

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	Docket No. 11-0711
)	
Development and adoption of rules)	
concerning rate case expense.)	

**BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY
RELATING TO THE ADMINISTRATIVE LAW JUDGE'S
PROPOSED FIRST NOTICE ORDER**

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Commonwealth Edison Company (“ComEd”) submits this Brief on Exceptions (“BOE”) relating to the Administrative Law Judge’s Proposed First Notice Order served on April 30, 2013 (the “Proposed Order” or “PO”) and the Appendix to the Proposed First Notice Order served the following day, on May 1, 2013 (the “Draft Rule”). Appendix A to this BOE incorporates into the Proposed Order various ComEd exceptions, in legislative format. Appendix B to this BOE incorporates into the Draft Rule various ComEd exceptions, also in legislative format. The Illinois Commerce Commission’s (“ICC” or “Commission”) Final Order in this proceeding should adopt the changes to both the Proposed Order and the Draft Rule.

INTRODUCTION

This proceeding originated with the entry of an order in ComEd’s last Article IX rate case, Docket No. 10-0467, in which the Commission announced its intent to have a rulemaking in order to “provide guidance for all parties as to what evidence is needed to establish attorney’s fees and expert witness fees.” *Commonwealth Edison Co.*, ICC Docket No. 10-0467, (Order May 24, 2011) at 71. The parties to this docket have worked together diligently with the Administrative Law Judge to craft a Draft Rule that clarifies the evidence that utilities must submit in order to recover rate case expenses and to address the concerns of all stakeholders. In many respects, the Draft Rule accomplishes this goal by providing evidentiary standards to

ensure that utilities will know what is expected of them and to prevent second guessing of the evidence that the utilities provide. The Draft Rule also requires the four types of evidence discussed in *People ex rel. Madigan v. Ill. Commerce Comm'n*, 2011 IL App. (1st) 101776 (1st Dist. Dec. 9, 2011, *reh'g denied*, April 11, 2012), *appeal denied* 2012 IL 114314 (Ill. S. Ct. Sept. 26, 2012), namely: (1) a description of the services performed, (2) by whom they were performed, (3) the time expended, and (4) the rate charged. The Proposed Order and Draft Rule also correctly clarify that internal utility expenses related to rate cases are not within the scope of 220 ILCS 5/9-229. To this extent, the Proposed Order and Draft Rule are consistent with the governing law.

In two principal areas, however, the Proposed Order and Draft Rule bring uncertainty to the rate case expense recovery process and create requirements that are not likely to provide benefits to customers that would justify the significant costs to implement those requirements. First, the Draft Rule requires utilities to track utility employee and utility affiliate employee activities and associated costs related to a rate case. Second, the Draft Rule changes the standard of recoverability of rate case expense from “just and reasonable” (as provided in Section 9-229) to “necessary.” These requirements go beyond the language of Section 9-229 and the standards set forth in *Madigan*, and are otherwise unfair, unlawful, and unduly burdensome to administer. The Commission should reject each one.

Section 9-229 simply requires the Commission to discuss the evidence it reviewed in order to support the required finding of “justness and reasonableness” of rate case expense, something the Commission did not do in *Madigan*. This is generally the standard required to support recovery of other utility expenses. The purpose of the Draft Rule is to clarify the timing and form of the evidence that the Commission will review. In implementing Section 9-229, the

Commission need not and cannot require more onerous or more costly evidence than the evidence required for other types of utility expenses.

In this BOE and Appendices A and B, ComEd makes what it intends to be constructive recommendations in order to create a final product that is thorough, flexible, and fair. ComEd discusses the two main substantive issues in further detail in Section I. Other aspects of the Proposed Order and Draft Rule are confusing, incorrect, pejorative, or otherwise require revision. ComEd discusses those items in Section II. If the Commission adopts ComEd's proposed exceptions, it will achieve its laudable goal of implementing a rule governing rate case expense that clearly and faithfully effectuates Section 9-229. This will also tend to ensure that the rule will be accepted by the Joint Committee on Administrative Rules, and avoid potentially onerous and costly litigation over challenges to the rule. *See* 5 ILCS 100/10-55(c).

