

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company :
: **12-0321**
Annual formula rate update and revenue :
requirement reconciliation authorized by :
Section 16-108.5 of the Public Utilities Act. :

**COMMONWEALTH EDISON COMPANY'S
EXCEPTIONS TO THE PROPOSED ORDER**

November 29, 2012

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Annual formula rate update and	:	12-0321
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PROPOSED ORDER

I. Introduction

Section 16-108.5 of the Public Utilities Act (the “PUA” or the “Act”) provides that an electric utility or combination utility serving more than one million customers may elect to become a “participating utility” and voluntarily undertake an infrastructure investment program as described therein. 220 ILCS 5/16-108.5(b). A participating utility is allowed to recover its expenditures made under the infrastructure investment program through the ratemaking process, in the manner that is set forth in Section 16-108.5. *Id.*

On November 8, 2011, Commonwealth Edison Company (“ComEd”) filed its first performance-based formula rate tariff, Rate DSPP – Delivery Service Pricing and Performance (“Rate DSPP”) pursuant to Section 16-108.5, which the Commission suspended on that same day. Suspension Order, Docket 11-0721, November 8, 2011. The Commission issued its Final Order in Docket 11-0721 on May 29, 2012.

On June 5, 2012, ComEd filed an Application for Rehearing. The Commission granted this Application in part and denied it in part on June 21, 2012. Rehearing was granted on the following three issues: the pension asset issue, average year vs. year-end rate base; and the methodology regarding calculation of interest on reconciliation adjustments. The Commission issued an Order on Rehearing on October 3, 2012, affirming its decision from the May 29 Order on the average vs. year-end rate base issue. Order on Rehearing, Docket 11-0721, October 3, 2012 at 18. It also concluded that the interest rate on reconciliation adjustments should be at a rate that is equivalent to the cost of ComEd’s short term debt. *Id.* at 36. Regarding the pension asset issue, the Commission found that ComEd had a “pension asset” as defined by the amount listed in its Federal Energy Regulatory Commission (“FERC”) Form 1, subject to accuracy and other items that Section 16-108.5 of the Act provides. *Id.* at 24.

Section 16-108.5(d) provides in relevant part:

Subsequent to the Commission's issuance of an order approving the utility's performance-based formula rate structure and protocols, and initial rates under subsection (c) of this Section, the utility shall file, on or before May 1 of each year, with the Chief Clerk of the Commission its updated cost inputs to the performance-based formula rate for the applicable rate year and the corresponding new charges.

220 ILCS 5/16-108.5(d).

Section 16-108.5(d) further specifies the requirements for this annual filing as follows:

Within 45 days after the utility files its annual update of cost inputs to the performance-based formula rate, the Commission shall have the authority, either upon complaint or its own initiative, but with reasonable notice, to enter upon a hearing concerning the prudence and reasonableness of the costs incurred by the utility to be recovered during the applicable rate year that are reflected in the inputs to the performance-based formula rate derived from the utility's FERC Form 1.

...

In a proceeding under this subsection (d), the Commission shall enter its order no later than the earlier of 240 days after the utility's filing of its annual update of cost inputs to the performance-based formula rate or December 31.

...

A participating utility's first filing of the updated cost inputs, and any Commission investigation of such inputs pursuant to this subsection (d) shall proceed notwithstanding the fact that the Commission's investigation under subsection (c) of this Section is still pending and notwithstanding any other law, order, rule, or Commission practice to the contrary.

Id.

On April 30, 2012, ComEd filed a petition seeking relief pursuant to the statutory language above, thus initiating the instant docket. In a Staff Report issued and distributed April 30, 2012 from the Financial Analysis Division, Commission Staff recommended initiating an investigation of the filing. The Commission concurred with the recommendation and initiated an investigation concerning the prudence and reasonableness of the ComEd's costs. Initiating Order of May 2, 2012.

The following ComEd witnesses testified in this case: Dr. Ross C. Hemphill (ComEd Exs. 1.0R, 1.1, 11.0, 18.0), Kathryn M. Houtsma (ComEd Exs. 2.0R, 12.0, 12.1), Martin G. Fruehe (ComEd Exs. 3.0R, 3.1 – 3.9, 10.1 – 10.5, 13.0, 19.0 – 19.8), Joseph R. Trpik, Jr., (ComEd Exs. 4.0, 14.0 – 14.3, 10.7, 10.14), John Hengtgen (ComEd Exs. 5.0 – 5.2, 16.0 – 16.4, 21.0), Michelle Blaise (6.0R, 6.1 – 6.3), Ronald E. Donovan (ComEd Exs. 7.0R – 7.2R), Michael F. Born (ComEd Exs. 8.0 – 8.2, 17.0 –

17.2), Charles S. Tenorio (ComEd Exs. 9.0 – 9.9), and Todd J. Jirovec (ComEd Exs. 15.0 – 15.4, 20.0).

The following Staff witnesses submitted testimony in this case: Burma C. Jones (Staff Exs. 1.0 and 6.0), Richard W. Bridal II (Staff Exs. 2.0 and 7.0), Scott Tolsdorf (Staff Exs. 3.0 and 8.0), Michael McNally (Staff Exs. 4.0 and 9.0), Greg Rockrohr (Staff Exs. 5.0 and 10.0), and Philip Rukosuev (Staff Ex. 11.0).

In addition to ComEd and Staff, the following parties have submitted testimony in this case: the Citizens Utility Board (“CUB”), and the People of the State of Illinois (“AG”) and AARP (collectively, “AG/AARP”). CUB provided the testimony of Ralph C. Smith (CUB Exs. 1.0 – 1.3, 2.0, 2.1, 3.0). AG/AARP provided the testimony of Michael L. Brosch (AG/AARP Exs. 1.0 – 1.9, 3.0 - 3.2), and David J. Efron (AG/AARP Exs. 2.0, 2.1, 4.0 – 4.3).

An evidentiary hearing convened in this matter in Chicago, Illinois on September 25, 2012. Initial Post-trial Briefs were filed and served on October 12, 2012. Reply Briefs were filed and served on October 22, 2012.

II. OVERALL REVENUE REQUIREMENT

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

ComEd states that before adding the reconciliation and return on equity (“ROE”) collar adjustments which are discussed below, its revenue requirement is \$1,959,382,000. ComEd Ex. 19.1, Sch FR A-1. After application of the rulings in the Commission’s Order on Rehearing in Docket 11-0721, (ComEd’s previous formula rate case) the final revenue requirement that ComEd seeks is \$2,030,958,000.

B. 2011 Reconciliation and ROE Collar Adjustments

The total revenue requirement (the net revenue requirement per the formula rate template) to be reflected in delivery service charges beginning in January of 2013 includes a reconciliation adjustment and a ROE collar adjustment. The reconciliation adjustment reflects the reconciliation of the revenue requirement approved pursuant to previous ComEd rate orders that are in effect in 2011, weighted with the actual revenue requirement for 2011. ComEd Ex. 2.0 at 6. ComEd’s reconciliation adjustment, including interest, is a reduction of \$24,035,000 to the revenue requirement discussed in II.A herein. Its ROE collar adjustment is an increase of \$18,030,000. ComEd Ex. 19.1, Sch FR A-1. Neither Staff nor the Intervenors took issue with these amounts.

C. Total Revenue Requirement

The revenue requirements that are attached to Staff’s Reply Brief (Appendices A & B) reflect the conclusions from the Order on Rehearing entered on October 3, 2012 in Docket 11-0721. Pursuant to the Order on Rehearing: (1) ComEd is allowed to recover pension funding costs on the amount listed as a pension asset in its FERC Form 1; and

(2) the interest on reconciliation adjustments is to be calculated using ComEd's cost of short-term debt. Order on Rehearing, Docket 11-0721, October 3, 2012 at 24, 36. As a result, there are two changes to the revenue requirements: (1) an addition of \$71,576,000 to expense for pension asset funding cost; and (2) a change in the interest rate, from 3.42% to 0.71%. Neither change affected the ROE collar adjustment, but the reconciliation adjustment decreased from a negative \$103,001,000 to a negative \$24,910,000.

Technical Exception No. 1

After including these changes, ComEd's proposed total revenue requirement, upon which, the rates in 2013 will be based is \$2,024,953,000.—~~Neither Staff nor the intervenors contested the propriety of ComEd's proposed total revenue requirement.~~

III. RATE BASE

A. Overview

Technical Exception No. 11

ComEd's final revised proposed rate bases are \$6,025,650,000 for the reconciliation year and \$6,367,003,000 for the ~~projected piece of this proceeding~~ 2013 inception revenue requirement (which is based on 2011 costs and 2012 projected plant additions and associated changes in depreciation and Accumulated Deferred Income Taxes (ADIT)), (See, ComEd Ex. 19.1, Sch. FR B-1, lines 28 and 36) using the average rate base method for the reconciliation figure. ComEd states that its rate bases are calculated using final 2011 FERC Form 1 balances, functionalization of plant between the transmission and distribution functions, the applicable ratemaking adjustments consistent with the statute, plus, in the 2013 inception revenue requirement, its estimated 2012 plant additions, and also minus the corresponding updating of its accumulated reserve for depreciation and amortization. ComEd Ex. 3.0 REV at 18-20. The contested adjustments to rate base proposed by various intervenors and Staff are discussed in Section III.C of this Order.

B. Potentially Uncontested Issues

1. Plant-in-Service

Staff recommends that the Commission accept the Company's 2012 projected plant additions and its related accumulated depreciation, depreciation expense and accumulated deferred income taxes, as is reflected on Staff Ex. 6.0, Schedule 6.03 FY. ComEd updated its 2012 projected plant additions in its rebuttal testimony. ComEd Exs. 11.0, at 8-9; 13.0 at 8-9; 14.0 at 12-13. No party contested this projection. ComEd's figures in this regard are approved.

a. Distribution Plant

ComEd's Distribution Plant is on ComEd Ex. 19.1, Sch. FR b-1, Lines 4 and 29. Neither Staff nor any Intervenor took issue with ComEd's Distribution Plant. The Commission therefore approves the foregoing Distribution Plant costs.

b. General and Intangible Plant

ComEd's General and Intangible ("G&I") Plant is at ComEd Ex. 19.1, Sch FR B-1, line 5 and 31. Staff and the Intervenor did not take issue with ComEd's General and Intangible Plant. The Commission therefore approves this item.

c. Plant Additions

ComEd's Plant Additions are at ComEd Exs. 13.03, Sch. B-2.4 FY; 13.04, WPB-2.4 FY. There are no issues in this proceeding regarding ComEd's Plant Additions. The Commission therefore approves the 2012 Plant Additions.

d. Original Cost Finding

ComEd requests that the Commission approve the original cost of plant in service as of December 31, 2011, after adjustments, in the amount of \$14,996,019,000. ComEd Ex. 13.0 at 10. Staff agrees with the original cost determination requested by the Company. Accordingly, Staff recommends that the Commission unconditionally approve \$14,996,019,000 as the original cost of plant as of December 31, 2011, as presented in ComEd Ex. 13.06. Should the Commission make any additional adjustments to historical plant, Staff opines, those additional adjustments should also be considered in the original cost determination. Further, Staff recommends that the Commission include the following language in the Findings and Orderings paragraphs of its Order in this proceeding:

(#) the Commission, based on ComEd's proposed original cost of plant in service as of December 31, 2011, before adjustments, of \$15,036,912,000, and reflecting the Commission's determination adjusting that figure, unconditionally approves \$14,996,019,000 as the composite original cost of jurisdictional distribution services plant in service as of December 31, 2011.

2. Materials & Supplies

Technical Exception No. 11

ComEd's Distribution Plant Materials & Supplies ("M&S") inventory in rate base for the reconciliation and the ~~projected piece of its filing~~ 2013 inception revenue requirement are uncontested. They are located at ComEd Ex.19.1, Sch FR B-1, line 18; ComEd Ex. 13.03, Sch. B-1RY, Col. D, line 11; ComEd Ex. 13.03, Sch. B-1 FY, Col. D, line 11. The Commission approves this component of rate base.

3. Construction Work in Progress

Technical Exception No. 11

ComEd's Construction Work in Progress ("CWIP") is at ComEd Ex. 19.1, Sch FR B-1, line 14; ComEd Ex. 13.03, Sch. B-1 RY, Col. D, Neither Staff nor any Intervenor took issue with ComEd's assertions regarding this item. Therefore, the Commission approves this component of rate base, which applies only to the reconciliation.

4. Regulatory Assets and Liabilities

Technical Exception No. 11

ComEd's Regulatory Assets and Liabilities is comprised of (1) a regulatory asset representing the unamortized balance of capitalized incentive compensation costs, and (2) the unamortized balances of costs that are related to ComEd's Advanced Metering Infrastructure ("AMI") pilot. See ComEd Ex. 3.0 REV at 17-18. The Regulatory Assets and Liabilities for the 2011 reconciliation and the ~~projected portion of this filing~~ 2013 inception revenue requirement are uncontested. Therefore, the Commission approves this component of rate base.

5. Deferred Debits

Technical Exception No. 11

ComEd's Deferred Debits are comprised of (1) Cook County Forest Preserve Fees, which are licensing fees for distribution lines, (2) a Long Term Receivable from the Mutual Beneficial Association Plant that is related to ComEd's payments to a trust on behalf of union employees for short-term disability, for which, it is awaiting reimbursement; and (3) ComEd's adjustment to the operating reserve for accrued vacation pay as a result of the final Order in Docket 11-0721. ComEd Ex. 3.0 REV at 18; 10.4, Schedule B-2.8. The Deferred Debits for the reconciliation and the ~~projected portion of ComEd's filing~~ 2013 inception revenue requirement are uncontested and therefore are approved.

6. Other Deferred Charges

Technical Exception No. 11

ComEd's other Deferred Charges relating to incremental distribution costs for storms greater than \$10 million for the reconciliation and the ~~projected piece of its filing~~ 2013 inception revenue requirement are uncontested. Therefore, the Commission approves this component of rate base.

7. Accumulated Provisions for Depreciation & Amortization

ComEd's Operating Reserves and Deferred Liabilities for the reconciliation year and the project portion of its filing are uncontested. The Commission approves this component of rate base.

8. Accumulated Miscellaneous Operating Provisions

Technical Exception No. 11

ComEd's Operating Reserves and Deferred Liabilities for the reconciliation year and ~~the projected piece of its filing~~ 2013 inception revenue requirement are uncontested. The Commission approves this component of rate base.

9. Asset Retirement Obligation

Technical Exception No. 11

ComEd's Asset Retirement Obligation for the reconciliation and ~~the projected portion of its filing~~ 2013 inception revenue requirement are uncontested. Therefore, the Commission approves this component of rate base.

10. Customer Advances

Technical Exception No. 11

ComEd's customer advances for the reconciliation and the ~~projected filing~~ 2013 inception revenue requirement are uncontested. The Commission approves this component of rate base.

11. Customer Deposits

ComEd's customer deposits for the 2011 reconciliation year and the 2012 filing year are uncontested. Therefore, the Commission approves this component of rate base.

12. Other

There are no other rate base issues, apart from those addressed in Section III.C below.

C. Potentially Contested Issues

1. Cash Working Capital

ComEd's Position

ComEd states that this Commission should approve a Cash Working Capital ("CWC") requirement in rate base of negative \$21,274,000. ComEd initially presented and supported a Cash Working Capital requirement in rate base of \$42,439,000. See, ComEd Exs. 5.0; 5.1, 5.2, and 5.3. It revised that figure to reflect Commission determinations that were made in its last formula rate case, Docket 11-0721, as well as to reflect recent legal changes regarding when remittance of certain pass-through taxes are due to the City of Chicago. Staff did not contest ComEd's change related to the City of Chicago taxes, however, Staff provided a slightly different calculation based on its level of operating expenses, adding an amount of \$36,000, resulting in a Cash Working Capital figure of negative \$21,238,000. See, Staff Ex.6.0, Sch. 6.03 FY, line 11, Sch.

6.04 FY, col.(b), and Sch. 6.10 FY. ComEd did not calculate a new figure in its surrebuttal testimony. According to ComEd, no intervenor presented a different figure. ComEd Initial Brief at 16. With the exception of this \$36,000, ComEd does not seek any change in the tax treatment of Cash Working Capital.

Nevertheless, ComEd asks this Commission to overrule an evidentiary ruling regarding the tax treatment of Cash Working Capital. At the evidentiary hearing, ComEd attempted to enter into evidence a quote from Staff testimony from the Ameren formula rate case, Docket 12-0001. That quote was in ComEd witness Mr. Hentgen's testimony, ComEd Ex. 16.0 at 4-5. ComEd witness Mr. Hentgen was quoting Staff witness Mr. Kahle's testimony in the Ameren rate case, Docket 12-0001, concerning whether to consider current and deferred income taxes separately. In the previous formula rate case, Docket 11-0721, these two items were considered separately. However, in the first formula rate case for Ameren, Docket 12-0001, they were not considered separately.

The Administrative Law Judges struck that portion of ComEd's rebuttal testimony on evidentiary grounds. Tr. 37-50. According to ComEd, that ruling was erroneous as a matter of law because the Staff testimony from the Ameren rate case was admissible as a party-admission on the part of Staff pursuant to Ill. R. Evid. 801(d)(2). ComEd further argues that under Illinois law, it is error to exclude a party admission on the theory that it is not a statement against interest or other "admission," as long as the statement offered is inconsistent with the position of the party in the instant case, citing Graham, *Handbook of Illinois Evidence* 812-817 (10th ed. 2011); DiVito, *The Illinois Rules of Evidence* 102 (Rev. Mar 7, 2012).

ComEd also posits that Staff's rebuttal testimony in the instant Docket did not deny that Staff witness Mr. Kahle made a recommendation in the Ameren rate case that is different from what Staff witness Ms. Jones recommended here. Here, Staff took the position that reconsidering any change in the treatment of these taxes that had been directed by the final Order in Docket 11-0721, which issued in May of 2011 was beyond the scope of the instant Docket. See, Staff Ex. 6.0 at 10-11.

In the September 19, 2012, final Order in the first Ameren formula rate case, Docket 12-0001 the Commission stated in part as follows:

The Commission finds that AIC, (Ameren) as supported by Staff, has proposed the appropriate method in this docket for determining the appropriate income tax lead and lag. The Commission agrees that it has a long-standing practice of not considering current and deferred income taxes separately. The Commission finds no evidence present in this docket to cause it to vary from this treatment. The Commission recognizes that a different result was adopted in the ComEd docket, Docket No. 11-071 [sic]; however, the Commission recognizes that ComEd and AIC calculate income taxes using different methodologies. Should those methodologies align in the future, or new evidence be

presented, the Commission will certainly re-visit this issue in future proceedings.

Docket 12-0001, Final Order of September 19, 2012 at 29. ComEd acknowledges that Section 16-108.5(c)(1) requires application of Commission practice. Because ComEd agrees with Staff that this subject was addressed with respect to the formula rate by the *May 11-0721 Order*, it requests that the Commission, in the final Order here, include a paragraph that is similar to the above paragraph from the Ameren rate case Order stating that, if the methodologies align in the future or if new evidence is presented, the Commission will re-visit this issue in an appropriate future proceeding. ComEd Initial Brief at 16-17.

Staff's Position

According to Staff, the Commission need not make any decision in this proceeding regarding Cash Working Capital. Staff stated that although ComEd does not agree with Staff's methodology regarding the treatment of negative current income taxes and the associated deferred income taxes in the Cash Working Capital calculation, ComEd does not dispute that Staff's treatment of said taxes in the instant proceeding is consistent with the final Order that the Commission entered in Docket 11-0721, on May 29, 2012. In that Order, the Commission explicitly approved Staff's treatment of current and deferred income taxes in the Cash Working Capital calculation. Staff Initial Brief at 8-9.

Analysis and Conclusions

Technical Exception No. 2

There are really three issues here-the unexplained \$36,000 difference between ComEd's figures and those provided by Staff; whether a statement in another rate proceeding regarding a different utility, which could involve different facts, is a party-admission on the part of Commission Staff; and whether at some point in the future, the formula rate methodologies regarding these taxes should be revisited for purposes of consistent treatment of utilities. ~~With regard to the first issue, Staff does not argue that ComEd's figures should be adjusted by this amount. Therefore, w~~We conclude that the propriety of ComEd's determination that this \$36,000 should be excluded from Cash Working Capital has been established, provided that the final Cash Working Capital figure should reflect this Order's rulings on those operating expenses issues that affect inputs to the Cash Working Capital calculation.

With regard to the last issue, the Commission concludes that, if the methodologies align in the future or new evidence is presented, the issue of computation of certain taxes (set forth above) should be revisited. While consistency in treatment of utilities is not always possible due to the fact that there are different factual situations amongst utilities, consistency is a desirable result.

This leaves the second issue pertaining to the admissibility of evidence from another case as a Staff admission under the facts presented. The paragraph directly above acknowledges that a different tax treatment took place in the first Ameren formula rate case, Docket 12-0001. It also acknowledges that this issue may be revisited in the future. Therefore, the issue of what was done in that case and its impact on future ComEd rate cases appears to be moot.

~~Even if this issue were not moot, exclusion of what another Staff witness testified to in another rate case, under the fact presented here, was in accordance with Illinois law. The Rule of Evidence cited by ComEd is as follows:~~

Admission by Party-Opponent. ~~The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy or (F) a statement by; a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.~~

~~Ill. R. Evid. 801(d)(2). Thus, for a statement by a Staff expert witness in another docket to be an admission here, there must be some sort of agency type of relationship between the two Staff witnesses. None was alleged and none is obvious, except to the extent that the two experts are co-workers at the same state agency. It is error to admit an admission of one person as an admission against another person. See, e.g., *Rowe v. State Bank of Lombard*, 247 Ill. App. 3d 686, 695, 616 N.E.2d 520 (2nd Dist. 1993).~~

~~ComEd provided no information indicating that all of Commission Staff can be considered as one "party" in a Commission proceeding for purposes of finding that one Staff member's statement can be imputed to another. In fact, ComEd provides no legal reasoning or facts to support its theory that the Ameren testimony in question is an admission, other than to state that it involves different tax treatment than what it received previously in Docket 11-0721. See, ComEd Initial Brief at 16-17.~~

~~Additionally, an admission is evidence that is damning, in that it is evidence of guilt, or, it is evidence that leads a trier of fact to matters upon which guilt can be inferred, or it is otherwise probative of another party's case in chief as to a material fact. See, e.g., *Ficken v. Alton & Southern Railway Co.*, 291 Ill. App. 3d 635, 646-47, 685 N.E.2d 1 (5th Dist. 1996); *Zaragoza v. Ebenroth*, 332 Ill. App. 3d 139, 141-42, 770 N.E.2d 1238 (3rd Dist. 2002). The evidence from the Ameren docket was an expert opinion of another Staff member, Mr. Kahle, as opposed to Burma Jones, Staff's accounting expert here. This testimony concerned another utility, Ameren, which could have been based upon different facts than those that are present here. ComEd made~~

~~no attempt in its offer of proof to establish that the same factual situation is present here as that which was present in the Ameren docket. Tr. 44-52.~~

~~Without more, there is nothing unusual about two experts having differing opinions. At a minimum, ComEd acknowledges that the statute governing formula rate cases, Section 16-108.5(c)(1), requires application of Commission practice, (See ComEd Initial Brief at 16-17) which necessarily involves adherence to what was done before regarding a particular utility, unless different facts or laws are present. Thus, ComEd has not established that the different tax treatment in a different rate case involving a different utility (Ameren in Docket 12-004) establishes a material fact here. Additionally, because ComEd did not establish that this testimony is an admission, it is hearsay, for which, ComEd did not establish any applicable exception to the hearsay rule.⁴~~

~~This is not to suggest that another expert opinion that differs from that of a particular witness is not a legitimate line of inquiry. It can be a very legitimate line of inquiry, especially upon cross-examination of an expert witness. However, here, Mr. Hentgen's testimony contained an excerpt from Staff witness Mr. Kahle's testimony. By placing this quote in ComEd's testimony, ComEd effectively bypassed the opportunity for Ms. Jones to explain why her expert opinion differed from that of Mr. Kahle in the Ameren formula rate case. Such an opportunity to explain would have been provided, if ComEd had merely cross-examined Ms. Jones regarding Mr. Kahle's opinion in the Ameren formula rate case. That was not done here.~~

[The primary proposal here is to remove the preceding five paragraphs but, in the alternative, ComEd proposes that, in addition to removing those paragraphs, the following additional language be added.]

Setting aside that the evidentiary issue is moot because the subject is not before the Commission in the instant Docket, and, in addition, because what is the Commission's long-standing practice has been stated in the final Order in the 2011 Ameren rate case, the Commission notes that it agrees with ComEd that the Staff testimony from the 2011 Ameren rate case regarding what is Commission practice on this subject is admissible as a party admission under Ill. R. Ev. 801(d)(2). See, e.g., M. Graham, Handbook of Illinois Evidence 812-817 (10th ed. 2011) (discussing party admissions). A party admission is not a binding admission, in the sense that it cannot be controverted, but it is proper evidence.

2. Accumulated Deferred Income Taxes

The AG/AARP Position

According to the AG/AARP, ComEd's calculation of the Accumulated Deferred Income Taxes ("ADIT") which is related to vacation pay is flawed. They also opine that

¹ An admission is non-hearsay. Ill. R. Evid. 801(d).

it is inconsistent with state and federal income tax rates, as well as with the Commission's recent order in Docket 11-0721, ComEd's first formula rate proceeding. They seek to reduce ComEd's rate base by \$8,540,000.

The AG/AARP aver that ComEd's calculation of the rate base ADIT deduction for accrued vacation pay is shown on ComEd Ex. 10.3, WP 5, p. 6. They acknowledge that ComEd also calculated an ADIT debit that was related to capitalized vacation pay. That deferred debit, the AG/AARP continue, was added back to rate base on ComEd Ex. 10.3, WP 5, p. 5. AG/AARP Initial Brief at 7.

However, the AG/AARP continue, when making this adjustment, ComEd asserted that, because vacation pay is charged to specific capital projects during the year in which ComEd's employees use that vacation pay, the cost of the estimated vacation pay liability that is expected to be distributed to capital in the following year is recorded as a deferred debit to the ComEd general ledger in FERC Account 186-Deferred Debits. The AG/AARP state that ComEd (incorrectly) averred that the rate base deduction for accrued vacation pay should be reduced by the amount of this related and deferred ADIT debit, because these deferred costs were not recovered from ratepayers. *Id.*

AG/AARP witness Mr. Effron agreed with ComEd's position, to the extent that accrued vacation pay was not included in its operating expenses and is not included in ComEd's plant that is either in rate base or in accruing AFUDC.² He opined that this portion of accrued vacation pay should not be included in the operating reserves that are deducted from rate base. However, he took issue with ComEd's treatment of the deferred ADIT debit balance, which is related to accrued vacation pay, as a separate addition to its rate base. Mr. Effron additionally opined that the deferred debit to rate base that ComEd added does not require investor-supplied funds. According to Mr. Effron, this deferred debit should not be included in ComEd's rate base. Rather, he testified, this debit balance should be netted against the accrued vacation pay that is included in operating reserves. AG/AARP Initial Brief at 7-8.

Mr. Effron calculated the effect of netting the deferred debit against the accrued vacation pay that is included in operating reserves. Schedule DJE-1 eliminates the deferred debit from rate base. Instead, it offsets the deferred debit against the accrued vacation pay that was included in operating reserves. Mr. Effron then calculated the deferred taxes by multiplying the accrued vacation pay, net of the deferred debit, by the combined income tax rate of 41.175%. The net rate base deduction that Mr. Effron calculated is \$8,540,000 greater than ComEd's net rate base deduction calculation. (*Id.* at 8).

Mr. Effron testified that, referring to ComEd Ex. 10.3, WP 5, page 6, it can be seen that the average jurisdictional balance of accrued vacation pay in 2011 was \$46,027,000. ComEd removed \$20,741,000 of this balance (representing accrued

² AFUDC is an Allowance for Funds Used During Construction. FERC.USA.gov.

vacation pay that was not included in operating expenses and was not included in the plant that is either in rate base or in accruing AFUDC) from the balance that it deducted from rate base, leaving a net vacation pay balance of \$25,286,000 that is deducted from rate base.

ComEd's proposal, the AG/AARP continue, is to offset a deferred tax debit balance of \$18,952,000 against this \$25,286,000 rate base deduction for accrued vacation pay. Mr. Effron testified that this might be "appropriate," if ComEd's combined state and federal income tax rate were 75%. However, the AG/AARP aver, ComEd's combined income tax rate is 41.175%. They conclude that thus, the ADIT debit balance that is consistent with the net balance of accrued vacation pay of \$25,286,000 deducted from rate base is \$10,412,000 (41.175% of 25,286,000), which is \$8,540,000 less than the ADIT debit balance of \$18,952,000 that ComEd added to rate base. AG/AARP Initial Brief at 9.

The AG/AARP additionally argue that Mr. Effron's proposed calculation of the deferred tax debit balance to be included in rate base is consistent with the method adopted by the Commission in Docket 11-0721. The AG/AARP maintain that in Docket 11-0721, the Commission did not eliminate the accrued vacation pay included in operating expenses from the rate base deduction for accrued vacation pay. (*Id.*).

CUB's Position

CUB takes issue with the fact that ComEd recorded ADIT on its accrued vacation pay liability but did not record ADIT on the deferred debit balance of accrued vacation pay that it expects to capitalize. (CUB Reply Brief at 3). CUB points out that, in ComEd's last formula rate case, this Commission determined that Accrued Vacation Pay can be a source of non-investor supplied funding supporting rate base, and the Accrued Vacation Pay liability should be deducted from rate base, citing the final Order in Docket 11-0721 at 67-70. In this case, CUB asserts, ComEd correctly reduced rate base by \$25.286 million for Accrued Vacation Pay on a jurisdictional basis, but, according to CUB, ComEd did not coordinate the amount of ADIT that is added to rate base so that it matches the amount of rate base deduction for Accrued Vacation Pay. CUB posits that ComEd's improper matching resulted in ComEd overstating rate base by \$8.54 million. CUB Initial Brief at 6-7.

