

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

**REPLY BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY**

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Commonwealth Edison Company (“ComEd”), by its counsel, under Section 10-111 of the Public Utilities Act (the “Act”), 220 ILCS 5/10-111, 83 Ill. Admin. Code § 200.830, and the order of the Administrative Law Judges (“ALJs”), submits this Reply Brief on Exceptions relating to Exceptions of Staff and intervenors to the ALJs’ November 15, 2012, Proposed Order (“Proposed Order” or “PO”).

Introduction

This Reply Brief responds to continued attempts to circumvent recovery of reasonable and prudent costs. In each case, the proposed disallowance was properly rejected by the Proposed Order and/or represents last minute advocacy of a new or changed position.

They include efforts to:

- Impute a “tax liability” with respect to accrued vacation pay, when no such liability exists;
- Deny that the Exelon-Constellation merger will reduce costs and save customers tens of millions of dollars, when the only plausible evidence shows that substantial and enduring savings will be realized;
- Have the Illinois Commerce Commission mandate, without any supporting evidence or record of any kind, that ComEd’s charitable contributions be

accompanied by a potentially untrue and previously unmentioned “disclosure” whose legality and implications were never discussed in this docket, all based on a Proposed Order in an Ameren docket where the issue apparently was also not the subject of testimony or briefing;

- Support (by AG/AARP) the Proposed Order’s *sua sponte* disallowance of rate case expenses, the recovery of which AG/AARP never opposed in testimony or any prior brief; and
- Give new life to Staff’s proposed but rejected disallowance of \$386,000 of charitable contributions, based on the new and baseless theory that the evidence must show how the charities *used* the contributions.

Each of these positions is inconsistent with the record (other than the “charitable disclosure” issue, as to which no record exists) and law, and the Proposed Order’s well-reasoned decision on the first three subjects and the fifth subject should be adopted.

II.A, II.B, and II.C [Revenue Requirement]

Staff proposes language changes to Sections II.A., II.B, and II.C. Staff Brief on Exceptions (“BOE”) BOE at 2-3. ComEd supports Staff’s proposed deletion of the final sentence of Section II.C. *See* ComEd BOE at 23. ComEd notes that Staff’s proposed language includes the Proposed Order’s figures for: (1) the 2013 inception revenue requirement (2011 costs plus 2012 projected plant additions and the associated depreciation reserve and expense and Accumulated Deferred Income Taxes (“ADIT”)), (2) the reconciliation adjustment, and (3) the total revenue requirement. ComEd differs from the Proposed Order’s figures for those three items based on ComEd’s revenue requirement related Exceptions. *See* ComEd BOE at 6-20. ComEd infers that Staff may intend the Proposed Order figures as placeholders for the

amounts determined by the final Order. ComEd does not oppose inclusion of the final Order figures, subject to its positions. ComEd neither supports nor opposes Staff's other language proposals for these Sections.

III.A [Rate Base -] Overview

Staff proposes language changes to Section III.A. ComEd does not support or oppose Staff's proposals, except ComEd has proposed a different revision to part of the first sentence of Section III.A, and ComEd's proposal should be adopted. ComEd BOE at 31-32.

III.C.1 Cash Working Capital

Staff proposes language changes in the "Staff Position" and the first two paragraphs of the "Analysis and Conclusions" sections of Section III.C.1. Staff BOE at 5-6. ComEd also proposed revisions to those sections. ComEd BOE at 23-24. Both sets of changes are valid. ComEd suggests that the Commission adopt ComEd's changes plus the Staff changes that are consistent therewith.¹

III.C.2 Accumulated Deferred Income Taxes

This issue presents the Commission with a clear choice – use the amounts reflected in ComEd's Federal Energy Regulatory Commission ("FERC") Form 1 or adopt a fictional calculation that artificially reduces ComEd's rate base by \$8.54 million. The Proposed Order properly rejected this artificial rate base reduction, as recommended by both Staff and ComEd. In so doing, the Proposed Order affirmed the undisputed facts that support this conclusion.

