

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company)	
)	
Reconciliation of revenues collected under Rider)	Docket No. 10-0537
EDA with actual costs associated with energy)	
efficiency and demand response programs.)	

APPENDIX:
COMMONWEALTH EDISON COMPANY'S
EXCEPTIONS TO THE PROPOSED ORDER

Dated: July 25, 2012

I. Exception 1: The Proposed Order Should Be Revised to Permit the Recovery of Incentive Compensation Costs.

Alternative 1: Approves Recovery of ComEd's Incentive Compensation Costs

The second full paragraph on page 16 should be modified as follows:

Staff witness Mr. Tolsdorf recommended that the Commission deny ComEd's incentive compensation expense that is related to the incremental employees hired by ComEd to implement its energy efficiency portfolio and whose costs were recovered through Rider EDA. Specifically, Mr. Tolsdorf requested that the Commission disallow \$262,929. As an initial matter, ComEd noted that the amount of Staff's disallowance is incorrect and unsupported in the record. ComEd explained that the uncontested evidence demonstrates that only approximately \$96,000 of incentive compensation expense was charge through Rider EDA during Plan Year 2. ComEd IB at 1, fn. 1; Staff Cross Ex. 3; ComEd Cross Ex. 1.

The following paragraphs should be inserted before the first full paragraph on page 17:

ComEd further submitted that it is a well-established principle of Illinois law, that where an opinion clearly states that its effect shall be prospective (i.e., "in ComEd's next reconciliation filing") it will not apply retroactively. Aleckson v. Village of Round Lake Park, 176 Ill. 2d 82, 86 (1997). Also, according to ComEd, this is consistent with the equally well-established rule prohibiting retroactive ratemaking. Citizens Utils. Co. v. Ill. Commerce Comm'n, 124 Ill. 2d 195, 207 (1988) ("The rule prohibiting retroactive ratemaking is consistent with the prospective nature of legislative activity, such as that performed by the Commission in setting rates."). Furthermore, ComEd explained that because the ICC is a creature of the legislature and derives its authority therefrom, the presumption against retroactive application of a statute is also instructive here. Barrett v. Guaranty Bank & Trust Co., 123 Ill. App. 2d 326, 332 (1st Dist. 1970).

In its Reply Brief, ComEd further explained that the incentive compensation costs are clearly recoverable under the terms of Rider EDA. As ComEd explained in its Initial Brief, the costs recoverable through Rider EDA include all incremental costs incurred by ComEd in association with energy efficiency and demand response measures. ComEd IB at 5; ComEd Ex. 2.0 at 19. Rider EDA defines "Energy Efficiency and Demand Response Measures" ("Measures") as "activities and programs that are developed, implemented, or administered by or for the Company, or the Department of Commerce and Economic Opportunity (DCEO), that are related to energy efficiency and demand response plans approved by the ICC." Rider EDA, ILL. C. C. No. 10, 1st Revised Sheet No. 245. The rider then defines "Incremental Costs" as follows:

Incremental Costs mean costs incurred after August 28, 2007 by the Company or recovered on behalf of DCEO in association with the Measures and include, but

are not limited to (a) fees, charges, billings, or assessments related to the Measures; (b) costs or expenses associated with equipment, devices, or services that are purchased, provided, installed, operated, maintained, or monitored for the Measures; (c) the revenue requirement equivalent of the return of and on a capital investment associated with a Measure, based on the most recent rate of return approved by the ICC; and (d) all legal and consultative costs associated with the Measures.

Incremental Costs also include incremental expenses for wages, salaries, and benefits of Company employees, including direct and indirect incremental costs associated with such Company employees, who are hired for positions that are specifically related to the Measures and that were created after August 28, 2007. Incremental Costs may not include any expenses for wages, salaries, and benefits of Company employees in positions that are related to the Measures, employed either before or after August 28, 2007, that are otherwise recovered under other effective tariffs.

Id., 1st Revised Sheet No. 246 (emphasis added). ComEd explained that when the requirements of Section 8-103 of the Act took effect, ComEd had to hire additional (“incremental”) employees to implement the extensive new energy efficiency measures and programs designed to achieve the energy savings goals. Accordingly, Rider EDA permits the recovery of the expenses for wages, salaries, and benefits of these incremental ComEd employees, including direct and indirect incremental costs associated with these employees, just as it permits the recovery of other incremental costs associated with the measures. The only “related to” standard here is that the positions must be “specifically related to the Measures.” Id.; ComEd Reply Br. at 8.

ComEd stated that under this “related to” standard, the incentive compensation costs associated with the incremental EE employees are clearly recoverable. Indeed, Staff does not question that the incremental EE employees and the positions they fill are specifically related to the Measures. Specifically, Staff does not contest the hiring of these incremental EE employees, that these employees are employees of ComEd, or that they implement energy efficiency measures and programs within ComEd’s Energy Efficiency department. Tr. at 39-40. ComEd noted that Rider EDA broadly permits recovery of expenses for “wages, salaries, and benefits,” “including direct and indirect incremental costs.” Rider EDA, ILL. C. C. No. 10, 1st Revised Sheet No. 246. Consistent with the terms of Rider EDA, the incentive compensation costs associated with the incremental EE employees during Plan Year 2 are appropriately recoverable through the rider. ComEd Reply Br. at 9.

