

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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| COMMONWEALTH EDISON COMPANY | : | |
| | : | |
| Petition for approval of an Alternative | : | No. 10-0527 |
| Rate Regulation program pursuant to | : | |
| Section 9-244 of the Public Utilities Act | : | |

BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY

ORAL ARGUMENT REQUESTED

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Commonwealth Edison Company (“ComEd”) respectfully submits this Brief on Exceptions to the Proposed Order (the “Proposed Order” or “PO”) issued by the Administrative Law Judge (“ALJ”). Pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”), 83 Ill. Admin. Code § 200.830, suggested replacement language is provided in separate Exceptions, filed contemporaneously.

I. INTRODUCTION & EXECUTIVE SUMMARY

The Proposed Order slams the door on regulatory innovation in Illinois. It would erect legal hurdles to Alternative Regulation that are contrary to Section 9-244 of the Public Utilities Act¹ (“PUA” or “Act”), which authorizes alternative regulation plans and defines when they may be approved. These hurdles would tie the Commission’s hands and prove to be insurmountable for many realistic and beneficial forms of alternative regulation.

This is a critical time for Illinois utility regulation. The Commission is confronting the need to foster infrastructure investment, to promote energy efficiency and demand response, and to modernize the grid to accommodate everything from electric vehicles to smart appliances to

¹ 220 ILCS 5/1-101 *et. seq.*

micro-generation, and improving reliability – all while ensuring that rates remain just and reasonable. Accomplishing these tasks will require the Commission to be flexible and innovative. As President Obama² recently observed about our nation’s energy policies:

[O]ur best opportunities to enhance our energy security can be found in our own backyard --because we boast one critical, renewable resource that the rest of the world can’t match: American ingenuity. ... To make ourselves more secure, to control our energy future, we’re going to have to harness all of that ingenuity.

ComEd agrees. ComEd’s alternative regulation proposal delivers beneficial programs to customers and offers the Commission a chance to pilot incentive regulation, all in a very limited and low-risk package. It should be approved.

In rejecting ComEd’s alternative regulation proposal, the Proposed Order would wrongly and sharply restrict the Commission’s ability to approve future alternative regulation proposals.

In an apparent effort to conclude that ComEd’s proposal fails to meet virtually every possible provision of Section 9-244, the Proposed Order violates many longstanding principles of statutory construction and unnecessarily restricts the Commission’s jurisdiction and future flexibility.

For example, alternative regulation is not legally limited to programs that replace a traditional rate for an entire service, as the Proposed Order suggests. It is also entirely appropriate for alternative regulation to be used as a means to test out new technologies, cost reducing incentives, or new approaches to managing programs or investments, and the Commission will search Section 9-244 in vain for any prohibition against such use. Likewise, measures of success under alternative regulation plans should not be limited to “performance metrics” like system reliability. The law does not bar incentives aimed at reducing costs, and

² Remarks by the President on America's Energy Security, Georgetown Univ., Washington, D.C. (March 31, 2011). The transcript is available at www.whitehouse.gov.

both the PUA and the Commission's own decisions make clear that promoting efficiency and lowering overall costs are critical regulatory goals.

The Proposed Order also seriously misconstrues the criteria that alternative regulation proposals actually must meet under Section 9-244. Most importantly, Section 9-244(b) does not require rates to go down, particularly for alternative regulation proposals designed to provide enhanced or better service. It does not require that utilities can or must provide customers with more and better services for free, or less than free. Rather, it asks which method of providing those services – traditional or alternative regulation – will result in lower rates “for the services covered by the program.” 220 ILCS 5/9-244(b)(1).

Section 9-244(b) also calls for appropriate comparisons. It does not call on the Commission to compare alternative regulation rates that do recover new programs' costs with traditional regulatory rates that do not, as the Proposed Order does. In particular, it does not require or permit the Commission to assume in evaluating an alternative regulation proposal that the delay and regulatory lag often found in traditional regulation will keep traditional rates down by depriving the utility of full cost recovery. That is not a fair comparison, but one predisposed to failure. Unless it is the Commission's position that traditional regulation is incapable of allowing ComEd full recovery of its costs of these programs, penalizing an alternative regulation proposal simply because it could allow full cost recovery is both unlawful and imposes yet another unreasonable barrier to alternative regulation.

Furthermore, holding that “equitable sharing” of benefits forbids a utility from receiving a share of reduced costs turns alternative regulation on its head. It is equitable – and nearly universal among alternative regulation programs – to share the cost savings benefit between customers and the utility. If costs go down, everyone wins, and everyone should benefit.

Finally, ComEd respectfully submits that the Proposed Order is also mistaken on matters of prudence, where it suggests that the Commission must use hindsight information to review a program's prudence. Section 9-244 does not require, or even favor, after the fact prudence review. Indeed, Illinois law could not be clearer that the prudence of a course of action must be assessed based on the information available when the decision was made. Relying on information that can only be known later is expressly prohibited. "In determining whether or not a judgment was prudently made, only those facts available at the time the judgment was exercised can be considered. Hindsight review is impermissible." *Illinois Commerce Comm'n v. Commonwealth Edison Co.*, ICC Docket No. 84-0395 (Order, Oct. 7, 1987) at 17 (emphasis added); *accord Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill.App.3d 425, 428 (5th Dist. 2003); *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 279 Ill.App.3d 824, 828 (1st Dist. 1996).

The Proposed Order overlooks key features of ComEd's proposal. Most importantly, ComEd proposes to pilot an important regulatory alternative. After nearly one hundred years of utilities being paid based on a historical "cost plus" basis, this pilot allows us to explore a different, forward looking form of regulation to determine whether incentives can hold down costs. Similarly, after nearly one hundred years of trying to "steer" delivery investment through after the fact decisions, ComEd's proposal allows the Commission and the public to have a greater say in how ComEd adapts its electric delivery system to a changing world before those investments are made. Hemphill Dir., ComEd Ex. 1.0 Rev, 4:80 – 5:101; Hemphill Sur., ComEd Ex. 8.0, 3:44-53. Illinois has little experience with incentive regulation. Hemphill Sur., ComEd Ex. 8.0, 3:48-53. ComEd's alternative regulation program would be a valuable learning exercise.

ComEd proposes beneficial pilot programs. Alternative regulation has advantages over traditional regulation, particularly for discretionary and high-tech investments. *E.g.*, Hemphill Reb., ComEd Ex. 6.0, 29:623-33, 20:426-42, 22:478-81. Therefore, ComEd proposed a limited pilot of four programs. Three of these can be approved by the Commission now and can begin immediately. Because a cost recovery mechanism is essential for whatever Smart Grid investments the Commission authorizes, ComEd also provided that portions of future Smart Grid investments (up to a \$90 million cap) could be included provided the Commission in the future specifically approves the program and its regulatory treatment. The record demonstrates that those programs have customer benefits. Yet, the Proposed Order would reject them all.

In the case of ComEd's Urban Underground Facility Reinvestment ("UUF³R") and Electric Vehicle ("EV") Pilot programs, the Proposed Order largely does so by requiring in advance more detail than would be required of a similar program in a general rate case after the fact. Certainly many benefits (for example, reliability improvements) could be and were quantified in advance, and ComEd did provide detailed scopes of work. But requiring, for example, that ComEd prove exactly what mix of manholes and cable repairs will be necessary to satisfy the scope of work *before* ComEd inspects and tests those manholes and cables is a Catch 22. Requiring information like that is simply a death knell for pilots of new technology.

ComEd's voluntary low income assistance program ("LIAP") was criticized on the grounds that it does not benefit all customers. Although ComEd believes it certainly does, Section 9-244 does not require that a program benefit all customers. LIAP is also criticized as being insufficiently novel, although Section 9-244 imposes no novelty requirement at all. But, in

³ Some Staff witnesses call this program "Urban Underground Investment Reinvestment" or "UUIR." There is no difference. For clarity, ComEd uses the name and abbreviation found in its testimony and tariffs.

fact, a rate-funded program of this type has never before been approved by the Commission, and absent the certainty alternative regulation can provide, it will likely not occur. Ironically, the parties that question why ComEd proposed LIAP in its alternative regulation plan are the very parties whose “traditional” rate case arguments make it prohibitively risky to fund that assistance in any other way.

In this respect, speculating about how programs like UUFRR or LIAP might hypothetically function under traditional regulation is a misleading red herring. Under traditional regulation, the risks associated with those programs are too high, and they simply will not be undertaken. It is one thing if the Commission decides that the costs of these programs exceed the benefits and rejects them on their merits. It is quite another to reject beneficial programs out of a desire to force them into a traditional model into which they simply will not go.

The Proposed Order recommends findings that are not supported by fact or law. In many cases, it appears that the worst possible “facts” are assumed about ComEd’s proposal. However, ComEd is especially troubled by certain portions of the Proposed Order that appear to accuse it of bad faith. *ComEd is not motivated to “sell” the Commission overstated budgets, even if it could.* Even if one believed that ComEd would so compromise its credibility with the Commission, the maximum monetary gains ComEd could reap in this pilot proposal are tiny. Moreover, ComEd could hardly expect to retain even those tiny gains. If ComEd cheated – by inflating its budgets or by declaring work is “complete” when it is not – the Commission would (and should) end the pilot and take other remedial measures.

Indeed, despite repeated claims to that effect, the evidence shows that ComEd’s budgets are not soft or inflated.

- The UFR budget is based on actual 2008 and 2009 historical unit costs for similar work. Those costs are not increased for inflation, and are discounted a further 10%. By any measure of real costs, the UFR budget is already a lowball budget.
- The EV budget is detailed down to the level of individual vehicles and pieces of equipment. This is a far more granular level of support than what is typically provided or examined in a rate case. Despite the Proposed Order's rejection, ComEd provided detailed evidence supporting its budget and its cost components.
- The LIAP is the sum of specified program expenditures. There can be no doubt about its accuracy.

Elsewhere, the Proposed Order can be read to be critical of the use of budgets to support any rate related proposal. At a minimum, it should be clarified to indicate that such criticism is related to the specific proposals in this case and should not be read as criticism of the use of budgets in other contexts not at issue in this Docket.

ComEd makes no windfall off this proposal. Under this program, ComEd must pay for the investments up front and will not fully recover those costs, no matter what the incentive, for decades. Moreover, incentives under this proposal – even if costs came in way under budget – are modest, far less than the \$2 million Operating & Maintenance (“O&M”) expense credit customers can receive. *Nor are ComEd's proposed low income programs a stratagem.* The costs of LIAP are not in the adjusted test year of ComEd's pending rate case, nor could they be under the Commission's rules. In any event, trying to fund utility low income assistance programs directly through rates – especially in the face of the challenges made in this very docket – without Section 9-244's pre-approval is simply too risky. There is good reason for addressing them here. *The Commission remains in control.* ComEd cannot expand, or even

continue, the pilot without the Commission's approval. The Commission's decisions on those questions will no doubt focus on whether the program benefitted customers and whether ComEd lived up to its promises.