The basis for this decision is clear and correct. The Energy Infrastructure Modernization Act ("EIMA") directs that the amounts of recoverable costs reported in FERC Form 1 (other than

¹ Staff did not address the last five paragraphs of the "Analysis and Conclusions" sections of Section III.C.1, which ComEd has shown should be deleted as moot or, alternatively, corrected. ComEd BOE at 24-29.

the projected plant additions and the related items) are to be the basis of the formula rate and of the reconciliation. 220 ILCS 5/16-108.5(c)(6) and (d)(1). The facts show the following:

- As of December 31, 2011, there was a deferred income tax asset of \$18,116,000 (which increases rate base) associated with the accrued vacation operating liability and reflected in Account 190.²
- ComEd included the jurisdictional amount of \$18,952,000³ in its rate base calculation, which fully reflects deferred tax impacts associated with the accrual of vacation pay liability.⁴
- Separately, ComEd recorded in Account 186 a vacation pay deferred debit related to the vacation pay that it estimates will ultimately be capitalized.
- The deferred debit amount, which the Proposed Order refers to as the amount “in question”, is not included as a reduction to expense for either income tax or book purposes, and therefore results in no deferred tax booked for the vacation pay deferred debit. These costs, as of December 31, 2011, had not yet been distributed to capital projects and thus could not be deducted for income tax purposes.

See generally ComEd Init. Br. at 19-20; PO at 15. As a result, the Proposed Order correctly concluded that, “based on the evidence presented, it appears that there is no timing differential here.” PO at 15.

The Brief on Exceptions of AG/AARP mischaracterizes this conclusion and argues that the Proposed Order is wrong because “ComEd specifically identified an ‘ADIT on Reserve for

² ComEd Initial Brief (“Init. Br.”) at 19; Fruehe Rebuttal (“Reb.”), ComEd Exhibit (“Ex.”) 13.0, 7:123-127; ComEd Ex. 10.3, WP 4, line 5, col. (D).

³ Calculated in accordance with the May 29, 2012, final Order in ComEd’s first formula rate case (“*May 11-0721 Order*”). This calculation results in an amount that is slightly higher than that reflected in Account 190.

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

Vacation Pay’ of \$18,952,000...”, which they claim means there must be a timing difference. AG/AARP BOE at 2; *see also* ComEd Ex. 10.3, WP5, page 6 of 7, line 18. However, the Proposed Order’s conclusion as to the absence of a timing difference relates to the amount “in question” – correctly referring to the vacation pay deferred debit reflected in Account 186 – not the undisputed ADIT on Reserve for Vacation Pay reflected in Account 190. PO at 15 (“ComEd did not record any ADIT associated with the accrued vacation pay *in question*.” (Emphasis added).) The Proposed Order correctly concluded that there was no timing differential as to *the amount in question* (*i.e.*, the vacation pay deferred debit) because it was not included as a reduction to expense for either income tax or book purposes, and therefore does not result in the booking of any deferred tax. *Id.*

Although the deferred debit amount could not be deducted for income tax purposes, AG/AARP and CUB also resurrect their prior argument that generates an artificial deduction by inappropriately netting, for ADIT purposes, the deferred debit and operating reserves liability related to accrued vacation pay against each other prior to inclusion in rate base. In other words, although the evidence conclusively shows that deferred debit amount is not included as a reduction to expense and results in no deferred tax booked, AG/AARP and CUB would through inappropriate netting *essentially impute a deferred tax liability (which reduces rate base) related to the accrued vacation pay debit where none exists*. ComEd Init. Br. at 19-21; ComEd Rep. Br. at 9-10. Indeed, CUB admits in its Brief on Exceptions that it is attempting “to estimate” the ADIT where none exists in the FERC Form 1, while citing to absolutely no authority to support this fictional adjustment. CUB BOE at 5.

