

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Annual formula rate update and revenue	:	No. 12-0321
requirement reconciliation authorized by Section	:	
16-108.5 of the Public Utilities Act.	:	

REPLY BRIEF OF COMMONWEALTH EDISON COMPANY

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REPLY BRIEF OF COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company (“ComEd”), by its counsel, in accordance with the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”) and the scheduling order of the Administrative Law Judges, submits this Reply Brief.

I. INTRODUCTION / STATEMENT OF THE CASE

This case is the first annual update and the first reconciliation under the formula rate structure established by the Energy Infrastructure Modernization Act (the “EIMA”)¹. The number of contested issues in the instant Docket is relatively few, given the May 29, 2012, final Order (“*May 11-0721 Order*”) and the October 3, 2012, Order on Rehearing (“*Order on Rehearing*”), in ComEd’s initial formula rate case, ICC Docket No. 11-0721, which, in combination, have reduced ComEd’s direct case revenue requirement in the instant Docket by a net amount of over \$100 million. Nonetheless, in this Docket, as in all cases, the issues must be decided by the Commission in accordance with the law, in particular with EIMA where it contains a provision regarding the subject, and based on the evidence in the record. 220 ILCS 5/10-03, 10-201(e)(iv)(A), 16-108.5. The revenue requirement presented by ComEd is consistent with the law and supported by the evidence. It is also not far from the revenue requirement supported by Staff.

¹ Illinois Public Act (“PA”) 097-0616, as amended and supplemented by PA 097-0646.

In contrast, the AG/AARP and CUB revenue requirement, billing determinants, and interest rate proposals are nothing more than artificial attempts to improperly reduce ComEd's revenue requirement and then to interfere with the collection of that revenue requirement.

Accumulated Deferred Income Taxes (“ADIT”): Staff and ComEd agree that the Commission should not adopt the AG/AARP and CUB proposal to reduce rate base by \$8,540,000 for ADIT that those intervenors claim to be associated with the rate base reduction for the operating reserve for accrued vacation pay liability. Initial Brief of [Staff] (“Staff Init. Br.”) at 9-11; ComEd Init. Br. at 18-22. The ADIT proposal imputes a deferred tax liability where none exists, and it is inconsistent with the calculations of Staff in ICC Docket No. 11-0721 and with the *May 11-0721 Order*. ComEd Init. Br. at 19-22.

Costs Incurred to Achieve Savings: Staff and ComEd further agree that the Commission should not adopt the AG/AARP and CUB proposals to reduce operating expenses by disallowing \$6.8 million (AG/AARP), or \$7.2 million (CUB), of costs incurred in order to achieve savings passed on to customers in 2012 and for the indefinite future. Staff Init. Br. at 28; ComEd Init. Br. at 42-51. The attempt to deny recovery of costs incurred to achieve savings for customers is based on misleading attempts to paint these costs as simply “merger costs” and on other non-fact based rhetoric. ComEd Init. Br. at 18-22, 42-51.

Historical Weather-Normalized Billing Determinants: AG/AARP and CUB continue to argue for deviating from use of the *2011 historical weather normalized* billing determinants required to be used here by Section 16-108.5(c)(4)(H) of the Public Utilities Act (the “Act”), 220 ILCS 5/16-108.5(c)(4)(H). They would adjust the 2011 data, based on incomplete *2012 data on customer growth*, but still use 2011 data for customer usage, *not recognizing the 2012 data*

showing declining usage. Staff argues for the AG/AARP proposal, primarily on the theory that it is consistent with the *May 11-0721 Order*.

- Staff's Initial Brief, however, says not one word about: (1) the fact that the AG/AARP and CUB proposal transparently is one-sided by adjusting the customer count data but not adjusting the customer usage data and (2) the fact that the *May 11-0721 Order* on this subject proceeded from the mistaken premise that the adjustment there was based on 2010 data rather than on adjusting 2010 weather normalized customer count data using 2011 data. *See* Staff Init. Br. at 12-14.
- Indeed, Staff's Initial Brief (like its testimony) is silent on that second point even though Staff's Initial Brief (at 12-13) confirms, as has every piece of testimony and every brief in that Docket and the instant Docket, that the customer count adjustment approved in the *May 11-0721 Order* was based mistakenly on adjusting 2010 weather normalized customer count data using *2011 data*. There is no room left for any misunderstanding on this subject. AG/AARP's and CUB's proposed adjustment is flatly contrary to Section 16-108.5(c)(4)(H) and it is improperly one-sided. ComEd Init. Br. at 23-28.

Reconciliation Balance Interest Rate: Finally, CUB (Initial Brief at 4-5) erroneously complains about ComEd preserving issues for appeal, while CUB later (*id.* at 19-20) hypocritically urges the Commission to impose an asymmetrical interest rate on reconciliation adjustments, depending on whether the adjustments are credits or charges. CUB does so even though the Commission rejected this CUB proposal in the *May 11-0721 Order* (at 161-166) and again in the *Order on Rehearing* (at 36). CUB's unjustifiable – and literally results-driven -- proposal is improper here and, moreover, it is contrary to the interest provision of EIMA, which does not provide for different interest rates depending on the direction of reconciliation adjustments. 220 ILCS 5-16-108.5(d)(1).

As for the few remaining differences between Staff and ComEd, the Commission should adopt ComEd's proposals because they are both faithful to law and supported by the record.

- **Charitable Contributions:** Staff argument to disallow \$620,000 of charitable contributions is lengthy (Staff Init. Br. at 16-25), but cannot change the facts that: (1) the contributions are charitable and of a kind that the Commission has approved in innumerable rate cases and (2) Staff's argument is not founded in

past Orders, is contrary to the Commission's recent Order in *Ameren Illinois Co.*, ICC Docket No. 12-0001 (Order Sept. 19, 2012) at 78-79, and, most importantly, cannot be reconciled with Section 9-227 of the Act, 220 ILCS 5/9-227.

- ***EIMA Reporting Requirements:*** Staff continues to advocate that the Commission require ComEd to try to identify individual investments and low-income and customer assistance program contributions that would not have been made in the absence of EIMA. Staff Init. Br. at 44-45. This requirement is foreign to the law, which does not measure EIMA investment on an individual project basis. The law instead establishes detailed reporting requirements consistent with its investment requirements, so that the Commission will have relevant investment information well before the annual filings. There is no need, or basis, to establish new and contradictory reporting requirements. Indeed, it is not possible to meet the Staff's proposal requirements using the information that currently exists. ComEd Init. Br. at 61-65. The prescriptions of EIMA, including the balances and lines it draws, matter and they should not be disregarded²

II. OVERALL REVENUE REQUIREMENT

ComEd's final Illinois jurisdictional revenue requirement (reflecting the *Order on Rehearing*) is \$2,024,953,000.³ ComEd Init. Br. at 5. This figure is reflected in ComEd's October 11, 2012, compliance filing. *See* pending ComEd Ex. 23.0, Sch FR A-1, line 36. The Initial Briefs of Staff and intervenors do not take into account the *Order on Rehearing* or consider ComEd's compliance filing.

A. 2013 Inception Revenue Requirement (Based on 2011 Costs and 2012 Projected Plant)

Given the *Order on Rehearing*, ComEd's final revenue requirement, before the reconciliation and ROE Collar adjustments, is \$2,030,958,000, which is reflected in ComEd's

² The Commission's jurisdiction is carefully circumscribed. "The Commission only has those powers given it by the legislature through the Act." *Bus. and Prof'l People for the Pub. Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 201, 555 N.E.2d 693, 697 (1989). In addition, because the Act is in derogation of common law, no requirement to be imposed on public utilities can be read into the Act by intentment or implication. *E.g., Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 251, 630 N.E.2d 1318, 1330 (2d Dist.), *appeal denied*, 157 Ill. 2d 524, 642 N.E.2d 1305 (1994).

³ In setting forth its calculations and proposals in this Reply Brief, and in identifying which issues are contested, ComEd has reflected the Commission's *May 11-0721 Order* and the *Order on Rehearing* in ICC Docket No. 11-0721. In doing so, ComEd does not waive any rights it has in its appeal from ICC Docket No. 11-0721 or otherwise.

October 11, 2012, compliance filing. ComEd Init. Br. at 7; pending ComEd Ex. 23.0, Sch FR A-1, line 23. Staff's rebuttal position, which does not take into account the *Order on Rehearing* or ComEd's compliance filing, reflects a revenue requirement of \$1,958,521,000. Staff. Init. Br. at 4 and Appendix A, p.1. AG/AARP does not propose a revenue requirement in their Initial Brief, only that certain adjustments be added to ComEd's compliance filing. AG/AARP Init. Br. at 4-5. The same is true of CUB. These adjustments are addressed elsewhere as applicable in ComEd's Initial and Reply Briefs.

