; ComEd Ex. 55.5, as compared with the jurisdictional pension costs accrued of $94 million in the same period, Id., the catch-up contribution in 2009 would not be necessary, and there would be no issue here.

ComEd tries to position itself as a victim of market forces, but that strategy is not supported by the evidence. The Company's asserts that "it was unnecessary to have made any additional contributions in prior years," ComEd In.Br. at 48, referring to its 2006-2008 contributions that were $80 million less than the recorded pension costs in those same years. Tr. 2367; ComEd Ex. 55.5. Yet the Company argues that its defined benefit pension plan was 40% underfunded by December 31, 2008 "due to the stock market crash in 2008 and persistent low interest rates," ComEd In.Br. at 46, completely ignoring its own role in underfunding for those years. As AG/CUB witness Effron explained:"[T]o the extent that the pension accruals are matched by contributions, there will be no increase in the prepaid pension asset included on the Company's balance sheet….Similarly, to the extent that contribution in 2009 was, in effect, a catch-up for the difference between accruals and contributions in the years 2006-2008, it should not be included in rate base." AG/CUB Ex. 8.0 at 9.

### 6. Capitalized Incentive Compensation

### 7. Customer Deposits

Both AG witness Brosch and Staff witness Scott Tolsdorf agree that the amount of customer deposits to be deducted in rate base is $130,510,000. AG/CUB Ex. 1.0 at 37-38; Staff Ex. 19.0 at 5-6; Staff In. Br. at 29-30. Both witnesses agree that (1) a year-end balance is more reflective of the growth in customer deposits experienced by the Company; and (2) all customer deposits, not just those attributed to jurisdictional delivery service, should be subtracted from rate base. *Id.*

On the first point, the Company argues that an average balance is appropriate because it "smoothes out seasonal variations" and provides a more accurate reflection of customer deposits. ComEd In. Br. at 50. The evidence, however, shows otherwise. As noted by AG/CUB witness Brosch, the balances of Customer Deposits have been consistently growing since 2006 and throughout 2009, as shown on Schedule B-13, pages 1 and 2. Therefore, utilization of the December 2009 amounts, in fact, are more representative of ongoing levels and better matched to the otherwise year-end 2009 rate base than ComEd's proposed 13-month average. *Id.* at 37. Mr. Tolsdorf agrees. Staff In. Br. at 29-30.

With nothing left to cling to, ComEd argues that "No party has presented any evidence showing that the three year "increasing trend" posited by Messrs. Brosch and Tolsdorf is likely to continue in the future." ComEd In. Br. at 40. This is a hollow argument that misstates the requisite burden of proof in a rate case. ComEd presented its purported level of customer deposits. Staff and intervenor witnesses countered with evidence that that amount was not representative of the Company's customer deposit experience. The Company has not sustained its burden of proof by arguing that intervenors have failed to show the trend they highlight will continue. It is the Company's burden to show that the Staff/Intervenor testimony is unreliable. They failed in that objective.

The second issue related to customer deposits deals with the Company's failure to include an amount of customer deposits that the Company asserts does not relate to delivery services. At Schedule B-13, page 1, ComEd summarizes its monthly 2009 "Total Company" and "Jurisdictional" Customer Deposits, and then carries forward a proposed 13- month average balance of the "Jurisdictional" amount, after subtracting "Interest Accrued on Customer Deposits in 2009" at line 15 of Schedule B-13, page 1. The resulting $44,705 amount is carried forward and included in rate base at line 18 of Schedule B-1. ComEd argues that including this non-descript non-jurisdictional amount is inappropriate because it would amount to Commission rate-setting outside the scope of its jurisdiction. ComEd still does not offer whether the customer deposit amount is related to supply or transmission. ComEd In. Br. at 51.

As noted in the AG Initial Brief, ComEd's jurisdictional allocation to its Customer Deposits balance is unorthodox because ComEd only serves two jurisdictions, with its transmission services regulated by the FERC and its retail delivery services regulated by the ICC. The Company's rate base investment is allocated between only these two jurisdictions, the FERC and ICC, where transmission function investments are subject to the Company's Transmission Formula Rate.[11] The Company's most recent FERC Transmission rate adjustment filing was provided (via internet link) in response to Data Request No. AG 5.01 and that filing shows ComEd's asserted FERC rate base is <u>not</u> reduced for any Customer Deposits amounts. Therefore, 100 percent of Customer Deposits balances should be attributed to retail delivery services that are regulated by the ICC.

Staff witness Tolsdorf agreed, noting that the delivery service tariffs govern ComEd‟s ability to collect customer deposits. Thus, all customer deposits collected pursuant to those delivery service tariffs should be considered in the determination of tariffed delivery service rates. Staff In. Br. at 30.

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[11] These jurisdictional allocations of Plant are discussed at ComEd Ex. 6.0, lines 486-500.

In assessing this issue, the Commission should be mindful that Customer Deposits are deducted from rate base to recognize such amounts as a low-cost source of capital that can be used to finance Plant in Service and other rate base investments. *ComEd has no rate base investment associated with energy supply costs.* To the extent the principal balances associated with individual customer's deposits are used to offset otherwise uncollectible energy costs, the resulting avoided bad debt expenses do not change the fact that Customer Deposits in the aggregate, while held by ComEd prior to application to uncollectibles, represent a source of low cost financing that must be included in rate base. AG/CUB Ex. 1.0 at 38-39.

As shown in AG/CUB Ex. 7.6, ComEd has presented no evidence to support its contention that any of the Company's Customer Deposits are non-jurisdictional. AG/CUB Ex. 7.6. While the response asserts that the deposits at issue "are not associated with the provision of delivery services," the Company fails to explain what this mystery jurisdiction is. The evidence shows that no Customer Deposits were used to reduce rate base in the Company's FERC transmission rate filing. Customer Deposits have not been a component of rate base in ComEd's most recent prior delivery service cases (Docket Nos. 05-0597 and 07-0566). The Brosch/Tolsdorf-recommended adjustments (shown in AG/CUB Ex. 7.1, Schedule B-8) should be adopted.

The Company concurs that interest on customer deposits should be added as an expense item, and does not dispute this AG/CUB/Staff adjustment.

#### 8. Material and Supplies Inventories

#### 9. Severance Cost – Regulatory Debit

See Section V.c.3.h-Severance Expenses of this brief.

### D. Rate Base (Total)

## V. OPERATING EXPENSES

### A. Overview

### B. Potentially Uncontested Issues

#### 1. 2009 Amortization adjustment of Existing Regulatory Assets (Staff)
#### 2. Outside Professional Services – Jacobs Consultancy (Staff)
#### 3. Advertising Expense (Staff)
#### 4. Investment Tax Credit Amortization (AG)

The Investment Tax credit Amortization issue does not appear to be a contested any longer. ComEd stated in their Initial Brief:

> ComEd has agreed to the proposal by AG/CUB witness Effron to reduce income tax by $113,000 by including the amortization of proceeds from the sale of investment tax credits in ComEd's income tax expense. Fruehe Reb., ComEd Ex. 30.0 Public, 13:262-68.

ComEd In. Br. at 54.

Reflection of the amortization of this credit reduces pro forma jurisdictional income tax expense by $113,000 (Schedule DJE-2.4), and should be adopted by the Commission. AG/CUB Exhibit 2.1 at 18; AG Brief at 49.

### C. Potentially Contested Issues

#### 1. Incentive Compensation Cost and Expenses
#### 2. Rate Case Expenses

##### a. Rate Case Expenses of the Instant Case

ComEd requests that the Commission allow it to include $8.5 million in rate case expenses in determining ComEd's revenue requirement. Fundamentally, although ComEd cites Section 9-229 of the Public Utilities Act at the end of its Rate Case section, it fails to provide the Commission with a "specific assessment" of its legal and expert witness costs as required by Section 9-229. ComEd Ini. Br. at 64; 220 ILCS 5/9-229. Instead, ComEd relies on the fact that in its 2007 rate case, decided before Section 9-229 was enacted in 2009, it recovered $10.5 million in rate case expense, which it suggests makes the current $8.5 million request acceptable.

ComEd Ini. Br. at 59. The size of its prior rate case is not relevant to the standard established in Section 9-229, and ComEd's extraordinarily large rate case expense in 2007 does not justify its equally extraordinarily large rate case expense in this case.

ComEd's rate case expense is extraordinary in comparison to the rate case expenses allowed other utilities. For example, in the last Ameren Utilities rate case, involving six different companies and six sets of rates, the Commission approved $4,662,000 in rate case expense. AG/CUB Ex. 9.0 at 31. In the last Illinois American Water Company rate case, the Commission approved a requested $2,339,496 rate case expense, over the objection of the People who identified specific expenses that were unreasonable. Docket 09-0319, Order at 72-75 (April 13, 2010). The $8.5 million requested by ComEd, for a unified rate for a single company, is excessive even without regard to the specific assessment of the components of the charge. The fact that ComEd recovered $10.5 three years ago just demonstrates the importance of the specific assessment of this cost item mandated by Section 9-229.

In response to the extensive adjustments recommended by AG/CUB witness Ralph Smith, ComEd cites to the testimony of ComEd witness Martin Fruehe. For example, the People recommend that $225,000 for Economic Development/Jobs Creation issues be disallowed as irrelevant to ComEd's rate request. Citing Mr. Fruehe's testimony, ComEd argues that Chicago Partners, which assessed hourly billing rates of $580.00 and $980.00, "was instrumental and very valuable in helping to frame the issues and provide additional avenues of research and exploration." ComEd Ini. Br. at 60. In addition to lacking the specificity required by Section 9-229 or sufficient detail to meet the Company's burden on proof to justify this cost, Mr. Fruehe's testimony was significantly vaguer. Mr. Fruehe simply said:

In preparation for this rate case, ComEd sought the opinion and assistance of several

> consultants, one of which was Chicago Partners. Although ComEd ultimately chose to present the testimony of Dr. Hewings and Dr. Andrade in regards to the issue of Economic Development and Jobs Creation, it does not diminish the upfront investigation of the issue. This is similar to Staff's proposal to remove all the costs associated with Dr. Hewings and 50% of the costs associated with Dr. Andrade. ComEd should be allowed to recover its costs of preparing its case.

ComEd Ex. 56.0 Rev. at 14. Consumers should not be asked to pay $101,000 to a firm that conducted vague "upfront investigation of this issue," particularly when the issue is unrelated to ComEd's cost of service or cost of capital, the consultants did not offer testimony, and the testimony that was offered on the (irrelevant) issues was billed at a fraction of Chicago Partners' charges.