The question of this fictional ADIT is not only one of evidence. Creating such fictional deductions violates EIMA’s unambiguous requirement that “[t]he inputs to the performance-

based formula rate for the applicable rate year shall be based on final historical data reflected in the utility's most recently filed annual FERC Form 1.... The filing shall also include a reconciliation ... with the actual revenue requirement for the prior rate year (as reflected in the applicable FERC Form 1 that reports the actual costs for the prior rate year)." 220 ILCS 5/16-108.5(d)(1).⁵ See also 220 ILCS 5/16-108.5(c)(6). Consistent with EIMA, ComEd calculated the ADIT in rate base beginning with an itemization of all deferred taxes ComEd has recognized and reported in its FERC Form 1. ComEd Init. Br. at 20; Fruehe Surrebuttal ("Sur."), ComEd Ex. 19.0, 7:131-136. Efforts to conjure up a non-existent deferred income tax benefit related to the vacation pay deferred debit, in contrast, violate EIMA.

Finally, although AG/AARP continue to claim that their calculation is consistent with *May 11-0721 Order* and related Staff Schedule 16.07R in that Docket in particular, the Proposed Order (at 15) appropriately reaches the same conclusion as Staff, who offered the Schedule. Staff found that the issue in this docket is not the same as that in the *May 11-0721 Order*. Staff Init. Br. at 10. Indeed, the issue cannot possibly be the same because the accrued vacation pay deferred debit that AG/AARP and CUB use to reduce the accrued vacation pay liability was never part of Staff's calculation on Schedule 16.07R. Fruehe Sur., ComEd Ex. 19.0, 5:92-103. Regardless, however, in this docket, the law and facts are clear and the Commission cannot ignore them.

In sum, AG/AARP and CUB present no basis upon which to disturb the Proposed Order's conclusion that their proposed reduction to rate base is without support. Staff Init. Br.

⁵ Indeed, in its recently issued October 3, 2012, Order on Rehearing in ICC Docket No. 11-0721 ("*Order on Rehearing*"), at 23, the Commission recognized that Section 16-108.5's entire ratemaking paradigm is based off the utility's FERC Form 1 filing data: "while such heavy reliance on a filing made in a separate forum was not traditional practice for the Commission in its Article IX rate cases, this seems to be exactly what the General Assembly has envisioned as the Commission's role under Section 16-108.5."

at 9-11. Accordingly, the Commission should reject AG/AARP's and CUB's Exceptions and adopt the Proposed Order's conclusion.

**V.C.1.a Charitable Contributions (and AG/AARP's
New Issue of Charitable Reporting)**

The Commission should reject the exceptions proposed by Staff and AG/AARP on the subject of charitable contributions. Shifting positions, Staff now contends that the Proposed Order has determined the recoverability of donations based on insufficient evidence and, once again, seeks to disallow contributions made to the Metropolitan Mayors' Caucus and the American Legion. And, AG/AARP offers a previously unheard of, and completely unsupported, proposal that ComEd be required to state, along with each contribution it makes, that the contribution is funded by rates. Staff's and AG/AARP's exceptions should be rejected.

Donations to Non-Charitable Organizations. Staff has seemingly abandoned its previous arguments that "public welfare" only means aid to the economically disadvantaged and for categorical disallowance of contributions to organizations not classified by the Internal Revenue Service as Section 501(c)(3) organizations. Now, Staff contends that the Proposed Order must disallow \$376,000 in contributions made to several organizations solely on the grounds that ComEd failed to show that the organizations used those specific contributions for charitable purposes. Staff BOE at 9-10. The Proposed Order provides an extensive and sound analysis as to why these contributions are recoverable under Section 9-227 of the Act, 220 ILCS 5/9-227, which Staff's new argument does not address. PO at 44-45. As the Proposed Order notes, proposed rules that are not yet available to guide the analysis and expressly states that its conclusions are therefore "based *on the record* and past precedent." PO at 43 (emphasis added).

Staff's argument that the only evidence that ComEd has provided with regard to these contributions is a classification of each donation is inaccurate. ComEd has provided the name of

each organization to which it has made a contribution for which it seeks recovery along with descriptions of each of these donations in its testimony. Fruehe Reb., ComEd Ex. 13.0, 13:262-19:389; Fruehe Sur., ComEd Ex. 19.0, 8:169-11:216; ComEd Ex. 3.2, WP 7, p. 20, subpages 1-8; ComEd Ex. 13.05. The record clearly supports the organizations' purposes and the recovery of these contributions.

