

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
vs.	:	Docket No. 10-0537
	:	
Commonwealth Edison Company	:	
	:	
Reconciliation of revenues collected under Rider EDA	:	
with actual costs associated with energy efficiency and	:	
demand response programs.	:	

**COMMONWEALTH EDISON COMPANY’S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE THE DIRECT TESTIMONY OF JENNIFER L. HINMAN**

Commonwealth Edison Company (“ComEd”), by its attorneys, respectfully submits this Reply to the Staff of the Illinois Commerce Commission’s (“Staff”) Response to ComEd’s Motion to Strike (“Response”). When the General Assembly established the electric utility energy efficiency requirements under Section 8-103 of the Public Utilities Act (“Act”), it did so by enacting a comprehensive regulatory framework that mandates the filing and Illinois Commerce Commission (“Commission”) approval of three-year energy efficiency plans and, thereafter, annual reports regarding reconciliation of costs incurred and evaluation of the achievement of energy savings goals. This oversight is further enlarged by the formation of the Stakeholder Advisory Group (“SAG”), to which ComEd reports on a monthly basis, and a workshop process that the Commission directed Staff to conduct to identify issues and submit a report to the Commission regarding their resolution. This framework, summarized in more detail below, ensures that the Commission maintains supervision of virtually every aspect of ComEd’s energy efficiency plans.

Because the present docket was initiated to investigate just one of the annual reports ComEd files – its Annual Report to the Commission Concerning the Operation of Rider EDA for the Period Beginning June 1, 2009 and Extending Through May 31, 2010 (“Annual Report”), Staff witness Ms. Hinman’s testimony regarding additional reporting on energy savings goals and evaluation issues and proposed changes to cost-effectiveness methodologies should be stricken. This testimony is not relevant to the reconciliation at issue in this docket, and the General Assembly and Commission have already established separate reporting requirements and fora in which Ms. Hinman’s recommendations can be raised.

ComEd’s Motion to Strike is designed to respect the unique nature and scope of each of the energy efficiency-related dockets established by the General Assembly, including this reconciliation docket, and ensure that only issues relevant to a specific docket are considered. Introduction of the issues Ms. Hinman raises here would blur the clear lines drawn by the legislature and result in the Commission deciding issues that overlap with and relate to other pending and upcoming dockets, which could result in conflicting decisions and deprive interested stakeholders of an opportunity to be heard.

Accordingly, ComEd’s Motion to Strike should be granted.

I. The General Assembly Has Established a Comprehensive Regulatory Framework That Ensures Commission Oversight of ComEd’s Plan.

As described below, the General Assembly directed that electric utilities subject to Section 8-103 file a variety of plans and reports with the Commission and that the Commission open dockets to investigate these filings, thereby creating robust reporting requirements and broad Commission supervision over ComEd’s energy efficiency plans:

- ***Triennial Filing and Investigation of Energy Efficiency and Demand Response Plan:*** Every three years, electric utilities such as ComEd must file a proposed energy efficiency and demand response plan that sets forth cost-effective energy efficiency and demand response measures designed to achieve statutorily mandated energy savings goals within the corresponding annual budgets set by the General Assembly. *See generally* 220 ILCS 5/8-103. During these proceedings, the utility must demonstrate, among other things, that its portfolio of energy efficiency measures is cost-effective (*i.e.*, satisfies the statutorily-defined total resource cost test). 220 ILCS 5/8-103(a), (f)(5); 20 ILCS 3855/1-10.
- ***Annual Filing of Report, and Initiation of Commission Docket, Regarding Reconciling Costs Incurred with Revenues Collected:*** Following each plan year, ComEd must file an annual report that reconciles the incremental costs incurred during the prior year with the revenues collected under its Rider EDA – Energy Efficiency and Demand Response Adjustment (“Rider EDA”). 220 ILCS 5/8-103(e).
- ***Annual Filing of Evaluation Reports, and Initiation of Commission Docket, Regarding Achievement of Annual Energy Savings Goals:*** Following each plan year, the Commission must initiate a docket to review whether ComEd achieved the energy savings goals during the prior year, which includes a review of the reports submitted by the independent evaluator regarding the energy savings achieved during the prior year. 220 ILCS 5/8-103(f)(7), (i) & (j).
- ***Regular Reporting to the SAG:*** In its order approving ComEd’s 2008 – 2010 Energy Efficiency and Demand Response Plan (“Plan”), the “Commission agree[d] with ComEd that it should establish a stakeholder process to review ComEd’s progress towards

achieving the required energy efficiency and demand response goals and to continue strengthening the portfolio. The Stakeholder group’s responsibilities include, but are not limited to: reviewing final program designs; establishing agreed-upon performance metrics for measuring portfolio and program performance; reviewing Plan progress against metrics and against statutory goals; reviewing program additions or discontinuations; reviewing new proposed programs for the next program cycle; and reviewing program budget shifts between programs where the change is more than 20%.” *In re Commonwealth Edison Co.*, ICC Docket No. 07-0540, Final Order (Feb. 6, 2008) at 32 (“*Plan 1 Order*”).