The last full paragraph on page 20 should be modified as follows:

Finally, ComEd also stated that beginning with the 2010 AIP, ComEd added a Key Performance Indicator (“KPI”) called the Focused Initiatives & Environmental Index, which includes a measure of energy efficiency savings programs offered pursuant to Section 8-103 of the Act. ComEd IB_{at} 16; Staff Cross Ex. 2 at 4, 8. According to ComEd, the incremental EE employees are vital and necessary to achieving energy savings under Section 8-103, and their performance is directly tied to achievement of the KPI described above. ComEd IB at

16; ComEd Ex. 6.0 at 5. ComEd observed that Mr. Tolsdorf failed to address the addition of this KPI in his direct testimony, and only acknowledged it in his rebuttal testimony in response to ComEd witness Mr. Fruehe. ComEd IB_at 16; Tr. at 48. ~~ComEd concluded that Staff's recommendation should therefore be rejected by the Commission.~~

The following paragraphs should be inserted after the last full paragraph on page 20:

Responding to Staff's Initial Brief, ComEd noted in its Reply Brief that Staff's position appears to be that the customer benefits were realized wholly independently of, and bear no relation to, the AIP and the specific individual performance goals set for the incremental EE employees under the AIP. ComEd stated that in Staff's fictional Plan Year 2, the incremental EE employees just happened to far exceed the energy savings goals at a savings of \$16 million. Or, put another way, these employees were not at all incented by their individual performance goals under the AIP even though achievement of these goals determines whether they will receive the pay-at-risk portion of their compensation under the AIP. According to ComEd, Staff's view does not reflect the facts or reality, ignores the key features of the AIP, and should be rejected. ComEd Reply Br. at 9.

ComEd explained that substantial portions of the AIP are devoted to explaining how each individual employee's performance is measured against individual and departmental goals for purposes of determining whether a given employee will even receive compensation under the AIP. See, e.g., Staff Cross Ex. 2 at 2, 6, 9-10. As a result, an incremental EE employee is incented to achieve individual goals related to energy efficiency because the employee's receipt of compensation under the AIP ultimately depends on that individual's successful performance of these energy efficiency-related tasks. As ComEd witness Mr. Fruehe testified, EE employees' goals "are directly related to achieving ComEd's overall energy efficiency goals." ComEd Ex. 6.0 at 6. Moreover, employees are also evaluated based on their personal contribution to their team during the year. Staff Cross Ex. 2 at 6; see also id. at 2 ("The final amount of your award will be based on how well you, the group that shares your key performance indicators and the Company as a whole perform against goals set for the year."). ComEd noted that Staff witness Mr. Tolsdorf admitted on cross-examination that he did not consider any of this evidence. Tr. at 50-51; ComEd Reply Br. at 10.

ComEd further noted in its Reply Brief that Mr. Tolsdorf also ignored the tailoring of the AIP to the incremental EE employees that is accomplished in part through the IPM. Id.; Staff Cross Ex. 2 at 6. The IPM is based on an employee's "individual performance and personal contribution to [his or her] team during the year." Staff Cross Ex. 2 at 6. The AIP explains the effect of the IPM in detail. Id. Importantly, ComEd stated that an employee will not receive an award if his or her year-end performance rating is "does not meet expectations" or if the employee did "not successfully complete a performance improvement plan by year end." Staff Cross Ex. 2 at 6. Under the IPM, the incremental EE employees are evaluated based on their individual performance as an energy efficiency employee and their contribution to the Energy Efficiency department. Based on these specific energy efficiency-related criteria, the incremental EE employees may receive a portion of their total compensation through the AIP only if their performance rating qualifies for such compensation. Put another way, if the incremental EE employees do not achieve their EE-related goals, they will not be able to

participate in the AIP and will receive less than their total expected compensation. ComEd Reply Br. at 10-11.

ComEd noted that Staff considered none of this evidence. According to ComEd, on cross-examination Mr. Tolsdorf admitted that he had not considered the AIP’s individual goals or the effect of the IPM. Tr. at 50-51. As a result, ComEd argued that Staff cannot now be heard to argue that the AIP does not “relate” to energy efficiency while refusing to consider the very features of the AIP that ensure it relates directly and substantially to achievement of energy efficiency objectives. ComEd concluded that when this evidence is considered, the incremental EE employees are plainly incented under the terms and goals of the AIP to achieve energy efficiency goals, and therefore the incentive compensation these employees receive is indisputably “related” to energy efficiency. ComEd Reply Br. at 11.

In its Reply Brief, ComEd noted that the only portion of the AIP to which Staff paid any attention was the discussion of KPIs. Staff IB at 14-15. ComEd explained that in the 2009 and 2010 AIPs, the cost KPIs included Operating & Maintenance Expense and Capital Expenditures, and the operational KPIs included SAIFI, CAIDI, OSHA Recordable Rate, and the Customer Satisfaction Index. Staff Cross Ex. 1 at 3; Staff Cross Ex. 2 at 3-4. Beginning with the 2010 AIP, ComEd added an operational KPI called the Focused Initiatives & Environmental Index, which includes a measure of energy efficiency savings achieved through ComEd’s energy efficiency programs offered pursuant to Section 8-103 of the Act. Staff Cross Ex. 2 at 4, 8. ComEd stated that the incremental EE employees are vital and necessary to achieving energy savings under Section 8-103, and their performance is therefore directly tied to achievement of this new KPI. ComEd Ex. 6.0 at 5. According to ComEd, Staff witness Mr. Tolsdorf failed to address the addition of this KPI in his direct testimony, and only acknowledged it in his rebuttal testimony in response to ComEd witness Mr. Fruehe. Tr. at 48; ComEd Reply Br. at 12.