In sum, "[t]he world is changing, and innovation in this industry is increasingly critical to keeping our state competitive and its economy strong. It is time to begin exploring ways that we can all win, rather than continuing the emphasis on trying to ensure that utilities lose." Hemphill Sur., ComEd Ex. 8.0, 3:56-59. ComEd's alternative regulation pilot is a first step in that direction. As stated herein and in ComEd's post-hearing briefing, ComEd's pilot is lawful, innovative, and supported by the evidence. It should be approved.

II. ORGANIZATION OF THIS BRIEF

The Proposed Order begins by turning to the legal criteria for alternative regulation programs established by Section 9-244 of the PUA. However, those sections of the Proposed Order actually do more than lay out the legal criteria. In most cases they actually make findings about whether ComEd's alternative regulation plan and the programs it includes meet those criteria, even though the sections discussing the detailed facts of the plan and its programs do not come until later. ComEd believes that this brief will be less repetitive if it addresses the facts of the programs and plan first, and then analyzes whether those plans meet the legal criteria. ComEd does not expressly propose reorganizing the Proposed Order as an Exception.

III. COMED PROPOSES BENEFICIAL PROJECTS

ComEd proposes to implement and fund discrete programs through its alternative regulation plan. Three of those programs – the UUFR pilot, a utility fleet Electric Vehicle ("EV") pilot, and LIAP – would commence immediately after the plan is approved, and ComEd is also seeking Commission approval of those three programs in this Docket. ComEd's

alternative regulation proposal also includes a mechanism for funding future Smart Grid investments. Such a mechanism will be necessary if meaningful Smart Grid investments are to occur. However, ComEd seeks no approval of any specific Smart Grid investment in this Docket. Smart Grid deployment would only occur if and when the Commission approves, in a subsequent docket, specific Smart Grid investments to be implemented under Rate ACEP.

A. Urban Underground Facilities Reinvestment

1. Customer Benefits

The Proposed Order correctly recognizes that the UUFR program has “many potential benefits” and will “enhance reliability ... [and] safety, create jobs, reduce leakage, avoid occupational exposure to lead fumes and has the potential to reduce costs in the long run.” PO at 75. Section 9-244(b)(2) requires a finding that “the program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program.” 220 ILCS 5/9-244(b)(2). Despite the un-rebutted and strong evidence showing the UUFR program’s benefits, the Proposed Order concludes that its benefits “in no way satisfies ... the requirements that must be met for Commission approval of Rate ACEP under Section 9-244 of the Act.” PO at 75. In this, the Proposed Order errs.

Key to the Proposed Order’s finding is based on an incorrect interpretation of the plain meaning of Section 9-244(b)(2). That section requires a showing that a proposed program is “likely to result” in benefits “that would not be realized in the absence of the program” 220 ILCS 5/9-244(b)(2). In contrast, the Proposed Order applies Section 9-244(b)(2) as if it required a showing that the “benefits ... are not likely to accrue **for UUFR performed under traditional regulation.**” PO at 76 (emphasis added). The standard imposed by the Proposed Order is not

contained anywhere in Section 9-244(b), and the Proposed Order's interpretation of the law to require that standard is contrary to applicable principles of statutory construction. The primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature, and that intent is best evidenced by the language used by the legislature. *Thomas M. Madden & Co. v. Department of Revenue*, 272 Ill.App.3d 212, 215, 651 N.E.2d 218, 220 (2nd Dist. 1995); *Metro Utility Co. v. Illinois Commerce Comm'n*, 262 Ill.App.3d 266, 273-74, 634 N.E.2d 377, 382 (2nd Dist. 1994). Thus, it is improper "to depart from the plain language and meaning of the statute by reading into it exceptions, limitations[,] or conditions that the legislature did not express." *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 189, 561 N.E.2d 656, 661 (1990); see also *Davis v. Toshiba Machine Co., America*, 186 Ill.2d 181, 184-85, 710 N.E.2d 399, 401 (1999). The Proposed Order violates that well established canon of statutory construction by imposing a condition – that benefits would not be realized if the program were performed under traditional regulation – that is not contained in the statute.

2. Rate ACEP Provides for an Equitable Sharing of Net Benefits

Section 9-244(b)(8) of the Act also requires an affirmative finding that "the program includes provisions for an equitable sharing of any net economic benefits between the utility and its customers to the extent the program is likely to result in such benefits." 220 ILCS 5/9-244(b)(8). The Proposed Order questions whether the UUFR program satisfies this requirement, but ComEd respectfully submits that its analysis of this issue is deficient. See PO at 76. The analysis in the Proposed Order does not discuss or give any weight to Rate ACEP's actual benefit sharing provisions. Rate ACEP provides that customers will receive half of any capital carrying costs savings generated by ComEd completing the programs for less than the Commission approved budget and all of the benefit of reduced Operating & Maintenance costs.

ComEd Ex. 1.2, Original Sheets Nos. X+14 and X+15; *see also* ComEd Init. Br. at 11-12, 40. In *Northern Illinois Gas Co.*, ICC Docket No. 99-0127, Order (Nov. 23, 1999), 198 P.U.R.4th 436, 1999 Ill. PUC LEXIS 921*88-89. (“*Nicor Alt Reg Order*”) the Commission found that “a 50/50 sharing of savings and losses ... is equitable, would create a balanced level of incentives and disincentives for Nicor and, therefore, would meet the requirements of Sections 9-244(b)(4) and 9-244(b)(8).” *Nicor Alt Reg Order* at *88. ComEd proposed sharing – which is more favorable to customers than the 50/50 sharing mechanism in the *Nicor Alt Reg Order* – similarly satisfies Section 9-244(b)(8).

Turning to the sharing of savings that occur through the actual budget for UUFR, the Proposed Order acknowledges that the UUFR budget was based on historical rather than current costs, and that those historical costs were not adjusted for inflation, meaning that it is likely to be understated. However, the Proposed Order does not discuss or give any weight to the additional fact that the UUFR budget incorporates a built-in discount of approximately 10% based on an assumed productivity gain. Blaise Dir., ComEd Ex. 4.0, 15:259-16:268; ComEd Init. Br. at 21. Instead, the Proposed Order posits that all proof of equitable sharing for UUFR is undermined “[b]ecause of the risk of inflated” budgets in the context of an incentive program, and the absence of a “quantitative analysis.” PO at 76. These criticisms lack merit.

There is, first of all, no proof whatsoever that the UUFR budget is inflated in any way. To the contrary and as just discussed, the Proposed Order recognizes and the record demonstrates that the UUFR budget is based on historical costs that have not been adjusted for inflation and then were reduced further for an assumed productivity gain. If anything, the UUFR budget is understated. No witness identified any respect in which it was “inflated.” While some

parties complained about the policy of using “budgets” in alternative regulation programs in general, none offered testimony on the actual UUFR budget.

The Proposed Order does not discuss what it means by an absence of a “quantitative analysis,” but the record is clear that ComEd provided testimony showing how the UUFR budget numbers were developed and substantiating the built in discount. Blaise Dir., ComEd Ex. 4.0, 14:245-16:268. Moreover, Section 9-244(b) of the Act does not contain any requirement for a quantitative analysis with respect to the equitable sharing of any net economic benefits. As discussed above, it violates well established rules of statutory construction “to depart from the plain language and meaning of the statute by reading into it exceptions, limitations[,] or conditions that the legislature did not express.” *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 189, 561 N.E.2d 656, 661 (1990). Courts have made clear that it is particularly inappropriate to impose a quantitative evidentiary requirement for demonstrating after-the-fact benefits when the statute does not call for one. The Illinois Appellate Court has held that the similar imposition of a present-value-of-future-revenue-requirements (PVRR) analysis in order to demonstrate the prudence of retiring a plant was improper:

we find that the Commission created *after the fact* the standard of care a reasonable person should have followed in early 2000 when deciding whether to retire the Freeburg plant, and it applied it in hindsight to judge the prudence of Illinois Power's actions. The Commission's finding that a PVRR analysis was required in the instant case was not supported by substantial evidence; hence, that finding was arbitrary and unreasonable. Therefore, Illinois Power was not "imprudent" for failing to conduct a PVRR analysis in order to substantiate its decision to retire the Freeburg propane plant.

Illinois Power Co. v. Illinois Commerce Comm'n, 339 Ill. App. 3d 425, 439-40 (1st Dist. 2003).

ComEd notes that the Commission did not impose or discuss the need for a quantitative showing with respect to the requirement to show an equitable sharing of any net economic benefits in the *Nicor Alt Reg Order*. Indeed, the requirement under Section 9-244(b)(8) is for a finding that the

program “**includes** provisions for an equitable sharing of **any** net economic benefits ... **to the extent the program is likely to result in such benefits**” (220 ILCS 5/9-244(b)(8), not for a finding that benefits will necessarily result under Alternative Regulation but not otherwise.

The Proposed Order also errs in relying on the AG’s assertion that Rate ACEP does not account for either the avoided cost of the normal level of ongoing UUFR replacement or for any prospective O&M savings that may result from the acceleration of UUFR replacements and reduced outage response costs. PO at 76. The “avoided cost” argument is a red herring based on the false premise that customers are already paying these costs. The proactive work performed under the proposed UUFR project is completely incremental and additional to the ongoing emergent and reactive corrective maintenance work that ComEd has been performing, and will be separately tracked for that reason. Blaise Dir., ComEd Ex. 4.0, 8:112-19, 16:269-71; Hemphill Dir., ComEd Ex. 1.0 Rev., 12:248-51. The record also establishes that the emergent work performed by ComEd each year only covers a portion of the total work that ComEd’s existing program has identified and expects to perform over time. Blaise Dir., ComEd Ex. 4.0, 6:76-7:90. There is no evidence that the discrete 18-month UUFR pilot could exhaust the total work to be performed under the current program. Hence, even if some of the currently identified work were to be performed under the UUFR project it would not reduce the level of work or the costs reflected in current rates.⁴ Therefore, any suggestion that the 18-month UUFR pilot project

⁴ Much of the work under the current program would be for new plant additions that are not included in ComEd’s current rate base. To the extent that such costs could be considered “avoided” by incurring them under the UUFR project, no action or provision in Rate ACEP is needed to share such savings with ratepayers since they are not currently paying for them. Similarly, the proposed additional O&M expense for proactive testing under the UUFR project is obviously not part of the current reactive replacement program costs. See PO at 64, 69, 71. Again, to the extent such costs constitute “avoided” costs, no action or provision in Rate ACEP is needed to share such savings because those costs are not currently paid for by ratepayers.

will avoid UUFR type work now performed or somehow reduce underground cable maintenance costs included in current rates is unsupported and contrary to the facts.