I. Major Substantive Issues with the Proposed Order and Draft Rule

A. Tracking Utility and Affiliate Employee Time and Costs

The PO states that "in order to determine that Outside Counsel or an Outside Technical Expert is not duplicating work performed by the client/utility, it may be necessary to examine what work was performed by the client/utility." PO at 5-6. The PO then adds an entirely new Section .200(b)(3) describing internal utility activities (and related "costs") that must be tracked and reported to the Commission. These proposed requirements are vague and unclear, appear to be extremely onerous and detailed, and do not serve any useful purpose. The information to be tracked includes the total rate case expense per utility employee; a schedule of salaries, payroll taxes, and benefits related to rate case expense for each employee; and evidence establishing what services the employees performed. ComEd takes exception to the idea that internal utility costs must be tracked and proposes revisions to the new section of the Draft Rule.

First and foremost, ComEd does not currently track its employee and affiliate employee costs in this manner. Indeed, the PO specifically recognizes that “there are no invoices for what a utility employee did to further a rate case litigation.” PO at 6. ComEd employees do not bill time to matters or projects in the level of detail that the Draft Rule contemplates. They do not maintain narrative time entries of their daily tasks. No reasonable way exists to determine and provide the information that Section .200(b)(3) of the Draft Rule calls for. Certain affiliate employees do bill their time, but they do not maintain narrative descriptions and would have similar difficulty providing the information specified in Section .200(b)(3) of the Draft Rule. If ComEd is forced to undertake this task, it would certainly be difficult – if not impossible – and expensive to implement.

Before establishing a requirement of this potential magnitude, the Commission should at the very least weigh the costs and benefits associated with it, to ensure the benefits are likely to exceed the costs. There is no record about the costs this will cause utilities to incur, and the existing record suggests that any benefits are likely to be *de minimus* at best. The Proposed Order cites to no evidence establishing that duplication between internal utility personnel and outside counsel and experts has ever been a problem, and no party to this proceeding has requested this change to the Draft Rule. No estimate exists of the extent to which (if at all) rate case expenses may be reduced by, or the extent to which overall utility costs may increase because of, the need to change systems to comply with this requirement. Fundamental changes to the way utilities conduct their business that are likely to involve great expense should be supported by a showing that the burden involved will be outweighed by the benefits that

customers will ultimately receive. The Proposed Order does not do this. Instead, it offers a potentially very costly “solution” where no problem has been identified.¹

Second, this section of the Draft Rule contemplates a much higher level of scrutiny than the Commission applies to any other operating expense. In order to recover plant investment, utilities are not required to specifically prove that an outside contractor did not “duplicate” in some way some work that internal employees may have done. Moreover, the Commission’s assessment of the justness and reasonableness of rate case expense is not intended to be a hindsight review; it is intended to be an assessment of whether it was just and reasonable to engage in the work performed.

Third, it is not necessary to require the utility to produce salary, payroll tax, and benefit information in order to provide assurance that duplication has not occurred. At most, a description of utility employee activities would suffice. But as stated above, even that would involve a significant change to ComEd’s internal record-keeping that cannot be justified based on the existing record.

In short, this section of the Draft Rule is unnecessary and inconsistent with the degree of scrutiny given other utility expenses. ComEd has accordingly revised the Draft Rule to indicate that testimony or other evidence that reasonable precautions were taken to prevent duplication should be deemed sufficient to meet the requirements of Section 9-229 and the underlying concern expressed by the PO. This new language recognizes that the analysis should not be post hoc – *i.e.*, it is not whether some duplication did occur – but whether at the outset reasonable

¹ In ComEd’s current formula rate update case, Docket No. 13-0318, ComEd has already expended approximately 600 outside counsel hours (attorneys and paralegals) preparing testimony and exhibits to comply with the less onerous requirements of the Staff of the Illinois Commerce Commission’s (“Staff”) prior iteration of a draft rule on rate case expense. ComEd has provided over a thousand pages of supporting documentation, comprised of invoices and detailed time entries. The increased burden and requisite documentation contemplated by the Draft Rule with regard to utility and affiliate employees will undoubtedly significantly increase the number of hours expended and the total dollar value of rate case expense.

precautions were taken to prevent duplication. It also recognizes that although sometimes overlap occurs, *e.g.*, outside counsel and internal personnel may have reviewed the same drafts of testimony or draft data request responses, these multiple reviews were from different perspectives and are not prohibited *per se*. The Draft Rule would punish this careful consideration even when it is not accompanied by any inefficiency. *See* Exception No. 1 in Appendices A and B.

