

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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<b>Commonwealth Edison Company</b>	:	<b>Docket No. 07-0566</b>
	:	<b>On Remand</b>
<b>Proposed general increase in</b>	:	
<b>electric rates.</b>	:	

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**STAFF OF THE ILLINOIS COMMERCE COMMISSION**

**REPLY BRIEF ON EXCEPTIONS ON REMAND**

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply Brief on Exceptions ("RBOE") on Remand in the above-captioned matter.

**I. INTRODUCTION**

Initial Briefs on Remand ("Initial Brief" or "IB") were filed by Staff, Commonwealth Edison Company ("ComEd" or "Company"), the Attorney General ("AG") and the Citizens Utility Board ("CUB") (jointly "AG/CUB") and the Illinois Industrial Energy Consumers ("IIEC"). Reply Briefs on Remand ("Reply Brief" or "RB") were also filed by all of the previously listed parties. The Administrative Law Judge's ("ALJ") Proposed Order ("PO") was issued on November 10, 2011. Briefs on Exceptions ("BOE") were filed by the AG/CUB, ComEd, IIEC and Staff on November 18, 2011. Staff, AG/CUB and IIEC all reached basically the same conclusion on one of the critical issues in this proceeding that the PO at page 42 made a critical mistake when it concluded "that [the

Commission] does not have the authority to order a refund at this juncture.” Staff BOE, pp. 1-5; AG/CUB BOE, pp. 1-10; IIEC BOE, pp. 1-8. ComEd on the other hand agreed with the PO on that issue and in addition to taking exception to the PO on numerous other issues provided argument supporting the PO’s erroneous conclusion regarding the Commission’s authority. ComEd BOE, pp. 1-2. Accordingly, Staff’s RBOE responds to ComEd’s arguments made both in support of the PO and against the PO and also responds to the AG/CUB’s four exceptions to the PO and the IIEC’s exceptions language in order to assist the Commission in drafting its final order in this matter.

## **II. ARGUMENT**

### **A. Response to ComEd’s Brief on Exceptions**

#### **1. The Commission has the authority to order a refund in this proceeding.**

ComEd argues in its BOE that the Commission “lacks the authority to order any refund in this case” and accordingly supports the PO’s conclusion on this issue. ComEd BOE, p. 1. Staff addressed the issue of the Commission’s authority to order a refund in its Reply Brief and Brief on Exceptions. RB, p. 2-3; BOE, pp. 2-5. As Staff argued in its Brief on Exceptions the PO failed to give appropriate consideration and weight to the actual language in the Appellate Court’s opinion, that ComEd charged an illegal rate. ComEd’s and the PO’s erroneous conclusion that there is no authority is apparently impacted more by the absence of a single magical word, “refund,” in the Court’s Opinion rather than the words that actually appear in the Court’s opinion. The Court found that ComEd’s reading of the test-year principles to exclude accumulated depreciation on existing plant during the pro forma period resulted in consistently and unavoidably inflated rate base and an inescapably inaccurate picture of ComEd’s finances.

Commonwealth Edison Co. v. Illinois Commerce Comm'n, 405 Ill. App.3d 389, 407 (2d Dist. 2010) (“ComEd”). The Appellate Court clearly stated that the Commission abused its discretion in excluding from the rate base the increase in accumulated depreciation of existing plant during the post-test-year period. Once the Appellate Court found the rate approved by the Commission to be illegal, restitution is compelled against ComEd because from that point on it obtained money without authority and ratepayers have no adequate legal remedy available to them. Independent Voters of Illinois v. Illinois Commerce Comm'n, 117 Ill. 2d 90, 98 (1987). (“IVI”) The only available remedy to take back that money from ComEd and put it back into ratepayers’ pockets is for ComEd to pay a refund. Based upon the language contained in the Appellate Court’s remand a refund is implied and the Commission must order a refund in this proceeding. ComEd and the PO in error give no consideration to the above language from the Court’s opinion.

ComEd’s and the PO’s arguments should be rejected based upon all of the above and the arguments previously made in the Staff Reply Brief and Brief on Exceptions. Staff RB, pp. 2-3; Staff BOE, pp. 2-5.