ComEd further argues that the Commission should allow it to recover the costs of ComEd witnesses Hewings and Andrade because their testimony was ultimately admitted to the record. ComEd Ini. Br. at 60-61. ComEd does not mention that the costs of those witnesses were $15,000 and $26,000 respectively. Staff Ex. 17.0, Sch. 17.01. Staff Ex. 2.0, Sch. 2.04, page 2, lines 6, 9. Yet, ComEd seeks $225,000 for $41,000 in witness costs. Even if the Chicago Partners bill is included – which it should not be – ComEd is asking ratepayers to pay close to $83,000 more than its incurred cost and $184,000 more than its actual witness cost. This over-statement of costs is indicative of the problems with ComEd's rate case expense, requiring that the rate case cost be reduced.

In response to AG/CUB witness Smith's recommendation that ComEd be limited to a normal cost of capital expense, ComEd tries to justify the testimony of multiple cost of capital witnesses by describing the purpose of their testimony. ComEd Ini. Br. at 61. However, these descriptions merely demonstrate the paucity of the testimony for which ComEd is trying to charge ratepayers $160,000. Dr. Tierney's testimony supported a unique adder to ComEd's profit level, as if the more standard cost of capital analyses provided by ComEd's cost of capital witnesses were inadequate. In addition to the excessively high charges for that expert testimony,[12] the Commission's review and rejection of the recommendations in that testimony will justify the refusal to pass the cost of that testimony on to consumers. ComEd describes the Abbott/Fetter testimony as addressing why maintaining or improving ComEd's credit rating is critical. However, is it "just and reasonable" to charge consumers $100,000 to have an expert tell the Commission that there is a relationship between improved credit ratings and increased revenue? See ComEd Ini. Br. at 61. As ComEd witness Philip O'Connor and Steven Fetter both testified, credit ratings are merely opinions, and not always accurate. E.g., Tr. at 191, 1800, ComEd Ex. 45 at 10. There is no question but that the Commission must base its ratemaking decisions on Illinois law and the cost information provided in the record – not on the opinions of credit agencies. Tr. at 194. The opinions of credit ratings are just that – opinions. They are derived from multiple factors, such as, and in some cases capped by the ratings of a parent company. Tr. at 239.[13] Credit agency ratings are not relevant to ratemaking, and consumers should not be asked to pay $100,000 to witnesses who testify about the opinions of credit rating agencies in an attempt to increase rates.

ComEd also responds to AG/CUB witness Smith's recommendation that the $100,000 for Sullivan and Associates be disallowed because the Company did not provide any description of the services provided. ComEd Ini. Br. at 61-62. Although not cited, ComEd refers to Mr. Fruehe's *surrebuttal* testimony, which is the first time in discovery or testimony that ComEd

[12] ComEd is charging consumers Dr. Tierney's hourly rate of $655 per hour. Her cost overruns, which had her billing more than $213,000 on a $100,000 estimate as of November 30, 2010, should not be passed on to consumers. ComEd Ex. 56.3, page 2, line 20; Tr. at 1823.

[13] ComEd witness Joseph Trpik testified that Standard and Poor's will not rate a subsidiary like ComEd at a higher level than it rates its parent, i.e. Exelon Corp. Tr. at 239.

described Mr. Sullivan's services. ComEd Ex. 56.0 3rd Rev. at 16-17.[14] ComEd argues that Sullivan and Associated provided assistance with Part 285 filing requirements and responses to data requests. *Id.* However, ComEd does not explain why the $150,000 for Mr. Sullivan 's services were not subsumed in the $570,000 for Administration and Support Functions, Discovery Contractor, and Prepare Data Room. See ComEd Ex. 56.3, page 2. Further, these expenditures are in addition to rate case support provided by ComEd and Exelon Business Services employees, which is not included in the rate case expense. Tr. at 1947-48.

ComEd's *ad hoc* defense of its rate case expense fails to account for all of the over-estimates and multiple estimates Mr. Smith identified and removed in his adjustment.

ComEd responds to Mr.Smith's disallowance of amounts that over-estimate costs by arguing that ComEd is "on track" to spend the full amounts identified. ComEd Ini. Br. at 63. However, the amounts ComEd identifies exclude the $890,000 ComEd requests for "Post Direct Testimony" despite the fact that the expenditures through November 30, 2010 include ComEd's rebuttal testimony, which was filed on November 22. It is not credible that the remaining surrebuttal testimony and cross examination would result in billing *higher* than direct and rebuttal testimony combined. The record is silent on any actual billing or expenditure for $890,000 ComEd asks for "Post Direct Testimony."

A specific assessment of rate case costs requires that the Commission protect consumers from excessive rate case costs. Although the courts have recognized rate case expense as a valid test year expense, it must be "just and reasonable" and multiple entries for similar service and over-estimates of costs are not "just and reasonable."

[14] Staff witness Hathhorn testified at the hearing that she thought that Sullivan & Associates "looked like a bunch of policy-thinker-type people, but I don't know exactly what they do." Tr. at 1974.

**b. Alternative Regulation Case – Legal Expenses. Given the lack of detail, the Commission should reduce ComEd's claimed legal fees by 50% to remove the effect of the Alt Reg litigation.**

ComEd argues that no disallowance for legal services related to ComEd's pending alternative regulation case is appropriate because "virtually all of these costs would have been incurred even in the absence of the Alt Reg proceeding because …[R3] agreed to a flat rate for all work." ComEd Ini. Br. at 64. This argument highlights the difficulty with fixed rate fee agreements. It is difficult to discern what portion of a charge is attributable to which services, yet it is not credible to expect a firm to accept the same fee for a rate case plus a novel petition for alternative regulation, involving an untested statute and unique cost recovery methods. See Staff Ex. 17 at 4. If the fee is high enough for the firm to "throw in" an alternative regulation petition, the fee is too high for simple a rate case and an adjustment is necessary.

In assessing the level of attorney's fees in fee shifting civil litigation, Illinois courts have required that time records be produced to guard against the risks of overstatement of costs. In *Fiorito v. Jones*, 72 Ill.2d 73, 90-91 (1978), the Court said:

> unless time spent and skill displayed be used as a constant check on applications for fees, there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation.

In this docket before the Commission, the Commission needs more detail than a fixed fee contract to serve as a "check" in the same way that a Court requires itemized billing in a fee shifting, class action setting.

ComEd argues that it negotiated with potential service providers and sought the most competitive rates. However, Illinois courts have been clear that the reasonableness of fees "cannot be determined on the basis of conjecture or on the opinion or conclusions of the attorney seeking the fees." *LaHood v. Couri*, 236 Ill.App.3d 641, 648 (1992); *Kaiser v. MEPC American Properties, Inc.*, 164 Ill.App.3d 978, 984 (1987). In *LaHood* the Court reversed a trial court order to the defendant to pay the plaintiff's attorney's fee because the plaintiff did not provide sufficient records to demonstrate that its fees were reasonable. "In assessing whether attorney's fees are reasonable, the petitioner must provide sufficient information, including detailed time records that were kept throughout the proceeding." *McNiff v. Mazda Motor of America, Inc.*, 384 Ill.App.3d 401, 407 (2008)(internal quotation marks omitted). The type of records the court "routinely sees" include "the date the services were rendered, a description of the services, the hours, the fee rate, and the total dollar amount." *Id*. Courts regularly discuss attorney fee petitions in their orders, including the hourly rates and charges of specifically named attorneys. See, e.g., *id*.; *McHenry Savings Bank v. Autoworks of Wauconda, Inc*., 399 Ill. App. 3d 104, 108 (2010); *Demitro v. General Motors Acceptance Corp*., 388 Ill.App.3d 15, 24 (2009); *Mobil Oil Corp. v. Maryland Casualty Co*., 288 Ill. App. 3d 743, 759 (1997); *Fitzgerald v. Lake Shore Animal Hospital*, 183 Ill.App.3d 655, 662 (1989); *Kaiser v. MEPC American Properties, Inc*., 164 Ill.App.3d 978, 982 (1987); *Metropolitan Sanitary Dist. of Greater Chicago* ex rel *William F. O'Keeffe v. Ingram Corp.* et al., 85 Ill.2d 458, 480 (1981).

In a fee shifting situation, the ordinary incentives applicable to the parties who pay out of their own pocket are either absent or not as strong because someone else is ultimately responsible for the bill. The need to assess the reasonableness of costs for services that one party (the utility) obtains, but another party (ratepayers) pays, requires that all relevant details are provided. Under such circumstances, courts require that the party seeking fees demonstrate reasonableness by producing "detailed information concerning the nature of the actual time expended in each of the legal tasks performed, the identity of who performed them, how they related to the litigation and whether they were necessarily required." *Mars v. Priester*, 205 Ill.App.3d 1060, 1065 (1990). Representations by the party seeking fees that the fees are "reasonable" are insufficient, yet that is precisely what ComEd is doing in connection with $4.025 million in attorney's fees. Although more detail has been produced in connection with the unredacted portion of the remaining $975,000 in attorneys fees, the bulk of the legal services charges are essentially a "black box."

The fact that no itemization of legal services was provided for the $4.025 million fixed fee contracts also prevents the Commission from assuring that only rate case expenses are included in the work under the fixed fee contact. In *Rexam Beverage Co., v. Bolger*, 620 F.3d 718, 738 (7th Cir. 2010) the Seventh Circuit Court of Appeals noted the problem when there are several issues or services combined in a single bill. The Court said: "We are more troubled by the potential entanglement of attorneys' fees relating to the repair claims and those not authorized by the lease."

Under Section 9-229 of the Public Utilities Act and under prior Commission practice, the cost of a rate case has been included in the rates consumers pay. However, Section 9-229 requires a specific assessment of legal expenses and the lack of specificity to support the legal expense makes it impossible for the Commission to conduct the assessment required by the statute. ComEd provided no information in its Initial Brief to remedy this deficiency.

### 3. Administrative and General (A&G) Expenses

#### a. Exelon Way Severance Amortization

ComEd makes several assertions about the nature of its Exelon Way Severance Program that ultimately disprove the fairness of the Company's request for continued recovery of the costs associated with this program. On page 65 of its Initial Brief, ComEd implies that the

Company continues to realize savings associated with the Exelon Way Severance program. ComEd In. Br. at 65. But there is no evidence to support this suggestion. The Exelon Way Severance program was an early retirement program that took place in 2003 and 2004. Given that the program was implemented seven years ago, it is likely that a significant number of the employees taking early retirement at that time would have retired by now, even if there had been no program. All of the employees accepting early retirement would have retired at some point even in the absence of the program. To the extent that the employees would have retired even in the absence of the program, the savings attributable to the program cease to exist. Therefore, it would be improper to assume that significant savings from the Exelon Way program are still continuing after seven years.