B. 2011 Reconciliation and ROE Collar Adjustments

ComEd's reconciliation adjustment with interest is a reduction of \$24,035,000 to the revenue requirement discussed in Section II.A, *supra*. ComEd Init. Br. at 5. Staff's reconciliation adjustment as reflected in its Initial Brief was not updated to reflect the *Order on Rehearing* or ComEd's October 11, 2012, compliance filing. Staff Init. Br. at 5.

The ROE Collar adjustment reflects the differences in revenue levels between those that resulted from application of historical weather-normalized billing determinants used to determine rates in effect during 2011 and the actual revenues for 2011. ComEd Init. Br. at 57; Staff Init. Br. at 5. Staff and ComEd agree that the ROE collar adjustment is an increase of \$18,030,000. ComEd Ex. 19.1, Sch FR A-1, line 35; Staff Init. Br., Appendix A, p.1. No other party took a position in testimony or the Initial Briefs as to the ROE Collar adjustment.

C. Total Revenue Requirement

Considering the final 2012 revenue requirement, the 2011 reconciliation adjustment, and the ROE collar calculation, ComEd's October 11, 2012, compliance filing (pending ComEd Ex. 23.0, Sch FR A-1, line 36) reflects the final revenue requirement for rates to become effective January 1, 2013 of \$2,024,953,000. Staff and intervenors did not comment in their

Initial Briefs as to the figures reflected in that compliance filing. Staff Init. Br. at 4-5; AG/AARP Init. Br. at 4-6.

III. RATE BASE

A. Overview

The only contested rate base issue is the AG/AARP and CUB proposal to reduce ComEd's rate base by inflating the ADIT subtraction. That proposal, which Staff and ComEd oppose, is wrong, as discussed in Section III.C.2, *infra*. See also ComEd Init. Br. at 18-22.

B. Potentially Uncontested Issues

1. Plant in Service

a. Distribution Plant

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b. General and Intangible Plant

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c. Plant Additions

Staff agrees with ComEd's rebuttal testimony figures for plant additions and the related adjustments to accumulated depreciation, accumulated deferred income taxes, and depreciation expense. Staff Init. Br. at 6. Intervenors did not address this subject.

d. Original Cost Finding

Staff agrees with ComEd's proposed original cost finding figures and proposed language as revised in ComEd's rebuttal testimony. Staff Init. Br. at 6-7. Intervenors did not address this subject.

⁴ This Reply Brief uses "--" to mean that Staff's and intervenors' Initial Briefs did not address the subject.

2. **Materials & Supplies**

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3. **Construction Work In Progress**

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4. **Regulatory Assets and Liabilities**

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5. **Deferred Debits**

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6. **Other Deferred Charges**

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7. **Accumulated Provisions for Depreciation and Amortization**

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8. **Accumulated Miscellaneous Operating Provisions**

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9. **Asset Retirement Obligation**

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10. **Customer Advances**

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11. **Customer Deposits**

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12. **Other**

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C. Potentially Contested Issues

1. Cash Working Capital

The respective cash working capital (“CWC”) figures of ComEd, *i.e.*, negative \$21,274,000, and Staff, *i.e.*, negative \$21,238,000, differ by only \$36,000. ComEd continues to propose its figure. *See* ComEd Init. Br. at 15-16. Intervenors did not address this subject.

Staff and ComEd agree that a change in the treatment of current and deferred income taxes in the cash working capital calculation should not be addressed in the instant Docket. ComEd Init. Br. at 16-18; Staff Init. Br. at 8-9. As discussed in more detail in its Initial Brief, ComEd proposes, however, in light of the Commission’s inconsistent decisions on this subject, that the Commission’s final Order include language that, if the Ameren and ComEd methodologies align in the future, or new evidence is presented, the Commission will re-visit this issue in an appropriate future proceeding. ComEd Init. Br. at 17-18. Intervenors did not address this subject.

2. Accumulated Deferred Income Taxes

Neither AG/AARP nor CUB offers any new argument in support of their proposal to reduce rate base by \$8,540,000 by artificially reducing the deferred tax asset associated with the vacation pay operating liability. Contrary to EIMA’s directive to use the amounts reported in ComEd’s Federal Energy Regulatory Commission (“FERC”) Form 1, AG/AARP and CUB wrongly assume they have broad discretion to develop new calculations that result in hypothetical amounts neither reflected in, nor supported by, the FERC Form 1. AG/AARP Init. Br. at 6-10; CUB Init. Br. at 6-8. Their proposal should accordingly be rejected.

While the details regarding the amount of ADIT associated with ComEd’s accrued vacation pay liability are set forth in ComEd’s Initial Brief (at 18-22), a short primer is provided here for convenience. The facts are:

- As of December 31, 2011, there was a deferred income tax asset of \$18,116,000 (which increases rate base) associated with the vacation operating liability and reflected in ComEd's FERC Form 1.⁵
- ComEd included the jurisdictional amount of \$18,952,000⁶ in its rate base calculation, which fully reflects deferred tax impacts associated with the accrual of vacation pay liability.⁷
- ComEd also recorded a vacation pay deferred debit related to the vacation pay that it estimates will ultimately be capitalized.
- The deferred debit amount is not included as a reduction to expense for either income tax or book purposes, and therefore results in no deferred tax booked for the vacation pay deferred debit. These costs, as of December 31, 2011, had not yet been distributed to capital projects and thus could not be deducted for income tax purposes.
- Finally, no other deferred income taxes related to either vacation pay deferred debit or operating liability appear on ComEd's books as of December 31, 2011.

See generally ComEd Init. Br. at 19-20.

Contrary to these facts, AG/AARP and CUB create, out of thin air, an \$8,540,000 reduction to the deferred tax asset. Although the deferred debit amount could not be deducted for income tax purposes, AG/AARP and CUB nevertheless effect a deduction by inappropriately netting the deferred debit and operating reserves liability related to accrued vacation pay against each other prior to their inclusion in rate base. In other words, although the deferred debit amount is not included as a reduction to expense and results in no deferred tax booked,

⁵ ComEd Init. Br. at 19; Fruehe Reb., ComEd Ex. 13.0, 7:123-127; ComEd Ex. 10.3, WP 4, line 5, col. (D).

⁶ Calculated in accordance with the *May 11-0721 Order*.

⁷ *See* ComEd Ex. 10.3, WP 4, line 5, col. (G) plus line 107, col. (G).

AG/AARP's and CUB's recommendation that the deferred debit be netted against the operating reserves liability related to accrued vacation pay *essentially imputes a deferred tax liability (which reduces rate base) related to the accrued vacation pay debit where none exists.*

AG/AARP's and CUB's hypothetical calculation and the fictional reduction it creates do not square with EIMA's unambiguous requirement that "[t]he inputs to the performance-based formula rate for the applicable rate year shall be based on final historical data reflected in the utility's most recently filed annual FERC Form 1...". 220 ILCS 5/16-108.5(d)(1). Indeed, in its recently issued *Order on Rehearing*, the Commission recognized that Section 16-108.5's entire ratemaking paradigm is based off the utility's FERC Form 1 filing data: "while such heavy reliance on a filing made in a separate forum was not traditional practice for the Commission in its Article IX rate cases, this seems to be exactly what the General Assembly has envisioned as the Commission's role under Section 16-108.5." *Order on Rehearing* at 23. Consistent with EIMA and the *Order on Rehearing*, ComEd calculated the ADIT in rate base beginning with an itemization of all deferred taxes ComEd has recognized and reported in its FERC Form 1. ComEd Init. Br. at 20; Fruehe Sur., ComEd Ex. 19.0, 7:131-136. Importantly, the FERC Form 1 reflects no deferred income tax liability related to the vacation pay deferred debit. It is therefore contrary to EIMA to conjure up such a figure now.

Although AG/AARP and CUB claim that their calculation is consistent with the *May 11-0721 Order* and related Staff Schedule 16.07R in that Docket in particular, this cannot possibly be the case because the accrued vacation pay deferred debit that AG/AARP and CUB use to reduce the accrued vacation pay liability was never part of Staff's calculation on Schedule 16.07R. Fruehe Reb., ComEd Ex. 19.0, 5:92-103. Moreover, the very proponent of that Schedule – Staff – concludes in this docket that AG/AARP and CUB have not supported their

proposed reduction to rate base, and recommends that the Commission reject their proposal. Staff Init. Br. at 9-11.⁸ ComEd agrees, and joins Staff in concluding that the Commission should reject intervenors' proposal.