With respect to Staff’s claim that the addition of the Focused Initiatives & Environmental Index falls short of Staff’s “related to energy efficiency” standard, ComEd explained that even without this KPI, the AIP already incentes the incremental EE employees to achieve energy efficiency goals by linking a portion of their pay to such achievement. See discussion *supra*. Moreover, ComEd noted that Staff’s analysis of the KPIs is itself flawed. As ComEd witness Mr. Fruehe testified, “[t]he incremental [EE] employees are ComEd employees, and as such, participate in ComEd’s AIP, just as all other ComEd employees do. In his or her own way, each employee has a stake in how successful ComEd as a whole is in achieving its goals.” ComEd Ex. 4.0 at 6; see also ComEd Ex. 6.0 at 5 (testifying that the AIP ensures “that all ComEd employees together contribute to the success of the company as a whole”). ComEd explained that given that the AIP covers *thousands* of ComEd employees, the fact that the 17 incremental EE employees’ energy efficiency goals are directly incorporated into a KPI more than demonstrates that the AIP, in yet another way, relates to these employees. Staff Cross Ex. 2; Staff Cross Ex. 3; ComEd Cross Ex. 1. ComEd stated that Staff failed to consider any of these facts. ComEd Reply Br. at 12-13.

The Section entitled “Commission Analysis and Conclusion” beginning on page 24 should be modified as follows:

Staff proposes to disallow all of ComEd's incentive compensation expense that is related to the incremental employees hired by ComEd to implement its energy efficiency ("EE") portfolio and whose costs are recovered through Rider EDA. The Commission declines to adopt Staff's proposal.

As an initial matter, we agree with ComEd and Staff that the Commission has a "long standing policy of allowing Incentive Compensation costs when those costs benefit ratepayers..." ComEd IB at 10; Staff Ex. 3.0 at 4. (quoting *Commonwealth Edison Co.*, ICC Docket No. 10-0467, Final Order (May 24, 2011) at 65. As ComEd noted, the incentive compensation costs must not be tied to net income or earnings per share metrics that primarily benefit shareholders. See e.g., *Commonwealth Edison Co.*, ICC Docket No. 07-0566, Final Order (Sept. 10, 2008) at 61. Because of this well-established policy, the Commission does not agree with Staff's mischaracterization of incentive compensation costs as "extra" or bonus compensation. Rather, incentive compensation represents the portion of the employee's compensation that is at risk in a given year in the event performance goals are not achieved.

Under this customer benefits standard, we find that the incentive compensation costs related to the incremental energy efficiency employees provide clear and significant customer benefits. We agree with ComEd that these employees assist in delivering the benefits described in Section 8-103(a) of the Act, as well as the annual energy savings required under Section 8-103(b) of the Act. ComEd IB at 11. Indeed, the Commission recently concluded in its order in ICC Docket No. 10-0520 that ComEd exceeded the Plan Year 2 energy savings goal and was permitted to apply to a future Plan year or years approximately 40,000 MWhs of that additional energy savings. *Commonwealth Edison Co.*, ICC Docket No. 10-0520, Final Order (May 16, 2012) at 6. Notably, these significant savings were achieved at a cost \$16 million below budget. ComEd IB at 12; ComEd Ex. 2.0 at 2. Importantly, Staff did not (nor could it) dispute these very real benefits delivered by the incremental energy efficiency employees. ComEd IB at 12.

With respect to the Commission's directive in ICC Docket No. 10-0570 that ComEd show *in its next reconciliation filing* how its current incentive compensation relates to energy efficiency or how it has tailored its incentive compensation for EE employees, there can be no dispute that this directive applies to the next reconciliation to be filed as of the Commission's December 2010 order. That filing was made on August 31, 2011 in ICC Docket No. 11-0646, and is not at issue in this docket.

Although the Commission's directive in ICC Docket No. 10-0570 does not apply here, we agree with ComEd that the 2009 and 2010 AIP plans already both relate to EE and are tailored to EE employees. ComEd explained that inherent in the AIP is the requirement that employees are evaluated based on their achievement of specific, individual goals during the year that relate to their particular department within ComEd. ComEd IB at 14. Therefore, the AIP structure ensures that incentive compensation relates to energy efficiency and is tailored to EE employees. *Id.* ComEd witness Mr. Fruehe testified that EE employees' goals "are directly related to achieving ComEd's overall energy efficiency goals" (ComEd Ex. 6.0 at 6), and employees are also evaluated based on their personal contribution to their team during the year (ComEd IB at 15; Staff Cross Ex. 2 at 6; see also *id.* at 2). Thus, the amount of incentive compensation an incremental EE employee receives directly relates to energy efficiency and is tailored to the employee because such compensation depends on how well the employee

performed in achieving energy efficiency goals and contributing to the success of the Energy Efficiency Department during the year. ComEd IB at 15. We also find that incentive compensation is further tailored to the incremental energy efficiency employees through the application of the Individual Performance Multiplier.

Accordingly, the Commission declines to adopt Staff's recommendation to disallow the recovery of ComEd's Plan Year 2 incentive compensation costs recovered through Rider EDA.