Donation to Metropolitan Mayors' Caucus and the American Legion. Staff continues to recommend a disallowance of \$10,000 to the Metropolitan Mayors' Caucus because ComEd cannot trace its contribution to its actual expenditure by the organization to determine specifically how it was spent. Staff also seeks to disallow a contribution to the American Legion on the same basis. Staff BOE at 6-8. Requiring ComEd to go beyond even that and oversee precisely how an organization spends its contribution, and then prove in a Commission proceeding that ComEd's dollars can be "traced" to a specific charitable application, is unrealistic and not what Section 9-227 requires.⁶ The record supports recovery of these contributions. The Proposed Order found this to be the case, and also concluded that no evidence in the record suggested otherwise. PO at 44.

Finally, Staff disagrees with the Proposed Order's reasoning that because a donation to the American Legion was allowed in the past, it is again recoverable. Staff BOE at 8. Had the Proposed Order relied solely on that criteria to justify recoverability, Staff may have a point that past approval standing alone is not dispositive. However, it is clear that the Proposed Order also applies the appropriate criteria to this record and this contribution, and properly found it to be recoverable under Section 9-227 of the Act.

⁶ ComEd made the donation to the Metropolitan Mayors' Caucus because the organization is involved in community and neighborhood development and economic development. ComEd Ex. 3.2, WP 7, p. 20, subpage 5, line 137. 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 Ex. 13.05, p. 2, line 18.

The New Disclosure of Recoverability Requirement. AG/AARP takes no position as to which of ComEd's charitable contributions should be recovered in rates. AG/AARP BOE at 10. Yet, citing solely to a Proposed Order in ICC Docket No. 12-0293, a pending Ameren Docket in which ComEd is not a party, they argue that the Proposed Order in this case be modified to require ComEd⁷ to accompany each contribution with a statement that the cost of the contribution is recoverable from customers as permitted by Section 9-227 of the Act. The imposition of this requirement is procedurally unsound, unsupported by the record, and unworkable in practice.

The Commission should reject AG/AARP's proposal for several reasons. First, no party in this proceeding – or in the Ameren docket, for that matter – made or supported such a proposal in testimony or briefing. The record is totally void of any such suggestion, let alone any supporting evidence. In a rate investigation, the utility is entitled to notice of the proposed governmental action and a meaningful opportunity to be heard. *Peacock v. Bd. of Trustees of Police Pension Fund*, 395 Ill. App. 3d 644, 654, 918 N.E. 2d 243, 251 (1st Dist. 2009); *Quantum Pipeline Co. v. Illinois Commerce Comm'n*, 304 Ill. App. 3d 310, 709 N.E.2d 950 (3d Dist. 1999) (Illinois Commerce Commission denied procedural due process by not giving notice and opportunity to be heard in rescission of certificate). As importantly, the Commission's findings in this case must be supported by the record. The Commission's decision must be based exclusively on matters in the evidentiary record and the applicable law. 220 ILCS 5/10-103; 220 ILCS 5/10-201(e)(IV)(A); *Bus. and Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 227, 555 N.E.2d 693, 709 (1989) (“*BPF*”). Presenting nothing but argument after the record is closed provides neither adequate notice nor the required evidence.

⁷ AG/AARP *too* closely mirrors the language in the Proposed Order in ICC Docket No. 12-0293 because, if its proposed language is adopted, the Order in this docket would require *Ameren* – not ComEd – to make such a disclosure. AG/AARP BOE at 12.

Second, the Commission should not consider such a requirement unless and until all the implications of doing so have been explored at hearing and in briefs. For example, key premises of AG/AARP's argument – that customers do not understand the source of utility contributions or that they want to be specifically informed of their source – are the subject of no examination or proof. Nor has AG/AARP's argument that customers have “no say in how those dollars are spent” been lined up against other expressly recoverable costs. AG/AARP BOE at 11. Statements made in a BOE without any evidentiary support from the record cannot be relied upon to form the basis for a new requirement such as this.