3. **Accumulated Reserve for Depreciation and Amortization**

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4. **Other**

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IV. **REVENUES**

A. **Overview**

The subject of revenues is not contested, apart from the improper and incorrect billing determinants adjustment proposed by AG/AARP and CUB, and supported by Staff, discussed in Section IV.C.1, *infra*.

B. **Potentially Uncontested Issues**

1. **Other Revenues**

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2. **Other**

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⁸ In response to Staff's request for clarification regarding the issue of the deferred debit and any associated deferred tax liability, ComEd witness Mr. Fruehe explained in surrebuttal testimony that a deferred income tax liability represents a book-tax timing difference in which expenses (deductions) recognized in determining current income taxes payable are greater than expenses recognized for book income purposes. In this case, the vacation pay deferred debit is not considered in either the determination of income taxes payable or book income. Thus, there is no book-tax timing difference associated with the vacation pay deferred debit, and no income tax benefit attributable to it. Fruehe Sur., ComEd Ex. 19.0, 6:124-130.

C. Potentially Contested Issues

1. Billing Determinants

Although EIMA requires the use of “historical weather normalized billing determinants” in the formula rate, AG/AARP, CUB, and Staff recommend that the Commission modify the *historical* billing determinants proposed by ComEd so that they reflect *estimated* 2012 numbers. This obvious departure from the historical billing determinants is inconsistent with EIMA. Indeed, the term “historical” is not ambiguous and no party claims otherwise. Further, AG/AARP’s citations to past ComEd rate case orders decided under Article IX of the Act are misplaced and also ignore that ComEd has since elected to become a participating utility under EIMA, meaning that Section 16-108.5 of the Act applies to this Docket. As the Commission recently recognized in its *Order on Rehearing*, “[i]t is well-established that the General Assembly can provide for a different ratemaking treatment than past Commission practice,” making prior Commission orders and practice non-determinative. *Order on Rehearing* at 22. Indeed, EIMA is explicit that any provisions of the Act that are inconsistent with EIMA do not apply. 220 ILCS 5/16-108.5(c). Such an inconsistency is at issue here, and EIMA must supersede past Article IX practice.

The General Assembly has expressly provided that “historical weather normalized billing determinants” must be used. 220 ILCS 5/16-108.5(c)(4)(H). This directive is clear and unambiguous. “The fundamental rule of statutory construction is to ascertain and give effect to the General Assembly’s intent[.]” *Order on Rehearing* at 23 (citing *Michigan Ave. Nat’l Bank v. County of Cook*, 191 Ill. 2d 493, 503-504, 732 N.E.2d 528, 535 (2000)). Moreover, “[t]he best indication of the legislative intent is the statutory language, given its plain and ordinary meaning, if such a plain meaning can be ascertained.” *Order on Rehearing* at 23 (citing *Nowack v. City of Country Club Hills*, 2011 IL 111838 at 7, 958 N.E. 2d 1021, 1023 (2011)). Applying these

principles here, there is, unquestionably, a “plain meaning” to the word “historical.” Webster’s Dictionary defines it as “of, pertaining to, treating, or characteristic of *history or past events*.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 907 (2003) (emphasis added). Because the term “historical” is clear, it should be given its plain and ordinary meaning, and AG/AARP has not argued otherwise.⁹ While AG/AARP may disagree with the way in which the General Assembly established the components of the formula rate, the law cannot be rewritten through this Commission proceeding.

To be sure, there is no basis upon which to conclude that *historical* means and includes *forecasted customer* additions. Indeed, where EIMA intended that a forecast be used, it was explicit in that directive. For example, EIMA clearly requires that each annual update filing to the formula rate include “*projected* plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the tariff and data are filed.” 220 ILCS 220 5/16-108.5(c) (emphasis added). This leaves no doubt that the General Assembly knew how to require the filing of such projections. Yet, it expressly chose not to incorporate projections in setting the billing determinants. Rather, the General Assembly directed that *historical* weather normalized billing determinants be used. Moreover, there is nothing absurd in this directive – 2011 is the most recent year for which complete, actual historical data is available.

Furthermore, AG/AARP, Staff, and CUB are simply incorrect that the proposed billing determinants adjustment would “ensure that the billing determinants are based on accurate information.” Staff Init. Br. at 14; Rukosuev Reb., Staff Ex. 11.0, 6:108-109.¹⁰ Notwithstanding

⁹ As a result, AG/AARP’s claim that “the formula would be unreasonably designed to consistently over-collect ComEd’s revenue requirement because real customer growth would be ignored” is misplaced. *See Relf v. Shatayeva*, 2012 IL App (1st) 112071, – N.E. 2d – (Aug. 7, 2012) (“we will not utilize extrinsic aids of statutory interpretation unless the statutory language is unclear or ambiguous.”).

¹⁰ In its Initial Brief, ComEd inadvertently cited to the customer increase percentages proposed by CUB witness Mr. Smith in Docket No. 11-0721. *See* ComEd Init. Br., at 26. In this proceeding, Mr. Smith proposed an

that their proposal is based on estimated rather than historical data, the proposed billing determinants adjustment also fails to truly match costs and revenues despite AG/AARP's, CUB's and Staff's claims to the contrary. *See, e.g.*, AG/AARP Init. Br. at 11. This is because their proposal does not take into account the fact that weather-normalized kilowatt-hour ("kWh") billing determinants have decreased in 2012 over 2011. Fruehe Reb, ComEd Ex. 13.0, 23:484-24:491. As ComEd explained in testimony and its Initial Brief, billing determinants are calculated on the basis of *both* customer charges *and* total amount of electricity delivered. *Id.*, 20:404-410. In other words, customer base constitutes only one half of the billing determinants equation – the "fixed charge." The other half of the equation is the "variable charge," which is determined by dividing the variable costs by the number of kWhs consumed. Fruehe Reb., ComEd Ex., 20:411-415. Thus, if the proposal to use estimated customer counts for 2012 were to be approved, 2012 billing determinants for kWh sales would have to be reflected by lowering the amount of kWh deliveries in 2012 versus 2011. ComEd Init. Br. at 25-26; Fruehe Reb., ComEd Ex. 13.0, 24:504-25:509.

Indeed, the very Article IX cases that AG/AARP cite in support of their proposal (*i.e.*, ComEd's 2005, 2007, and 2010 rate cases)¹¹ approved changes to billing determinants that account for *both* customer *and* usage changes, a fact that AG/AARP eventually admit in their Initial Brief. *See* AG/AARP Init. Br. at 15.¹² In response to the contention that its billing determinants proposal is one-sided, AG/AARP argue in their initial brief that "Mr. Effron's

increase of 0.37% increase in residential customers and a 0.88% increase in small commercial and industrial customers based on 2011 growth rates. Smith Dir., CUB Ex. 1.0, at 18:434-19:437. Staff and AG/AARP recommend an increase of 0.29% for residential customers and 0.39% for small C&I customers, which reflect actual increases through May 2012. AG/AARP Init. Br. at 16; Staff Init. Br. at 13-14; Fruehe Reb., ComEd Ex. 13.0, 25:517-26:533.

¹¹ *Commonwealth Edison Co.*, ICC Docket No. 05-0597, Final Order (July 26, 2006) at 5; *Commonwealth Edison Co.*, ICC Docket No. 07-0566, Final Order (September 10, 2008) at 74-76; *Commonwealth Edison Co.*, Final Order (May 24, 2011) at 306-309.

¹² These changes were reflected in the form of a "new business revenue credit." *See* fn 11.

proposed adjustment does not decrease total kwh sales because plant additions for customer growth, by definition, only result in growth” (AG/AARP Init. Br. at 15), and further quote the following passage of the Commission’s *May 11-0721 Order*:

Additionally, a decline in kwh sales, in and of itself, does not establish that there are less customers... Without information as to what causes a decline in kwh sales, it does not appear that this decline should offset the increase in billing determinants that reflects ComEd’s new business.

May 11-0721 Order at 75-76; *see also* AG/AARP Init. Br. at 15-16. However, the AG/AARP argument and the *May 11-0721 Order* each reflect a crucial mistake of fact – kWh sales are an independent component of the billing determinants equation, not *another* way of measuring the amount of customers. For example, in a given year customer counts could increase while weather-normalized kWh consumption decreases because of the implementation of energy efficiency programs. As a result, each component should be given full effect in the billing determinants equation to ensure “matching” and accuracy. Thus, if the customer count portion of the billing determinants equation is updated for 2012, the kWh sales portion must also be updated. It is implausible to presume, as AG/AARP, CUB, and Staff do, that the General Assembly intended the two aspects of billing determinants (customer counts and kWh sales) be determined based on different time periods when they prescribed that historical, weather-normalized billing determinants be used. AG/AARP’s, Staff’s, and CUB’s proposal would only update one of the two inputs, exacerbating the risk of ComEd’s under recovery. Fruehe Sur., ComEd Ex. 19.0, 14:280-284. Because this one-sided approach is flatly inconsistent with EIMA as well as prior commission practice, the Commission should correct this mistake of fact in the event it were to adopt Staff and intervenors’ proposal (which it should not do).