~~This Commission has long required a showing of benefit to ratepayers due to AIP to recover incentive compensation cost. In this Docket, the Company had failed to show how the incentive cost it sought to recover relate to energy efficiency or how the AIP had been tailored for ComEd's EE employees.~~

~~Under ComEd's AIP plan as noted by Staff, the incentive compensation paid is barely related to ComEd's incremental EE employees' efforts. Under the Company's AIP plan the base amount of incentive compensation paid to employees subject to the AIP Plan is the result of goal weights and KPI Performance pay out percentages. Eighty five percent of the goal weights in the AIP Plan relate to ComEd's: (1) O&M expense, (2) capital expenditures, (3) SAIFI, (4) CAIDI, OSHA recordable rate, and (5) and customer satisfaction. None of those goal weights relate to energy efficiency let alone energy efficiency activities and programs approved in ComEd's plan. The other fifteen percent is related to Focused Initiatives and Environmental Index.~~

~~The record shows that for 2009 none of the Focused Initiatives and Environmental Index related to energy efficiency. For 2010 only 2 of the 13 Focused Initiatives and Environmental Index related to energy efficiency. Further, the record demonstrates that for the 2010 AIP Plan, the impact of energy efficiency performance on incentive compensation is at most 2% of the total incentive compensation paid. (*Id.*, p. 58; Staff Cross Ex. 2, p. 10) Stated another way, ninety eight percent of incentive compensation paid to incremental energy efficiency employees has nothing to do with energy efficiency. (*Id.*)~~

~~As a result, the efforts of the incremental EE employees have very little to do with the incentive compensation which the Company seeks to recover from ratepayers through Rider EDA. This is further buttressed by the testimony of Company witness Fruehe who admitted on cross examination that EE employees do not do Underground Cable Program work, Substation Transformer Maintenance Work and Vegetation Management for Distribution and Transmission work, which compose some of the other eleven Focused Initiatives and Environmental Index upon which incentive compensation is based. (Tr., May 10, 2012, pp. 17-18) Because AIP is not tailored to energy efficiency and demand response measures approved in ComEd's Energy Efficiency Plan that are ultimately implemented by ComEd for which ComEd seeks cost recovery through Rider EDA, ComEd is unable to meet the customer benefit standard set forth in past Commission orders.~~

~~This docket is the first time the issue of AIP cost recovery has been brought to the Commission's attention by Staff in a ComEd Rider EDA reconciliation proceeding. Therefore, the argument that AIP incentive compensation costs may have been previously recovered from ratepayers through ComEd's Rider EDA is not a valid reason for the recovery of the AIP costs in~~

~~this reconciliation proceeding. The allowance of these costs through Rider EDA would be contrary to several prior Commission orders regarding ComEd rates with respect to incentive compensation cost recovery in general. Similarly, the argument that the Commission directive in Docket 10-0570 that ComEd show in its next reconciliation how its incentive compensation relates to energy efficiency exempts ComEd from that requirement in this Docket is misplaced.~~

~~The Commission therefore adopts Staff's recommendation to disallow the recovery of ComEd's Plan Year 2 incentive compensation costs recovered through Rider EDA. The Commission adopts the reconciliation contained in Staff's Appendix A which is attached hereto as an appendix to this Order.~~

The fourth and fifth "Findings and Ordering Paragraphs in page 25 should be modified as follows:

- (4) for the period June 1, 2009 through May 31, 2010, ComEd prudently incurred Rider EDA program expenditures of ~~\$63,543,468~~63,280,545;
- (5) for the period June 1, 2009 through May 31, 2010, ComEd recovered \$70,546,051 from ratepayers in accordance with the terms of Rider EDA, resulting in an over-recovered amount, or ARF, of ~~\$10,905,600~~11,168,523 after taking into account the cumulative over-recovery from the prior reconciliation periods, as reflected in Appendix A attached hereto; and

Alternative 2: Disallows Incentive Compensation Costs Actually Charged Through Rider EDA

The second full paragraph on page 16 should be modified as follows:

Staff witness Mr. Tolsdorf recommended that the Commission deny ComEd's incentive compensation expense that is related to the incremental employees hired by ComEd to implement its energy efficiency portfolio and whose costs were recovered through Rider EDA. Specifically, Mr. Tolsdorf requested that the Commission disallow \$262,929. As an initial matter, ComEd noted that the amount of Staff's disallowance is incorrect and unsupported in the record. The uncontested evidence demonstrates that only approximately \$96,000 of incentive compensation expense was charge through Rider EDA during Plan Year 2. ComEd IB at 1, fn. 1; Staff Cross Ex. 3; ComEd Cross Ex. 1.

The following paragraph should be inserted after the first full paragraph beginning on page 17:

ComEd further submitted that it is a well-established principle of Illinois law, that where an opinion clearly states that its effect shall be prospective (i.e., "in ComEd's next reconciliation filing") it will not apply retroactively. *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 86 (1997). Also, according to ComEd, this is consistent with the equally well-established rule prohibiting retroactive ratemaking. *Citizens Utils. Co. v. Ill. Commerce Comm'n*, 124 Ill. 2d

195, 207 (1988) (“The rule prohibiting retroactive ratemaking is consistent with the prospective nature of legislative activity, such as that performed by the Commission in setting rates.”). Furthermore, ComEd explained that because the ICC is a creature of the legislature and derives its authority therefrom, the presumption against retroactive application of a statute is also instructive here. *Barrett v. Guaranty Bank & Trust Co.*, 123 Ill. App. 2d 326, 332 (1st Dist. 1970).