**2. A refund is equitable. (Response to ComEd’s 4<sup>th</sup> exception)**

ComEd argues that a refund would not be equitable. ComEd BOE, pp. 2, 5-9. In support of its argument, ComEd argues that ratepayers “paid ComEd less than the just and reasonable cost of the service they received” therefore, ratepayers “have not been harmed.” Id., p. 2. To support this argument ComEd relies upon the Commission’s recent order in ComEd’s 2010 Rate Case (ComEd BOE, pp. 5, 7 and 9) and the case People v. Illinois Commerce Commission, 148 Ill.2d 348 (1992) (“Hartigan II”). Id., pp. 6-

9. As Staff discussed in its Reply Brief, the Commission should reject ComEd's arguments for the following reasons: first, the aggrieved party is not ComEd and its shareholders, it is ComEd's ratepayers; second applying the Commission's order in the recently completed ComEd 2010 Rate Case to reduce the refund would be retroactive ratemaking; and third, ComEd misconstrues Hartigan II to support its equity argument. Staff RB, pp. 3-4.

With respect to ComEd's equity argument that a refund would be inequitable because there has been no unjust enrichment of ComEd, that is the same argument that Illinois Bell made in IVI which the Illinois Supreme Court rejected. IVI, 117 Ill.2d at 105. ComEd's argument ignores that IVI provides that once a rate order is set aside on appeal the utility should not continue to benefit from what has been determined to be unlawful portions of a rate increase. Id., at 104. ComEd's equity argument is focused on the wrong party. The focus should be on ComEd's ratepayers not ComEd's shareholders because "the goal of equity is to make the aggrieved party whole." Hartigan II, 148 Ill.2d at 405. Ratepayers are the ones that paid an illegal rate while ComEd and its shareholders were the beneficiaries of that illegal rate. In order to make ratepayers whole, the Commission must order ComEd to pay a refund. Staff RB, p. 4.

According to ComEd the fact that allegedly supports its equity argument is the Commission's recent order in ComEd's 2010 rate case, Docket No. 10-0467, because that demonstrates that ComEd under recovered its costs during the period of excessive rates. ComEd BOE, p. 5. However, consideration of the Commission's order in ComEd's 2010 rate case in order to reduce the refund is no different and is just as illegal as considering ComEd's return on equity during the period of excessive rates. The ALJ in her ruling struck ComEd's return on equity testimony (ALJ Ruling, p.3) and

the Commission upheld that ruling on Interlocutory Review. Voting Record, October 5, 2011; Notice of Commission Action, October 6, 2011. Just as considering the return on equity testimony would be retroactive ratemaking so too would be considering the Commission's recent order in ComEd 2010 rate case, because ratemaking is legislative in nature and the Commission can only change rates prospectively not retroactively. IV, 117 Ill.2d at 104. While the law clearly prohibits refunds when rates are too high and surcharges when rates are too low (Citizens Utilities Co. v. Illinois Commerce Commission, 124 Ill.2d 195, 207 (1988)) ComEd is advocating the Commission do exactly that when it argues a just and reasonable rate for the refund period would have been higher than the invalid rate actually charged and therefore there is no refund. ComEd BOE, p. 9. According to ComEd, the just and reasonable rate is the rate determined in Docket No. 10-0467; however, that rate can only be applied on a going forward basis from June 1, 2011 and cannot be applied retroactively to the period September 30, 2010 through May 31, 2011. Staff RB, p. 5.

ComEd argues that its conclusion that a refund would be improper follows from Hartigan II. ComEd BOE, p. 8. ComEd however misconstrues Hartigan II. Citing Hartigan II, ComEd argues that a refund is the difference between the money collected pursuant to the invalid rate and the money that would have been collected pursuant to a just and reasonable rate. According to ComEd, the just and reasonable rate is one that reflects its actual costs during the refund period as determined in Docket No. 10-0467. ComEd BOE, pp. 2 and 7. However, the just and reasonable rate discussed in Hartigan II is the same just and reasonable rate discussed in IV. ComEd ignores the fact that under IV which is still good law, the refund "should be comprised of the difference between the original rates ... and the rates that would have been charged if they had

been set in accordance with the views expressed in the previous decision ...” IVI, p. 105. The “view [ ] expressed in the previous decision is the Second District Appellate Court’s conclusion that the rate approved by the Commission in ComEd’s 2007 Rate Case was excessive since the Commission excluded as a deduction from rate base the increase in accumulated depreciation of existing plant during the post-test year period. ComEd, 405 Ill. App.3d at 420. Not only does ComEd misconstrue Hartigan II, ComEd ignores the fact that in Hartigan II the Court specifically rejected the exact same argument ComEd makes in this proceeding that there must be an offset to the refund for an alleged increase in ComEd’s actual operating costs. Hartigan II, 148 Ill.2d at 410.