Similarly, the claim that the UUFR program will generate O&M expense savings for reduced outage response costs that are not being equitably shared is also not supported by the record. O&M expenses for outage response costs are included in ComEd's rates for storm restoration expense based on the normalized or average level of such costs over a number of years. *See Commonwealth Edison Co.*, ICC Docket No., 07-0566, p. 52 (Order Sept. 10, 2008) (approving recovery of storm restoration expense in base rates.); *see also id.* at 143-159 (discussing storm restoration costs in context of proposal for a storm expense cost rider). Any effect of the UUFR program on outage restoration costs will thus be captured and fully passed on to customers on a rolling basis, just as any factors that could increase those costs are currently reflected in rates on a rolling basis. In any event, the UUFR program is unlike to significantly change restoration costs. While the program would result in avoided outages, ComEd's testimony explains that outages would be avoided by identifying cable joint issues, equipment defects and cables that fail diagnostic testing and repairing or replacing those items as appropriate. Blaise Dir., ComEd Ex. 4.0, 6:76-7:90. That reduces outages by accelerating the identification and remediation of defective or damaged cable and equipment that is more likely to fail under load, not during a storm. It is not a program to reduce or prevent storm or weather related outages and, accordingly, would not be expected to have any appreciable effect on those costs.

The testimony also establishes that the UUFR project will address mainline feeder cable that forms the "stem" or "trunk" of feeders using high-capacity 12kV cables supplying switchgear and transformers that ultimately provide service to many customers. Blaise Dir.,

ComEd Ex. 4, 2:39-3:55. ComEd’s testimony also establishes that while “only a very small proportion of the mainline cable system fails,” mainline cable failures are a significant source of customer interruptions given their feeder function and the large number of customers affected by a feeder outage. *Id.* at 7:91-5. This evidence does not support an inference or assumption that there are any appreciable non-storm related outage response costs potentially resulting from UUFR. The same facts that make UUFR an attractive reliability enhancement measure (outages avoided from a single cable remediation potentially avoids a large number of customer interruptions), diminishes its impact on restoration costs (only one restoration effort is needed to restore a large number of customers). The real impact of UUFR is on the capital costs of replacing or repairing the equipment or cable, and ComEd’s proposal provides for a clear and equitable means of sharing those costs. Indeed, ComEd’s proposal errs on the side of sharing potential savings with customers by including assumed efficiency savings for capital costs up front in the budget. For all the foregoing reasons, there is no basis to find that ComEd’s proposed UUFR program does not include “provisions for an equitable sharing of any net economic benefits between the utility and its customers.” 220 ILCS 5/9-244(b)(8).

3. The UUFR Budget Is Specific, Reasonable and Allows The Commission to Assess Prudence And Completion

The Proposed Order claims that “the very nature of the UUFR proposal highlights the problems with ComEd’s proposed budget-based Alt Reg.” PO at 76. According to the Proposed Order:

[I]t is impossible to approve a reasonable budget when the scope of the work is so fluid and undefined. Indeed, because UUFR involves testing, which has not been undertaken, followed by a decision on what level of work is required, the Commission believes the nature of UUFR makes it extremely difficult to assess the reasonableness of ComEd’s UUFR budget. UUFR is remarkably ill suited for what the Company proposes in Rate ACEP and the Commission finds the CG’s argument compelling:

manhole costs appear to constitute the majority of the UUFR capital budget but not even ComEd will know until it gets underground and inspects the manholes whether these manholes will only need to have support parts replaced/refurbished (ComEd Ex. 40.0, p. 10, Ins. 149-152 [Blaise]) or whether more extensive manhole rebuilding or replacement needs to be performed *Id.* Ins. 151-154. This after-budget decision will drive actual costs. In such a circumstance, it is not easy to see how a “beat the budget” approach is appropriate.... Nor would anyone on Staff know whether it is more cost efficient in the long run to replace outdated cable with higher (or lower insulation) level polymer cables.... These are the types of business decision that are within ComEd’s knowledge, expertise, and business judgment; decision that seem better fit for after-the-fact prudence review than a before-the-fact budget appraisal.

CG IB at 3. It would be near impossible to determine when the UUFR project is complete because there are no specific scope of work parameters defined before the budget is established. The Commission understands that the proposed project is to replace 2,400-3,600 manholes and 25-37 miles of cable. The Commission is concerned that this is a huge range that could easily be manipulated to allow ComEd to declare a project complete in order to come in under budget.

PO at 76-77. The passage of the Proposed Order is flatly wrong because the description of the UUFR budget it relies upon is wrong and contains numerous misstatements or mischaracterizations of the facts.

The Proposed Order’s view of the scope of the work to be performed under the UUFR project as completely unknown because it involves testing is contrary to the evidence and wrong. ComEd witness Ms. Blaise explained that ComEd has developed a detailed work plan that breaks down the inspection and replacement work by quarters. Blaise Dir., ComEd Ex. 4.0, 9:134-40. Ms. Blaise also explained that the cost for this work used in ComEd’s proposed budget was developed by applying unit costs to the units of work to be performed. *Id.* at 15:251-16:268. The costs developed from the units of work to be performed under the UUFR project were supported in Ms. Blaise’s workpapers – documents provided to all parties, including the

Commercial Group – and no party challenged or questioned these numbers in any of their testimony.

It is true that ComEd cannot predict exactly which cable and manholes will require work in advance. Testing to determine which cables could benefit from proactive work is the whole point of the program. The program operator cannot predict in advance which specific cables will be flagged upon testing, but it can statistically identify the work it will perform over the group. Here, no party challenged ComEd’s estimation of the failures that would be reasonably expected to be detected and remedied under the UUFR program. Indeed, Staff so strongly endorsed this methodology that it went so far as to argue that ComEd should be required to undertake this work because of its estimated reliability benefits.

Likewise, the CG’s claim, which the Proposed Order accepts, that the UUFR program could not assess benefits is simply false. Assessing the benefits of the cable work is done on an aggregate, statistical basis, just like any other equipment evaluation. Cost savings are similarly assessed by comparing the costs where work has been done with those where it has not. ComEd does not need to know which cables will fail in advance to conduct either test.

Similarly, the fact that ComEd has provided quarterly work and budget amounts for the six quarters of the UUFR project undermines the unsupported assertions that ComEd could somehow declare the UUFR project complete at the low end of certain ranges mentioned in the testimony. Work is allocated to each of the six quarters and reflects reduced work during the quarters including the peak summer months (when peak load requirements limit the number of feeder circuits ComEd can take out of service). *See* Blaise Dir., ComEd Ex. 4.0, 9:136-40, 15:247-50. The assertion in the Proposed Order that ComEd could stop work early (*e.g.*, at the end of quarter 4 or 5) because it has reached the low end of the total range for the program is

incorrect. It would be contrary to the quarterly workplan to perform no work in quarter six (or any later quarter) if the work in quarters 1 through 5 reach the lower end of the ranges discussed in the testimony for the overall UUFR pilot program.

Moreover, the “ranges” supporting these arguments are not what opponents of ComEd’s alternative regulation proposal claim them to be. These were summaries of the detailed workplan described in Ms. Blaise’s testimony that were intended to put the UUFR project in context:

Manholes: Ms. Blaise explained that the mainline feeder cable system includes joints, terminations, cable support hardware (vertical channels, horizontal brackets, & cable saddles), conduit, and manholes. Blaise Dir., ComEd Ex. 4.0, 2:41-3. The UUFR project includes the proactive maintenance and reconstruction of cable support hardware in the manholes, and in some atypical instances structural repair or replacement of a manhole. *Id.* at 8:114-18, 8:126-28, 10:150-54, 10:156-11:174. The Manhole category describes the cable support hardware work and the atypical and more limited manhole structural work included in the budget. Since the amount of cable support hardware varies by manhole, the range of manholes represents the number of manholes that will be worked on to meet the units of work included in the budget.

Circuit Miles VLF Tested: ComEd witness Ms. Blaise explained VLF testing and the fact that it is included in the UUFR Project. Blaise Dir., ComEd Ex. 4.0, 8:122-28, 9:134-46, 14:246-15:250. This includes testing of existing and replaced cables. *Id.* Because the length of each circuit varies and the specific circuits to be tested pursuant to the workplan have not yet been identified, the number of miles to be tested pursuant to the detailed workplan represents a range of miles but not a range of tests.

Cable Replacement: ComEd witness Ms. Blaise explained that cable replacement is a significant part of the UUFR project, and identified how ComEd will identify the specific cables to be replaced. Blaise Dir., ComEd Ex. 4.0, 8:114-18, 8:128-9:140, 10:147-52. This includes work on cable joints. Again, since circuit length varies by circuit, there is a range of miles specified with costs based on assumptions falling near the middle of the range.

The Commercial Group argument cited by the Proposed Order (at 76-77) that the scope of work to be performed will vary based on future decisions is not supported by the record and is incorrect. This argument twists the fact the specific manholes, cable hardware and cables to be replaced have not yet been identified into an unsupported and incorrect assertion that the scope of work to be performed has not been specified. There are no post-budget decisions driving the scope of work to be performed. As discussed above, ComEd's detailed workplan specifies the work to be performed, and no party questioned this plan in testimony. Nor does ComEd's UUFR proposal create future decisions, as alleged by the Commercial Group on whether "to replace outdated cable with higher (or lower insulation) level polymer cables." PO at 77. ComEd's proposal is clear: "PILC cable segments that require replacement will be replaced with a more modern dielectric polymer insulated cable." Blaise Dir., ComEd Ex. 4.0, 9:130-1. ComEd supported this decision in testimony, and no party provided testimony rebutting same. *Id.* at 13:207-14:227.

4. Staff's Proposal To Mandate UUFR Work

With respect to the issue of whether to mandate ComEd to undertake the UUFR project outside of its proposed Alternative Regulation proposal, the Proposed Order correctly concludes that "[t]his is not the docket[] or the record []on which to base such a decision." PO at 75.

While correctly finding this issue to be beyond the scope of this docket, the Proposed Order subsequently addresses unnecessarily several matters related to this issue.⁵ In addition to the legal concern over addressing an issue that is beyond the scope of this Docket, the Proposed Order also makes incorrect statements. For instance, the Proposed Order is incorrect when it states that there is no basis to assume that any of the costs associated with the UUFR project would not be recovered from customers under traditional regulation if they are otherwise reasonable and prudent. Traditional regulation bases cost recovery on test year snippets. The return on and of UUFR investments between the time made and the inclusion of such costs in new rates is forever lost under traditional regulation. Moreover it would be difficult, if not impossible, to fit the proactive O&M costs of the short term UUFR project into either an historical or future test year. *See* Hemphill Dir., ComEd Ex. 1.0, 8:159-9:179; Hemphill Reb., ComEd Ex. 6.0, 19:411-20:442; Staff Group Cross Ex. 1, pp. 29, 31. The appropriate remedy to these issues is to delete the unnecessary language from the Proposed Order.

* * * * *

For all these reasons, the Proposed Order should be revised with respect to the UUFR project in accordance with ComEd’s Exception Nos. 4, 12 and 15.

B. Utility Electric Vehicle (“EV”) Pilot

The Proposed Order’s errs in both its analysis and conclusions regarding the Electric Vehicle (“EV”) Pilot project. The Proposed Order’s expression of “agree[ment] with Staff ... that not only does ComEd have ‘an incentive to inflate its budgets under its proposed Alt. Reg.