CUB states that a deferred debit is a cost that ComEd defers, which is accounted for as an asset on ComEd's books. ComEd recorded the Accrued Vacation Pay deferred debit in Account 186, Miscellaneous deferred debits. CUB cites that FERC Uniform System of Accounts for Electric Utilities, which provides that Account 186 shall include: (1) all debits not elsewhere provided for, (2) unusual or extraordinary expenses, not included in other accounts, which are in the process of amortization or (3) items the final disposition of which, is uncertain. (*Id.* at 7). CUB argues that because the deferred debit portion of Accrued Vacation Pay represents a temporary difference, ADIT accrues on the deferred debit portion, just as it does on the Accrued Vacation Pay liability.

CUB avers that the ADIT that is related to the rate base offset for accrued vacation pay is determined by multiplying the accrued vacation pay, net of the deferred debit, by the combined income tax rate of 41.175%. *Id.* at 7; CUB Ex. 2.0 at 2. CUB finally disputes the veracity of ComEd's argument that its witness Mr. Smith and AG/AARP witness Mr. Effron imputed a deferred tax liability. Instead, CUB continues, these experts limited the deferred tax debit balance that was included in rate base to the correct amount, consistent with the net accrued vacation pay that is deducted from ComEd's rate base, citing AG/AARP Ex. 4.0 at 2.

Staff's Position

Staff does not recommend reducing ComEd's rate base by the ADIT that CUB and the AG/AARP associate with the accrued vacation pay deferred debit. Staff opines that such deferred taxes were not definitively shown to exist in this proceeding.

Staff contends that this issue is not the same as the issue of ADIT that is related to the accrued vacation pay reserve, which was litigated in ComEd's previous formula rate case, Docket 11-0721. In its compliance filing in this proceeding, ComEd Ex. 10.2, Staff continues, ComEd correctly included adjustments that the final Order in Docket 11-0721 required, thus reducing rate base by the average accrued vacation pay reserve. Also, according to Staff, ComEd correctly included the corresponding adjustment to ADIT. Staff avers that the ADIT proposal at issue here, however, is related to ComEd's choice in this proceeding to include in rate base a deferred debit related to the vacation pay reserve that was not included in Docket 11-0721, and the Intervenor's belief that there should be a further adjustment to the ADIT that is associated with the newly-included deferred debit. Staff Initial Brief at 9-10.

Staff is of the opinion that the CUB AG/AARP proposal (above) would be valid, only if the deferred taxes actually exist. Although Staff did not take a definitive position on the Intervenor proposal in testimony, Staff notes that neither the Intervenor nor ComEd provided evidence as to any authoritative accounting or financial reporting guidance in support of their respective positions on the issue. Staff states that its own review of this issue did not identify any precedent, statutory guidance, or any governing accounting or financial reporting authority which directly supported the Company or Intervenor positions.

Staff points out that the only record citations to any governing accounting or financial reporting authorities are found in ComEd's response to Staff DR RWB 12.01, which is Staff Cross Ex. 1.0. Even there, Staff opines, the applicability of that authority to the issue at hand is questionable. Staff concludes that it is unclear if there is a basis for the AG/AARP and CUB assertion that there is a deferred tax liability which is related to the accrued vacation pay deferred debit. In Staff's view, ADIT is a complicated topic, which requires careful analysis. Staff Initial Brief at 10.

ComEd's Position

ComEd states that as of December 31, 2011 the level of ADIT on vacation pay (after adjustments) that should be deducted from rate base is \$2,469,748,000. Thus, according to ComEd, any further deduction, as is proposed by the AG/AARP and CUB, is not warranted. ComEd avers that its calculation was derived through an analysis of the components of the deferred tax balances and then either by directly assigning or allocating the items based on assignment, or by allocating the operating items to which they relate. ComEd contends that its 2011 ADIT balance is reflective of the 100% bonus depreciation that is applicable to 2011 capital investments, as well as the adoption of the safe harbor method of tax accounting for repair costs. ComEd Initial Brief at 18.

ComEd continues to state that ADIT typically includes both deferred income tax liabilities and deferred income tax assets. In general, it avers, a deferred income tax liability is booked when a company recognizes an expense for income tax purposes, but not for book purposes, as, actual income taxes paid are less than those that are recognized on an income statement. A deferred income tax asset is booked when a company records an expense for book purposes but not for income tax purposes, because the actual income taxes paid are greater than what is recognized on an income statement. For ratemaking purposes, ComEd continues, deferred income tax assets increase rate base and deferred income tax liabilities decrease rate base. *Id.*

ComEd further posits that at the end of each calendar year, it records a liability that is related to the vacation pay that it expects to incur during the next year. The recoding of this liability is referred to as the “operating reserve” for accrued vacation pay. ComEd avers that it does not record an expense for income tax purposes that is related to the full amount of this liability, but it does recognize the expense for book purposes. As a result, ComEd states, it does not receive the full amount of the income tax benefit in that year and a deferred income tax asset is booked. ComEd maintains that it also records a vacation pay deferred debit which is related to the vacation pay which ultimately will be capitalized, but it does not include this amount as a reduction to expense for either income tax or book purposes, resulting in no deferred tax booked for the vacation pay deferred debit. *Id.* at 19.

According to ComEd, the AG/AARP and CUB have essentially imputed a deferred tax liability, which reduces its rate base, when none exists. As of December 31, 2011, it states, there was a deferred income tax asset, which increased its rate base in a manner that is associated with the vacation pay operating liability of \$18,116,000. ComEd argues that this amount fully-reflects the deferred tax impacts that are associated with ComEd’s accrual of a vacation pay liability. It maintains that no other deferred income taxes appear on its books that are related to, either its vacation pay deferred debit, or its operating liability, as of December 31, 2011. It points out that Section 16-108.5(c) and (d) require a participating utility to use its actual costs. ComEd Initial Brief at 20.

ComEd points out that Section 16-108.5 places heavy reliance on what it reports on its FERC Form 1. Here, it continues, ComEd’s applicable FERC Form 1 reflects no deferred income tax liability related to its vacation pay deferred debit. ComEd Reply Brief at 10.

ComEd additionally argues that there is no deferred tax liability that is associated with the accrued vacation pay deferred debit as of December 31, 2011 because the accrued vacation pay was not a reduction to its expense for either book or tax purposes. These costs, it states, as of December 31, 2011 had not yet been distributed to capital projects and thus, ComEd concludes, they could not be deducted for income tax purposes. It concludes that because no tax benefit existed at that time, none should be imputed. *Id.*

ComEd disputes the veracity of AG/AARP witness Mr. Efron's assertion that he calculated the deferred income tax asset in accordance with the *May 11-0721 Order*, citing AG/AARP Ex. 4.0 at 3-4. Mr. Efron referred to Staff Schedule 16.07R from Docket 11-0721 as evidence that he calculated the deferred income tax asset in accordance with that Order. ComEd argues that Mr. Efron's calculations reduced the accrued vacation pay liability by the vacation pay deferred debit, and then he calculated the deferred income tax asset on its remaining balance, citing AG/AARP Ex. 2.1. ComEd maintains that its deferred income tax asset is the product of multiplying the thirteen (13) month average vacation pay liability balance, which is listed as "deferred credit amount" on WP 5, by its income tax rate; which is exactly what Staff did on the Staff Schedule 16.07R in Docket 11-0721. *Id.* at 21; ComEd Ex. 13.02, WP5, p. 6.

ComEd does not agree with Mr. Efron's assertion that the deferred tax asset balance of \$18,952,000 which is associated with the vacation pay reserve would be "appropriate, "only if ComEd's tax rate was 75%. It opines that this point would be valid only accepting Mr. Efron's assumption that a deferred income tax liability exists that is related to the vacation pay deferred debit. ComEd avers that Mr. Efron's mathematical assumption that every rate base element must have a corresponding ADIT balance equivalent to 41% of the rate base value ignores the reality that not all cost elements carry a tax benefit. ComEd Initial Brief at 21-22.

Analysis and Conclusions

It is not disputed that ADIT results from the timing difference between when a certain item is recorded as an expense and when the actual tax liability occurs for that item. It is also not disputed that ComEd's deferred debit consisting of the accrued vacation pay in question did not reduce expense for either book or tax purposes. Further, ComEd did not record any ADIT associated with the accrued vacation pay in question. Therefore, based on the evidence presented, it appears that there is no timing differential here.

We additionally note that, as Staff and ComEd point out, the situation here is not the same as the one that was present in ComEd's last formula rate case, Docket 11-0721. There, a timing difference between what was expensed and the income tax liability was established. See, Docket 11-0721, final Order of May 29, 2012, at 66-67. Further, Staff correctly points out that no accounting authority was cited by ComEd or the AG/AARP or CUB. No authority was presented establishing that recording a debit,

which was done here, warrants the same treatment as recording a reduction to expense, which was what was done in Docket 11-0721.

Finally, while the Commission is mindful of the extraordinarily short time frames in 220 ILCS 5/16-108.5, it is also mindful of what must be contained in briefing. This issue was unnecessarily complicated by the post-trial briefs, which, with the exception of Commission Staff, were merely a regurgitation of testimony. Briefs require a statement of the issue, the relevant law (or in this case, the applicable accounting principle) application of that law/principle and a conclusion. A regurgitation of testimony does not state the issue and it complicates what is at issue in a manner that is unnecessary.

The Commission therefore declines to make the adjustment that the AG/AARP and CUB recommend.

3. Accumulated Reserve for Depreciation and Amortization

There are no contested issues regarding the accumulated reserve for depreciation and amortization in this proceeding.

4. Other

There are no other contested rate base issues.

IV. REVENUES

A. Overview

With the exception of the billing determinants issue, discussed in Section IV.C.1 below, there are no issues regarding revenues.

B. Potentially Uncontested Issues

1. Other Revenues

2. Other

C. Potentially Contested Issues

1. Billing Determinants

ComEd's Position

According to ComEd, EIMA requires the use of "historical weather normalized billing determinants" in the formula rate. 220 ILCS 5/16-108.5(c)(4)(H). AG/AARP, CUB, and Staff, recommend, however, that the Commission modify the historical billing determinants proposed by ComEd so that they reflect estimated 2012 numbers. ComEd argues that this obvious departure from the historical billing determinants is inconsistent with EIMA – the term "historical" is not ambiguous and no party claims otherwise. ComEd Reply Brief at 12-13. ComEd further observes that 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. ComEd Reply Brief at 14-16. 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. Docket 11-0721, Order on Rehearing at 22. ComEd maintains that EIMA is explicit that any provisions of the Act that are inconsistent with EIMA do not apply, citing 220 ILCS 5/16-108.5(c). According to ComEd, such an inconsistency is at issue here, and EIMA must supersede past Article IX practice.

ComEd states that the General Assembly has expressly provided that “historical weather normalized billing determinants” must be used (220 ILCS 5/16-108.5(c)(4)(H)), and observes that this directive is clear and unambiguous. ComEd Reply Brief at 12. “The fundamental rule of statutory construction is to ascertain and give effect to the General Assembly’s intent[.]” Docket 11-0721, 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)). It also contends that “[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.” Docket 11-0721, 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, ComEd states that there is, unquestionably, a “plain meaning” to the word “historical.” ComEd Reply Brief at 12-13. ComEd asserts that 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, ComEd contends that it should be given its plain and ordinary meaning, and AG/AARP have not argued otherwise. ComEd Reply Brief at 13. While AG/AARP may disagree with the way in which the General Assembly established the components of the formula rate, ComEd states that the law cannot be rewritten through this Commission proceeding. *Id.*

ComEd further explains that there is no basis upon which to conclude that *historical* means and includes *forecasted* customer additions. According to ComEd, where EIMA intended that a forecast must be used, it was explicit in that directive. *Id.* For example, ComEd continues, 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). ComEd argues that 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. ComEd Reply Brief at 13. Rather, according to ComEd, the General Assembly directed that historical weather normalized billing determinants must be used. ComEd further observes that there is nothing absurd in this directive – 2011 is the most recent year for which complete, actual historical data is available. *Id.*

ComEd further contends that AG/AARP, Staff, and CUB are simply incorrect in arguing that the proposed billing determinants adjustment would “ensure that the billing determinants are based on accurate information,” citing Staff Initial Brief at 14; Staff Ex. 11.0 at 6; ComEd Reply Brief at 13. Notwithstanding that their proposal is based on estimated rather than historical data, ComEd explains that 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 Initial Brief at 11; ComEd Reply Brief at 14. 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. ComEd Ex. 13.0 at 23-24; ComEd Reply Brief at 14. 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. ComEd Ex. 13.0 at 20; ComEd Initial Brief at 23; ComEd Reply Brief at 14. In other words, ComEd states, 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. ComEd Ex. 13.0 at 20; ComEd Initial Brief at 23-24; ComEd Reply Brief at 14, 16. Thus, ComEd explains that 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 Initial Brief at 25-26; ComEd Reply Brief at 14; ComEd Ex. 13.0 at 24-25.

According to ComEd, the very Article IX cases that AG/AARP cite in support of their proposal (*i.e.*, ComEd’s 2005, 2007, and 2010 rate cases) 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 Initial Brief at 15. In response to the contention that its billing determinants proposal is one-sided, AG/AARP argue in their initial brief that “Mr. Effron’s proposed adjustment does not decrease total kWh sales because plant additions for customer growth, by definition, only result in growth” (AG/AARP Initial Brief 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.

Docket 11-0721, Order at 75-76 (May 2012); see also AG/AARP Initial Brief at 15-16. However, ComEd contends that 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. ComEd argues that each component should be given full effect in the billing determinants equation to ensure “matching” and accuracy. ComEd Reply Brief at 15.

Thus, ComEd continues, if the customer count portion of the billing determinants equation is updated for 2012, the kWh sales portion must also be updated. According

to ComEd, 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. *Id.* ComEd notes that AG/AARP's, Staff's, and CUB's proposal to only update one of the two inputs exacerbates the risk of ComEd's under-recovery. ComEd Initial Brief at 27; ComEd Reply Brief at 15; ComEd Ex. 19.0 at 14. Because this one-sided approach is flatly inconsistent with EIMA as well as prior Commission practice, ComEd urges the Commission to correct this mistake of fact in the event it were to adopt Staff and intervenors' proposal.

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. In response, ComEd contends that, in addition to the mistake of fact identified previously, 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). ComEd Reply Brief at 16. Although the Commission's *May 11-0721 Order* adopts billing determinants that are based on something other than historical 2010 data, ComEd observes that it is not at all clear that the Commission intended to make this departure from the language of the statute. According to ComEd, 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. *Id.* 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." Docket 11-0721, Order at 75 (May 29, 2012). 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.

ComEd points out that AG/AARP stated in the very beginning of their argument that the information they have is 2010 information, not 2011 information." *Id.* Based on this language, ComEd states that 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" must be used, citing 220 ILCS 5/16-108.5(c)(4)(H) (emphasis added); ComEd Reply Brief at 16. If that is the case, ComEd notes that the Commission should be consistent with its intent in the *May 11-0721 Order* and reject the proposed billing determinants adjustment in this proceeding. However, even if that is not what was intended, ComEd notes that the Commission is not bound to follow a prior ruling that was based on a mistake of fact. ComEd concludes that the Commission should not repeat the mistake here by requiring a billing determinants adjustment that is contrary to the plain language of EIMA. *Id.*

Staff's Position

Staff recommends that the Commission accept the adjustment to billing determinants proposed by AG/AARP and CUB. In order to properly match the billing determinants used in the determination of pro forma revenues to the plant used to

provide service included in rate base, AG/AARP and CUB proposed an adjustment to increase the number of customers corresponding to the Company's inclusion of plant to serve New Business in 2012. Staff Ex. 11 at 3; AG/AARP Ex. 2.0 at 9; CUB Ex. 1.0 at 18-19.

Staff notes that in the Company's initial formula rate case, Docket 11-0721, AG/AARP proposed the same billing determinant adjustment that CUB and AG/AARP are proposing here. Staff Ex. 11.0 at 3. In that case, AG/AARP pointed out that if the billing determinants do not match the number of customers that are actually served by plant additions and customer growth, the revenue requirement will be collected from too few customers, resulting in the rate per customer being higher than it should be. Docket 11-0721, Order at 73-74 (May 29, 2012). Consequently, in its Order in Docket 11-0721, the Commission concluded that the adjustment to billing determinants was appropriate. *Id.* at 75. Specifically, the Commission noted that "[t]he AG/AARP proposal is reasonable" and directed ComEd to "adjust its billing determinants accordingly." *Id.* at 76; Staff Ex. 11 at 3-4. Yet, according to Staff, in the initial filing for the instant proceeding, the Company did not adjust the 2011 billing determinants to reflect 2012 New Business consistent with the Commission's directives in its Docket 11-0721 Order. Docket 11-0721, Order at 75-76 (May 29, 2012); Staff Ex. 11.0 at 4. According to the Company, no such adjustment was made because it believes that the adjustment to reflect New Business billing determinants has no applicability outside of Docket 11-0721. Staff Ex. 11.0 at 4, Attachment A; ComEd Ex. 13.0 at 23. ComEd believes that the Commission's directive in Docket 11-0721 does not address adjustments to 2011 billing determinants. Staff Ex. 11.0 at 4; Attachment A.

Staff disagrees with the Company's position that the adjustment to reflect New Business billing determinants has no bearing outside of Docket 11-0721. Staff Ex. 11.0 at 5. Staff believes that the issue of adjusting the billing determinants continues to apply in the instant proceeding because ComEd has included in its proposed revenue requirement estimated 2012 distribution plant addition for New Business. *Id.* Furthermore, Staff believes that the ratemaking issue concerning billing determinant growth for New Business in this docket is the same issue that was addressed by the Commission in Docket 11-0721. *Id.*

In Staff's opinion, the reasoning for the Commission's decision regarding billing determinants in Docket 11-0721 applies to the facts in this proceeding, and the 2012 estimated increase in customer count should be included in the billing determinants. *Id.* Staff states that, in this case, an analogous situation arises where ComEd included its 2012 forecasted plant additions in the requested rate base as required by Section 16-108.5(c)(6) of the Act. *Id.* Specifically, Staff recommends the Commission should reflect a similar adjustment to billing determinants for 2012 customer growth served by 2012 New Business (or new facilities) that are built to accommodate 2012 customer growth. *Id.* Consequently, Staff states that with respect to adjustments to billing determinants, as discussed in ComEd Ex. 13.0, p. 26, the average number of residential customers in 2011 increased by 0.29% over the average number of residential customers in 2010, and the average number of small commercial and industrial

customers in 2011 increased by 0.39% over the average number of small commercial and industrial customers in 2010. *Id.* at 6. According to Staff, these increases, based on the 2011 over 2010 increases, would appear to be reasonable estimates of the growth rates that can be expected from 2011 to 2012. *Id.* In designing the rates to produce the approved revenue requirement, Staff recommends that the billing determinants used to set rates reflect these increases in order to reflect estimated annual growth in the number of customers in those classes and to be consistent with the inclusion of 2012 New Business plant additions in rate base. *Id.*

Therefore, consistent with the Commission's Order in Docket 11-0721, which required ComEd to revise the customer count portion of its 2010 billing determinants, Staff recommends the Commission apply the same methodology in this proceeding to ensure that the billing determinants are based on accurate information.

CUB's Position

CUB criticizes ComEd's choice to include in rate base 2012 plant additions to handle "New Business," (*i.e.* customer growth) but not to adjust billing determinants to spread the revenue requirement out among those anticipated new customers that will be served by the new plant that has been included in rate base to provide for such customer growth. CUB Ex. 1.0 at 17-18. CUB contends that if billing determinants do not match the number of customers that are actually served by plant additions and customer growth, the revenue requirement will be based upon too few customers and the rate per customer will be higher than it should be. CUB Ex. 1.0 at 17 (citing *11-0721 Order* at 73-74). CUB notes that in the *11-0721 Order*, the Commission concluded that an adjustment to billing determinants for customer growth related to projected plant additions for customer growth should be made. In that Order, the Commission adopted the AG/AARP proposal to ensure that the billing determinants related to the number of customers being served by the plant included in rate base were based on accurate information. CUB Ex. 1.0 at 17 (citing *11-0721 Order* at 75-76). CUB states that despite the Commission's *11-0721 Order*, ComEd did not reflect, in its compliance filing in this case, an adjustment to billing determinants that is consistent with that Order. CUB Ex. 1.0 at 17. CUB notes that ComEd acknowledges that the Company's position is contrary to the Commission's decision in Docket 11-0721, citing ComEd Initial Brief at 24. Because ComEd's New Business and Billing Determinants forecast includes distribution facilities that are built to accommodate customer growth, CUB argues an adjustment must be made to allocate the revenue requirement among the new customers for whom the new facilities are built. CUB Ex. 1.0 at 16. CUB argues that ComEd's position mismatches the number of customers actually paying to the number of customers assumed to be paying.

CUB responds to ComEd's argument that the Company chose to ignore the Commission's conclusions in Docket 11-0721 based on their position that the finding in the *11-0721 Order* was limited to rates that went into effect in June 2012. ComEd Ex. 13.0 at 23. CUB responds that no language exists in that order which would reasonably lead to that conclusion, and the same issue is present in this case as was in that docket.

See AG/AARP Ex. 4.0 at 5-6. CUB contends the issue presented in both Docket 11-0721 and in the current case is how to appropriately coordinate the projected plant additions being included in rate base to serve customer growth with the number of customers that are used in developing the billing determinants. Consistent with its conclusions in the *11-0721 Order*, CUB implores the Commission to take into account customer growth.

CUB further responds to ComEd's arguments with respect to the EIMA. CUB notes that the statute requires that a formula rate shall:

(4) Permit and set forth protocols, subject to a determination of prudence and reasonableness consistent with Commission practice and law, for the following:

...

(H) historical weather normalized billing determinants...

220 ILCS 5/16-108.5(c)(4)(H). CUB strongly disagrees with ComEd's claims that this "very clearly requires" that nothing more than historical weather-normal billing determinants should be considered, citing ComEd Initial Brief at 25. Rather, CUB argues that what is "very clear" is that the EIMA directs the Commission to use historical weather normalized billing determinants *subject to a determination of prudence and reasonableness and consistent with Commission practice and law*. 220 ILCS 5/16-108.5(c)(4)(H). CUB notes that ComEd raised this same argument in Docket 11-0721, and the Commission determined that the 108.5(c)(4)(H) was not at issue there. CUB points out that the Commission found, "All that AG/AARP proposes here is a methodology to ensure that the billing determinants are based on accurate information... Certainly, the use of accurate billing determinants is consistent with Commission practice and law." Docket 11-0721, Order at 76 (*citing* Docket 10-0467, Order at 306-309 (May 24, 2011)).

CUB further addresses ComEd's argument that the CUB and AG/AARP proposals, also supported by Staff, (see Staff Initial Brief at 12), "ignore the fact that weather-normal kWh deliveries are lower, which also results in a lower revenue if a corresponding adjustment is not made." ComEd Initial Brief at 26. CUB argues that it does "ignore" the fact that weather-normalization exists; rather, CUB believes it simply has no impact on the issue at hand. CUB again states that ComEd has included in rate base plant additions to handle "new business," but wants to recover its revenue requirement from only existing customers (*i.e.* not the customers for whom the new plant is being built). CUB Ex. 1.0 at 17-18. CUB therefore contends that weather and its impact on customer usage has no place in this equation and ComEd's attempt to distract this issue with this straw man must be rejected.

CUB concludes that the end result of ComEd's request is that the Company would recover its entire revenue requirement from the number of current customers,

and any recovery from new customers (the customers for whom the plant is being built) will result in over-recovery. *Id.*

AG/AARP's Position

AG/AARP notes that, in past rate cases, ComEd recognized post-test year growth in sales and revenues, consistent with proposing New Business plant in post-test year plant additions. AG/AARP Initial Brief at 10. In ComEd's last rate order, before it elected to be a participating utility under Section 16-108.5, the Commission noted: "As it has done in its last two rate cases (Dockets 05-0579 and 07-0566), ComEd has included a new business revenue credit to account for the estimated revenue from growth in customers during the *pro forma* period." ICC Docket 10-0467, Order at 306 (May 24, 2011). Moreover, AG/AARP highlight that in ComEd's first formula rate case, Docket 11-0721, the Commission ordered ComEd to adjust its billing determinants to recognize the new business plant included in the proposed pro forma rate base after Mr. Effron proposed a similar adjustment in that case. AG/AARP Initial Brief at 11. AG/AARP further note that, in the instant docket, however, ComEd failed to adjust the billing determinants used in the calculation of rates necessary to produce the required revenues to reflect customer growth in 2012. *Id.*

AG/AARP witness Mr. Effron calculated the New Business adjustment in this docket and recommended that the billing determinants used to set prospective rates reflect the increase in customers associated with the plant used to provide new service and included in rate base. AG/AARP Ex. 2.0 at 6. Staff witness Mr. Rukosuev also recommended that the billing determinants be updated to match plant added to rate base to serve new business. Staff Ex. 11.0. AG/AARP witness Mr. Effron agreed that such an adjustment is necessary to properly match the billing determinants related to customer count (the customer charges and the standard metering service charges) to recognize customer growth in 2012 with the plant used to serve new business included in rate base. AG/AARP Ex. 2.0 at 6-7; *Id.* at 6-7.

According to AG/AARP, it is the Company's position that it can disregard the Commission's adoption of the New Business adjustment to billing determinants in Docket 11-0721 notwithstanding the express language found in Section 16-108.5(d) that:

The Commission shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act." 220 ILCS 5/16-108.5(c) &(d).

AG/AARP Initial Brief at 12-13. AG/AARP argue ComEd's failure to incorporate this adjustment to its billing determinants is unreasonable, violates the Commission's holding in Docket 11-0721, and undermines the consistency expected in the application of the formula rate tariff. *Id.* at 13.

AG/AARP state that ComEd witness Mr. Fruehe offers three arguments against adopting the AG/AARP adjustment: (1) that the proposed adjustment is not consistent

with Section 16-108.5(c)(4)(H) of EIMA, which he claims requires the application of historical, weather-normalized billing determinants in formula rate filings and prohibits any kind of adjustment to these determinants relative to the Company's forecasted 2012 plant additions; (2) that the Commission's adoption of Mr. Efron's adjustment in the 11-0721 docket was specific to that year; and (3) that the AG/AARP adjustment selectively ignores ComEd-forecasted declines in kWh usage for the year in question. ComEd Ex. 13.0 at 22-26. All of these arguments, AG/AARP notes, were presented in the 11-0721 docket and specifically rejected by the Commission. AG/AARP Initial Brief at 13.

According to AG/AARP, Mr. Efron's adjustment does not contradict Section 16-108.5(c)(4)(H) concerning "historical weather normalized billing determinants." AG/AARP argues this language does not imply that the formula should ignore real customer growth resulting from plant additions. AG/AARP state that if "historical" were used in that sense, the formula would be unreasonably designed to consistently over-collect ComEd's revenue requirement because real customer growth would be ignored. *Id.* AG/AARP argue that, if understated billing determinants are used, ComEd will consistently over-recover its revenue requirement, which is unreasonable and not the intent of a statute designed to allow recovery of "actual costs." AG/AARP Initial Brief at 13-14. According to AG/AARP, ComEd admits that, while billing determinants do not have any effect on ComEd's revenue requirement, they can change the amount of revenue which ComEd ultimately recovers and the specific rates paid by consumers because the more customers over whom to spread its total revenue requirement, the lower the individual rates. AG/AARP Reply Brief at 6 (citing ComEd Initial Brief at 23). AG/AARP maintain that if the revenue requirement is spread over too many customers, rates will be too low and if they are spread over too few customers, will be too high. AG/AARP Reply Brief at 6.

AG/AARP state that ComEd's interpretation of Section 16-108.5(c)(4)(H) must be considered in light of the critical prefatory language that requires the Commission to establish formula rates that incorporate Article IX ratemaking principles. The referenced section of the Act provides that "[t]he performance-based formula rate approved by the Commission shall ...(4) Permit and set forth protocols, *subject to a determination of prudence and reasonableness consistent with Commission practice and law...*" 220 ILCS 5/16-108.5(c)(4) (emphasis added). While the statute calls for the filing of historical weather normalized billing determinants in the formula rate tariff, according to AG/AARP, that specification does not prevent the Commission from making the ratemaking adjustments necessary to ensure that the rates produced are "prudent and reasonable." AG/AARP Initial Brief at 14.

AG/AARP also disagree with ComEd's claim that the Commission's decision in Docket 11-0721 was specific to the application of billing determinants for rates that went into effect in June, 2012. AG/AARP argue that ComEd's claim is spurious, and there is no language in the Order that states that the finding there was limited to rates that went into effect in June, 2012. *Id.* AG/AARP state that the adjustment to ComEd's billing determinants in this proceeding is substantively the same as the one adopted in Docket 11-0721. *Id.* In Docket 11-0721, Mr. Efron presented testimony that stated that if New

Business plant additions subsequent to the historic year are included in rate base, then the additional customers being served by that plant should be reflected in the billing determinants used to design the rates necessary to produce the required revenues. *Id.* at 15. According to AG/AARP, the matching principle holds true in the present case. *Id.*

AG/AARP state the Commission has consistently matched customer growth (and associated billing determinants) with ComEd's projected plant additions. AG/AARP Reply Brief at 6. AG/AARP contend that this represents application of the fundamental regulatory matching principle. *Id.* AG/AARP states that rates for the 2013 rate year are based on two components: historical costs from 2011 and projected plant additions for 2012. *Id.* AG/AARP asserts that, of the plant additions included in rate base, approximately \$130.0 million represents facilities to accommodate customer growth. *Id.*; AG/AARP Ex. 2.0 at 6. AG/AARP assert the billing determinants adjustment correctly matches the 2012 projected plant additions associated with new business with the increase in the number of customers responsible for this new business investment. AG/AARP Reply Brief at 6; see also Staff Initial Brief at 12-13. According to AG/AARP, ComEd's suggestion that EIMA requires the Commission to disregard this matching principle both ignores well-established Commission practice and law and misreads the Act's treatment of billing determinants. AG/AARP Reply Brief at 6.