The Company also represents in its Initial Brief that AG/CUB witness Effron recommends the Commission should eliminate $18.8 million from the Company's operating expense proposal to end any further recovery of Exelon Way severance costs approved in Docket No. 05-0597. ComEd In. Br. at 65. The Company is correct when it states that the Commission's orders in Docket Nos. 05-0597 as well as 07-0566 allowed for recovery of Exelon Way costs. However, neither of those orders addressed the date on which amortization was deemed to have begun or when the amortization would be complete. In fact, as the Commission's order in Docket No. 05-0597 reflected a full year of *actual* Exelon Way Severance expense in 2004, which was test year in that case, ComEd's recognition of these costs must have begun in that year. Tr. 2373-2375. Yet ComEd insists that the expenses for this program somehow began to accrue in a vacuum in 2004, without any relationship to tangible savings, as if the Company would have embarked on the initiative without the certainty it would save money in the long run. This is simply not believable. With a 7.5 year amortization period beginning no later than 2004, it must logically follow that the recovery of costs will be complete in mid-2011.

The Company's characterization of Mr. Effron's recommendation as disallowing recovery of 40% of the Exelon Way costs is also off base. The Company began experiencing savings form this program in 2004, and those savings were not reflected in rates until 2007. Thus, the savings in the years 2004, 2005, and 2006 were available to the Company to recover the cost of the program. A proper matching of costs and benefits requires amortization of the costs of the program to have begun in 2004, which means that, with a 7.5 year amortization period, the amortization will be complete in mid-2011.

**b. Accounts 920-923**

**c. Pension Costs**

**i. Recovery of Actuarially-Determined 2010 Pension and OPEB Costs (Uncontested b/t Company and Staff)**

**ii. 2005 Pension Funding Cost Recovery**

**d. Wages and Salaries *Proforma* Adjustment**

On pages 69-70 of its Initial Brief, ComEd asserts that the AG/CUB recommendation to reflect reductions to the number of employees "should be rejected because ComEd's proposed revenue requirement already takes into account $3.69 million in what ComEd has already determined are sustainable savings from the reductions." ComEd misstates the purpose of the AG/CUB adjustment, which is necessary to reflect reductions to the number of employees *beyond* the reduction recognized by ComEd. There is no dispute that the employee reductions Mr. Effron reflects in his adjustment have taken place as shown on the table on page 77of the People's Initial Brief. Further, there is no evidence of the reductions being reversed.

The assertion that “the proposed disallowance overlooks offsetting increases in overtime and fringe benefits” is without merit. ComEd did not cite Mr. Effron’s prefiled testimony and exhibits or cross-examination to support is assertion. In fact, the adjustment proposed by Mr. Effron explicitly takes into account offsetting increase in overtime and incorporates changes in fringe benefits in the quantification of the proposed adjustment. AG/CUB Ex. 8.0. Sch. DJE-2.2a. The Commission should adopt the adjustment to ComEd’s wages and salaries recommended by CUB/AG witness Effron so that the wages and salary expense included in rates accurately reflects the reduction in employee levels from 2009.

**e. Director Fees and Expenses**

**f. Corporate Aircraft Costs (Uncontested b/t Company and Staff)**

**g. Perquisites and Awards**

ComEd provided a general defense of its requested $3.495 million in discretionary perquisites and awards. ComEd In. Br. at 72-73. It argued that “the majority of the expenses represent retention awards, special recognition performance awards and meter reader performance awards designed to improve accuracy and completeness of meter reads.” ComEd In. Br. at 72. Although not provided in ComEd’s Initial Brief, AG/CUB witness Smith itemized the expenses that made up these costs and identified those that should not be included in rates. He pointed out that $566,000 was inappropriately allocated from affiliates and added to the annual incentive compensation plans. AG/CUB Ex. 3.0 at 54. Another $1.425 million was for “retention awards” and *was higher than the last three such awards combined*. AG/CUB Ex. 3.0 at 55. Another $837,000 was for discretionary payments as low as $5.00. ComEd has not indicated what portion of these amounts is for “meter reader performance awards.” The payments as low as $5.00 are discretionary, and it is far from clear that they are provided to meter readers at any significant levels. ComEd’s Initial Brief failed to either present the components of the perquisite and awards expense or to address the problems Mr. Smith identified with that expense.

Mr. Smith made reasonable adjustments to these charges to reduce the payments that are additive to ComEd's incentive compensation plan and that are allocated from ComEd's affiliates; to reduce extraordinarily high retention awards; and to reduce the amount of small, discretionary payments by 50% to reflect the uncertain nature of these payments. People's In. Br. at 78-79. The Commission should adopt these adjustments to bring the Perquisite and Awards Expense to a reasonable level.

#### h. Severance Expenses

At pages 73-74 of its Brief, ComEd cites the Commission order in Ameren's rate case, *Central Ill. Light Co., et al.*, ICC Dkt. Nos. 09-0306 (*cons.*), (Order April 29, 2010) as support for its request to include amortization of the 2009 severance costs in its revenue requirement. This argument is faulty because the circumstances of that case were completely different. Ameren's work force reduction took place in November and December of 2009 (ICC Dkt. Nos. 09-0306 (*cons.*), Order April 29, 2010, p. 106), which was shortly before the rates in ICC Dkt. Nos. 09-0306 (*cons.*) went into effect. Thus, the period when Ameren was able to retain the savings from the workforce reduction for shareholders was negligible. Given that Ameren had so little time to retain the savings from workforce reduction before those savings were passed on to ratepayers, the Commission's adoption of the Ameren proposal to amortize the cost of the program over three years was perfectly logical.

This contrasts to the circumstances of the present case, where ComEd will have retained the savings from its 2009 severance program for nearly two years before the rates in Docket No. 10-0467 go into effect. It is the period between when ComEd began experiencing savings and when the savings will be reflected in rates that is at the heart of the recommendation of both Staff and AG/CUB. ComEd retained substantial savings from its severance program, whereas Ameren did not. Therefore, the suggestion that the Commission's treatment of the cost of the workforce reduction in the Ameren case should inform the Commission's decision in the present case is without merit.

The Company's reference to Docket 08-312 should also be given no weight. ComEd In. Br. at 75. That docket addressed the effect of a change in accounting policy related to the capitalization of repair costs, not the treatment of costs associated with a severance program and has no relevance to the present case.

For all of the reasons discussed above and in the AG Initial Brief, Mr. Effron's proposed adjustment should be adopted.

**i. Charitable Contributions**

ComEd argues in its Brief that the only proper tests for evaluating the reasonableness of charitable contributions are whether the donation is made for "charitable, scientific, religious or educational purposes" and whether it is "reasonable in amount." ComEd In. Br. at 78; Fruehe Sur., ComEd Ex. 56.0 3rd Rev., 6:123-28; 220 ILCS 5/9-227. ComEd avers that its $6.3 million of charitable contributions qualify on both counts and should be approved in their entirety.

This argument, however, suggests that any proposed reductions or sharing of charitable donation expense is contrary to Section 9-227 of the Act. In fact, Mr. Brosch's recommendation that shareholders contribute to the expense in order to reach a reasonable amount for ratepayer recovery in no way contradicts Section 9-227. The thrust of AG/CUB witness Brosch's testimony and recommended sharing method is that passing on one hundred percent of $6.3 million in discretionary spending to ratepayers is unreasonable and excessive. The sharing method is recommended in order to give ComEd an incentive to not only prioritize its charitable funding, as noted by ComEd, but also to reduce the amount of overall contributions that are being charged back to customers. ComEd In. Br. at 76.

Furthermore, Mr. Brosch's recommended sharing scheme does not violate Section 9-227 of the Act. Specifically, this 50-50 sharing method is not a "rule" that would be used as an authoritative standard or norm in future proceedings to establish whether charitable contributions may be included as operating expenses. The determination must be made on the evidence presented for each case when evaluating the reasonableness of the amount. Indeed, it is ComEd that suggests this Commission adopt a rule based on previous allowed charitable contributions. ComEd In. Br. at 77. In this case, the sharing method should be implemented to recognize that many ratepayers are currently facing financial difficulty (*see* AG Ex. 5.0 at 9-50 [Direct testimony of Roger Colton]) and ComEd's charitable contributions are discretionary costs. The adjustment Mr. Brosch proposes is exactly the kind of balancing of ratepayer and shareholder interests that the Commission is required to take into account as it sets rates, especially in these times of economic uncertainty and given evidence of ratepayer financial difficulties in the ComEd service territory supplied by Mr. Colton. AG Ex. 5.0 at 9-50.

In addition, ComEd gives the wrong impression by claiming that its charitable contributions are not out of the ordinary. ComEd In. Br. at 78. By claiming that the average contribution level of 23 utility companies in 2008 was more than one-third higher than the $6.3 million ComEd currently seeks, ComEd would have this commission believe that its policy of charitable contributions is on par with the industry norm. *Id.* However, as noted in Mr. Brosch's testimony, most public utility companies outside of Illinois make contributions out of *earnings*, not fees charged back to ratepayers. AG/CUB Ex. 1.0, 47: 1038 – 1040. The statistics ComEd cites before this commission are the average practices of utility companies throughout the U.S., not just in Illinois. ComEd Ex. 30.0 at 8:166-71. If ComEd truly wants its method of making contributions to be in line with industry norms, one hundred percent of the contributions should come from the shareholders, notwithstanding Section 9-227 of the Act.

Mr. Brosch's recommended sharing method, which would result in a reduction of $2,803,000, should be adopted to reflect a reasonable amount of charitable contributions made on behalf of ratepayers. AG/CUB Ex. 7.1, Schedule C-17.

#### j. Legal Fees – IRS Dispute

ComEd describes its use of a labor allocator to allocate all costs in Account 923 and claims because this allocation method achieves a fair, overall allocation of expenses to the distribution function, it is unfair to "cherry pick" one cost from the account as non-distribution-related. ComEd Brief at 78-79. The Company, however, fails to note that the allocation to which it refers is the allocation between distribution and transmission. The legal expenses at issue relate to generation. There simply is no dispute on this fact. Staff agrees and has adopted the AG/CUB adjustment on this issue. As Staff stated in their Brief:

> The Company does not dispute the nature of the fees as originating from the fossil plant tax dispute, but argues that since the fees were recovered to account 923, a general allocator should be used. (ComEd Ex. 30.0, pp. 10-11) While it is reasonable to sometimes allocate a portion of costs to delivery service when those costs benefit multiple functions, it is never reasonable to include a cost in delivery service when it is definitely known that the cost is not related to providing delivery service Improperly recording such a cost as if it was a jurisdictional cost does not cure the problem. The Company has presented no evidence that the fees were properly recorded as jurisdictional and therefore, they must be disallowed. (Staff Ex. 17.0, pp. 11-12.) (emphasis added)

Staff Brief at 54-55. As these legal expenses relate to generation, they should be removed before there is any allocation between distribution and transmission.