⁵ The Proposed Order states “If Staff is correct that this project is necessary to ensure adequate reliability for Illinois ratepayers, then ComEd should complete it, with or without Rate ACEP. The Commission rejects ComEd’s argument that this would be an unfunded mandate. The ability of a utility under traditional regulation to recover its reasonable and prudently incurred costs for necessary, used and useful investments is long-standing and if UUFR is required to provide adequate reliability there is no basis for assuming the associated costs will not be recovered from ratepayers.” PO at 76.

plan, but also that it has in fact inflated its proposed EV Pilot budget” is conceptually unsound and not supported by the record facts. See PO at 91.

1. ComEd’s Budget is Not Inflated

The Proposed Order apparently endorses Staff’s view that regardless of ComEd’s proof, ComEd could never prove its case because pre-approved budgets are somehow subject to an insurmountable incentive to inflate the underlying budget. While a \$5 million budget is certainly significant, it is modest in terms of ComEd’s overall revenue requirement and the minimal return on and of that investment under the EV Pilot will not generate the type of “gains” that necessarily underlie Staff’s, and the PO’s, negative incentive view. Ironically, while accepting the unreasonable and illogical view that utilities will necessarily act on economic incentives to improperly inflate publicly reviewed budgets, the Proposed Order simultaneously fails to find that utilities would act on legitimate incentives to share in increased efficiencies and cost savings under rate sharing mechanisms such as Rate ACEP.

The Proposed Order finds that, contrary to the rules of evidence, it is not enough in a “budget” approval scenario for ComEd to prove its case – it must disprove every negative assertion by any other party. See PO at 91. ComEd has no such burden. In this case, the assertion supporting the Proposed Order’s incorrect conclusion that that ComEd inflated the EV budget was the speculation that “bulk discounts” might be available for charging stations. *Id.* Staff’s speculation that such discounts *may* exist does not establish that they *do* exist – and, to be clear, ComEd does not believe that they do. Moreover, such speculation cannot support the Proposed Order’s actual finding that ComEd inflated its EV Pilot budget. ComEd explained in evidence how it developed its budgets, and if Staff or any other party had evidence that supported a discount for the volume of charging stations, they could have presented that

evidence. They did not. Moreover, the fact that Staff did not cross-examine Mr. McMahan on this issue suggests that Staff's goal is to further its general opposition to Rate ACEP, not to identify any unrecognized discount that actually exists.

The Proposed Order attempts to bolster its rejection of the EV Pilot by stating that “the Company has not compromised on its initial budget proposal in any way, except to agree to the obvious need to reflect any tax credits that may be available.” PO at 92. The Proposed Order then speculates that:

the “correct” number is probably somewhere between the Company and Staff, but this highlights yet another problem with the Company's proposed Rate ACEP. It would be inappropriate for the Commission to allow the Company to recover costs based on a number the Commission would essentially have to make up. This is in contrast to an after-the-fact review where, the Commission might adopt a compromise position, but at least that position would be based on actual numbers.

Id. First, the Proposed Order's criticism of ComEd for not “compromising” is legally suspect. Section 9-244(b) specifically requires that “[i]f the Commission cannot make the [required statutory] findings, it shall specifically identify in its order the reason or reasons why the proposed program does not meet the above criteria, and shall identify any modifications supported in the record, if any, that would cause the program to satisfy the above criteria.” While ComEd can and does pursue compromise in many circumstances, it is improper and contrary to the law to criticize ComEd for not reducing a budget it believes to be accurate – particularly given that no party opposed to ComEd's Alternative Regulation proposal provided any facts that supported a reduction.

The Proposed Order also errs in suggesting that any proposed modification of ComEd's EV Pilot budget would essentially have to be “made up.” While it is true that no party suggested modifications to the EV Pilot budget, the basis for ComEd's EV Pilot budget was clearly established in the record for each piece of equipment. Further, to the extent that the Commission

believes there are any *substantiated* concerns with the EV Pilot budget, the record allows the Commission to undertake proposed modifications.

2. ComEd Cannot “Substitute” Cheaper Equipment to “Game” its Budgets

The Proposed Order also has a distorted view of budget-based alternative regulation. ComEd’s proposal conceptually represents insurance that it will make certain investments under Rate ACEP at no more than the approved budgeted costs, and customers pay no “premium” or “fee” unless ComEd is able to deliver those investments for less than the approved budgeted costs. In that situation, ComEd retains a portion of the cost savings. In exchange, ComEd receives regulatory certainty regarding recovery of amounts within the approved budgets. Subjecting ComEd to after the fact disallowances through the use of hindsight is not a better design.

Unfortunately, the Proposed Order misinterprets ComEd’s reply to Staff’s meritless argument that ComEd could buy cheaper Level 2 charging stations and thereby artificially come in under budget. The Proposed Order (at 92) states that Staff’s argument demonstrates:

why the Commission is concerned with the possible perverse incentives ComEd’s alternative regulation proposal could create. When faced with the suggestion that its budget may be too high, rather than reducing its budget and potentially reducing costs, ComEd instead suggests that to comply with its proposed budget, it should simply purchase the budgeted equipment. While such a process may be in ComEd’s economic interest, the Commission believes it is clearly not in customers’ economic interest. The Commission concludes that this single example demonstrates a fundamental flaw in the proposal to measure ComEd’s actual performance against a pre-approved budget. It appears to the Commission that in at least some instances, ComEd will have an incentive to act in a manner that is in its shareholders economic interests and, at the same time, contrary to customers’ economic interests.

By accepting the premise of Staff’s argument, this passage ends up getting everything wrong. ComEd explained that Staff’s view that ComEd could buy the cheaper charging stations

and come in under budget was based on the false premise that ComEd was not obligated to perform in accordance with the specific budget approved by the Commission. ComEd Init. Br. at 23-24; ComEd Rep. Br. at 25-26. Rate ACEP does not allow ComEd to propose one type of facility and instead install a less functional cheaper type of facility to “beat the budget.” Doing so would not comply with work the Commission would approve for the EV Pilot. Indeed, the hypothetical situation posited by Staff would constitute a violation of ComEd’s obligation to make the approved investments consistent with its approved budget.

Moreover, ComEd’s commitment to purchase the equipment proposed is not motivated by a desire to defend its budget, but by the fact that the more capable charging stations are needed. The fact that Staff’s budget is lower than ComEd’s is a function of this different equipment choice and not any artificial inflation of the budget. “ComEd has clearly proposed to purchase the Coulomb Technologies CT 2100 charging stations. Staff’s cost estimates are based on the use of different equipment that costs less.” ComEd Rep. Br. at 24. The evidence, moreover shows that the Coulomb Technologies CT 2100 charging station is appropriate for the EV Pilot given its data gathering and management capabilities – an issue the Proposed Order never addresses.⁶ *Id.* at 24-25.

This same misunderstanding is perpetuated in several additional paragraphs of the Proposed Order. For example, it also states that:

⁶ Mr. McMahan explained that the functionality of this particular Level 2 charging station is essential for an informational EV pilot like the one proposed here. “In order to evaluate the total lifecycle costs of EV ownership and the methods to reduce those costs, remote communications, load management, and usage data collection and analysis are all essential. As mentioned in ComEd’s response to Staff Data Request JLH 1.09, the Coulomb Technologies CT-2100 charging station was chosen for its ability to be networked and for its remote communications capability, enabling aggregate management of the electrical load associated with ComEd’s fleet of plug-in vehicles. This data gathering and charge management capability will provide valuable information not only to ComEd for its own fleet, but for commercial and residential EV owners as well.” McMahan Reb., ComEd Ex. 7.0, 10:173-88. Charging stations like ComEd proposes can fully charge an EV in significantly less time, an important consideration for ComEd’s fleet. McMahan Reb., ComEd Ex. 7.0, 8:147-9:166. The cheaper stations provide no communications, control, or data collection capability, all of which are vital to the ComEd EV Pilot.

[t]he Commission also finds evidence of the inappropriateness of the Rate ACEP budget process in the proposed installation costs for the charging stations. The DOE Study is apparently the only publicly available information regarding the cost of installing charging stations, which are remarkably lower than ComEd's estimated costs. The Commission is left wondering on what basis it could determine a reasonable estimate of the costs. The Commission believes that in this instance, an after-the-fact review of what it actually costs to install the charging stations is obviously necessary to determine whether the costs were reasonable and prudently incurred.

PO at 92-93. The evidence is otherwise. The DOE Study was, once again, not the correct type or capability of charging station. The \$5,000 per unit estimate for the CT-2100 is based on a quote from Coulomb Technologies. McMahan Reb., ComEd Ex. 7.0, 10:185-86.

It is because the Proposed Order does not recognize the evidence justifying why the CT 2100 should be used for the EV Pilot and its mistaken belief that ComEd can exploit the budget by installing equipment different than that proposed, that the Proposed Order inappropriately concludes that ComEd "has not presented a record upon which the Commission can make a prudence determination." PO at 92. To the contrary and as discussed above, ComEd specifically refuted Staff's assertion that cheaper, less functional charging stations should be used. As explained in ComEd's Initial Brief:

ComEd's proposed installation cost budget also reflects additional material and labor costs to reflect the following circumstances: (i) the majority of existing parking spaces at ComEd's facilities where charging stations would be located are not within 40 feet of the breaker panel; (ii) a portion of the existing circuit breaker panels will not be able to accommodate additional circuit breaker locations to serve the new EV charging loads, given the age of many of ComEd's facilities and the fact that load has already been added to them over the years; and (iii) concrete saw cutting or additional concrete work will be required because a majority of ComEd's parking spaces where charging stations would be located are not directly adjacent to buildings housing electric service panels. McMahan Reb., ComEd Ex. 7.0, 11:207-12:233.

ComEd Init. Br. at 24.

Finally, based upon the erroneous conclusions regarding ComEd's EV Pilot budget discussed above, the Proposed Order concludes that it is not appropriate to proceed with the EV Pilot:

Because of the problems with the budget process, ComEd has not shown that the proposed EV pilot, which the Commission finds to be poorly defined, should be [SIC] funded through Rate ACEP. Indeed, the Commission questions how useful the pilot will be to the majority of ComEd's delivery service customers because it focuses on how EVs will perform in a fleet environment.

PO at 93. As explained above, the Proposed Order's conclusions regarding the EV Pilot budget are contrary to the record and not well reasoned. Similarly, the statement that the EV Pilot may not be useful to ComEd's delivery service customers is wrong and contrary to the record. The EV Pilot will provide ComEd with valuable information on how EVs perform in a fleet environment so as to allow ComEd to make a well-informed decisions regarding deployment of EVs in its fleet on a widespread basis. Given the environmental benefits of EVs, obtaining the information needed to make better informed decisions regarding widespread deployment will be a benefit to ComEd's customers. Finally, while the information ComEd will obtain will be particularly useful to fleet vehicle operators, information about how EVs perform and maintenance cost information will be valuable to non-fleet operators as well.

* * * * *

For these reasons, the Proposed Order should be revised with respect to the EV Pilot program in accordance with ComEd's Exception Nos.6, 13, and 15.