Finally, AG/AARP disagree with ComEd, which argues that the AG/AARP-proposed adjustment is one-sided and ignores ComEd-projected declines in kWh usage for 2012. AG/AARP Initial Brief at 15. In fact, AG/AARP state that their witness Mr. Effron limited his adjustment to the customer growth related to plant additions. *Id.* According to AG/AARP, Mr. Effron could have, but did not suggest a change in kWh usage, despite the fact that, in past cases, ComEd and the Commission have recognized growth in both the number of customers and kWh sales. *Id.* On the other hand, AG/AARP state, Mr. Effron's proposed adjustment does not decrease total kWh sales because plant additions for customer growth, by definition, only result in growth. *Id.* Otherwise, AG/AARP maintain, the investments for customer growth would not be made. *Id.* Additionally, AG/AARP argue that a decrease in the usage per customer does not mean that there is a decrease in the number of customers, particularly when ComEd has identified \$130 million in plant additions for New Business for 2012, the year prior to the rate year (2013). AG/AARP Reply Brief at 8. AG/AARP aver that ComEd's argument that the proposed adjustment is one-sided falls flat. AG/AARP Initial Brief at 15.

AG/AARP also note that ComEd offered this same "one-sided" argument in the 11-0721 case. The Commission specifically rejected that characterization and, as noted above, adopted Mr. Effron's adjustment, stating:

Additionally, a decline in kwh sales, in and of itself, does not establish that there are less customers. It simply means that less electricity was sold. Other factors, such as energy efficiency, a bad economy, etc. may very well contribute to a decline in kwh sales. 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. ComEd, in short, has not presented valid reasons for rejecting the AG/AARP proposal.

Docket 11-0721, Order at 75-76 (May 29, 2012). Again, AG/AARP assert, the facts are no different in this docket. AG/AARP Initial Brief at 15-16.

AG/AARP state that it remains appropriate and internally consistent to match the billing determinants used in the calculation of rates necessary to produce the approved net revenue requirement to the plant used to provide service included in rate base. *Id.* at 16. Accordingly, AG/AARP recommend that the Company's billing determinants based on customer count should be adjusted to increase the average number of residential customers in 2011. *Id.* AG/AARP note that Staff witness Rukosuev calculated the change in billing determinants to increase the average number of residential customers by 0.29% and to increase the average number of small commercial and industrial customers by 0.39% (Staff Ex. 11.0 at 6) and recommend that the Commission adopt that adjustment. *Id.*

Commission Analysis and Conclusions

Exception No. 1

Following a thorough review of the Commission's May 11-0721 Order and the record in the present case, the Commission concurs with ComEd that the May 11-0721 Order appears to have been based on a mistake of fact. As our recent Order on Rehearing observed, "[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, this is precisely the case here where the General Assembly explicitly directed that historical weather normalized billing determinants be used rather than estimates, forecasts or projections. As ComEd notes, the General Assembly was clear when it intended that projections be used. See, e.g., 220 ILCS 5/16-108.5(d). Accordingly, its express direction here to use historical data is telling and conclusive.

Our review of the May 11-0721 Order shows that the Commission believed it was approving historical figures, consistent with the plain language of EIMA, but, as this case has confirmed, those figures were indeed a "hodgepodge" of data. This is inconsistent with EIMA, and, accordingly, we reject AG/AARP's, CUB's and Staff's proposed adjustment to the billing determinants, which would result in the use of estimated data rather than historical data.

~~Staff, CUB and AG/AARP all recommend that the Commission adopt an adjustment to billing determinants consistent with the methodology used in Docket 11-0721. ComEd proposes similar arguments against such an adjustment in this~~

~~proceeding as it proffered in Docket 11-0721. Once again, ComEd purports to put the meaning of Section 16-108.5(c)(4)(H) at issue, stating that there is a “plain meaning” to the word “historical,” and as such the Commission would err in including an adjustment to reflect New Business to billing determinants. Section 16-108.5(c)(4)(H) provides that the formula rate shall:~~

~~(4) Permit and set forth protocols, subject to a determination of prudence and reasonableness consistent with Commission practice and law, for the following: . . .~~

~~(H) historical weather normalized billing determinants . . .~~

~~220 ILCS 5/16-108.5(c)(4)(H).~~

~~The Commission agrees with AG/AARP that the statute is not at issue here. The statute calls for the filing of historical weather normalized billing determinants in the formula rate tariff; however, as the AG/AARP assert, this requirement does not prevent the Commission from making the ratemaking adjustments necessary to ensure that the rates produced are prudent and reasonable. The statute itself requires that the Commission make a determination of prudence and reasonableness, and therefore the Commission can make appropriate adjustments to historical weather normalized billing determinants to affect such a determination.~~

~~The Commission agrees that the same methodology, consistent with the Order in Docket 11-0721, should be used in this proceeding. In Docket 11-0721, the Commission agreed with the AG/AARP proposal to include an adjustment to billing determinants for customer growth related to projected plant additions included in the rate base. The same adjustment is appropriate in this proceeding because, like in Docket 11-0721, ComEd has included estimated distribution plant additions for New Business in the revenue requirement.~~

~~ComEd argues that the proposed adjustment is one-sided and ignores projected declines in kWh usage for 2012. According to ComEd, kWh sales and customer count are independent components of the billing determinants equation, yet ComEd then argues that if one component is changed the other must be as well, which goes against the notion of “independent” components. As stated in the 11-0721 Order, there are many factors that affect kWh sales, including energy efficiency and a poor economy, and a change in kWh sales could be a result of multiple factors, not necessarily solely a change in the number of customers. A decline in kWh sales merely means that less electricity was sold. In this proceeding, ComEd provides no evidence indicating why there is a decline in usage. As the customer base of the billing determinants equation is a “fixed charge,” it is appropriate to insure that the customer base component is accurate and accounts for expected customer growth so that customers are not charged an inflated rate.~~

~~The Commission also rejects ComEd’s assertion that the adjustment to reflect New Business billing determinants has no bearing outside of Docket 11-0721. The~~

~~Commission agrees with Staff's argument that the issues in the two dockets are similar, wherein ComEd has included in its proposed revenue requirement estimated distribution plant addition for New Business. As such, it is appropriate in this proceeding to adjust the customer count portion to due to the inclusion of plant to serve New Business in 2012 in the revenue requirement. By applying this adjustment, the billing determinants will more accurately match the number of customers that are served by plant additions and customer growth, otherwise the rate per customer will be too high.~~

~~The Commission also agrees with Staff's recommendation to use ComEd's own numbers, as presented in ComEd Ex. 13.0, rather than the specific adjustments proposed by AG/AARP and CUB. See Staff Reply Brief at 7-8. ComEd shall adjust its billing determinants accordingly.~~

[Alternative Exception No. 1]

Commission Analysis and Conclusions

Staff, CUB and AG/AARP all recommend that the Commission adopt an adjustment to billing determinants consistent with the methodology used in Docket 11-0721. ComEd proposes similar arguments against such an adjustment in this proceeding as it proffered in Docket 11-0721. Once again, ComEd purports to put the meaning of Section 16-108.5(c)(4)(H) at issue, stating that there is a "plain meaning" to the word "historical," and as such the Commission would err in including an adjustment to reflect New Business to billing determinants. Section 16-108.5(c)(4)(H) provides that the formula rate shall:

- (4) Permit and set forth protocols, subject to a determination of prudence and reasonableness consistent with Commission practice and law, for the following: . . .
- (H) historical weather normalized billing determinants . . .

220 ILCS 5/16-108.5(c)(4)(H).

~~The Commission agrees with AG/AARP that the statute is not at issue here. The statute calls for the filing of historical weather normalized billing determinants in the formula rate tariff; however, as the AG/AARP assert, this requirement does not prevent the Commission from making the ratemaking adjustments necessary to ensure that the rates produced are prudent and reasonable. The statute itself requires that the Commission make a determination of prudence and reasonableness, and therefore the Commission can make appropriate adjustments to historical weather normalized billing determinants to affect such a determination.~~

With one important modification discussed below, ~~t~~The Commission agrees that the same methodology, consistent with the Order in Docket 11-0721, should be used in

this proceeding. In Docket 11-0721, the Commission agreed with the AG/AARP proposal to include an adjustment to billing determinants for customer growth related to projected plant additions included in the rate base. The same adjustment is appropriate in this proceeding because, like in Docket 11-0721, ComEd has included estimated distribution plant additions for New Business in the revenue requirement.

~~However, we also agree with ComEd argues that the proposed adjustment is one-sided and ignores projected declines in kWh usage for 2012. According to ComEd, kWh sales and customer counts are independent components of the billing determinants equation, and neither Staff nor intervenors disputed this fact. As a result, we agree that each component of the billing determinants equation should be updated using the estimated 2012 data, yet ComEd then argues that if one component is changed the other must be as well, which goes against the notion of "independent" components. As stated in the 11-0721 Order, there are many factors that affect kWh sales, including energy efficiency and a poor economy, and a change in kWh sales could be a result of multiple factors, not necessarily solely a change in the number of customers. A decline in kWh sales merely means that less electricity was sold. In this proceeding, ComEd provides no evidence indicating why there is a decline in usage. As the customer base of the billing determinants equation is a "fixed charge," it is appropriate to insure that the customer base component is accurate and accounts for expected customer growth so that customers are not charged an inflated rate.~~

~~The Commission also rejects ComEd's assertion that the adjustment to reflect New Business billing determinants has no bearing outside of Docket 11-0721. The Commission agrees with Staff's argument that the issues in the two dockets are similar, wherein ComEd has included in its proposed revenue requirement estimated distribution plant addition for New Business. As such, it is appropriate in this proceeding to adjust the customer count portion to due to the inclusion of plant to serve New Business in 2012 in the revenue requirement. By applying this adjustment, the billing determinants will more accurately match the number of customers that are served by plant additions and customer growth, otherwise the rate per customer will be too high.~~

The Commission also agrees with Staff's recommendation to use ComEd's own numbers, as presented in ComEd Ex. 13.0, rather than the specific adjustments proposed by AG/AARP and CUB. See Staff Reply Brief at 7-8. ComEd shall adjust its billing determinants accordingly.

2. Other

There are no other contested revenue issues.

V. OPERATING EXPENSES

A. Overview

ComEd contends that its revised operating expenses total (pre-tax) as of rebuttal and surrebuttal, before application of the conclusions in the *Order on Rehearing*, was \$1,474,876,000. See, e.g., ComEd Ex. 13.0 at 11. ComEd states that its distribution and operating expenses include: (1) expenses recorded in Operating and Maintenance (“O&M”) Accounts that are functionalized to the distribution function; (2) the portion of expenses recorded in other O&M Accounts that are customer-related and appropriately assigned to or allocated to the delivery service function; and (3) the portion of expenses that were recorded in other Accounts that were appropriately assigned to or allocated to the delivery service function, including Administrative and General (“A&G”) Expenses Accounts, Depreciation and Amortization Expenses Accounts, Taxes Other Than Income Taxes Accounts, and Income Taxes Accounts.

It asserts that given the *Order on Rehearing*, in Docket 11-0721, as is reflected in ComEd’s compliance filing (ComEd Ex. 23.0 Corr., Sch. FR A-1), ComEd’s revised operating expenses total (pre-tax) is \$1,546,452,000. The difference is driven by inclusion of the debt-based rate of return on ComEd’s pension asset, net of deferred taxes, which was required by the *Order on Rehearing* in Docket 11-0721. ComEd Initial Brief at 28. This item is uncontested. It is therefore approved.

B. Potentially Uncontested Issues

1. Distribution O&M Expenses

ComEd states that its Distribution O&M expenses were \$414,484,000 for 2011. It explains that, after reflecting adjustments, a revised total of \$412,317,000 in distribution O&M expenses recorded in FERC Accounts 580-598 is included in the revenue requirement. ComEd Ex. 19.1, Sch. FR A-1; see also ComEd Ex. 3.0 REV at 23. This item is uncontested Therefore it is approved.

2. Customer-Related O&M Expenses

ComEd’s customer-related expenses are expenses that are recorded in its FERC Accounts 901-910, which include the costs of maintaining and servicing customer accounts, e.g., meter reading, recordkeeping, and billing and credit activities. ComEd states that in determining its revenue requirement, it adjusted the \$352,704,000 of customer related expenses for the following:

- (1) \$110,232,000 reduction to remove the costs associated with ComEd’s energy efficiency and demand response program recovered under Rider EDA – Energy Efficiency and Demand Response Adjustment (“Rider EDA”);
- (2) \$57,943,000 reduction to reflect the uncollectibles costs recoverable through Rider UF and outside collection agency costs;

- (3) \$44,000 reduction to remove costs associated with incentive compensation related to net income recorded in customer accounts;
- (4) \$9,000 reduction for certain industry association dues for which recovery is not being sought;
- (5) \$2,115,000 reduction to remove general advertising expenses;
- (6) \$730,000 increase to include interest on customer deposits in operating expenses; and
- (7) \$2,000 increase to adjust for an accrual reversal related to Customer's Affordable Reliable Energy expenses.

ComEd Initial Brief at 29.

ComEd avers that after those adjustments, \$183,093,000 of FERC Accounts 901-910, which are directly related to and supporting the delivery service function and are included in the revenue requirement. This matter is uncontested. The Commission approves ComEd's position.

3. Uncollectibles Expense

ComEd now recovers for uncollectible accounts through Rider U.F. Therefore, no uncollectible expense is reflected in ComEd's 2011 costs.

4. Incentive Compensation Expense

ComEd has two basic incentive compensation programs: the Annual Incentive Program ("AIP"), and the Long-Term Incentive Program ("LTIP"). ComEd asserts that all of its employees participate in the AIP. The LTIP, however, is applicable to key managers and those at or above the vice-presidential level. ComEd states that it seeks to include \$32,563,000 of AIP expense in O&M and \$20,590,000 in capitalized AIP in rate base. Regarding the LTIP, ComEd states that it seeks to include \$4,984,000 of expense included in O&M and \$606,000 in rate base. ComEd Initial Brief at 30.

ComEd avers that its 2011 AIP plan did not include any goals that were related to net income or return on equity or earnings per share. ComEd has seven goals, or Key Performance Indicators, in its 2011 AIP. It states that these goals all conform to 220 ILCS 5/16-108.5 and recent Commission precedent regarding what is recoverable as incentive compensation through rates.³

³ ComEd explained that a small number of ComEd employees participated in Exelon Business Service Company's ("BSC") AIP in 2011. Because 75% of the BSC AIP is related to a net income goal, 75% of the BSC AIP costs were removed in light of the *May 11-0721 Order*. Specifically, rate base was reduced by \$1,901,000 and operating expenses by \$4,923,000. (See ComEd Initial Brief at 30).

According to ComEd, the LTIP performance metrics for 2011 were not based on goals related to Net Income or Return on Equity. However, in 2009, one of the three performance metrics applicable to the executive LTIP included a return on equity component. ComEd argues that, because the LTIP plans typically vest over three years, one-third of the amounts awarded for 2009 were expensed in 2011. ComEd continues to state that the amounts that concerned ComEd's return on equity metrics were removed. ComEd further avers that \$127,000 was removed from jurisdictional O&M expense and \$13,000 was removed from rate base. *Id.* at 31. This matter is not contested. Therefore, it is approved.

5. Sales and Marketing Expense

ComEd did not include any sales or marketing expenses in rates. These items are therefore not at issue here.

6. Depreciation and Amortization Expense

ComEd states that it seeks to include its depreciation and amortization expense of \$433,976,000 in its revenue requirement. The amount of 2011 depreciation and amortization expense that was included in the revenue requirement is \$413,315,000. This amount is comprised of \$327,445,000 related to Distribution Plant and \$85,870,000 related to G&I Plant. Additionally, the revenue requirement includes \$20,661,000 of depreciation expense associated with the 2012 projected plant additions. ComEd Initial Brief at 31. Neither Staff nor any Intervenor contested the depreciation and amortization expense. They are therefore approved.

7. Taxes Other than Income Taxes

ComEd submits that the level of taxes other than income taxes that were originally included in the revenue requirement was \$150,895,000, revised to \$147,122,000 after the *May 11-0721 Order*. In general, these include real estate taxes, the Illinois Electric Distribution Tax ("IEDT"), payroll taxes, and several other taxes. ComEd Ex. 3.0 REV at 35. In 2011, ComEd recorded an accrual for an estimated IEDT credit of \$11,376,000 which is related to its actual 2011 IEDT of \$117,576,000 and included the net amount of \$106,200,000 in operating expense. ComEd Initial Brief at 32. This matter was not contested. Therefore, the Commission approves ComEd's position.

8. Income Taxes

ComEd points out that the passage of Public Act 96-1496 (Illinois Senate Bill 2505) on January 13, 2011, increased the previous corporate income tax rate of 7.3% to 9.50% for the years 2011 through 2014, with reductions to 7.75% in 2015 and 7.3% in 2025. According to ComEd, this change impacts the revenue requirement in several ways. ComEd contends that the statutory income tax rate used to calculate the overall total income tax rate on Sch. FR C-4 has been revised to reflect the 9.5% statutory income tax rate. ComEd additionally contends that, as a result of the change in the rate, previously-recorded ADIT balances, e.g., balances as of December 31, 2010, were required to be re-measured to reflect the deferred tax balances calculated by applying

the new tax rates noted above. The re-measurement of ADIT resulted in a required increase to jurisdictional ADIT as of January 1, 2011 of \$13.1 million. ComEd submits that, consistent with Commission precedent, this shortfall in ADIT is offset by a regulatory asset and is being amortized prospectively over the remaining life of the underlying asset by applying a weighted average rate for future reversals. Amortization of the re-measurement balance resulted in a credit of \$1.9 million in 2011. ComEd Initial Brief at 33.

Finally, ComEd states that in 2011, it recognized a significant benefit due to the difference between the current income tax rate of 9.50% and the rate at which the related deferred tax expense is recorded. ComEd submits that the deferred tax rate is lower because, as described above, the state income tax rate is scheduled to decline in 2015 and again in 2025, which means that some of the deferred taxes recorded in 2011 will reverse in later years, when the state income tax rate is scheduled to be lower. ComEd states that this difference in current and deferred tax rates combined with the fact that in 2011, it had two notable and significant tax deductions, resulted in a jurisdictional 2011 tax benefit of \$16,960,000, which was updated in its June 2012 compliance filing to \$16,946,000. ComEd Ex. 10.2, Sch FR C-4; ComEd Initial Brief at 33-34. No Intervenor or Commission Staff contested to the amount of income taxes as revised. Therefore, the Commission approves ComEd's position.

9. Regulatory Asset Amortization

Exception No. 4

ComEd included in its revenue requirement \$8,656,000 of regulatory asset amortization. It avers that this amount includes the effects of the Commission's Order (entered in 2011 in a previous ComEd rate case) in Docket 10-0467, which revised the amount of amortization of several existing regulatory assets, authorized amortization of new regulatory assets. It additionally eliminated amortization of others. Regulatory asset amortization also included \$524,000 for rate case expenses that ComEd claims it incurred in 2011, which were related to Docket 11-0721, the initial formula rate proceeding. Additionally, according to ComEd, Section 16-108.5(c)(4)(E) of the Act provides that these costs shall be recovered over a three-year period.⁴ ~~With the exception of the rate case expense for Docket 11-0721, ComEd's Regulatory Asset Amortization~~ is approved.

10. Operating Cost Management Efforts

ComEd submits that during 2011, it continued its aggressive and successful measures to manage and reduce its costs. ComEd Initial Brief at 34. No Intervenor or Commission Staff contested ComEd's operating cost management efforts. The Commission approves ComEd's position.

⁴ See, Section V.C.1(c) herein regarding rate case expense for Docket 11-0721.

11. Storm Damage Repair Expense

ComEd states that, in 2011, it experienced 14 storms of the type that is reportable pursuant to the Illinois Administrative Code. These 14 storms affected 2.8 million customers, which is the highest customer impact on record. In addition to these storms, there were also five non-reportable storms affecting an additional 155,000 customers in 2011. ComEd Initial Brief at 35. ComEd asserts that the total jurisdictional (distribution) storm damage repair expense for 2011 was approximately \$140 million. ComEd further contends that, consistent with Section 16-108.5(c)(4)(F), it amortized the expense of three storms over five years, each of which, was in excess of \$10 million, and in total were \$68,201,000. ComEd states that an additional amount for the remaining storm damage, \$54,561,000, was included in rate base. ComEd Initial Brief at 35. This issue is not contested. Therefore, the Commission approves ComEd's position.

12. Interest Expense

No Intervenor or Commission Staff contested ComEd's interest expense calculation on its customer deposits. The Commission therefore approves ComEd's calculation on this issue.

13. Lobbying Expense

Staff states that no adjustment is necessary for lobbying expense. Staff had proposed in its direct testimony to disallow certain political and legislative expenditures, in accordance with Section 9-224 of the Public Utilities Act. ComEd had included these expenditures to support the amount it reported in Account 928, Regulatory Commission Expenses. Staff Ex. 8.0 at 15. After Staff filed direct testimony, ComEd stated that the invoices relating to political and legislative activities were reclassified to a below the line account and, therefore, not included in Account 928 on the FERC Form 1. Staff withdrew its adjustment in rebuttal testimony because these invoices were not included in the Company's requested revenue requirement. This matter is no longer contested.

14. Gross Revenue Conversion Factor

ComEd submits that its Gross Revenue Conversion Factor is 1.700. No Intervenor or Commission Staff disagreed with ComEd. The Commission therefore approves this item.

C. Potentially Contested Issues

1. Administrative and General Expenses

a. Charitable Contributions

Staff's Position

Staff recommends that the Commission adopt its adjustments to disallow certain charitable contributions to organizations outside of ComEd's service territory, donations made to political organizations, and donations made to non-charitable organizations because the Company has failed to meet the requirements as described in Section 9-227 of the Act. Staff Ex. 8.0 at 2. Section 9-227 states:

It shall be proper for the Commission to consider as an operating expense, for the purpose of determining whether a rate or other charge or classification is sufficient, donations made by a public utility for the public welfare or for charitable scientific, religious or educational purposes, provided that such donations are reasonable in amount. In determining the reasonableness of such donations, the Commission may not establish, by rule, a presumption that any particular portion of an otherwise reasonable amount may not be considered as an operating expense. The Commission shall be prohibited from disallowing by rule, as an operating expense, any portion of a reasonable donation for public welfare or charitable purposes.

220 ILCS 5/9-227.

Donations to Organizations outside the Company's Service Territory

Staff recommends the Commission disallow \$306,000 in donations made to organizations outside the Company's service territory that include the following: \$74,000 to the University of Pennsylvania, \$44,000 to Pennsylvania State University, \$44,000 to the YMCA of Philadelphia and Vicinity, \$29,000 to the Archdiocese of Philadelphia, \$29,000 to the University of South Carolina, and \$29,000 to Drexel University, among others. Staff Ex. 3.0 at 4; Staff Ex. 8.0, Schedule 8.01 at 2) The Company contends that the Commission's Order in Docket 11-0721 only disallowed donations to the University of Wisconsin. Staff disagrees. The Order stated:

Section 9-227 of the Public Utilities Act provides that a public utility may recover (from rates) its charitable contributions made for the public welfare or for charitable scientific, religious or educational purposes, provided that such donations are reasonable in amount. (220 ILCS 5/9-227). **Logically, the term "public" includes only the rate-paying public, which is ComEd's service territory.**

Docket 11-0721, Order at 98 (May 29, 2012). (**Emphasis added**).

According to Staff, this conclusion is consistent with the Commission's Order in the previous ComEd rate case, Docket 10-0467, in which ComEd sought recovery of donations to organizations outside the Company's service territory other than the University of Wisconsin. The Commission accepted Staff's adjustments and stated:

The Commission concurs with Staff's proposal to disallow charitable contributions made by ComEd to organizations outside of the Company's service territory. There is no evidence that these contributions provide any benefit to ratepayers in ComEd's service territory. The Commission agrees with Staff that it is not reasonable to require ComEd ratepayers to bear the cost of such contributions. Accordingly, Staff's adjustment is adopted.

Docket 10-0467, Final Order at 108 (May 24, 2011).

Staff concludes that therefore, the Commission should again conclude that ComEd's donations to organizations outside its service territory should not be borne by its ratepayers and accept Staff's adjustments that reflect that conclusion.

Donations to Political Organizations

Staff recommends that the Commission accept Staff's adjustment to disallow \$10,000 to the Metropolitan Mayors' Caucus which is a political organization as described in Section 9-224 of the Act. Staff Ex. 8.0 at 6. The mission statement of the Metropolitan Mayors' Caucus indicates its mission to be a strong advocate for positions on a broad range of key issues at the federal, state, and local government. The mission statement states, in part:

The Mayors Caucus develops consensus positions on a broad range of key issues facing the Chicago region and is a strong advocate for their adoption at the federal, state, and local levels of government. ([http://www.mayorscaucus.org/pages/Home/About the Caucus/Mission History.htm](http://www.mayorscaucus.org/pages/Home/About%20the%20Caucus/MissionHistory.htm))

Staff Ex. 8.0 at 6-7.

Pursuant to the Lobbyist Registration Act, lobby and lobbying means: any communication with an official of the executive or legislative branch of State government as defined in subsection (c) for the ultimate purpose of influencing any executive, legislative, or administrative action"

25 ILCS 170/2(e).

and influencing means:

any communication, action, reportable expenditure as prescribed in Section 6 or other means used to promote, support, affect, modify, oppose or delay any executive, legislative or administrative action or to promote goodwill with officials as defined in subsection (c).

25 ILCS 170/2(f).

Staff argues that Section 9-224 of the Act does not allow the recovery through rates an expense of a public utility that is for political activity or lobbying. Section 9-224 states:

The Commission shall not consider as an expense of any public utility company, for the purposes of determining any rate or charge, any amount expended for political activity or lobbying as defined in the "Lobbyist Registration Act."

220 ILCS 5/9-224.

Staff reasons that therefore, the Commission should conclude that recovery of this donation to a political organization as a charitable contribution is improper and adopt Staff's adjustment.

Donations made to Non-charitable Organizations

Staff recommends that the Commission adopt Staff's adjustment to disallow \$376,000 in donations made to non-charitable organizations because the donations do not meet the requirements for recovery according to Section 9-227 of the Act. Staff Ex. 8.0 at 9-10; Staff Ex. 8.0, Schedule 8.01 at 2-3. Staff bases its adjustment on whether the purpose of the donation is for the public welfare. Staff Ex. 3.0 at 7.

Staff used the Internal Revenue Code Part 501(c)(3) as an initial filter to identify organizations that are defined as "charitable" by the federal government by the organization's tax exempt status and are, thus, restricted in the ability to participate in political activities or lobbying. Staff Ex. 3.0 at 7; Staff Ex. 8.0 at 9-10. Staff then considered the purpose of the donation to determine whether the donation served the public welfare. *Id.*

Staff acknowledges that the Commission rejected the notion of an Internal Revenue Code Section 501(c)(3) "filter" in its recent decision in Docket 12-0001. However, Staff argues that, as the Commission is aware, Commission decisions are not *res judicata*, and therefore the Commission is not bound to follow past precedent. See *United Cities Gas Co. vs. Illinois Commerce Comm'n*, 163 Ill.2d 1, 22-23 (1994). Staff states that the Commission is in fact required to make its decision exclusively on the facts of the record evidence before it, citing 220 ILCS 5/10-113. The Commission concluded in its Order in Docket 12-0001 that for a donation to meet the Section 9-227

“public welfare” requirement, it must benefit the rate paying public in the utility’s service territory. Docket 12-0001, Order at 79 (September 19, 2012). Specifically, the Order noted the importance of providing easily discoverable and reviewable information regarding the nature and purpose of the contributions. *Id.* ComEd has failed, in Staff’s view, to provide sufficient evidence to demonstrate that these donations meet the Section 9-227 requirements, and Staff recommends the donations be disallowed. Staff states that the only evidence ComEd provided in the record that these donations provide for the public welfare is the classification of the donations as Community and Neighborhood Development/Economic Development, Community and Neighborhood Development, Community Service, Arts and Culture/Performing Arts, or Community Involvement. ComEd Exs.13.05 and 13.10. In Staff’s opinion, this is not sufficient evidence that these donations provide for the public welfare.

Community and Neighborhood Development; Community Service, and Community Involvement Organizations

Included in Staff’s disallowance are the following organizations that ComEd has classified as Community and Neighborhood Development that total \$340,000: \$42,000 for the Chicagoland Chamber of Commerce; \$17,000 for the American Legion – Commonwealth Edison Post; \$15,000 for the Hacia; \$7,000 for the Italian American Chamber of Commerce – Midwest; and \$10,000 for the Downers Grove Park District; \$15,000 for the Commercial Club Foundation; 10,000 for Institute For Positive Living; \$8,000 for Project Brotherhood; A Black Man’s Clinic; \$10,000 for Thomas Alva Edison Foundation; \$156,000 for Truist; and \$50,000 for United Negro College Fund. Staff Ex. 8.0, Schedule 8.01 at 2-3.

Staff contends that these organizations are predominately economic and community development organizations. Staff states that the Commission has previously concluded that payments to economic and community development organizations disguised as charitable contributions should not be recovered from ratepayers. In these orders, the Commission explicitly found that it “is not willing to blur the distinguishable categories of industry dues and charitable contributions.” In the orders cited below, the Commission concluded that the specific contributions to economic and community development organizations at issue were more properly categorized as industry dues that should be shouldered by shareholders.

In Docket 05-0597, a rate case proceeding for Commonwealth Edison Company, the Commission disallowed a \$50,000 donation to the Illinois Manufacturers’ Associations (“IMA”). The Commission’s conclusion explained that because the payment constituted a payment for lobbying or a political activity, the donation should not be included in the requested revenue requirement:

ComEd claims that this contribution was for the IMA’s “Research on Education in Illinois” and that Staff’s adjustment for this should be rejected. Staff argues that the invoice is clearly labeled a “Legislative Strategies” contribution. *Section 9-224 of the Act (220 ILCS 5/9-224)*

prohibits including in any rate or charge any costs or payments for lobbying or political activity. Therefore, the Commission will reduce the revenue requirement for ComEd by \$50,000.00.

Docket 05-0597, Order at 103 (July 26, 2006) (emphasis added).

In Docket 04-0442, a rate case proceeding for Aqua, the Commission upheld a Staff disallowance for an amount paid to the Danville Area Economic Council. The Commission found that the payment was within the category of dues and not charitable contributions. The Commission explained that:

The first area of the adjustment concerns the amount paid to the Danville Area Economic Council. This type of adjustment also was at issue in Docket 03-0403. The Order entered in that case states:

The Commission is not willing to blur the distinguishable categories of industry dues and charitable contributions. The Order entered in 90-0169 squarely places the costs for industry association dues on the shareholders. See Order, 90-0169, at 65.