The Company also argues that "(t)o 'cherry pick' one cost from the account because it is not distribution, but to overlook all of the other costs that may be exclusively distribution but are allocated only in part to the distribution function, or that may be more closely distribution than suggested by the allocator, improperly biases the distribution revenue requirement downward." ComEd In. Br. at 79. The Company, however, cites no examples of any "other costs that maybe exclusively distribution but are allocated only in part to the distribution function, or that may be more closely distribution than suggested by the allocator," and there is no evidence any such costs were incurred in the 2009 test year. *Id.*

Therefore, the Company's pro forma jurisdictional O&M expenses should be reduced by $2,187,000. (Schedule DJE-2.2b) AG/CUB Exhibit 2.1 at 11; AG Brief at 84.

#### k. Professional Sporting Activity Expenses

Although ComEd agreed that it is only seeking recovery of $64,000 in expense and $8,000 in rate base for sporting events, it failed to explain why it is appropriate to move any of these expenses from the "below the line" treatment provided in its FERC accounts. ComEd In. Br. at 72-72. The entire amount should be disallowed as discussed in the People's Initial Brief at pages 84-85.

#### l. Workforce Expense Reduction

### 4. AMI Pilot Expenses
### 5. New Business Revenue Credit
### 6. Tax Repair Methodology – New IRS procedures

ComEd disagrees with the recommendation of AG witness Dave Effron to "require ComEd to maintain the effect of any future adjustment in a 'reserve account' and accumulate future additions to the enhanced deduction from the effective date of the accounting change so that the accumulated revenue requirement impact of this changed policy can be 'credited to customers and recovered with appropriate 'carrying charges' at the time of ComEd's next rate case. AG/CUB Ex. 2.0, 33:741-49; ComEd In. Br. at 82.

In support of their position the Company maintains that, "ComEd is collaborating with the Edison Electric Institute and other electric utilities to obtain specific implementation guidance from the IRS in order to request the described change in accounting." ComEd In. Br. at 82. Numerous other utilities, however, have already implemented this tax accounting change. AG witness Dave Effron described the immediate tax benefits these companies received from making the repair allowance deduction. AG Brief at 88-90. In fact the People request that the Commission take administrative notice, pursuant to 83 Ill.Admin.Code Part 200.640, of the fact that the recently filed general rate increase tariffs of The Peoples Gas Light and Coke Company ("Peoples Gas") include recognition of the Company's stated intention to implement this tax change. The Company, in the pre-filed testimony supporting these tariffs, described this ratemaking change as follows:

> [c]onceptually, the change in the capitalization of repairs for tax purposes is to align the determination of what is a repair or maintenance activity versus a capital expenditure based on what is allowed for tax purposes as opposed to our historical practice, which generally followed the determination made for financial and regulatory accounting purposes.

PGL Ex. 10.0 at 6 (Direct testimony of John Stabile) (No docket number has yet been assigned to this filing). In doing so, PGL witness Stabile noted that "Peoples Gas is making the change at this time because it is becoming more common in the utility industry to do so." *Id.* at 7.

Additionally, Mr. Stabile discussed benefits of the accounting change and stated:

> [the change] will increase the balance of Peoples Gas' deferred income tax liability associated with plant in service. This increased deferred tax liability will decrease Peoples Gas' capital requirement needs, rate base, and revenue requirement.

*Id.* at 8.

Since the Company has discretion as to when this tax accounting change will be implemented, ComEd should not be allowed to game the timing of this tax change so as to maximize the retention of the benefits of the tax savings for shareholders, at the expense of ratepayers. Therefore, If ComEd implements this change before the record in this case closes, then its rate base should be adjusted to reflect the additional ADIT related to the incremental deduction.[15] Otherwise, the Commission should require that the Company 1) maintain the effect of any Section 481(a) adjustment related to the new repair allowance in a reserve account; and 2) keep a record of any increase to the ongoing repair allowance deduction from the effective date of the accounting change. The cumulative revenue requirement effect of the change in accounting for repair allowances, with appropriate carrying charges, should then be credited to customers at the time of the Company's next rate case.

### 7. Depreciation of Intangible Plant

AG witness Dave Effron supports a reduction of amortization expense of $4.987 million, reflecting elimination of amortization on 2002 and 2005 vintage plant (which will be completely retired by March 31, 2011). AG/CUB Ex. 2.0, 27:595-617; AG/CUB Ex. 8.0, 19;412-430; ComEd In. Br. at 84. Nonetheless, the Company mistakenly describes the proposed adjustment to reduce the pro forma amortization of intangible plant for plant becoming fully amortized as "an attempt at single issue ratemaking." ComEd In. Br. at 84..

[15] AG/CUB witness Effron indicates the IRS could issue further guidance on implementing the change in accounting for repairs later this year. AG/CUB Exhibit 2.0 at 33.

This argument is baseless. ComEd, in fact, has reflected amortization of intangible plant being added after the end of the test year. As this intangible plant is added, older vintages of intangible plant will become fully amortized. If it is appropriate to recognize amortization on post-test year additions to intangible plant, it also appropriate and consistent to recognize prospective reductions to amortization expense from the completion of amortization on certain vintages of intangible plant. In fact, that is exactly what the Company has done with regard to depreciation of distribution plant, where increases to depreciation expense from post-test year plant additions is offset by reductions to depreciation expense from the retirement of distribution plant. The same symmetry should be applicable to intangible plant. If any party is proposing single-issue ratemaking, it is the Company, who proposes to recognize increases in amortization of intangible plant related to post test year additions, but wants to ignore the effect of the completion of amortization of intangible plant on certain vintages after the end of the test year.

Therefore, the AG/CUB recommendation that the amortization of intangible plant that becomes fully amortized subsequent to the test year be eliminated from the pro forma depreciation and amortization expense should be adopted by the Commission.

**8. Late Repayment Charge Reclassification**

**9. Illinois Electricity Distribution Taxes**

One of the taxes other than income taxes that must be paid by ComEd is the Illinois Electric Distribution Tax ("IEDT"). At ComEd Schedule C-2.17, the Company has proposed a ratemaking adjustment to increase the recorded amount of this tax by $7.0 million so as to reflect weather normalized sales volumes subject to the tax and to also recognize a six-year average of the annual IEDT "credits" that have been received historically from the Illinois Department of Revenue ("IDOR") for this tax. The Company is proposing a total test year IEDT in the amount of $108.8 million, which is excessive given more recently available information. ComEd In. Br. at 85; AG/CUB Ex. 1.0 at 51.

As noted in the AG Initial Brief, the AG/CUB Schedule C-19, shows AG/CUB witness Brosch's updated calculation of the IEDT based upon ComEd's actual IEDT taxes paid in the 2009 test year, reduced by the Company's most recent estimate of the IEDT credit that is expected to be received for tax year 2009. The source of the 2009 Estimated IEDT credit Mr. Brosch proposed at line 2 of Schedule C-19 is based upon (1) ComEd's analysis of historical taxes paid by each Illinois electric utility; (2) the statutory cap limiting total tax receipts from all utilities; and (3) changes in CPI that influence the revenue cap, as set forth in the Company's response to Data Request AG 9.02, Attachment 2. A copy of this response is included as AG/CUB Exhibit No. MLB-1.8.

ComEd disputes Mr. Brosch's calculation of the Illinois Electric Distribution Taxes, arguing that Mr. Brosch's approach mixes the 2009 tax with a credit that is not applicable to 2009 because the credit lags the tax by three years (resulting in a mismatch), and that "(U)se of the six-year average of the credit will smooth out year-to-year fluctuations and will provide a better estimate of the net amount of the tax ComEd will pay in a given year." ComEd In. Br. at 86.

These smoke-and-mirrors arguments, however, should be rejected. As noted in the AG Initial Brief, Mr. Brosch testified that the Company's estimation of a weather normalized IEDT produces a large upward adjustment amount that fails to account for the fact that total receipts under this tax are capped on a statewide basis pursuant to the Public Utilities Revenue Act (35 ILSCS 620). The adjustment proposed at AG/CUB Schedule C-19 is based upon the Company's own analysis of how the IEDT tax upon each Illinois utility will interact with the statutory revenue cap to produce refunds to each utility.[16]

If the Company's proposed weather normalization of sales is used as the basis to calculate a much larger tax than ComEd actually paid in 2009, as suggested by Mr. Fruehe, the Commission should adopt Mr. Brosch's calculation of the net IEDT tax, rather than the Company's calculation. ComEd's calculation at Schedule C-2.17 employs weather normalization to estimate the gross tax, but a six-year average of historical IEDT credits to estimate the offsetting tax credit under the statutory revenue cap. Critically important is the fact that no analysis was conducted by ComEd to determine which of the six historical years that were averaged had abnormally mild or severe weather and correspondingly large or small taxes subject to the revenue cap. The adjustment proposed by AG/CUB is the only approach that explicitly accounts for the statutory revenue cap in a way that properly synchronizes statewide taxable revenues, gross taxes and credits.

The AG/CUB adjustment is reflected in Schedule C-19 of AG/CUB Exhibit 7.1, and should be adopted.

**10. Depreciation and Amortization Expenses (Derivative and Direct)**

**11. Regulatory Asset Relating To Tax Liability for Medicare Part D (Uncontested between Company and Staff)**

ComEd states in their Initial Brief that the ten-year amortization period of the regulatory asset being proposed by AG/CUB "could very likely leave ComEd with insufficient funds to make required tax payments when they become due." ComEd In. Br. at 87. There is no basis for this claim, however, as the Company was unable to specify the time by which the full amount of

16 A copy of ComEd's response to data request AG 9.02 is included at AG/CUB Exhibit 1.8.

the tax due needs to be paid, other than to say that it will not be due before January 1, 2013. AG/CUB Exhibit 8.0 at 18.. The lost tax benefits on which the deferral is based would have been realized over many years. AG/CUB Exhibit 2.0 at 26. Accordingly, the proposed ten-year amortization period is reasonable.

Therefore, the AG recommends that the deferral be amortized over a period of at least ten years, resulting in annual amortization expense of $931,000. This is $2,173,000 less than the annual amortization expense of $3,104,000 calculated by the Company. *Id.* Thus, the pro forma amortization expense should be reduced by $2,173,000 (Schedule DJE-2.2e). AG/CUB Exhibit 2.1 at 14; AG Brief at 95-96.

**12. Taxes Other than Income Taxes (Derivative Adjustments)**

**13. Income Taxes (Derivative Adjustments)**

**14. Photovoltaic Pilot Costs**

**15. Customer Deposits – Interest Expense Component**

**D. Operating Expenses (Total)**

## VI. RATE OF RETURN

### A. Overview

The People incorporate by reference the arguments presented on rate of return by the Citizens Utility Board in both their Initial and Reply Briefs.