C. Low-Income Customer Assistance Programs

The Proposed Order concludes that ComEd's Low Income Assistance Programs ("LIAPs") is merely a pass through of costs and that the continuation of these programs is better

addressed by the legislature. The Proposed Order errs. The LIAPs is an appropriate program to be included as part of Rate ACEP for several reasons.

1. Customer Benefits

The Proposed Order's conclusion that LIAPs do not benefit customers as customers are paying for the continuation of programs is incorrect for several reasons. PO at 63. First, if the programs are not continued, there is little doubt that more customers will be unable to pay their electric bills and therefore, ComEd's uncollectible costs being recovered through Rider UF would increase. As Dr. Hemphill explained, "Rider UF incorporates management's best estimate of uncollectible expenses. It is trued up on a monthly basis taking into account the outstanding balance of accounts receivables as well as accounts written off during the month." Thus, without the approval of the LIAPs to help customers that cannot afford to pay their bills in Rate ACEP, ComEd customers would have to pay many of these costs with higher payments under Rider UF. Hemphill Reb., ComEd Ex. 6.0, 44:978-979.

Second, the programs that ComEd seeks to continue help to change payment behavior of customers, which will reduce uncollectible costs in the long term. For example, the Fresh Start Payment Plan attempts to change payment behavior of customers not eligible for Low Income Home Energy Assistance Program by rewarding timely bill payments. Emmons Dir., ComEd Ex. 5.0, 9:149-150. The Helping Hand program encourages customers to establish prompt payment behavior by matching a certain percentage of a customer's payment if those payments are made over a certain period of time. *Id.* at 10:169-171. Therefore, LIAPs is beneficial for all ratepayers. Low income customers are benefited as up to 300,000 of such customers will be assisted each year under Rate ACEP. Emmons Dir., ComEd Ex. 5.0, 13:228-230. All other customers benefit by the reduction in costs collected under Rider UF.

Finally, the Proposed Order cites several claims made by AARP which are simply incorrect. AARP argued that low income customers may be harmed by LIAPS as they are low use customers. PO a 63-64. However, the Commission has already recognized that there is no direct correlation between low income customers and low use customers. In its Order in Docket No. 07-0566, ComEd's last rate case, the Commission found:

Although the premise that low-income customers are low electricity use customers seems reasonable, the record does not demonstrate that all low-income customers are necessarily low-usage customers, or visa versa.

Docket No. 07-0566, Order (9/10/08) at 215 ("07 Rate Case Order"). AARP provided no support for its contention and the Commission has rejected it in the past. Further, the Proposed Order cites the AARP argument that there has been no analysis of ongoing CARE programs. PO at 64. ComEd can only once again point to the direct testimony of Ms. Emmons who details ongoing programs, the number of individuals helped, and the third party agencies administering these programs.

2. Contrary to the Proposed Order, There is a LIAP Budget

The Proposed Order also erroneously concludes that there is no budget for the LIAPs. ComEd is proposing to spend up to \$10 million per year over two years. As explained by Ms. Emmons, the needs of ComEd's low income customers justify dedicating \$10 million to fund the seven low income assistance programs. This amount is based on ComEd's experience with the ComEd CARE program. See Emmons Dir., ComEd Ex. 5.0, 4:66-6:78; 7:95-106.

3. Approval of LIAP is Necessary and Appropriate

Finally, in order to implement the LIAPs, a mechanism such as Rate ACEP is necessary to eliminate after-the-fact disputes about legality and recoverability of costs. While legislation has continued some of these low income programs on a very limited basis, ComEd has identified

seven programs that, if funded, would benefit not just low income customers but all customers. However, Staff and Intervenors have argued everything from: ComEd and its parent, Exelon, should just fund LIAP without any recovery of costs – to the LIAPs proposal is an impermissible lifeline rate to – LIAPs are solely a matter for the legislature. Given the parties positions, it should be apparent why ComEd is unable to take the risk of implementing LIAP now and hoping it is approved in a subsequent rate case. As explained in ComEd testimony and Briefs, LIAP is an appropriate program to be pre-approved as part of Rate ACEP. Together with all the other proposed projects, Section 9-244 requirements are satisfied.

* * * * *

Therefore, ComEd’s proposed Low Income Assistance Programs should be approved as part of Rate ACEP and the Proposed Order amended in accordance with Exception Nos. 11 and 15.

D. Cost Recovery Mechanism for Future Smart Technology Investments

Despite “see[ing] ComEd’s various warnings regarding the need to have a cost recovery mechanism in place now,” the Proposed Order concludes that adopting a cost recovery mechanism in this proceeding would be premature. PO at 95. The Proposed Order’s conclusions regarding the subsequently-approved Smart Grid investments are in error in several aspects. The Smart Grid Investment mechanism should be approved as part of Rate ACEP and the Proposed Order conclusion amended as reflected in Exception Nos. 9, 14, and 15.

First, the Proposed Order relies heavily on the Smart Grid Policy Docket for a determination of the appropriate Smart Grid recovery mechanism. However, the policy docket is just that – a proceeding to discuss the policy surrounding Smart Grid investments, not cost recovery mechanisms. The Smart Grid Policy docket, which will be initiated by the

Commission, not by a tariff filing, and it will not be an Article IX tariff proceeding. It is the tariff filing that ComEd would make to initiate the Implementation Docket that would have to contain ComEd's proposed recovery mechanism. Even if the Commission reaches some conclusions in the Smart Grid Policy docket regarding the appropriate recovery mechanism as the Proposed Order speculates, the Implementation Docket will still be litigated if ComEd has been instructed to address certain aspects of the recovery mechanism in that proceeding. With respect to the Implementation Docket, the Commission instructed ComEd to:

... show whether the earnings cap is the appropriate method to capture the benefits for consumers and the impact of rider approval on its cost of capital for those projects

ComEd 07 Rate Case Order at 142-143. Therefore, despite the Proposed Order's speculation that issues regarding cost recovery will be resolved in the Smart Grid Policy Docket, pursuant to the 07 Rate Case Order, the recovery mechanism will continue to be at issue in the Implementation Docket.

Further, when filing its Alternative Regulation petition on August 31, 2010, ComEd anticipated that the Smart Grid Policy Docket would have been initiated and concluded by the time this proceeding ended. Hemphill Dir, ComEd Ex. 1.0 Rev.; 17:352. The reality is it that the Commission has not yet initiated the Policy docket even though the Illinois Statewide Smart Grid Policy Collaborative filed its report on September 30, 2010. There is already delay. The fact that there is no active proceeding currently underway in Illinois makes it all the more urgent that the recovery mechanism be considered and approved as part of Rate ACEP. Specific proposals should have no impact on the form of the cost recovery mechanism because the specific proposals will be discussed in the implementation filing after the Policy docket concludes. Thus, absent the Commission approving a recovery mechanism as part of Rate ACEP

or legislation, the benefits to customers, the Northern Illinois economy, and society will be delayed and lost. Hemphill Dir., ComEd Ex. 1.0 Rev., 16:329-330.

Second, the Proposed Order states that the defined Smart Grid process set forth in the 07 Rate Case Order “will allow the Commission to maintain control over the [Smart Grid] discussion.” PO at 99. However, the approval of a Smart Grid cost recovery mechanism as part of Rate ACEP will not deprive the Commission control over any Smart Grid decisions. It will simply allow ComEd to coordinate policy and investment decisions. Thus, if the Commission decides that no Smart Grid technology should be deployed, there is nothing to recover.

Finally, contrary to the Proposed Order’s conclusions, advanced approval mechanisms can meet the statutory requirements of Section 9-244 of the PUA. Should the Commission determine that Smart Grid technologies should be deployed in the Implementation Docket, ComEd will still have to present a budget for such deployment and all the determinations required in Section 9-244 will need to be met. The fact that a mechanism is now in place is not premature nor does it alter the requirements under Section 9-244.

* * * * *

Therefore, ComEd respectfully requests that the Proposed Order be amended as reflected in Exception Nos. 9, 14, and 15.

IV. RATE ACEP STRUCTURE

In describing Rate ACEP, the Proposed Order incorrectly describes the tariff and how it works. While ComEd appreciates that the tariff may be complex (PO at 32), it actually functions very simply as described in ComEd’s Verified Petition and the testimony of Dr. Hemphill. ComEd recommends the Proposed Order be amended to correct the descriptions of the tariff.

A. Under Rate ACEP, Customers Pay Actual Costs and Budgeted Costs

At Page 32, the Proposed Order states

... it appears to the Commission that the way the tariff is written, ratepayers would pay 100% of budgeted amounts. ComEd witness Hemphill testified that ratepayers are charged 95% of actual costs, but it is not clear to the Commission how the tariff operates to reflect any reductions from the budgeted amounts.

The Proposed Order simply misunderstands the tariff. Under Rate ACEP, two costs flow through Rate ACEP (1) the carrying costs of the capital expenditures; and (2) actual Operating and Maintenance (“O&M”) expenses. If ComEd exceeds the Commission approved budget by more than 105%, it does not recover any of these costs. In the case of O&M expenses, there will never be an opportunity to recovery these expenses as they will fall outside the test year in any subsequent rate case. Further, the budget for capital expenditures incentivizes ComEd to obtain the investments for less than budgeted. If ComEd comes in under budget, customers can benefit in three ways: (1) if the *capital* investment is under budget (*i.e.*, comes in under 95% of the budget) then ComEd will share with customers on a 50/50 basis the savings (the carrying costs) realized as a result (ComEd Ex. 1.2, Original Sheets Nos. X+14 and X+15); (2) there is an immediate reduction of O&M expenses of 5%, capped at \$2 million (ComEd Ex. 1.2, Original Sheets Nos. X+2, X+3, X+4, X+8, X+9, X+11, and X+15); and (3) O&M expense savings from efficiencies will be immediately realized by customers as ComEd *only* recovers the amount spent, not 100% of the budget as indicated by the Proposed Order (ComEd Ex. 1.2, Original Sheets Nos. X+2, X+3, X+4, and X+15).

Further, the purpose of alternative regulation is not to ensure that “ratepayers have the possibility of paying less than ComEd’s actual costs.” PO at 32. As the Commission stated in the *Nicor Alt Reg Order*, “it is consistent with the basic premise of incentive regulation, that companies with rate incentives are likely to be more efficient and productive than if there were

no incentives.” *Nicor Alt Reg Order*, 1999 Ill. PUC LEXIS 921*88-89. ComEd designed its budget based Alt Reg Plan to incentivize ComEd to obtain the investment as approved by the Commission for less than budgeted. As described above, ComEd’s proposal shares efficiencies with ratepayers.

B. Efficiencies Gained During the Deployment of an Approved Program Are Realized by Ratepayers

The Proposed Order at page 50 states:

The Commission believes Rate ACEP would produce a shifting of economic responsibility, but no net economic benefit to customers. As explained above, the 5% reduction in O&M expenses and the budget based capital investment scheme are of no benefit to ratepayers and merely shift risk for investments from shareholders to ratepayers.

...