The Commission finds that the payments to the Danville Area Economic Council are within the category of dues and not charitable contributions. The eventual public purpose, as alleged by Aqua, is insufficient to qualify the dues paid for recovery pursuant to Section 9-227. The Commission therefore holds that the adjustment proposed by Staff is proper for the payments to the Danville Area Economic Council.

Docket 04-0442, Order at 31 (April 20, 2005) (emphasis added).

Again, in Docket 03-0403, a rate case proceeding for Consumers Illinois Water Company, the Commission adopted Staff's adjustment to charitable contributions because it lacked sufficient evidence to determine that the contributions to the economic and community development organizations were properly within the scope of Section 9-227. The Commission explained that:

Neither party contends that the donations at issue are for "charitable scientific, religious or educational purposes." Instead, they are for community or economic development associations.

* * *

The Commission declines to presume that, at any given local unemployment rate, contributions to economic and community development organizations are necessarily for the public welfare. It is possible that such a contribution is made for a purpose that can not be recovered under Section 9-227. The Commission specifically notes, however, 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. Instead, a determination must be made on the evidence presented for each case. The utility has the burden to provide the evidence required to establish recoverability under this Section.

* * *

With only the basic information contained in Schedule C-7 and Company testimony regarding other donations not at issue here, the Commission lacks sufficient evidence to determine that the contributions to the community and economic development organizations are properly within the scope of Section 9-227. Accordingly, the Commission concludes that the amounts in question should be excluded from the cost of service in this case. (Cf. Order, 02-0690, at 21 (disallowing recovery of donations “which may or may not be allowable under the Act, but [due to the] lack of evidence, cannot be determined as such”). Accordingly, Staff’s proposed reduction to charitable contributions is accepted.

Docket 03-0403, Order at 18-19 (April 13, 2004) (emphasis added).

Staff further argues that another example in which the Commission concluded that dues to chambers of commerce and community organizations may not be characterized as charitable contributions is found in the Commission’s order in Docket 01-0432, a rate case proceeding for Illinois Power Company:

A significant component of Staff’s argument on this issue is that IP will receive membership benefits in return for the dues payments in question. Notably, IP did not refute this assertion. The Commission concurs with Staff’s recommended disallowance of \$56,000 of chambers of commerce and community organizations dues. Since IP benefits from the payment of the dues, they may not be characterized as charitable contributions. Whether or not the IRS considers the organizations to which the dues payments were made not-for-profit is not at issue.

Docket 01-0432, Order at 54 (March 28, 2002).

Staff avers that clearly, the specific contributions to economic and community development organizations at issue in this proceeding, which Staff seeks to disallow, suffer from the same infirmities as those contributions addressed by the Commission above and further are inconsistent with the Commission’s understanding of “public welfare” under Section 9-227 as articulated in its recent 12-0001 Order.

In addition, Staff continues, the Commission has previously found that donations to the American Legion should not be recovered from ratepayers because the mission of the American Legion includes lobbying. The American Legion’s mission statement reads, in part:

The American Legion is a nonpartisan, not-for-profit organization with great **political influence** perpetuated by its grass-roots involvement in the legislation process from local districts to Capitol Hill. (<http://www.legion.org/mission>) (emphasis added).

Staff maintains that Section 9-224 of the Act prohibits the recovery of expenses for political activity or lobbying. According to Staff, since cash is fungible, any donation given to an organization that participates in political activity is effectively supporting that political activity. Staff recommends that the Commission accept Staff's adjustment to remove from the Company's revenue requirement the dues paid to organizations that are predominately economic and community development organizations because they are not charitable contributions to be reviewed under the criteria established in Section 9-227 of the Act. Staff argues that the record in this docket lacks sufficient evidence to determine if these donations were for the public welfare or educational, scientific, or religious purposes. Staff recommends that, without sufficient evidence to demonstrate compliance with Section 9-227, these donations should be disallowed.

Arts and Culture/Performing Arts

Staff recommends that \$36,000 in donations to non-charitable organizations that represent arts and culture type organizations be removed from the revenue requirement including \$29,000 for Galliard Performance Hall Foundation and \$7,000 for Hubbard Street Dance Chicago. Staff Ex. 8.01 at 2-3. Arts and culture is not a recoverable category of donations under Section 9-227. Staff avers that there is no evidence in the record supporting how these donations meet those requirements for recovery. Staff recommends that, without such evidence, these donations should be disallowed.

Summary of Staff's Adjustment for Charitable Contributions

Staff summarizes by stating that the Commission should accept its adjustment to disallow \$306,000 in donations to organizations outside of ComEd's service territory, \$10,000 to the Metropolitan Mayors' Caucus as it is a political organization, and \$376,000 in donations made to non-charitable organizations. According to Staff, the donations to non-charitable organizations include \$340,000 to economic development organizations which were incorrectly represented as charitable donations and \$36,000 to arts and culture organizations should be disallowed because there is no evidence in the record as to how they comply with Section 9-227 of the Act. Staff also seeks a disallowance of \$17,000 (of the \$340,000 noted above) to the American Legion-Commonwealth Edison Post 118 as the mission of the organization is lobbying.

ComEd's Position

ComEd requests approval to include \$6.862 million of charitable contributions (total amount, before removal of non-jurisdictional portion) in its revenue requirement.

ComEd Ex. 19.1, App. 7, line 5, col. (G). ComEd contends that inclusion of these charitable contributions in the revenue requirement is expressly provided for by Section 9-227 of the Act, which allows the Commission to consider as an operating expense “donations made by a public utility for the public welfare or for charitable scientific, religious or educational purposes, provided that such donations are reasonable in amount.” 220 ILCS 5/9-227. ComEd notes that these are the only proper tests for determining whether charitable contributions are recoverable. ComEd Reply Brief at 18. Indeed, ComEd further notes that 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.*; 220 ILCS 5/9-227. Yet, ComEd explains that in nearly every instance that Staff seeks a disallowance, its proposed disallowance is premised on imposition of a new test or rule not reflected in Section 9-227 or authorized by it. ComEd Reply Brief at 18-19.

Donations to Charitable Organizations

ComEd notes that Staff proposes 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. ComEd points out that this approach was squarely rejected by the Commission in its final Order in the first Ameren formula rate case, *Ameren Illinois Co.*, Docket 12-0001, Order at 78-79 (Sept. 19, 2012). ComEd states there is no reason for the Commission to depart from its ruling here. ComEd explains that while Staff 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.” ComEd thus takes the position that Staff’s after-the-fact attempt to justify disallowances based on the now discredited Section 501(c)(3) theory should be rejected. ComEd Reply Brief at 19.

ComEd notes that Staff’s argument that organizations involved in community and neighborhood development, community service, or the arts are not organizations serving the “public welfare” is not a new one. In fact, ComEd points out the Commission rejected this very argument only a few months ago in Docket 11-0721. ComEd observes that 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” in its *May 11-0721 Order* at 98. ComEd notes that in the prior two ComEd rate cases, the Commission allowed full recovery of donations to community and economic development and cultural organizations, finding 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.*; ComEd Reply Brief at 19.

ComEd takes issue with Staff’s argument that the donations to community and economic development organizations should be rejected because they are really “industry dues” that are only “disguised as charitable contributions,” citing Staff Initial

Brief at 21. ComEd points out that the orders cited by Staff to support this theory do not support such a result. ComEd notes that in ComEd's 2005 rate case (Docket 05-0597), the Commission disallowed recovery for just one disputed contribution to the Illinois Manufacturers Association because ComEd had labeled it as a "Legislative Strategies" contribution and the Commission thus found it to be a payment made for lobbying activities, a claim not at issue here. Further, ComEd notes that in Dockets 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, citing *Aqua Illinois, Inc.*, Docket 04-0442, Order at 31 (April 20, 2005); *Illinois Power Co.*, Docket 01-0432, Order at 53-54 (March 28, 2002).

Indeed, ComEd continues, in Docket 01-0432, the utility did not even contest that it would receive benefits from the "membership dues." *Illinois Power Co.*, Docket 01-0432, Order at 53-54 (March 28, 2002). ComEd explains that there is no such claim here that it received membership benefits from any of these contributions. Finally, ComEd contrasts the order in Docket 03-0403, in which 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 03-0403, Order at 16, 18-19 (April 13, 2004). There, ComEd points out, 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; ComEd Reply Brief at 20-21.

ComEd emphasizes that Staff has offered no explanation for why the donations at issue in this docket could or should be characterized as "industry dues" for which ComEd received membership benefits. ComEd points out that there is no evidence whatsoever – and Staff tellingly cites none – remotely suggesting that these donations were "industry dues." ComEd Reply Brief at 20-21. ComEd provides several examples that it believes demonstrate Staff's "strained" attempt to disallow certain contributions. *Id.* at 21. 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. ComEd notes with disbelief that 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, citing Staff Initial Brief at 20. ComEd observes that it cannot comprehend or even imagine what membership benefits or industries (much less "industry dues") are being referred to by Staff. ComEd Reply Brief at 21.

ComEd takes issue with Staff's argument 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. While Staff contends (without citation)

that the Commission has previously disallowed donations to the American Legion, ComEd cites to ComEd's 2011 and 2010 rate cases which allowed for such donations. See ComEd Ex. 13.05, p. 2, line 18; see generally, *May 11-0721 Order* and Docket 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. ComEd Reply Brief at 22.

ComEd submits that Staff once again argues 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", and that Staff's claim should again be rejected. Staff Initial Brief at 25. ComEd cites to the *May 11-0721 Order* (at 98) which provides that "the term 'public welfare' only means contributing to the general good of the public", and submits that cultural organizations promoting the arts fit within that definition. ComEd contends that, just 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. ComEd concludes that 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."). ComEd Reply Brief at 22.

Donation to Metropolitan Mayors' Caucus

ComEd addresses Staff's recommended 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 Initial Brief at 18. ComEd contends that it 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. Furthermore, ComEd provides evidence that this group works to address major issues, including, for example, affordable housing. ComEd Ex. 13.05 at 2, line 16. According to ComEd, 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. ComEd takes issue with Staff's suggestion that the Commission should adopt just such a rule, and impose a blanket prohibition on recovery of donations to any charitable organization that might also engage in political activity. ComEd contends that such a rule, 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.

Contributions to Organizations Outside of the ComEd Service Territory

ComEd also takes issue with Staff's argument that the Commission should reject donations made to organizations outside of ComEd's service territory because the

statute contains no such prohibition and the statute actually bars the Commission from making this type of blanket rule barring recovery. ComEd Reply Brief at 22-23. To the extent, if any, that the Commission has endorsed such a prohibition in prior orders (*i.e.*, *May 11-0721 Order* or *Ameren 2012*), ComEd respectfully disagrees with that conclusion as inconsistent with the statutory language. Further, the statute does not limit the definition of “public” to the customers in ComEd’s service territory. ComEd Initial Brief at 39-40.

ComEd concludes that because its donations were made for the public welfare and are consistent with Section 9-227 of the Act, 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). ComEd Reply Brief at 23.

Commission Analysis and Conclusions

Exception No. 2

Section 9-227 of the Act allows the Commission to consider as an operating expense “donations made by a public utility for the public welfare or for charitable scientific, religious or educational purposes, provided that such donations are reasonable in amount.” 220 ILCS 5/9-227. In this proceeding, ComEd requests the Commission’s approval of \$6.862 million in charitable contributions in its revenue requirement. ComEd Ex. 19.1, App. 7, line 5, column G. Staff proposes an adjustment to the charitable contributions amount by disallowing \$692,000. Staff Ex. 8.0, Sched. 8.01 at 2-3. Specifically, Staff proposes to disallow \$306,000 in donations made to organizations outside of ComEd’s service territory, \$10,000 to the Metropolitan Mayors’ Caucus arguing that it is a political organization, and \$376,000 in donations made to non-charitable organizations.

The Commission notes that the issue in this matter is not whether ComEd can make certain donations to various organizations, but whether the expense of those donations is recoverable from ratepayers. The Commission recently initiated a rulemaking in Docket 12-0457 that will provide a better methodology for reporting charitable contributions made by utilities, thus allowing a better prudence-review of those contributions in future dockets. Unfortunately, those rules are not available to use in the instant docket and the Commission must address this issue based on the record and past precedent.

The Commission disagrees with Staff’s adjustment disallowing charitable contributions made to organizations outside the Company’s service territory. ~~The Commission routinely disallows contributions to organizations outside a utility’s service territory. See Docket 11-0721, Order at 98; Docket 10-0467, Order at 108; and Docket 12-0001, Order at 79. While it is entirely possible that a donation made to an organization outside of a utility’s service territory may in some way benefit the public within the utility’s service territory, for a utility to recover that expense, the donations~~

~~must have some showing of the benefit to the public within the utility's service territory. However, making this showing is currently not required by Section 9-227 though it may be part of the potential rules that provide guidance on this subject. ComEd did not provide such a showing in this docket, and instead relies on a blanket objection to the Commission's past practice and maintains that Unlike the General Assembly's definition of "Public utility" in Section 3-105(a) of the Act, which is expressly limited to utilities "within this State", the statute Section 9-227 does not limit the definition of "public" in any way, much less to the customers in ComEd's service territory. The Commission rejected ComEd's arguments regarding the limitations of what is "public" in Docket 11-0721, and ComEd's arguments in this docket fail to provide a basis for the Commission to reverse its position.~~

Finally, the Commission finds ComEd's argument that disallowing contributions to out-of-state organizations absent a showing of benefit to ratepayers runs afoul of the Commerce Clause to be convincing. The dormant Commerce Clause forbids this sort of discrimination and "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Mgt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992). The Commission cannot afford preferential treatment to organizations in ComEd's service territory (which are, of course, in state) because it will have the effect of encouraging ComEd to make contributions only to those organizations in Illinois and will penalize out-of-state organizations because recovery will not be permitted for those contributions. This principle was affirmed by the U.S. Supreme Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997) in which the Court invoked the Commerce Clause to prevent a State from providing a tax break only to charities that benefit the State's inhabitants. The same is true here and the contributions to organizations outside of ComEd's service territory should be recoverable to alleviate a legally unsound interpretation of Section 9-227. Accordingly, ~~t~~The Commission finds that declines to adopt Staff's proposed disallowance of charitable contributions made to organizations outside ComEd's service territory is reasonable.

The Commission disagrees with Staff's remaining proposed disallowances to charitable contributions, notably the donation to the Metropolitan Mayors' Caucus and donations made to non-charitable organizations. Staff argues that recovery of the \$10,000 donation to the Metropolitan Mayors' Caucus is improper because the Metropolitan Mayors' Caucus is a political organization. Staff argues that money is fungible and therefore the Company cannot ascertain whether the money donated to an organization that is active in politics was used for the public welfare or for political purposes. ComEd maintains that the donation was made for charitable purposes and that the organization is involved in community and neighborhood development and economic development. There is no argument ~~that~~ as to whether ComEd made the donation for charitable purposes. Rather, the question is whether the donation is barred by Section 9-224 of the Act. Section 9-224 of the Act provides that: "The Commission shall not consider as an expense of any public utility company, for the purposes of determining any rate or charge, and amount expended for political activity or lobbying as defined in the 'Lobbyist Registration Act.'" The Metropolitan Mayors' Caucus is

involved in community and economic development, including working towards affordable housing. ComEd asserts that the donation was made to the Metropolitan Mayors' Caucus to further the organization's community and neighborhood development and economic development activities, and the Commission finds no evidence to dispute this assertion. The Commission agrees with ComEd that the fact that the organization might engage in some political activity does not necessarily mean the Company's contribution must be disallowed under Section 9-224 of the Act. Moreover, the Commission notes that it has allowed recovery of charitable contributions to this organization in the past.

Staff further argues that the contribution to the American Legion, which is included in the non-charitable organization contribution disallowance, should also be rejected on the basis that the organization has "great political influence" according to its web page. The Commission disagrees with Staff's argument using the same reasoning as above regarding the Metropolitan Mayors' Caucus, and again, the Commission has allowed contributions to this organization in the past. See Docket 04-0442, Order at 31-32.

In Docket 12-0001, the Commission rejected an argument by Staff to disallow recovery of donations to organizations based on whether the organization is tax exempt pursuant to Section 501(c)(3) of the internal Revenue Code. While Staff notes the Commission's decision in Docket 12-0001, Staff again proposes to disallow donations for the public welfare which are not made to Section 501(c)(3) organizations. The Commission rejected reliance on Section 501(c)(3) on the basis that it "does not provide the intended clarity as to when a donation made or the "public welfare" would be recoverable from ratepayers." Docket 12-0001, Order at 79. As in Docket 12-0001, the Commission will take at face value the record evidence that these contributions were made for the public welfare or scientific, educational, or religious purposes.

The Commission notes that Staff listed dockets wherein the Commission "concluded that the specific contributions to economic and community development organizations at issue were more properly categorized as industry dues that should be shouldered by shareholders." However, unlike in the dockets cited by Staff, there is no evidence in the record in this proceeding that these contributions afforded ComEd membership benefits or related to industry dues.

Staff also proposes disallowances to non-charitable organizations that represent arts and culture, arguing that these contributions are not recoverable under Section 9-227 of the Act. The Commission finds that the term "public welfare" should be taken in its normal meaning, in essence contributing to the general good of the public. ComEd argues that these contributions are for the public welfare, and the Commission agrees in this case. The Commission declines to adopt a position, as Staff would suggest, that arts and culture are not in the public welfare.

Accordingly, the Commission ~~adopts Staff's adjustment to disallow contributions to organizations outside the Company's service territory, and rejects all of Staff's other recommended disallowances to recovery of charitable contributions.~~

b. Rate Case Expense - - Instant Docket (for Preparation of an Article IX Rate Case)

Staff's Position

Staff recommends accepting its adjustment to remove as rate case expense from ComEd's revenue requirement over \$270,000 which, Staff states, is the costs that are associated with a traditional Article IX rate case that ComEd never filed. (Staff Ex. 8.0 at 10). Staff argues that it is unreasonable for customers to pay for the preparation of this Article IX rate case which the Company never filed, while also paying for the preparation of, and the filing of, a formula rate case that ComEd ultimately did file, Docket 11-0721. Staff points out that ComEd was not required to become a participating utility under Section 16-108.5 of the Public Utilities Act. Rather, ComEd did so at its own election. ComEd decided to simultaneously prepare a traditional Article IX rate case and a formula rate case. Staff contends that ComEd failed to show any ratepayer benefit resulting from preparing this unfiled rate case.

Staff further avers that the preparations involved in a rate case, either for a traditional or a formula-type of rate case, should greatly overlap. Thus, Staff asserts that allowing this item to remain in rate case expense runs the risk of ratepayers paying twice for the same services. In Staff's opinion, ComEd witness Dr. Hemphill's claims that management at ComEd "was not sure whether or not the legislation (220 ILCS 5/16-108.5) would eventually become law or what requirements the final legislation would include," ignores the fact that ComEd could reasonably have waited just a few weeks to see what the legislative outcome would be regarding enactment of Section 16-108.5 before spending over \$270,000 to prepare for an Article IX case that it never filed. Staff Initial Brief at 26.

ComEd's Position⁵

ComEd states that its formula rate update includes about \$244,000 in costs that it incurred in 2011 as a result of preparing an Article IX rate case.⁶ ComEd acknowledges that this Article IX rate case was never filed, but it avers that in 2011, it was unclear to personnel at ComEd if, or when, Section 16-108.5 would become law. As a result, because of a claimed revenue shortfall that ComEd faced, ComEd started preparing to file a traditional Article IX rate case, along with the necessary Part 285 filing

⁵ In ComEd's Initial Brief, this issue is entitled: "Rate Case Expenses—Docket No. 11-0721 and Article IX Filing." (See, ComEd Initial Brief at 40).

⁶ Because ComEd asserts that it seeks only \$244,000 in rate case expense for its unfiled Article IX matter, it appears that Staff's figure, \$270,000, is erroneous. However, we caution all parties to explain why their figures are not the same as the figures of others.

requirements. ComEd Ex. 13.0 at 12-13). ComEd argues that had it not done so, and had Section 16-108.5 not been enacted, it would have lost at least six months of cost recovery. However, when this statute became law, ComEd elected to become a “participating utility” under that statute and it discontinued its Article IX case preparation. Up to that time, ComEd incurred about \$244,000 in costs for the preparation of that Article IX filing. ComEd Initial Brief at 40-41.

According to ComEd, the sole basis for Staff’s proposed disallowance is that customers should not be expected to pay for both an Article IX filing and a Section 16-108.5 filing, where the Article IX case was never filed, citing Staff Ex. 8.0 at 11. ComEd further contends that “Staff does not doubt that these costs were incurred, or claim that they are not reasonable in amount or even that ComEd was imprudent in incurring these costs.” (*Id.*).

ComEd avers that a close parallel to the facts here is the treatment of the cost of investing in utility plant that was never completed and thus, those expenditures never provided any service to the public. Despite arguments that recovery of those costs should be disallowed, in the past, this Commission allowed a full recovery of the costs that were prudently-incurred in connection with the construction of the Duck Creek generating plant, even though that plant was not completed because of changed circumstances, citing *Central. Ill. Light Co.*, Docket 83-0177 (Interim Order, December 21, 1983). ComEd Initial Brief at 40-41.

Analysis and Conclusions

ComEd seeks to recover \$244,000 in costs incurred in 2011 as a result of preparing an Article IX rate case. We disagree with Staff that these expenditures were included in a manner that is not consistent with the relevant portion of the Public Utilities Act.⁷ Section 9-229 of the Public Utilities Act provides that “The Commission shall specifically assess the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts to prepare and litigate a general rate case filing.” 220 ILCS 5/9-229. We also disagree with Staff’s contention that it is inappropriate that customers be expected to pay for both an Article IX filing and an EIMA filing because that is not what the statute requires or addresses. At the time ComEd incurred these expenses, it was unclear whether, or when, EIMA would become law. Indeed, the legislation had been vetoed by the Governor and its fate was entirely uncertain. As a result of this uncertainty, it was both reasonable and prudent for ComEd to begin preparing an Article IX rate case filing based on current law. The Commission refuses to take Staff’s position which is formed with the benefit of hindsight. The Commission also declines to punish ComEd for becoming a “participating utility” under EIMA. For the above reasons, the Commission approves ComEd’s position and allows for the recovery of \$244,000 in costs associated with the preparation of its Article IX filing. This language clearly means the rate case at issue, not

⁷ No party or Commission Staff has argued that Section 9-229 does not apply here. Additionally, it appears that it was incorporated in Section 16-108.5. 220 ILCS 5/16-108.5(c)(4)(E).

~~other, additional rate cases. As is set forth herein in the next subsection, Section 9-229 became effective in 2009, which is a few decades after 1983, the year when the Commission decided the Interim Order in *Central Ill. Light Co.*, Docket 83-0177 (which is the Commission Interim Order that ComEd cites). Additionally, *Central Illinois* does not concern rate case expense. Therefore, the *Central Illinois* Interim Order does not aid ComEd. Any other outside of Illinois case cited by ComEd in its argument does take Illinois law into effect, and therefore, does not aid ComEd.~~

~~Additionally, the issue of including ComEd's expenditures involving other cases in rate case expense was decided in Docket 10-0467, when ComEd included the costs of another unsuccessful Alternative Regulation proceeding in its rate case expense for Docket 10-0467. (See, Docket 10-0467, final Order of May 24, 2011, at 86-92). After the decision in Docket 10-0467, including the rate case expense for another case that was never even filed is a frivolous argument. The Commission additionally notes that ComEd's articulated reason for its Article IX filing was an alleged (unspecified) revenue shortfall in 2011. ComEd does not state why it had this "revenue shortfall." Nor is it obvious, as ComEd received a rate increase on May 24, 2011, which is when the final Order issued in Docket 10-0467. This Commission encourages all parties not to pursue frivolous arguments, which merely waste taxpayer/ratepayer resources, in the future.~~

c. Rate Case Expenses - - Docket 11-0721

Exception No. 4

ComEd's Position

ComEd states that the evidence from Staff and ComEd and the Initial Briefs of Staff and ComEd confirm that the amount of compensation paid to attorneys and technical experts to prepare and litigate the initial formula rate docket (ICC Docket 11-0721) is prudent, reasonable, and uncontested. ComEd Ex. 3.0 REV at 38-40; ComEd Init. Br. at 40; Staff Init. Br. at 27; ComEd Rep. Br. at 24. ComEd submits that the Commission should find that amount, \$1,544,161, to be amortized over three years resulting in an amortization amount of \$515,000 to included in the 2013 inception revenue requirement, to be just and reasonable pursuant to Section 9-229 of the Act. E.g., ComEd Rep. Br. at 24. ComEd also submitted proposed language to that effect in its draft Proposed Order. ComEd's testimony and briefing addressed this subject both in this section and as to amortization of the related regulatory asset. ComEd also addressed this issue in detail in its Brief on Exceptions. The Proposed Order's recommended disallowance on this subject should not be adopted for the reasons stated here and in ComEd's Brief on Exceptions.

Under Illinois law, it is well established that a utility is entitled to recover rate case expenses, which have been found by the Supreme Court of Illinois to be ordinarily, properly and fairly allowable as an operating expense. *DuPage Util. Co. v. Illinois*

Commerce Comm'n, 47 Ill. 2d 550, 561, 267 N.E.2d 662, 668 (1971). Since that decision, Illinois courts have continued to allow utilities to recover rate case expenses as an ordinary and reasonable cost of doing business. Section 9-229 of the Act, 220 ILCS 5/9- 229, also recognizes the recoverability of rate case expenses. EIMA specifically provides that a participating utility, like ComEd, can recover its expenses related to the cost of Commission proceedings to approve performance-based formula rates and of the annual update and reconciliation proceedings, with the costs of the initial proceeding to be amortized over three years. 220 ILCS 5/16-108.5(c)(4)(E).

Staff fully investigated these costs through discovery and in its rebuttal testimony recommended that the Commission approve them as prudent and reasonable under Section 9-229. Staff Ex. 8.0 at 14. No party proposed disallowance of the costs.

Under existing case law prior to enactment of EIMA, in proceedings before the Commission, once a utility has established a *prima facie* case, the burden then shifts to others to bring forth evidence of unreasonableness because of inefficiency or bad faith. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 327 Ill. App. 3d 768, 776, 762 N.E.2d 1117, 1123-1124 (3rd Dist. 2002); *City of Chicago v. Illinois Commerce Comm'n*, 133 Ill. App. 3d 435, 443, 478 N.E.2d 1369, 1375 (1st Dist. 1985). A utility need not anticipate and pre-emptively disprove arguments that other parties may raise but on which they have provided no evidence. *City of Chicago v. Illinois Commerce Comm'n*, 133 Ill. App. 3d at 442, 478 N.E.2d at 1375. This principle was modified and made even stronger by EIMA. Specifically, regarding the annual update proceedings such as the instant case, EIMA states that “during the course of the hearing, each objection shall be stated with particularity and evidence provided in support thereof, after which the utility shall have the opportunity to rebut the evidence.” 220 ILCS 5/16-108.5(d).

The decision in *People ex rel. Lisa Madigan v. Illinois Commerce Comm'n*, 2011 IL App (1st) 101776, 964 N.E.2d 510 (1st Dist. Dec. 9, 2011, *reh'g denied*, April 11, 2012), appeal denied (Ill. S. Ct. Sept. 26, 2012) does not require the disallowance of these uncontested costs. Among other reasons, that case involved the much different procedural posture of the expenses being contested. Also, the case did not rule that any costs had to be disallowed, and order a remand to the Commission, which has not yet commenced (the mandate was only issued to the Commission on November 8, 2012). The Commission's rate case expense rulemaking also is pending.

In the alternative, ComEd filed a motion to supplement the record with copies of ComEd's responses to Staff data requests on this subject, which responses showed information such as the scope of work performed by counsel and experts / consultants and other vendors on the 2011 rate case, engagement terms, hours, and hourly rates.

Staff's Position

Staff recommends determining that the amount of compensation for attorneys and technical experts incurred in 2011 to prepare and litigate the initial formula rate Docket 11-0721 in the amount of \$1,544,161 to be just and reasonable pursuant to Section 9-229 of the Act. Staff also recommends that the Commission place ComEd on notice that the Commission will be reviewing the bills from outside counsel in future cases to ensure that it is diligent in ensuring compliance with Exelon Corporation's Billing and Procedural Guidelines for Outside Counsel. Included in the compensation for attorneys and technical experts to prepare and litigate Docket 11-0721 are several meals invoiced for ComEd's outside legal firm. Staff states that the outside legal counsel with which ComEd contracts is required to review and accept Exelon Corporation's Billing and Procedural Guidelines for Outside Counsel, which clearly indicate that ComEd will not pay for meals unless those meals are related to long distance travel.

However, Staff continues, the meals in question were at the external counsel's premises, which are in Chicago. Staff reasons that thus, no travel was involved and, therefore, outside counsel for ComEd should not have been reimbursed. Staff does not make an adjustment for these meals because the amount was immaterial (approximately \$1,100) and is included as part of the initial formula rate case expense which is being amortized over three years, per Section 16-108.5. Staff recommends that the Order in this proceeding place ComEd on notice that it should comply with Exelon Corporation's Billing and Procedural Guidelines for Outside Counsel. Staff Ex. 8.0 at 12-14.

Exception No. 4, Continued

Analysis and Conclusions⁸

Section 9-229 of the Act requires the Commission to assess the justness and reasonableness of amounts expended by a public utility to compensate attorneys or technical experts in preparing and litigating a rate proceeding. 220 ILCS 5/9-229. ComEd seeks approval of, and Staff supports, rate case expenses for ICC Docket No. 11-0721 in the amount of \$1,544,161, to be amortized over three years, resulting in an amortization amount of \$515,000 to be included in the 2013 inception revenue requirement. ComEd Init. Br. at 40; Staff Init. Br. at 27; ComEd Rep. Br. at 24. In fact, Staff submitted testimony (Staff Ex. 8.0) agreeing that the rate case expenses are just and reasonable and should be approved under Section 9-229 of the Act. Because these costs are uncontested, the Commission finds those rate cases expenses to be just and reasonable pursuant to Section 9-229 of the Act. The Commission notes that in future cases, ComEd may be expected to move more detailed evidence into the record, but here, where the costs were uncontested, ComEd's direct case and Staff's rebuttal testimony were sufficient in the instant Docket.