Finally, AG/AARP, CUB, and Staff further rely on the *May 11-0721 Order*’s adoption of AG/AARP’s proposal to require an adjustment to 2010 historical data using 2011 projected

growth figures. However, in addition to the mistake of fact identified above, that decision should not be followed here because it appears to have mistakenly departed from the clear language of Section 16-108.5(c)(4)(H). Although the Commission's *May 11-0721 Order* adopts billing determinants that are based on something other than historical 2010 data, it is not at all clear that the Commission intended to make this departure from the language of the statute. In fact, it appears from the *May 11-0721 Order* that the Commission may have thought it was adopting an adjustment that would somehow provide for more accurate *historical* 2010 data. The Commission stated that "[a]ll that AG/AARP proposes here is a methodology to ensure that the billing determinants are based on accurate information." *May 11-0721 Order* at 75. Further, the Commission stated that it "disagrees with ComEd's argument that the issue presented by AG/AARP is some kind of hodgepodge of facts between 2010 and 2011. AG/AARP stated in the very beginning of their argument that the information they have is 2010 information, not 2011 information." *Id.* Thus, it appears that the Commission may have intended to adopt a billing determinants adjustment that would actually comply with EIMA's plain language that "*historical* weather normalized billing determinants" be used. 220 ILCS 5/16-108.5(c)(4)(H) (emphasis added). If that is the case, the Commission should be consistent with its intent in the *May 11-0721 Order* and reject the proposed billing determinants adjustment in this proceeding. Even if that is not what was intended, however, the Commission is not bound to follow a prior ruling that was based on a mistake of fact. It should not repeat the mistake here by requiring a billing determinants adjustment that is contrary to the plain language of EIMA.

2. Other

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V. **OPERATING EXPENSES**

A. **Overview**

These issues were fully addressed in ComEd's Initial Brief. *See* ComEd Init. Br. at 28, *et seq.*

B. **Potentially Uncontested Issues**

1. **Distribution O&M Expenses**

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2. **Customer-Related O&M Expenses**

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3. **Uncollectibles Expenses**

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4. **Incentive Compensation Expenses**

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5. **Sales and Marketing Expense**

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6. **Depreciation and Amortization Expense**

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7. **Taxes Other than Income**

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8. **Income Taxes**

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9. **Regulatory Asset Amortization**

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10. Operating Cost Management Efforts

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11. Storm Damage Repair Expense

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12. Interest Expense

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13. Lobbying Expense

Staff acknowledges its withdrawal of its proposed adjustment. Staff Init. Br. at 16. Intervenor did not address this subject.

14. Gross Revenue Conversion Factor

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C. Potentially Contested Issues

1. Administrative and General Expense

a. Charitable Contributions

ComEd's \$6.862 million of charitable contributions (total amount, before removal of non-jurisdictional portion) should be recovered in its entirety because, consistent with the governing statute, the contributions were made "for the public welfare or for charitable scientific, religious or educational purposes," and because they are "reasonable in amount." 220 ILCS 5/9-227. These are the only proper tests for determining whether charitable contributions are recoverable. Indeed, the General Assembly deems the contributions of such importance that the Commission is explicitly "prohibited from disallowing by rule, as an operating expense, any portion of a reasonable donation for public welfare or charitable purposes." *Id.* Yet, as

described below, in nearly every instance Staff's proposed disallowance is premised on imposition of a new test or rule not reflected in Section 9-227 or authorized by it.

Donations to Charitable Organizations. As an initial matter, Staff's proposal that the Commission categorically disallow recovery of contributions to any organizations that are not classified by the Internal Revenue Service as Section 501(c)(3) organizations was squarely rejected by the Commission in its final Order in the first Ameren formula rate case, *Ameren Illinois Co.*, ICC Docket No. 12-0001 (Order Sept. 19, 2012) at 78-79. As discussed in ComEd's Initial Brief (at 38-40), there is no reason for the Commission to depart from its ruling here. While Staff now claims that it only used Section 501(c)(3) status as an "initial filter" to determine whether organizations were "charitable," it is readily apparent that this was Staff's "only filter." As shown below, Staff's after-the-fact attempt to justify disallowances based on the now discredited Section 501(c)(3) theory should be rejected.

Discarding its "initial filter," Staff now makes the incredible argument that organizations involved in community and neighborhood development, community service, or the arts are not organizations serving the "public welfare." Staff's argument is not new, however, and the Commission rejected it only a few months ago in Docket No. 11-0721. The Commission rejected this attempt to impose an artificially constrained definition of "public welfare" to limit recovery, explaining that "the term 'public welfare' only means contributing to the general good of the public." *May 11-0721 Order* at 98. As it had done in the prior two ComEd rate cases, the Commission allowed full recovery of donations to community and economic development and cultural organizations, noting that "many organizations, including those that promote the arts and those that promote community and economic development, contribute to the general good of the public." *Id.*

This time, attempting to find a new hook to save an old argument, Staff suggests that ComEd's donations to community and economic development organizations should be rejected because they are really "industry dues" that are only "disguised as charitable contributions." Staff Init. Br. at 21. However, the four orders cited by Staff in support of this latest theory are also its undoing. In the order from ComEd's 2005 rate case (Docket No. 05-0597), the only charitable contribution that was disputed was one made to the Illinois Manufacturers Association. The Commission disallowed recovery for that contribution because ComEd had labeled it as a "Legislative Strategies" contribution and the Commission thus found it to be a payment made for lobbying activities. No such claim is made here regarding these charitable contributions. In the Orders in ICC Docket Nos. 01-0432 and 04-0442, the donations at issue were disallowed on the basis that they constituted "industry dues" for which membership benefits were received. *Aqua Illinois, Inc.*, ICC Docket No. 04-0442 (Order April 20, 2005) at 31; *Illinois Power Co.*, ICC Docket No. 01-0432 (Order March 28, 2002) at 53-54. Indeed, in ICC Docket No. 01-0432, the utility did not even contest that it would receive benefits from the "membership dues." *Illinois Power Co.*, ICC Docket No. 01-0432 (Order March 28, 2002) at 53-54. However, as explained below, there is no such claim here that ComEd received membership benefits from any of these contributions. Finally, in ICC Docket No. 03-0403, the Commission disallowed recovery for certain payments, characterized as "fees," to community and economic development organizations because it could not determine, on the basis of that record, whether they were for the public welfare. *Consumers Illinois Water Co.*, Docket No. 03-0403 (Order April 13, 2004), at 16, 18-19. However, the Commission "specifically note[d] ... that it also does not establish any rule or presumption that contributions to economic

and community development organizations may not be recovered under Section 9-227.” *Id.* at 18.

Staff does not offer any explanation for why the donations at issue in this docket could or should be characterized as “industry dues” for which ComEd received membership benefits. In fact, there is no evidence whatsoever – and Staff tellingly cites none – remotely suggesting that these donations were “industry dues.” Indeed, it would be very difficult to make that argument. For example, Staff seeks to disallow a donation made to Project Brotherhood, A Black Men’s Clinic, which is a community-based outreach and prevention program for African American men residing in south side communities of Chicago. ComEd Ex. 13.05, p. 4, line 27. It also seeks to disallow a contribution to the Institute for Positive Living, which seeks to help families solve educational, social, and economic problems and, through its Open Book program, to create a love of reading and an appreciation for the world of ideas. ComEd Ex. 13.05, p. 4, line 25. Despite these descriptions, Staff suggests that there is not “sufficient evidence to demonstrate” that the donations were made for the public welfare and not industry dues. Staff Init. Br. at 20. What membership benefits or industries (much less “industry dues”) are being referred to by Staff is beyond all reason, comprehension, and even imagination.

Simply put, Staff’s argument that the record in this docket lacks sufficient evidence to determine whether these and other donations were made to serve public welfare – and, even further, that the donations could and should somehow be conflated with “industry dues” – is absurd. ComEd has provided the foregoing descriptions of each of these donations, along with many others, in its testimony and discovery responses in this docket. Fruehe Reb., ComEd Ex. 13.0, 13:262-19:389; Fruehe Sur., ComEd Ex. 19.0, 8:169-11:216; ComEd Ex. 3.2, WP 7,

p. 20, subpages 1-8; ComEd Ex. 13.05. Staff points to nothing to suggest that the donations were “industry dues.”