Moreover, the Commission is concerned that any efficiencies that will be gained will not be realized by customers until ComEd’s next rate case. So, although Rate ACEP allows for the immediate recovery of O&M expenses it does not immediately reflect the potential savings and thus, the Commission believes any net economic benefits are not equitably shared with customers.

...

Moreover, the Commission agrees with CTA’s observation that “the O&M benefit to ratepayers is capped per Rate ACEP at \$2 million for all projects, so ComEd alone would keep all O&M savings in excess of the \$2 million - and not share them with ratepayers.

These statements are not correct for several reasons. First, there are some real economic benefits to customers. As explained above, if ComEd comes in under budget, customers benefit in three real and substantial ways. ComEd maintains full economic burden of deploying each of these projects efficiently otherwise it is penalized in several ways: (1) if O&M expenses exceed budget, ComEd cannot collect those costs, which are lost forever, and (2) if the capital budget is exceeded (by 105%), ComEd cannot recover the carrying costs on that excess, which will likely be challenged in the subsequent rate case.

Second, the Proposed Order errors when it states O&M savings are not realized by customers. ComEd does not recover budgeted O&M expenses. Only actual costs are recovered through Rate ACEP, up to 105% of the budgeted amounts. To the extent that ComEd is efficient, the efficiencies will be reflected in that lower than budgeted O&M expenses will be recovered through Rate ACEP. Further, while the Proposed Order discounts the effect of the 5% reduction of O&M expenses (up to \$2 million), the reality is given the O&M budgets for UUFR (\$15 million) and EV (\$0), the \$2 million cap will not be expended until ComEd begins to any Smart Grid Program that Commission approves.

Finally, the 5% reduction in O&M expenses is unrelated to efficiency savings. As explained above, efficiencies are passed through to customers (in the form of lower than budgeted O&M expenses) regardless if the \$2 million cap is met. ComEd will be reducing O&M expenses by 5% on top of any efficiencies that it can pass on to customers. Thus, ComEd does not keep any of the savings realized from efficiencies and reduces O&M by 5%.

C. When ComEd is Under Budget, Customers Receive the Investment for Less Than Anticipated

The Proposed Order at page 51 states:

It appears to the Commission that every time ComEd spends less than 95% of its proposed budget, ratepayers pay more than ComEd's actual costs. This is further exacerbated by the failure to share savings from gains in efficiencies until its next rate case.

Customers do not pay more if ComEd comes in under budget. The reason being only actual costs are recovered through Rate ACEP and not budgeted costs. Additionally, if ComEd comes in under budget, the amount customers pay is further reduced by the 5% reduction of O&M expenses (up to \$2 million) and a 50/50 sharing on the capital investment expenses.

* * * * *

Therefore, ComEd respectfully requests that the Proposed Order be amended as reflected in Exception Nos. 2 and 8.

V. COMED'S PROPOSAL MEETS THE STATUTORY CRITERIA

Section 9-244 provides the Commission with authority to adopt an alternative regulation plan. Section 9-244(b) of the PUA creates eight specific statutory criteria against which the Commission is to judge proposed alternative regulation plans. 220 ILCS 5/9-244(b). Those statutory criteria are well defined and, quite deliberately, afford the Commission substantial latitude to approve alternative regulation plans of different types and scopes. Unfortunately, the Proposed Order misinterprets many of these criteria in order to justify rejecting ComEd's proposal on legal grounds. In other cases, the Proposed Order conflates disputed factual issues with the legal standards itself. This section of ComEd's Brief on Exceptions addresses the legal standards established by Section 9-244.

A. The Proposed Order Incorrectly and Unnecessarily Restricts the Commission's Broad Authority Under 9-244

Under Section 9-244, the Commission, at the request of a utility, "may authorize for some or all of the regulated services of that utility, the implementation of one or more programs" of alternative regulation. 220 ILCS 5/9-244(a). Alternative regulation programs are broadly defined, to include:

(i) alternatives to rate of return regulation, including but not limited to earnings sharing, rate moratoria, price caps or flexible rate options, or (ii) other regulatory mechanisms that reward or penalize the utility through the adjustment of rates based on utility performance. ... The Commission is specifically authorized to approve in response to such petitions different forms of alternatives to rate of return regulation or other regulatory mechanisms to fit the particular characteristics and requirements of different utilities and their service territories.

Id. The Proposed Order, throughout its discussion of the Commission’s authority under this statute,⁷ confuses the programs of alternative regulation with the services to which they must relate, and reads non-existent limitations into the types of alternative regulation programs authorized. For example, the Proposed Order states (at 18):

Although ComEd states that Rate ACEP is really a combination of both (i) and (ii), the Commission does not find ComEd’s Rate ACEP to fall under option (i). Ratepayers that will receive the “service” chosen by ComEd for its Alt Reg petition will still take service under its traditional rate of return tariffs. Rate ACEP charges will be in addition to customers’ base rates, not in the alternative. Also, ComEd will receive the rate of return approved by the Commission in the Company’s latest rate case for the “service” provided under Rate ACEP. In the Commission’s view, Rate ACEP is a supplement to traditional rate of return regulation and because it provides for recovery of operating expense, capital expenditures and associated carrying charges it may not be fairly characterized as an alternative to rate of return regulation.

The upshot of the proposed rulings is that virtually no alternative regulation proposal would be lawful – even the Nicor proposal that the Commission approved a decade ago.

To begin with, Section 9-244 authorizes alternative regulation *programs*. It does not require or limit those programs to entire utility services. The statute uses the two phrases “one or more programs” and “services” separately, clearly, and in different phrases of its grant of jurisdiction to the Commission. It is unclear why the Proposed Order seems troubled and confused about this distinction. As noted above, it is improper “to depart from the plain language and meaning of the statute by reading into it exceptions, limitations[,] or conditions that the legislature did not express.” *Kraft*, 138 Ill.2d at 189. Moreover, the Proposed Order’s reading of the statute would radically restrict the Commission’s own jurisdiction to consider any alternative regulation program that did not encompass an entire service.

⁷ *E.g.*, PO at 18, 19, 20.

Moreover, where there is any doubt as to the meaning of a statute, the Commission should interpret it in a manner that is sensible and consistent with its overall purpose. Had the General Assembly meant that any program a utility proposed had to include an entire class of service, it makes no sense to authorize the Commission to approve “one or more” programs relating to a service – any single program would have to cover the entire service alone. Furthermore, in the only Commission decision approving an energy utility alternative regulation program, *Nicor Alt Reg Order*, cited above, the alternative regulation program approved by the Commission covered far from the entire bundled natural gas service there at issue. Indeed, the Proposed Order expressly recognizes that Nicor’s alternative regulation program was limited to only some supply aspects of its gas service and that the costs of those supply components would otherwise have been “recovered separately through a rider under traditional regulation.” PO at 17. Strangely, the Proposed Order appears to treat these facts as supporting its conclusion. It does not. The issue here is legal and jurisdictional, not about how easy it is to compare program costs, as the Proposed Order emphasizes. And, on that legal issue, the Commission decided in *Nicor* that an alternative regulation program does not have to encompass an entire service. There is no reason to repudiate that precedent now, especially because it is so clearly the correct one under the statute.

The Proposed Order is also unclear about what utility service ComEd’s proposed programs relate to. All of the programs relate to ComEd’s provision of electric delivery services. For example, the UUFR program relates to facilities used to provide delivery services. The EV pilot encompasses vehicles that ComEd would use to provide delivery services. LIAP assists customers in paying for their electric delivery service. And, future Smart Technologies would be installed on the system that also provides delivery services.

Finally, the Proposed Order also wrongly concludes that there is doubt about ComEd's programs even qualifying as alternative regulation. PO at 18. The statutory grant of authority to the Commission is broad and flexible. To reiterate, Section 9-244 authorizes Commission approval of either:

- (i) alternatives to rate of return regulation, including but not limited to earnings sharing, rate moratoria, price caps or flexible rate options, or
- (ii) other regulatory mechanisms that reward or penalize the utility through the adjustment of rates based on utility performance.

The statute contains no restrictive language or definitions confining how the Commission may interpret these terms. Nor does the statutory language or purpose suggest any intention by the General Assembly that the words of this statute should have anything other than their plain and natural meaning.

As ComEd made clear, its proposals qualify under both subsection (i) and (ii). The costs of the programs ComEd proposes will be recovered, and the programs themselves must be approved, under an incentive regulation mechanism that is quite clearly an alternative to rate of return regulation. The notion that to be an "alternative," a program must be optional or cannot be "in addition to" (PO at 18) existing rates is inconsistent with the common meaning of alternative regulation and wholly inconsistent with the *Nicor* decision. There is nothing whatsoever about an incentive regulation proposal being a "supplement" (*id.*) to other, traditional rates that somehow would disqualify it from being alternative regulation.

ComEd's proposal is also clearly an alternative regulation proposal under option (ii). ComEd will receive not only the rate of return approved by the Commission in its latest general rate case, but will also receive an adjustment (up or down) to its return based on its performance in completing the programs at or below an approved target budget. The Proposed Order appears to view the fact that ComEd's programs also have other goals besides cutting costs in response to

the reward/penalty mechanism somehow invalidates their status as alternative regulation programs. That argument finds no support in the statute. Nothing in Section 9-244 prohibits a program embodying a “mechanism[] that reward[s] or penalize[s] the utility through the adjustment of rates based on utility performance” from also having other laudable goals. Moreover, it would make no sense for there to be such a prohibition as Section 9-244(b) expressly requires alternative regulation programs to have other, tangible benefits.

In short, ComEd proposes alternative regulation programs well within the Commission’s authority under Section 9-244. The Proposed Order adopts strained and unnecessary arguments in an effort to exclude ComEd’s proposal; these arguments that are foreign to the statute itself, would tightly confine the Commission’s future jurisdiction and are, frankly, unnecessary to support rejection of ComEd’s proposal. The Commission should decline to establish such unlawful restrictions on its own jurisdiction.

Therefore, the Proposed Order should be amended in accordance with ComEd’s Exception Nos. 1, 5, 9, 10, and 15.

B. The Proposed Order Wrongly Concludes That Rate ACEP Fails Any Section 9-244(b) Criterion

1. ComEd’s Proposal Meets § 9-244(b)(1) – Lower Rates Than Would “Otherwise” Apply

Section 9-244(b)(1), in pertinent part, requires ComEd to show that Rate ACEP:

... is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program (Emphasis added).

The law thereby calls for a comparison between rates under the proposed alternative regulation plan and the rates that “otherwise would have been in effect” under traditional regulation to recover the costs of the same “services covered by the program.” It does not require the utility to

show that rates would likely be lower than they are now, or lower than they would be if the “services covered by the program” were not provided at all. Under well-established principles of statutory construction, the primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature, and that intent is best evidenced by the language used by the legislature. *Thomas M. Madden & Co. v. Department of Revenue*, 272 Ill.App.3d 212, 215, 651 N.E.2d 218, 220 (2nd Dist. 1995); *Metro Utility Co. v. Illinois Commerce Comm'n*, 262 Ill.App.3d 266, 273-74, 634 N.E.2d 377, 382 (2nd Dist. 1994). The question of whether rates will be lower than if the Commission rejected ComEd’s proposal entirely is utterly irrelevant to Section 9-244(b)(1).