⁸ ComEd took no position on this issue.

[Alternative Exception No. 4]

Section 9-229 of the Act requires the Commission to assess the justness and reasonableness of amounts expended by a public utility to compensate attorneys or technical experts in preparing and litigating a rate proceeding. 220 ILCS 5/9-229. ComEd seeks approval of, and Staff supports, rate case expenses for ICC Docket No. 11-0721 in the amount of \$1,544,161, to be amortized over three years, resulting in an amortization amount of \$515,000 to be included in the 2013 inception revenue requirement. ComEd Init. Br. at 40; Staff Init. Br. at 27; ComEd Rep. Br. at 24. In fact, Staff submitted testimony (Staff Ex. 8.0) agreeing that the rate case expenses are just and reasonable and should be approved under Section 9-229 of the Act. The Commission has granted ComEd's motion to supplement the evidentiary record with data request responses of ComEd, and the Commission has reviewed that additional evidence. The testimony and the documentation in evidence support the prudence and reasonable of the work of the work performed and of the amounts and costs (including hourly rates) of that work. For that reason, and because these costs are uncontested, the Commission finds those rate cases expenses to be just and reasonable pursuant to Section 9-229 of the Act.

[Second Alternative Exception No. 4]

Section 9-229 of the Act requires the Commission to assess the justness and reasonableness of amounts expended by a public utility to compensate attorneys or technical experts in preparing and litigating a rate proceeding. 220 ILCS 5/9-229. ComEd seeks approval of, and Staff supports, rate case expenses for ICC Docket No. 11-0721 in the amount of \$1,544,161, to be amortized over three years, resulting in an amortization amount of \$515,000 to be included in the 2013 inception revenue requirement. ComEd Init. Br. at 40; Staff Init. Br. at 27; ComEd Rep. Br. at 24. In fact, Staff submitted testimony (Staff Ex. 8.0) agreeing that the rate case expenses are just and reasonable and should be approved under Section 9-229 of the Act. Although these costs are uncontested, the Commission is not approving the inclusion of the first year amortization of these costs in the 2013 inception revenue requirement, on the grounds that the evidence in the record is insufficient under *People ex rel. Lisa Madigan v. Illinois Commerce Comm'n*, 2011 IL App (1st) 101776, 964 N.E.2d 510 (1st Dist. Dec. 9, 2011, *reh'g denied*, April 11, 2012). ComEd may submit evidence to support these expenses in its 2013 formula rate update and reconciliation case, to support their recovery. The issue in that Docket will be addressed based on the record of that case.

~~Very generally, rate case expense is the attorney's fees and expert witness fees that a utility incurs in a rate case. The significance of those fees is that they are included in any rate increase. In other words, the general public pays for the attorneys and expert witnesses that a utility procures in an effort to increase its rates. In many situations, such fees are recoverable after it has been established that an opposing party paying those fees has created some harm. See, e.g., 42 U.S.C. Sec. 1988. However here, consumers merely are required to pay the cost of a utility rate increase without regard to fault or any harm caused by the consumers.~~

In 2009, Section 9-229 of the Public Utilities Act became law. It provides that:

Consideration of attorney and expert compensation as an expense

The Commission shall specifically assess the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts to prepare and litigate a general rate case filing. This issue *shall be expressly addressed* in the Commission's final order.

220 ILCS 5/9-229; emphasis added. Clearly, in order for the Commission to be able to expressly address the compensation for attorneys and expert witness fees, there must be some evidence of record as to what services these persons or entities did in the rate case at issue. Indeed, as the Appellate Court has noted, this Commission must make findings in support of its decisions and those findings must be supported by the record. *Commonwealth Edison Co. v. Ill Commerce Commission*, 398 Ill. App. 3d 510, 551-52, 924 N.E. 2d 1065 (2nd Dist. 2010). There can be no express finding of justness and reasonableness that is supported by the record, unless there is evidence in the record as to what the Commission is finding to be just and reasonable.

In Docket 10-0467, a ComEd rate case, the Commission addressed the issue of what evidence satisfies the requirements in Section 9-229 of the Public Utilities Act. This Commission concluded that the parties should adhere to the well-established body of case law on the subject, which, very generally, requires proof of what services were performed, the necessity for those services, and proof that the rates at issue for the services are reasonable for the services performed. The Commission also concluded that a rulemaking should commence, which should have placed all concerned parties, including ComEd, "on the same page" regarding that body of law. In that rulemaking proceeding, an extensive amount of information as to the documentation that is required by the body of law that was cited in the Docket 10-0467 Order was provided to all of the parties, including ComEd. See, Docket 10-0467, final Order of May 24, 2011 at 81-86; See also, Docket 11-0711, generally, regarding the rulemaking and regarding what that body of law requires.

With regard to attorney's fees, in that Order, the Commission noted that accountants do not necessarily know what lawyers do or should be doing on behalf of their clients. Docket 10-0467, final Order of May 24, 2011, at 81. This determination on the part of the Commission should have made it obvious to all of the parties, including ComEd, that merely tendering information in discovery, but not placing it in the evidentiary record, does not satisfy the legal requisites in the applicable body of law regarding attorney's fees. See, Tr. 129. This is true because when there is no evidence of record, the Commission has no evidence upon which, it can determine that the rate case expenditures were just and reasonable, which it is required by Section 9-229 of the Public Utilities Act to do.

~~Subsequent to the final Order in Docket 10-0467, on December 9, 2011, the Illinois Appellate Court ruled in a matter involving another utility that, in order to satisfy Section 9-229 of the Act, the party seeking attorney's fees and expert witness fees must provide evidence that specifies: (1) the services performed; (2) by whom they were performed, (3) the time expended; and (4) the hourly rate charged. In that decision, the Illinois Appellate Court cited the very same body of case law that the Commission Order in Docket 10-0467 referred to above. The Appellate Court then remanded the matter back to the Commission for a determination based upon these criteria. *People ex. rel. Madigan v. Illinois Commerce Comm.*, 2011 Ill. App. (1st) 101776, at 24-26, 964 N.E.2d 510 (Ill. App. 1st Dist. 2011). At that point in time, this Commission became required to follow the body of law that was cited in the Appellate opinion and in the final Order in Docket 10-0467. Notably, even a cursory examination of the body of case law cited in the final Order in Docket 10-0467 and in *People ex. rel. Madigan*, cited above, would reveal that what is necessary to satisfy that body of law is evidence as to what the lawyers and expert witnesses did, in the case file, for the trier of fact to view, in order to make a decision based on that evidence.~~

~~Nevertheless, the evidence that ComEd presented regarding the amount of rate case expense that it is requesting, \$1,979,83, is a scant one-page spreadsheet that merely lists totals and various entities.⁹ See, ComEd. Ex. 3.9. There is no proof as to what these entities did to earn their fees, and no proof as to what time was expended, or as to the rates charged consumers for various persons or entities, not to mention the reasonableness of those rates. In fact, this document does not even establish that the services were performed in conjunction with any particular proceeding.¹⁰ *Id.*, Tr. 128-29.~~

~~———— The Commission additionally notes that it appears that several of the items listed on that page appear to be improperly included overhead expenses. See, e.g., *Losurdo Bros. v. Arkin Distributing Co.*, 125 Ill. App. 3d 139-144, 465 N.E.2d 139 (2nd Dist. 1984). These items are: "Beeline" for unspecified schedule and discovery response preparation in the amount of \$67,646; "Ikon Office Solutions" for unspecified office supplies in the amount of \$210; "Lakeview Energy Resource Consultants" for unspecified rate case preparation and consulting in the amount of \$31,968; "PRDC," for capital project review in the amount of \$266,880; "SFIO" for unspecified rate case preparation in the amount of \$34,700 and finally "Other" for miscellaneous unspecified travel, meals, postage and shipping in the amount of \$3,940. ComEd Ex. 3.9. Overhead costs, generally, are not recoverable under the body of case law concerning expert witness fees and attorney's fees that govern here. *Johnson v. Thomas*, 342 Ill. App. 3d 382, 402-04, 749 N.E.2d 9 (1st Dist. 2003), noting that routine charges are included in overhead and therefore not recoverable as a cost of litigation; see also *Harris Trust & Savings Bank v. American National Bank & Trust Co.*, 230 Ill. App. 3d 591, 599, 594 N.E.2d 1308 (1st Dist. 1992).~~

⁹ This amount appears to be amortized over a few years, as the total amortized expense record ed as of December 2011 was listed as \$523,633.

¹⁰ However, the amounts listed in ComEd Ex. 3.9 were all paid. Tr. 128.

~~However, this Commission is not deciding whether these costs are improperly included as overhead. From the scant information provided in the record, it is not possible to do so. The fact that inclusion of these items may be contrary to the applicable law only highlights the fact that evidence must be provided in the evidentiary record as to what expenditures were made, and the nature of, the need for, and reasonableness of, those expenditures. Otherwise, this Commission runs the risk, in a proceeding that will raise electric rates for the general public, of passing on unnecessary fees in those rates. It should again be noted that the general public pays those fees, as they are included in any rate increase. Without evidence establishing what the entities listed on that spreadsheet did and establishing that what they did was reasonable, this Commission cannot approve any item in rate case expense. Doing so would be ignoring the statutory requisite to expressly address the reasonableness of the fees involved and also ignoring the fact that all findings must be supported by the record.~~

~~Therefore, with the exception of the \$200,000 paid as a statutory filing fee, the entirety of rate case expense is disallowed.¹¹ ComEd is further cautioned to follow the law and Commission Orders in the future. Because ComEd presented virtually no evidence to support its rate case expense for Docket 11-0721, the Commission need not decide the issue raised by Staff, whether some of the expenses labeled as “Other” violate a contractual obligation to ComEd.~~

d. Merger Expense

ComEd’s Position

ComEd requests approval to include in its formula rate update \$7,213,346 of costs related to the merger of Exelon Corporation (“Exelon”) and Constellation Energy Group (“Constellation”) that were incurred in 2011 to achieve post-merger savings that will be passed through to ComEd’s customers in 2012 and thereafter. ComEd asserts that it is not seeking to recover attorney’s fees, bank fees and other traditional costs associated with obtaining approval 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. ComEd Initial Brief at 42; ComEd Reply Brief at 26.

ComEd states that through 2015 these savings are estimated to amount to \$156 million net of the costs that will be incurred to achieve them. Furthermore, in 2015 and annually thereafter the per-year cost savings are estimated to be \$66 million, and no further costs to achieve these savings will be incurred. ComEd argues that because of the existence of net merger savings this case is unlike the situation in ComEd’s 2007 rate case where the Commission disallowed merger-related costs incurred in the failed merger between Exelon and Public Service Enterprise Group (“PSEG”). According to

¹¹ This expenditure, a filing fee, is allowed because it is independently verifiable through the Chief Clerk’s office.

ComEd that case was a failed merger that would never be expected to result in savings. ComEd Reply Brief at 31.

ComEd notes that Staff initially objected to recovery of the \$7.2 million in 2011 costs, as did AG/AARP and CUB. However, after ComEd filed its rebuttal testimony further explaining these costs, Staff withdrew its objection in its entirety, and AG/AARP withdrew their objection to \$400,000 of those costs. AG/AARP and CUB continue to object to the recovery of these costs, in the amount of \$6.8 million and \$7.2 million, respectively. ComEd Initial Brief at 42-43.

ComEd states that the process utilized by Exelon to estimate potential merger related cost savings and then to realize those savings is consistent with the process utilized by other companies in previous merger transactions. ComEd explains that Exelon has identified and planned for the realization of these synergies by developing an integration structure to oversee the execution of the integration plans, has established individual accountability for synergy realization and has developed a detailed tracking and reporting process to evaluate synergy attainment. Mr. Todd Jirovec, of Booz & Company, testified on behalf of ComEd that the level of merger savings identified by ComEd is reasonably attainable so long as Exelon and ComEd execute the integration plans in a manner consistent with their intent and how other utilities have pursued similar opportunities. Mr. Jirovec also stated that, based on his observations, management is firmly committed to doing just that. ComEd Initial Brief at 43.

Prudence and Recoverability of the Costs-to-Achieve.

ComEd witness Mr. Trpik explains that, aside from the \$400,000 of costs that are contested by CUB, the remaining \$6.8 million in costs consist of \$3.7 million for BSC and \$3.1 million for external vendors. Mr. Trpik asserts that “[t]hese costs were incurred to reduce O&M-related costs associated with ComEd’s provision of delivery service.” ComEd Ex. 14.0 at 5. According to ComEd, these are the cost reductions that lead directly to the anticipated \$156 million of net savings through 2015. ComEd Initial Brief at 44.

Mr. Trpik states that the \$3.7 million in BSC costs are primarily payroll-related expenses associated with employees conducting various pre-merger integration activities necessary to ensure that the combined companies would operate successfully upon completion of the merger (i.e., on ‘Day 1’) and deliver the anticipated benefits. ComEd explains that these activities included the evaluation and development of combined company processes, policies, procedures, organizational structures, compensation and benefits plans, information technology systems, internal and external communications plans, coordination of a combined calendar for key meetings, events and deliverables, the identification of risks, and development of risk mitigation plans. ComEd Ex. 14.0 at 5.

ComEd asserts that the \$3.1 million of external vendor costs were primarily for consultants and experts supporting merger integration planning, coordination and execution efforts. ComEd also identifies the outside vendors who provided the services in question as well as a description of the services provided by each. Mr. Trpik explains that all of these efforts “were necessary to realize future savings through reductions in BSC costs and ComEd specific supply savings.” ComEd Ex. 14.0 at 5-7.

ComEd states that AG/AARP argues 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. ComEd responds 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. ComEd notes, however, that had it done so millions of dollars of savings would have been lost to the detriment of its ratepayers. ComEd asserts that Exelon’s Integration Office has estimated that delaying the planning process by only one month would have reduced savings by between \$3 and \$5 million. ComEd Initial Brief at 46-47; ComEd Reply Brief at 30; ComEd Ex. 20.0 at 3, 4.

ComEd’s Responses to Objections regarding Recovery of the Costs.

(a) AG/AARP and CUB’s characterization of the costs.

ComEd states that AG/AARP witness Mr. Brosch contends that the \$6.8 million in costs should be disallowed because they were not incurred to ‘achieve’ any specific merger savings within ComEd’s business. He claims these costs were incurred in connection with the assessment of the merger itself and Exelon’s decision whether to acquire Constellation. They are, according to Mr. Brosch, “parent company ownership costs incurred by Exelon to expand and manage its portfolio of businesses” and not prudent or reasonably incurred expenses of operating a utility. AG/AARP Ex. 1.0 at 6; Ex. 3.0 at 4. ComEd contends that these statements are simply incorrect, and the characterizations are meaningless.

First, ComEd asserts that, Mr. Brosch presents no evidence to support his assertions. Instead, Mr. Brosch relies entirely on his interpretation of the testimony of ComEd witnesses Mr. Trpik and Mr. Jirovec, and concludes that the activities they describe were not undertaken to achieve merger savings. AG/AARP Ex. 3.0 at 7-8. ComEd contends that interpretation is groundless because Mr. Trpik testified that the costs were incurred in connection with efforts to realize future cost savings. ComEd Ex. 14.0 at 5, 6; ComEd Initial Brief at 45. Specifically, Mr. Trpik states that “[t]ransaction costs of the merger (e.g., regulatory and compliance costs, credit facilities costs, consent fees, and attorneys and bankers fees) were held at the Exelon Corporate level and were not charged to ComEd.” ComEd Ex. 14.0 at 5. Mr. Jirovec also testified that no such transaction costs are within the \$7.2 million sought to be recovered by ComEd in this case. ComEd Ex. 15.0, at 10; ComEd Initial Brief at 46.

ComEd contends that Mr. Brosch's characterization of these costs as "parent company ownership costs" is meaningless as it ignores the substance of the costs and the reason they were incurred - - to reduce operating costs to benefit customers. ComEd submits that if cost reduction efforts were implemented outside a merger context, no one would credibly suggest that the costs incurred to achieve long-term reductions should not be recovered. ComEd concludes that the fact that costs were incurred in connection with a merger is no sound basis to disallow them. ComEd Initial Brief at 46.

(b) Merger Integration Risks

ComEd states that Mr. Brosch also objects to recovery of the costs in question on the grounds that to allow recovery would "shift the risks of merger integration from shareholders to ratepayers." AG/AARP Ex. 1.0 at 6. In response, ComEd submits that Mr. Jirovec points out both shareholders and customers face risks in any merger context. ComEd Ex. 15.0 at 12; ComEd Initial Brief at 47. According to ComEd, no interested stakeholder group can be assured that expected savings, synergies and other benefits will be realized. ComEd maintains that because both shareholders and customers face the risk that savings can be achieved, it is reasonable to ask both to bear some of the costs to achieve those savings. The \$6.8 million at issue is a small fraction of overall 2011 merger costs, less than 4%. ComEd Ex. 20.0 at 8; ComEd Initial Brief at 47. ComEd further contends that throughout the entire period through 2015, ComEd customers will bear only 9% of total merger costs, but will receive the benefit of 15% of total expected savings. ComEd Ex. 15.0 at 5; ComEd Initial Brief at 47. ComEd notes that no party has questioned this evidence.

ComEd concludes that in light of these uncontradicted facts, it cannot be said that allowing recovery of the \$6.8 million represents any shifting of risks from shareholders to customers. ComEd asserts that for the same reasons, CUB witness Mr. Smith's argument that because shareholders expect to benefit from the merger they should bear all of the 2011 costs is illogical and unfair. According to ComEd, because both shareholders and customers will benefit, they should share in the costs, and the costs allocated to ComEd are far less than the expected benefits, both on an absolute and a percentage basis. ComEd Initial Brief at 47-48.

(c) Realization of Expected Savings

ComEd states that Mr. Brosch also opposes recovery of these costs on the grounds that the expected savings are "speculative" and "highly uncertain." ComEd concedes that neither shareholders nor customers can be assured of savings at any particular level, but contends that does not make savings "speculative." ComEd notes that the more relevant questions in cases of costs incurred to achieve future savings are whether: (1) sufficient analyses have been performed to identify savings so that it is reasonable to expect that net benefits will result; and (2) controls have been put in place to provide reasonable assurance that these savings will be realized. ComEd Ex. 15.0 at 12; ComEd Initial Brief at 48-49.

ComEd maintains that the evidence shows that although savings at any particular level cannot be guaranteed it is reasonably likely to expect that customers will achieve substantial savings. ComEd continues that institutional mechanisms and controls have been put in place to ensure that result as much as is possible. Mr. Jirovec, describing the process by which the merger savings were identified and quantified, states that the savings estimates were the result of hundreds of hours of planning analysis and were developed by teams intimately familiar with operations of the utilities involved. ComEd Ex. 15.0 at 5 7; ComEd Ex. 20.0 at 5 6; ComEd Initial Brief at 49. ComEd states that the savings identified are of the type that one would expect from combining two similar organizations. ComEd asserts that the savings are expected to be realized in connection with combining a number of corporate and operating support functions, including the integration and avoidance of overlapping information technology systems; avoidance of overlap in such business support functions as professional services, benefits administration, facilities and insurance; consolidation of supply chain and sourcing strategies, e.g., the enhanced scale provided by a larger utility creates the opportunity to negotiate lower prices with suppliers. ComEd Ex. 15.0 at 12-14; ComEd Initial Brief at 49. ComEd further submits that savings have been realized in the first few months after the merger close, and as of June 2012, Exelon is expecting to realize overall merger savings of about \$170 million in 2012. ComEd Ex. 15.0 at 20; ComEd Initial Brief at 50. Finally, ComEd points out that 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. ComEd Reply Brief at 27.

ComEd also responds to CUB's argument 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". ComEd states that under the formula rate, the cost savings achieved as a result of the merger will flow through automatically to ComEd's customers (via the annual updates). ComEd Reply Brief at 27.

ComEd explains that institutional mechanisms and controls are in place to monitor and track achievement of synergies and post-merger savings to ensure realization of such future savings to the extent possible. An Integration Office is staffed with individuals responsible for governance and oversight of integration activities, including synergy capture and tracking. This office oversees management of Integration Teams that have been established at the operating company functional level to execute, monitor and report on integration activities. Individuals accountable for achieving synergies and savings in specific areas update progress towards achieving those goals and report that progress monthly to the Integration Office. Remediation plans are developed where necessary. The Integration Office reports to an Integration Steering Committee, which is comprised of executives who report directly to the Exelon CEO, and which is tasked with executive oversight of integration activities. The Integration Office formally meets with the Steering Committee at least monthly. ComEd Ex. 15.0 at 19; ComEd Initial Brief at 50; see also ComEd. Exs. 15.3 and 15.4.

ComEd contends that a disallowance of costs to achieve future savings on grounds those savings are “speculative” would remove the incentive for any utility to spend money to achieve future savings to the ultimate detriment of customers. ComEd submits that many utility expenditures produce benefits only in future periods and that this is especially true of cost savings programs. ComEd Initial Brief at 48. Mr. Trpik states that Part 285.3215 of the Commission’s Rules of Practice allows the recovery of costs incurred in a “test year” related to a cost savings program that is anticipated to result in future jurisdictional cost savings. 83 Ill. Admin. Code §285.3215(a); ComEd Initial Brief at 48. ComEd observes that in its 2005 rate case, the Commission applied this section to allow ComEd to recover \$21 million of severance cost related to the Exelon Way, a defined cost savings initiative designed to achieve long-term sustainable savings. (Commonwealth Edison Co., ICC Docket No. 05-0597 (Order July 26, 2006), at 90). ComEd states that this principle was applied, and accompanying cost recovery was allowed, in ComEd’s next two rate cases as well. (Commonwealth Edison Co., ICC Docket 07-0566 (Order Sept. 10, 2008), at 66; Commonwealth Edison Co., ICC Docket 10-0467 (Order May 24, 2011), at 105. ComEd Ex. 14.0 at 10-11; ComEd Initial Brief at 48.

(d) FERC Order and Section 7-204(c)

ComEd opposes the AG/AARP argument that the FERC Order approving the Exelon/Constellation merger in EC11-83-000/001 supports disallowance of the costs at issue here. ComEd asserts that 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 the transaction-related costs so included.” ComEd Reply Brief at 30. ComEd notes that in its order authorizing the merger, FERC merely accepted the offer not to recover transaction-related costs from transmission customers. Similarly, ComEd states that it is not seeking to recover transaction costs from Illinois distribution customers in this docket.

ComEd also asserts that CUB’s argument that Section 7-204(c) of the PUA prohibits recovery of the merger costs at issue does not apply in this instance which CUB acknowledges in its Initial Brief. ComEd contends, moreover, that even if the statute did apply, it does not require the result that CUB supports. ComEd submits that 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. Aside from the fact that Section 7-204(c) does not itself establish when costs are “eligible for recovery,” ComEd asserts that the merger costs at issue here are clearly “eligible for recovery,” as they are not transaction costs incurred to accomplish the merger, but rather only those costs that “were necessary to realize future savings.” ComEd Ex. 14.0 at 6-7; ComEd Reply Brief at 28. ComEd asserts that its witness, Mr. Trpik’s testimony in this regard is unchallenged.

ComEd submits that CUB's reliance on the Commission's order disallowing recovery of certain transaction costs sought by Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor") in a 2011 application for approval of a reorganization under Section 7-204 in AGL Resources Inc., Nicor Inc. and Northern Illinois Gas Company d/b/a Nicor Gas Company, Application for Approval of a Reorganization pursuant to Section 7-204 of the Public Utilities Act, ICC Docket 11-0046, Order at 35-36 (December 7, 2011), is also misplaced because the transaction costs disallowed in that proceeding bear no resemblance to those at issue here. ComEd Reply Brief at 28-29. ComEd explains that in Nicor, the reorganization costs at issue were the sort of traditional transaction costs—legal fees, bank fees, financing costs, etc. – that are not included here. ComEd Ex. 14.0 at 8; ComEd Initial Brief at 42; ComEd Reply Brief at 28- 29.

According to ComEd, 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., ICC Docket 11-0282, for example, the Commission allowed recovery of merger costs incurred to improve operational efficiency and cost savings. Ameren Illinois Co., ICC Docket 11-0282 (Order Jan. 10, 2012), at 33-34. ComEd states that "[l]ike 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." ComEd Ex. 14.0 at 9; ComEd Reply Brief at 29. ComEd concludes that the Commission's order in Ameren supports its request in this proceeding.

(e) The Maryland Public Service Commission Order

ComEd notes that CUB argues that an order of the Maryland Public Service Commission ("MPSC") entered in connection with the merger requires Exelon's affiliate, Baltimore Gas and Electric Company ("BGE"), to provide a \$100 credit to each BGE residential ratepayer and to fund a \$115.5 million Customer Investment Fund. CUB claims that the MPSC imposed these requirements to "ensure that the Exelon/Constellation merger provided certain, specific and measurable benefits to Maryland ratepayers" because the merger savings were "inherently speculative" and were "too intangible to quantify as a benefit under its statutes." CUB Ex. 2.0 at 5-7. ComEd asserts that in no way does the Maryland Order stand as a bar to recovery of the costs at issue here. ComEd Reply Brief at 29-30.

According to ComEd, that case did not address the recoverability of merger costs, but rather the separate question of whether the merger should be approved. ComEd states that the statute addressed by the MPSC required that merger benefits be "direct" and "certain" as opposed to "contingent" or "intangible" before a merger could be approved. ComEd Initial Brief at 51. The portion of the Maryland decision relied upon by CUB witness Mr. Smith characterized "foregone requests for rate relief" as a benefit too "intangible" to qualify as a customer benefit and thereby justify a merger under the Maryland law. The benefit of cost savings created by the merger would be realized only

if the utility filed future requests for rate relief, and the uncertainty about the timing of any such filings was what led the Commission to conclude that the benefit was too speculative and intangible, and to require BGE to provide the one-time \$100 bill credit. ComEd Ex. 20.0 at 6. ComEd asserts that under its formula rate, the net savings resulting from the merger and allocated to ComEd will automatically flow through to its customers. ComEd Ex. 15.0 at 5; ComEd Reply Brief at 29-30.

In summary, ComEd maintains that the evidence presented in this proceeding establishes that the costs to achieve savings requested by ComEd are prudent, reasonable and recoverable. ComEd requests that the Commission reject the objections to its recovery of the full \$7.2 million of 2011 costs-to-achieve savings. ComEd Initial Brief at 51; ComEd Reply Brief at 31.

AG/AARP's Position

The AG/AARP request that the Commission find that it is unreasonable to include in ComEd's revenue requirement the 2011 costs associated with the 2012 merger of ComEd's parent, Exelon with Constellation. They maintain that a total of \$7,213,346 should be removed from ComEd's 2011 actual costs. AG/AARP Ex. 1.4 at 2. They contend that if the Commission allows recovery of any allocated merger costs, no more than the costs associated with ComEd direct employees should be allowed. AG/AARP Ex. 3.1; (quantifying an adjustment of \$6,831,877). The AG/AARP notes that this adjustment applies to both the inception rates for 2013 and the reconciliation balance for 2011. AG/AARP Initial Brief at 16-17.

The AG/AARP explain that Exelon and Constellation were in discussions about a possible merger in January of 2011, and a merger agreement was signed on April 28, 2011. AG/AARP Initial Brief at 17. This transaction involved ComEd's parent company – Exelon, which in addition to ComEd, owns generation operations and another electricity distribution utility in Pennsylvania – and Constellation, which also owns generation, power sales, and electricity distribution operations. ComEd witness Mr. Trpik described the merger as creating “the largest competitive integrated energy provider in the United States.” ComEd Ex. 14.0 at 3. While the transaction was reviewed and approved by the FERC and the MPSC, it was not presented to the Commission for review. The merger was completed on March 12, 2012. AG/AARP Ex. 1.0 at 5.

After discovering that ComEd's FERC Form 1 Administrative and General expense included expenses related to the merger of ComEd's parent and another holding company, AG/AARP witness Mr. Brosch recommended that these expenses be excluded from the revenue requirement because, among other things, they “are not necessary or reasonable costs incurred to operate the regulated utility, but rather are parent company ownership costs incurred by Exelon to expand and manage its portfolio of business.” AG/AARP Ex. 1.0 at 6. Mr. Brosch added that allocation of parent pre-merger and pre-savings costs to ComEd, which was not a party to the merger, shifts the

risks that merger integration savings will not exceed costs from Exelon shareholders to Illinois consumers. *Id.*

The AG/AARP state that while ComEd witnesses addressed the 2011 merger costs ComEd seeks to recover from Illinois consumers, they failed to justify recovery of the vast majority of the \$7.2 million identified as merger-related. Specifically, ComEd identified \$400,000 of internal employee costs, \$3.7 million associated with BSC, and \$3.1 million paid to external vendors. AG/AARP Ex. 3.0 at 3; ComEd Ex. 14.0 at 5. The AG/AARP claims that ComEd was not able to identify any 2011 savings associated with these costs, although it does project future savings. AG/AARP Initial Brief at 18.

The AG/AARP continue that Section 16-108.5(c) of the Act provides that “[t]he performance based formula rate approved by the Commission shall ... (1) provide for the recovery of the utility’s actual costs of delivery services that are prudently incurred and reasonable in amount consistent with Commission practice and law.” 220 ILCS 5/16-108.5(c)(1). Section 16-108.5(c) further provides: “Nothing in this Section is intended to allow costs that are not otherwise recoverable to be recoverable by virtue of inclusion in FERC Form 1.” The AG/AARP concludes that merely recording a cost in the FERC Form 1 does not necessarily require the Commission to include that cost in rates. AG/AARP Initial Brief at 18.

The AG/AARP note that the Commission’s authority to review costs to insure they are reasonable is well established. AG/AARP Initial Brief at 18-19. The AG/AARP states that in its review of ComEd’s 2007 rate case order, the Second District Appellate Court stated: “to be recoverable, in addition to being reasonable and prudent, a cost must also pertain to operations or service delivery.” *Commonwealth Edison Co. v. Illinois Commerce Commission*, 398 Ill.App.3d 510, 516 (2d Dist. 2009). Significantly, in its review of the Commission’s Order in ICC Docket 07-0566, the Second District Appellate Court affirmed a Commission adjustment to remove merger-related costs from ComEd’s labor expense. *Commonwealth Edison v. Illinois Commerce Commission*, 405 Ill.App.3d 389, 400-402 (2d Dist. 2010)(Commission’s decision to deduct 25% of the labor costs to account for merger-related activities within the Commission’s discretion).