Finally, to support its argument that it would be inequitable to impose a refund obligation on it, the Company attempts to characterize “the error identified by the Appellate Court [as] a methodological one.” ComEd BOE, p. 6. ComEd argues “the methodological error [ ] did not, in the end, result in ComEd’s collection of unreasonably high rates.” Id. ComEd’s reading of the opinion is not fair or accurate. The Court’s opinion is not about a methodological error. The Court’s opinion is about costs not being accounted for at all which led to an overstatement of rate base. As a result the rate base approved by the Commission was inflated as the approved rate base exceeded “the investment value ComEd actually dedicates to utility services” (ComEd, 405 Ill. App.3d at 405) which led to excessive rates. The Commission should reject ComEd’s misreading of the Appellate Court’s opinion. While ComEd fails to see it, the PO agreed with Staff that there is no difference between a utility that recovers costs that should never be properly recovered from ratepayers (ComEd BOE, p. 6) and a utility whose revenue requirement “is based on an ‘inflated rate base and an inescapably inaccurate picture of the utility’s finances.’ ComEd, 405 Ill. App.3d at 407.” PO, p. 44. In

both cases the rates were improper to recover from ratepayers, ratepayers have been harmed and ratepayers are entitled to a refund so that they are made whole from paying illegal rates.

Based upon the above arguments and Staff's prior briefs the Commission should reject the Company's 4<sup>th</sup> exception.

**3. The Commission should not consider ComEd's third quarter additions in a refund calculation. (Response to ComEd's 5<sup>th</sup>, 6<sup>th</sup> and 10<sup>th</sup> exceptions)**

ComEd argues that any refund must account for its third quarter 2008 plant additions. ComEd BOE, pp. 9-18. Staff addressed this argument in both its Initial Brief and Reply Brief. The primary reason the Commission should not consider ComEd's third quarter 2008 plant additions in a refund calculation is that to do so would be retroactive ratemaking. The secondary reason is that the third quarter 2008 plant additions are not known and measureable. To support its position that the Commission must account for its third-quarter 2008 plant additions in rate base, ComEd argues that the plain terms of the remand opinion demand that third-quarter plant additions be considered for inclusion in rate base. Id. Therefore, ComEd's argument seems to be that third-quarter 2008 plant additions must be considered in any refund. The Commission should reject ComEd's argument. ComEd has made the same critical error in reading the Appellate Court's Opinion as the ALJ did with regard to intertwining the issues of accumulated depreciation and pro forma third-quarter plant additions. The ALJ's Ruling erroneously stated that "[i]t cannot be, argued by Staff, that considering accumulated depreciation is not retroactive ratemaking, but considering third quarter plant additions is retroactive ratemaking." ALJ Ruling, p. 2. Staff now addresses how the issues were not intertwined by the Appellate Court as the ALJ suggested.

The Appellate Court dealt with each issue separately and in a different manner. Regarding accumulated depreciation, the Appellate Court found that the Commission abused its discretion in excluding from rate base the increase in accumulated depreciation. ComEd, 405 Ill. App.3d at 420. The Court stated that ignoring the decline in embedded plant by ignoring the increase in accumulated depreciation artificially boosted ComEd's rate base in violation of test-year principles. Id., at 407. The Court found that exclusion from rate base to be an abuse of the Commission's discretion. Id., at 420. Yet, the Court did not direct the Commission to include third-quarter 2008 plant additions in rate base (Id., at 408) only to allow ComEd the opportunity to request their recovery in rates. Id., at 420. The Court acknowledged that with respect to third-quarter 2008 plant additions the Commission is the finder of fact not the court. Id., at 409. Also, the Court was very clear that it expressed no opinion as to whether third-quarter plant additions should be included in rate base. Id., at 420. Even ComEd in its Initial Brief acknowledged a difference in the treatment of the third-quarter 2008 plant additions issue and the accumulated depreciation issue when it stated that "[t]he Appellate Court understood, however, that it could not direct the Commission to include third-quarter 2008 plant additions in the rate base, because 'the Commission has not had the opportunity [to] make findings of fact regarding [them], and the Commission is the fact-finding body.' *Id.*" ComEd IB, p. 17. Clearly these issues were dealt with in a separate distinctive manner by the Appellate Court and are not intertwined.