In its Reply Brief, ComEd further explained that the incentive compensation costs are clearly recoverable under the terms of Rider EDA. As ComEd explained in its Initial Brief, the costs recoverable through Rider EDA include *all incremental costs* incurred by ComEd in association with energy efficiency and demand response measures. ComEd IB at 5; ComEd Ex. 2.0 at 19. Rider EDA defines “Energy Efficiency and Demand Response Measures” (“Measures”) as “activities and programs that are developed, implemented, or administered by or for the Company, or the Department of Commerce and Economic Opportunity (DCEO), that are related to energy efficiency and demand response plans approved by the ICC.” Rider EDA, ILL. C. C. No. 10, 1st Revised Sheet No. 245. The rider then defines “Incremental Costs” as follows:

Incremental Costs mean costs incurred after August 28, 2007 by the Company or recovered on behalf of DCEO in association with the Measures and include, but are not limited to (a) fees, charges, billings, or assessments related to the Measures; (b) costs or expenses associated with equipment, devices, or services that are purchased, provided, installed, operated, maintained, or monitored for the Measures; (c) the revenue requirement equivalent of the return of and on a capital investment associated with a Measure, based on the most recent rate of return approved by the ICC; and (d) all legal and consultative costs associated with the Measures.

Incremental Costs also include incremental expenses for wages, salaries, and benefits of Company employees, including direct and indirect incremental costs associated with such Company employees, who are hired for positions that are specifically related to the Measures and that were created after August 28, 2007. Incremental Costs may not include any expenses for wages, salaries, and benefits of Company employees in positions that are related to the Measures, employed either before or after August 28, 2007, that are otherwise recovered under other effective tariffs.

Id., 1st Revised Sheet No. 246 (emphasis added). ComEd explained that when the requirements of Section 8-103 of the Act took effect, ComEd had to hire additional (“incremental”) employees to implement the extensive new energy efficiency measures and programs designed to achieve the energy savings goals. Accordingly, Rider EDA permits the recovery of the expenses for wages, salaries, and benefits of these incremental ComEd employees, including direct and indirect incremental costs associated with these employees, just as it permits the recovery of other incremental costs associated with the measures. The only “related to” standard here is that the positions must be “specifically related to the Measures.” *Id.*; ComEd Reply Br. at 8.

ComEd stated that under this “related to” standard, the incentive compensation costs associated with the incremental EE employees are clearly recoverable. Indeed, Staff does not question that the incremental EE employees and the positions they fill are specifically related to the Measures. Specifically, Staff does not contest the hiring of these incremental EE employees, that these employees are employees of ComEd, or that they implement energy efficiency measures and programs within ComEd’s Energy Efficiency department. Tr. at 39-40. ComEd noted that Rider EDA broadly permits recovery of expenses for “wages, salaries, and benefits,” “including direct and indirect incremental costs.” Rider EDA, ILL. C. C. No. 10, 1st Revised Sheet No. 246. Consistent with the terms of Rider EDA, the incentive compensation costs associated with the incremental EE employees during Plan Year 2 are appropriately recoverable through the rider. ComEd Reply Br. at 9.

The last full paragraph on page 20 should be modified as follows:

Finally, ComEd also stated that beginning with the 2010 AIP, ComEd added a Key Performance Indicator (“KPI”) called the Focused Initiatives & Environmental Index, which includes a measure of energy efficiency savings programs offered pursuant to Section 8-103 of the Act. ComEd IB at 16; Staff Cross Ex. 2 at 4, 8. According to ComEd, the incremental EE employees are vital and necessary to achieving energy savings under Section 8-103, and their performance is directly tied to achievement of the KPI described above. ComEd IB at 16; ComEd Ex. 6.0 at 5. ComEd observed that Mr. Tolsdorf failed to address the addition of this KPI in his direct testimony, and only acknowledged it in his rebuttal testimony in response to ComEd witness Mr. Fruehe. ComEd IB at 16; Tr. at 48. ~~ComEd concluded that Staff’s recommendation should therefore be rejected by the Commission.~~

The following paragraphs should be inserted after the last full paragraph on page 20:

Responding to Staff’s Initial Brief, ComEd noted in its Reply Brief that Staff’s position appears to be that the customer benefits were realized wholly independently of, and bear no relation to, the AIP and the specific individual performance goals set for the incremental EE employees under the AIP. ComEd stated that in Staff’s fictional Plan Year 2, the incremental EE employees just happened to far exceed the energy savings goals at a savings of \$16 million. Or, put another way, these employees were not at all incented by their individual performance goals under the AIP even though achievement of these goals determines whether they will receive the pay-at-risk portion of their compensation under the AIP. According to ComEd, Staff’s view does not reflect the facts or reality, ignores the key features of the AIP, and should be rejected. ComEd Reply Br. at 9.

ComEd explained that substantial portions of the AIP are devoted to explaining how each individual employee’s performance is measured against individual and departmental goals for purposes of determining whether a given employee will even receive compensation under the AIP. See, e.g., Staff Cross Ex. 2 at 2, 6, 9-10. As a result, an incremental EE employee is incented to achieve individual goals related to energy efficiency because the employee’s receipt of compensation under the AIP ultimately depends on that individual’s successful performance of these energy efficiency-related tasks. As ComEd witness Mr. Fruehe testified, EE employees’ goals “are directly related to achieving ComEd’s overall energy efficiency goals.” ComEd Ex.

6.0 at 6. Moreover, employees are also evaluated based on their personal contribution to their team during the year. Staff Cross Ex. 2 at 6; see also id. at 2 (“The final amount of your award will be based on how well you, the group that shares your key performance indicators and the Company as a whole perform against goals set for the year.”). ComEd noted that Staff witness Mr. Tolsdorf admitted on cross-examination that he did not consider any of this evidence. Tr. at 50-51. ComEd Reply Br. at 10.