The AG/AARP also state that in its 2010 *Commonwealth Edison v. Illinois Commerce Commission* decision, the Court noted that: “The parties correctly agree that merger-related expenses are unrecoverable.” 405 Ill.App.3d at 400. That case involved a failed merger between ComEd’s parent Exelon and PSEG. In this docket, however, ComEd seeks merger-related costs related to pre-merger activities of its parent Exelon and Constellation for a merger that was completed, albeit in 2012. The AG/AARP argue that there were no merger savings in 2011 and ComEd consumers are essentially being asked to pay the pre-merger costs of its parent. AG/AARP Initial Brief at 19.

The AG/AARP add that ComEd identified \$3.1 million for outside vendors for services described by ComEd witness Mr. Trpik. ComEd Ex. 14.0 at 6-7. These services were not necessitated by ComEd distribution services. Rather, they were all

required to implement and manage the corporate acquisition and growth strategy of ComEd's parent company. The AG/AARP note for example, Booz & Company provided advice, counsel and guidance on pre-closing integration; AT Kearney provided a "clean room" for pre-merger review; Price Waterhouse Coopers provided "Day 1 financial close readiness support for Accounting and Tax;" and Hypermedia Solutions provided "Exelon's branding post merger." ComEd also identified \$3.7 million in costs assigned to BSC related to the merger, primarily to prepare for "day one" consolidation. ComEd Ex. 14.0 at 5. However, the AG/AARP claim that ComEd has not identified anything that changed at ComEd due to the merger on day one. AG/AARP Initial Brief at 19-20.

The AG/AARP contend that in addition to the lack of nexus between the merger costs and distribution services, the Commission should exclude merger costs because the allocation of those costs to ComEd is based on factors unrelated to the merger. The majority of merger costs were allocated to ComEd based on the "Modified Massachusetts Factor" method that uses direct labor, revenue, and gross assets as the allocation factors. ComEd Ex. 14.0 at 7. According to the AG/AARP, these factors are unrelated to the actual chores associated with the merger and unrelated to which subsidiaries are the most affected. These factors allocate costs to subsidiaries of Exelon despite the fact that the merger itself is based on parent company management and strategy unrelated to the provision of distribution services. The AG/AARP recommend that BSC merger costs, which represent the costs of the "service company," should not be allocated to ComEd customers when the merger had not closed in 2011, no distribution services were affected by these costs, no savings resulted from these costs, and these costs are not justified by specific or direct allocation to ComEd. AG/AARP Initial Brief at 20.

ComEd witnesses Mr. Trpik and Mr. Jirovec claim that integration activities are expected to reduce costs to ComEd in the long run. ComEd Ex. 14.0 at 10; ComEd Ex. 15.0 at 5. According to the AG/AARP, that identical argument could have been used to justify charging Exelon and Constellation's transmission customers and Constellation's distribution services customers pre-closing merger costs and other merger costs without regard to savings. AG/AARP Initial Brief at 20. However, in requesting approval from the FERC, Exelon and Constellation offered to exclude transaction related costs from rates unless savings at least equaled costs. The AG/AARP explains that in Exelon Corp. and Constellation Energy Group, Inc., Dockets EC11-83-000/001, the FERC accepted the applicants offer not to charge transmission customers for merger related costs, stating in its Conclusion:

Commission Determination

118. We accept Applicants' commitment to hold transmission customers harmless for five years from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs (both capital and operating) incurred to achieve merger synergies. Transaction-related costs do not include any acquisition premium (or acquisition adjustment), including goodwill, associated with the Proposed

Transaction. The Commission has stated that it “historically has not permitted rate recovery of acquisition Premiums.” Any acquisition premium (or acquisition adjustment) associated with the Proposed Transaction is not permitted to be included in rates absent Commission approval in a section 205 rate filing.

119. We note that nothing in the application indicates that rates to customers will increase as a result of transaction-related costs created by the Proposed Transaction. The Commission will be able to monitor the Applicants’ hold harmless commitment under the books and records provision of PUHCA 2005 and its authority under section 301(c) of the FPA, and the commitment is fully enforceable based on the Commission’s authority under section 203 of the FPA.

120. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates within five years after the Proposed Transaction is consummated, they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery within such five-year period, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket. We also note that, if the Applicants seek to recover transaction-related costs in a filing within such five-year period, whereby Applicants are proposing a new rate (either a new formula rate or a new stated rate), then that filing must be made in a new section 205 docket as well as in the instant section 203 docket. The Commission will notice such filings for public comment. In such filings, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the transaction, in addition to any requirements associated with the filings made under section 205. Such a hold harmless commitment will protect customers’ wholesale and transmission rates from being adversely affected by the Proposed Transaction.

121. Accordingly, in light of these considerations and requirements, we find that the Proposed Transaction will not adversely affect rates.

“Order Conditionally Authorizing Merger and Disposition of Jurisdictional Facilities” at page 40-42,138 FERC 61,167 (Issued March 9, 2012) (“FERC Exelon-Constellation Merger Order”). The AG/AARP state that the Order relates Exelon’s position as follows: “they will not seek to include transaction-related costs in their transmission revenue requirements, except to the extent they can demonstrate that transaction-related savings are equal to or in excess of all of the transaction related costs so included.” Id. at 39. The AG/AARP note that in contrast, in Illinois ComEd distribution customers are being asked to pay all costs related to the merger transaction even though there are no achieved savings. AG/AARP Initial Brief at 21-22.

The AG/AARP state that similarly, in requesting the approval of the MPSC, Exelon and Constellation again agreed to limit recovery of merger costs to the amount of savings. The MPSC stated in its Order:

Exelon has committed that BGE will not incur any costs associated with this merger, including goodwill. It has further committed it will ensure that the Merger is rate neutral for BGE's customers, and it will provide a quarterly report on the activities of Exelon Utilities to allow us to review the costs allocated to BGE and the benefits received as a result of the Merger. ... with these protections in place, we conclude that BGE's customers will suffer not transaction-related harm as a result of this Merger.

In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Case No. 9271 at 8a4-85 (Feb. 17, 2012)(CUB Ex. 2.1). Both the MPSC and the FERC concluded that consumers should not bear costs in excess of the savings associated with the mergers. The AG/AARP assert that it is not reasonable to expect ComEd's customers to have any less protection. AG/AARP Initial Brief at 22.

The AG/AARP note that the FERC transmission rates are based on an annual formula, as are the Illinois distribution rates under Section 16-108.5 of the Act. Yet despite that fact, the FERC concluded that merger-related costs could only be recovered to the extent that they are exceeded by merger-related savings. While BGE is regulated under traditional rate of return regulation, the same condition was applied. The AG/AARP find that in addition to the fact that the merger itself is not related to delivery services and operation, it is not reasonable to expect ComEd customers to pay increased rates due to the costs of its parent's merger when other customer groups are protected from increased rates by conditions that limit recovery of merger-related costs unless merger-related savings exceed the costs. AG/AARP Initial Brief at 22-23.

The AG/AARP notes in their Reply Brief that ComEd cites its witnesses' testimony describing the amount of anticipated merger savings by 2015 and the procedures Exelon put in place to track its "integration" efforts. The AG/AARP maintains that while these promises are potentially laudable, they do not address the fact that in the two jurisdictions that reviewed the merger, Exelon and Constellation proposed that no merger costs be collected from consumers except to the extent that the costs are offset by merger savings. See "Order Conditionally Authorizing Merger and Disposition of Jurisdictional Facilities" at page 40-42, 138 FERC 61,167 (Issued March 9, 2012) and In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Case No. 9271 at 8a4-85 (Feb. 17, 2012). The AG/AARP assert that no matter how many integration processes are in place or how many savings are predicted, allowing recovery of costs in the absence of contemporaneous savings adversely affects rates. AG/AARP Reply Brief at 9.

The AG/AARP note that ComEd cites the Commission decision in Docket 05-0597 for the proposition that the Commission has allowed ComEd to recover costs related to savings plans in the past. ComEd Initial Brief at 48. The AG/AARP explain

that a review of the Commission's decision in that docket demonstrates that the savings for which cost recovery was allowed were already being realized in the test year. AG/AARP Reply Brief at 10. The Commission stated: "The record is clear that there are already savings from the Exelon Way program that will be reflected in the rates in this proceeding. In addition, no party has disputed that, as a result of Exelon Way, at least 70 million dollars a year in savings are expected." ICC Docket 05-0597, Order at 90 (July 26, 2006) (severance costs of \$21 million claimed).

The AG/AARP also state that ComEd cites Commission rule 285.3215(a) as allowing "recovery of costs incurred in a 'test year' related to a cost savings program that is anticipated to result in future jurisdictional costs savings." ComEd Initial Brief at 48. That rule describes the information to be included in Schedule C-22, entitled "Cost Savings Programs". The AG/AARP argue that if ComEd intended this section to justify its merger costs, it failed to include any information on the Schedule C-22 it filed with this docket. AG/AARP Reply Brief at 10-11. The AG/AARP assert that ComEd cannot rely on this section of the Commission's rules or the Order in ICC Docket 05-0597 to justify including merger-related costs in its revenue requirement because it did not submit any information in its Schedule C-22 and because in the rate order, savings were being realized in the test year to justify the recovery of associated expenses.

The AG/AARP allege that notwithstanding ComEd's claims of anticipated, future merger-related savings, it is not reasonable to expect Illinois consumers to pay the costs of "day one" integration of Exelon and Constellation, particularly when Exelon's ownership of ComEd did not change in the test year. Further, the jurisdictions that have reviewed the merger to assure that consumers are not harmed or adversely affected have both limited the recovery of merger-related costs to the extent of savings. Finally, the Commission's Order in ICC Docket 05-0597, cited by the Company, involved savings in the test year period that exceeded the costs. The AG/AARP reason that these precedents all support the conclusion that it is simply not reasonable to expect Illinois consumers to bear these costs prior to the closing of the transaction and without regard to coincident savings. AG/AARP Reply Brief at 11.

The AG/AARP request that the Commission remove all 2012 costs associated with Exelon's merger with Constellation as not related to the provision of utility service in both the reconciliation and the inception rate analyses. Further, consistent with the treatment of merger costs in other jurisdictions, the AG/AARP request that if the Commission allows recovery of merger-related costs, recovery be limited to no more than the merger-related savings for a given year. In addition, if any recovery of merger-related costs is allowed, the Commission should adopt the same reporting required by the FERC and the MPSC in the event that ComEd seeks to include merger-related costs in rates. In the alternative, if the Commission declines to exclude all 2011 merger-related costs from the revenue requirement, no more than ComEd's direct employee costs should be allowed into rates. AG/AARP Ex. 3.1 (excluding \$6,831,877 in Exelon Business Services and external merger costs); AG/AARP Initial Brief at 23.

CUB's Position

CUB argues against ComEd's attempt to recover \$7.213 million in jurisdictional operating expenses for costs recorded by ComEd in 2011 in connection with the proposed merger between ComEd's parent company, Exelon, and Constellation. CUB notes the Exelon/Constellation merger was not reviewed by the Commission under Section 7-204 of the PUA because it involves ComEd's parent company, Exelon. Accordingly, CUB contends, the Commission has not had the opportunity to evaluate the treatment of merger-related costs, Illinois ratepayer protections against parent company merger costs, or any potential cost savings for ratemaking purposes. This proceeding, therefore, represents the first opportunity for the Commission to review and protect Illinois ratepayers from additional cost increases in 2011 relating to the Exelon/Constellation merger. CUB argues that merger costs should be removed from ComEd's formula rate plan expenses because the costs ComEd seeks to recover in this proceeding for 2011 were incurred before the merger was consummated and because no savings were recognized as an offset to the costs ComEd attempts to recover in 2011. Moreover, CUB avers, Commission practice is to disallow transaction costs associated with mergers and simultaneously require any merger savings to flow through to customers. CUB Initial Brief at 10-11.

The merger of Exelon and Constellation was completed on March 12, 2012, and was therefore not complete in 2011. CUB notes that ComEd witness Mr. Jirovec admits that, because the merger was not consummated in 2011, no merger savings could possibly be achieved in 2011:

The merger was not consummated until April 2012, so by definition you can't achieve merger savings until after the confirmation of the transaction. So in 2011, that's correct, no merger savings could be realized legally.

Sept. 25, 2012 Tr. at 110:15-19. CUB further notes that in his rebuttal testimony, Mr. Jirovec included an estimation of potential savings that could be realized, "in the form of lower O&M costs, through formula rates or through avoided returns on invested capital." ComEd Ex. 15.0 at 5:97-103. However, savings are not even projected to be realized by ComEd customers until 2013 at the earliest. *Id.*

CUB points out that Exelon and Constellation claim that combined earnings are expected to increase and future cost savings and synergies are anticipated to result from the merged company. See CUB Ex. 1.3. Mr. Jirovec testified that both customers and shareholders must bear some risk in the merger transaction (that is, bear some of the costs), in order to share in the potential benefits (referred to as "risk of synergy attainment"). Sept. 25, 2012 Tr. at 111:9-15. However, CUB avers, ComEd has not reflected merger savings as an offset to costs in its current proposed revenue requirement. Even ComEd's broad estimation of future projected savings – which will be achieved on a net basis beginning first in 2013 – only narrowly surpasses the costs ComEd expects its customers to bear over the next several years: "Over the period from 2011 to 2015, ComEd is projected to incur \$63M of merger costs, or about 9% of total estimated merger cost-to-achieve, while receiving recurring cash savings by 2015 of

\$66M or 15% of total savings.” ComEd Ex. 15.0 at 5:97-103. CUB points out that Mr. Jirovec’s high-level estimate of potential savings is conditioned upon ComEd customers bearing nearly 10% of the costs of its parent company’s merger. Yet, CUB notes, the Company has not committed to any specific level of savings to be passed through to its ratepayers. Sept. 25 Tr. at 146:7-9. CUB argues that without a firm commitment to pass through a specific level of savings to customers, or even track and report any potential savings, the alleged “benefits” of this transaction to ComEd customers are speculative at this juncture. CUB believes the risks of this transaction – in the form of the jurisdictional costs ComEd seeks to recover – are inappropriately borne by ComEd’s customers and the expenses charged to ComEd prior to the consummation of the Exelon/Constellation merger should be viewed as transaction costs borne exclusively by shareholders. CUB Initial Brief at 11-12.

CUB avers removal of merger costs is also consistent with Commission precedent and the PUA where prospective savings have not occurred and are speculative. Section 7-204(c) of the Act provides that:

The Commission shall not approve a reorganization without ruling on: (i) the allocation of any savings from the proposed reorganization; and (ii) 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 and how the costs will be allocated.

While this provision was not directly triggered by the Exelon-Constellation transaction, CUB contends that because the transaction involved a merger of ComEd’s parent company, Exelon, with Constellation, it should be referenced by the Commission as a guidepost in evaluating whether any costs of this transaction should be borne by ratepayers. CUB notes the PUA requires that savings be allocated as a condition of approving a Section 7-203(c) transaction. In interpreting this provision, CUB states that the Commission has consistently required an explicit recognition of savings, and disallowed the costs to achieve the transaction from being recovered from ratepayers. CUB Initial Brief at 12-13.

CUB responded to ComEd’s argument that the Commission has previously approved recovery of costs relating to a cost savings program, where savings would be achieved beyond the test year. See ComEd Initial Brief at 48. CUB avers the set of facts to which ComEd cites is an atypical situation where the Commission allowed costs-to-achieve to be recovered for a cost savings program in the absence of a merger. CUB contends that rather than aid ComEd’s argument, this example merely bolsters CUB and AG/AARP’s proposal to disallow the merger costs ComEd seeks to include in 2013 rates. In ICC Docket 05-0597, the Commission allowed ComEd “to recover \$21 million of severance cost related to the Exelon Way, a defined cost savings initiative designed to achieve long-term sustainable savings.” *Id.*, citing Commonwealth Edison Co., ICC Docket 05-0597 Final Order (July 26, 2006) (“05-0597 Order”) at 90. In the 05-0597 Order, however, CUB notes the Commission based its allowance of the Exelon Way program costs in part on a finding that savings occurred and flowed

through rates in the applicable test year: “[t]he record is clear that there are already savings from the Exelon Way program that will be reflected in the rates in this proceeding.” Id. CUB maintains the 05-0597 Order does not support a conclusion that the Commission would have approved the recovery of Exelon Way costs in absence of the immediately recognized savings. In 05-0597, CUB notes there were findings that the Exelon way had already produced savings and those savings had been reflected in the rates in that proceeding. In the current case, CUB states, the situation is just the opposite: there are no savings from the Exelon/Constellation merger in the 2011 test year. There are only net pre-merger costs related to the Exelon/Constellation merger, which was consummated in 2012. CUB further points out that the Commission’s analysis in the 05-0597 Order was similar to the Section 7-204(c) requirement that the allocation of savings were considered in evaluating the cost recovery request. CUB Corrected Reply Brief at 9-10.

CUB noted that in each of the most recent merger/reorganization transactions approved by the Commission, the Commission based its approval on the condition that costs relating to achievement of the reorganization would not be recovered from ratepayers. CUB discussed the Commission’s recent review of the reorganization of Northern Illinois Gas Company d/b/a Nicor Gas Company (as well as Nicor Inc., Nicor’s parent) and AGL Resources Inc. (“AGL”) in ICC Docket 11-0046. Nicor and AGL filed an Application for Approval of a Reorganization Pursuant to Section 7-204 of the PUA. In that proceeding, the Commission disallowed the recovery of transaction costs of the reorganization from ratepayers, yet simultaneously required jurisdictional reorganization-related savings to be allocated to ratepayers:

The Commission concludes that subsection 7-204(c) of the Act shall be applied in the instant case by allocating all reorganization-related savings to ratepayers and precluding recovery by Nicor Gas of any costs incurred in accomplishing the Reorganization (as defined above). Irrespective of when, how or by whom a future Nicor Gas ratemaking proceeding is initiated, all savings must flow through to the costs associated with regulated operations under our jurisdiction [footnote omitted]. Merger-related savings realized by any of Nicor Gas’ corporate affiliates or corporate parents must be included within the flow-through to Nicor Gas ratepayers, insofar as those savings are reflected in costs allocated to Nicor Gas by any such affiliate or parent and insofar as such allocated costs are associated with Nicor Gas’ regulated activities under our jurisdiction.

AGL Resources Inc., Nicor Inc. and Northern Illinois Gas Company d/b/a Nicor Gas Company, Application for Approval of a Reorganization pursuant to Section 7-204 of the Public Utilities Act, ICC Docket 11-0046, Order at 35-36 (December 7, 2011). Thus, CUB avers, even if ComEd’s estimation of merger-related savings do, in fact, materialize, costs incurred by ComEd relating to the merger of Exelon and Constellation should still not be passed on to ratepayers. CUB argues it is not prudent or reasonable to expect Illinois ratepayers to absorb any portion of the risk attributable to a merger of the utility’s parent, especially when no savings have been achieved and estimates of future savings are purely speculative. CUB contends that consistent with such an

allocation of merger costs and savings, the merger costs incurred by ComEd in 2011 to accomplish the merger should be removed from ComEd's jurisdictional operating expenses. CUB Initial Brief at 13-14.

CUB also discussed the merger of Illinois-American Water Company ("IAWC") and Northern Illinois Water Company ("NIWC"), where the Commission concluded that transaction costs would not be recoverable from ratepayers, because they "would not be incurred in the absence of the proposed merger." Illinois-American Water Company and Northern Illinois Water Company, Application for approval of Proposed Reorganization, ICC Docket 99-0418, Order at 11 (March 29, 2000) ("99-0418 Order"); CUB Corrected Reply Brief at 11.

The transactional costs at issue in the IAWC-NIWC merger included costs associated with internal and external communications, employee separation and relocation costs, employee stock plan costs, and integration costs, some of the very same costs ComEd seeks to recover here. *Id.*; ComEd Initial Brief at 44 (CUB notes the activities for which ComEd seeks cost recovery include "compensation and benefits plans" and "internal and external communications plans" and integration costs consisting of "evaluation and development of combined company processes, policies, procedures, organizational structures," etc.). In that decision, CUB maintains the Commission made clear that to be recoverable, the costs must be related to direct utility operations (and even then, costs were only allowed if exceeded by savings). 99-0418 Order at 10-11. In this case, on cross-examination, ComEd witness Mr. Jirovec testified that there were no operational changes to ComEd business starting with the first day after closing:

I think largely the operations were unchanged as to the BSC support functions that support the operations of ComEd were changed. The two companies came together. It's now a consolidated services company that has synergy opportunities to do those services at a lower cost level and so the costs to provide those services would be lower to ComEd day one and beyond.

Sept. 25 tr. at 122-123. None of these costs were identified as being directly related to ComEd operations. CUB notes other categories of costs for which ComEd seeks recovery are external vendor costs for consultants and vendors "supporting the merger integration planning, coordination and execution efforts." ComEd Ex. 14.0 at 5:104-06. CUB contends these are exactly the type of costs the Commission disallowed in the IAWC and NIWC merger as relating to the "business end of the deal." 99-0418 Order at 11; CUB Corrected Reply Brief at 11-12.

CUB points out that both the MPUC and the FERC reviewed the Exelon Constellation transaction. CUB Initial Brief at 14-15. While the merger was approved in both forums, CUB also notes that approval was conditional. The February 17, 2012 MPUC decision noted how the projections of benefits through synergies are inherently speculative and, to the extent they materialize, would likely benefit ratepayers only as

foregone requests for rate relief, which the MPUC indicated it had previously found to be too intangible to quantify as a benefit under its statutes:

The Applicants have presented extensive evidence as to various benefits that will inure indirectly to all BGE ratepayers in the form of synergy savings, the sharing of “best practices,” and lowering BGE’s costs for “shared services.” Most significantly, the Applicants estimate that BGE ratepayers will realize, through rate reductions or postponed rate increases, \$87.3 million in benefits based upon merger-related synergy savings. The Applicants quantified this amount through a consulting firm’s analysis that combined company-wide savings and then allocated those savings among the Applicants’ competitive and regulated business segments, including BGE. Staff and MEA even suggested that these savings might be under-stated, highlighting the need for this Commission to ensure that BGE ratepayers actually receive the full extent of any merger-related savings.

We do not discount the Applicants’ firm belief that such benefits will ultimately accrue to ratepayers, and we will require BGE to fully account for all merger-related savings in its next rate case. However, projections of benefits through synergies, “shared services” or “best practices” are inherently speculative and, to the extent they materialize, will likely benefit ratepayers only as “forgone requests for rate relief,” which we have previously held to be too intangible to qualify as a benefit under PUA § 6-105.

CUB Ex. 2.1 at 90. In order to ensure that the Exelon/Constellation merger provided certain, specific and measurable benefits to Maryland ratepayers, the MPUC approved a \$100 credit per BGE residential ratepayer to be applied within 90 days after consummation of the merger, and also required funding of incremental energy efficiency and low income energy assistance for BGE customers:

33) Residential Rate Credit: Exelon shall, within 90 days after consummation of the Merger, fund a one-time distribution of \$100 per BGE residential customer in direct rate credits, which shall be credited within 90 days after consummation of the Merger, and amount to approximately \$112 million, and which shall not be recoverable in rates. The credits will be provided for all residential customers of record with active accounts on a specified date following the Merger. Residential customers served under both a residential electric schedule and a residential gas schedule will receive one credit.

34) Customer Investment Fund: Exelon shall invest \$113.5 million over a three-year period in an interest bearing Customer Investment Fund subsequent to the consummation of the Merger. Funds shall be credited in equal installments, with the first installment credited within 90 days after consummation of the Merger, or as otherwise approved by the Commission, and shall not be recoverable in rates. This investment shall be directed to a fund for the purpose of providing long-term benefits in the form of energy efficiency and low-income energy assistance to

BGE customers. These funds shall be directed towards the goals set forth in this Order, which we will specify after further proceedings to determine their most effective use.

CUB contends this Maryland ratemaking treatment starkly contrasts with ComEd's proposal in the current proceeding to treat the \$7.2 million of Exelon/Constellation merger costs charged to ComEd in 2011 as additional net costs that should be charged to Illinois ratepayers through the formula rate plan, with no offset for merger savings. CUB Initial Brief at 14-15.

CUB responded to ComEd's claims that "if cost reduction efforts were implemented outside a merger context, no one would credibly suggest that the costs to achieve long-term reductions should not be recovered." ComEd Initial Brief at 46. CUB points out that if ComEd incurred \$7.2 million in so-called "cost reduction" efforts in one single year, without simultaneously realizing any savings at all in that year, projecting no operational savings and only future savings consisting largely of incremental corporate costs, you can bet those costs-to-achieve would be challenged in this formula rate context as being unreasonable. Indeed, CUB avers that, to incur that level of costs in one year without any firm commitment to flow through a specific level of savings to offset those costs would be unreasonable in any ratemaking context. CUB Corrected Reply Brief at 12.

CUB additionally responded to ComEd's argument that both shareholders and ratepayers face risks in any merger context. CUB maintains that ComEd's position ignores the obvious fact that ratepayers are being subjected to this risk – and the associated costs – without any simultaneously realized savings or guarantee of savings. CUB maintains that the issue the Commission must address is what level of risk is acceptable to force ratepayers to bear in the face of a transaction that has produced no recognized jurisdictional savings for ratepayers, and in the face of ComEd's inability or refusal to commit to any level of savings or even to report the tracking of savings to the Commission. CUB concludes that the fact that ratepayers must front any costs associated with the Exelon-Constellation merger before the merger is even consummated and before even a penny of cost savings has been achieved undeniably saddles ratepayers with significant, unacceptable risk. CUB Corrected Reply Brief at 12-13.

Because any potential future merger savings to be credited to ComEd ratepayers are speculative at this time – in terms of amount and timing – CUB argues that the concept of matching benefits with costs would dictate that the merger costs recorded by ComEd in its 2011 results should be removed. Moreover, CUB notes, allocating the merger savings to ratepayers and the merger costs to shareholders would be consistent with the prior Commission findings applying subsection 7-204(c) of the Act to allocate reorganization-related savings and costs. While the Exelon-Constellation merger did not require Commission review or approval, and Section 7-204 of the PUA was not directly invoked, CUB avers the regulatory principles noted in the cases cited above

provide a framework for evaluating ComEd's attempted inclusion of Exelon-Constellation merger costs. CUB Initial Brief at 15-16.

CUB recommends an adjustment to remove the jurisdictional operating expense of \$7.213 million identified in ComEd's corrected response to data request AG 2.03. CUB Ex. 1.2, Schedule C-1.

Staff's Position

Staff recognizes that ComEd has provided information that demonstrates the amount of synergy savings between 2011 and 2015 will exceed the costs to achieve those savings. Staff further recognizes the resulting benefit to ComEd's customers over that same period. Staff states that assuming the projected savings are realized, it is reasonable for the Company to seek recovery of the costs to achieve those savings. Staff Initial Brief at 28.

Commission Analysis and Conclusion

ComEd requests approval to include in its formula rate update approximately \$7.2 million of costs related to the merger of Exelon and Constellation. While Staff agrees with ComEd's request, the AG/AARP and CUB maintain an objection to the recovery of these costs and request a reduction in the amount of \$6.8 million and \$7.2 million, respectively. The costs incurred in merger expenses included costs for the evaluation and development of combined company processes, policies, procedures, organizational structures, compensation and benefits plans, information technology systems, internal and external communications plans, coordination of a combined calendar for key meetings, events and deliverables, the identification of risks and the development of risk mitigation plans. The costs do not include transaction costs such as attorney and banker fees. The record demonstrates that the \$7.2 million represents costs that were incurred in 2011 in order to achieve post-merger operational cost savings that will be passed on to ComEd's customers in 2012 and for the indefinite future. Through 2015, these savings are estimated to amount to \$156 million net of the costs that will be incurred to achieve them. In 2015, and annually thereafter, the per-year cost savings are estimated to be \$66 million. The record establishes that substantial net savings resulting from these costs are reasonably likely to occur; that both shareholders and ComEd customers face risks and that ComEd's customers have been allocated savings that are reasonably proportional to the risks they face; that Section 7-204(c) does not prohibit recovery of the costs at issue; and that nothing in the orders of the FERC or the MPSC upon which the AG/AARP and CUB rely preclude recovery of these costs. For the reasons above, the Commission agrees with ComEd and Staff and finds that the \$7,213,346 of costs related to the merger of Exelon and Constellation were incurred in order to and were necessary to realize future savings, and were prudently incurred and are reasonable in amount.

VI. RATE OF RETURN

A. Overview

Staff and ComEd agreed that the appropriate rate of return for setting rates to be effective January 1, 2013 is as shown in the following table:

	Amount (\$ Thousands)	In	Percent Total Capital	of Cost	Weighted Cost
Short-Term Debt	\$ 17,947		0.18%	0.71%	0.00%
Long-Term Debt	5,702,622		57.27%	5.78%	3.31%
Common Equity	4,236,935		42.55%	9.71%	4.13%
Credit Facility Fees					0.10%
Total	\$ 9,957,503		100.00%		7.54%

Staff Ex. 9.0 at 5; ComEd Ex. 19.1.

Staff and ComEd also agreed that the rate of return for the 2011 reconciliation should be as is shown below:

	Amount (\$ Thousands)	In	Percent of Total Capital	Cost	Weighted Cost
Short-Term Debt	\$ 17,947		0.18%	0.71%	0.00%
Long-Term Debt	5,702,622		57.27%	5.78%	3.31%
Common Equity	4,236,935		42.55%	9.81%	4.17%
Credit Facility Fees					0.10%
Total	\$ 9,957,503		100.00%		7.58%

Staff Exhibit 9.0 at 5; ComEd Ex. 19.1. No party took issue with the position taken by Staff and ComEd. Therefore ComEd's rate of return is approved.