It is important for the Commission to recognize the significance of the difference between how the Appellate Court handled the two issues. When the Commission applies a determination made by a court (i.e. a court determination) that is the result of a statutory authorized review of a Commission order that is not retroactive ratemaking.

IVI, 117 Ill.2d at 105. However, if the Commission makes a ratemaking determination, the Commission determination can only be applied prospectively given that “[t]he Commission is statutorily authorized to change rates and, because ratemaking is legislative in nature, rates can be changed only prospectively.” Id., at 104. Because the Commission in this proceeding would be making the determination of whether third-quarter plant additions are or are not known and measurable, that Commission determination can only apply prospectively. To apply it back to the period of excessive rates would be retroactive ratemaking.

If the Commission decides to consider ComEd’s third-quarter 2008 plant additions which it should not, ComEd argues that its evidence was overwhelming (ComEd BOE, p. 13), it was the same type of evidence the Commission considered for first and second-quarter 2008 plant additions (Id.) and Staff did not introduce “any evidence on the issue.” Id., p. 11. ComEd’s argument should be rejected since the arguments are contrary to the evidence in the record. First with respect to Staff’s evidence concerning third-quarter 2008 plant additions, Staff addressed this issue in its Initial Brief and Reply Brief but will respond again. In the original proceeding Staff witness Griffin testified in his direct testimony which was admitted into evidence that ComEd’s pro forma adjustments for the third-quarter were not known and measurable given that the additions were not reasonably certain to occur nor were they determinable in amount. Mr. Griffin explained that the Company’s budgets showed variances of different degrees which led him to conclude that those budgets could not support ComEd’s arguments that the additions were reasonably certain to occur and determinable. Staff Ex. 2.0 Corrected, p. 7. In this remand proceeding ComEd through Ms. Houtsma’s testimony and through its Initial Brief and Brief on Exceptions has

attempted to portray Mr. Griffin's testimony as not addressing third quarter 2008 plant additions. However ComEd's own counsel recognized that Staff offered evidence in the original proceeding addressing ComEd's third-quarter 2008 plant additions. Tr, August 11, 2011, p. 39. Staff IB, pp. 17-18; Staff RB, pp. 9-10.

Not only does ComEd attempt to rewrite Staff's testimony, ComEd attempts to rewrite the Commission's appellate brief filed in the appeal of the original order for this docket. ComEd claims the statement that "[t]he Commission cannot know what position either the Staff Witnesses or the Commission would take if this issue were to be remanded" means that Staff introduced no evidence on the issue. ComEd BOE, p. 11. ComEd is wrong. ComEd ignores the prior statement in the Commission's brief that "it does not appear that the Staff witness agreed with ComEd that the third quarter was known and measurable under 83 Ill. Adm. Code 287.40, since their evidence and the Stipulation (R. vol. 61, C14980-C14984) did not include that additional quarter of pro forma capital additions." Id. If the Commission thought Staff took no position on third-quarter 2008 plant additions or did not introduce evidence on the issue, the Commission would not have stated that it does not appear that Staff agreed with ComEd that the third-quarter 2008 plant additions were known and measurable since the stipulation did not include the third-quarter 2008 plant additions. The simple plain meaning of the statement "[t]he Commission cannot know what position either the Staff Witnesses or the Commission would take if this issue were to be remanded" is that the Commission did not know if there was a remand whether Staff would still maintain Mr. Griffin's position from his direct testimony or whether Staff would withdraw it. It is a complete misreading of the Commission's appellate brief to say that brief stated Staff offered no evidence on the third-quarter 2008 plant additions.

In response to ComEd's argument that the evidence regarding third quarter 2008 plant additions is the same type of evidence considered for first and second-quarter 2008 plant additions that statement is false, if ComEd is referring to the evidence available at the time the Commission was making its determination. The Commission made its determination regarding first and second-quarter 2008 plant additions on actual data. Actuals for the third-quarter 2008 plant additions were not known and could not have been known at the time the Commission was making that determination.