### B. Capital Structure

### C. Cost of Short-Term Debt

### D. Cost of Long-Term Debt (Potentially Uncontested)

### E. Cost of Common Equity

### F. Adjustments to Rate of Return

The Company in its initial brief continues to support an upward adjustment to its return on equity related to its revenue risk from implementation of energy efficiency. ComEd Brief at 100-101. As such the Company states:

> Dr. Tierney presented an extensive analysis showing that the 40 basis point adder ["adder"] proposed by ComEd is justified. Tierney, ComEd Ex. 13.0, 19:37-28:551.

ComEd Brief at 101.

The adder proposed by Dr. Tierney, however, was not developed by her. Indeed, in response to cross examination at the evidentiary hearing in this case, Ms. Tierney agreed that she "didn't [actually] determine [herself] whether 40 basis points was the basis points – was the correct amount of basis points to add." Tr. at 1822.

The facts in this case and the law on this issue clearly lead to a conclusion that any basis point adder should be rejected by the Commission. The arguments against an adder have been clearly and thoroughly articulated in the AG's initial brief and by AG witness Michael Brosch, as well as in Staff's initial brief and by Staff witnesses Dr. David Brightwell and Mr. Michael McNally.

The AG stated in their initial brief, "the evaluation to determine the appropriate rate of return in this case is a detailed process and assesses risk as a whole. Experts testifying on behalf of the Company, Staff, and intervenors each developed acceptable ranges for the Company's rate of return, based on DCF and CAPM models." AG Brief at 102-103. Likewise, Staff described a certain portion of the "adder related to reduced sales volume as single-issue rate making that violates the test- year rules. (See *Business and Professional People for the Public Interest v. Illinois Commerce Commission* (1991), 146 Ill. 2d 175, 244-245." Staff Brief at 86. The Illinois Supreme Court, in addressing the issue of single-issue ratemaking in BPI II, stated:

> **The rule against single-issue ratemaking recognizes that the revenue formula is designed to determine the revenue requirement based on the *aggregate* costs and demand of the utility. Therefore, it would be improper to consider changes to components of the revenue requirement in isolation. Often times a change in one item of the revenue formula is offset by a corresponding**

> **change in another component of the formula.** For example, an increase in depreciation expense attributable to a new plant *may* be offset by a decrease in the cost of labor due to increased productivity, or by increased demand for electricity. In such a case, the revenue requirement would be overstated if rates were increased based solely on the higher depreciation expense without first considering changes to other elements of the revenue formula. Conversely the revenue requirement would be understated if rates were reduced based on the higher demand data without considering the effects of higher expenses. (emphasis added)

BPI II, 146 Ill.2d at 244-45 (emphasis added).

ComEd witness Dr. Susan Tierney further described a situation in which ComEd would be "better off" by not meeting its statutory goals under Section 8-103 of the Act. In describing this circumstance Dr. Tierney states:

> ComEd would likely be better off if it were to simply, consistent with the *letter* of the law, pay a penalty for failing to accomplish the KWh and KW reduction targets and thus avoid having its shareholders absorb the lost revenues and increased risk in the future. Under the law, the penalty for non-performance is a known and predictable amount of money, and is small relative to the revenues that a company would stand to lose from aggressive compliance to achieve the targeted program expenditures and energy efficiency reductions.

ComEd Ex. 13.0 at 20.

Dr. Tierney's previously described scenario married with the Company proposed adder creates the perfect storm of bad regulatory policy. This potentially disastrous effect of the adder applied to the energy efficiency statute under 220 ILCS 5/8-103 is clearly described by Staff witness Dr. David Brightwell:

> …the 40 basis point adder would be awarded to the Company regardless of whether the Company actually complies with the energy efficiency law, and the adder provides no additional incentive to comply with the energy efficiency law. In fact, if the Company received this adder and subsequently decided not to comply with the energy efficiency law, it would be about $30.1 million better off than if it failed to comply with no adder. [Footnote omitted] Approving this adder leaves the Commission at risk of having to explain to the General Assembly why it rewarded ComEd a $30.1 million annual windfall for failing to comply with state law.

ICC Staff Exhibit 23.0 at 8-9.

As noted above, ComEd witness Dr. Susan Tierney admits she did not develop nor was she responsible for determining the amount of the adder. Instead, ComEd determined what the adder amount would be and Dr. Tierney simply supported the theory in her testimony. For example, Dr. Tierney stated, "I have been asked by Commonwealth Edison Company ("ComEd") to testify on a proposed adjustment to ComEd's return on equity in support of its efforts to promote the adoption of energy efficiency measures by its customers." ComEd Ex. 13.0 at 1.

Dr. Tierney discussed certain risk the Company faces such as recovery related to "increased prudency risk" and perceived "financial community risk."[17] ComEd Ex. 13.0 at 3 and 21-22;ComEd Ex. 13.7. In cross examination, however, when asked if she was aware of any disallowances under energy efficiency for ComEd, she stated she was "not aware of any disallowances to date." Tr. at 1827. When Dr. Tierney was asked to "identify any utility that has been downgraded or put on watch as a result of state energy efficiency goals or targets," she similarly stated she was not aware of any.

Dr. Tierney opines, "[o]vercoming utility resistance and supporting positive utility participation is a critical factor in the success of these programs." ComEd Ex. 13.0 at 8. Later Dr. Tierney argues the adder will "create positive support for energy efficiency" *Id*. at 21. The People assume Dr. Tierney meant positive support by the Company -- not the utility customer or a third party- toward their energy rfficiency programs. The Company, however, is required by

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[17] Section 8-103 allows ComEd to recover reasonable and prudently incurred expenses associated with the operation of its energy efficiency programs. These costs are currently recovered through the Energy Efficiency and Demand Response Adjustment Rider (Rider EDA") Rider EDA is a cost-tracker, in which rates initially set based on forecast program spending and adjusted in subsequent years depending on whether actual allowed costs are greater or lesser than forecast costs. ComEd Ex. 13.0 at 15.

Section 8-103 of the Public Utilities Act to comply with, among other things, certain energy efficiency goals and demand response goals. Section 8-103(a) states:

> It is the policy of the State that **electric utilities are required to use cost-effective energy efficiency and demand-response measures to reduce delivery load**. Requiring investment in cost effective energy efficiency and demand-response measures **will reduce direct and indirect costs to consumers**…

220 ILCS 5/8-103(a) (emphasis added).

Also, Section 8-103(a) discusses utility cost recovery and states, "It serves the public interest to allow electric utilities to recover costs for reasonably and prudently incurred expenses for energy efficiency and demand-response measures." *Id.* Nowhere, in any provision of the energy efficiency and demand-response section of the Act is there language describing a utility adder (or subtracter for that matter). Dr. Tierney talks about lost sales[18] and revenue associated energy efficiency programs. ComEd Ex. 13.0 at 3-4, 8, 11-12, 17; ComEd Ex. 13.8 and 13.9. What Ms. Tierney fails to mention in her testimony, however, is that ComEd's overall electric sales have been increasing. For example, regarding Company electricity load growth Dr. Tierney stated, "It is my recollection that there is anticipated growth in overall kilowatt hour sales in spite of the energy use per customer going down." Tr. at 1825.

While Dr. Tierney talks about positive incentives that are necessary for ComEd to promote energy efficiency, the Company's recommended adder provides no incentive for the Company to further promote energy efficiency and certainly does nothing to benefit the customer. In fact, Staff witness Dr. David Brightwell argues that the proposed adder is not

[18] Dr. Tierney in her rebuttal testimony admits in her response to IIEC witness Mr. Gorman and CUB witness Mr. Thomas, that the Company could have mitigated lost sales risk if it had chosen a future test year. She states, "a future test year could address the anticipated lost sales (and in turn lost revenues) in the first year that rates go into effect. ComEd Ex. 39.0 at 5.

necessary to induce customers to adopt energy efficiency or to help assist suppliers to deploy energy efficiency services and states:

> It sends the wrong incentives to ComEd's management, it does not affect the behavior of vendors or program implementers and it charges customers more for distribution service after requiring them to pay for energy efficiency programs.

ICC Staff Exhibit. 23.0 at 6-7; Staff Brief at 87. Even Dr. Tierney opines "[that she] did not assert that the adder makes it more likely that customers or providers will do anything different to deepen their adoption/deployment of energy efficiency…" ComEd Ex. 64.0 at 4-5.

Instead, it is the energy efficiency statute under Section 8-103 of the Act that sets out meaningful incentives or disincentives to provide an "increase in utility commitments to energy efficiency programs to benefit their [utility] customers." For example, if the Company fails to meet certain energy efficiency goals pursuant to the statute it is assessed monetary penalties and over time risks losing their energy efficiency programs to the Illinois Power Agency ("IPA").[19] Also, it is unclear how a Company calculated adder in this case would translate into a customer benefit or ComEd taking on additional steps to promote the statutorily required energy efficiency programs. In support of this argument, the People look to ComEd witness Val Jensen, who agreed that:

- He had managed the energy efficiency programs to the best of his ability;
- ComEd during the course of the last three years has made the best effort possible to achieve energy efficiency savings for customers under the programs in its plan: and

[19] As described under the energy efficiency statute in the Act, if ComEd fails to achieve energy efficiency targets in either the second or third years of initial program implementation, it must pay up to $665,000 in each year to the Low-Income Home Energy Assistance Program. Further, if ComEd fails to achieve targets after the third year, then responsibility for implementing the energy efficiency and demand response programs would transfer to the Illinois Power Agency. 220 ILCS 5/8-103(i).

- ComEd was committed to making its best effort to help customers save energy under the Year 4 to 6 plan recently approved in Docket 10-0570.

Tr. at 2308-2309. Additionally, Mr. Jensen later concurred that ComEd views the energy efficiency programs as a positive way to connect with its customers, and that the company has done a significant amount of marketing related to energy efficiency. *Id.* at 2313.

Dr. Tierney, in supporting the Company's adder, states that if it is approved, "the chances are increased that ComEd will not have to file a new rate case as soon as it otherwise would" ComEd Ex. 13.0 at 27. Dr. Tierney, however, does not quantify that statement. Hence, when she was asked if she could provide any kind of number associated with the change in frequency of rate cases related to the Company's requested adder she answered, "I could not" Tr. at 1828.

There clearly has not been a proven case for this additional adder. The Commission should reject the Company proposal for <u>any</u> adder as it is bad public policy, provides significant risk to ratepayers, does not provide any incentive for the Company to further promote energy efficiency, is contrary to Section 8-103 of the Act and provides no customer benefit.