On a related note, the PO also revises Section .20 to delete subsection (b), among other things. ComEd has further revised this section to simplify the Draft Rule and to conform to legislative outline conventions, *i.e.*, no subpart (a) without a subpart (b). ComEd has also moved the Draft Rule's statement regarding "consider[ation] at the time the work was performed," *i.e.*, no hindsight review, to this section, modified it slightly, and removed it from another subsection. *See* Exception No. 2 in Appendices A and B.

B. Changing the Standard of Recovery to "Necessary" or "Necessity"

The PO effectively, and unlawfully, changes the standard of recoverability of rate case expense from "just and reasonable" to "necessary," by inserting the words "necessary" and "necessity" throughout the Draft Rule. It is well established under Illinois law that when applying a statute, the Commission cannot rewrite its provisions or depart from its plain language by reading into it terms that were not expressed by the legislature. *See People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009). It also would be unlawful for the Commission to "enlarge the meaning of an unambiguous statute" to make it consistent with the Commission's ideas of "orderliness and public policy." *Harshman v. DePhillips*, 218 Ill. 2d 482, 512 (2006), quoting *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 394-95 (1998). Section 9-229 clearly incorporates a just and reasonable standard and any rule should not deviate from that standard.

Contrary to the analysis and conclusion in the PO, “necessary” is neither equivalent to “just and reasonable” nor a benign articulation of “the notion in the case law regarding ... advance[ment] of the litigation.” PO at 12-13. Necessary means compulsory, absolutely needed, or required. See <http://www.merriam-webster.com/dictionary/necessary>. It is a distinct standard that is different from and more onerous than just and reasonable. It implies not only advancement of the litigation but that the litigation could not possibly have been advanced without that particular service. This standard is beyond the holding in *Madigan*, which sets forth four basic evidentiary standards: (1) the services performed, (2) by whom they were performed, (3) the time expended, and (4) the rate charged. *Madigan*, ¶51. It is an unprecedented standard that the Commission has no experience applying. It should be rejected here.

Aside from all the defects identified above, the proposed standard is unworkable in practice, for both the utilities and the Commission. For example, how will the Commission reasonably determine whether the testimony of a witness and the legal work related to that witness were “necessary” to a rate case, or if more abbreviated testimony would have sufficed? Certainly no single piece of testimony can be said to be “compulsory.”

- Will the Commission engage in an analysis of whether the costs of a capital project would have been found to be recoverable if the witness’s testimony was not offered or if the lawyer did not advise the witness in preparing the testimony?
- Will the Commission make a finding as to whether a witness would have been able to testify adequately on cross-examination if her attorney did not prepare her for cross-examination and therefore whether that preparation was “necessary?”
- How will the Commission determine whether any witness preparation for a hearing was “necessary?”
- In order to determine whether attorney and paralegal time to process data request responses and their attachments was “necessary,” will the Commission analyze all of the data requests issued by Staff and Intervenors to determine if the utility should have objected to more requests and thereby potentially reduced rate case expense?

The “necessity” standard opens the proverbial “can of worms” and thereby defeats two of the principal purposes of the rule by introducing (1) more, not less, uncertainty into the rate case expense recoverability equation, and (2) more, not fewer, opportunities for dispute and litigation. Finally, these analyses are not made easier simply because the analysis is to be “considered at the time the work was performed” (Draft Rule at .300(b)(4), moved to Section .20 by Exception No. 2), as opposed to a hindsight analysis (which would be unlawful in any event).

Recognizing the difficulties inherent in any determination of “necessary,” the legislature enacted a statute providing that the legal standard for recovery of rate case expense is just and reasonable. This is the standard that is used throughout the Public Utilities Act and is a standard the Commission is familiar with implementing; a well-developed body of case law and Commission decisions interpret the “just and reasonable” standard. Adding in a requirement that rate case expense be necessary in addition to just and reasonable is an unlawful and likely impossible standard and should be rejected outright. *See* Exception No. 3 in Appendices A and B, which simply excise the terms “necessary” or “necessity” to bring the Draft Rule back to the just and reasonable standard.