Based upon the above arguments and Staff's prior briefs the Commission should reject the Company's 5<sup>th</sup>, 6<sup>th</sup> and 10<sup>th</sup> exceptions.

**4. The Commission cannot consider ComEd's actual third quarter 2008 plant additions in a refund calculation. (Response to ComEd's 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> exceptions)**

ComEd argues that any refund should utilize actual figures for the third-quarter 2008 rather than projections. ComEd BOE, pp. 18-21. Staff previously addressed this issue in its Initial Brief and Reply Brief. IB, pp. 18-19; RB, pp. 10-12. ComEd's main argument is that because actual accumulated depreciation is used to match actual pro forma additions as of the end of the second-quarter 2008, actual plant additions for the third-quarter must be considered. ComEd BOE, p. 19. As Staff discussed in its Initial Brief and Reply Brief, the Commission in its order in Docket Nos. 83-0537 and 84-0555 (Consolidated) (On Second Remand) (1993 WL 13653472 (Ill.C.C)) set forth the Commission's position on the appropriate information to consider in a remand proceeding. In that Order, the Commission addressed the issue of the appropriate refund related to ComEd's then owned Byron 1 nuclear unit. The threshold issue for the Commission was whether ComEd should be able to determine 1989 rates for purposes

of determining a refund using data that would not have been available when the Commission would have been determining the 1989 rates. ICC Docket Nos. 83-0537 and 84-0555 (Consolidated), June 2, 1993, Order, p. 3. ComEd wanted to use actual data from 1990 to make a used and useful determination for a revenue requirement determination for 1989. The Commission concluded that it would be improper to use actual data for 1990 since that data would not have been available to the Commission to consider at the time it was setting 1989 rates. Id., p. 4. In this original proceeding at the time the Commission was making its original determination of what plant additions met the known and measureable standard, ComEd's third-quarter 2008 actual plant additions were not available. The only information that was available for the third-quarter was ComEd's forecasted third-quarter 2008 plant additions. Accordingly, the Commission should not consider in this remand proceeding ComEd's actual third-quarter 2008 plant additions as discussed by Ms. Houtsma and Mr. McMahan in their testimony on remand. Staff RB, pp. 11-12.

Unlike third-quarter 2008 plant additions, actual data regarding June 30, 2008 plant additions and accumulated depreciation through June 30, 2008 was available at the time the Commission was making its determination in the original proceeding. Staff's refund calculation utilized the following data from the original proceeding's Order dated September 10, 2008: actual gross plant as of June 30, 2008 (Appendix p. 4, line 1, column d), incremental accumulated depreciation on actual plant additions as of June 30, 2008 and accumulated depreciation on existing plant as of December 31, 2006. Appendix, p. 4 line 1, column d. In addition, Staff's refund calculation included the amount of accumulated depreciation on existing plant during the post test year period for the calendar year 2007 and the first six months of 2008. Staff Ex. 22.0, Attachment

A, line 4, column c. While the actual amount of post test year period accumulated depreciation on existing plant at June 30, 2008 was not in evidence in the original proceeding, the data was available at the time of the Commission's decision in the original proceeding (September 10, 2008) and is part of the record evidence in this remand proceeding. Staff Group Exhibit 1 (On Remand). Therefore, the refund amount recommended by Staff is appropriate. Staff IB, p. 15; Staff RB, p. 12.

Based upon the above arguments and Staff's prior briefs the Commission should reject the Company's 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> exceptions.

**5. The period of excessive rates ended on May 31, 2011 not May 24, 2011. (Response to ComEd's 7<sup>th</sup> exception)**

ComEd argues that the period of excessive rates<sup>1</sup> ended on May 24, 2011<sup>2</sup>. ComEd BOE, p. 21. ComEd's support for its position is an equity argument. ComEd argues that "[e]quity should not require ComEd to refund amounts collected after the Commission expressly found that ComEd was permitted to charge higher rates." *Id.*, p. 22. ComEd argues that customers should not be able to benefit from the unavoidable lag in implementing a new rate order by continuing to collect a refund from rates the

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<sup>1</sup> ComEd refers to the time period at issue as the putative refund period. Staff refers to the time period as the period of excessive rates. Staff's use of the phrase period of excessive rates is more accurate since during that period of time ComEd was charging a rate determined by the Appellate Court to be excessive. Also the use of the phrase "period of excessive rates" avoids any confusion with the subsequent period of time when the refund amount is paid back to ratepayers, which is often referred to as a refund period. To avoid any confusion on these two distinct periods of time, Staff recommends that the Commission adopt Staff's use of the phrase "period of excessive rates" for the time period from September 30, 2010 through May 31, 2011 and refund period for the time period in which refunds are paid back to customers. The PO adopts Staff's use of the phrase period of excessive rates.