**G. Overall Cost of Capital (Derivative)**

**VII. COST OF SERVICE AND ALLOCATION ISSUES**

**A. Overview**

**B. Potentially Uncontested Issues**

**C. Potentially Contested Issues**

**1. Embedded Cost of Service Study Issues**

**a. Class Definitions**

**(i) Residential Classes**

**(ii) Non-residential Classes**

**b. Primary/Secondary Split**

**(i) Appropriate Methodology/Compliance with Docket No. 08-0532**

**(a) Functional Identification of Costs**

**(b) Direct Observation of ComEd Facilities**

**(c) Sampling**

**(d) Review of Other Utilities' Treatment of Primary/Secondary Issues**

**(ii) Other Primary/Secondary Split issues**

(a) 4kV facilities allocation

c. **Investigation of Assets Used To Serve Extra Large Load Customer Class**

d. **NCP vs CP**

e. **Allocation of Primary Lines and Substations**

f. **Functionalization of General and Intangible Plant**

g. **Street Lighting**

h. **Allocation of Illinois Electricity Distribution Tax**

i. **Indirect Uncollectible Costs and Uncollectible Costs**

j. **Customer Care Cost Allocation**

k. **Other Docket 08-0532 Compliance Issues**

l. **Other Issues**

**D. Rate Moderation**

## VIII. RATE DESIGN

**A. Overview**

**B. Potentially Uncontested Issues**

1. **High Voltage Rate Design Simplification**
2. **Rate MSPS (Staff- need to verify in Rebuttal)**
3. **General Terms and Conditions**
   a. **New Customer with load that includes motors equal or greater than five horse power (Staff- need to verify in Rebuttal)**
4. **Miscellaneous Charges and Fees (Staff)**
5. **Meter Lease Charges**
6. **Residential Real Time Pricing Program Costs (Staff- need to verify in Rebuttal)**
7. **Standard Meter Allowances**

**C. Potentially Contested Issues**

**1. SFV (ComEd Proposal)**

ComEd proposes an unprecedented change in the residential customer charge that would increase residential single-family and multi-family class cost recovery through the flat, customer charge from 37% to a whopping 80% by May, 2014. ComEd In. Br. at 138; ComEd Ex. 14.0 at 11. Staff witness Christopher Boggs pointed out that the residential class is particularly punished under the ComEd SFV rate design, with the Residential and "Watt-Hour" classes experiencing significantly larger customer charge increases than other classes. Staff Ex. 13.0 at 26.

As justification for its radical proposal, ComEd argues in its Brief that "(f)ailing to properly make the distinction between fixed and variable costs results in misallocation of costs." ComEd In. Br. at 137. ComEd complains that the current rate structure recovers an inordinate proportion of fixed costs through rates that are not fixed, but that vary with volume, thereby sending "a distorted price signal to customer (sic)" that "penalizes utilities for implementing conservation programs." *Id.*

As noted in the AG Initial Brief, ComEd's SFV proposal rests on the assumption that residential customer costs do not vary with usage. ComEd Ex. 14.0 at 10. While ComEd downplays it in its Brief, ComEd witness Ross Hemphill argued that cost recovery through the distribution facilities charge ("DFC" or "usage charge") is inappropriate because the costs of the particular lines, substations, and other equipment do not change with the quantity of energy delivered over them. *Id.* But one of ComEd's own witnesses, testifying on the used and usefulness of certain rate base additions since the last rate case, contradicted this Company theory when he confirmed during cross-examination that customer usage triggers investment and all of the additional costs that go along with that new investment. ComEd witness Michael McMahan testified, for example, that the significant rate base investments that will be added to the Company's rate base in this case, such as the Northwest Reliability Project and others, were triggered as a result of the Company's conclusion that the existing facilities serving this area could no long meet the overall usage and peak demand of the customers served by these facilities. Tr. 498-505. Likewise, he confirmed that ComEd engineers look at the usage of the customers serviced by distribution investments, including, among others, transformers and substations – all used in the delivery of electric service – to determine whether these facilities needed to be expanded or replaced based on forecasted peak load. *Id.* at 505-516. He noted that these distribution facilities are examined each year to ensure that they are capable of serving customer load in the hottest of months. *Id.* at 508. Even when plant additions are made to create redundancy in the distribution system, Mr. McMahan confirmed that the Company examines customer usage to ensure that the facilities will meet usage demand in the affected areas. Tr. 510-516.

Both AG/CUB witness Scott Rubin and Staff witness Christopher Boggs likewise disputed Mr. Hemphill's unsupported theory that usage does not drive ComEd's costs, and that residential rates should be established so that only costs that vary in the short-run with energy consumption (what he terms "throughput-variable costs"; see ComEd response to data request 4.03, attached to Mr. Rubin's testimony as AG/CUB Ex. 6.06) should be recovered through an energy-related rate. Mr. Rubin pointed out that there is no support among reputable public utility economists or among public utility commissions for setting utility rates based on short-run marginal costs. This notion was floated by a few economists during the 1940s and 1950s and quickly was discredited by those who understood the public utility industry. The essential flaw in pricing electricity distribution service based on short-run marginal cost is that the industry exhibits economies of scale (as one would expect from a natural monopoly). This means that the marginal cost declines as more of the product is supplied. AG/CUB Ex. 6.0 at 16-17; AG In. Br. at 114.

While Mr. Hemphill cites Professor Bonbright for support of his proposed rate design, in fact, Bonbright's seminal work, *Principles of Public Utility Rates,* explains that pricing based on short-run cost is inconsistent with the long-run time horizon and function of a public utility and the proper setting of utility rates. Professor Bonbright explained that such a high fixed charge would be unfair to those who did not consume the product or who consumed relatively little of it.

That unfairness is not just a social welfare concern, but a fundamental economic concern: requiring a non-user (or low user) of a service to subsidize the service for those who use it does not increase overall economic welfare; rather, it transfers the "consumer surplus" (that is, the benefits of a service in excess of the costs paid for the service) from one group of customers (the low users) to another group (the large users).[20] AG/CUB Ex. 6.0 at 17-18; AG In. Br. at 114-115.

For his part, Staff witness Boggs noted that ComEd's proposed SFV customer charge would require customers who have the lowest level of electricity usage to pay the same customer charge as customers who have the highest level of usage. Mr. Boggs noted that "a more reasonable assumption would be that the customer with the highest level of usage would have a larger demand impact on the grid system than the customer with the lowest level of usage." Staff Ex. 13.0 at 25.

Staff witness Boggs likewise concurred with Mr. Rubin's conclusion that ComEd's proposed rate design is contrary to cost causation principles (the cost causer should pay) embraced by the Commission as a bedrock when analyzing rate design. He stated:

> Consider, for example, a residential customer that has the Company's lowest level of electricity usage versus a residential customer that has the Company's highest level of electricity usage. Under the SFV rate design, both residential customers would pay the same amount for fixed costs that are included in their monthly customer charges. The SFV assumes that the distribution costs they cause ComEd to incur would be comparable. However, a more reasonable assumption would be that the customer with the highest level of usage would have a larger demand impact on the grid system than the customer with the lowest level of usage.
>
> ComEd's proposed customer charge, which would ultimately recover 80% of the costs to serve the residential customer class in the Company's proposed phase-in SFV rate design, would be the same for these two customers, which means that the customer

[20] Id., p. 397.

> with the lowest usage and the customer with the highest usage would be paying an equal share for the recovery of these fixed costs. This result would be contrary to cost causation principles.

Staff Ex. 13.0 at 25; Staff In. Br. at 126.

ComEd's SFV proposal would also lead to great inequities among low and high use customer bills. AG/CUB witness Rubin was the only witness to carefully study the effects of the proposed SFV rate on ComEd's highest and lowest residential users. Mr. Rubin's analysis showed that ComEd's proposed rates would increase revenues from MF Heat customers by almost $5 million (a 9.6% increase) *even though ComEd's own cost study*[21] *shows those customers already are paying more than the cost to serve them*. The effect would be that MF heating customers would pay nearly 20% more than the cost to serve them. *Id.* at 23.

Similarly, SF Heat customers, who currently pay rates almost exactly equal to their cost of service, would pay rates that would exceed the cost of serving SF Heat customers by more than 14%. These overpayments by the heating class relative to their cost of service were confirmed by ComEd witness Heintz, who confirmed the numbers relied upon by Mr. Rubin's for purposes of analyzing ComEd's SFV rate design were accurate, were provided by the Company, and were representative of ComEd's costs to serve (including its requested profit level) these particular customers. Tr. at 690-691.

The record evidence proved that ComEd's SFV proposal results in gross inequities in three of the four residential classes that punish low users of electricity while providing rate *decreases* for the highest usage customers. As shown in AG/CUB Ex. 6.10, under ComEd's

[21] It is critical for the Commission to understand that ComEd's cost of service figures, as provided in its cost study, include its requested revenue requirement, including its proposed return on equity. Thus, when ComEd's proposed rates trigger increases that exceed even its own "cost" of service, those customers are paying rates that exceed their allotted share of the ComEd requested revenue requirement in this case.

proposal, the lowest effective annual bill for single-family No Heat customers (that paid by fewer than 5% of customers) would be about $300 per year. Under present rates, the equivalent annual bill is less than $200. *ComEd's proposal thus would result in large percentage rate increases (in excess of 50% rate increases) for those who use the least amount of electricity (and, therefore, are least likely to cause ComEd to incur significant demand-related costs). Id.* at 31. At the other end of the curve, the two percent of customers with the highest bills currently (and, therefore, the greatest energy usage) actually would receive rate decreases under ComEd's proposal.

AG/CUB Ex. 6.11 shows that, similar to the SF No Heat subclass, ComEd's proposal would impose very large increases on its SF Heating customers with the lowest usage (lowest annual bills). ComEd's proposal would result in large percentage rate increases (in excess of 50% rate increases) for those who use the least amount of electricity (and, therefore, are least likely to cause ComEd to incur significant demand-related costs). *Id.* at 34; AG In. Br. at 126. At the other end of the curve, the two percent of customers with the highest bills currently (and, therefore, the greatest energy usage) actually would receive rate decreases under ComEd's proposal. *Id.*

With regard to the Multi-family No Heat residential class, Mr. Rubin also found that approximately 40% of the revenue increase would be received from the 25% of customers with the lowest current bills. *Id.* at 36-37. ComEd's proposal would result in approximately a 30% rate increase for those who use the least amount of electricity (and, therefore, are least likely to cause ComEd to incur significant demand-related costs). At the other end of the curve, the six percent of customers with the highest bills currently (and, therefore, the greatest energy usage) actually would receive rate decreases under ComEd's proposal. AG/CUB Ex. 6.12; AG/CUB Ex. 6.0 at 36-37.