Alternatively, if the Commission desires to add additional language to the Draft Rule, instead of using the terms “necessary” or “necessity,” it should utilize the concept presented in the Proposed Order regarding “advancing the litigation” (which is the purported justification for the “necessity” standard, *see* PO at 12-13). The Commission could accomplish this by replacing the words “necessary” or “necessity” with “whether it would advance the litigation.” And in any event, to focus the parties on matters really in dispute, the Draft Rule should make clear that “the proponents of such a disallowance bear the burden of proving that at the time the work in

question was performed, it could not reasonably have been undertaken to advance the litigation.”

This language should be considered Exception No. 3 ALT.

II. Other Aspects of the Proposed Order and Draft Rule That Are Confusing, Incorrect, Pejorative, or Otherwise Require Revision

A. Description of Participants

In listing the participants in this docket, the PO refers to all other parties by name – Staff, the Illinois Attorney General (“AG”), and the Citizens Utility Board (“CUB”) – but refers to the Utilities who participated in this docket as “a conglomerate of attorneys who represent utilities.” PO at 1. The significance of this seemingly pejorative language is not clear, but the language is wholly inaccurate, and it should not be included in the final order in this proceeding. Instead, the participants are the utilities themselves, and they should be referred to by name in the same manner as all other parties. *See* Exception No. 4 in Appendix A.²

B. Discussion of *Madigan* and its “Requirements”

The PO describes *Madigan* as requiring certain standards and documentation.³ *See* PO at 2-4. This overstates the holding in *Madigan* and evidences a fundamental misunderstanding of the requirements of Section 9-229 and *Madigan*. ComEd has included exceptions bringing the PO in line with the actual language in the *Madigan* case, which speaks in terms of guidance, not requirements. *See Madigan* at ¶¶ 51-52 (“we point the Commission to other cases ... the Commission has the ability to consider the factors presented ... these cases ... can provide

² In several other instances the PO contains incorrect or inflammatory statements directed at utilities in general, and ComEd in particular. Each of these instances is addressed by other exceptions in this BOE. If the Commission declines to accept those exceptions on a substantive basis, however, ComEd respectfully requests that the Commission at least remove the disparaging language, the tone of which does not befit a regulatory body such as the Commission. *See i.e.*, PO at 3 (customers must pay fees through no fault of their own); p. 4 (utilities’ goal is maximizing profits); PO at 12 (rate case expenses are potentially unreasonable just because so much money is involved); PO at 13 (discussing use of the word “inappropriate”); PO at 21 (citing to Bench Memo that ComEd was not permitted to rebut and that contained incorrect assertions); and PO at 25-26 (same).

³ Aside from the fact that the PO misstates the reach of *Madigan*, it is also important to recall the context in which *Madigan* arose: an unexplained 43% increase in rate case expenses over the immediately preceding case. *Madigan* could arguably be limited to similar exceptional cases. Nonetheless ComEd is willing to accept the four principles enunciated in *Madigan*.

guidance to the Commission and the parties to comply with section 9-229.”). *See* Exception No. 5 in Appendix A. This exception does not affect the Draft Rule and is solely for the purpose of clarifying the legal and regulatory framework.

C. Discussion of Fee Shifting, Fault, and the American Rule

The PO contains a discussion of customers “paying the fees for utilities through no fault of their own” as justification for a higher standard of proof for rate case expense than for all other operating expenses. PO at 3. Yet no element of “fault” is associated with the standard for recoverability of any utility operating expense, rate case or otherwise. Indeed, this biased language ignores the fundamental regulatory principle that rate case expenses are incurred for the benefit of both the utility and its customers in that the collection of just and reasonable rates reflecting the cost of service is essential to the provision of reliable service. *See* 220 ILCS 5/1-102. The PO also accepts inflammatory, unsupported and inaccurate language from the AG/CUB brief that “a utility’s ultimate goal is to maximize its profits and provide dividends to shareholders.” PO at 4. Unsupported statements like these create an unduly adversarial atmosphere, and ignore the fact that a utility’s real goal is to provide adequate, safe and reliable service in exchange for the opportunity to earn a fair – and in the case of a “participating utility” under the Energy Infrastructure Modernization Act (“EIMA”) a statutorily prescribed – return on its prudent and reasonable investment. These discussions are also confusing, irrelevant, and quite simply cloud the issues. ComEd has included exceptions removing this language from the PO. *See* Exception No. 6 in Appendix A.