<sup>2</sup> Section IV of ComEd's BOE is entitled "THE PUTATIVE REFUND PERIOD ENDED ON MAY 23, 2011" Staff assumes that is a typo since the last sentence in the first paragraph of the section states "The putative refund period should end on May 24, 2011, when the Commission authorized ComEd to begin charging higher rates." ComEd BOE, p. 21.

Commission had deemed too low to be just and reasonable. Id. The Commission must reject ComEd's argument. First, its argument is contrary to existing law on the refund formula. As Staff set forth in its Initial Brief and Reply Brief, the period of excessive rates is the period of time ComEd charged its customers a rate determined by the Appellate Court to be excessive. Staff IB, p. 11; Staff RB, p. 14. Under IVI, rates found to be improper are improper from the time the court enters its judgment until new rates take effect. IVI, 117 Ill.2d at 102-103. ComEd's rate was illegal starting September 30, 2011 until the date new rate schedules were effective (i.e. June 1, 2011). Staff IB, p. 11. Second, not only is ComEd's argument contrary to IVI, the argument makes no sense. If the Commission adopted ComEd's position it would be saying that a rate charged to customers on May 23, 2011 is illegal but that same rate charged to those same customers the last eight days of May 2011 is not illegal. The refund formula is simple under IVI. As long as a utility charges its customers an illegal rate, ratepayers are entitled to get back that illegal amount.

Based upon the above arguments and Staff's prior briefs the Commission should reject the Company's 7<sup>th</sup> exception.

**6. Section 9-253 of the PUA applies to the refund ordered in this proceeding. (Response to ComEd's 9<sup>th</sup> and 11<sup>th</sup> exceptions)**

ComEd argues that it "has never charged customers anything more than a Commission-approved rate"; therefore, ComEd concludes that it has not overcharged customers under Section 9-253 of the Illinois Public Utilities Act ("PUA"). ComEd BOE, pp. 22-23. ComEd goes on to argue that the Commission need not address Section 9-253 since ComEd is willing to follow a refund procedure that sets aside amounts for former customers and the Commission apart from Section 9-253 has jurisdiction over

any refund tariff under Article IX of the PUA. Id., p. 23. Staff has previously responded to ComEd's Section 9-253 argument in its Reply Brief. Staff RB, pp. 15-16. As Staff argued in its Reply Brief, ComEd's argument that Section 9-253 of the PUA does not apply to this proceeding (ComEd BOE, p. 23) is based upon a flawed interpretation of the law. ComEd narrowly defines "overcharge" as charging customers "more than a Commission-approved rate." ComEd BOE, p. 22. ComEd defines the term "overcharge" to exclude a utility continuing to charge a rate the Appellate Court has determined to be excessive. Given that the term "overcharge" is not defined in Section 9-253, and the fact that the first sentence of Section 9-253 refers to "the Commission or a court" determining that a public utility "has over-charged its customers" the Commission can reasonably conclude that when a public utility charges its customers a rate which the Appellate Court finds to be excessive the public utility has overcharged its customers and, accordingly, Section 9-253 applies to that situation. Staff RB, p. 15.

At pages 23 and 24 of its Brief on Exceptions ComEd also discusses its proposed language to provide clarity on certain findings regarding the treatment of certain customers and a proposed clarification related to the recalculation of the refund credit after five months. ComEd offered and agreed to an alternative proposal that sets aside amounts for former customers in a process outlined in the rebuttal testimony on remand of ComEd witness Mr. Tenorio, which the PO accepts. ComEd BOE, p. 23. Staff accepts the Company's alternative proposal. ComEd would provide notice through newspaper publication, with delivery service bills, and on the ComEd.com website. Funds would be set aside for former customers for a period of 120 days after the Commission issues its final Order on Remand in the docket, or if the Commission decides it has no authority to order a refund, which it should not, for a period of 120

days after the end of any successful appeal of that order and the refund to customers has commenced. ComEd would develop a form for former customers to submit claims to ComEd. Upon receipt and verification of a claim, a payment in the form of a one-time check would be sent to the former customer based on the kWhs delivered by ComEd to the former customer during the applicable refund period. ComEd also stated it would recover its administrative costs associated with this procedure from the funds set aside for former customers prior to any payout. ComEd Ex. 60.0, p. 4. ComEd Ex. 60.1 is an exemplar tariff for this alternative proposal. The Commission should approve the tariff as set forth in ComEd Ex. 60.1.

