

**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.	:	
.	:	

**ADMINISTRATIVE LAW JUDGE’S RULING**

Under Section 8-103 of the Public Utilities Act<sup>1</sup>, Commonwealth Edison Company (“ComEd”) is obliged to implement cost-effective energy efficiency (“EE”) and demand response (“DR”) measures. Subsection 8-103(e) of the Act permits ComEd to recover the costs of the required measures through an automatic adjustment clause, and ComEd does so through tariff Rider EDA. Subsection 8-103(e) also requires the Commission to annually reconcile the amounts collected under the Rider with ComEd’s actual and allowable EE/DR costs. Under Rider EDA, as approved by the Commission in Docket 07-0540, ComEd must (among other things) submit an annual report to facilitate the reconciliation process. ComEd made the necessary submission and the Commission initiated this review proceeding on September 9, 2010. Pursuant to subsection 8-103(f)(6), ComEd is entitled to recover “the prudently and reasonably incurred costs of Commission-approved programs” for EE/DR<sup>2</sup>

Commission Staff pre-filed its direct testimony in this docket on September 7, 2011. On September 28, 2011, ComEd filed a Motion to Strike the Direct Testimony of Jennifer L. Hinman, a Staff witness, whose testimony appears in Staff Exhibit 2.0. The Motion addresses all but the first of four recommendations in that testimony. Staff filed its Response to the Motion on October 20, 2011, opposing the Motion. ComEd filed a Reply to Staff’s Response on November 10, 2011.

The Motion is premised on relevance (and, in certain instances, on due process). According to ComEd, relevant matter is “of consequence to the determination of” the issues in a proceeding, and Ms. Hinman’s second, third and fourth recommendations fail to meet that standard<sup>3</sup>. ComEd would therefore strike the pertinent testimony

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<sup>1</sup> 220 ILCS 5/8-103.

<sup>2</sup> 220 ILCS 5/8-103(f)(6).

<sup>3</sup> Motion at 4.

pursuant to subsection 200.610(a) of the Commission's Rules of Practice, which states that "irrelevant...evidence shall be excluded."<sup>4</sup>

Since the challenged testimony has been pre-filed, but not yet admitted to the evidentiary record, the Motion is akin to a motion *in limine* in judicial proceedings. That is, granting the Motion would not literally strike matter from the record, but would preclude that matter from entering the record for decision-making purposes. Also, because ComEd is objecting to Staff's requested outcomes, not to factual matter, it is essentially raising questions about the boundaries of Commission authority and discretion in Section 8-103 reconciliation proceedings. Consequently, the Motion bears some resemblance to a motion to dismiss. These attributes of the Motion shape the issues that are actually in dispute.

This Ruling will discuss the three Staff recommendations under challenge in the order in which they appear in Exhibit 2.0.

## RECOMMENDATION 2

Ms. Hinman's second recommendation is that "the Commission order the Company to file semi-annual reports with the Commission starting June 2012 and that the Commission include language in its final order consistent with that provided later in this testimony."<sup>5</sup> Although the language Staff specifically proposes for implementing this recommendation is quite detailed<sup>6</sup>, ComEd's objects generally to considering Staff's proposed additional reporting requirements in a proceeding ostensibly designed to reconcile costs with funds collected. As ComEd sees it, Staff's recommendation gives rise to three issues that are, and should remain, outside the parameters of this docket: 1) whether additional reports are necessary; 2) whether additional reports require separate dockets; and 3) whether the Commission "can impose additional reporting."<sup>7</sup>

As a matter of Commission authority, nothing in subsection 8-103(e), or in the comprehensive powers of the Commission, generally precludes consideration of any of the three foregoing issues here. To perform its annual duty to reconcile collections and expenses and adjust the annual tariff factor in Rider EDA, the Commission is empowered to prospectively determine what reports it needs and how many reports it will review in a single docket. However, the Commission is also governed by subsection 8-103(f), which additionally obliges it to review and approve ComEd's three-year EE/DR plans. The Commission fulfills that mandate in dockets other than annual reconciliation proceedings like this one. Accordingly, as a matter of administrative efficiency and procedural fairness (and, arguably, as a matter of statutory power, depending upon the authority invoked in a particular docket's initiating order), disputes entirely or principally associated with three-year plans ought to be considered in

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<sup>4</sup> 83 Ill. Adm. Code 200.610(a).

<sup>5</sup> Staff Ex. 2.0 at 4.

<sup>6</sup> *Id.* At 14-16.

<sup>7</sup> Motion at 5.

proceedings initiated under subsection 8-103(f), rather than in proceedings initiated under subsection 8-103(e).