B. Capital Structure

The capital structure is not disputed, as is stated above. As presented in Staff witness McNally's rebuttal testimony, the capital structure, and the cost of capital components, for purposes of determining the revenue requirement for the 2013 rate year are as follows:

	<u>Amount</u>	<u>Percent of Total Capital</u>	<u>Cost</u>	<u>Weighted Cost</u>
Short-Term Debt	\$17,947	0.18%	0.71%	0.00%
Long-Term Debt	\$5,702,622	57.27%	5.78%	3.31%
Common Equity	\$4,236,935	42.55%	9.71%	4.13%
Credit Facility Fees				0.10%
Total Capital	\$9,957,503	100.00%		
Weighted Average Cost of Capital				7.54%

Staff Ex. 9.0 at 4-5.

As presented in Staff witness McNally's rebuttal, the capital structure, and the cost of capital components, for purposes of determining the reconciliation adjustment are as follows:

	<u>Amount</u>	Percent of <u>Total Capital</u>	<u>Cost</u>	Weighted <u>Cost</u>
Short-Term Debt	\$17,947	0.18%	0.71%	0.00%
Long-Term Debt	\$5,702,622	57.27%	5.78%	3.31%
Common Equity	\$4,236,935	42.55%	9.81%	4.17%
Credit Facility Fees				0.10%
Total Capital	\$9,957,503	100.00%		
Weighted Average Cost of Capital				7.58%

Id. at 5.

The Commission approves this uncontested capital structures.

C. Cost of Capital Components

1. Rate of Return on Common Equity

See Section VI.B herein.

2. Cost of Long - Term Debt

See Section VI.B herein.

3. Cost of Short - Term Debt

See Section VI.B herein.

4. Overall Weighted Cost of Capital

See Section VI.B herein.

VII. COST OF SERVICE AND RATE DESIGN

A. Overview

Rate design is an issue that, pursuant to statute, will be addressed in another proceeding. 220 ILCS 5/16-108.5.

B. Potentially Uncontested Issues – Embedded Cost of Service Study**VIII. OTHER****A. Overview****B. Potentially Uncontested Issues****1. Distribution System Loss Factor Study****Staff's Position**

Staff states that ComEd updated its 2011 Distribution System Loss Factor (“DLF”) Study in order to comply with the final Order in the last ComEd rate case, Docket 11-0721. Staff witness Mr. Rockrohr raised several concerns regarding ComEd’s DLF Study and Secondary and Service Loss Study. Staff states that ComEd revised these studies to address Mr. Rockrohr’s concerns.

However, the sample size of customers used in ComEd’s Secondary and Service Loss Study was small. ComEd witness Mr. Born, who prepared these studies, testified that he believed that an increase in the sample size would have a *de minimus* effect on this study. Also, due to the statutory time constraints in Section 16-108.5, Mr. Born was not able to complete this study on a larger sampling. ComEd Ex. 17 at 7. Mr. Born testified that ComEd would work with Staff in the future to increase the number of customers in the sample for each of the four-largest customer categories in this study in order to determine if the current weighing of models is accurate. He also stated that the results of this analysis will be presented in an updated Secondary and Service Loss Study and DLF Study, submitted at the outset of ComEd’s revenue-neutral cost of service and rate design proceeding that will be initiated in the first half of 2013.

Staff agreed with ComEd’s revisions to both studies and its proposal to address the sample size analysis for the Secondary and Service Loss Study in the future. Staff also agreed that, due to the statutory time constraints in Section 16-108.5, Mr. Born did not have sufficient time to prepare the Secondary and Service Loss Study in a scientific manner. Staff concluded that therefore, there are no remaining issues relating to the revised DLF Study, ComEd Ex. 17.2, and it should be approved and used in the design of compliance rates. Staff Initial Brief at 55-56.

ComEd’s Position

ComEd also agreed that the short time deadlines in Section 16-108.5, did not allow Mr. Born sufficient time to conduct an adequate sampling for its Secondary and Service Loss Study. ComEd contends that there are no issues with regard to these studies and the Commission should approve in its compliant and revised DLF Study, ComEd Ex. 17.2. ComEd Initial Brief at 55-56.

Analysis and Conclusions

Both Staff and ComEd find the short time deadlines in Section 16-108.5 to be so restrictive as to preclude ComEd from being able to conduct a Secondary and Service Loss Study in a manner that includes a representative sampling therein. The Commission notes that this is some indicia that the short time deadlines in this statute do not provide any of the parties with adequate time to conduct discovery and present evidence.

However, it is not contested that ComEd shall be required to update its DLF Study and its Secondary and Service Loss Study in its revenue-neutral cost of service and rate design case, which will be filed in the first half of 2013. At that time, ComEd shall file studies that do not have significant gaps in accuracy, such as the Secondary and Service Loss Study that was presented in this case. Any failure to do so will be considered to be ignoring a Commission order. Additionally, the Commission approves ComEd's revised DLF Study, ComEd Ex. 17.2.

2. Computation of ROE Collar Adjustment for 2011

According to ComEd witness Kathryn Houtsma, the ROE collar adjustment attached to the direct testimony of Staff witness Burma Jones was calculated incorrectly. Staff witness Ms. Jones agreed. Staff Ex. 6.0 at 9. A corrected collar calculation was attached to Ms. Jones' rebuttal testimony. *Id.* This matter is no longer at issue.

C. Potentially Contested Issues

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

To promote clarity regarding the calculation of applicable operating revenues for the ROE collar adjustment, Staff proposed modifications to Schedule FR A-3, ROE for Collar Computation, and related workpaper 22 ("WP 22"). Staff revised (corrected) that proposal in its rebuttal, and asked that ComEd's surrebuttal indicate: (1) ComEd's position on this presentation item and (2) how this item could be effectuated given that it involves the formula. Staff Ex. 6.0 at 9-10. ComEd's surrebuttal agreed to the presentation item as revised in Staff's rebuttal, and indicated that ComEd planned to file a motion to revise its additional August 12, 2012, compliance filing in ICC Docket No. 11-0721 to effectuate this item (without taking a legal position on whether this item could be addressed in the instant Docket). ComEd Ex. 18.0 at 4-5. No intervenor contested this item. On October 17, 2012, ComEd filed a ministerial motion to address that presentation item in ICC Docket 11-0721. Staff filed its response on October 26, 2012, and did not oppose ComEd's motion.

Technical Exception No. 3

ComEd has also noted that in its additional October 10, 2012, compliance filing in ICC Docket 11-0721, it reflected an August 10, 2012, compliance item that inadvertently removed the ROE Collar amount from the interest calculation on Schedule FR A-4. ComEd Initial Brief at 58-59. ComEd included this issue in its October 17, 2012 ministerial motion to correct that item in ICC Docket 11-0721. The Commission approved that motion on November 28, 2012. Effectuating this item will result in the correct calculation of interest on the ROE Collar adjustment being included in the calculation of the revenue requirement.

ComEd is directed to effect each of the two above items appropriately (consistent with the action on its October 17, 2012, ministerial motion in ICC Docket 11-0721) in the compliance filing here.

2. Preservation of Docket 11-0721 Rehearing Issues

a. Pension Asset Funding Costs

ComEd submits that it presented and supported the pension asset funding cost recovery in its case-in-chief. The recovery of this cost now has been confirmed by the *Order on Rehearing* in Docket 11-0721. ComEd further submits that in its direct case, the pension asset funding cost recovery amount is \$71,461,000. ComEd Ex. 3.1, Sch. FR A-1, line 9. In ComEd's *Order on Rehearing* compliance filing, the pension asset funding cost recovery amount is \$71,576,000, reflecting a revised cost of debt of 5.78%, as was agreed to by ComEd witness Mr. Fruehe and Staff witness Mr. McNally. ComEd Exs. 23.0 Corr., Sch. FR A-1, line 9; 9.1, Sch. FR D-1, line 12. Because the parties are no longer contesting this issue, the Commission approves ComEd's position.

b. Average or End of Year Rate Base in Reconciliations

The Commission uses an average rate base for purposes of calculating the reconciliation revenue requirement. This is consistent with the Commission's October 3, 2012 *Order on Rehearing* in Docket 11-0721 and Section 16-108.5(d)(3) of the Act. Docket 11-0721, Order on Rehearing at 18 (October 3, 2012).

c. Interest Rate for Reconciliation Adjustments

ComEd's Position

ComEd states that in light of the Order on Rehearing in ICC Docket 11-0721, its revenue requirement must reflect the reduced rate of return (interest rate) on the reconciliation adjustment set by that order. ComEd Initial Brief at 61. The reconciliation adjustment, reflecting that reduced rate, was discussed in Section II.B, supra.

ComEd notes that CUB repeats a condensed version of its rejected claim in ICC Docket 11-0721 in its briefs in this docket stating that the interest rate on reconciliation balances should be set asymmetrically, with utilities paying a far higher rate than they can ever receive. ComEd Reply Brief at 33. ComEd states that the Commission

rejected this argument in the Order on Rehearing, finding that the cost of the relevant capital:

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

ComEd claims that CUB's effort to revive this argument is improper, unlawful, and erroneous in both premise and conclusion. ComEd states that 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. It does not re-visit the rate formula itself; that must be done through an Article IX proceeding. ComEd asserts that the interest rate paid on reconciliation balances is a function of the formula, not the particular year or its costs, and is outside the limits of this Docket. ComEd Reply Brief at 34.

ComEd states, moreover, that 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 Assembly 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. ComEd Reply Brief at 34.

ComEd argues that CUB's intimation that a reconciliation balance exists because ComEd predicted "higher projected plant" as if ComEd were at fault or could game the system, is completely unsupported and patently untrue. The case reconciles 2011 revenue requirements. The 2011 rates were set by the Commission in two separate traditional cases, 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. ComEd Reply Brief at 34.

Finally, ComEd states that CUB implies that treating ComEd and customers alike somehow cheats customers out of a portion of their credit. ComEd argues that 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 for "the entire amount they over-paid" regardless of the interest rate set on the balance. ComEd asserts that if CUB's argument were true, it

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. ComEd Reply Brief at 35.

CUB’s Position

CUB states that similar to the average versus year-end rate base measurement issue, the Commission has repeatedly rejected ComEd and Ameren’s requests to apply their respective WACC as a proxy for the appropriate interest rate on the reconciliation balance, which would have provided each utility a full equity return including long-term debt on a short-term balance spanning from one to two years. CUB notes that on October 3, 2012, the Commission again rejected ComEd’s plea to apply its WACC to the reconciliation balance and determined that the utility’s short-term debt rate should be used instead:

Consistent with the Commission’s decision in Docket No. 12-0001, the Commission adopts the recommendation of IIEC to apply ComEd’s short-term cost of debt rate as the reconciliation interest rate. This rate 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 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. Of the proposals in record evidence, the Commission believes that short-term debt best matches with the actual incremental cost of any reconciliation balance. It is therefore adopted.

Docket 11-0721, Order on Rehearing at 36. Cub states that nothing in the facts of this reconciliation nor any change in law warrants a departure from this established Commission policy. CUB Initial Brief at 19.

However, according to CUB, it appears ComEd has produced an over-collected reconciliation balance in this proceeding which would warrant CUB’s proposed treatment of over-collected reconciliation balances. ComEd Ex. 19.1, Schedules FR A-1 and FR A-4. CUB argues that applying the utility’s WACC to over-collections is rational and fair to customers and the utility, because it symmetrically reimburses customers for the entire amount they overpaid through the over-collection. CUB maintains that since ratepayers will incur the WACC cost of the higher projected plant in rates they will have already paid, it is only appropriate and reasonable to require that the overcharge be credited back to customers at the same rate. CUB asserts that using ComEd’s WACC on over-collections assures that ratepayers will be compensated for providing excess funds to the utility under the formula rate plan (as measured by the

over-collection) at a financing rate that is at least equal to the financing rate that the utility charged to ratepayers, which has in part produced those over-collections. CUB concludes that there is therefore ample legal, factual and policy justification to apply ComEd's WACC to the over-recovered reconciliation balance. CUB Initial Brief at 19-20.

Commission Analysis and Conclusion

The Commission agrees with ComEd that, in the instant Docket, in light of the Order on Rehearing in Docket 11-0721, ComEd's revenue requirement must reflect the reduced rate of return (interest rate) on the reconciliation adjustment set by that order. The reconciliation adjustment, reflecting that reduced rate, was discussed in Section II.B, supra. CUB's argument for an asymmetrical rate of return on reconciliation adjustments is improper because it seeks to change the approved formula rate and thus it is beyond the scope of the instant Docket.

Per the Commission's Order on Rehearing in Docket 11-0721, the interest rate for reconciliation adjustments is the cost of ComEd's short-term debt. Docket 11-0721, Order on Rehearing at 36 (October 3, 2012).

3. Section 16-108.5 of the PUA

a. Identification of costs incurred in compliance with Section 16-108.5

Staff's Position

Technical Exception No. 11

Staff recommends requiring ComEd to present evidence in each future formula rate filing establishing what ComEd's EIMA projected plant additions costs are for the future year and what ComEd spent the EIMA money on in the previous year. Staff opines that identification of ComEd's costs provides for a more timely and in-depth review, as well as provide greater transparency on the part ComEd.

Staff acknowledges that Section 16-108.5(b) of the Public Utilities Act requires a participating utility to submit a report to the Commission on an annual basis no later than April 1st. This report describes how ComEd is satisfying its infrastructure investment program commitments under that Section. However, Staff opines, this report would not necessarily establish what costs were included in the subsequent May 1st filing of updated cost inputs to the performance-based formula rate which are required by Section 16-108.5(d) of the Act. Also, according to Staff, this report would not necessarily establish what amounts reflect the actual costs for the prior rate year, plus the next year's projected plant additions. Staff points out that the costs requested for recovery in ComEd's annual formula rate update filing for formula ratemaking purposes represent both actual and projected costs. On the other hand, Staff continues, the costs reported in the April 1st annual report only indicate the actual costs that ComEd incurred through a certain date. Staff Initial Brief at 35-36.

Staff states that it is critical for the Commission to know how much of those actual costs are due to the Company's compliance with, or in meeting, the infrastructure investment requirements under Section 16-108.5(b) of the Act. Staff reasons that this has an impact upon the Commission's determination of the reasonableness of the requested costs and whether these costs should be reflected in the formula rates.

Citing Section 16-108.6(c), Staff avers that this statute clearly provides that the investments that are made pursuant to a Commission-approved AMI Plan are subject to reasonableness reviews. In any such review, Staff continues, it is crucial that the different costs that are reflected in the annual formula rate update filing and the April 1st annual report are easily reconciled and explained, and that ComEd's costs that are related to the infrastructure investment program under Section 16-108.5(b) of the Act are open and transparent. Staff concludes that therefore, it is important that ComEd provide, and the Commission identify in its Order in each formula rate filing, the costs that ComEd incurred in compliance with, or in meeting, the requirements of Section 16-108.5(b) of the Act. Staff Ex. 7.0 at 5-6.

Staff takes issue with statements made by ComEd witness Dr. Hemphill that "[n]othing prohibits Staff and Intervenor from issuing 'data requests' relevant to the issues in a formula rate filing." See, ComEd Ex. 10 at 11. Staff notes that in surrebuttal testimony, ComEd witness Dr. Hemphill argued that "[t]his type of information is not called for by EIMA, and it is simply impossible to provide." See, ComEd Ex. 18.0 at 5. Dr. Hemphill also asserted that, as time passes, it will become impossible for ComEd to isolate the particular investments that are attributable to the EIMA revenue, concluding that Staff's proposal is inconsistent with how the investment target is determined under Section 16-108.5, and that the "data" that Staff seeks is unnecessary to assess the prudence of ComEd's EIMA investments. *Id.* at 6-7; see also Staff Initial Brief at 3.

Staff argues that ComEd's objections should be rejected because it is well-established that the Commission is vested with authority to do what is reasonably necessary to accomplish the legislature's objective, citing *Abbott Laboratories, Inc. v. Illinois Commerce Comm.*, 289 Ill.App.3d 705, 712, 682 N.E.2d 340, 347 (1st Dist. 1997). Staff additionally cites Section 16-108.5(d)(1), which provides that:

Notwithstanding anything that may be to the contrary, the intent of the reconciliation is to ultimately reconcile the revenue requirement reflected in rates for each calendar year, beginning with the calendar year in which the utility files its performance-based formula rate tariff pursuant to subsection (c) of this Section, with what the revenue requirement would have been had the actual cost information for the applicable calendar year been available at the filing date.

Staff Initial Brief at 38 citing 220 ILCS 5/16-108.5(d)(1).

Staff maintains that ComEd's objection that it is "impossible" to provide this information is meritless. Staff points out that ComEd witness Dr. Hemphill admitted during cross-examination that providing this information was not impossible, but merely "impracticable." See, Tr. 12-13. Staff points out that ComEd, in fact, provided in response to Staff "Data Request" RWB 9.08, a breakdown of projected 2012 investments pursuant to Section 16-108.5(b)(1) cross-referenced to 2012 projected plant additions, including distribution infrastructure improvements, training facility

construction or upgrade projects, wood pole inspection, treatment and replacement programs, circuit storm hardening, additional smart meters, distribution automation and associated cyber secure data communication network, and substation microprocessor relay upgrade. All of this, Staff states, is precisely the type of information that Staff recommends requiring ComEd to provide in its annual formula rate update filing. See, ComEd Resp. to Staff DR RWB 9.08, Staff Ex. 7.0, Attachment B at 1-2.

Additionally, Staff continues, in its Infrastructure Investment Plan filed with this Commission on January 6, 2012, ComEd provided a detailed description of and breakdown of both reliability-related and Smart Grid-related projects to be pursued during the respective investment periods for each category that was described in Section 16-108.5, including the scope, schedule, budget, full-time employees and units associated with each project. The reliability-related projects described by ComEd in its Plan include Underground Residential Cable Injection and Replacement, Mainline Cable System Refurbishment and Replacement, Ridgeland 69kV Cable Replacement, Construction of Training Facilities, Wood Pole Inspection, Treatment and Replacement, and Storm Hardening. Smart Grid-related projects described in the Plan include distribution automation, substation micro-processor relay upgrades, smart meters, and associated cyber-secure data communications network. Staff avers that this type of information is precisely the type of information that it recommends proving at the time of future annual formula rate update filings, so that a timely and in-depth review of such information can be performed. See *generally*, Commonwealth Edison's Infrastructure Investment Plan, January 6, 2012, AG Cross Ex. 1.0; Staff Initial Brief at 39-40.

Staff additionally argues that ComEd's argument (below) that Staff's recommendation "is not consistent with the EIMA structure in how the investment target is determined[.]" is without merit. Staff maintains that Section 16-108.5(b)(1) requires a participating utility to invest \$1.3 billion over a five-year period on certain electric system upgrade, modernization and training facility projects and another \$1.3 billion over ten years on transmission and distribution infrastructure and Smart Grid electric system upgrades. In describing the required investments, Staff continues, Section 16-108.5(b) of the Act states:

The investments in the infrastructure investment program described in this subsection (b) shall be incremental to the participating utility's annual capital investment program, 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..."

Staff Reply Brief at 17 citing 220 ILCS 5/16-108.5(b). Staff additionally contends that Section 16-108.5 requires the additional \$2.6 billion investment to be incremental to what ComEd invested historically via its capital investment program. It also, according to Staff, defines the investment required of the utility. Staff concludes that its recommendation merely requires ComEd to annually report, as part of its formula rate filings, those defined investments that it incurred or is projected to incur in complying

with or in meeting the infrastructure investment requirements in Section 16-108.5(b). *Id.* at 17-18.

Staff recommends the following:

1. Requiring that in each future formula rate proceeding, ComEd must present evidence in its case-in-chief establishing the costs that are included in the rate year revenue requirement that are incurred and projected to be incurred in compliance with, or in meeting, the infrastructure investment requirements of Subsection 16-108.5(b) of the Act;
2. Clearly identifying, in each Order establishing the rates resulting from a formula rate proceeding, the costs that are included in the rate year revenue requirement that ComEd incurred or is projected to incur in complying with or in meeting the infrastructure investment requirements of Subsection 16-108.5(b) and of the Act;
3. Including the following language in the Findings and Orderings paragraphs of its Order in this proceeding:

Technical Exception No. 4

- (#) The Commission, based on the record in this proceeding, finds that the approved revenue requirement includes \$269,474 ~~million~~ thousands of projected 2012 plant additions to be incurred by the utility in compliance with or in meeting the infrastructure investment requirements of Subsection 16-108.5(b) of the Act. These are projected costs and will be reconciled to actual costs in the Company's next formula rate filing. The detail of these projected plant additions in the categories as required by Section 16-108.5(b)(1) are as follows (in ~~Millions~~ Thousands):

Distribution infrastructure improvements	\$ 128,888
Training facility construction or upgrade projects	2,551
Wood pole inspection, treatment, and replacement	11,110
Reducing the susceptibility of storm-related damage	<u>23,447</u>

Total electric system upgrades, modernization projects, and training facilities	\$ 165,996
Additional smart meters	\$ 52,246
Distribution automation and associated cyber secure data communication network	50,957
Substation micro-processor relay upgrades	<u>275</u>

Total upgrade and modernization of transmission

**and distribution infrastructure and Smart Grid
electric system upgrades** **\$ 103,478**

**Total projected incremental 2012 plant additions
In compliance with Section 16-108.5(b)(1) of the Act**
\$269,474

Staff Ex. 7.0 at Attachment B.

AG/AARP Position

The AG/AARP contend that the Commission should reject ComEd's assertion that it does not track the investments that it made pursuant to the Section 16-108.5(b) requirements. They assert that AG Cross Exhibit 1, which is entitled "Commonwealth Edison Company's Infrastructure Investment Plan," is dated January 6, 2012. The AG/AARP state that it was filed with the Commission pursuant to Section 16-108.5(b). They aver that ComEd witness Dr. Hemphill agreed that the Company's Infrastructure Investment Plan shows that, when ComEd submitted the plan, ComEd was able to identify the budget associated with each of the categories included in the document, citing Tr. 52, 57. AG/AARP Initial Brief at 24-25.

The AG/AARP maintain that AG Cross Exhibit 1 demonstrates that ComEd has developed a detailed plan as to the manner in which it intends to invest regarding each of the categories in which it is obligated to invest, citing 220 ILCS 5/16-108.5(b)(1)(A) and (B). The AG/AARP further state that the budgets in this document include both annual and cumulative costs.

They maintain that AG Cross Exhibit 1 includes ComEd's Annual Plan for 2012, which includes the total budget for the year. According to the AG/AARP, this document breaks down the projected investment for each category of investment for the year into monthly increments. For example, the AG/AARP continue, the Summary 2012 Plan Budget section of the 2012 Investment Plan states the total investment for the year: "The program budget identifies the planned monthly capital cost for each program." "The 2012 Plan budget total is estimated to be \$233 million in incremental capital investments plus associated expenses." See, AG Cross Ex. 1, Attachment 2 at 9. The AG/AARP posit that, in each of eight subsections therein, ComEd identified the program scope, schedule, budget, and full-time equivalent staffing for each month in 2012. AG Cross Ex. 1 at 21-25; AG/AARP Initial Brief at 25.

The AG/AARP point out that neither the initial January 6, 2012 Infrastructure Investment Plan nor the annual updates of the Plan include a mechanism to review the reasonableness of the amounts spent on particular projects. Rather, they state, the review of reasonableness occurs in the formula rate case proceedings, which are done on an annual basis through the formula update rate case process. The AG/AARP state that this confirms the importance of identifying the Section 16-108.5(b) investments in the annual formula rate filings, as recommended by Staff witness Mr. Bridal. (*Id.* at 25). They cite 220 ILCS 5/16-108.5(b-5) and (d), which require Commission review of

ComEd's infrastructure investments during the annual review process. The AG/AARP conclude that, if the Commission is to perform this review, ComEd must provide evidence establishing its infrastructure investments and costs. AG/AARP Reply Brief at 13.

ComEd's Position

~~According to ComEd, Section 16-108.5 does not require it to present evidence as to what the projects will be or what ComEd spent the EIMA money on for reconciliation purposes.—ComEd witness Dr. Hemphill, opined that: “it’s ... possible to actually spend the time to try to identify item by item exactly what was and was not EIMA. But given the nature of the investment, it’s not correct.” See, e.g., Tr. 14, ComEd Ex. 18.0 at 5. He also stated that “on a year-by-year basis, it’s impracticable to take individual investments and basically paint them as to whether they are EIMA or not.” Tr. 29.~~

ComEd maintains that, as new investments are made, they change the nature of the system and affect future investments and costs. As time passes, it rapidly becomes impractical, and then completely impossible, for ComEd to say how it would have reacted to those changes, and with what changed investments, had there been no EIMA. ComEd argues that its personnel cannot generally know what specific investments it would have made, both absent EIMA at the time of the investment and given a hypothetical system where only hypothetical non-EIMA investments were made in prior years. ComEd Initial Brief at 61-62.

ComEd further states that Staff's position conflicts with Section 16-108.5, as, according to ComEd, Section 16-108.5(b) measures the target investment not by comparison to a base case, or by characterizing individual investments or their costs, but instead by comparing ComEd's investment to a calculated average of past investment, specifically, ComEd's "average capital spend" for the calendar years 2008, 2009, and 2010, as is reported in its FERC Form 1. It argues that the use of this calculated baseline was necessary because ComEd cannot identify specific incremental investments or their costs. See, ComEd Ex. 18.0 at 6.

ComEd also posits that it would be "impracticable" to go out in the field and find a place where cable is being replaced and determine whether that particular cable replacement project was an EIMA-funded program or a baseline cable replacement project. ComEd witness Dr. Hemphill further testified that "there is no reason why you'd need to know that in order to determine that ComEd has complied with the incremental investment requirements of the EIMA." Tr. 32–33. ComEd further avers that the "data" that Staff seeks is not required to assess prudence. According to ComEd, the statutory determination of prudence is not based upon the cost of particular investments. (ComEd Initial Brief at 62-63).

ComEd does state that it is committed to providing information in discovery. It is also willing to 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, ComEd avers, that “data” will already appear in ComEd’s annual EIMA reports. *Id.* at 63-64.

ComEd also contends that the evidence that Staff seeks is cumulative to (and therefore unnecessary) the reports that Section 16-108.5 requires. It points out that pursuant to this statute, each participating utility must file a comprehensive 10-year infrastructure investment plan that includes “scope, schedule, and staffing, for satisfying its infrastructure investment program commitments,.” citing 220 ILCS 5/16-108.5(b). Thereafter, ComEd continues, it is required, no later than April 1st of each subsequent year, to 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. ComEd Reply Brief at 35-36.

Analysis and Conclusions

Exception No. 5 and Technical Exception No. 11

The portion of Section 16-108.5 that ComEd cites is as follows:

The investments in the infrastructure investment program described in this subsection (b) shall be incremental to the participating utility's annual capital investment program, 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; . . . A participating utility may add reasonable construction ramp-up and ramp-down time to the investment periods specified in this subsection (b). For each such investment period, the ramp-up and ramp-down time shall not exceed a total of 6 months.

220 ILCS 5/16-108.5(b). The costs at issue, as is provided in Section 16-108.5 are as follows:

(Participating utilities shall):

- (A) over a 5-year period, invest an estimated \$1,300,000,000 in electric system upgrades, modernization projects, and training facilities, including, but not limited to:
 - (i) distribution infrastructure improvements totaling an estimated \$1,000,000,000, including underground residential distribution cable injection and replacement and mainline cable system refurbishment and replacement projects;
 - (ii) training facility construction or upgrade projects totaling an estimated \$10,000,000, provided that, at a minimum, one such facility shall be located in a municipality having a population of more than 2 million residents and one such facility shall be located

in a municipality having a population of more than 150,000 residents but fewer than 170,000 residents; any such new facility located in a municipality having a population of more than 2 million residents must be designed for the purpose of obtaining, and the owner of the facility shall apply for, certification under the United States Green Building Council's Leadership in Energy Efficiency Design Green Building Rating System;

(iii) wood pole inspection, treatment, and replacement programs;

(iv) an estimated \$200,000,000 for reducing the susceptibility of certain circuits to storm-related damage, including, but not limited to, high winds, thunderstorms, and ice storms; improvements may include, but are not limited to, overhead to underground conversion and other engineered outcomes for circuits; the participating utility shall prioritize the selection of circuits based on each circuit's historical susceptibility to storm-related damage and the ability to provide the greatest customer benefit upon completion of the improvements; to be eligible for improvement, the participating utility's ability to maintain proper tree clearances surrounding the overhead circuit must not have been impeded by third parties; and

(B) over a 10-year period, invest an estimated \$1,300,000,000 to upgrade and modernize its transmission and distribution infrastructure and in Smart Grid electric system upgrades, including, but not limited to:

(i) additional smart meters;

(ii) distribution automation;

(iii) associated cyber secure data communication network; and

(iv) substation micro-processor relay upgrades.

220 ILCS 5/16-108.5(b)(1)(A)-(B). These are very concrete statutory requirements, for which, ComEd should have some plan of achieving every year during which Section 16-108.5 is in effect. It also appears that, before approving these requirements, the Commission should have concrete evidence establishing that they can be met, in the projected plant additions piece of a Section 16-108.5 case, but especially as to the applicable plant in a reconciliation piece of a Section 16-108.5 proceeding, where the money has already been spent and is therefore quantifiable as to what actually happened.

The Commission notes that Section 16-108.5(c) requires utilities that voluntarily elect and commit to undertake an infrastructure program pursuant to subsection (b) to design rates that are cost-based, and based on the *actual costs* involved in providing

delivery services that are prudently incurred and reasonable in an amount that is consistent with Commission practice and law. (220 ILCS 5/16-108.5(b) and (c)(1)). The formula rate statute additionally states that:

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) . . . 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). The Commission also "shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act." 220 ILCS 5/16-108.5(d)(3).

Additionally, Section 16-108.5(d)(1) provides that:

Notwithstanding anything that may be to the contrary, the intent of the reconciliation is to ultimately reconcile the revenue requirement reflected in rates for each calendar year, beginning with the calendar year in which the utility files its performance-based formula rate tariff pursuant to subsection (c) of this Section, with what the revenue requirement would have been had the actual cost information for the applicable calendar year been available at the filing date.