ComEd further noted in its Reply Brief that Mr. Tolsdorf also ignored the tailoring of the AIP to the incremental EE employees that is accomplished in part through the IPM. Id.; Staff Cross Ex. 2 at 6. The IPM is based on an employee’s “individual performance and personal contribution to [his or her] team during the year.” Staff Cross Ex. 2 at 6. The AIP explains the effect of the IPM in detail. Id. Importantly, ComEd stated that an employee will not receive an award if his or her year-end performance rating is “does not meet expectations” or if the employee did “not successfully complete a performance improvement plan by year end.” Staff Cross Ex. 2 at 6. Under the IPM, the incremental EE employees are evaluated based on their individual performance as an energy efficiency employee and their contribution to the Energy Efficiency department. Based on these specific energy efficiency-related criteria, the incremental EE employees may receive a portion of their total compensation through the AIP only if their performance rating qualifies for such compensation. Put another way, if the incremental EE employees do not achieve their EE-related goals, they will not be able to participate in the AIP and will receive less than their total expected compensation. ComEd Reply Br. at 10-11.

ComEd noted that Staff considered none of this evidence. According to ComEd, on cross-examination Mr. Tolsdorf admitted that he had not considered the AIP’s individual goals or the effect of the IPM. Tr. at 50-51. As a result, ComEd argued that Staff cannot now be heard to argue that the AIP does not “relate” to energy efficiency while refusing to consider the very features of the AIP that ensure it relates directly and substantially to achievement of energy efficiency objectives. ComEd concluded that when this evidence is considered, the incremental EE employees are plainly incented under the terms and goals of the AIP to achieve energy efficiency goals, and therefore the incentive compensation these employees receive is indisputably “related” to energy efficiency. ComEd Reply Br. at 11.

In its Reply Brief, ComEd noted that the only portion of the AIP to which Staff paid any attention was the discussion of KPIs. Staff IB at 14-15. ComEd explained that in the 2009 and 2010 AIPs, the cost KPIs included Operating & Maintenance Expense and Capital Expenditures, and the operational KPIs included SAIFI, CAIDI, OSHA Recordable Rate, and the Customer Satisfaction Index. Staff Cross Ex. 1 at 3; Staff Cross Ex. 2 at 3-4. Beginning with the 2010 AIP, ComEd added an operational KPI called the Focused Initiatives & Environmental Index, which includes a measure of energy efficiency savings achieved through ComEd’s energy efficiency programs offered pursuant to Section 8-103 of the Act. Staff Cross Ex. 2 at 4, 8. ComEd stated that the incremental EE employees are vital and necessary to achieving energy savings under Section 8-103, and their performance is therefore directly tied to achievement of this new KPI. ComEd Ex. 6.0 at 5. According to ComEd, Staff witness Mr. Tolsdorf failed to address the addition of this KPI in his direct testimony, and only acknowledged it in his rebuttal testimony in response to ComEd witness Mr. Fruehe. Tr. at 48; ComEd Reply Br. at 12.

With respect to Staff’s claim that the addition of the Focused Initiatives & Environmental Index falls short of Staff’s “related to energy efficiency” standard, ComEd explained that even without this KPI, the AIP already incents the incremental EE employees to achieve energy efficiency goals by linking a portion of their pay to such achievement. See discussion *supra*. Moreover, ComEd noted that Staff’s analysis of the KPIs is itself flawed. As ComEd witness Mr. Fruehe testified, “[t]he incremental [EE] employees are ComEd employees, and as such, participate in ComEd’s AIP, just as all other ComEd employees do. In his or her own way, each employee has a stake in how successful ComEd as a whole is in achieving its goals.” ComEd Ex. 4.0 at 6; see also ComEd Ex. 6.0 at 5 (testifying that the AIP ensures “that all ComEd employees together contribute to the success of the company as a whole”). ComEd explained that given that the AIP covers *thousands* of ComEd employees, the fact that the 17 incremental EE employees’ energy efficiency goals are directly incorporated into a KPI more than demonstrates that the AIP, in yet another way, relates to these employees. Staff Cross Ex. 2; Staff Cross Ex. 3; ComEd Cross Ex. 1. ComEd stated that Staff failed to consider any of these facts. ComEd Reply Br. at 12-13.

The Section entitled “Commission Analysis and Conclusion” beginning on page 24 should be modified as follows:

Staff proposes to disallow all of ComEd’s incentive compensation expense that is related to the incremental employees hired by ComEd to implement its energy efficiency (“EE”) portfolio and whose costs are recovered through Rider EDA. The Commission adopts Staff’s proposal in part.

This Commission has long required a showing of benefit to ratepayers due to AIP to recover incentive compensation cost. In this Docket, the Company had failed to show how the incentive cost it sought to recover relate to energy efficiency or how the AIP had been tailored for ComEd’s EE employees.

Under ComEd’s AIP plan as noted by Staff, the incentive compensation paid is barely related to ComEd’s incremental EE employees’ efforts. Under the Company’s AIP plan the base amount of incentive compensation paid to employees subject to the AIP Plan is the result of goal weights and KPI Performance pay out percentages. Eighty-five percent of the goal weights in the AIP Plan relate to ComEd’s: (1) O&M expense, (2) capital expenditures, (3) SAIFI, (4) CAIDI, OSHA recordable rate, and (5) and customer satisfaction. None of those goal weights relate to energy efficiency let alone energy efficiency activities and programs approved in ComEd’s plan. The other fifteen percent is related to Focused Initiatives and Environmental Index.