Ms. Hinman's recommended additional reports are principally associated with ComEd's three-year EE/DR plans. As the witness states, they would be "formal written reports that summarize the progress of [ComEd's] EE Plan,"<sup>8</sup> and are "important to know whether the Company's EE efforts resulted in a cost-effective EE portfolio."<sup>9</sup> Consequently, the efficacy of the proposed reports is more appropriately determined in a docket connected to ComEd's EE/DR plans and portfolios, rather than in this reconciliation proceeding. The essential purpose of the three-year plan reviews is to assess and, as needed, enhance plan effectiveness, while the principal purpose of this reconciliation docket is to compare received revenue against allowable costs. Additional reporting related to cost-effectiveness, irrespective of the time interval between reports, is more suitably considered in plan review proceedings<sup>10</sup>.

To be clear, the foregoing conclusion is absolutely unrelated to whether Staff's proposed additional reporting requirements should be adopted by the Commission. Staff argues cogently in support of its recommendation, and Ms. Hinman asserts that ComEd has already agreed to furnish comparable reports<sup>11</sup>. This Ruling addresses only whether the imposition of Staff's recommended reporting requirements will be considered in this case or another. Similarly, nothing here is intended to predetermine that any part of the *contents* of the proposed reports would be irrelevant in a reconciliation proceeding. As Staff correctly emphasizes, only reasonable and prudent costs are recoverable from ratepayers. It follows that reported information concerning reasonableness or prudence would be relevant to reconciliation. Again, this Ruling only determines that the establishment of the recommended reporting requirements should be considered in another type of docket.

Staff's second recommendation is not solely about *additional* reporting requirements, however. It also contemplates submission of the annual independent evaluation of cost-effectiveness required by subsection 8-103(f)(7). Two questions thus arise - whether pre-existing independent evaluations are relevant to reconciliation issues here (particularly reasonableness and prudence), and whether a standard requirement should be created to file such evaluations in reconciliation cases. ComEd does not address the first question and, indeed, that question cannot be answered at this juncture, without the offer of the evaluation(s) as evidence. Consequently, the Motion has to be denied with respect to the evaluations. As for a forward-looking filing requirement in reconciliation dockets, this Ruling will not preclude Staff from seeking to persuade the Commission in this case that standardized filing of portions or full texts of

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<sup>8</sup> Staff Ex. 2.0 at 18.

<sup>9</sup> *Id.* at 24.

<sup>10</sup> Annual plan reviews are contemplated in the final Order in Docket 07-0540 at 27.

<sup>11</sup> Staff Ex. 2.0 at 19. Indeed, Staff contends that ComEd has already committed to providing semi-annual reports, Staff Reply at 5, which begs the question of why Staff has not presented a motion in Docket 07-0540 to compel ComEd to implement that commitment.

pre-existing annual evaluations would assist the Commission in carrying out its reconciliation duty.

In sum, regarding recommendation 2, the Motion is granted in part (with respect to page 4, line 64 through line 70, and page 6, line 94, through page 26, line 517) and denied in part (insofar as the foregoing testimony concerns the annual independent evaluations required by subsection 8-103(f)(7)).

### RECOMMENDATION 3

Ms. Hinman's third recommendation is that the Commission "direct the Company to work with Staff to reach agreement on the appropriate cost classifications for use in cost-effectiveness analyses required by Section 8-103 of the Act."<sup>12</sup> ComEd maintains that this is another recommendation more properly addressed in a docketed review of its three-year EE/DR plans. Staff counters that the subsection 8-103(f)(7) independent evaluations mentioned above are performed annually, not every three years, but overlooks the fact that those analyses, per the statute, concern *cost-effectiveness*, not reconciliation. Moreover, Staff itself aptly views the independent analyses as providing forward-looking guidance, rather than facilitating a true-up of past revenues and costs<sup>13</sup>.

However, Staff additionally emphasizes that it "must be able to analyze what costs are being allocated into what cost classifications in order to determine if costs are prudent and reasonable and to ensure there is no double recovery of costs."<sup>14</sup> Staff thus raises a concern that is unquestionably relevant to this docket. There is, though, no explicit nexus between that concern and the challenged testimony, which focuses exclusively on purported inconsistencies and inadequacies in and among ComEd's three-year plans<sup>15</sup>. Hinman recommendation 3 criticizes the cost classifications in those plans, but fails to connect the alleged classification deficiencies to the reasonableness, prudence or accuracy of the costs subject to reconciliation in this proceeding.