Staff also argues that there is not enough evidence in this docket to determine whether ComEd’s donation to the American Legion was made for a charitable purpose or a lobbying activity. It states, without citation to any docket, that the Commission has previously disallowed donations to the American Legion. However, donations to the American Legion were allowed in ComEd’s 2011 and 2010 rate cases. *See* ComEd Ex. 13.05, p. 2, line 18; *see generally*, *May 11-0721 Order* and ICC Docket No. 10-0467 (Order May 24, 2011). As described in ComEd Ex. 13.05, the donation to the American Legion was made because that organization works in community and neighborhood development, is the nation’s largest veterans’ service organization, and sponsors youth programs and promotes support for service members and veterans. *Id.*

Finally, Staff’s argument that donations made to cultural organizations should be disallowed because “[a]rts and culture is not a recoverable category of donations under Section 9-227” should also be rejected. Staff Init. Br. at 25. Again, “the term ‘public welfare’ only means contributing to the general good of the public” (*May 11-0721 Order* at 98), and cultural organizations that promote the arts fit within that definition. As with donations to community and economic development organizations, the Commission allowed full recovery of donations to cultural organizations in each of the three preceding ComEd rate cases. Because these donations serve the public good, they should once again be allowed here. *See May 11-0721 Order* at 98 (“many organizations, including those that promote the arts and those that promote community and economic development, contribute to the general good of the public.”).

Donation to Metropolitan Mayors’ Caucus. In its Initial Brief, Staff continues to recommend a disallowance of \$10,000 to the Metropolitan Mayors’ Caucus based on a claim that

it is a prohibited contribution to a “political organization” under Section 9-224 of the Act. Staff Init. Br. at 18. However, for the reasons described in ComEd’s Initial Brief and below, this argument should be rejected. As explained in ComEd Ex. 3.2, ComEd made the donation for charitable purposes because the Metropolitan Mayors’ Caucus is involved in community and neighborhood development and economic development. ComEd Ex. 3.2, WP 7, p. 20, subpage 5, line 137. This group works to address major issues, including, for example, affordable housing. ComEd Ex. 13.05, p. 2, line 16. The fact that a given organization may also engage in political activity does not mean that ComEd made its donation for political or lobbying purposes. Staff, however, improperly suggests just such a rule, and would impose a blanket prohibition on recovery of donations to any charitable organization that might also engage in political activity. Such a rule, while prohibited by Section 9-227, would create the absurd result of permitting donations to only some very small set of organizations that abstain entirely from political activity, thereby punishing organizations exercising their right to participate in the political process.¹³

Because ComEd’s donations were made for the public welfare, they should be recovered in their entirety. ComEd requests that the Commission allow recovery for ComEd’s \$6.862 million of charitable contributions (total amount, before removal of non-jurisdictional portion).

b. Rate Case Expenses -- Instant Docket

In its Initial Brief, ComEd correctly stated that “[t]here are no rate case expenses of the instant Docket in the revenue requirement, due to their timing.” ComEd Init. Br. at 40. While

¹³ Staff’s argument that the Commission should reject donations made to organizations outside of ComEd’s service territory should similarly be rejected because the statute contains no such prohibition. Moreover, the statute actually bars the Commission from making this type of blanket rule barring recovery. 220 ILCS 5/9-227.

Staff's Initial Brief addressed the Article IX filing preparation expenses issue under this subsection, ComEd's Initial Brief addressed this issue in the next subsection (Section V.C.1.c.), and therefore again addresses the issue in Section V.C.1.c., *infra*.

c. **Rate Case Expenses –Docket No. 11-0721 and Article IX Filing**¹⁴

The Initial Briefs confirm that the amount of compensation paid to attorneys and technical experts to prepare and litigate the initial formula rate docket (ICC Docket No. 11-0721) is uncontested. ComEd Init. Br. at 40; Staff Init. Br. at 27. Accordingly, the Commission should find that amount, \$1,544,161, to be just and reasonable pursuant to Section 9-229 of the Act.

Staff recommends that the Commission remove over \$270,000 of rate case expense from ComEd's revenue requirement because it was expended during 2011 on an Article IX rate case filing for which preparation had begun but that was not ultimately filed due to superseding legislation passed by the General Assembly. Staff Init. Br. at 26. As a preliminary matter, Staff has inflated this figure because ComEd only seeks recovery of about \$244,000 in costs incurred in 2011 preparing its Article IX rate case filing. ComEd Init. Br. at 40-41. Staff does not dispute that late 2011 was an uncertain time with regard to whether ComEd would be filing an Article IX rate case or one governed by legislation that had been vetoed by the Governor. While Staff contends that ComEd "could reasonably have waited just a few weeks to see what the legislative outcome would be..." (Staff Init. Br. at 26), that position wholly fails to account for the time and effort required to prepare a rate case filing of any kind. As ComEd stated in its Initial Brief, it was both reasonable and prudent for ComEd to begin preparing its Article IX rate case filing because it was facing a revenue shortfall. In fact, it may have been *imprudent* for ComEd to place itself in the position that it could not file an Article IX rate case in the event that the

¹⁴ ComEd has added to the sub-title of this heading to reflect the contested issue also addressed here.

General Assembly did not override the Governor's veto of EIMA. Had ComEd failed to plan for such contingency, it faced losing at least six months of cost recovery. ComEd Init. Br. at 40-41; Fruehe Reb., ComEd Ex. 13.0, 13:256-260.

It is axiomatic that a utility is entitled to recover from customers those costs that are prudently incurred and reasonable in amount. EIMA specifically adopts this well-accepted principle. Aside from Staff's impermissible, hindsight-based suggestion that ComEd could have waited a couple of weeks, neither of these cost recovery standards is challenged.¹⁵ Instead, Staff's position would punish ComEd for dealing as best it could with the uncertainties it faced in late 2011. And to deny recovery on grounds that ratepayers did not "benefit" from the costs expended on the Article IX case preparation introduces a requirement for recovery that has never been applied to evaluate prudence or reasonableness in rate case cost recovery and would otherwise violate EIMA. 220 ILCS 5/16-108.5(c) (requiring evaluation of prudence and reasonableness consistent with Commission practice and law). Further, as ComEd has shown, the Commission practice of allowing recovery for reasonable and prudent costs even where customers did not receive service from the investment supports approval of the Article IX rate case filing expense at issue here. ComEd Init. Br. at 41-42 (allowing recovery for plant costs not placed into service because of changed circumstances).

It cannot be said that ComEd knew or should have known that both houses of the General Assembly would vote to override the Governor's veto of EIMA.¹⁶ At the time that ComEd was

¹⁵ It is well accepted that the Commission makes determinations of prudence and reasonableness based on evidence and information which was known or should have been known by the utility at the time a decision was made. *Bus. and Prof'l People for Pub. Interest v. Ill. Commerce Comm'n*, 146 Ill. 2d 175, 200-201, 585 N.E.2d 1032, 1041 (1991).

¹⁶ Staff's statement that ComEd's approach "perhaps does not fully capture ComEd's role in the drafting and passage of EIMA" (Staff Init. Br. at 26) is not only totally unsupported by the record, but it also blatantly misconstrues the Illinois legislative process.

preparing its Article IX rate case filing, Illinois law provided for only one type of rate case filing. Consequently, to criticize ComEd for following the law and applicable procedures in effect at the time is improper and defies the tenets that define prudence and reasonableness. At the time that EIMA became law and ComEd elected to become a participating utility, ComEd immediately stopped work on the Article IX case. However, Staff's proposed disallowance would, in effect, penalize ComEd for then electing to become a participating utility under EIMA, thereby discouraging such election and frustrating the achievement of EIMA's goals and the intent of the General Assembly. The Commission should reject this attempt to undermine EIMA implementation and permit ComEd to recover the \$244,000 in expenses incurred in 2011 in connection with preparing the contemplated Article IX rate case.

d. Merger Expense

ComEd is entitled to recover \$7.2 million of costs related to the merger of Exelon and Constellation that were incurred in 2011 to achieve post-merger savings that will be passed through to ComEd's customers in 2012 and thereafter. As ComEd made clear, it is *not* seeking to recover attorneys' fees, bank fees and other traditional costs associated with obtaining approval of and effectuating the merger; rather, it is only seeking to recover a small portion of the total merger costs limited to specific costs necessary to achieve post-merger operational cost savings.¹⁷ The amount in dispute also represents a small fraction of the net savings that will be passed through to ComEd's customers – which are estimated to be \$156 million through 2015 and an additional \$66 million in 2015 and each year thereafter. ComEd Init. Br. at 42; Jirovec

¹⁷ The \$7.2 million requested by ComEd represents about 4% of the total costs incurred in 2011 in connection with the merger. ComEd Init. Br. at 42.