These inequities fly in the face of rate design principles that strive to promote equity and fairness. The SFV proposal also sends the wrong price signals to customers when the General Assembly has declared that electric delivery utilities are charged with reducing load by investing in energy efficiency and demand response programs, because "investment in cost-effective energy efficiency and demand-response measures will reduce direct and indirect costs to consumers by decreasing environmental impacts and by avoiding or delaying the need for new generation, transmission, and distribution infrastructure." *See* 220 ILCS 5/8-103. Contrary to this legislative declaration and directive, ComEd's proposed SFV rate design discourages customers' attempts to reduce usage, and suggests that demand for electricity is irrelevant to the costs of the provision of electricity.

The Commission Staff shared the principal conclusions of Mr. Rubin's review of the Company's SFV proposal: Staff In.Br. at 122-125. Staff witness Boggs highlighted numerous deficiencies in the proposal, including his view that the SFV rate design would send the wrong price signal to ComEd's residential customers. Staff Ex. 13.0 at 22. He noted that as electricity demands increase, the environmental costs of electricity generation increase. Because of this relationship, it's reasonable to associate environmental costs with usage charges, which supports an argument for higher, rather than lower usage charges. If the proposed SFV rate design is approved, the Distribution Facilities Charge, or usage charge, would decrease from its current level and lower price signals would be sent to ratepayers concerning the impact of their usage on the environment. *Id.*

In the face of this evidence, ComEd ultimately resorts in its Brief to relying on a "if they get it, we want it" argument of sorts that points out that recent Commission orders in natural gas delivery rate cases adopted SFV rate designs that recovered about 80% of the company's fixed costs. ComEd In. Br. at 138. This argument is hardly persuasive, however. As noted in Staff's Brief, there are significant environmental costs associated with electricity usage that support adoption of a rate design that retains a significant role for usage charges. Moreover, unlike the evidence produced in the referenced gas cases, ComEd's usage per customer, which declined in 2009, is expected to increase in future years. ComEd Ex. 4.0 at 7 (Tripek Revised Direct).

Moreover, adoption of ComEd's SFV proposal would run counter to electric distribution rate-setting through out the U.S. Staff witness Boggs pointed out that his review of utility rate structures throughout the country revealed that not a single state has approved SFV pricing for electricity rates. Staff Ex. 13.0 at 27. Only one state, Delaware, was even considering the rate structure. *Id.*

For all of these reasons, ComEd's flawed and inequitable SFV proposal for the residential class should be rejected. Instead, the Commission should adopt Mr. Rubin's fair, equitable rate design that both ensures (1) the recovery of ComEd's cost of service; (2) equitable rate treatment for the Company's heating and non-heating residential customers of all usage levels; and (3) the elimination of cross-subsidies between the heating and non-heating classes. In addition, the AG/CUB rate design produces rates that retain a price signal that incentivizes conservation and ensures that cost causers pay – all goals that have been embraced by the Commission in prior rate orders.

As noted in the AG Initial Brief, Mr. Rubin's testimony provides the Commission with specific instructions as to how to implement this rate design regardless of the revenue requirement number that is calculated in the order. AG/CUB Ex. 6.0 at 46-50.

### 2. Decoupling (NRDC Proposal)

The NRDC, in response to ComEd's SFV proposal, presented a decoupling proposal, consistent with its national agenda of promoting revenue decoupling in states throughout the country. In its Brief, NRDC argues that its decoupling proposal is similar to ComEd's SFV proposed rate design because "(i)f sales lag below the assumptions underlying the rates approved by the Commission in its last rate case, then the company will not recover its approved revenue requirement for the fixed costs of distribution service." NRDC In. Br. at 3.

This observation betrays a principal flaw in the per customer revenue decoupling proposal promoted by the NRDC – its failure to recognize that revenues and cost recovery are not merely a function of per customer consumption. Decoupling, as noted in the AG Initial Brief, violates the rule against single-issue ratemaking because it fails to properly account for (1) the revenues the company gains when new customers are added; (2) changes in usage and sales to customer classes not decoupled; (3) changes in operating expenses, such as labor force reductions and operating efficiencies gained through new technology; (4) changes in the rate base; and (4) changes in the cost of capital – all elements that affect a utility's revenue requirement.. *See* AG In. Br. at 142-144.

NRDC recognizes the potential for per customer revenue decoupling to provide a windfall to the Company in its argument that a 3% cap on revenues collected through the rider is needed to protect customers from paying excessive rates. NRDC In. Br. at 7-8. ComEd, however, is unwilling to include such a safeguard. ComEd Ex. 46.2.

NRDC argues that its decoupling proposal will remove ComEd's incentive to maintain its electric sales level, and would encourage ComEd to devise innovative ways to meet or exceed its statutory targets. NRDC In. Br. at 6. But this central tenet of the NRDC proposal is thwarted by ComEd's assertion in the record that it would not commit to increasing its energy efficiency effort beyond that required by Section 8-103 of the Act, even with a decoupling rider in place. Tr. at 464. Conspicuously absent from the NRDC Brief is any recognition of this fact.

NRDC argues, in response to AG/CUB witness Rubin's rebuttal testimony, that their decoupling proposal is not intended to incent customers to embrace energy efficiency, but rather to incent the utility. NRDC In. Br. at 18. But this declaration fails to address the disincentives that may be created when customers realize their delivery service rates are being adjusted upward when residential per customer revenues decline.

NRDC witness Ralph Cavanagh dismisses concern over the possibility of inordinate price increases under decoupling. Yet, his recommendation that a 3% cap be included in a decoupling mechanism speaks volumes about the threat of additional surcharges to customers. In addition, cross-examination revealed that significant rate increases have followed in jurisdictions that adopted decoupling. Tr. at 1454-1463. While Mr. Cavanagh characterizes some of these increases as de minimis, he does so in the context of a utility's total revenues. No analysis is provided as to whether these increases are, in fact, significant to the residential and small business customers that would be paying the surcharges.

NRDC further argues that its decoupling proposal does not violate the rule against single-issue ratemaking. NRDC In. Br. at 23-24. But the NRDC Brief acknowledges that single-issue ratemaking will occur, noting that the per customer form of decoupling being promoted would protect a utility during economic downturns because the revenues gained from new customers would offset any declines in usage.  NRDC In. Br. at 18.  This point highlights the piecemeal nature of decoupling.  It adjusts customer  rates based on isolated elements of a utility's revenue streams – per customer usage – while ignoring the variable nature of a utility's expenses, *overall* revenue streams (such as revenues derived from adding new customers) and cost of capital.

NRDC further opines that the recent decision in under *Commonwealth Edison Co. v. Illinois Commerce Comm'n,* ("*ComEd*"), 937 N.E.2d 685 (2d Dist. 2010) does not render its decoupling proposal illegal.  NRDC argues it is inapposite because decoupling recovers lost *revenues,* not expenses.  NRDC In. Br. at 23-25.  But this point only highlights why decoupling is illegal, not permissible.  Riders, as the Court noted, are to be used to recover *costs* or *expenses* – not lost revenues.  The Court in *ComEd* specifically held that because riders always permit direct recovery of a single cost, rather than incorporating that cost into the aggregate calculation of the revenue requirement, they always pose, at the very least, a "danger of single-issue ratemaking."  *City of Chicago II*, 281 Ill. App. 3d at 628; *see also ComEd,* 937 N.E.2d at 708 ("Because a rider is a method of single-issue ratemaking, by nature, it is not allowed absent a showing of exceptional circumstances.").  The Court concluded that exceptional circumstances necessary to justify a rider arise only when the proposed rider is designed to "recover a particular cost if (1) the *cost* is imposed upon the utility by an external circumstance over which the utility has no control and (2) the *cost* does not affect the utility's revenue requirement." *Id.* at 687 (emphasis added).   The Court further held:

> In other words, a rider is appropriate only if the utility cannot influence the cost (*Citizens Utility Board,* 166 Ill.2d at 138 ['a rider mechanism is effective and appropriate for cost recovery when a utility is faced with unexpected, volatile, or fluctuating expenses') and the expense is a pass-through item that does not change *other expenses or increase income* (*Citizens Utility Board,* 166 Ill.2d at 138 (*a valid rider has no 'direct impact on the utility's rate of return*').

*Id.* at 687.

In its review of Illinois law, the Court reconciled and distinguished past cases affirming Commission approval of riders that involved the recovery of expenses related to the purchase of natural gas, federally-mandated environmental remediation costs and a municipality's franchise fee. The Court concluded:

> In each instance, the expense was an externality imposed on the utility, and the expense was passed directly on to the consumer without affecting the utility's return on investment.

*Id.* at 688.

As noted in the AG Initial Brief, the NRDC/ComEd decoupling proposal fails to meet the test for permissible riders spelled out by the Court. First, recovery of per customer revenues is not recovery of a pass-through "expense." Second, the sole purpose of a decoupling rider is to increase income and directly impact the utility's rate of return. Under ComEd and the cases cited in the Second District opinion that came before ComEd, the decoupling tariff would not pass legal muster.

For all of these reasons, and the reasons supplied in the AG Initial Brief at pages 138-148, the Commission should reject approving a decoupling rider as an alternative to ComEd's SFV proposal.

### 3. Class Definitions

#### a. Residential Rate Design – Consolidation of Classes

ComEd proposes to reduce the number of residential delivery classes from four to two. ComEd In. Br. at 140 ; ComEdEx. 16.0 3rd Rev., 16:345-17:372. ComEd proposes to combine the two single family delivery classes into one class: the Residential Single Family Delivery Class, and the two Multi-family delivery classes into one class: the Residential Multi Family Delivery Class, thereby eliminating the Heat/No Heat intraclass designation. *Id.* ComEd proposes to have one DFC for all single family customers and one DFC for all multi-family customers. *Id.* ComEd asserts that this proposed change is "reflective of the fact that the cost of delivering electricity is not affected in any way by whether the electricity is used for space heating or anything else." *Id*., 17:363-68.

This consolidation proposal should be rejected, however, because ComEd's own cost study refutes the Company's assertion that the costs to serve these customers are not different among the residential classes, i.e. whether or not a customer uses electricity for heat. AG/CUB Ex. 6.01 represents the Company's COSS if the four existing residential subclasses are retained. ComEd witness Alan Heintz confirmed during cross that this exhibit (1) was prepared by ComEd and (2) represents an accurate representation of ComEd's cost assuming the retention of the four residential customer classes. Tr. at 690-691. This exhibit shows clearly that ComEd's proposed cost[22] to serve SF heating customers is $20,583,974, but that subclass *under current rates* is already providing ComEd with $20,626,143 in revenues, or $42,169 more than is required. Similarly, the MF heating subclass has a proposed cost of service of $45,648,505, but that subclass *under current rates* is already providing ComEd with revenues of $49,916,857, or $4,268,352 more than is required. AG/CUB Ex. 6.0 at 11-12. The answer as to why ComEd's *existing* heating rates are providing excessive revenues lies primarily in the characteristics of heating customers as compared to non-heating customers. It can be seen from AG/CUB Ex. 6.05 that the excessive revenues are being provided in the distribution (DFC or usage) charge paid by heating customers. The distribution-related cost (that is, demand- and energy-related cost) to serve SF heating customers is $15.23 million, but they are providing distribution revenues of

[22] Again, the ComEd cost of service includes the Company's requested revenue requirement, including its proposed return on equity – not just costs in the traditional sense of the word.