ComEd has also corrected the PO’s misunderstanding of the utilities’ argument regarding the “American Rule.” The utilities argued that fee shifting cases involve the “American Rule,” *i.e.*, each party in civil litigation bears its own attorneys’ fees unless otherwise specified, and even then the court often has discretion as to whether and to what extent attorneys’ fees should

be awarded. *See Kaiser v. MEPC Am. Props., Inc.*, 164 Ill. App. 3d 978, 983 (1st Dist. 1987) (American Rule); *Hensley v. Eckhart*, 461 U.S. 424 (1983) (discretion); *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 715, 716 (5th Cir. 1974) *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989) (discretion).

The fee shifting cases are not applicable here because they represent an exception to the civil litigation rule that each party bear its own expenses. Rate making is not civil litigation and in the rate making context the rule is that customers pay the utility's costs of following the statutory procedures to change its rates, procedures designed to protect customers. The Supreme Court of Illinois has held that rate case expenses are ordinarily, properly and fairly allowable as an operating expense. *DuPage Util. Co. v. Ill. Commerce Comm'n*, 47 Ill. 2d 550, 553, 561 (1971) (holding that "just and reasonable" rates "should be sufficient to provide for operating expenses" and that "rate-case expense is ordinarily properly and fairly allowed as an operating expense").⁴ Thus, the utilities argued that the fee shifting cases and the American Rule stand in stark contrast to the express recoverability of rate case expenses. *See* Exception No. 7 in Appendix A. This clarification does not affect the Draft Rule and is solely for the purpose of explicating the parties' positions. ComEd further suggests that the discussion of the American Rule in the PO is confusing, superfluous, does nothing to support to Proposed Rule, and should be omitted.

⁴ *See also Madigan*, 2011 IL App (1st) 101776, ¶ 13 ("Illinois courts have allowed utilities to recover rate case expense because "[t]he costs incurred by a utility to prepare and present a rate case are properly recoverable as an ordinary and reasonable cost of doing business.") (quoting *Central Illinois Public Service Co. (CIPS) v. Ill. Commerce Comm'n*, 243 Ill. App. 3d 421, 432 (4th Dist. 1993) (citing *DuPage*)); *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 120-21 (1939) (In "a proceeding by a commission to determine reasonableness" of rates, "we are of the view that the utility should be allowed its fair and proper expenses for presenting its side to the commission.")).

D. Definitions

ComEd suggests various housekeeping changes to the Definitions section of the Draft Rule. These changes are for uniformity with regard to defined terms, clarity, to avoid redundancy, and to address typos, formatting, and grammatical issues. ComEd has also replaced the phrase “particular task” in the definition of “Time Entries” with “daily basis” to match the other provisions in the Draft Rule that deal with this issue and to match the level of billing detail that the parties have contemplated throughout this docket. *See* Exception No. 8 in Appendix B. Additional housekeeping suggestions throughout the Draft Rule that are not encompassed by other distinct exceptions are also labeled as Exception No. 8. This includes one exception related to an inaccurate description of rate case expense recovery in formula rate cases. *See* Appendix A at p. 16 (projections of rate case expense are not made in formula rate cases).

E. Different Standards for Flat Fee Contracts

The PO rejects the position that a different type or quantum of evidence may be used to satisfy the just and reasonable standard when utilities enter into flat fee contracts with outside counsel or experts, as opposed to hourly rate contracts. As support for this rejection, the PO relies on cases that do not deal with flat fee contracts and are thus inapposite in this context. *See* cases cited in PO at 9. The Draft Rule requires utilities to furnish hourly rate and hours worked information (in the form of daily time entries) for outside counsel and experts even if the fee arrangement for a particular case is not based on hourly rates or hours worked. In linking flat fee contracts back to actual, presumed, or estimated hourly rates and hours worked, the rule forces utilities and their lawyers and experts – and the Commission – into employing, to judge the reasonableness of fees, a standard (the hourly rate) that has increasingly come under criticism. Just as the Commission does not require utilities to engage any other service providers on an hourly basis, or judge the reasonableness of the cost by reference to an hourly charge, it should

not do so for outside counsel and experts – at least where the utility and the outside counsel or technical expert have agreed to a different approach.