Third, AG/AARP proposes this significant disclosure requirement but provides no explanation as to how – or more importantly, whether – such a requirement would achieve the desired result. For example, if ComEd were to provide the suggested disclosure with a contribution, does that assure it that the expense will be recoverable? Many factors following the contribution impact whether a donation will be recovered including whether the utility chooses to seek recovery or how disputes such as the ones in this docket are resolved. In short, ComEd cannot know whether a contribution will be recoverable at the time that it, or the disclosure, is made – that is for the Commission to decide well after the fact.

Finally, the Commission has initiated a rulemaking, ICC Docket No. 12-0457, relating to Section 9-227 of the Act. A rulemaking is the appropriate forum for consideration of this sort of proposal and, if the Commission deems it a worthy requirement, it can be adopted in such a proceeding and govern all utilities in Illinois, not just ComEd, if its adoption can be lawfully supported.⁸

⁸ “The Commission only has those powers given it by the legislature through the Act.” *BPI*, 136 Ill. 2d at 201, 555 N.E.2d at 697. No requirement to be imposed on public utilities can be read into the Act by intendment or implication. *Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 251, 630 N.E.2d 1318, 1330 (2d Dist.), *appeal denied*, 157 Ill. 2d 524, 642 N.E.2d 1305 (1994).

ComEd incorporates the arguments it has already provided in its Initial and Reply Briefs that support the Proposed Order's conclusions. *See* ComEd Init. Br. at 36-40, ComEd Reply Br. at 18-23. For the reasons discussed above and those set forth and referenced in ComEd's Initial and Reply Briefs, the Commission should reject Staff's and AG/AARP's exceptions and adopt the Analysis and Conclusion section of the Proposed Order as modified by ComEd's Exception No. 2. ComEd BOE at 6-9.

V.C.1.c Rate Case Expenses – Docket No. 11-0721

AG/AARP support the Proposed Order's recommendation to disallow most of the one-third (first year) amortization of the rate cases expenses of ComEd's first formula rate case, ICC Docket No. 11-0721, that were incurred in 2011 and included in ComEd's proposed revenue requirement. AG/AARP BOE at 12-15. AG/AARP's position is opportunistic, misleading, and incorrect.

AG/AARP's addressing this subject for the first time in its Brief on Exceptions is opportunistic. AG/AARP never challenged the 2011 rate case expenses in their direct testimony, rebuttal testimony, Initial Brief, or Reply Brief. AG/AARP chose not to do so even though the AG, unlike ComEd, was a party to *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) ("*Madigan*"), *appeal denied* (Ill. S. Ct. Sept. 26, 2012), on which the Proposed Order in large part relies. If AG/AARP had submitted testimony claiming that ComEd had not met its burden, ComEd could and would have submitted additional evidence in response, as is obvious from the material ComEd produced in discovery that was referenced by Staff witness Mr. Tolsdorf, and discussed further below. *See, e.g.*, ComEd BOE at 16.

In any event, AG/AARP's arguments are misleading and wrong, for numerous reasons. First, ComEd has shown that the Proposed Order's recommendation, which involves whether to exclude \$448,000 of the \$515,000 one-third (first year of three years) amortization of the \$1,544,161 of the 2011 rate case expenses incurred in 2011, should not be adopted. ComEd BOE at 12-19.