- ***Staff-Led Workshop Process:*** Similarly, in its *Plan 1 Order*, the Commission also found that

workshops will provide an excellent opportunity for Commission Staff, utilities and stakeholders to anticipate, learn about and address generic technical, program design, financing, evaluation, new technology and longer-term implementation issues – including but not limited to standards regarding the accounting of the funds collected, the appropriate measure savings values, Net to Gross ratios, financial compliance, program information tracking and reporting, and related issues ... Staff is directed to conduct workshops on these and any related issues. The outcome of these workshops shall be in the form of a Staff report, setting forth Staff’s recommendations regarding what rules, if any, need to be developed.

Plan 1 Order at 46.

Importantly, the present docket only involves issues related to the second bullet – reconciliation of costs incurred with revenues received during Plan Year 2. As explained further in Section II *infra*, however, Staff witness Ms. Hinman’s second, third, and fourth recommendations improperly attempt to introduce irrelevant issues regarding evaluation and cost-effectiveness.

II. Ms. Hinman's Recommendations (2), (3) and (4) Are Not Relevant to This Proceeding.

As an initial matter, ComEd is not moving to strike Ms. Hinman's first recommendation, which relates to the Annual Report at issue in this docket. Regardless of whether or not ComEd agrees with Ms. Hinman's first recommendation, it concerns the Annual Report presently before the Commission. As explained below, her second, third and fourth recommendations are not relevant, however, because they relate to issues addressed in separate plans and reports that are before the Commission in other dockets mandated by the General Assembly.

A. Recommendation (2) Seeks to Impose Irrelevant Reporting Obligations Regarding Achievement of Energy Savings Goals and Evaluation.

Concerning Ms. Hinman's second recommendation, she asks the Commission to order ComEd to file two additional reports per year, a Pre-Plan Year Report and a Post-Plan Year Report, each of which would have to include the pages of requirements that she lays out in her direct testimony. However, as ComEd noted in its Motion to Strike, the present docket involves the review of a single report – ComEd Annual Report regarding Plan Year 2. Accordingly, issues of whether there is a need for additional reports outside of a reconciliation docket, whether separate dockets must be opened to consider these reports, and whether the Commission can impose additional reporting requirements under Section 8-103 are not relevant to this docket.

Indeed, Staff's Response only further underscores the irrelevance of the Pre- and Post-Plan Year Reports to this reconciliation. In highlighting what information Staff is seeking in these reports, the Response notes:

[These reports] are to include, at minimum, information as to whether the Company's energy efficiency portfolio is meeting its objectives under Section 8-103 of the PUA and compare its original EE Plan Year budgets (and savings) versus actual/forecasted EE expenditures by program level and portfolio-level cost categories (and savings by program).

Staff Response at 4; *see also id.* (noting that the Post-Plan Year Report should include the independent evaluation reports). However, issues regarding the independent evaluation reports and whether ComEd is achieving the Section 8-103 goals are the subject of the evaluation and goals dockets that are initiated annually in the fall. *See, e.g., In re Commonwealth Edison Co.*, ICC Docket No. 10-0520, Initiating Order (Aug. 20, 2010) at 2 (ordering that a proceeding be initiated to determine whether ComEd has met the statutory energy efficiency goals). Indeed, Staff offers no explanation regarding how evaluation reports are relevant to this reconciliation docket.¹

B. Recommendation (3) Improperly Attempts to Introduce Cost-Effectiveness Issues in This Reconciliation Proceeding.

With respect to Ms. Hinman’s third recommendation, she asks that “the Commission direct the Company to work with Staff to reach agreement on the appropriate cost classification for use in cost-effectiveness analyses required by Section 8-103 of the Act.” Hinman Dir., Staff Ex. 2.0 at 27:522-24. However, as ComEd explained in its Motion to Strike, issues regarding cost-effectiveness methodologies are not before the Commission in this docket. Rather, as Section 8-103 clearly states, the General Assembly has provided two separate dockets in which cost-effectiveness issues can be considered:

- First, in the dockets opened to review ComEd’s three-year energy efficiency and demand response plans, ComEd must “[d]emonstrate that its overall portfolio of energy efficiency and demand-response measures ... are cost-effective using the total resource cost test.” 220 ILCS 5/8-103(f)(5).

¹ ComEd notes that Staff’s Response appears to mistakenly repeat Ms. Hinman’s first recommendation in the discussion regarding her second recommendation (*i.e.*, information regarding a comparison of budgeted to actual expenditures).

- Second, the annual goals dockets provide for a review of the “annual independent evaluation of the performance of the cost-effectiveness of the utility's portfolio of measures and the Department's portfolio of measures, as well as a full review of the 3-year results of the broader net program impacts and, to the extent practical, for adjustment of the measures on a going-forward basis as a result of the evaluations.” 220 ILCS 5/8-103(f)(7); *Plan 1 Order* at 26-27.

And, in addition to these fora, Staff may also explore cost-effectiveness issues through the SAG or its own workshop process. With respect to annual reconciliation dockets such as the present, however, neither Section 8-103, ComEd’s Rider EDA, nor the Initiating Order in this docket direct that cost-effectiveness methodologies be considered here.