Reb., ComEd Ex. 15.0, 5:97-103. CUB and AG/AARP advance a number of objections to recovery of the so-called “merger costs,” none of which has merit.¹⁸

First, CUB argues that the request should be disallowed because ComEd has not made a firm commitment to any “specific level of savings to be passed through to its ratepayers.” CUB Init. Br. at 12. But this misses the point. Under ComEd’s formula rate, the cost savings achieved as a result of the merger will flow through automatically to ComEd’s customers (via the annual updates), and while CUB argues that the *exact* amount of future benefits is uncertain and “speculative,” it does not provide any evidence or other principled basis to refute ComEd’s evidence that the net savings will far exceed the costs to achieve that it is seeking to recover.

Indeed, the unrefuted evidence establishes that it is reasonably likely to expect that ComEd’s customers will realize substantial savings (far exceeding the costs to achieve sought here), and that institutional mechanisms and controls are in place to ensure realization of such future savings to the extent possible. Mr. Jirovec’s rebuttal testimony described in detail the process by which the merger savings were identified and quantified. Jirovec Reb., ComEd Ex. 15.0, 5:105-7:135, 12:263-265. He further testified that a framework has been put in place to monitor and track achievement of synergies and post-merger savings. Jirovec Reb., ComEd Ex. 15.0, 19:404-424; *see also* ComEd. Exs. 15.3 and 15.4. In the end, although savings at a particular level cannot be guaranteed, neither CUB nor AG/AARP has presented any evidence that ComEd’s savings estimates are flawed for some operational, structural or quantification reason (ComEd Init. Br. at 50; Jirovec Sur., ComEd Ex. 20.0, 8:163-167), and none of their

¹⁸ Staff has withdrawn its prior objection to recovery of the \$7.2 million in 2011 costs. Staff Init. Br. at 28. In its rebuttal testimony, AG/AARP also withdrew their objection to \$400,000 of those costs, but in their Initial Brief they argue that the entire amount should be disallowed, or in the alternative, that if any such costs are allowed, they should be limited to \$400,000. AG/AARP Init. Br. at 16.

witnesses has provided any evidence or analysis to lead the Commission to doubt that substantial net benefits are reasonably likely to occur.

Second, CUB argues that Section 7-204(c) of the Act prohibits recovery of merger costs where prospective savings have not occurred and are speculative. CUB Init. Br. at 12. But this argument also misses its mark. As a threshold matter, Section 7-204(c) does not apply here, and CUB acknowledges as much in its initial brief (at 12 and 16). But even if the statute did apply, it does not require the result that CUB supports. Section 7-204(c) merely provides that where the Commission is asked to approve a reorganization it must determine, among other things, “whether the companies should be allowed to recover any costs incurred in accomplishing the proposed reorganization and, if so, the amount of the costs eligible for recovery....” 220 ILCS 5/7-204. In this case, the merger costs at issue are clearly “eligible for recovery,” as they are not transaction costs incurred to accomplish the merger; rather, they are only those costs that “were *necessary* to realize future savings.” Trpik Reb., ComEd Ex. 14.0, 6:108-7:153 (emphasis added). ComEd witness Mr. Trpik’s testimony in this regard is unchallenged.

Following its misplaced citation to Section 7-204, CUB cites to the Commission’s order disallowing recovery of certain transaction costs sought by Nicor in a 2011 application for approval of a reorganization under Section 7-204. CUB Init. Br. at 13 (citing *AGL Resources Inc., Nicor Inc., and Northern Illinois Gas Co. d/b/a Nicor Gas Company*, ICC Docket No. 11-0046 (Order Dec.7, 2011) (“*Nicor*”). CUB’s reliance on *Nicor* is misplaced because the transaction costs that were disallowed in that proceeding bear no resemblance to the costs at issue here. In *Nicor*, the reorganization costs at issue were the sort of traditional transaction

costs – *i.e.*, legal fees, bank fees, and financing costs¹⁹ - that are *not* included here. Trpik Reb., ComEd Ex. 14.0, 8:168-179 (explaining that ComEd is not seeking to recover any transactional costs, such as legal costs, but is only requesting recovery of ”costs that were incurred in 2011 to achieve post-merger operational cost savings”). ComEd Init. Br. at 42.

While the *Nicor* order cited by CUB is largely irrelevant, other Commission rulings support ComEd’s request for recovery of merger costs incurred to achieve savings. In *Ameren Illinois Co.*, Docket No. 11-0282, for example, the Commission allowed recovery of merger costs incurred to improve operational efficiency and cost savings. *Ameren Illinois Co.*, ICC Docket No. 11-0282 (Order Jan. 10, 2012), at 33-34. “Like Ameren’s merger costs, ComEd’s merger costs are O&M expenditures that were incurred to perform merger integration initiatives ... that would result in savings to its customers.” Trpik Reb., ComEd Ex. 14.0, 9:197-202. The Commission’s order in ICC Docket No. 11-0282 supports ComEd’s request in this proceeding, and the same result should obtain here.

Third, CUB cites to an order issued by the Maryland Public Service Commission requiring Exelon’s affiliate, BGE, to provide a \$100 credit to each BGE residential ratepayer and to fund a \$113.5 million Customer Investment Fund. CUB Init. Br. at 14-15. CUB argues that the Maryland Commission imposed these requirements “to ensure that the Exelon/Constellation merger provided certain, specific and measurable benefits to Maryland ratepayers”, and that ComEd’s request in this proceeding should be rejected because it seeks recovery of merger costs “with no offset for merger savings”. *Id.* The comparison is disingenuous and misleading. Under ComEd’s formula rate, the net savings between now and 2015 far exceed the \$7.2 million costs to achieve those savings; and the estimated \$66 million per year savings represent net

¹⁹ The costs at issue in the portion of the *Nicor* decision quoted by CUB were: ”Transaction Costs, Change in Control Costs, Financing Costs, Separation Costs, and Legal and Other Professional Costs.” *Nicor* at 33.

annual savings beginning in 2015 which will automatically flow through to ComEd's customers. Jirovec Reb., ComEd Ex. 15.0, 5:97-103. The suggestion that ComEd is seeking recovery of costs with no offset for savings is simply wrong.

Fourth, AG/AARP argue that the FERC Order approving the Exelon/Constellation merger in EC11-83-000/001 supports disallowance. AG/AARP Init. Br. at 20-21. In that FERC proceeding, Exelon and Constellation took the position that they would not “seek to include transaction-related costs in their transmission revenue requirements, except to the extent they can demonstrate that the transaction-related savings are equal to or in excess of all of the transaction-related costs so included.” *Id.* at 21. In its order authorizing the merger, which AG/AARP quote at length, FERC accepted the applicants’ offer not to charge transmission customers for transaction-related costs. AG/AARP, however, neglect to mention that FERC’s acceptance of this offer related entirely to transmission customers in a different jurisdiction. Nothing suggests or supports the position that this provision would in any way apply to Illinois distribution customers.

Fifth, AG/AARP argue that the costs should be disallowed because they were incurred in 2011, prior to the consummation of the merger, and that none of the projected merger savings were realized in 2011. AG/AARP Init. Br. at 19. The flip-side of this argument, of course, is that if ComEd had delayed the planning and integration process until after the merger closed in March 2012, the costs to achieve would be fully recoverable. Had ComEd done so, however, the undisputed evidence shows that millions of dollars of savings would have been lost, to the ultimate detriment of ComEd’s customers. ComEd Init. Br. at 46-47; Jirovec Sur., ComEd Ex. 20.0, 3:59-64, 4:70-72.

Sixth, and finally, AG/AARP cite to ComEd's 2007 rate case where the Commission disallowed merger-related costs incurred in the failed merger between Exelon and Public Service Enterprise Group. AG/AARP Init. Br. at 18-19. That case is completely inapposite, however, as a *failed* merger would never be expected to result in savings. In this case, by contrast, the evidence establishes that the 2011 costs to achieve are likely to result in substantial savings to ComEd's customers.

In summary, the evidence presented in this proceeding establishes that the costs-to-achieve savings requested by ComEd are prudent, reasonable and recoverable. For the reasons discussed above and in ComEd's Initial Brief, the objections to ComEd's recovery of the full \$7.2 million of 2011 costs to achieve savings should be rejected.