The question, then, is how to address, in this reconciliation proceeding, matter that, if properly presented, would be relevant to reasonableness, prudence and cost computation, without addressing issues more properly considered in three-year plan dockets. ComEd elided that question in both its Motion and Reply, even though it had apparently declared that it was "open to discussing the development of an alternate set of consistent and clearly defined cost categories."<sup>16</sup> That is puzzling, since ComEd has the burden of proving the reasonableness, prudence and accuracy of its costs (which ComEd acknowledges in Rider EDA<sup>17</sup>). Since ComEd believes that its existing cost

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<sup>12</sup> *Id.* at 27.

<sup>13</sup> Staff Reply at 6, quoting subsection 8-103(f)(7) ("for adjustment of the measures *on a going-forward basis* as a result of the evaluations") (emphasis added).

<sup>14</sup> *Id.* at 7.

<sup>15</sup> Staff Ex. 2.0 at 27-30.

<sup>16</sup> *Id.* at 27, citing a ComEd data request response.

<sup>17</sup> *Id.*, Att. 2, Original Sheet 248.

classifications are “consistent and clearly defined,”<sup>18</sup> it would presumably want to reach an accord with Staff, to forestall testimony that would make an affirmative finding of reasonableness, prudence and accuracy less likely. Thus, a recommendation to “work with Staff” would appear to be in ComEd’s own interest, insofar as cost classification disputes would affect cost and revenue reconciliation.

Nevertheless, as things currently stand, the Motion must be granted with regard to recommendation 3 (page 5, lines 76-79, and page 27, line 519 through page 30, line 594), which is better suited for consideration in a plan review docket. However, Staff is granted leave, *sua sponte*, to amend its testimony to render it relevant to this proceeding. That is, proposals to revise ComEd’s triennial plans must be deleted and testimony linking purported deficiencies in ComEd’s cost classifications to the reasonableness, prudence or accuracy of the costs subject to reconciliation in this proceeding would need to be added. Alternatively, Staff can simply proceed in this docket without the stricken testimony.

#### RECOMMENDATION 4

In her fourth recommendation, Ms. Hinman urges the Commission to order 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),” which the witness contends will ensure that ComEd “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.”<sup>19</sup> ComEd’s Motion characterizes this recommendation as, by its terms, another matter for the triennial filing and review contemplated by subsection 8-103(f)<sup>20</sup>. Staff replies that non-Rider EDA employee costs are relevant to reconciliation because they are ineligible for recovery under the Rider<sup>21</sup>.

As with recommendation 2, the pertinent testimony in recommendation 4 concerns filings connected with triennial planning and cost-effectiveness. Again, such filing requirements are more properly established (if at all) in dockets concerning ComEd’s three-year plans (or in non-docketed proceedings such as workshops conducted for that purpose). And also again, certain *information* in such proposed filings may well be relevant in reconciliation of lawfully recoverable costs. Thus, while cost-effectiveness filing requirements for EE/DR plans cannot be considered in this docket, information regarding non-Rider EDA employee costs, if presented, can be considered for admission to the evidentiary record. However, all of the testimony associated here with Hinman recommendation 4 concerns cost-effectiveness filing requirements for EE/DR plans.

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<sup>18</sup> Staff Ex. 2.2 at 28.

<sup>19</sup> Staff Ex. 2.0 at 31.

<sup>20</sup> Motion at 6.

<sup>21</sup> Staff Reply at 9.

Accordingly, the Motion is granted with respect to recommendation 4 (page 5, lines 80-83, and page 30, line 596 through page 33, line 654). However, Staff is again granted leave, *sua sponte*, to amend its testimony to render it relevant to this proceeding. That is, proposals to establish new cost-effectiveness filing requirements must be deleted and testimony linking non-Rider EDA employee costs to the reasonableness, prudence or recoverability of the costs subject to reconciliation in this proceeding would need to be added. Alternatively, Staff can simply proceed in this docket without the stricken testimony,

### DUE PROCESS

ComEd also argues in the Motion that consideration of the Hinman recommendations would contravene the due process rights of entities and persons that are not parties to this docket<sup>22</sup>. Since the Motion has already been sufficiently addressed here on other grounds (which, additionally, vitiate the due process claim substantively), no ruling on due process is necessary. Moreover, the capacity of a party to assert due process rights for a non-party is hardly clear (although ComEd's presentation could be taken here solely as a reminder regarding previous Commission decisions).

### SUMMARY

The Motion is granted in part and denied in part, as described above in this Ruling. Staff is granted, *sua sponte*, leave to amend the pertinent testimony, but only in the manner described in this Ruling.

END OF RULING

November 29, 2011  
David Gilbert, ALJ

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<sup>22</sup> Motion at 6.