The record shows that for 2009 none of the Focused Initiatives and Environmental Index related to energy efficiency. For 2010 only 2 of the 13 Focused Initiatives and Environmental Index related to energy efficiency. Further, the record demonstrates that for the 2010 AIP Plan, the impact of energy efficiency performance on incentive compensation is at most 2% of the total incentive compensation ~~paid~~. (*Id.*, p. 58; Staff Cross Ex. 2, p. 10) Stated another way, ninety-eight percent of incentive

compensation paid to incremental energy efficiency employees has nothing to do with energy efficiency. (*Id.*)

As a result, the efforts of the incremental EE employees have very little to do with the incentive compensation which the Company seeks to recover from ratepayers through Rider EDA. This is further buttressed by the testimony of Company witness Fruehe who admitted on cross examination that EE employees do not do Underground Cable Program work, Substation Transformer Maintenance Work and Vegetation Management for Distribution and Transmission work, which compose some of the other eleven Focused Initiatives and Environmental Index upon which incentive compensation is based. (Tr., May 10, 2012, pp. 17-18) Because AIP is not tailored to energy efficiency and demand response measures approved in ComEd's Energy Efficiency Plan that are ultimately implemented by ComEd for which ComEd seeks cost recovery through Rider EDA, ComEd is unable to meet the customer benefit standard set forth in past Commission orders.

This docket is the first time the issue of AIP cost recovery has been brought to the Commission's attention by Staff in a ComEd Rider EDA reconciliation proceeding. Therefore, the argument that AIP incentive compensation costs may have been previously recovered from ratepayers through ComEd's Rider EDA is not a valid reason for the recovery of the AIP costs in this reconciliation proceeding. The allowance of these costs through Rider EDA would be contrary to several prior Commission orders regarding ComEd rates with respect to incentive compensation cost recovery in general. Similarly, the argument that the Commission directive in Docket 10-0570 that ComEd show in its next reconciliation how its incentive compensation relates to energy efficiency exempts ComEd from that requirement in this Docket is misplaced.

The Commission therefore adopts Staff's recommendation to disallow the recovery of ComEd's Plan Year 2 incentive compensation costs recovered through Rider EDA. ~~The Commission adopts the reconciliation contained in Staff's Appendix A which is attached hereto as an appendix to this Order.~~ However, while Staff contends that \$262,923 of incentive compensation should be disallowed, the record evidence conclusively establishes that ComEd only charged \$96,148 to Rider EDA. See Staff Cross Ex. 3 (\$96,148.06 was charged to Rider EDA for AIP.); ComEd Cross Ex. 1 ("total incentive compensation charged to Rider EDA during PY2 was \$96,148.06.") Mr. Tolsdorf took no issue with this amount in either his direct or rebuttal testimony. Tr. at 89. Because only \$96,148 is at issue in this docket, the Commission adopts Staff's disallowance, but only to the limited extent of \$96,148. To disallow any more than that amount would require the Commission to improperly consider costs outside of this proceeding or to disallow costs that already have been reviewed and determined to be prudently incurred and reasonable in amount in this docket.

The fourth and fifth "Findings and Ordering Paragraphs in page 25 should be modified as follows:

- (4) for the period June 1, 2009 through May 31, 2010, ComEd prudently incurred Rider EDA program expenditures of \$63,447,320~~63,280,545~~;

- (5) for the period June 1, 2009 through May 31, 2010, ComEd recovered \$70,546,051 from ratepayers in accordance with the terms of Rider EDA, resulting in an over-recovered amount, or ARF, of ~~\$11,072,375~~~~41,168,523~~ after taking into account the cumulative over-recovery from the prior reconciliation periods, as reflected in Appendix A attached hereto; and

II. Exception 2: The Proposed Order Should Clarify the Scope of Staff's and ComEd's Agreement Regarding Provision of Budget to Actual Comparisons.

The following paragraphs should be inserted immediately after the first full paragraph on page 11.

In its Reply Brief, ComEd noted that Staff substantially departed from its agreement with ComEd. ComEd explained that a brief summary of Staff's and ComEd's positions would bring much needed clarity. In rebuttal testimony, Staff witness Ms. Hinman proposed the following:

I recommend that the Commission include language in its final order in this proceeding directing the Company to include in its Rider EDA Annual Report filed by August 31st of each year, a comparison of its EE Plan Year budgets versus actual EE expenditures by program-level and portfolio-level cost categories consistent with that presented in its EE Plan approved by the Commission.

Staff Ex. 4.0 at 4. In response, ComEd witness Mr. Brandt agreed to provide the comparison "in a form that is substantially similar to the one [Staff] requests" while explaining that ComEd does not manage the individual cost categories for each program, but rather affords the program manager flexibility to manage the total budget. ComEd Ex. 3.0 at 2. For this reason, ComEd must retain the flexibility to identify the most appropriate individual cost category or categories for the various expenses, especially in cases where an expense cannot be clearly defined by one cost category, but rather goes across two or more categories. Id.. In its Initial Brief, ComEd noted that Staff had not taken issue with this clarification, and requested that the Commission adopt Staff's recommendation as modified by ComEd's clarification to accommodate the flexibility ComEd needs to manage the budget. ComEd IB at 6-7; ComEd Reply Br. at 3.

According to ComEd, Staff's Initial Brief expands Ms. Hinman's single recommendation into four recommendations, only the first of which was agreed to by ComEd as described above. Specifically, Staff's Initial Brief states:

...Staff recommends that the Commission order the Company to: (1) provide in its Annual Rider EDA Report a comparison of its energy efficiency Plan Year budgets versus actual energy efficiency expenditures by program-level and portfolio-level cost categories consistent with that presented in its energy efficiency Plan approved by the Commission; (2) consistently and accurately classify, track, and report energy efficiency expenditures in its Rider EDA Annual Report by cost categories consistent with those proposed in the Company's energy efficiency Plan; (3) provide invoices and supporting documentation for

any requested cost category by energy efficiency program and it should substantiate that these expenses were reasonably and prudently incurred in future Rider EDA reconciliation proceedings; and (4) include in its direct testimony in Rider EDA reconciliation proceedings justification for significant shifts in expenditures in comparison to those forecasted in its approved energy efficiency Plan.