Staff accepts ComEd's proposal to provide a refund to current customers who were not customers during the putative refund period. (ComEd BOE, p. 23) Staff agrees that since the refund period is recent, the number of such customers should be very low.

Staff also accepts ComEd's proposal for additional language to clarify that a recalculation of the remaining credit be made after five months. (ComEd BOE, p. 23) Staff agrees that the refund rates for the last two monthly billing periods should be adjusted to provide for a final refund amount that as nearly as reasonable matches the amount the Commission orders ComEd to refund. The remaining portion from the amount set aside for the former customers for 120 days should be included in the recalculation as well.

Based upon the above arguments and Staff's prior briefs but modified by the acceptance of certain ComEd proposals set forth above the Commission should reject the Company's 11<sup>th</sup> exception. The Commission should also reject the Company's 9<sup>th</sup>

exception with the exception of the following specific language taken from ComEd's 9<sup>th</sup> exception<sup>3</sup>.

Proposed Language  
(PO, p. 50)

\* \* \*

Having found that Section 9-253 is controlling for purposes of this refund, a portion of the refund must be set aside for former customers of ComEd and a portion of the funds set aside for refunds to former customers may be used to cover administrative costs of the refund. The Commission adopts the procedure set forth by ComEd witness Tenorio in rebuttal testimony on remand, ComEd Ex. 60.0 (Remand). Additionally, the Commission concludes that current ComEd customers, who were not customers during the period of excessive rates, September 30, 2010 through May, 31, 2011, should also receive a refund credit.

(PO, p. 51)

\* \* \*

appeal is issued, so long as the period only reflects one month of summer usage. The Commission notes that there were no summer cooling months during the period of excessive rates. Additionally, the Commission finds that after the first five monthly billing periods in the refund period have elapsed, a recalculation of remaining credit shall be made. Based on this calculation, the refund rates for the last two monthly billing periods (i.e., the 7<sup>th</sup> and 8<sup>th</sup> monthly billing periods) would be adjusted to provide for a final refund amount that as nearly as reasonable matches the amount the Commission orders ComEd to refund. In the event that the actual amount refunded to customers is less than the ordered refund amount after the refund period, the Commission directs ComEd to donate the difference to an energy assistance program designated by ComEd.

## **7. Response to ComEd's 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> exceptions.**

ComEd proposes certain "technical corrections" to the PO which it identifies as exceptions 1A, 1B, 1C, 2 and 3. With respect to exception 1A that exception appears to

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<sup>3</sup> Consistent with the PO conclusion regarding the period of excessive rates, September 30, 2010 has replaced October 1, 2010, May 31, 2011 has replaced May 23, 2011 and period of excessive rates has replaced refund period in ComEd's exceptions language.

have a typo since it indicates the Appellate Court's opinion was issued on September 23, 2010 rather than September 30, 2010. ("Opinion filed September 30, 2010") ComEd, 405 Ill.App. 3d, 389. With that correction Staff has no objection to exception 1A.

ComEd exception 1B is that "ComEd has not reargued those same positions in subsequent briefing, but has preserved the issues for potential further review." Staff finds that exception to not be a technical correction but rather ComEd laying the groundwork for some future legal argument. Staff's position is that exception is unnecessary.

ComEd's exception 1C concerns a very brief description of ComEd's offer of proof in the section of the PO addressing ComEd's position. Staff does not object to exception 1C.

ComEd's exception 2 concerns a description of Staff's and the AG/CUB's Motion in Limine. The language ComEd seeks to modify is the actual language which appeared in Staff's Motion in Limine. Staff fails to see a substantive difference between the PO's language and the language ComEd proposes. With that understanding, Staff is indifferent to ComEd's exception 2.