$16.45 million. For MF customers, the relationship is even worse with a distribution-related cost of $26.07 million, and current distribution revenues of $33.31 million – current revenues that are approximately 27% more than the proposed cost of service. AG/CUB Ex. 6.0 at 12.

It should be noted that simply because the current heating rate per KWH already is lower than the non heating rate per KWH does not mean that it costs less to distribute electricity to a heating customer than a non-heating customer. Mr. Rubin explained that, in fact, because heating customers use so much more electricity than non-heating customers, it actually costs more to serve them. Some heating customers will require more expensive meters, larger service lines, and other distribution facilities (such as transformers) that have greater capacity. The COSS shows that the average cost to serve a SF heating customer is $585 per year, compared to the average cost to serve a SF non-heating customer of only $432 per year.[23] The similar figures for MF customers are $293 for heating and $243 for non-heating.[24] Thus, it costs between 20% and 35% more to serve a heating customer than a non-heating customer in the same type of housing unit. *Id.* at 12-13. (These facts, too, contradict ComEd's assertion that customers' level of usage has no effect on Company costs.)

But heating customers also use substantially more electricity each year than non-heating customers, on average, a fact ComEd witness Lawrence Alongi confirmed. Tr. at 2070-2071.

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[23] SF Heating: cost of service $20,583,974 ÷ 35,203 customers = $584.72 per customer. SF Non-heating cost of service is $971,567,193 ÷ 2,247,865 customers = $432.22 per customer. Cost of service from AG/CUB Ex. 6.03; customers from AG/CUB Ex. 6.04.

[24] MF Heating: cost of service $45,648,505 ÷ 155,692 customers = $293.20 per customer. MF Non-heating cost of service is $248,202,069 ÷ 1,020,942 customers = $243.11 per customer. Cost of service from AG/CUB Ex. 6.03; customers from AG/CUB Ex. 6.04.

The average SF heating customer uses more than 23,000 KWH per year compared to the average SF non-heating customer who uses only 9,600 KWH per year.[25] That is, while it costs 35% more to serve a SF heating customer than a SF non-heating customer, the SF heating customer uses about 2.4 times as much electricity. The comparable annual average consumption for MF customers are 10,600 KWH for heating customers and 4,400 KWH for non-heating customers.[26] AG/CUB Ex. 6.0 at 13. These facts point to the need to retain intra-class distinctions in residential rate design and the need for varying DFC (usage) charges for the four residential rate groups.

In other words, while it costs more to serve an average heating customer than it does to serve a non-heating customer, that cost can be recovered by selling substantially more KWH to the heating customer – well over twice as many KWH on an annual basis. So the cost per KWH should be substantially lower for a heating customer than a non-heating customer. The present rate differential between heating and non-heating customers of less than 0.4 cents per KWH is not large enough to reflect this relationship, Mr. Rubin testified. *The result is that costs are being over-recovered from heating customers and under-recovered from non-heating customers, even under present rates.* ComEd's proposal to consolidate the rate classes to two from four and eliminate the usage charge distinctions between heating and non-heating customers obviously

[25] SF Heating usage: 813,271,116 KWH ÷ 35,203 customers = 23,102 KWH per customer. SF Non-heating usage is 21,589,389,198 KWH ÷ 2,247,865 customers = 9,604 KWH per customer. AG/CUB Ex. 6.04.

[26] MF Heating usage: 1,646,448,874 KWH ÷ 155,692 customers = 10,575 KWH per customer. MF Non-heating usage is 4,515,886,137 KWH ÷ 1,020,942 customers = 4,423 KWH per customer. AG/CUB Ex. 6.04.

aggravates that cost recovery defect. ComEd's own cost study shows there is a very real difference in the cost of serving heating and non-heating customers, and that difference should be reflected in the rates paid by those customers. *See* AG/CUB Ex. 6.01.

The fact that the residential heating subclasses already are providing revenues in excess of the cost of service proves to be very important in deciding how rates should be designed in this case. Rather than addressing the currently excessive heating rates, ComEd is proposing to completely abolish the heating subclasses, thereby requiring heating customers to pay the same distribution (variable usage) charge as non-heating customers. ComEd's proposal, thus, would impose substantial rate increases on many heating customers, even though those customers *already* are paying rates in excess of the proposed cost of service. *Id.* at 14.

The elimination of the heating subclasses, therefore, is neither equitable nor cost-based. AG In. Br. at 110-113; AG/CUB Ex. 6.0 at 11-13. In its Brief, ComEd further offers the strawman argument that retaining the four residential customer classes "is inappropriate, because it requires ComEd to, among other things, police the use of electricity within customer homes for billing purposes." ComEd In. Br. at 140; ComEd Ex. 16.0 3rd Rev. at 17. This feeble argument is neither explained nor elaborated upon. ComEd appears to be equating the measurement of customer usage with unnecessary surveillance. The comparison is inapt and absurd. Measuring usage by whether a customer uses electricity for heat is nothing more than an effort to ensure that customer class revenues align with customer class costs. This argument should be rejected out of hand.

ComEd further asserts that the Commission already took steps to eliminate the distinction between heating and non-heating residential customers when it approved Rider PE – Purchased Electricity ("Rider PE"), which has specific grandfather provisions that apply to residential electric space heat customers. ComEd In. Br. at 140. This red herring comparison is inapt, primarily because the rider terms address the pricing of electric commodity, not delivery service. Unlike the rates set in this delivery service case, the supply rates are not based on any cost study. In this docket, however, the Commission has clear evidence – ComEd's own cost of service study detailing the costs of the four residential rate classes – that detail the varying costs to serve heating and non-heating customers.

The bottom line is that ComEd's residential class consolidation proposal increases the cost recovery inequities that exist under current rates. Adoption of this proposal would translate into excessive and unjust rate increases for the Company's heating customers that are neither cost-justified or equitable. The proposal should be denied.

**b. New Primary Voltage Delivery Class vs. Primary Subclass Charges**

**4. Non-Residential**

**a. Movement Toward ECOSS Rates**

**(i) Extra Large Load and High Voltage Customer Classes**

**(ii) Railroad Customer Class**

**b. Allocating Secondary Costs Among Customer Classes**

**c. Railroad customers - Utilization of Railroad Customers' Facilities**

**d. Dusk to Dawn Street Lighting**

**5. Collection of Illinois Electricity Distribution Tax**

**6. Distribution Loss Factors**

**7. General Terms and Conditions**

**a. Residential Service Station (Ownership of Residential Primary Service Connection facilities on private property)**

**b. Limitation of Liability Language**

**8. Rider UF (Could be uncontested – check Staff rebuttal)**

**9. Notification Regarding Elimination of Self Generation Customer Group**

**10. Docket 08-0532 Compliance Issues**

**11. Other Issues**

## IX. REVIEWS

### A. Uncontested Issues - Other Revenues – Rate Relief Payment (Staff)
### B. Miscellaneous Revenues
### C. Weather Normalization
### D. Late Payment Charge Revenues (Moved from Operating Expenses, V.C.8)

ComEd receives late payment charges from consumers when they pay their bills after the due date. ComEd collects several charges on its bills, and the late payment charge is assessed on the total unpaid balance. See People's In. Br. at 151, quoting Commonwealth Edison Co., Ill.C.C. No. 10, 1st Rev. Sheet No. 207, effective Aug. 28, 2009. ComEd argues that it should only apply an allocated portion of these charges to its revenue requirement because only a portion of each bill is for delivery services. ComEd In. Br. at 158. ComEd implicitly acknowledges that it would deny consumers the benefit of the payment of late charges they pay on the total bill when it states: "Whether or not the calculation of other rates [sic] includes an adjustment for non-delivery services late payment charges revenues is not determinative of the appropriate treatment in this proceeding." *Id*. at 159. ComEd would have the Commission simply ignore a majority of the amount consumers indisputably provide it in late payment revenue ($13.9 million ignored, while only $11.1 million included in utility revenues). Removing $13.9 million from "other revenues" without accounting for how consumers are otherwise credited for these payments effectively transfers these revenues to ComEd's shareholder. ComEd has provided no justification for allowing it to retain these revenues.

ComEd's revenue requirement includes a calculation of expenses as well as revenues. An underestimate of revenues provided by consumers to the Company results in an overstatement of rates, and is unjust and unreasonable. *Business and Professional People in the Public Interest v. Illinois Commerce Comm'n,* 146 Ill.2d 175, 238 (1991). The Commission should adopt AG/CUB witness Brosch's recommendation that it increase the late payment charge revenues by $13.9 million to include all revenues consumers provide the Company under its tariff for late payments.

### E. New Business Revenue Credit (moved from Operating Expenses, V.C.5)

ComEd agrees that it is appropriate to recognize the increase in revenues that result from its *pro forma* additions in the *pro forma* period. ComEd In. Br. at 159-160. Mr. Effron calculated the new business revenue credit based on the number of customers identified by ComEd. Nonetheless, ComEd claims that "AG/CUB witness Effron seeks to artificially inflate this new business revenue credit by only including growth in customer classes without providing an offset to reflect a *decline* in customer classes due to customer migration." ComEd In. Br.at 160. There is no real evidence that really was any such migration. In his surrebuttal testimony, Mr. Fruehe referred to potential double counting *if* some large C&I customers have migrated to the small C&I class. ComEd Ex. 56.0, p. 22. However, he did not present any testimony that such migration actually took place. On cross-examination he was not able to provide any quantification of such migration or to state from his own knowledge that there was any migration. Tr. 2452. Neither Mr. Effron nor the Commission can make an adjustment *based on the possibility* that there might be some migration between customer classes. Mr. Effron's adjustment was properly based on the data provided by ComEd and should be adopted by the Commission. See People's In. Br. at 85-86.

## X. OTHER

### A. RES Services Issues
### B. UUFR
### C. Updated Distribution Loss Study
### D. Meters and Meter Reading
### E. Competitive Retail Market Development Issues
### F. New Section 9-250 Investigation of ComEd's electric rate design

### G. **Other**

## XI. CONCLUSION

For the foregoing reasons, the People request that the Commission enter an order establishing just and reasonable rates for Commonwealth Edison incorporating the adjustments discussed herein, the rate of return discussed in the CUB Initial and Reply briefs, and employing the rate design recommended by AG/CUB witness Scott Rubin.

Respectfully submitted,

The People of the State of Illinois
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