220 ILCS 5/16-108.5(d)(1). Such a reconciliation is a true-up of the actual expenditures to the projected expenditures for any given year, which necessarily includes proof of what the expenditures were. Further, the reconciliation filing "shall include relevant and necessary 'data' and documentation for the applicable rate year that is consistent with the Commission's rules applicable to a filing for a general rate increase. . . ." 220 ILCS 5/16-108.5(d)(3). Indeed, this Commission is required by the Public Utilities Act to base rates on evidence that establishes prudently-incurred expenses. *Citizens Utility Board v. Ill. Commerce Comm.*, 166 Ill. 2d 111, 124, 651 N.E.2d 1089 (1995); *City of Chicago v. Ill. Commerce Comm.*, 281 Ill. App. 3d 617, 622, 666 N.E.2d 1212 (1st Dist. 1996).

However, it is not possible to make a finding regarding the reconciliation piece of a Section 16-108.5 proceeding that the costs incurred were just and reasonable or prudently-incurred, if a utility does not provide proof as to what it spent the money on. It is also not possible to make a finding regarding the projected plant additions piece of a Section 16-108.5(d) proceeding, if the Commission is not provided with evidence, in a utility's case-in-chief, establishing what these projected plans are.

ComEd took no issue with the evidentiary standard EIMA applies to proceedings under Section 16-108.5(d), which provides that "[t]he Commission shall apply the same

evidentiary standards, including, but not limited to, those concerning prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act.” 220 ILCS 5/16-108.5(d)(3). ~~ComEd’s argument that Section 16-108.5(b) does not require it to proffer evidence in its case-in-chief regarding projected expenditures and establishing the reasonableness of its previous expenditures in the reconciliation piece of Section 16-108.5 proceedings places its construction of that portion of Section 16-108.5(b) in conflict with the other portions of Section 16-108.5 cited above, as well as the various provisions in Article IX of the Public Utilities Act, which are incorporated into Section 16-108.5. Nor does ComEd argue that it no longer has the burden of proof on the issue of reasonableness and prudence of its costs.~~ These Article IX provisions require this Commission to set just and reasonable rates. (See, 220 ILCS 5/9-101; see also 220 ILCS 5/9-211, which requires this Commission, when determining rates, to include in rate base only the value of such investment which is both prudently incurred and use and useful in providing service to public utility customers; 220 ILCS 5/9-212, which requires that no significant addition to existing facilities or plant, can be included in a utility’s rate base unless and until the utility proves, and the Commission determines, that such plant or facility is both prudent and used and useful in providing utility service to the utility’s customers).

Well-established law regarding statutory construction requires this Commission to construe statutes, when it is reasonably possible to do so, in a manner that avoids a conflict between the two statutory provisions. *Moore v. Green*, 291 Ill. 2d 470, 479, 848 N.E.2d 1015 (2006); *Barragan v. Casco Design Corp*, 216 Ill. 2d 435, 442-43, 837 N.E.2d 16 (2005). Indeed, the Cardinal rule of statutory construction is to give effect to the General Assembly’s intent. (*Moore*, 291 Ill. 2d at 479).

~~It seems to be extremely doubtful that the General Assembly would incorporate Article IX provisions in Section 16-108.5 and require a utility like ComEd, which elects to be subject to Section 16-108.5, to “include relevant and necessary ‘data’ and documentation for the applicable rate year that is consistent with the Commission’s rules applicable to a filing for a general rate increase. . . .” See, 220 ILCS 5/16-108.5(d)(3), if ComEd’s construction of Section 16-108.5(b) expressed the full extent of the evidence to be provided in a Section 16-108.5 proceeding. It also seems unlikely that the General Assembly would require the Commission to approve rates that are cost-based, and based on the actual costs involved in providing delivery services that are prudently incurred and reasonable in an amount that is consistent with Commission practice and law, if ComEd were not required to provide evidence in its case-in-chief as to what it intends to spend the money on and what it has already spent the previous year’s money on. See, 220 ILCS 5/16-108.5(b)(1)(A)-(B) and (c)(1).~~

The Commission notes that, if the relevant portion of Section 16-108.5(b) that ComEd cites is read in a manner that requires proof of just and reasonable rates in a utility’s case-in-chief (as opposed to in rebuttal) then, Section 16-108.5(b) is read in a manner that is harmonious with the Article IX provisions cited above, as well as the other portions of Section 16-108.5 that are cited above. This seems to be the more likely approach that the General Assembly intended, given the incorporation of the

Article IX requirements in Section 16-108.5. ComEd has provided this Commission with no indication as to the General Assembly's intent.

~~Even assuming that ComEd is not arguing that Section 16-108.5 has provisions that conflict internally and also conflict with Article IX of the Public Utilities Act, its argument fails. Staff and Intervenor, who do not have the burden of proof, as it requires those persons/entities to seek all of the relevant information in discovery and present the evidence without requiring any evidentiary showing on the part of ComEd.~~

~~ComEd has argued, essentially, that in order to make a finding of prudence, it is not necessary for ComEd to provide evidence in an annual formula rate prudence review establishing its projected EIMA expenditures, or establishing what it spent the EIMA money on in the reconciliation piece of this review. This argument would effectively render the annual formula rate prudence review to be meaningless. ComEd has presented no argument establishing that this meaningless review is what the General Assembly intended.~~

ComEd correctly points out that it is required by Section 16-108.5 to file reports to the Commission. While these reports may be detailed, they are not the same as evidence, which is subject to discovery, cross-examination and procedural rules. The reports do not have the same checks and balances that evidence submitted in a litigated formula rate case would have. Further, there is nothing in the statute stating that these reports are in lieu of evidence.

~~ComEd's argument must also be read in the context of the discovery that actually takes place in a rate case. In a rate case, there typically are no depositions or requests to admit facts. Typically, there are only "data requests," which are somewhat of a hybrid between the interrogatories and requests to produce that the Supreme Court Rules and Rules of Civil Procedure provide. See, e.g., S. Ct. Rules 213, 214. The answers to these "data requests" are not required to be verified. See generally, 83 Ill. Adm. Code Part 200. Given the fact that the deadline for completion of a Section 16-108.5 case from beginning to end is eight months in multi-billion dollar rate cases involving many, many components of a rate, (See, 220 ILCS 5/16-108.5(d) and (d)(1)) it appears to be doubtful that Commission Staff and Intervenor would actually be able to propound discovery, and receive information that was responsive to that discovery, within that eight-month time period in a manner that would allow Staff and the Intervenor to effectively use the information gleaned in discovery at trial, without a detailed proffering on the part of ComEd of initial evidence supporting its positions.~~

~~ComEd presents nothing indicting that this is what the General Assembly intended when it enacted this statute. Indeed, tThe fact that Article IX provisions in the Public Utilities Act are explicitly incorporated in Section 16-108.5 is indicia that ComEd is required to present evidence in its case-in-chief (as opposed to in rebuttal) establishing that it meets the requirements in Section 16-108.5. Because ComEd indisputably has the burden of proof regarding Section 16-108.5(d) formula rate proceedings, this argument ignores the law.~~

The Commission notes that nothing in Section 16-108.5(d) of the Act states that such proceedings should have a lessening of Article IX scrutiny. Quite the contrary, Section 16-108.5 *requires* such scrutiny. 220 ILCS 5/16-108.5(d)(3). Yet, according to

ComEd, it is not possible to provide evidence regarding what it actually spent to meet the statutory requisites or what it intends to spend to meet those requisites. The Commission notes that, while ComEd asserts that presenting evidence establishing its EIMA projections and its expenditures for reconciliation purposes is a laborious task that it should not be required to endure, both Staff and the AG/AARP have provided evidence that ComEd does have a detailed plan regarding how it intends to expend EIMA money. It also seems to be a simple matter to track certain expenditures for proof in the reconciliation process.

The Commission therefore concludes that, consistent with EIMA, “[t]he Commission shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act.” 220 ILCS 5/16-108.5(d)(3) (emphasis added). Accordingly, ComEd is required by Section 16-108.5(d)(3) to provide specific evidence, in every Section 16-108.5(d) proceeding, in its case-in-chief, as to ~~what it intends to spend Section 16-108.5~~ the projected plant additions it intends to make under Section 16-108.5(b)(1)(A)-(B) for the current calendar year ~~money on~~ and specific evidence establishing what it ~~has already spent Section 16-108.5~~ money on for reconciliation purposes ~~investments it made pursuant to Section 16-108.5(b)(1)(A)-(B) during the preceding calendar year for reconciliation purposes.~~ It is also required to clearly segregate the evidence regarding its projected plant additions from its evidence regarding its reconciliation of the previous year’s expenditures. While separate evidence is not required regarding these two types of evidence, a clear identification ~~(e.g., subheadings as to what the evidence is probative of) is the only type of evidence that this Commission will accept from~~ must be submitted by ComEd in future formula rate case filings. The stringent time lines in Section 16-108.5 do not allow the parties, ALJs or this Commission with the time to independently, and quickly, ascertain whether a particular item is being proffered for the previous year’s reconciliation, or for a future projection.

b. Contributions to energy low-income and support programs

Staff recommends requiring ComEd to identify, in each formula rate filing, evidence as to the costs that were: (1) incurred in the applicable year in compliance with, or in meeting, the requirements for contributions to energy low-income and support programs of Section 16-108.5(b-10) of the Act; (2) and were excluded from ComEd’s requested revenue requirement, and; (3) provide evidence that these costs were, in fact, excluded from rates. The evidence provided with this filing, Staff opines, provides for a more timely and in-depth review of the “data.” Staff is also of the opinion that this will also provide greater transparency on the part of ComEd. Staff Ex. 7.0 at 4-5, 7-8.

Staff states that ComEd is required by law to file (with the Commission) annual reports documenting its disbursement of funds to energy low-income and support programs, citing 220 ILCS 5/16-108.5(b-10). Staff points out that payments to these programs are not recoverable in rates. In so arguing, Staff acknowledges that the Commission is authorized to audit ComEd’s disbursements to ensure they were

disbursed in a manner that is consistent with Section 16-108.5(b-10). Staff Initial Brief at 47-48.

Staff maintains that it is crucial that the Commission knows the amount of funds disbursed for these programs in the prior year pursuant to Section 16-108.5(b-10) during the formula rate update process because the Commission must ensure that those costs are not included in ComEd's proffered annual formula rate updates and reconciliation filings. Staff points out that there is no required filing date for the annual reports required by Section 16-108.5(b-10) and, thus, according to Staff, there is no guarantee that this information would be available in a timely manner to the Commission. *Id.*

According to Staff, ComEd accepts that the expenditures which it makes for energy low-income and support program are not recoverable in rates. ComEd also agrees that Section 16-108.5 does not specify an annual filing date or a format for the reports to be filed with the Commission, citing ComEd Exs. 11.0 at 10; 18.0 at 8. Staff also avers that ComEd has indicated a willingness to work with Staff in developing a mutual recommendation for a report format, and the submission of the report prior to the annual formula rate update and reconciliation filing. Staff Initial Brief at 49, citing ComEd Ex. 18.0 at 8.

Staff posits that it is well-established that the Commission is vested with authority to do what is reasonably necessary to accomplish the legislature's objective, citing *Abbott Laboratories, Inc.*, 289 Ill. App. 3d at 712, 682 N.E.2d at 347. Staff recommends the following:

1. Requiring ComEd, in each formula rate proceeding, to identify in its case-in-chief, the costs included in the rate year revenue requirement that are incurred in the applicable year that are in compliance with, or in meeting, the requirements for contributions to energy low-income and support programs in Subsection 16-108.5(b-10) of the Act that were excluded from the requested revenue requirement, and to provide evidence that the costs were excluded;
2. In each Order establishing the rates resulting from a formula rate proceeding, clearly identifying in that Order, the costs which ComEd incurred in the applicable year in complying with, or in meeting the requirements for contributions to energy low-income and support programs of Subsection 16-108.5(b-10) of the Act and to indicate that those specific costs were properly excluded from the approved revenue requirement;
3. Including the following language in the Findings and Orderings paragraphs of its Order in this proceeding:
 - (#) The Commission, based on the record in this proceeding, finds that the utility incurred in 2011 \$0 in compliance with or in

meeting the requirements for contributions to energy low-income and support programs of Section 16-108.5(b-10) of the Act, and that said costs have been excluded from the approved revenue requirement in a manner that is in accordance with Section 16-108.5(b-10) of the Public Utilities Act.

Staff Initial Brief at 51-52.

The AG/AARP Position

The AG/AARP support Staff's proposal to require ComEd to include the costs which ComEd incurred in the applicable year in complying with or in meeting the requirements for contributions to energy low-income and support programs required by Section 16-108.5(b-10). They also support Staff's recommendation to require ComEd to provide evidence establishing that those specific costs were excluded from the approved revenue requirement. The AG/AARP disagree with ComEd's suggestion (see below) that a report submitted to the Commission prior to and separate from the annual formula rate review is all that is necessary. They opine that ComEd's suggestion makes this information less readily available and it also defeats the statutory goal of transparency. The AG/AARP further assert that requiring this evidence to be in annual formula rate proceedings should be less burdensome on ComEd than a separate, unscheduled filing, because a separate filing requires interested parties to track down the report, and create a new review process for Staff and potentially other interested parties. They conclude that including this statutorily-required information in the annual, comprehensive formula review is more efficient for all parties. AG/AARP Initial Brief at 26-27.

ComEd's Position

ComEd posits that Section 16-108.5(b-10) states that, with respect to the disbursement of funds to energy low-income and support programs:

The participating utilities whose customers benefit from the funds that are disbursed as contemplated in this Section shall file annual reports documenting the disbursement of those funds with the Commission. The Commission has the authority to audit disbursement of the funds to ensure they were disbursed consistently with this Section.

ComEd agrees with Staff's assertion that this language does not specify an annual filing date or define any report format. ComEd Initial Brief at 64-65, citing 220 ILCS 5/16-108.5(b-10).

However, ComEd states, this statute excludes non-recoverable costs from its formula rate input "data." According to ComEd, there is no reason why these particular excluded costs should have an additional requirement imposed on them above and beyond what is required by law. ComEd further states that it excludes non-recoverable costs, like lobbying costs, from its formula rate. ComEd Reply Brief at 41.

ComEd avers that it is prepared to work promptly with Staff toward a mutual recommendation for submitting this report prior to the annual formula rate update and reconciliation filing so as to allow for a “timely and in-depth review.” ComEd also proposes to work with Staff to develop a report format that includes transparent information to identify where non-recoverable costs are recorded. According to ComEd, the annual reporting requirement in Subsection 16-108.5(b-10) and the reconciliation both cover the same time period, thus, any reconciliation between the two should be straightforward. It argues that filing for the annual report that is required by Subsection 16-108.5(b-10), and then submitting evidence with the same “data” as part of the annual formula rate update and reconciliation filing is neither required by EIMA nor is it an effective use of anyone’s time and scarce resources. ComEd Initial Brief at 65.

Analysis and Conclusions

Exception No. 6

Section 16-108.5 requires participating utilities to do the following:

(b-10) All participating utilities shall make contributions for an energy low-income and support program in accordance with this subsection. . . . a participating utility other than a combination utility shall pay \$10,000,000 per year for 5 years . . . which is intended to fund customer assistance programs with the primary purpose being avoidance of imminent disconnection. Such programs may include:

(1) a residential hardship program that may partner with community-based organizations, including senior citizen organizations, and provides grants to low-income residential customers, including low-income senior citizens, who demonstrate a hardship;

(2) a program that provides grants and other bill payment concessions to disabled veterans who demonstrate a hardship and members of the armed services or reserve forces of the United States or members of the Illinois National Guard who are on active duty pursuant to an executive order of the President of the United States, an act of the Congress of the United States, or an order of the Governor and who demonstrate a hardship;

(3) a budget assistance program that provides tools and education to low-income senior citizens to assist them with obtaining information regarding energy usage and effective means of managing energy costs;

(4) a non-residential special hardship program that provides grants to non-residential customers such as small businesses and non-profit organizations that demonstrate a hardship, including those providing services to senior citizen and low-income customers; and
 (5) a performance-based assistance program that provides grants to encourage residential customers to make on-time payments by matching a portion of the customer's payments or providing credits towards arrearages.

220 ILCS 5/16-108.5(b-10). However, unlike the situation with the Section 16-108.5(b) requisites, the Section 16-108.5(b-10) requisites “[S]hall not be a recoverable expense.” *Id.*, emphasis added. It is critical to be able to determine, quickly, given the statutorily-limited timeline imposed by Section 16-108.5, if there are any expenses that are included in an annual reconciliation that are associated with the Section 16-108.5(b-

10) programs. It is not uncommon to have to review a utility's expenditures or other items that were included in rates and find out that they are not legally included therein. (See, e.g., Docket 10-0467, final Order of May 24, 2011, at 18-25, rejecting a ComEd "recommendation" that the Commission reject Appellate precedent that was exactly on point regarding the same facts and the same utility). We additionally note that although it well-established that lobbying expenses are not recoverable from ratepayers, those expenses were initially included in rates here. Therefore, ComEd's argument that evidence establishing what it did to satisfy the Section 16-108.5(b-10) requirements should not be reviewed in a formula rate case under Section 16-108.5 does not aid it.

~~Additionally, there is no requisite in Section 16-108.5 that any report must be verified, which carries the penalty of perjury, or subject to cross-examination or to discovery, unless that report is so patently deficient that Commission Staff issues a report to the Commission requiring an investigation. Such a scenario does not provide for transparency and it does not ensure that consumers, who pay for the other items required by Section 16-108.5, will not be charged for the Section 16-108.5(b-10) programs. This scenario also does not ensure that any discrepancy regarding Section 16-108.5(b-10) charges being included in rates will not be rectified in a timely manner. Therefore, ComEd shall file specific evidence regarding its expenditures pursuant to Section 16-108.5(b-10) in every rate case filing it makes pursuant to Section 16-108.5(d).~~

~~The Commission further notes that Section 16-108.5 contains no language specifying what the format of this report will be. These programs can be vital to low-income persons, as well as other persons, (e.g., disabled veterans and senior citizens) many of whom are barely "getting by" in an economy that is still struggling to recover. The persons who these programs touch are the persons who need help the most. Without some structure, the reports regarding these programs could be meaningless, leaving the persons whom the General Assembly intended to aid without the effective use of these programs. Therefore, in future Section 16-108.5 filings, ComEd shall proffer evidence in its case-in-chief establishing what it did to meet (including, but not limited to its expenditures) the low-income and support programs that are required by Section 16-108.5(b-10), which ComEd is statutorily obligated to fund. In this manner, the Commission aids the General Assembly's intent that certain persons, who are defined by statute, get the aid that they need.~~

4. Format of Revenue Requirement Schedules and Related Documents.

Staff's Position

a. Changes to Formula Rate Template.

Staff notes that ComEd witness Martin Fruehe states in his surrebuttal testimony that ComEd inadvertently removed the ROE collar amount from the reconciliation

balance in its Docket 11-0721 compliance filing, resulting in no interest being applied to the amount that results from the application of the ROE collar. Staff explains that this error was also identified in ComEd's response to Staff DR BCJ-5.01. According to ComEd witness Mr. Fruehe, ComEd will file a motion apart from this proceeding to correct this error. ComEd Ex. 19.0 at 16. Staff does not oppose a correction that results in interest being applied to the ROE collar amount and agrees that it should be addressed apart from this proceeding. On October 17, 2012, ComEd filed a Motion to Make, Nunc Pro Tunc, a Ministerial Correction and a Change in the Form of Presentation of a Portion of Its Filed Rate Formula. Staff filed its response on October 26, 2012 and did not oppose ComEd's motion. Staff Initial Brief at 44-45.

- b.** Use of traditional schedules as an attachment to the Commission's final orders in the formula rate proceedings.

Recognizing that there will be a rulemaking to address a systematic approach governing the formula rate process, it is Staff's position that the Commission should attach the traditional revenue requirement schedules as modified by Staff (Appendices A and B) to the Commission's order in this formula rate proceeding. Staff argues that use of the traditional schedules provides transparency to the formula rate proceeding in that the traditional schedules show all the adjustments made by the parties, the ALJs or the Commission to the formula rate inputs proposed by the Company. Staff Ex. 6.0 at 7-8.

Staff states that while the Company had some issues with Staff's use of the traditional schedules as set forth in Company witness Fruehe's testimony (ComEd Ex. 13.0 at 32-34), the Company did not address the issue in its surrebuttal testimony. Staff is not clear whether the Company agrees with or opposes Staff's recommendation to use the traditional schedules as an attachment to the Commission's final order in the instant proceeding. Staff explains that the Company in its initial brief indicated that it does not oppose use of traditional revenue requirement schedules, but believes that the formula rate template should also be used in the Commission's final Order to ensure that the calculations are aligned. ComEd Initial Brief at 65. Staff states that although it is not clear to which parts of the formula rate template ComEd is referring, Staff does not oppose the Company's position. Staff Initial Brief at 45; Staff Reply Brief at 24-25.

ComEd's Position

ComEd states that the formula rate, in App 3, should be corrected as to descriptions of portions of the cash working capital calculation. ComEd Ex. 19.0 at 15-16. ComEd also notes that the presentation of the ROE Collar adjustment should be corrected in Schedule FR A-3 and WP 22 as discussed in Section VIII.C.1, *supra*. ComEd and Staff agree as to these corrections. ComEd also explains that Staff proposed, and ComEd did not oppose, the attachment of "traditional" revenue requirement schedules to this Order. ComEd mentions that no other party opposed this point. ComEd, as well, requested that the formula rate template should also be used in

the Commission's final Order to ensure that the calculations are aligned. ComEd Initial Brief at 58-59, 65; ComEd Reply Brief at 42.

AG/AARP's Position

The AG/AARP state that this docket applies the formula rate tariff approved by the Commission in Docket 11-0721 to both the inception and reconciliation revenue requirement. Staff witness Jones presented revenue requirement schedules in the form currently used by the Commission in all other rate case proceedings. See Staff Ex. 1.0, Schedules 1.1 – 1.10 and Staff Ex. 6.0, Schedules 6.1 -6.10. While the AG/AARP did not provide revenue requirement schedules, they agree that it is appropriate and necessary to provide ratemaking information in the form used by Staff because if the only information publicly available are the inputs to the formula, it will be impossible to identify what costs go into each input and how they have been changed or adjusted by the parties or the Commission or even from one year to the next. AG/AARP Initial Brief at 27-28.

The AG/AARP further mention that Section 16-108.5 recognizes the importance of having rate information available for public review. The statute provides:

(c) A participating utility may elect to recover its delivery services costs through a performance-based formula rate approved by the Commission, which shall specify the cost components that form the basis of the rate charged to customers with sufficient specificity to operate in a standardized manner and be updated annually with transparent information that reflects the utility's actual costs to be recovered during the applicable rate year, which is the period beginning with the first billing day of January and extending through the last billing day of the following December.

220 ILCS 5/16-108.5(c). The AG/AARP maintain that it is apparent that the exclusive use of the formula tariff spreadsheet format would require both discovery and a separately prepared identification of costs that make up a given cost. The AG/AARP assert that costs and their treatment for ratemaking purposes will not be transparent under this approach. AG/AARP Initial Brief at 28.

The AG/AARP present for example, that they discovered that a total of \$7.2 million of merger-related costs were recorded as a jurisdictional expense in 2011. AG/AARP Ex. 1.0 at 5. While the itemization of costs in the FERC Form 1 Accounts includes multiple categories, such as "Oper supervision & engineering" and "Station expenses," these categories do not indicate that the costs were related to the merger of Exelon with Constellation. See AG/AARP Ex. 1.4 at 2. The AG/AARP continue that while ComEd witness Mr. Fruehe offered amended schedules to show that adjustments could be incorporated into the model, Staff witness Mr. Jones pointed out that the formula rate schedules do not show adjustments, necessitating the preparation of a separate document showing the changes with the specific inputs involved. Staff Ex. 6.0 at 5-6, referring to ComEd Ex.13.0 at 32; AG/AARP Initial Brief at 28-29.

The AG/AARP support the Staff use of standard rate making schedules in addition to the formula rate schedules so that the statutory goal of transparency is not frustrated. AG/AARP Initial Brief at 29.

Commission Analysis and Conclusion

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. This issue is uncontested and should be approved.

The Commission also agrees with Staff, ComEd and the AG/AARP's suggestion that both "traditional" revenue requirement schedules and formula rate schedules should be included in the appendix to the Commission's final Order. As the parties have mentioned, use of the traditional schedules provides transparency to the formula rate proceeding in that the traditional schedules show all the adjustments made by the parties, the ALJs and the Commission and the formula rate template should also be used in the Commission's final Order to ensure that the calculations are aligned.

IX. CONCLUSION

For the reasons stated herein, the Commission approves Commonwealth Edison Company's first annual formula rate update and revenue requirement reconciliation, to be applicable to delivery services provided by ComEd beginning on the first day of its January 2013 billing period, subject to ComEd's final compliance filing and the rulings in this Order.

X. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, distribution, and sale of electricity to the public in Illinois and is a "public utility" as defined in Section 3-105 of the Public Utilities Act;
- (2) the Commission has subject-matter jurisdiction and jurisdiction over the parties;
- (3) the recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact and conclusions of law; the Appendix attached hereto provides supporting calculations;
- (4) for purposes of this proceeding, as adjusted, Commonwealth Edison Company's rate base is \$6,079,780,000 for the 2011 reconciliation year and \$6,367,044,000 for the 2012 filing year;
- (5) the rate of return which Commonwealth Edison Company should be allowed to earn on its net original cost rate base is 7.58% for the 2011 reconciliation year, this rate of return incorporating a return on common equity of 9.81%, on long-term debt of 5.78%, and on short term debt of 0.71%; and the rate of return which Commonwealth Edison Company

should be allowed to earn on its net original cost rate base is 7.54% for the 2013 rate year, this rate of return incorporating a return on common equity of 9.71%, on long-term debt of 5.78%, and on short term debt of 0.71%;

Technical Exception No. 5: The figures in Finding (6) should be revised to reflect the impact of ComEd's Exceptions

- (6) the rates of return set forth in Finding (5) result in tariffed operating revenues of \$2,023,011,000 and net annual operating income of \$480,075,000 (both figures reflecting the reconciliation and ROE Collar adjustments);
- (7) the Commission, based on Commonwealth Edison Company's proposed original cost of plant in service as of December 31, 2011, before adjustments, of \$15,036,912,000, and reflecting the Commission's determination adjusting that figure, approves \$14,996,019,000 as the composite original cost of jurisdictional distribution services plant in service as of December 31, 2011;

Technical Exception No. 6: The figures in Finding (8) should be revised to reflect the impact of ComEd's Exceptions

- (8) Commonwealth Edison Company is authorized to place into effect tariff sheets and associated informational sheets designed to produce annual tariffed revenues of \$2,023,011,000, which represent an increase of \$72,347,000 or 3.7%; such revenues in addition to other revenues will provide ComEd with an opportunity to earn the rates of return set forth in Finding (5);
- (9) the determinations regarding other subjects contained in the prefatory portion of this Order are reasonable for purposes of this proceeding; the compliance filing to be filed by Commonwealth Edison Company shall incorporate such determinations;
- (10) new charges authorized by this Order shall become effective beginning with the first day of the January 2013 monthly billing period, consistent with the requirements set forth in Section 16-108.5 of the Act; Commonwealth Edison Company shall be allowed two business days after the issuance of this Order to submit its compliance filing for informational purposes; the new tariff sheets and associated informational sheets authorized to be filed by this Order shall take effect the next business day after the date of filing, with updated charges listed on said tariff sheets, and associated informational sheets to be effective with the first day of the January 2013 monthly billing period; Commonwealth Edison Company shall provide supporting work papers to the Staff of the Commission concurrently with such informational compliance filing;

Technical Exception No. 7

- (11) the Commission, based on the record in this proceeding, finds that the approved revenue requirement includes ~~\$237,046,269,474 million~~thousand of projected 2012 plant additions to be incurred by the utility in compliance with, or in meeting, the infrastructure investment requirements of Section 16-108.5(b) of the Act. These are projected costs and will be reconciled to actual costs in the Company's next formula rate filing. The detail of these projected plant additions in the categories as required by Section 16-108.5(b)(1) are as follows (in ~~Millions~~Thousands):

Distribution infrastructure improvements	\$ 128,888
Training facility construction or upgrade projects	2,551
Wood pole inspection, treatment, and replacement	11,110
Reducing the susceptibility of storm-related damage	<u>23,447</u>
Total electric system upgrades, modernization projects, and training facilities	\$ 165,996
Additional smart meters	\$ <u>19,818</u> 52,246
Distribution automation and associated cyber secure data communication network	50,957
Substation micro-processor relay upgrades	<u>275</u>
Total upgrade and modernization of transmission and distribution infrastructure and Smart Grid electric system upgrades	\$ <u>71,050</u>103,478
Total projected incremental 2012 plant additions in compliance with Section 16-108.5(b)(1) of the Act	<u>\$237,046</u>269,474

Technical Exception No. 8

- ~~(12) based on the record in this proceeding, the Commission finds that Commonwealth Edison Company incurred in 2011 \$0 in compliance with or in meeting the requirements for contributions to energy low-income and support programs of Section 16-108.5(b-10) of the Act.~~

IT IS THEREFORE ORDERED that the updated charges in ComEd's initial filing shall not go into effect.

Technical Exception No. 9

IT IS FURTHER ORDERED that Commonwealth Edison Company is authorized to file a compliance filing in accordance with Findings (8), (9), and (10) and the prefatory part of this Order, ~~applicable to service furnished on and after the effective date of said compliance filing with updated charges to be effective with the first day of the January 2013 monthly billing period;~~ work papers supporting the compliance filing shall be

provided to the Staff of the Commission concurrently with the filing of said compliance filing.

Technical Exception No. 10

IT IS FURTHER ORDERED that the approved revenue requirement set forth in Finding (11) above includes \$269,474 ~~million~~thousand of projected 2012 plant additions to be incurred by the utility in compliance with or in meeting the infrastructure investment requirements of Subsection 16-108.5(b) of the Act.

IT IS FURTHER ORDERED that, based on the record in this proceeding, the Commission finds that Commonwealth Edison Company incurred in 2011 \$0 in compliance with or in meeting the requirements for contributions to energy low-income and support programs of Section 16-108.5(b-10) of the Act.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

Dated:	November 15, 2012
Briefs on Exception due:	November 29, 2012
Reply Briefs on Exception due:	December 3, 2012.

Claudia E. Sainsot,
D. Ethan Kimbrel and
Heather Jorgenson
Administrative Law Judges
Illinois Commerce Commission