VI. RATE OF RETURN

A. Overview

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B. Capital Structure

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C. Cost of Capital Components

1. Rate of Return on Common Equity

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2. Cost of Long-Term Debt

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3. Cost of Short-Term Debt

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4. Overall Weighted Cost of Capital

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VII. COST OF SERVICE AND RATE DESIGN

A. Overview

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B. Potentially Uncontested Issues – Embedded Cost of Service Study

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VIII. OTHER

A. Overview

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B. Potentially Uncontested Issues

1. Distribution System Loss Factor Study

ComEd and Staff agree on the subject of the distribution system loss factor study. ComEd Init. Br. at 55-56; Staff Init. Br. at 30-32. Intervenors did not address this subject.

2. Computation of ROE Collar Adjustment for 2011

ComEd and Staff agree on the calculation of the ROE Collar adjustment. ComEd Init. Br. at 56-58; Staff Init. Br. at 33 and Appendix A, p. 9. Intervenors did not address this subject.

C. Potentially Contested Issues

1. Presentation of ROE Collar Adjustment on Schedule FR A-3 and WP 22

ComEd and Staff agree that Sch. FR A-3 and WP 22, and App 3 should be corrected and revised as to the ROE Collar adjustment, as discussed here and in Section VIII.C.4, *infra*. ComEd Init. Br. at 58-59, 65; Staff Init. Br. at 33-34, 44-45. Intervenors did not address this subject.

2. Preservation of Docket No. 11-0271 Rehearing Issues

ComEd has submitted compliance filings for the *May 11-0721 Order* and the *Order on Rehearing*. By submitting data in this Docket that faithfully complies with said orders, ComEd did not change its position on the issues, and ComEd has not waived any rights to pursue them in any proper forum, whether on appeal from ICC Docket No. 11-0721, from the instant Docket, or otherwise. ComEd Init. Br. at 59-61. ComEd appropriately will reflect the *Order on Rehearing* in its compliance filing after the issuance of a final Order in the instant Docket.

a. Pension Asset Funding Costs

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b. Average or End of Year Rate Base in Reconciliations

ComEd disagrees with the views of Staff (Init. Br. at 34-35) and CUB (Init. Br. at 16-19) on the merits of the year end versus average rate base for reconciliation base issue, but agrees that, in light of the *Order on Rehearing*, the average rate base methodology for reconciliation rate base is to be applied in the instant Docket.

c. Interest Rate for Reconciliation Adjustments

At the tail end of its Initial Brief, CUB repeats a condensed version of its rejected claim that the interest rate on reconciliation balances should be set asymmetrically, with utilities paying a far higher rate than they can ever receive. CUB Init. Br. at 19-20. The Commission rejected this argument just two weeks ago, finding that the cost of the relevant capital²⁰:

... fairly compensates either the Company or customers for the potential lag in recovery of actual costs that exceed (for the Company) or lag (for the customer) the revenue requirement established in annual formula rate

²⁰ ComEd does not agree with the Commission's view that this capital cost is ComEd's short-term debt rate. But, the Commission's holding that a correct capital cost compensates customers and ComEd equally is correct.

proceedings for the relevant 12-month period. This will ensure that neither ratepayers nor the Company pay more than the Company's actual costs/benefits of carrying a reconciliation balance.

Order on Rehearing at 36. *See also May 11-0721 Order* at 161-166.

At the threshold, CUB's effort to revive this argument is improper, unlawful, and erroneous in both premise and conclusion. This Docket sets the initial revenue requirement for rate year 2013 based on "updated costs" and reconciles the 2011 revenue requirement with ComEd's actual costs. 220 ILCS 5/16-108.5(c), (d). It does not re-visit the rate formula itself; that must be done through an Article IX proceeding. 220 ILCS 5/16-108.5(c)(6). The interest rate paid on reconciliation balances is a function of the formula, not the particular year or its costs, and outside the limits of this Docket.

Moreover, as the Commission stated, the interest rate offsets the time value of money, *i.e.*, the "lag" in reconciling the initial and actual revenue requirement. Neither the Commission nor the General Assembly²¹ has treated the time value of money as dependent on the direction of the balance, and it is neither "rational" nor "fair" to charge utilities a much higher interest rate on account of delay than they can ever receive for the same delay in the recovery of their own prudent and reasonable costs.

CUB's intimation that a reconciliation balance exists because ComEd predicted "higher projected plant" (CUB Init. Br. at 20), as if ComEd were at fault or could game the system, is patently untrue. The case reconciles 2011 revenue requirements. The 2011 rates were set by the Commission in a traditional case, not by ComEd, and they include no formula-based projections. Nor would it matter if they did. If interest compensates fully for the lag, as it is designed to, everyone is made whole.

²¹ The statutory interest rate, for example, does not vary depending on whom is being paid. 815 ILCS 205/2

Finally, CUB implies that treating ComEd and customers alike somehow cheats customers out of a portion of their credit. CUB seriously errs. If a revenue requirement used to set initial rates is too high, then the *entire* overage -- including 100% the portion representing return on rate base at the weighted average cost of capital (“WACC”) -- goes into the reconciliation adjustment and is returned. Customers are reimbursed, in CUB’s words, for “the entire amount they over-paid” regardless of the interest rate set on the balance. CUB Init. Br. at 20. Indeed, CUB’s argument, if it were true, would prove far too much. If the “financing rate” *for the reconciliation balances* must equal the financing rate *for the underlying assets*, then CUB would have proven ComEd’s point that WACC (not the short term debt rate) is the measure of the time value of money. If so, then, contrary to the *Order on Rehearing*, WACC should apply to *all* reconciliation balances, not just balances that happen to favor customers.

3. Section 16-108.5 of the PUA

a. Identification Of Costs Incurred In Compliance With Section 16-108.5

As explained in more detail below, Staff’s Initial Brief continues to ignore the specific reporting structure established by the General Assembly in EIMA, which is designed to provide the Commission with reports of the prior year’s EIMA investment one full month in advance of ComEd’s filing of an annual formula rate proceeding. Rather, Staff attempts to write into EIMA additional reporting obligations that would be impracticable, if not impossible, to carry out given the nature of this investment.

The EIMA Framework Already Requires Detailed Annual Reporting. While Staff is quick to dismiss the existing EIMA reporting requirements, a closer look at these requirements shows them to be both thorough and timely. First, each participating utility must file a comprehensive 10-year infrastructure investment plan (“IIP”) that includes “scope, schedule, and

staffing, for satisfying its infrastructure investment program commitments.” 220 ILCS 5/16-108.5(b). ComEd filed its IIP with the Commission on January 6, 2012. Thereafter, “[n]o later than April 1 of each subsequent year, the utility shall submit to the Commission a report that includes any updates to the plan, a schedule for the next calendar year, *the expenditures made for the prior calendar year and cumulatively*, and the number of full-time equivalent jobs created for the prior calendar year and cumulatively.” *Id.* (emphasis added). In other words, ComEd’s first annual report under Section 16-108.5(b) will be due on April 1, 2013, and will include, among other things, *the expenditures made for the prior calendar year and cumulatively*. This means that the Commission will have a detailed report on the 2012 EIMA expenditures one full month prior to the annual formula rate update filing for the 2012 reconciliation.

Second, each participating utility must file a separate Advanced Metering Infrastructure Deployment Plan (“AMI Plan”). ComEd filed its AMI Plan on April 23, 2012, and the Commission approved it on June 22, 2012. Thereafter, “[o]n April 1 of each year beginning in 2013 ... each participating utility shall submit a report regarding the progress it has made toward completing implementation of its AMI Plan.” 220 ILCS 5/16-108.6(e). In this report, ComEd must: “(1) describe the AMI investments made during the prior 12 months and the AMI investments planned to be made in the following 12 months; (2) provide sufficient detail to determine the utility's progress in meeting the metrics and milestones identified by the utility in its AMI Plan; and (3) identify any updates to the AMI Plan.” *Id.* Again, this report is due one full month prior to the date on which the annual formula rate update is filed for that same calendar year.

Further, each of these annual reports is a substantive and detailed filing. Indeed, to the extent a utility's annual report reveals that "the utility is materially deficient in satisfying a schedule or staffing plan, then the report must also include a corrective action plan to address the deficiency." 220 ILCS 5/16-108.5(b); 220 ILCS 5/16-108.6(e) (providing for a similar corrective action plan process).