Second, AG/AARP misstate the record, incorrectly claiming that "the evidence supporting this expense was a one-page spreadsheet (ComEd Ex. 3.9) and a sentence that Staff had no adjustments other than to exclude meals delivered to ComEd's attorneys. Proposed Order at 49." AG/AARP BOE at 12. AG/AARP simply ignore ComEd's direct narrative testimony, as well as ComEd's rebuttal testimony, Staff's direct testimony, and, most importantly, Staff's rebuttal testimony. *See* Fruehe Dir., ComEd Ex. 3.0 REV, 6:131-134, 38:794 – 40:836; *see also* Tolsdorf Dir., Staff Ex. 3.0, 9:198 - 11: 257; Fruehe Reb., ComEd Ex 13.0, 12:233 – 13:260; Tolsdorf Reb., Staff Ex. 8.0, 11:281 – 14:357.⁹

Third, AG/AARP also incorrectly claim: "ComEd did not describe, for example, who performed services or what was done by PDRC for \$266,880, by SFIO for a total of \$126,138, or by "external legal" for \$1.2 million. ComEd Ex. 3.9." AG/AARP at 12. AG/AARP again ignore the narrative portion of ComEd's direct testimony as to external legal support. Moreover, AG/AARP's suggestion of ignorance about the role of ComEd's outside counsel in the 2011 rate case is unconvincing, given that AG/AARP were parties to that case. PDR&C performed capital project review (ComEd Ex. 3.9), just as they did in ComEd's 2010 rate case, ICC Docket No. 10-0467 (Order May 24, 2011) at 10, in which the AG and AARP also were parties. Also, as indicated in ComEd Ex. 3.9, \$91,438 of the SFIO amount is for ComEd's independent expert witness on

⁹ Some of this testimony involves Mr. Tolsdorf's initial misimpression, later corrected, that there was some double counting of the costs in question, and some involves \$1,100 for costs of meals incurred under circumstances described in Mr. Tolsdorf's rebuttal testimony.

ComEd's cash working capital requirement and his CWC study in the 2011 rate case. Moreover, this type of data, at least absent any challenge, need not itself all be offered in evidence. For the reasons referenced above and below and an additional reason. Here, witnesses reviewed that data and opined on it. The Illinois Rules of Evidence make clear that there is no deficiency in offering and relying on expert testimony. They ignore the controlling rule of evidence that data of "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" need not themselves be admitted or even be "admissible in evidence." Ill. R. Evid. 703.

Fourth, AG/AARP cite EIMA (220 ILCS 5/16-108.5(d)) on adopting evidentiary standards in Article IX cases and invoke the burden on proof under Section 9-201 of the Act, 220 ILCS 5/9-201 (AG/AARP BOE at 12-13 and fn. 2), but they fail to address the governing principles, under case law and EIMA, which go against their theory. Under existing case law, 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 preemptively disprove arguments that other parties may raise. *City of Chicago v. Illinois Commerce Comm'n*, 133 Ill. App. 3d at 442, 478 N.E.2d at 1375.

The People's argument is based entirely on the erroneous assumption that a utility has the burden of going forward on any and all issues which are conceivably relevant to the reasonableness of its proposed rates. This premise is directly contrary to the overwhelming weight of authority and would place an impossible burden on the utility of anticipating the basis of every intervenor's objection and of coming forward with evidence during its case in chief with respect to each objection.

City of Chicago v. Illinois Commerce Comm'n, 133 Ill. App. 3d at 442, 478 N.E.2d at 1375.

That principle was modified and made even stronger by EIMA. Specifically with respect of annual update proceedings such as this, 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). Here, no party objected to the 2011 rate case expenses supported in ComEd’s direct testimony, except for some specific concerns raised by Staff that ComEd addressed, and as to which Staff later did not propose any disallowance, instead supporting recovery. Under EIMA, ComEd had no need to provide additional testimony and documents in rebuttal.

AG/AARP also point to 220 ILCS 5/16-108(d)(3), but that provisions involves compliance with 83 Ill. Admin. Code Parts 285, 286, and 287. AG/AARP acknowledge that the 2011 rate case expenses are recoverable under 220 ILCS 5/16-108.5(c)(4)(E), and that the recoverability is undisputed. AG/AARP BOE at 13 and fn. 3.

AG/AARP return to their untimely invocation of *Madigan* (AG/AARP BOE at 13-14), but as noted earlier, ComEd’s Brief on Exceptions (at 12-19), which discusses *Madigan*, has shown that the Proposed Order’s recommendation should not be adopted.