Staff IB at 7-8 (footnotes omitted). ComEd noted that no agreement or record evidence supports the addition of recommendations (2) through (4), and therefore requested that the Commission reject this misrepresentation of Staff's and ComEd's agreement and honor the original agreement as summarized above and in ComEd's Initial Brief. ComEd Reply Br. at 4.

The third full paragraph on page 13 should be modified as follows:

The Commission finds Staff's initial proposal, as modified by ComEd's clarification, reasonable. It is therefore approved, as modified, and ComEd shall provide in its Annual Rider EDA Report a comparison of its energy efficiency Plan Year budgets versus its actual energy efficiency expenditures consistent with that presented in its energy efficiency Plan approved by the Commission. The Commission accepts ComEd's proposal to provide such a comparison in a form that is substantially similar to the form requested by Staff while retaining the flexibility to identify the most appropriate individual cost category or cost categories for the various expenses.

III. Exception 3: Technical and Typographical Errors Should be Corrected.

The first full paragraph on page 2 should be modified as follows:

ComEd's motion was granted in part and denied in part. Generally as a result of the ALJ's ruling subject to the specifics set forth in the ALJ's ruling, three of Staff witness Hinman's four recommendations and supporting testimony were stricken. (ALJ Ruling, December 7, 2011) Another status hearing was held on December 6, 2011 at which time the parties agreed to further scheduling in this matter and the matter was continued to January 12, 2012. (Tr., December, 6, 2011, p. 21) A status hearing was held on January 12, 2012, and the matter was subsequently continued by the ALJ to February 22, 2012. (Notice of Continuance, January 12, 2012; Tr., January 12, 2012) At the status hearing on February 22, 2012, the ALJ with agreement of the parties set a schedule for the filing of Staff and Intervenor rebuttal testimony and Company surrebuttal testimony. (Tr., February 22, 2012, p. 33) On February 9, 2012, the Company filed its rebuttal testimony (Rebuttal Testimony of Michael S. Brandt, ComEd Ex. 3.0 and Rebuttal Testimony of Martin G. Fruehe, ComEd Ex. 4.0). On March 22, 2012 Staff filed its rebuttal testimony (Rebuttal Testimony of Scott Tolsdorf, Staff Ex. 3.0 and Rebuttal Testimony of Jennifer L. Hinman, Staff Ex. 4.0), and the Company filed surrebuttal testimony (Surrebuttal Testimony of Michael S. Brandt, ComEd Ex. 5.0 and Surrebuttal Testimony of Martin G. Fruehe, ComEd Ex. 6.0) on April 19, 2012.

The third full paragraph on page 2 should be modified as follows:

At the evidentiary hearing on May 10, 2012, at the request of Staff, the ALJ took administrative notice (in error) of the current version of ComEd's Rider EDA. On June 26, 2012 pursuant to Staff's unopposed Motion to correct its mistake, administrative notice was taken of the relevant Rider EDA tariff sheets in effect from June 2009 through May 2010. Staff Cross Exhibits 1 and 2 (the Company's 2009 and 2010 Annual Incentive Plan), ~~and~~ Staff Cross Exhibit 3 (Company's supplemental response to Staff Data Request ST 2.04 and Attachment) and ComEd Cross Exhibit 1 (Company's response to Staff Data Request ST 1.06) were also admitted into evidence by the ALJ. (Tr., May 10, 2012, at 26-27). The ALJ marked the record heard and taken and a briefing schedule was set.

The third sentence of the fourth full paragraph on page 4 should be modified as follows:

Mr. Brandt further testified that the "Smart Ideas for Your Business" program elements offered a ~~complimentary~~ complementary set of energy efficiency options to C&I customers during Plan Year 2. *Id.* at 11.

The first sentence of the third full paragraph on page 5 should be modified as follows:

Mr. Brandt also explained that because ComEd collects 100% of the revenue, it must reimburse DCEO for its incremental costs relating to the energy efficiency ~~efficient~~ measures DCEO implemented.

The fifth sentence of the second full paragraph on page 6 should be modified as follows:

A list of qualified vendors was created for the programs and projects based on numerous sources and then the RFPs were sent to the vendors for bid~~td~~.

The second full sentence of the third full paragraph on page 7 should be modified as follows:

He stated that Rider EDA defines "Energy Efficiency and Demand Response Measures" ("Measures") as "activities and programs that are developed, implemented, or administered by or for the Company, or the Department of Commerce and ~~Electric~~ Economic Opportunity (DCEO), that are related to energy efficiency and demand response plans approved by the ICC."

The eleventh sentence of the last paragraph beginning on page 22 and continuing on page 23 should be modified as follows:

The significance of which was addressed by Mr. Tolsdorf when he testified on redirect, that for the 2010 AIP Plan the impact of energy efficiency performance on incentive compensation is at most 2% of the total incentive compensation paid~~td~~. (*Id.*, p. 58; Staff Cross Ex. 2, p. 10)

The last sentence of the first full paragraph on page 25 should be modified as follows:

Similarly, the argument that the Commission directive in Docket 10-0570 that ComEd show in its next reconciliation how its incentive compensation relates to energy efficiency exempts ComEed from that requirement in this Docket is misplaced.