The key premise of the Proposed Order’s erroneous conclusion that ComEd’s proposal fails this criteria is its observation that, under traditional regulation, “rates remain in effect for a number of years [and] ratepayers would be assessed no O&M expenses or carrying costs for these projects until the next rate case.” PO at 33. The Proposed Order thereby compares ComEd’s alternative regulation proposal to traditional rates that do not yet reflect the costs of the services covered by the program. Such a comparison is wholly inappropriate. Why?

- It is expressly not what law calls for. The test established by the law is whether the public is better off paying for a service under alternative rates or traditional rates, not whether traditional rates can be manipulated to deny or delay cost recovery.
- It is a pointless and meaningless comparison. Comparing an alternative regulation rate that includes the costs of programs to a traditional rate that does not include those costs only tells the Commission that rates will be higher when more programs are provided. It defies credulity to suggest that the General

Assembly crafted Section 9-244(b)(1) intending for the Commission to reach such an unremarkable conclusion. .

- Obviously, the General Assembly meant these program criteria to inform the Commission about whether alternative regulation was desirable, not give it an excuse to reject any such proposal. Under the Proposed Order's version of the test, virtually any alternative regulation plan would automatically fail.

Ironically, the Proposed Order's conclusion actually underscores the need for alternative regulation. Taken at face value, the Proposed Order praises traditional regulation because a utility that spends and invests to provide beneficial programs can have recovery of its capital expenses significantly delayed and its O&M expenses denied if they do not occur in a rate case test year. PO at 33. Put aside for a moment the fundamental unjustness of that outcome and how contrary it is to the assurance that utilities will have a reasonable opportunity to recover their costs, the upshot of that position is that utilities simply should not offer these programs. That is what the record shows. *Hemphill Reb.*, ComEd Ex. 6.0, 26:557-69. A comparison based on the notion that customers could somehow receive and benefit from these programs without timely cost recovery is simply a fantasy. The Commission should not deprive customers of these programs based on that myth. If the Commission reads Section 9-244(b)(1) to require alternative regulation rates to be lower than traditional rates that do not timely reflect the costs of the programs, that is what it will be doing.

ComEd presented an alternative that is both reasonable and sensible and consistent with the statute: compare rates under the alternative regulation proposal to rates that "otherwise would have been in effect" if the costs of the "services covered by the program" were to be timely recovered under traditional regulation. One scenario in which this could occur – but by

no means the only way – is a short series of annual future test year rate cases during the pilot period.⁸ But, it does not matter how costs are recovered, the evidence shows how the comparison comes out – rates that recover the costs of the “services covered by the program” are lower under the alternative regulation plan.

Although the Proposed Order (at 31-32) describes Rate ACEP as complex, the tariff’s basic operation is not. How it works is spelled out in pertinent part in the Verified Petition, in ComEd’s testimony, and in the briefs. The key factors material to the rate comparison called for by Section 9-244(b)(1) are these:

- ComEd’s recovery of O&M expenses are limited to 95% of its actual O&M costs, subject to a \$2 million cap unlikely to ever be reached during the program, *and* capped by the O&M budget approved by the Commission. That 5% reduction in O&M recovery would not be a part of any traditional regulation rate that recovered the costs of ComEd’s programs. Those rates would, therefore, be higher.
- ComEd’s recovery of its capital carrying costs is also limited by the Commission-approved budget. While ComEd has an opportunity to recover over-budget capital costs – if and only if it proves in a later rate case to the Commission’s satisfaction that they were reasonable and prudent – customers at worst pay the same capital costs as under traditional regulation.

⁸ The Proposed Order asserts that this scenario “seems unlikely to happen” without citing any evidence. In fact, if periodic, historical test year cases continue to fail to recover costs, that scenario becomes more and more likely. Regardless, this criticism is both meritless and ironic given that the one scenario the record proves will not occur – the programs are provided without timely cost recovery – is the very scenario the Proposed Order relies on in order to reject the alternative regulation plan.

- The above comparisons understate the benefits of alternative regulation by omitting any effect the incentives have on ComEd's actual costs. The record shows that, by providing incentives, ComEd's actual costs will likely be lower than its actual costs would be under traditional regulation. That is a further reason why the alternative regulation plan will lower costs and rates.
- The only way ComEd is rewarded with recovery greater than its actual costs is if its performance is so extraordinary that capital costs are reduced more than 5% below budget in which case, the savings are shared. ComEd only earns this incentive if customers are already ahead.

In short, the evidence clearly shows that ComEd's proposal "is likely to result in rates lower than otherwise would have been in effect" for "the services covered by the program."

The remainder of this section of the Proposed Order addresses ComEd's proposed budgets. Those issues are addressed elsewhere, in the discussion of the various programs in Section III of this brief. However, the Commission should remember that it has the right to review and approve the budgets and arguments that the budgets are overstated – arguments that ComEd strongly refutes – are not arguments that the proposal cannot meet Section 9-244(b)(1), they are arguments to set reduced budgets.

Therefore, the Proposed Order should be amended in accordance with ComEd's Exception Nos. 2 and 15.

2. ComEd's Proposal Meets § 9-244(b)(2) – It Offers Substantial, Identifiable Benefits

Section 9-244(b) requires that the alternative regulation "program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program." 220 ILCS 5/9-244(b)(2).

Here, both the alternative regulatory mechanism and the programs that it makes possible have “substantial and identifiable benefits that would be realized by customers served under the program.” Both must be considered to determine if customers benefit under this criteria. The statute, by its terms, does not limit the benefits the Commission must consider to only those that derive from the rate mechanism. It would be entirely improper and unlawful to depart from the plain language and meaning of the statute by reading into it exceptions, limitations[,] or conditions that the legislature did not express.” *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 189, 561 N.E.2d 656, 661 (1990); see also *Davis v. Toshiba Machine Co., America*, 186 Ill.2d 181, 184-85, 710 N.E.2d 399, 401 (1999). Yet, this is exactly what the Proposed Order does.

The Proposed Order’s Analysis and Conclusions under Section 9-244(b)(2) is unduly restrictive and incorrect. First and foremost, the first paragraph of this section (PO at 40) states:

It appears to the Commission that ComEd has lost sight of what is being evaluated under Section 9-244(b)(2). It is the Rate ACEP mechanism itself that must provide benefits to ratepayers that would not otherwise be available. ComEd, perhaps in an attempt to obfuscate the real issue, focuses on the individual projects it has proposed. In the Commission's view, ComEd’s focus on the proposed projects misses the purpose, and possibilities, of alternative rate mechanisms under Section 9-244.

This finding is plainly contrary to the statute, and for that reason alone, must be revised.

Moreover, no matter how the issue is resolved, ComEd vehemently excepts to any notion, stated or implied, that ComEd’s proposals are “an attempt to obfuscate the real issue.” *Id.* ComEd bent over backwards to be open and forthcoming about its intentions and motives with alternative regulation, starting with a highly unusual, good-faith release of drafts of the entire filing on June 30, 2010, two months before actually making the filing with the Commission. ComEd has also been open about its legal argument and has no need to obfuscate anything since the plain language of the statute supports its position.

The next portion of the Proposed Order’s discussion of this issue states that “[b]ecause ComEd has proposed for the recovery of certain costs through alternative regulation, and not specific services, the Commission does not see how the proposed Alt Reg mechanism provides any benefits in and of itself.” *Id.* This analysis suffers from two errors. First, it again wrongly concludes that the Commission can only consider benefits relating to the alternative regulation mechanism and must close its eyes to the other customer benefits that the alternative regulation mechanism delivers through the programs it makes possible. Also, this paragraph seems to assume that the programs ComEd proposes are not specific or discrete. The evidence is otherwise. Whether called programs, services, activities, or projects, they are not included in base rates, and none of the customer benefits attributable to them will be realized in the absence of approval of the alternative regulation plan.

The Proposed Order also makes an argument about the low income assistance program (LIAP) that, while appearing to be a factual finding, raises a critical legal point.: the Proposed Order asserts that the low income program cannot meet the “benefits test” because “those who would take advantage of LIAP would benefit from the program; however, ... that benefit is exactly off-set by the cost it imposes on those who must pay more as a result of LIAP.” This conclusion is incorrect for three reasons. First, the statute requires only that “substantial and identifiable benefits that would be realized by customers served under the program.” That criterion is met. It cannot be undone just because the costs of delivering that benefit are paid for. Second, this is not a program that randomly shifts money among customers, each of whom has equivalent needs and benefits that cancel each other out. Rather, it provides assistance on a targeted basis to those customers who need it the very most. ComEd submits that the benefits to those customers far exceed the cost when spread among customers generally. Third, the

Proposed Order ignores the benefits that the LIAP program provides to all customers, including by minimizing uncollectible expenses. PO at 41.

Therefore, the Proposed Order should be amended in accordance with ComEd's Exception Nos. 3 and 15.

3. ComEd's Proposal Meets § 9-244(b)(7) – Adequate Review and Reporting Requirements

The Proposed Order concludes that ComEd's proposal does not comply with Section 9-244(b)(7) concerning Commission review and reporting requirements. However, even its own analysis and conclusions do not support that result. In fact, ComEd's plan provides the Commission with ample information and expressly calls for review and reporting on a schedule even more aggressive than the PUA requires.

The Proposed Order (at 45) states:

Because the Commission has already found Rate ACEP does not meet the requirements of Section 9-244, it is not necessary to delve into the specifics of the reports that the Company proposes. The AG, however, does raise a valid point that a mere comparison of actual costs to the budgeted amounts may not provide enough information to decide whether Rate ACEP should be extended beyond the pilot period. The Commission believes that perhaps additional information regarding whether the investments were prudently made would also be beneficial in evaluating Rate ACEP. Also, the Commission believes it would be useful to have information quantifying benefits.

As described in the Rate ACEP tariff, ComEd Ex. 1.2, Original Sheet X+19, the biennial review will be more involved than "a mere comparison of actual costs to budgeted amounts..." *Id.* Moreover, as described by the tariff, the biennial review is initiated when ComEd files a report evaluating the alternative regulation program. The Commission will then "open a proceeding to review the operation of this tariff during such previous two calendar year period." ComEd Ex. 1.2, Original Sheet X+19. Nothing in the tariff prescribes the Commission's review, which could include information about benefits.

The only exception, however, is on the question of prudence of proceeding with the approved programs. While the Commission will have a full opportunity to review the reasonableness of what ComEd spends on those programs with the latest available data, and will also have a full opportunity to decide if the program should continue prospectively, the prudence of implementing the programs at this time will be settled in this current proceeding (future Smart Grid investments aside). Absent such approval, those programs could not proceed. But, even more importantly, it would be improper and unlawful for the Commission to review the prudence of the programs themselves based on information not available to the Commission and ComEd at the present time. Doing so would be the essence of impermissible hindsight. Illinois law provides that:

In determining whether or not a judgment was prudently made, only those facts available at the time the judgment was exercised can be considered. Hindsight review is impermissible.