Indeed, this portion of the Draft Rule ensures that the rate case expense component of utilities' revenue requirements will discourage innovation and remain behind the times. Significant thought and discussion is being devoted to alternative fee arrangements, and many clients and law firms are moving away from looking at fee arrangements through the lens of billable hours and hourly rates. The Draft Rule should be flexible enough to allow for and even encourage these alternative contractual arrangements. Without this flexibility, the Draft Rule unnecessarily handicaps customers. This is because alternative arrangements may benefit customers by reducing overall rate case expense and shifting risk away from utilities and their customers to law firms and other service providers. One way that flat fee arrangements reduce expense is by reducing administrative burdens such as timekeeping. But by requiring that timekeeping for flat fee contracts be recorded in the same manner as hourly rate contracts, the Draft Rule eliminates this advantage of these alternative arrangements. This discourages both law firms and experts from entering into these alternative fee arrangements, and ultimately makes them less beneficial to utilities and customers.

Fixed fee arrangements are common in other aspects of utility business and life in general. Utilities (and their customers) often engage construction, plumbing, painting, and other contractors and vendors on a fixed fee basis as opposed to an hourly basis, and the Commission does not require an after the fact analysis to determine whether the fixed fee was more or less advantageous to the utility and its customers than an hourly rate would have been. Yet that is what the Draft Rule seeks to do here. This idea – which is in essence a hindsight review – is incorrect and the Commission should reject it.

To allow for this desired flexibility and encourage alternative arrangements, ComEd proposes that the term “Time sheet” be revised to “Time Entries” and that the definition of that term be modified to account for the lack of an hourly rate in flat fee contracts. *See* Exception Nos. 8 and 9 in Appendices A and B. ComEd has made similar proposed modifications to Section .200(a) and has added a new subsection (vi) providing for other supporting evidence for flat fee contracts. *Id.* In addition, the PO contains incorrect numbering when referring to the “current” version of Section .200(a). *Id.* ComEd has also made minor housekeeping changes to Section .200(a) for uniformity with regard to defined terms, clarity, to avoid redundancy, and to address typos and grammatical issues. *Id.*

F. Overhead Expense and Miscellaneous Expense

ComEd believes the Draft Rule adequately governs this topic. ComEd does suggest deleting one sentence from the PO because it is not necessary for implementation of the Draft Rule and also because it is tantamount to asking utilities to prove a negative: the Utility cannot be expected to prove that hourly rates would have been higher if expenses were not billed separately. It should be enough that the Utility proves that the expenses were not included in the rates charged. *See* Exception No. 10 in Appendix A. In addition, because the term “Miscellaneous Expenses” is a defined term in the Draft Rule, that same term should be used throughout the rule. Accordingly, ComEd has replaced the term “overhead expenses” (an undefined term) in the new Section .200(d) with the defined term Miscellaneous Expenses. This is a housekeeping exception and is included as part of Exception No. 8 in Appendices A and B.

G. Expert/Attorney Affidavits

The Draft Rule requires certain items to be provided with the utility’s direct case and other information with the utility’s rebuttal case. The Draft Rule also requires that certain evidence be presented by affidavit. ComEd proposes to modify this section of the Draft Rule to

allow utilities flexibility to provide more of their rate case expense evidence earlier in the process – with their direct case – if the utility so chooses. In formula rate updates under EIMA the evidence would typically be available at the time of filing the direct case and no reason exists why the utility should be required to wait until its rebuttal case to provide that evidence. This proposal will allow Staff and intervenors additional time to consider and assess the evidence to support rate case expense. Further, ComEd proposes to modify the Draft Rule to allow the utility to provide such evidence by testimony or affidavit, at the utility’s prerogative. *See* Exception No. 11 in Appendices A and B.