Fifth, on top of those substantive defects, AG/AARP misstate the amount at issue. They refer to it as “close to \$2 million” and “\$1.98 million”. AG/AARP BOE at 12. The Proposed Order’s recommendation involves the amounts noted above. *See also, e.g.,* Tolsdorf Reb., Staff Ex. 8.0, 14:345-357; Proposed Order at 47 and Appendix A at 1, col. (c), and 2, col. (e).

Finally, AG/AARP’s proposed language is inappropriate. The language discusses evidentiary standards and the burden of proof, but it is incomplete and misleading for the reasons indicated above, and therefore should not be adopted.

V.C.1.d Merger Expense

“Merger expense” – merger-related costs incurred to achieve savings – was perhaps the most litigated issue in this docket, and the Proposed Order’s conclusion is the product of a fully-developed record. The Proposed Order correctly allows ComEd to recover approximately \$7.2 million of costs related to the merger of Exelon and Constellation that were incurred in 2011 to achieve post-merger savings that will be passed through to ComEd’s customers “in 2012 and for the indefinite future.” PO at 70. Staff takes no issue with cost recovery in its Brief on Exceptions or the Proposed Order’s conclusion that the costs relating to the merger were prudently incurred and reasonable in amount. PO at 70. Only AG/AARP and CUB recycle arguments unsupported by the record that have already been considered and rejected.

The Amount and Timing of the Savings. While at the same time arguing that savings are unknown and speculative, CUB contends that the projected savings resulting from the merger “narrowly surpass[] the costs that ComEd expects its customers to bear.” CUB BOE at 7. This statement is not supported by the record, and in fact the \$7.2 million at issue here represents a small fraction of the net savings that will be passed through to ComEd’s customers – which are estimated to be \$156 million through 2015 and an additional \$66 million in 2015 and each year thereafter. ComEd Init. Br. at 42; Jirovec Reb., ComEd Ex. 15.0, 5:97-103, PO at 70. Despite clear evidence of this great differential, CUB proceeds to complain that ComEd has also not made a firm commitment to any “specific level of savings to be passed through to ratepayers.” CUB BOE at 8. Yet, under ComEd’s formula rate, the cost savings achieved as a result of the merger will flow through automatically to ComEd’s customers via annual updates, and while CUB contends 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 and the PO’s conclusion that net savings will occur in some amount, and that amount is likely to far exceed the

costs to achieve that ComEd is seeking to recover. PO at 70. In the end, although savings at a particular level cannot be guaranteed, neither CUB nor AG/AARP has presented any evidence that tends to undermine ComEd's evidence of likely savings estimates for some operational, structural or quantification reason (ComEd Init. Br. at 50; Jirovec Sur., ComEd Ex. 20.0, 8:163-167), and none of their witnesses has provided any evidence or analysis to lead the Commission to doubt that substantial net benefits are reasonably likely to occur.

Both CUB and AG/AARP also re-argue that the costs should be disallowed because they were incurred in 2011, prior to the consummation of the merger, and that none of the projected merger savings were realized in 2011. CUB BOE at 7-8; AG/AARP BOE at 7. Indeed, CUB and AG/AARP make nothing more than an argument as to timing here (one that the Proposed Order considered and rejected), yet neither party proposes any alternative as to when these recoverable costs should be recouped by ComEd. Rather than narrowly looking at 2011, the Proposed Order considers the record evidence and concludes that cost savings will be passed on to ComEd customers "in 2012 and for the indefinite future." PO at 70.