ComEd's exception 3 concerns findings made by the Commission in its 07-0566 order with respect to ComEd's evidence on first and second-quarter 2008 plant additions. Staff finds this technical correction to be unnecessary, therefore Staff objects to it.

**B. Response to AG/CUB's Brief on Exceptions.**

**1. AG/CUB exception 1.**

The AG/CUB point out in their Brief on Exceptions that the PO got it wrong on the pivotal issue of "whether the Commission has the authority to order refunds in this remand proceeding." AG/CUB BOE, p. 2. The IIEC also took exception to the PO on this issue. Staff agrees with the AG/CUB and IIEC on this issue and while either the AG/CUB's language (AG/CUB BOE, pp. 11-16)<sup>4</sup> or Staff's language (Staff BOE, pp. 5-7) must be adopted by the Commission, Staff is indifferent on which language the Commission adopts for pages 42 and 43 of the PO.

The AG/CUB also proposed language modification to page 45 of the PO related to the issue of the Commission's authority to order a refund. AG/CUB BOE, p. 17. Staff supports that language and recommends that it be adopted even if the Commission adopts Staff's proposed language for pages 42 and 43 of the PO. The AG/CUBS's language for page 45 is consistent with the arguments and position set forth by Staff in its Brief on Exceptions.

Finally, Staff would point out that it proposed language modifications to the PO at pages 47, 48 and 49 (Staff BOE, pp. 7-8) which are derivative of its and the AG/CUB's proposed modifications to pages 42, 43 and 45 of the PO. Therefore, regardless of whether the Commission adopts the AG/CUB's language for pages 42 and 43 or Staff's language for pages 42 and 43, Staff's modifications to the PO at pages 47, 48 and 49 must be adopted by the Commission.

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<sup>4</sup> The AG/CUB BOE appears to have a typographical error by mistakenly referring to the relevant PO page as page 13 rather than page 42.

**2. AG/CUB exception 2.**

Both Staff and AG/CUB filed exceptions on the issue of the period of excessive rates. While one of the two must be adopted by the Commission, Staff is indifferent as to whether the Commission adopts the AG/CUB's exception 2 or Staff's proposed language modification regarding the period of excessive rates. Staff BOE, pp. 11-12.

**3. AG/CUB exception 3.**

Both Staff and AG/CUB filed exceptions on the refund period. Staff BOE, pp. 10-11; AG/CUB BOE, pp. 19-20. While the AG/CUB proposed language modification on this issue is consistent with Staff's proposed modification, Staff believes that its alternative 1 (Staff BOE, p. 10) provides a more definitive conclusion on the issue, therefore, Staff recommends that the Commission adopt Staff's proposed modification.

**4. AG/CUB exception 4.**

Staff proposed modifications to the PO regarding a necessary finding by the Commission related to ComEd's formula rates filings and reconciliations under Section 16-108.5 of the PUA. Staff's modification was based upon arguments made by the AG/CUB in their Reply Brief on the issue. Staff BOE, pp. 12-14. The AG/CUB also took exception to the PO for its failure to address the issue. AG/CUB BOE, pp. 20-22. The AG/CUB suggest that a new section be added to the PO and include the relevant language in its exception 4. For the reasons set forth in Staff's BOE and the AG/CUB's BOE, Staff recommends that the Commission adopt both the AG//CUB's exception 4 to add a new section to the PO on the issue and Staff's recommendation that a specific finding on the issue be made by the Commission in its final order.

**C. Response to IIEC's Brief on Exceptions.**

Like Staff and the AG/CUB, the IIEC takes exception to the PO on the issue of the Commission's authority to issue a refund. The IIEC argues that on the issue of "whether a refund is required --- the [PO] got it wrong." IIEC BOE, p. 1. Consistent with that position the IIEC proposed language modifications to the PO. IIEC Replacement Language on Remand. While language modification must be made to the PO on this issue, Staff is indifferent as to whether the IIEC's, AG/CUB's or Staff's language is adopted for pages 42 and 43 of the PO. However, as discussed above with regard to the AG/CUB's exceptions, certain other modifications to the PO must be made at page 45 (AG/CUB BOE, p. 17), and pages 47, 48 and 49 (Staff BOE, pp. 7-8) which are derivative of the language in the PO at pages 42 and 43.

**III. CONCLUSION**

Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

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