H. Discussion of Bench Memorandum

ComEd takes exception to the PO’s citation to and reliance upon a Bench Memorandum from Docket No. 12-0321. The PO incorrectly treats the Bench Memorandum’s assumptions regarding work performed by ComEd’s counsel and its conclusions that expenses were “improperly” included as findings of fact and conclusions of law. *See* PO at 21. In actuality, the majority of the statements and conclusions in that Bench Memorandum are wrong, as demonstrated by testimony in ComEd’s most recent formula rate update filing. *See* Docket No. 13-0138, O’Brien Dir., ComEd Ex. 8.0, 12:258-13:264 and Ex. 8.10. Citing to this Bench Memorandum is particularly prejudicial in that ComEd had no opportunity to rebut its contents. *See Commonwealth Edison Co.*, ICC Docket No. 12-0321, December 20, 2012 Notice of Commission Action. Under 220 ILCS 5/16-108.5(d)(3), the utility must have an opportunity to rebut each objection to costs incurred by it. ComEd suggests simply deleting the discussion of this bench memo. This exception does not affect the Draft Rule, and simply removes incorrect language from the PO. *See* Exception No. 12 in Appendix A.

I. Attorney Review in Post-Trial Briefs

The Draft Rule includes a provision that “[r]ate case expenses shall be addressed in the attorney review in post-trial briefs.” PO at 26. If the intent of this provision is that parties raise objections to rate case expense for the first time in post-trial briefs, then this provision directly conflicts with 220 ILCS 5/16-108.5(d)(3) which, as discussed earlier, provides that each objection to costs incurred by a participating utility be stated with particularity and that the utility shall have the opportunity to rebut the objection. Addressing rate case expense for the first time in post-trial briefs does not allow the utility the opportunity to provide any evidence to rebut the objection to this cost. This provision should be deleted. *See* Exception No. 13 in Appendices A and B. Moreover, although it is unclear what “attorney review” means in this context, because the Draft Rule now contains language requiring an attorney affidavit on this subject (or testimony, pursuant to Exception No. 11), the element of “attorney review” is likely already satisfied.

J. Evidence of Market Fees, Including Rate Case Fees in Other Jurisdictions

The PO correctly concludes that the relevant benchmark for reasonableness of fees is the “market rates concerning fees charged for comparable services.” PO at 29; Draft Rule Section .300(b)(8). The Draft Rule should stop there. Instead, the Draft Rule includes language regarding “affiliates” and “other jurisdictions.” This additional language goes beyond the relevant legal standard. *See* PO at 23-24. If this type of evidence concerns the market rate for comparable services, it is already governed by the language in the Draft Rule. If it does not concern the market rate for comparable services – which is the more likely scenario because it seeks to substitute rates charged in other jurisdictions for the prevailing market rate in the relevant legal community – then it is irrelevant. This language thus invites the submission of irrelevant evidence, which will only serve to increase rate case expense.

The PO suggests that the parties utilize census bureau information to create a correlation between expenses in other jurisdictions and in Illinois. It is unclear how this would be applied in practice, or what census bureau data would be helpful, as the PO only provides a general website address. Moreover, census information fails to account for differences in regulatory environments. Accordingly, the Draft Rule should limit itself to referencing prevailing market rates. *See* Exception No. 14 in Appendices A and B. By the same logic, the Draft Rule would be better without the superfluous language in .300(b)(9). ComEd suggests deleting that language as well, or at least moving it into .300(b)(8) where the reference to affiliates and other jurisdictions used to be. *Id.*

K. New Section .500 Deferral for Recoupment

Along with the newly heightened attention to rate case expense, the Commission should also specifically provide for recovery of expenses disallowed in a previous case if an appellate court subsequently reverses that disallowance. For traditional Article IX cases this is not an issue. Currently, however, the mechanism for participating utilities under EIMA to recover disallowed rate case expense after conclusion of the docket in which they are disallowed is untested and unclear. Thus, the rule should provide for a deferral for recoupment of these expenses. ComEd has suggested language for this in Exception 15 in Appendix B.

CONCLUSION

ComEd requests that the foregoing be taken into consideration in the preparation of the Draft Rule for publication and that, if deemed necessary, the parties be permitted to offer additional comments or revisions relating to the Draft Rule prior to publication. In addition, ComEd also reserves the right to participate in oral argument on any issues on which the Commission believes such argument would be beneficial to its deliberation and decision.

Respectfully submitted,

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