Illinois Commerce Comm'n v. Commonwealth Edison Co., ICC Docket No. 84-0395 (Final Order, Oct. 7, 1987), at 17. There is no doubt or difference of opinion about this standard. *See, e.g., Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill.App.3d 425 (5th Dist. 2003). Revisiting the prudence of program approval is not only unnecessary under Section 9-244(b)(7) is, it would be affirmatively unlawful.

Finally, Rate ACEP itself ensures that the initial prudence determination cannot be used to lever unauthorized expansion of the programs. It provides that ComEd can only expand the program after *another* proceeding under Section 9-244. The tariff specifies that such a proceeding would include the same 270 days required by Section 0-244. Thus ComEd's alternative regulation program meets Section 9-244(b)(7).

Therefore, the Proposed Order should be amended in accordance with ComEd's Exception Nos. 7 and 15.

4. ComEd's Proposal Meets § 9-244(b)(8) – Equitable Sharing

The Proposed Order's analysis of Section 9-244(b)(8) reflects a fundamentally inappropriate view of "equitable sharing." Dividing the savings that result from an incentive regulation program between ComEd and customers is the essence of equitable sharing; condemning, as does the Proposed Order (at 50) any prospect the ComEd might receive recovery greater than its reduced costs turns this notion on its head and, in fact, makes "sharing" impossible. The Proposed Order also has a faulty understanding of ComEd's alternative regulation program and the workings of Rate ACEP.

At the outset, the PO makes two errors when it considers whether Rate ACEP without the associated programs results in any benefits at all (PO at 50). First, this concern is misplaced in this context since Section 9-244(b)(8) does not require economic benefits, only the equitable sharing of benefits "to the extent the program is likely to result in such benefits" – a point ComEd raised on page 54 of its Reply Brief. The PO repeats this error several times in this section. Many of the other benefits flowing from the proposed programs, *e.g.*, reliability benefits, are enjoyed entirely by customers.

The Proposed Order states, "[t]he Commission believes Rate ACEP would produce a shifting of economic responsibility, but no net economic benefit to customers. As explained above, the 5% reduction in O&M expenses and the budget based capital investment scheme are of no benefit to ratepayers and merely shift risk for investments from shareholders to ratepayers." *Id.* No evidence is discussed in this finding, but the most likely intent is simply to reject out of hand the notion that economic incentives could lead to a reduction in cost. If that is its intention, it is a radical departure from the evidence. Indeed, the Proposed Order does not address any of the evidence showing that incentives can reduce costs. In particular, the PO does not address the testimony of Dr. Hemphill, who explained how the Rate ACEP mechanism

works to provide immediate benefits to customers. *See*, ComEd Initial Brief at 11. Dr. Hemphill further demonstrated how the budget caps incentivize ComEd to operate more efficiently. Hemphill Dir., ComEd Ex. 1.0 Rev., 29:607-17; Hemphill Reb., ComEd Ex. 6.0, 11:237 – 12:246, 27:597 – 28:602. Customers see an immediate benefit in the form of lower O&M expenses. Hemphill Dir., ComEd Ex. 1.0 Rev., 22:455-58. Yet, the Order does not confront any of this testimony in reaching its conclusions.

Moreover, even if the incentive mechanism produced no benefit, the Proposed Order conclusion that the 5% O&M reduction is no benefit is also contrary to the record – and common sense. Rate ACEP recovers only actual O&M expenses up to the budgeted amount, minus the 5% discount. How does getting something for 95% of its cost not benefit customers? Indeed, the *only* way that ComEd can collect even its actual costs in full is if the programs come in under budget, and the only way ComEd can conceivably collect more than its costs is if the “shared” savings are so large that they swamp the 5% giveback. In this respect, the Proposed Order’s statement that “although Rate ACEP allows for the immediate recovery of O&M expenses it does not immediately reflect the potential savings” (PO at 50), demonstrates two clear misunderstandings of the tariff. First, ComEd’s does not immediately recover its costs, it recovers only a discounted portion of those costs. Second, any cost savings – any and all reductions in overall program costs resulting from the incentive mechanism – is immediately and automatically reflected in that rate. ComEd Reply Brief at 10.

Moreover, in stating that “the Commission is concerned that any efficiency that will be gained will not be realized by customers until ComEd’s next rate case,” the Proposed Order again ignores both how Rate ACEP works and Dr. Hemphill’s testimony showing that budgets create strong incentives for ComEd to operate more efficiently. In either case, customers realize

benefits immediately. Customers also, of course, realize the benefits of the programs themselves immediately. Hemphill Dir., ComEd Ex. 1.0 Rev., 25:514 – 29:602; *see* ComEd Initial Brief at 11.

In addition, the Proposed Order distorts the notion of “sharing” beyond reason. Illustrative is this Proposed Order’s statement (at 51) that “[i]t appears to the Commission that every time ComEd spends less than 95% of its proposed budget, ratepayers pay more than ComEd’s actual costs.” Indeed, ComEd can only recover more than its costs if those costs are significantly reduced by reason of the incentive program. Customers are far better off – due both to the reduced costs and the 5% credit and a portion of the benefit (less than half) is shared with the utility to create the incentive. That is exactly the equitable sharing the statute envisions.

Finally, ComEd observes that it is possible that much of this negative language is actually a product not of a conclusion that the sharing features of Rate ACEP are themselves infirm, but of the Proposed Order’s rejection of the budget-based incentive mechanism itself.⁹ If so, that conclusion – a conclusion that ComEd strongly disputes – is not a reason to criticize the sharing features of the proposal. The question of whether cost savings will occur or can be measured is separate and independent from the question of how any actual savings are shared. ComEd urges the Commission not only to judge its proposed sharing mechanism fairly, but not to make findings under subsection Section (b)(8) criticizing an equitable sharing mechanism that are actually based on disputes about whether there will be savings to share.

⁹ The Proposed Order, for example, asserts that the record “replete with evidence” (*Id.*) of why budgets are an unworthy approach to ratemaking without addressing ComEd’s counter arguments or the evidence of the budget’s accuracy.

For the forgoing reasons, the Commission should modify the Proposed Order to reflect that ComEd's alternative regulation proposal fulfills the requirements of Section 9-244(b)(8) in accordance with Exception Nos. 8 and 15.

C. The Proposed Order Incorrectly Interprets Other Criteria in Section 9-244

The Proposed Order also criticizes ComEd's proposal in its discussion of two other Section 9-244(b) criteria, although it does not appear that it recommends rejection of the proposal on the basis that those two criteria are violated. PO at 42-43. The evidence shows, to the contrary, that ComEd's proposal amply meets both of these criteria.

1. ComEd's Proposal Meets § 9-244(b)(3) – No Adverse Effect on Service Reliability

The finding required under Section 9-244(b)(3) is that ComEd is "in compliance with applicable Commission standards for reliability and implementation of the program is not likely to adversely affect service reliability." 220 ILCS 5/9-244(b)(3). The evidence unambiguously demonstrates both facts. Hemphill Dir., ComEd Ex. 1.0 Rev., 26:544-49, 30:632-38; McMahan Dir., ComEd Ex. 2.0, 13:242 – 14:266. Indeed, is clear that the UUFR project "will improve both service reliability and safety" for customers served by underground mainline feeders. Hemphill Dir., ComEd Ex. 1.0 Rev, 25:530-31. Although these customers already receive reliable service, all witnesses who testified on this subject concluded that the additional benefits were significant. The Proposed Order acknowledges as much. PO at 42.

The Proposed Order, nonetheless, expresses "concern[] that there is a potential that Rate ACEP could adversely affect reliability, if it were approved." PO at 42. The sole rationale for this is an unsubstantiated speculation that ComEd might cut back on the UUFR program due to budget concerns. *Id.* Even if that speculation were well founded – and it most certainly is not –

there is no way a cutback could result in an adverse effect on reliability. At worst, a cutback in or early termination of the UUFR program could reduce the reliability benefit from that UUFR program. But, even partial implementation of UUFR will improve reliability, and there is no way it could put the system in a less reliable state.

These provisions of the Proposed Order must be revised. Language making the required corrections is provided as Exception No. 4.

**2. ComEd’s Proposal Meets § 9-244(b)(5) –
No Adverse Effect on Competitive Markets**

The finding required under Section 9-244(b)(5) is that “implementation of the program is not likely to adversely affect the development of competitive markets.” 220 ILCS 5/9-244(b)(5). Although the Proposed Order makes no finding that ComEd’s EV Pilot will adversely affect the development of competitive markets, it goes out of its way to express “concern” that ComEd’s EV Pilot might gain a “first mover” advantage in the market. PO at 43. Not only is this finding utter speculation, supported by no evidence in the record, but it also demonstrates a fundamental misunderstanding of the law and the EV Pilot itself.

The premise underlying this discussion is that by deploying and learning about charging stations for its own utility fleet vehicles ComEd could gain some sort of cost advantage in connection with the commercialization of public charging stations. There is no evidence to support this; no witness even speculated about such a risk. As noted in ComEd’s Post-Hearing Reply brief, this issue was raised for the first time in Staff’s post-hearing brief (Staff Init. Br. at 57-58) and was based on a misreading of the record. “[T]he ‘infrastructure’ referred to in the record is delivery service infrastructure not charging infrastructure.” ComEd Reply Br. at 56.

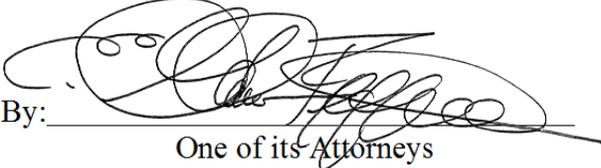
There is a very good reason there is no evidence of any competitive risk in the record: ComEd’s EV Pilot poses none. ComEd is not planning to be a supplier of competitive charging

services, or piloting any such service here. The EV Pilot deals with the deployment of commercial fleet vehicles, for ComEd's own use, not the deployment of general purpose charging stations. McMahan Reb., ComEd Ex. 7.0, 9:164-66. ComEd is not proposing to provide any public charging station services at all with these stations. McMahan Tr., 125:8 – 126:11 Moreover, ComEd has repeatedly made clear that whatever it learns from the Pilot it will make public for the benefit of all. McMahan Dir., ComEd Ex. 2.0, 7:112-15; McMahan Tr., 123:21 – 124:6. That offer is flatly inconsistent with any purported effort to unfairly dominate a market.

These provisions of the Proposed Order must be revised. Language making the required corrections is provided as Exception No. 6.

VI. CONCLUSION

WHEREFORE, for the reasons set forth herein, ComEd respectfully requests that the Proposed Order be modified as set forth in the ComEd's Exceptions and, as modified, be adopted by the Commission.

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| <p>Dated: April 15, 2011</p> | <p>Respectfully submitted, COMMONWEALTH EDISON COMPANY</p>  <p>By: _____ One of its Attorneys</p> |
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