In sum, a careful review of the EIMA framework clarifies that its individual subsections have been designed to work in concert with each other. Because of the detailed reporting obligations set forth in Section 16-108.5(b) and Section 16-108.6(e), there was no need for the General Assembly to impose additional reporting requirements in Section 16-108.5(d)'s annual formula rate update filings. Well before such filing, ComEd will have provided two detailed reports on its EIMA investment. This information can be used by Staff and intervenors to inform their discovery efforts beginning on day one, and therefore already provides increased transparency and efficiency in conducting discovery on these investments to determine their prudence and reasonableness. Further, as ComEd explains in its Initial Brief, ComEd has routinely provided detailed information specific to many of its larger projects as well as a variety of other data about investments and their cost. ComEd will do the same in its future formula rate filings under EIMA. ComEd submits that it could also provide with its filing the incremental investment calculated as specified in EIMA, *i.e.*, as a difference between actual or forecast investment and the statutory average investment baseline; however that data will already appear in ComEd's annual EIMA reports. Thus, ComEd would simply be repeating the provision of this information, and it is not a calculation with any ratemaking significance. ComEd Init. Br. at 63-64.

With respect to AG/AARP's claim that "[n]either the initial January 6, 2012 Infrastructure Investment Plan nor the annual updates of the Plan includes a mechanism to review the reasonableness of the amounts spent on particular projects", it is clear that they do not understand how EIMA operates. *See* AG/AARP Init. Br. at 26. The annual formula rate proceedings provide Staff and intervenors with full opportunity to review and challenge all costs, including, but not limited to, EIMA costs, a directive made explicit in EIMA:

Nothing in this Section shall prohibit the Commission from investigating the prudence and reasonableness of the expenditures made under the infrastructure investment program during the annual review required by subsection (d) of this Section and shall, as part of such investigation, determine whether the utility's actual costs under the program are prudent and reasonable.

220 ILCS 5/16-108.5(b-5). Given the clear assurance of full prudence and reasonableness reviews, the additional requirements that Staff and AG/AARP attempt to impose here appear to be an unlawful attempt to hold EIMA investment to some undefined *higher* standard of review, which flatly contradicts the law.

Staff's Proposal Is Impracticable, Unduly Burdensome, and Contrary to EIMA's Methodology for Identifying Incremental Costs. In light of EIMA's existing reporting structure, its assurance that all EIMA expenditures are subject to the Commission's well-established prudence and reasonableness standard, and Staff's and intervenors' ability to conduct efficient discovery, there is absolutely no need to impose the sort of itemized tracking of EIMA investment proposed by Staff. As explained below, such tracking is highly impracticable, would impose additional and unknown implementation costs, and is contrary to the methodology for identifying incremental investment established in EIMA.

First, Staff's requirement that each EIMA cost be separately called out and identified in each annual formula rate update filing is simply impracticable. While ComEd has allocated

portions of the estimated \$2.6 billion investment to the various projects specified in EIMA over a 10-year period (*see generally* ComEd's IIP) and will annually report on its progress in making that investment, it is quite another thing to require that a utility be able to separate, in a given category of investment, "EIMA spend" and "baseline spend". A short example demonstrates this very real problem. In an area of investment such as cable replacement, ComEd annually undertakes cable replacement projects. With the increased investment in cable replacement under EIMA, ComEd will be replacing more cable than it otherwise would have. However, this does not mean that one particular mile of cable can be labeled as "EIMA spend" while another particular mile of cable can be labeled as "non-EIMA" or "baseline" spend. Rather, all cable replacement is funded out of a single larger budget.

As further confirmed by ComEd witness Dr. Hemphill, EIMA investments are not simply "bolt on" additions to a baseline investment program that can be easily parsed out. Rather, EIMA investment adds funds to many existing baseline programs, thereby increasing the overall level of investment in a given program each year. Moreover, as new investments are made, they change the nature of the system and affect future investments and costs. Over time, it will rapidly become impractical, and then completely impossible, for ComEd to say how it would have reacted to those changes, and with what changed investments, absent EIMA's requirements. ComEd Init. Br. at 62; Hemphill Sur., ComEd Ex. 18.0, 6:107-117.

EIMA wisely avoids this issue by adopting a separate methodology for determining the level of incremental investment, which should be followed here. According to Section 16-108.5(b), the amount of the utility's incremental investment is not determined by comparison to a base case or by characterizing individual investments or their costs, but rather:

as defined by, for purposes of this subsection (b), the participating utility's average capital spend for calendar years 2008, 2009, and 2010 as reported in the applicable Federal Energy Regulatory Commission (FERC) Form 1.

220 ILCS 5/16-108.5(b); *see also* Hemphill Sur., ComEd Ex. 18.0, 6:119-124. In other words, EIMA renders superfluous the inquiry of whether a given cost of delivery service was made possible by EIMA.

Given the significant challenges posed by Staff's proposal, the costs associated with what appears to be an unworkable reporting requirement are unknown. As Dr. Hemphill testified, ComEd does not track the information that Staff now seeks. Tr. at 51:11. As a result, the implementation of Staff's proposal, even if possible, is likely to be costly when one considers the consulting and Information Technology costs that would likely be incurred. How such expense would impact EIMA investment is also unknown. The General Assembly selected what it believed to be the most efficient and timely options for annual reporting and identification of incremental spend. In hindsight, the wisdom of these choices is only magnified when compared to the complications of Staff's proposal.

b. Contributions to Energy Low-Income and Support Programs

As a participating utility, ComEd is obligated to make annual contributions of \$10 million for five years to support energy low-income and support programs. 220 ILCS 5/16-108.5(b-10). EIMA also requires that ComEd file annual reports documenting these disbursements, and specifies that the contributions are not a recoverable expense. Even though these contributions are not recoverable through the formula rate, Staff proposes that the Commission impose extra-statutory requirements *in the formula rate proceedings* requiring that ComEd report that the costs were incurred, that they were excluded from the revenue requirement, and provide evidence of such exclusion. Staff Init. Br. at 41-44. In other words,

Staff would rewrite (and essentially duplicate) the annual reporting requirement that already exists under Section 16-108.5(b-10), as well as impose some sort of increased reporting or evidentiary standard on ComEd related to these particular costs.

Although ComEd excludes other non-recoverable costs from its formula rate input data (*e.g.*, lobbying costs), Staff provides no credible rationale for why these particular costs should be treated differently and subject to an additional pre-filing requirement. Staff only argues that it is “crucial” that the Commission know the amount of funds disbursed on energy low-income and support programs at the time of the formula rate filing because expenditures made pursuant to Section 16-108.5(b-10) are not recoverable, and otherwise the Commission would not be able to ensure that the costs are not included in recoverable costs with ComEd’s formula rate filing. Staff Init. Br. at 42. However, that argument ignores the reality of formula rate proceedings. In every formula rate proceeding brought pursuant to EIMA, Staff and intervenors use discovery, testimony, and cross-examination to investigate and challenge the recoverability of costs. It is through this process that Staff and intervenors can assure themselves that ComEd has not included any Section 16-108.5(b-10) contributions in the formula rate proceeding or any other non-recoverable costs (*e.g.*, lobbying expenses). Furthermore, EIMA already grants the Commission explicit authority “to audit disbursement of the funds to ensure they were disbursed consistently with this Section.” 220 ILCS 5/16-108.5(b-10). Staff fails to explain why this ample authority is inadequate.

Finally, to ensure that the Section 16-108.5(b-10) annual report is timely filed, ComEd has proposed to work with Staff promptly to develop a mutual recommendation for submitting this report prior to the annual formula rate update, to allow for a timely and thorough review of Section 16-108.5(b-10) expenditures. ComEd Init. Br. at 64-65. Accordingly, the Commission

should reject the proposal to combine and confuse separate and distinct subsections of EIMA by requiring reporting of the energy low-income and support program contributions in connection with the formula rate filing.

4. Format of Revenue Requirement Schedules and Related Documents

ComEd and Staff agree that Sch. FR A-3, WP 22, and App 3 should be corrected and revised as to the ROE Collar adjustment, as discussed here and in Section VIII.C.1, *supra*. ComEd Init. Br. at 58-59, 65; Staff Init. Br. at 33-34, 44-45. Intervenors did not address this subject.

With respect to Staff's Initial Brief (at 45) regarding the inclusion of "traditional" revenue requirement schedules in the appendix to the Commission's final Order, ComEd does not oppose such inclusion but adheres to its view that the formula rate template should also be used in the Commission's final Order to ensure that the calculations are aligned. ComEd Init. Br. at 65. AG/AARP's Initial Brief (at 27-29) also advocates inclusion of both the "traditional" and the formula rate schedules in the appendix to the Commission's final Order.

IX. CONCLUSION

For all reasons appearing of record and herein, the Commission should approve ComEd's filing, subject to those corrections and revisions, and proposed acceptances of proposals in order to narrow the issues, made in its rebuttal and surrebuttal testimony, and in its compliance filings.

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Respectfully submitted,

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