C. Recommendation (4) Attempts to Pre-Litigate in This Docket Issues Regarding ComEd’s Next Triennial Plan to Be Filed in 2013.

Regarding Ms. Hinman’s fourth recommendation, she asks that the Commission require ComEd “to provide estimates of non-Rider EDA employee costs for employees who work on ComEd’s EE portfolio *in its next EE Plan filing* pursuant to 220 ILCS 5/8-103(f) to ensure the Company files an EE Plan that complies with 220 ILCS 5/8-103(f)(5) which requires the utility to demonstrate that its overall portfolio of EEDR measures, excluding low-income programs, are cost-effective using the TRC test.” Hinman Dir., Staff Ex. 2.0, 31:600-05 (emphasis added). Here again, Ms. Hinman’s fourth recommendation concerns cost-effectiveness analysis, which, as described above, is to be addressed in the triennial plan filings or evaluation dockets. Moreover, even Ms. Hinman admits that the issue relates to ComEd’s “next EE Plan filing.” It is in that fall 2013 filing – when the Commission will have ComEd’s proposed plan before it – that the Commission may consider and rule upon the issue Ms. Hinman raises here, assuming it even remains an issue for Staff two years from now.

Staff's only argument in its Response is to claim that Staff's authority to hold workshops somehow means that the Commission is free to consider any energy efficiency issue in any docket and therefore disregard concerns of relevance. However, in directing that Staff conduct workshops regarding the then-new energy efficiency issues confronting Illinois, it did so with the clear instruction that these workshops would not be a docketed proceeding and that the product of these workshops would be Staff's issuance of a report to the Commission regarding what rules, if any, should be adopted. Accordingly, Ms. Hinman is free to take up her fourth recommendation with Staff's own workshop process, through the SAG, or, as even she suggests, in ComEd's next plan filing in the fall of 2013.

D. Consideration of Recommendations (2), (3) and (4) in This Docket Raises Significant Notice and Due Process Concerns.

As noted in ComEd's Motion to Strike, most of the 15 stakeholders who participated in the docket to approve ComEd's Plan chose not to participate in this narrowly-focused reconciliation docket. As a result, if the Commission were to consider Ms Hinman's second, third, and fourth recommendations here, over a dozen stakeholders would be deprived of an opportunity to be heard regarding issues upon which they previously submitted testimony and briefs. *See, e.g., Plan 1 Order* at 28, 30-35, 45-46. Indeed, these stakeholders had no notice that this reconciliation proceeding – whose caption provides that it involves the “[r]econciliation of revenues collected under Rider EDA with actual costs associated with energy efficiency and demand response programs” – would be expanded to entertain issues regarding evaluation, achievement of energy savings goals, and cost-effectiveness methodologies that the General Assembly and Commission have already directed be considered in separate dockets.

Although Staff's Response attempts to downplay the due process concerns raised by Ms. Hinman's recommendations, it cannot dilute the foundational legal principles of due process and

notice to which the Commission referred in its order in *Nicor Gas Co.* There, the Commission unequivocally stated that “[a] proceeding must be initiated with proper notice. It cannot lie buried within a matter with a caption that fails to reflect the nature of the controversy.” *In re Nicor Gas Co.*, ICC Docket No. 05-0106, Final Order (July 25, 2007) at 16. Moreover, since *Nicor Gas*, the Commission has reaffirmed its concerns regarding attempts to enlarge the scope of reconciliation dockets. In the Commission’s recent order approving ComEd’s second triennial energy efficiency plan, the Commission considered the proper proceeding in which parties could propose changes to Rider EDA. The Commission held that the triennial proceedings to approve ComEd’s energy efficiency plans were “the most reasonable place to raise issues regarding the tariff”, in part because the “*Nicor Gas* ruling would arguably apply” to a reconciliation docket and therefore preclude consideration of a tariff change in such a docket.² *In re Commonwealth Edison Co.*, ICC Docket No. 10-0570, Final Order (Dec. 21, 2010) at 43 (“*Plan 2 Order*”). Based on these very same concerns, the Commission should limit the issues considered in this docket to those involving the Annual Report filed on August 31, 2010 to reconcile the costs incurred with revenues received under Rider EDA during Plan Year 2.

² Accordingly, to the extent Staff recommends that Rider EDA be amended in this docket to incorporate any of Ms. Hinman’s recommendations, the Commission should reject this proposal based on the same concerns raised in *Nicor Gas* and *Plan 2 Order*.

WHEREFORE, ComEd respectfully requests that the Administrative Law Judge grant its Motion and strike the portions of the Direct Testimony of Jennifer L. Hinman described therein.

Date: November 10, 2011

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By 

Mark R. Johnson

Eimer Stahl Klevorn & Solberg LLP

Mark R. Johnson
EIMER STAHL KLEVORN AND SOLBERG LLP
224 South Michigan Avenue, Suite 1100
Chicago, Illinois 60604
(312) 660-7600
mjohnson@eimerstahl.com

Michael S. Pabian
Exelon Business Services
10 South Dearborn Street, 49th Floor
Chicago, Illinois 60603
(312) 394-5400
michael.pabian@exeloncorp.com