Inapplicability of Section 7-204(c). CUB continues to argue that the analysis of a merger occurring under Section 7-204(c) of the Act, 220 ILCS 5/7-204(c), should apply to the Exelon/Constellation merger. CUB BOE at 8. Yet, CUB concedes that the statutory language of Section 7-204(c) makes clear that it does not apply here. *Id.* And, even if the analysis under Section 7-204(c) were applied, it does not require the result that CUB supports. Section 7-204(c) merely provides that where the Commission is asked to approve a reorganization it must determine, among other things, "whether the companies should be allowed to recover any costs incurred in accomplishing the proposed reorganization and, if so, the amount of the costs eligible for recovery...." 220 ILCS 5/7-204. In this case, the merger costs at issue are clearly "eligible

for recovery,” as they are not transaction costs incurred to accomplish the merger; rather, they are only those costs that “were *necessary* to realize future savings.” Trpik Reb., ComEd Ex. 14.0, 6:108-7:153 (emphasis added). The Proposed Order correctly rejects the relevance of this inapplicable statutory provision and analysis.¹⁰

Proceedings in Other Jurisdictions Relating to Other Customers. AG/AARP once again argue that the FERC Order approving the Exelon/Constellation merger in FERC Docket No. EC11-83-000/001 supports disallowance. AG/AARP BOE at 8. In that FERC proceeding, Exelon and Constellation took the position that they would not “seek to include transaction-related costs in their transmission revenue requirements, except to the extent they can demonstrate that the transaction-related savings are equal to or in excess of all of the transaction-related costs so included.” FERC Docket No. EC11-83-000/001 (Order Conditionally Authorizing Merger and Disposition of Jurisdictional Facilities, March 9, 2012) at 39. In its order authorizing the merger, FERC accepted the applicants’ offer not to charge transmission customers for transaction-related costs. However, neither CUB nor AG/AARP acknowledges that FERC’s acceptance of this offer related entirely to transmission customers in a different jurisdiction. The Proposed Order correctly concludes that nothing in that proceeding suggests or supports the position that this provision would in any way apply to or precludes recovery of distribution costs from retail customers. PO at 70. As ComEd has consistently pointed out, costs to achieve operational savings, like those at issue here, are undeniably recoverable under Illinois law and practice.

Rather than repeating still further arguments made in its Initial and Reply Briefs that support the Proposed Order’s conclusion, ComEd incorporates them herein by reference. *See*

¹⁰ AG/AARP speculates that ComEd did not present the Exelon/Constellation merger to this Commission because it believed that the change at the parent level would not result in a change in ownership of the utility (implicating Section 7-204(a)). Of course, this is entirely guesswork and totally unsupported by the record in this proceeding.

ComEd Init. Br. at 42-51, ComEd Rep. Br. at 26-31. For the reasons discussed above and those set forth and referenced in ComEd’s Initial and Reply Briefs, the Commission should adopt the Analysis and Conclusion section of the Proposed Order which agrees with ComEd and Staff and allows recovery of the merger costs at issue. PO at 70.

VIII.C.1 Presentation of ROE Collar Adjustment

Staff proposes minor appropriate edits to Section VIII.C.1. Staff BOE at 12-13. ComEd notes that it also proposed a technical Exception to Section VIII.C.1. The Staff and ComEd proposals are compatible.

VIII.C.4.b Use of traditional schedules as an attachment to the Commission’s final orders in the formula rate proceedings

Staff proposes clarifying language for Section VIII.C.4.b. Staff BOE at 15. ComEd supports Staff’s proposal.

Finding (6)

Staff proposes technical corrections to Finding (6). Staff BOE at 15-16. ComEd supports Staff’s proposal, but notes that Staff inadvertently did not underline the addition of “(which reflects ”.

Erratum to ComEd’s Brief on Exceptions

In ComEd’s Brief on Exceptions, its Technical Exception No. 7 corrected Finding (11) to change “\$269,474 million” to “\$237,406 thousand”. ComEd BOE at 30 and separate Exceptions to the Proposed Order at 109.

ComEd’s Technical Exception No.10 was intended to and should have made both of those same corrections to the second “IT IS FURTHER ORDERED” paragraph, but while

ComEd changed “millions” to “thousands” it inadvertently failed to change “\$269,474” to “\$237,406”. Both changes should be made there as well.

Conclusion

For all reasons appearing of record and herein, the Commission should grant Commonwealth Edison Company's Exceptions and issue a final Order (including its Appendices) consistent therewith, including making all derivative changes in the final Order consistent herewith, with such additional changes as ComEd supports herein.

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Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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